IN THE SUPREME COURT OF BELIZE, A.D. 1999

ACTION NO. 286

HAROLD O. WHITNEY INC. **Plaintiff**

BETWEEN **AND**

BELIZE LODGE AND EXCURSIONS LIMITED **Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Dons Waithe for the Plaintiff.
Mr. Michael Young S.C., along with Mr. Philip Zuniga, for the Defendant.

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JUDGMENT

By a writ dated 5th July 1999 in this action the plaintiff claims: *". . . rescission of an agreement in writing dated 4th day of February, 1998 and made between the Plaintiff and Defendant on the ground of misrepresentations made by the Defendant to the Plaintiff and with all proper and consequential directions."* In its Statement of Claim in the action the Plaintiff claims a) Rescission of the said agreement; b) Damages for negligent and/or fraudulent misrepresentation; and c) Damages for breach of contract.

2. The Defendant, in turn, in its amended Defence and Counterclaim dated 29th February, 2000 claims: a) that the injunction herein granted ex parte . . . on 6th day of August 1999, be discharged; b) that an inquiry be made as to the damages sustained by the defendant by reason of the said injunction; c) specific performance of the Agreement; d) that Harold O. Whitney Inc. and Harold O. Whitney be ordered to return to the defendant the share certificate referred to in paragraphs 7 and 8 of the Defence and to receive in its stead a share certificate in respect of 17% of the issued share capital of the defendant; e) damage and such further or other order as to the Court may seem fit; and costs.

3. However, at the address stage on the conclusion of the hearing of this action, Mr. Michael Young S.C. the learned attorney for the Defendant

informed the Court that title to the land had vested in the Defendant since November 2000. Therefore, he said the Defendant's prayer for specific performance was moot.

4. However, the principal issue in contention between the parties relates to the sale of land and the payment for it. This land and how it was to be paid for is the subject matter of **Exhibit H.W. 1**: The Agreement between the Plaintiff and the Defendant dated 4th February 1998.

5. Although the principal action is between two registered companies, the real ***dramatis personae***, however, are Mr. Harold O. Whitney (as in the name Harold O. Whitney Inc. the plaintiff), and the person Harold O. Whitney, in the counterclaim of the Defendant and Mr. Kenneth Karas. Mr. Whitney is the principal shareholder of the plaintiff company, and together with his wife and children, owns it. This company owns a sizeable tract of land in the area of Indian Creek in the Toledo District, part of which, 7,630.61 acres in total, has given rise to this action. Mr. Karas, who could fairly be described as a promoter for the purposes of this litigation, and from the evidence, is the managing director of the defendant company.

6. Mr. Karas and Mr. Whitney got in touch sometime in 1997 and discussed the idea of an eco-tourism project. This project was to be developed and operated on land owned by the plaintiff company. In pursuance of this an agreement for the sale of the land some 7,630.61 acres, was reached on 4th February 1998 between the plaintiff company as vendor, and the defendant company as the purchaser. This agreement was put in evidence as **Exhibit H.W. 1**.

7. **Clause 1.2** of the agreement provided as follows:

> *"1.2 'the property' means ALL THAT piece or parcel of land containing in the aggregate 7,630.61 acres or thereabouts situate east of the Southern Highway in the Toledo District. Together with the citrus and banana orchards and the farming business carried on thereon under the name or style of 'Rio Dorado' and the buildings plant machinery equipment and other personal property used in connection therewith."*

8. **Clause 1.3** on the payment for this property provided as follows:

"1.3 'the purchase price' means the sum of One million Two Hundred and Sixty-two Thousand United States Dollars (US $1,262,000.00) to be paid and discharged in the following manner namely:

(a) by payment prior to the execution of this Agreement of the sum Seventy-five Thousand United States Dollars (US $75,000) by way of earnest money;

(b) *by the issue to the Vendors or their nominee on the Completion Date of 30,000 redeemable preference shares in the capital of the Purchasers credited as fully paid (hereinafter called 'the shares') such shares being deemed for the purposes of this Agreement to be of an aggregate value of Seven hundred and Fifty thousand United States Dollars (US $750,000.00) and shall enjoy the same rights as to voting and entitlement to dividends as the Class A ordinary shares of the Purchaser (as those rights are defined in a Private Placement Investment Memorandum dated the day of 1997 and issued by the Purchasers); and*

(c) by payment of the balance, being the sum of Four hundred and Thirty-seven thousand United States Dollars (US $437,000.00), on the Completion Date."

9. The agreement then proceeded to specify various terms and conditions between the parties. It stated for example, that: "Completion of the sale and payment of the purchase price shall take place at the office of the Purchaser's Attorneys-at-law or where they may direct on a date to be appointed in writing by the Purchaser but not later than twenty-one (21) days after the last of the approvals permissions and license mentioned at clause 4 shall have been obtained and the other conditions therein mentioned shall have been satisfied or on such other dates as the Vendors and the Purchases may appoint", **(Clause 6.1)**.

This clause on completion went on to specify some of the things the vendors should do in relation to the sale of the property.

10. **Clause 6.2** then provided for what the Purchasers should deliver to the Vendors at completion of the agreement. In particular, **clause 6 sub-clause 2** provided as follows:

> *"6.2.1 A certified copy of the resolution of the Board of Directors of the Purchasers approving the terms of this Agreement and authorising the execution by such persons as are nominated by the said resolution of this Agreement and of every other document and instrument required to give effect to the provisions of this Agreement;*
>
> *6.2.2 A certified copy of the resolution of the Board of Directors of the Purchasers authorising the issue and allotment of the shares to the Vendors or their nominees;*
>
> *6.2.3 Duly executed shares certificates in respect of the shares in the names of the Vendors or their nominees having first made the appropriate entry in the register of the members of the Purchasers."*

11. The agreement then proceeded in succeeding clauses to specify various things between the parties such as payment of the balance of the purchase price as stated in **Clause 1.3(c)**; the capacity of the vendors; title to the property; indemnification of the Purchasers by the Vendors against claims in relation to the property; the redemption and sale of the shares to the Vendors; the costs and expenses relating to the transaction and how these were to be borne; notices; etc. etc.

12. The agreement was signed by Mr. Harold Whitney for and on behalf of the Plaintiff as its duly authorized representative; and by Mr. Kenneth Karas for and on behalf of the Defendant as its duly authorized representative.

13. At the hearing of this action both Mr. Whitney and Mr. Karas testified for the Plaintiff and Defendant respectively. In addition, Mr. Gordon Hein testified for the plaintiff. Also, in addition to the testimony at the trial, a number of documents were admitted as exhibits in this case.

14. The issues in contention between the parties can, I believe, be put in a short compass thus: The plaintiff claims that for the sale of 7,630.61 acres of its land to the defendant for the total price of **US$1,262,000.00**, for which it was to be paid partly in cash and partly in shares in the defendant

company to the value of **US$750,000.00**, it has not received shares to this value and was in fact induced by the fraudulent or false or reckless misrepresentations by the defendant in order for it to enter into the agreement for the sale of its land to the defendant.

15. The defendant for its part denies making any representation that induced the plaintiff to enter into the agreement for the sale of the land because a brochure entitled "Confidential Private Placement Memorandum of Belize Lodge and Excursions Ltd." **(Exhibit H.W. 3)** was delivered to the plaintiff which required it to make its own examination of the defendant company including the risks in investing in it and that the plaintiff should have consulted its own attorneys, accountants and advisors about this placement memorandum; also that the purchase of the securities being offered involved substantial risks and that no investment in the securities was to be made by anyone who was not prepared to lose the entire amount of such investment. The Defendant also says that the plaintiff was in fact issued in error more shares than it was entitled to under the agreement, because the authorized share capital of the defendant company was $10,000.00 divided into 10,000 shares of $1.00 each, and that the plaintiff was entitled to 17% of the issued share capital which is no more than 1,667 shares; and that the 30,000 shares of the aggregate value of US$750,000.00 stated in **clause 1.3(b)** of the agreement was to have been issued in accordance with page 8 of the memorandum on the private placement; and the defendant by way of counterclaim seeks to have returned to it of the share certificate for 5,601 shares issued to the plaintiff.

16. From the evidence in this case, I find as a fact that, at the time the agreement for the sale and purchase of the plaintiff's land was entered into **(Exhibit H.W. 1)**, the defendant company only had $10,000.00 BZ authorized share capital. This fact, of course, was known to Mr. Karas the managing director of the defendant company who negotiated the purchase of the plaintiff's land with Mr. Whitney. This fact of course would not prevent a company from owning assets way above its share capital or its issued shares. But where the price of those assets are represented by shares or exchanged for shares in the company, this fact must and should be reflected in the quantum of the company's share capital. Mr. Karas himself testified that the plaintiff as per the agreement of 4th February 1998 for the sale of its land to the defendant, was to receive 30,000 Class A shares valued at US$25.00 per share, a total of US$750,000.00 for the value of the land. Moreover, at **page 8** of the "Confidential Private

Placement Investment Memorandum" which the defendant relies on it is expressly stated:

> *"Securities Offered and Terms of the Offering: Belize Lodge and Excursions Ltd. is offering 180,000 shares of Class A stock at US$25.00 per share ($4,500,000.00 total value). 30,000 shares ($750,000.00 value) will be exchanged in partial payment for land being acquired. The remaining 150,000 ($3,750,000.00) Class A shares are being offered to qualified investors. 24,000 super voting Class B shares (ten votes per share) have been committed to Kenneth N. Karas, the project developer, and to key employees and strategic partners. The offering will close at a minimum level of 160,000 Class A shares ($4,000,000.00)."*

This is **Exhibit H.W. 3**, evidently one of several documents of its kind prepared by the defendant. At the very start of this document the defendant is described thus: *"Belize Lodge and Excursions Limited (BLE) is a $4.5 million ecotourism and sustainable development project located in a unique setting on Golden Stream in the Toledo District in Southern Belize."*

17. Moreover, by **Exhibit H.W. 5** - Share Application Form dated 3rd April 1998, on the letterhead of the defendant company, Mr. Whitney of the plaintiff company offered to subscribed for 30,000 Class A shares at US $25.00 per share in the defendant company. In this application form it is expressly stated:

> *"I Harold O. Whitney will receive US $750,000 worth of Class A shares credited toward land purchase and have received cash payment in full for cash portion of land purchase of US$513,000 as per signed and executed purchase agreement dated February 4, 1998."*

18. From the evidence, I find nothing to indicate that the authorized share capital of the defendant of **$10,000.00 BZ** was ever raised above this figure. This even after the distribution of **Exhibit H.W. 3**, its Confidential Placement Investment Memorandum; also even after the execution of the agreement for the purchase of the plaintiff's land in which the plaintiff was in addition to the cash payment, offered 30,000 Class A shares worth US$750,000.00 in the defendant company. Nothing manifestly was done to change this situation even after the receipt of various applications from

subscribers including the plaintiff. These applications and the respective amounts of shares applied for are in **Exhibit H.W. 4**.

19. Instead, from the evidence, the plaintiff was on 29th July 1998 issued a Share Certificate in the defendant company for 5,601 shares. This, the defendant avers in its Amended Defence was *"a clerical error Harold O. Whitney Inc. or Harold O. Whitney was issued 5,601 shares or 56% the present share capital of Belize Lodge (the defendant) when it should only have been issued 1,667 shares or 17% of the said share capital."*

20. This averment was based on a letter from the law firm of W. H. Courtenay & Co. to the shareholders of the defendant company. It was adduced in evidence as **Exhibit H.W. 6** in cross-examination of Mr. Whitney for the plaintiff company. This letter stated, among other things, that the issue of the share certificates to the shareholders respectively of the defendant company (by which the plaintiff/Mr. Whitney was allocated 5,601 shares) constituted the entirety of authorized capital of the defendant company; and that this was made in error as the amounts subscribed for by the intended members according to the Subscription Form signed by them was for the stated percentages; and the plaintiff was listed as having 17%.

21. This clearly would be in contradiction with **Exhibit H.W. 5**, the application form in which the plaintiff was to subscribe to 30,000 Class A shares valued at $750,000.00 representing part of the purchase price of its land. Moreover, Mr. Whitney said in evidence he, as representing the plaintiff, was to receive 17% of the US $4.5 million capital of the defendant. This latter figure tallies with the figure stated on both the cover of **Exhibit H.W. 3** and page 8 thereof already mentioned above at paragraph 18. Moreover, Mr. Karas for the defendant admitted in evidence that the shares actually issued to the plaintiff did not reflect the position stated in the agreement for the sale of the plaintiff's land.

22. Mr. Gordon Hein also testified for the plaintiff. His testimony was to the effect that while he was Executive Director of a company called International Expeditions, it had dealings with the defendant and agreed to invest in the latter to the tune of $200,000.00: $20,000.00 in cash and $180,000.00 in kind, based on materials such as the investment memorandum provided by the defendant. However, he got misgivings about the financial position of the defendant as the dollar amounts stated in the investment memorandum **(Exhibit H.W. 3)** were not factual. In

the end, International Expeditions dissociated itself from the defendant as the latter, Mr. Hein stated, was basically out of cash.

23. Having considered carefully the evidence, and the exhibits in this case, I am unable to agree with the contentions and submissions of Mr. Young S.C. on behalf of the defendant as to the effect of **Clause 17** in the agreement between the parties (**Exhibit H.W. 1)** and the statement to be found at **page 2** of the Confidential Private Placement Investment Memorandum **(Exhibit H.W. 3)**. This is for the simple reason that **Clause 17** clearly, in my opinion, does not exclude the operational and binding nature of **Clause 1.3** (on the purchase price and payment thereof of the plaintiff's land by the defendant), and **Clause 6.2** on what the defendant, as purchasers, should deliver to the plaintiff as Vendors on completion or execution of the contract between them, namely, the duly executed shares certificates for 30,000 Class A shares of the defendant to the value of US $750,000.00. Self-evidently, these are representations or warranties, nay obligations expressly contained and set forth in the agreement between the parties. **Clause 17** was not referring to or excluding anything expressly set out in the parties' agreement of 4th February 1998. It certainly does not and could not be taken to refer to **Exhibit H.W. 3**. Moreover, the general disclaimer and warning set out on page 2 of **Exhibit H.W. 3** has, in my view, precious little if any bearing or relationship to the obligations of the defendant to issue 30,000 shares to the plaintiff in part payment for the latter's land.

24. I do not, however, in view of the facts of this case, and the evidence, feel it is necessary for me to decide whether there was misrepresentation, whether fraudulent, false or reckless, by the defendant that induced the plaintiff to enter into the agreement of 4th February 1998. I find instead, however, that there was a breach of this agreement by the defendant in a material manner.

25. It was an express term of the agreement that the plaintiff as the vendor, would be paid in addition to cash in the amount of US$512,000.00, also be issued with 30,000 Class A shares in the defendant company of US $25.00 per share to the aggregate value of US $750,000.00. This would make a total payment of US $1,262,000.00 as the purchase price of the plaintiff's 7,630.61 acres of land which was expressly agreed upon between the parties.

26. The plaintiff received instead, 5,601 shares of lesser denomination, viz, $1.00 per share; and this out of the defendant's authorized capital of only $10,000.00. This was in the face of the clear application by the plaintiff to subscribe to 30,000 shares of US$25.00 per share in accordance with the parties' agreement in **Exhibit H.W. 1**, the contract for the sale and purchase of the plaintiff's land. Pursuant to this, the Plaintiff in **Exhibit H.W. 5** applied to subscribe for 30,000 Class A shares in the Defendant company.

27. Even the allocation of the 5,601 shares to the plaintiff was challenged and called an error; and he was requested to return them. The error was said to be that the plaintiff had received more shares than he should have! Whether it was an error or not, the shares issued to the plaintiff were **quantitatively** and **qualitatively** a far cry from those expressly stated in the agreement between the parties.

28. I find that in the result, the plaintiff did not get what it had contracted for in relation to the shares, and that the defendant failed to deliver the shares it expressly undertook to issue to the plaintiff as part of the purchase price for its land.

29. I do not think that the fact that the defendant had only an authorized capital of $10,000.00 divided into $1.00 each makes any difference. This fact was known to Mr. Karas, the managing director of the defendant, at the time of the conclusion of the agreement. He nonetheless signed and agreed to have issued to the plaintiff on the completion date of the sale of its land, 30,000 redeemable preference shares in the defendant's capital as fully paid in the amount of US $750,000.00.

30. The manifest intention between the plaintiff and the defendant, and which was expressly stated in their agreement, was that the plaintiff would be a shareholder in the defendant company to the extent and magnitude stated in that agreement, as part of the consideration for the sale of its land to the defendant.

31. At the very least, Mr. Karas could or should have procured an increase in the share capital of the defendant company to meet its obligations to the plaintiff. It was not intended to make the plaintiff a debenture holder for the part consideration of the purchase price of its land, that is, a mere creditor of the defendant. It was the express intention of the parties, I find on the evidence, that the plaintiff should be a shareholder in the defendant

company to the extent stipulated in the agreement in **Exhibit H.W. 1**. That this has not happened is due, solely and directly, as a result of the breach of the contract by the defendant to issue the necessary shares, as stipulated, to the plaintiff.

32. That there were risks in investing in the defendant company whose shares, 30,000 in all, to the equivalent of US $750,000.00, was to have been allocated to the Plaintiff as part consideration of the purchase price of its land, was made abundantly clear in **Exhibit H.W. 3**, the investment placement memorandum. This of course, is inherent in the nature of shares in **any** company. Risk associated with investment in shares in any company is a fact of everyday life. But it was a clear stipulation of the agreement between the parties that the plaintiff would be issued these 30,000 shares.

33. It is worthwhile to mention here what is regarded as perhaps the most quoted definition of shares is. This was given by Farwell J. in **Borland's Trustees v Steel (1901) 1 Ch. 271** at page 288:

> *"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but consisting of a series of mutual covenants entered into by all the shareholders inter se . . . The contract contained in the articles of association is one of the original incidents of a share. A share is not a sum of money . . . but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."* (emphasis added)

34. This definition of shares which may be regarded as classic was approved by the Court of Appeal in England in **Re Paulin (1935) 1 K.B. 26**, and by the House of Lords in **IRC v Crossman (1937) A.C. 26**.

35. The plaintiff, contrary to the stipulations in **Exhibit H.W. 1** (the agreement for the sale of its land to the defendant) was never issued the 30,000 shares so provided for. It would be grossly unfair and plainly contrary to common sense to assume that in entering into the agreement in **Exhibit H.W. 1** the parties intended the plaintiff to assume the risks that it would lose its investment in the defendant company by these shares **not** being issued. The risks mentioned in **Exhibit H.W. 3** in my view,

refer clearly to loss associated with investment in the defendant company; and not the risks that the shares would not be issued as stated in the agreement between the parties or at all.

36. That the defendant has failed to issue the 30,000 shares expressly stated in **Exhibit H.W. 1** is clearly a breach of the agreement for the sale and purchase of the plaintiff's land.

37. I do not however, find as is contended for by the plaintiff, that the consideration for the land has wholly failed. In fact, it cannot be denied that the plaintiff had received a sizeable amount of the purchase price for its land to the tune of US$512,000.00. I do not therefore think that in all the circumstances of this case it would be fair and just to rescind the contract. I take into consideration that since the initiation of this action title to the land in question has been vested in the defendant.

38. The plaintiff however, is entitled to damages for the breach of its contract with the defendant. In the circumstances I think it is reasonable, fair and just that the damages for the breach of contract committed by the defendant be commensurable with the loss it has occasioned the plaintiff. This on the evidence, stands at US$750,000.00, representing the value of 30,000 shares that the plaintiff should have received as part of the purchase price for its land.

39. I therefore adjudge and award the sum of BZ $1,500,000.00, representing US$750,000.00 to the plaintiff as damages for the breach by the defendant of its contract with the plaintiff. This sum shall carry interest at the rate of 5% from the date of this judgment until payment.

40. In view of my findings on the position of the shares, I adjudge that the plaintiff and or Mr. Whitney should return to the defendant the share certificate in respect of the 5,601 shares of $1.00 denomination issued to him by the defendant and I so order.

41. This outcome, I believe, will do practical and substantial justice between the parties in the light of the issues in dispute between them. I am fortified in this by the provisions of **section 38** of the **Supreme Court Act – Chapter 90 of the Laws of Belize, Revised Edition 2000**, which provides:

"The Court, in exercise of the jurisdiction vested in it by this Act, shall, in every cause or matter pending before it, grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

42. Finally, I award costs in this action in the sum of $5,000.00 to the plaintiff.

A. O. CONTEH
Chief Justice

DATED: 5th June, 2002.