IN THE COURT OF APPEAL OF BELIZE AD 2009

CIVIL APPEAL NO 13 OF 2008

SAGIS INVESTMENTS LIMITED Appellant

v

KREM RADIO LIMITED Respondent

BEFORE

The Hon Mr Justice Manuel Sosa Justice of Appeal
The Hon Mr Justice Boyd Carey Justice of Appeal
The Hon Mr Justice Dennis Morrison Justice of Appeal

V Nelson QC and E Kaseke for the appellant.
M C E Young SC and L M Young SC for the respondent.

2009: 18 and 19 March and 19 June

SOSA JA

I - *Introduction*

[1] By its claim form dated 9 November 2007, which gave rise to Claim No 519 of 2007 ('the Claim') in the court below, Sagis Investments Limited ('Sagis') claimed against Radio Krem Limited ('Krem') the following reliefs:

'1. An Order that [Krem] shall rectify its register of members by striking out the name of Evan X Hyde as the holder of the Shares (*sic*) and by inserting in lieu thereof the name of [Sagis] as the holder of the Shares;

(2) An Order that [Krem] give notice of the rectification to the Registrar of Companies;

(3) An Order that [Krem] issue and deliver to [Sagis] a share certificate in [Sagis's] name in respect of the Shares;

(4) An Order that [Krem] shall file its annual list (*sic*) of members and summaries with the Registrar of Companies in accordance with Section 27 of the Companies Act for the period 1999 to 2006;

(5) A Declaration that all and any rights and entitlements of shareholders of [Krem] since 17 June 1994 (including but not limited to any rights derived from the 50,000 shares numbered 1 to 50,000 in [Krem] such as dividends, share distributions and other entitlements such as share subscription rights) should be given to [Sagis] as a member of [Krem] in order to ensure, inter alia; (i) its holding of ten per cent. (10%) of the issued share capital of [Krem] is maintained and has not been unlawfully diluted in anyway (*sic*) and (ii) that it receives everything it is entitled to receive since 17 June 1994.

(6) [An order the claim for which was abandoned.]

(7) Costs; and

(8) Any or such other relief which the Court thinks fit.'

The court below delivered its judgment in the Claim on 27 May 2008 and, on 11 June 2008, there was entered pursuant thereto an order in the terms following:

'1. That the Claim for an Order that [Krem] rectify its register of members by striking out the name of Evan X Hyde as the holder of 50,000 shares of [Krem] and inserting the name of [Sagis] in place thereof as the holder of the said shares is dismissed

2. That the Claim for an Order that [Krem] give notice of rectification of its register to the Registrar of Companies is dismissed

3. That the Claim for an Order that [Krem] issue and deliver a share certificate to [Sagis] in respect of the said shares is dismissed

4. [Krem] shall pursuant to Section 27 of the Companies Act, file its annual list (*sic*) of members and summaries with the Registrar of Companies

5. [Sagis] is not entitled to any rights and entitlements as a shareholder of [Krem] since 17th June 1994 or at all and has never been the holder of 10% of the issued share capital of [Krem]

6. [Krem] shall repay to [Sagis] the sum of [BZE]$25,000.00 plus interest thereon at the rate of 6% per annum from the 17th of June 1994 to 9th November 2007 when the proceedings were commenced

7. That [Sagis] pay [Krem] the sum of [BZE]$30,000.00 as costs.'

Sagis has appealed to this Court, filing a Notice of Appeal dated 16 June 2008 which, as amended with leave granted at the commencement of the hearing, contains six grounds of appeal, to which I shall in due course, so far as is necessary, return.

II - *Factual background*

(a) Krem

[2] Krem is a private company limited by shares and incorporated in Belize under the Companies Act. No evidence was adduced as to the date of its incorporation; and the copies of its memorandum of association and articles of association admitted in evidence in the court below are not fully dated, making reference only to the year 1989. Krem operates a radio station known as Krem Radio which started broadcasting on 17 November 1989, a date which may well be earlier than that of Krem's incorporation. Krem was incorporated with a share capital of BZE$10,000.00 divided into 10,000 shares of $1.00 each. The memorandum and articles were subscribed by four persons, namely, Evan X Hyde, Rodolfo Silva, Glenn D Godfrey and Rufus X.

[3] By 19 January 1992, at the latest, the share capital of Krem had been increased to BZE$500,000.00 divided into 500,000 shares of $1.00 each, 200,000 of which were held by Evan X Hyde, 100,000 by Rodolfo Silva, 100,000 by Rufus X, 70,000 by Charles B Hyde, 25,000 by Randolph Enriquez and 5,000 by Godwin Hulse. It is a matter of inference, and not the subject of dispute, that, up to the date in 1994 when the share transfer to be referred to below was signed, the identities of the Krem shareholders and the amounts of their respective shareholdings remained the same.

(b) Belize Holdings Inc

[4] Belize Holdings Inc ('BHI') was, in 1994, the name of a company which, for some reason, changed its name several times between that year and the time of trial, when it was said to be going by the name BB Holdings Limited and to have Lord Ashcroft as its majority shareholder. In 1994 it was listed on the NASDAQ stock exchange and was the ultimate parent company in a corporate group of which The Belize Bank Limited ('The Belize Bank') formed part. But, whereas The Belize Bank was engaged in the business of lending, BHI was engaged in that of investment and had investments in a number of companies. Between 1987 and 1995 the Chief Executive Officer of this company was one Ian Robinson, who gave a witness statement, and also testified at trial, on behalf of Sagis. According to the witness statement in question, BHI had, in early 1994, a significant shareholding in a company which owned and operated Channel 5, a popular television channel in Belize City. In-house counsel to BHI at this time was one Philip Osborne, whose office was located upstairs of the offices of The

Belize Bank. Philip Osborne testified that, '[i]n 1994 it was part of [BHI's] general strategy … to invest … in the media sector in Belize'.

<u>(c) Krem's 'parlous' financial circumstances</u>

[5] The circumstances which led to the crossing by Krem and BHI of each other's paths and to the emergence between them of Sagis, and its involvement with Krem, are referred to in an editorial which appeared in the Amandala newspaper sometime in 1994 and was exhibited to the first witness statement of Philip Osborne in the Claim ('the editorial'). There was no evidence adduced at trial that Evan X Hyde was the editor of the Amandala at the material time (when he was chairman of Krem) but he, under cross-examination at trial, testified that he was 'most likely' the writer of the editorial, according to which, for reasons there stated, 'the survival of the undercapitalized Krem' had become 'a precarious proposition' sometime in 1993 or 1994. The editorial adverted to the adverse effect on Krem Radio of the advent of two other radio stations and continued: 'The board of KREM radio decided earlier this year that the KREM signal simply had to be upgraded and obtained a loan from the Belize Bank for $75,000. With the loan, KREM paid off some overdue bills and prepared a letter of credit for the purchase of some competitive equipment.'

[6] Confirmation of the 'parlous' financial circumstances of Krem at this time is to be found in Evan X Hyde's otherwise largely irrelevant supplemental witness statement, where he states: 'In 1994 [Krem] was struggling to survive financially'. It is also the case that Charles B Hyde, under cross-examination,

admitted that in 1994 (when he was a Krem director and Business Manager of the radio station) Krem was in ‘a precarious financial position’.

(d) The involvement of Krem with BHI and Sagis

[7] The evidence as to how Krem came into contact with BHI and Sagis and what occurred in their dealings with one another was sketchy and thus not entirely clear. And there were serious conflicts between the evidence of certain witnesses. At the same time, the findings of fact arrived at by the court below were relatively few in number, no doubt because of the overriding importance to that court (to which I shall return below) of the provisions of the articles of Krem dealing with the pre-emption rights of shareholders on the sale of shares owned by a fellow shareholder.

[8] There was some evidence that, in the face of Krem’s financial difficulties in 1994, its board of directors decided that it ‘would obtain a loan from the Belize Bank’. That evidence was given by Charles B Hyde, under cross-examination. But the circumstances under which he gave it render it, in my view, unreliable. Those circumstances are revealed in the relevant exchange between counsel and witness which, according to the record, was as follows:

> ‘Q. Now if we look again at [the editorial] it says in the 4th paragraph down: “The board of [Krem] decided that it would obtain a loan from the Belize Bank.”

A. That is so.'

The ready and unsolicited concurrence of the 84-year-old witness notwithstanding, the quotation from the editorial was, by virtue of an elision, inaccurate, the result, no doubt, of mere inadvertence. What the editorial in fact stated (as already noted above) was that '[t]he board of [Krem] decided earlier this year that the KREM signal simply had to be upgraded and obtained a loan from the Belize Bank for $75,000.' The only board decision being referred to there is one to the effect that the Krem radio signal had to be upgraded. Moreover, if the Krem board had indeed decided to seek a loan from The Belize Bank from the outset, it is difficult to explain the quest of Krem for a source of financial relief which, to my mind, undoubtedly ensued.

[9] It seems clear that Krem, in this quest for a source of financial relief (whatever Krem's conception of a source of such relief may have been), received key assistance from two persons, namely, 'Richard' Bradley and Said Musa. Somewhat strangely, however, neither of these names is called in the various witness statements (actual or deemed) filed on Krem's behalf in the Claim. This, it should be noted in passing, is an area in which findings of fact by the judge below are decidedly conspicuous in their absence, despite the favourable, if not inviting, state of the evidence, as revealed by the record. 'Richard' Bradley, according to the undisputed evidence of Charles B Hyde, undertook, in the face of Krem's dire financial plight, to negotiate on its behalf, puzzlingly enough, not with a lending institution, but with the PUP, the leading political party then in

opposition in Belize. With respect, the cross-examination of Mr Nelson QC, for Sagis, in this regard (Record, p 536) missed or ignored the point: Charles B Hyde did not suggest (as Evan X Hyde in his column in the 8 April 2007 edition of Amandala had, arguably, done) that 'Richard' Bradley had ever negotiated with the lender (whoever Charles B Hyde may have believed that to be) on Krem's behalf. As for the position regarding Said Musa's assistance, the evidence of Ian Robinson and Philip Osborne, both Sagis's witnesses, to the effect that he acted out of the firm of Musa & Balderamos as attorney-at-law for Krem was reasonably clear. What is more, it was undisputed. (The Amandala column just referred to, with its arguably contrary suggestion, was produced by Sagis rather than by Krem.) Therefore, to my mind, it is impossible to avoid findings to the effect that Musa & Balderamos represented Krem and that Said Musa made the initial approach to Ian Robinson and thereafter negotiated with him and spoke and corresponded with Philip Osborne. Indeed, under the pressure of cross-examination, Charles B Hyde admitted that Musa & Balderamos were acting on behalf of Krem in the transaction (to be described shortly) which the Claim was all about, even while perplexingly insisting that he did not know 'for a fact' that they, when corresponding with Philip Osborne, were the lawyers for Krem. The evidence (in which, of course, I cannot include the witness statement of Said Musa since it was never admitted in evidence) showed no involvement in the relevant correspondence of any attorney-at-law of the firm of Musa & Balderamos other than Said Musa.

[10] What 'Richard' Bradley actually did following his undertaking to Krem is not revealed by the admissible evidence. Charles B Hyde spoke only to his 'understanding' as to what was done by this 'associate' of Krem. The lacuna is perhaps not a critical one. What else, then, is shown by the evidence to have probably occurred after the giving by 'Richard' Bradley of his undertaking to negotiate? As already indicated above, I, like the court below, can have no regard to the contents of Said Musa's unadmitted witness statement. There is, however, the evidence of Ian Robinson, who asserted in his witness statement, as well as *viva voce*, that he, as the Chief Executive Officer of BHI, was approached by Krem early in 1994 with a request for an investment of BZE $100,000.00. Neither that assertion nor his stated belief that the initial approach was made by Said Musa of the firm of Musa & Balderamos, who at the time were the attorneys for Krem, was challenged in cross-examination. In Ian Robinson's words, 'the purpose of the investment was to purchase equipment to strengthen the radio signal and therefore to expand the business'. He further spoke in his witness statement of having received from Krem an investment proposal faxed on 13 April 1994 [Exhibit IR1], the sender, according to his unchallenged *viva voce* evidence, having been Musa & Balderamos. The terms of that initial proposal notwithstanding, Ian Robinson disclosed in his statement that: '[t]he final terms of the investment were that a loan would be made for BZE $75,000 and 50,000 shares in Krem would be purchased by Sagis for BZE $25,000'. He added that: 'These terms were reflected in a promissory note in favour of Sagis dated 17 May 1994 [Exhibit IR2] and a share transfer dated 17 June 1994 [Exhibit IR3] ...' A proper introduction of Sagis is now in order.

[11] Before turning to that, however, I would note that Charles B Hyde was obviously kept well informed as to the progress of negotiations between Said Musa and Ian Robinson, as representatives of the parties concerned. Who kept him so informed is of no consequence for present purposes. What is of significance is that, under cross-examination, he supported what Evan X Hyde said in his first witness statement, namely, that he (Charles B Hyde) informed Evan X Hyde that it was a condition of the loan agreement with the lender that he should sell 50,000 of his shares in Krem. And it is similarly significant that Charles B Hyde also declared in cross-examination that he informed Rufus X of the relevant condition of the loan agreement. Charles B Hyde, Evan X Hyde and Rufus X were the only directors of Krem at this time.

(e) Sagis

[12] It is convenient at this point to deal with the genesis and current status of Sagis, a copy of whose memorandum and articles was adduced through Philip Osborne [Exhibit PO1]. Evidence of Ian Robinson suggestive of the contrary notwithstanding, it is to be inferred that Sagis was formed in 1993, its constitutional documents having been subscribed, by Lois Young Barrow and Emelda Quiñonez in February of that year. It was, according to the oral evidence of Philip Osborne, incorporated as a ‘shelf’ company and provided to BHI by a local law firm. It is described, in its articles, as a private company and, in Philip Osborne’s first witness statement, as an investment holding company belonging in 1994 to the BHI group. Ian Robinson, in his *viva voce* evidence, stated that Sagis was ‘the chosen vehicle’ for the acquisition of the BHI investment in Krem

(a statement which finds support in the oral evidence of Philip Osborne) and that he became its chairman. Philip Osborne declared, under cross-examination, that Sagis 'no longer has anything to do with BB Holdings at all'.

(f) The role of Philip Osborne in the dealings between Krem and BHI and Sagis

[13] In addition to being, as noted above, in-house counsel to BHI in 1994, Philip Osborne was at that time, a member of the Belize Bar and a director of Sagis. He testified that he became involved in the dealings between Krem, on the one side, and BHI and Sagis, on the other, when he was asked by Ian Robinson to 'liase with Mr [Said] Musa' who 'was going to prepare drafts of the documents'. Said Musa was the first person he spoke to on 'the Radio Krem side' and 'the main communicator' for Krem. He spoke of an 'overall transaction' involving Krem, BHI and Sagis, saying:

> 'There was a composite arrangement involving a promissory note and shares and Mr Musa and myself had a discussion about there being insufficient authorised share capital for this (*sic*) shares to be issued and so he came back with a solution and his solution was that they would procure Mr [Evan X] Hyde to provide these shares.'

[14] Under cross-examination, Philip Osborne's attention was drawn to the fact that the date of the share transfer was changed by someone from 17 May 1994 to 17 June 1994. In the course of his reply to the question whether he had any idea why the date was so changed, he stated that 'by the time the parties had

gotten together to execute it we were then into June'. That may well be true. But it is difficult to accept that either date is correct. The original date (17 May 1994) is probably wrong since a covering letter, adduced in evidence, with which Philip Osborne sent to Said Musa, for review, a 'revised promissory note and transfer of shares' is dated 19 May 1994. The substituted date (17 June 1994) is also probably wrong since the promissory note and share transfer were sent, 'duly signed', by Said Musa to Philip Osborne under cover of a letter dated 13 June 1994. There seems, therefore, to be no realistic alternative to a broad finding that the two documents were executed and signed, respectively, on a date or dates during the period 19 May to 13 June 1994, inclusive. The practical implication of this, in my view, is that there is no basis left for a finding that the promissory note was executed on 17 May 1994 and the share transfer signed an entire month later, on 17 June 1994. The importance of this implication appears clearly when considering the issue whether the note and the transfer formed part of 'one overall transaction'.

[15] It is noteworthy that Philip Osborne did not claim to have had any meeting or conversation with either Charles B Hyde or Evan X Hyde prior to the signing of the share transfer or, for that matter, the execution of the promissory note (accepting as he, Philip Osborne, did that they properly bore different dates).

[16] But Philip Osborne did testify of a meeting with Charles B Hyde (during which he was introduced to Evan X Hyde) at Krem's offices on Partridge Street in September 1994. And earlier, in his first witness statement, he had claimed that

Charles B Hyde had promised, during that meeting, to forward to Said Musa for delivery to Sagis the new share certificate in the name of Sagis. He had further claimed in that statement that he had called Said Musa on 26 January 1995 and asked him to remind Evan X Hyde to forward the share certificate in question. But he had disclosed in the statement that he had done nothing more in this regard until 2007, when he realised that Sagis had still not received its share certificate.

[17] Concerning the passing of money, Philip Osborne testified that no moneys were 'sourced' from The Belize Bank. The monies in question were lent by BHI, from an account operated at The Belize Bank, to Sagis and then invested by the latter in Krem.

III - *The judgment of the court below*

[18] Counsel for Sagis correctly stated at p 1 of their skeleton argument that the court below 'dismissed [Sagis's] claim to be registered as a shareholder in [Krem] and to receive its rights and entitlements as [a] shareholder <u>on the grounds (*sic*) that the pre-emption provisions in [Krem's] Articles … had not been followed'</u>. [Emphasis added.]

[19] In its judgment, the court below, having set out what it considered the background to the claim of Sagis, said, at paras 34-35:

‘34. It is against this background that [Sagis] has pressed its claim to have this court order [Krem] to rectify its register of members by striking out the name of Evan X Hyde in respect of the 50,000 shares and entering the name of the claimant. Mr Nelson QC argued valiantly that this was a business arrangement which this court should give effect to.

35. [Krem] for its part, as I have stated, has stoutly rejected this <u>on the principal ground the transfer of the 50,000 shares would not be in accord with its Articles of Association</u>.’ [Emphasis added.]

[20] These two paragraphs immediately precede the section of the judgment, headed ‘Determination’ and comprising paras 36-51, in which the judge below purported to set out six discrete reasons for rejecting the claim of Sagis. Those reasons are, with respect, not easily found. Those who seek them must, to borrow the graphic expression employed by Lord Walker of Gestingthorpe, delivering the advice of the Privy Council in *HSBC Bank Middle East etc et al v Paul Clarke etc et al* [2006] UKPC 31, ‘hack their way through some tangled thickets’. The approach, as I understand it, was, broadly, that the articles which provide for pre-emption rights of shareholders in the event of a proposed sale of Krem shares, being part of Krem’s articles of association, must obviously be given effect to, save where there is a sufficient legal cause for not so doing. The six purported reasons of the court below for rejecting the claim of Sagis are centred around matters which, in the view of that court, do not constitute such

sufficient legal cause. The court, in setting out those reasons, implicitly recognised, as it seems to me, that, if any one of them was wrong, that would suffice to compel acceptance of Sagis's claim.

[21] The six reasons given by the court below for the rejection of Sagis's claim were, in my interpretation of the relevant paragraphs of the judgment, the following. First, the pre-emption articles had not been displaced by anything arising from the relationship between Sagis and Krem, which, as the court below saw it, was strictly one of lender and borrower. Secondly, and overlapping, in my view, with the sixth reason, it was not the case that each Krem shareholder had waived his pre-emption rights under the relevant articles. Thirdly, the fact that Krem, rather than itself increasing its share capital and making a direct allocation to Sagis, may have somehow secured a voluntary transfer by Evan X Hyde of some of his shares to Sagis for Krem's exclusive pecuniary benefit did not affect the application of the pre-emption articles to the share transfer in question. Fourthly, such application of the relevant articles was, similarly, not affected by the decision in *Guinness v Land Corporation of Ireland* (1888) 22 Ch D 349, that decision being distinguishable on its facts in that there is no inconsistency between the provisions conferring borrowing powers under clause 3(21) of Krem's memorandum and the provisions of the pre-emption articles, as reinforced by section 23(1) of the Companies Act (set out at para [26], p 20 below), such pre-emption articles having nothing to do with borrowing. Fifthly, the provisions of the memorandum relating to borrowing could not operate to affect in any way the application of the pre-emption articles to the relevant share

transfer since the subjects of that transfer were the shares of a member of Sagis and not of Krem itself; and the transfer of shares and the power of borrowing were two entirely different things. Sixthly, the operation of the pre-emption articles was unaffected by the decision in *Re Duomatic Ltd* [1969] 1 All ER 161, a decision distinguishable on the facts in that, whereas in *Duomatic Ltd* the assent of all shareholders to the relevant matter had been successfully sought, in the instant case no such assent had been sought, much less obtained, the proper mechanism created by the pre-emption articles for the securing of such assent never having been utilised.

[22] At para 55, the court below rejected the contention of Krem that Sagis had acquiesced in Krem's alleged omission to enter Sagis's name in its register of members and issue it a share certificate. In the words of the judge:

> 'I cannot find, notwithstanding the passage of considerable time in this case, that this would enable me to say that [Sagis] had acquiesced in not having its name on [Krem's] register and not receiving the share certificate for the 50,000 shares.'

[23] In dismissing the claim of Sagis, the judge below observed, at para 56:

> 'As I had intimated to Mr Nelson Q.C. during the course of the hearing, the availability of any of the relief would be contingent on my finding on the

main claim to have [Sagis] registered as holder of the 50,000 shares in [Krem].'

[24] Krem has, of course, filed no Respondent's Notice in this matter.

IV - *The grounds of appeal*

[25] The main grounds of appeal, numbered 3.1 and 3.4 respectively, were in the terms following:

> '3.1 The … Judge erred and misdirected himself in finding that the transfer of shares was ineffective and contrary to [Krem's] articles … The … Judge ought to have found that [Krem] had wide powers under the Memorandum … to borrow and raise money which powers are untrammeled by the Articles …
>
> 3.4 The … Judge erred in law and misdirected himself in:
>
> (a) not finding that the procuring by [Krem] of the execution of the share transfer as a condition of the loan evidenced by the promissory note was (*sic*) a valid transfer of shares by the transferee (*sic*); and
>
> (b) in finding that the execution of the share transfer was not approved by the directors of the Board of [Krem].'

V - *The Companies Act, Krem's memorandum and Krem's articles*

[26] It is convenient at this stage to set out some relevant provisions, clauses and articles, as the case may be, of the Companies Act, Krem's memorandum and Krem's articles, respectively.

<u>(a) The Companies Act</u>

Section 5(1) (c)

'5. –(1) The memorandum of every company must state –

(a) …

(b) …

(c) the objects of the company.'

Section 23(1)

'23.-(1) The shares or other interests of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate.'

Section 122(1) and (4)

'122. (I) For the purposes of this Act, the expression "private company" means a company which by its articles –

(a) restricts the right to transfer its shares; and

(b) …

(c) …

(d) …

(2) …

(3) …

(4) Where the articles of a company include the provisions which, by this section, are required to be included therein in order to constitute the company a private company, and default is made in complying with any of these provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under section 27(3), sections 115, 116 and section 130(d), and thereupon the said provisions shall apply to the company as if it were not a private company:

Provided that the court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested, and on such terms and

conditions as seem to the court just and expedient, order that the company be relieved from such consequences as aforesaid.'

(b) Krem's memorandum

Clause 3

'3. The objects for which the company is established are:

…

(21) To borrow, raise money or secure obligations (whether of the Company or any other person) in such manner as the Company may think fit and in particular by the issue of debentures, debenture stock, (perpetual or terminable), bonds, mortgages, or any other securities, founded or based upon all or any of the property and rights of the Company both present and future) including its uncalled capital, or without any such security; and to purchase, redeem or pay off any such securities.

…

(35) To do all such other things as may be deemed incidental or conducive to the attainment of the above objects or any of them.

AND IT IS HEREBY DECLARED that

(a) …

(b) the objects specified in each of the paragraphs of this clause shall be regarded as independent objects, and accordingly shall in no wise be limited or restricted (except where otherwise expressed in such paragraphs by reference to or inference from the terms of any other paragraph but may be carried out in as full and ample a manner and construed in as wide a sense as if each of the said paragraphs defined the objects of a separate and distinct company.'

(c) Krem's articles

Article 3 (Marginal note: 'Private Company restrictions')

'3. The Company is a private company and accordingly:-

(a) the right to transfer shares shall be restricted in manner hereinafter prescribed …'

Article 27 (Marginal note: 'Form of transfer')

> '27. Subject to the provisions hereinafter contained shares in the Company shall be transferable by written instrument in the common form signed by both the transferor and the transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register of Members in respect thereof.'

Article 31 (Marginal note: 'Transfers')

> '31. (1) …
>
> (2) Except as hereinafter provided no shares in the Company shall be transferred unless and until the rights of preemption hereinafter conferred shall have been exhausted.
>
> (3) Every member who desires to transfer any share or shares (hereinafter called the vendor) shall give to the Company notice in writing of such desire (hereinafter called transfer notice). Subject as hereinafter mentioned, a transfer notice shall constitute the Company the vendor's agent for the sale of the share or shares specified therein (hereinafter called the said shares) in one or more lots at the discretion of the Directors, or, in case if (*sic*) difference, at the price which the Auditor of the Company for the time being shall, by writing under his hand, certify to

be in his opinion the fair value thereof as between a willing seller and a willing buyer. A transfer notice may contain a provision that unless all the shares comprised therein are sold by the Company pursuant to this Article, none shall be so sold and any such provision shall be binding on the Company.

(4) …

(5) Upon the price being fixed as aforesaid, and provided the vendor shall not give notice of cancellation as aforesaid, the Company shall forthwith, by notice in writing, inform each member other than the vendor of the number and price of the said shares and invite each such member to apply in writing to the Company within twenty-one days of the date of dispatch of the notice (which date shall be specified therein) for such maximum number of the said shares (being all or any thereof) as he shall specify in such application.

(6) …

(7) …

(8) …

(9) …

(10) Notwithstanding the foregoing provisions of this Article, the Directors may refuse to register any transfer of a share where

(a) the Company has a lien on the share;

(b) The Directors do not approve of the proposed transferee and the share is not a fully paid one; or

(c) the registration of the share would cause the number of members to exceed the maximum permitted by Article 3.'

VI - *Discussion*

[27] It is necessary now to return to those grounds of appeal which, in my view, need to be considered in order to reach a decision in this appeal. Ground 3.4, as it appears to me, may, so far as convenient, be dealt with first. In 3.4(a), as already noted above, it was said that the judge below erred in law and misdirected himself in failing to find that 'the procuring by [Krem] of the execution of the share transfer as a condition of the loan evidenced by the promissory note was a valid transfer of shares by the transferee'. Two of the words appearing here in quotation marks do not appear to belong in the relevant sentence. First, it seems to me that the term 'was' is out of place in the sentence and should be replaced by an expression such as 'resulted in'. Secondly, the word 'transferee' should, I think, be replaced by the word 'transferor'. That said, I would, for now, spend no more time on this part of ground 3.4 since it is plainly subsumed in ground 3.1, to which I shall come later.

[28] In 3.4(b), the judge below is again said to have erred in law as well as misdirected himself, the specific complaint this time being that he found that the 'execution' of the share transfer was not approved by the Krem board. For my part, I am unable to concur in the conclusion of counsel for Sagis that the judge made such a finding. In my view, what the judge did was to refrain from making a finding one way or the other on the pertinent point, in circumstances where such a finding was very much called for. In my further view, there was a sound evidential basis for finding that all three of the Krem directors, namely, Charles B Hyde, Evan X Hyde and Rufus X, had approved, in advance, the signing of the share transfer in 1994. After all, Charles B Hyde, found by the judge to have been a witness both honest and truthful, unambiguously testified that he himself told both of his co-directors that the lender was making it a condition of the agreement for the loan of $75,000.00 to Krem that 10% of the issued shares of Krem be transferred to it for a consideration of $25,000.00. And all three directors signed the promissory note relating to the loan of $75,000.00, an event which could only have occurred after Charles B Hyde had so advised his two co-directors on the condition in question. It is folly to think (a) that Charles B Hyde would have withheld such advice from his co-directors until after they had signed the promissory note or (b) that any self-respecting investment company would have gone so far into a loan transaction (the note execution stage) involving a floundering corporate borrower without having been satisfied that all its conditions had been accepted by that borrower's board. (I say this entirely mindful of the fact that, on the evidence of Philip Osborne, he, and hence Sagis, on hearing from Said Musa that the required 50,000 shares would be transferred

to Sagis by Evan X Hyde, did not take the prudent step of consulting Krem's constitutional documents to see whether such a course would pose any problem.) As to the technical suggestion that there was no tabling of the share transfer before the Krem board (based on Charles B Hyde's assertion in his first witness statement, at para 10) it is difficult, with respect, to understand how such a patently facetious assertion (alluded to, but not expressly accepted, by the judge below at para 13 of his judgment) can form the basis of any serious contention. This, after all, is not the case of a company which was in the habit of holding formal board meetings: see the affidavit sworn by Charles B Hyde on 8 May 2005, at para 5. What significance could there possibly be, in the light of such a relaxed and informal corporate culture, in the fact (if fact it be) that there was no board-meeting-approval of the share transfer in question? In my view, it is right to decide this appeal on the basis that a finding that the directors approved the signing of the transfer is amply justified by a combination of the evidence and basic logic. (And there was, to my mind, no need for a finding going beyond that, contrary to what ground 3.4(b) seems to imply.) The judge deprived himself of the assistance that this finding would have afforded him.

[29] The finding seems to me to be of importance in the context of the other main ground of appeal, namely ground 3.1, to which attention must now be directed. It is necessary to have, as part and parcel of the foundation of this ground, clear acceptance of the evidence that there was action on the part of Krem's directors, action in the form of the exercise of powers conferred on the company by the objects clause contained in its memorandum; and action,

moreover, that was taken in good faith and in Krem's best interests. The relevant evidence here is that relating to the worrisome financial situation of the embarrassed Krem prior to the opening of the negotiations and the making of the approach which resulted in the encounter and subsequent transaction between Krem and Sagis, as well, of course, as the evidence relating to the preparation and execution and signing, respectively, of the promissory note and the share transfer. With that evidence, whose acceptance can hardly pose difficulty, in place, one turns to the essence of ground 3.1

[30] To my mind, the focus of this ground is the fourth of the six reasons given by the judge below for his rejection of Sagis's claim: see para [21] above. Mr Nelson submitted with force that the ratio of the decision below was unsound for reasons to be found in the decision in *Guinness*, already cited above.

[31] What, then, is it about the decision in *Guinness* that places it at the centre of the present discussion? It is helpful to begin to answer this question by reproducing the headnote to the report of the case. It reads as follows:

> 'By the memorandum of association of a company limited by shares it was stated that the objects of the company were the cultivation of lands in Ireland, and other similar purposes there specified, and to do all such other things as the company might deem incidental or conducive to the attainment of any of those objects, and that the capital of the company was £1, 050, 000, divided into 140,000 A shares of £5 each, and 3500 B

shares of £100 each. By the 8th of the contemporaneous articles of association, it was provided that the capital provided by the issue of B shares should be invested, and that the income, and so far as necessary the capital, should be applied so as to make good to the holders of A shares a preferential dividend of £5 per cent. on the amounts paid up on the A shares. Subject to this, the B fund was to belong to the owners of B shares. The profits of the company, after paying the £5 per cent. dividend to the A shareholders, were to be applied in payment of a non-cumulative dividend of £5 per cent. to the B shareholders, and the surplus was to be divided rateably between the A shareholders and the B shareholders according to the to the amounts paid up on their respective shares:-

Held, by Chitty J, and the Court of Appeal, that article 8 was invalid, as it purported to make the B capital applicable to purposes not within the objects of the company as defined by the memorandum of association, and in a way not incidental or conducive to the attainment of those objects, and that the directors must be restrained from acting upon it.

The articles of association of a company cannot, except in the cases provided for by sect. 12 of the Companies Act, 1862, modify the memorandum of association in any of the particulars required by the Act to be stated in the memorandum.'

[32] In the instant appeal, the Court is concerned with the exercise by the directors of Krem of powers contained in clause 3(21) of its memorandum in circumstances where section 5 (1)(c) of the Companies Act (set out at para [26], p 20 above), in terms identical to those employed in section 3(1)(iii) of the Companies (Consolidation) Act, 1908 (UK), requires that the objects of a company limited by shares be stated in its memorandum. Krem is proclaimed in the headings to both its memorandum and articles as a company limited by shares and, in addition to that, it is described as a private company in article 3 of its articles: see para [26], pp 23-24 above.

[33] Returning now to the case of *Guinness*, it suffices for present purposes to confine the discussion to the decision of the English Court of Appeal (Cotton and Bowen, LJJ) on the appeal from the order of Chitty J.

[34] I would deal first with the judgment of Cotton LJ. At p 375, he noted that the Act relating to companies then in force required that the memorandum of the company state the company's objects as well as the amount of the capital with which it was proposed to be registered. At p 376 he referred to the argument of the appellant Guinness as being that, because the memorandum mentioned two classes of shares, A and B shares, there was a resulting need for some explanation and therefore the articles, which defined what the A and B shares were, should be looked at 'for the purpose of controlling what would otherwise be the effect of the memorandum'. In rejecting that argument, Cotton LJ said, still at p 376:

> ‘Now the articles cannot in my opinion alter or vary that which would be the result of the memorandum standing alone.’

The learned lord justice went on to consider certain observations made by the then Master of the Rolls in two cases which, in the words of the former, ‘might seem to militate with’ the opinion which is the subject of the above quotation. Dealing with the second of the pertinent cases, he stated (at p 378) that the observations of the Master of the Rolls as to the purposes for which the articles can be looked to were confined to those matters not required by the Act of Parliament to be stated in the memorandum. He then continued, still at p 378:

> ‘[A]s regards <u>those conditions which the Act of Parliament does require to be stated in the memorandum</u>, the articles cannot, in my opinion, be referred to for the purpose of modifying or qualifying them.’ [Emphasis added.]

[35] With respect to the judgment of Bowen LJ in *Guinness*, I would note only the following passage, which appears at p 381:

> ‘We have then to consider the argument that the Court may turn to the articles of association to see if they do not, so to say, supplement the memorandum and for this particular purpose admit of being read with it … [W]e are thrown back upon the question how far as a general rule you may turn to the articles. There is an essential difference between the

> memorandum and the articles. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as for the shareholders. The articles are the internal regulations of the company. How can it be said that in all cases the fundamental conditions of the charter of incorporation, and the internal regulations of the company are to construed together … [I]t is, as it seems to me, certain that for <u>anything which the Act of Parliament says shall be in the memorandum</u> you must look to the memorandum alone. If the Legislature has said that one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument.' [Emphasis added.]

[36] This Court was usefully referred by counsel for Sagis to *Re Duncan Gilmour and Co Ltd; The Company v Inman and Others* [1952] 2 All ER 871, a decision of the Chancery Division in which the court applied the dicta of Cotton LJ contained in the first of the above quotations from his judgment in *Guinness*. Wynn-Parry J, having noted that the first point to be considered was whether, in construing the rights of the particular class of shareholders with which he was there concerned, he could 'go outside cl 5 of the memorandum and refer to the language of art 160 of the original articles' or whether he was 'confined to cl 5 of the memorandum', said, inter alia, at p 874:

> 'In *Guinness v Land Corpn of Ireland*, Cotton LJ said (22 Ch D 376):

> “Now the articles cannot in my opinion alter or vary that which would be the result of the memorandum standing alone.”

> Those passages [a reference to the dicta of Cotton LJ as well as to other passages quoted from a textbook and another decided case] show the limited area in which it is proper to refer to the articles of association, and, in my judgment, it emerges from those passages that the first thing I have to do is to endeavour to construe cl 5 of the memorandum standing alone, and to say whether, on that construction, there is any material matter as to which, as regards the rights of the preference shareholders, that clause is silent.’

While Wynn-Parry J does acknowledge in this passage that there is an area in which articles may properly be looked at, it must be borne in mind that, from all indications, the shareholder rights which he was considering were (unlike the objects of Krem in the present case) not required by the relevant Act to be dealt with in the memorandum.

[37] In another case, to which I referred in the course of oral argument but which Mr Nelson was (because of the paucity of information provided by me) unable to find, the Privy Council has relatively recently given some attention to dicta from the judgment of Cotton LJ now under consideration, including that which is contained in the first of the above quotations. That was the case of

HSBC Bank, already cited at para [20] above, in which the Board had to consider the memorandum of an international business company governed by an Act ('ICBA'), which required that provisions concerning differential share rights be set out in such a company's memorandum. The Board, in a judgment which, as already pointed out at para [20] above, was delivered by Lord Walker, noted (at para 21) that each member of the Court of Appeal of the Commonwealth of the Bahamas had cited *Guinness* in his judgment, and, at a later stage, said (at para 23):

> 'Nevertheless their Lordships consider that the Court of Appeal was right in its conclusion about the ineffectiveness of article 101. The language of section 12 (1) of ICBA is clear and mandatory. The memorandum … is the only permitted source of differential share rights for an international business company. The decision of the English Court of Appeal in *Guinness* is in line with this conclusion though it is not directly on point since in that case (i) it was not mandatory for the share rights to be set out in the memorandum; but (ii) there was an explicit inconsistency between the memorandum (in its objects clause) and the articles. That was the context in which Cotton LJ said (at p 376)
>
> > "Now the articles cannot in my opinion alter or vary that which would be the result of the memorandum standing alone."
>
> and (at p 378),

> "As regards those conditions which the Act of Parliament does require to be stated in the memorandum, the articles cannot, in my opinion, be referred to for the purpose of modifying or qualifying them." '

Lord Walker went on to point out (at para 26) that the memorandum 'contained nothing at all to indicate that there were to be differential share rights in a winding up', thus giving rise to a 'default position' under which the relevant case law required *pari passu* participation by shareholders in surplus assets. Then, consistently, as it seems to me, with the opinion of Cotton LJ under reference that articles were not to be referred to for the purposes in question, Lord Walker said (still at para 26):

> 'Reference to article 101, <u>even if otherwise possible</u>, would therefore contradict the shareholders' rights on a winding up under the memorandum, properly construed.' [Emphasis added.]

(I consider myself at liberty to cite this decision because the parts of it I rely upon merely endorse principles enunciated in *Guinness*.)

[38] Thus, from the above discussion, the principles enunciated in *Guinness* clearly emerge. It is those principles that set *Guinness* at the centre of the debate in this appeal. How, then, would those principles affect the instant case if

it were to turn out that the fourth of the reasons given by the court for its rejection of Sagis's claim is unsound? In my view the effect would be that the breadth of the power to raise money and, less importantly for present purposes, to borrow conferred on Krem's directors would fall to be defined exclusively by the relevant terms of the memorandum, such terms being those contained in clauses 3(21) and (35) as well as in declaration (b), all of which are set out at para [26], pp 22-23 above. The provisions of Krem's articles, including those of article 31 reproduced at para [26], pp 24-26 above, could not be consulted for the purpose of identifying modifications or qualifications of the relevant clauses of the memorandum and, hence, of the relevant power. Adopting the words of Cotton LJ, 'the result of the memorandum standing alone' cannot but be that Krem's directors, so long as they act in good faith and in the best interests of Krem, possess ample power to raise money for Krem by selling the shares of a consenting shareholder. If, however, the provisions of article 31 apply to the relevant share transfer, then, in the language of Sagis's skeleton argument, 'an existing shareholder in [Krem] could insist that the shares be sold to him at a "fair value" which in a struggling company … could be expected to be very low indeed'. I agree with counsel for Sagis when they further write: 'The effect of that would be to prevent Krem from exercising the wide powers conferred on it in the Memorandum … to sell the shares of a willing shareholder for a price which would provide the required funds …'

[39] The important remaining question, therefore, is whether the judge below was correct in holding that *Guinness* could have no application to the instant

case (regarded by him as one of borrowing only) since, as he opined, there is here no inconsistency between the memorandum and the articles of Krem. Counsel for Sagis, on the one hand, argued that the judge was wrong so to hold. Mr Nelson, advancing the oral arguments for Sagis, was emphatic: the memorandum is the dominant document and it matters not whether there is inconsistency between its provisions and those of the articles so long as the matter in issue is one (such as an object of a company limited by shares) required by the Companies Act to be dealt with in the memorandum. Mr Young SC, on the other hand, presenting Krem's arguments orally, fully supported the view of the judge below; but it is noteworthy that there is no mention of *Guinness* in the skeleton argument submitted by him and his co-counsel. The reason for that omission is, of course, to be found at para 5.1 of that skeleton argument, which states:

> 'The appellant makes heavy weather of the proposition that the Articles of a company are subordinate to and controlled by the Memorandum of Association. But, with due respect, it is weather that the Court need not embark into because on the facts and circumstances of this case, there is no interpretational conflict which arises between the Memorandum and the Articles.'

(Counsel further suggested, albeit only in oral argument, that the wording of clause 3(21) was such that it could not apply to the raising of money by the sale of a consenting shareholder's shares; but, in my respectful opinion, that is a

suggestion which does not take proper account of the provisions of clause 3(21), even if read in isolation rather than together with the rest of the objects clause and, in particular, clause 3(35) and declaration (b), set out at para [26], p 23 above.)

VII - *Determination*

[40] At the end of the day, my own conclusion is that the judge below was indeed in error in holding that *Guinness* does not apply in the instant case. My understanding of that case, and, as well, of *HSBC Bank*, in both of which mention is made of the existence of inconsistency between provisions of a company's constitutional documents, is that, far from saying that such inconsistency is a prerequisite for the application of the principles under consideration, those cases are merely noting the coincidental fact of the existence of such inconsistency. I consider that I am correct in so understanding the cases since there would otherwise be no sense in saying, as was said by Cotton LJ and Bowen LJ in *Guinness*, that, in a case where an Act requires that the relevant subject be dealt with in the memorandum, one need, indeed must, not look at the articles at all, only at the memorandum. If the view of the judge below were correct and the principles enunciated in *Guinness* only applied in the event of an inconsistency between the memorandum and the articles, the need would be to look at both documents in order to be able to determine whether there was in fact such an inconsistency. In my opinion, there is support for this view in the quotation from the judgment in *HSBC Bank* appearing at the end of para [37] above having regard to the presence in it of the words which I have underscored for emphasis.

[41] I would add to what I have stated above that I am mindful of the fact that the judge below found support for his view that the share transfer in question was subject to the provisions of article 31 of Krem's articles in the terms of section 23(1) of the Companies Act, set out at para [26], p 20 above. In my view, however, the requirement imposed by that subsection (that transfers of shares be carried out 'in manner prescribed by the articles') refers, not to the pre-emption provisions, but to the form of transfer which is described as such in article 27, quoted at para [26], p 24 above. In other words, since article 27 simply requires transfer 'by written instrument in the common form signed by both the transferor and the transferee', that is the sole requirement that, in the case of Krem, receives statutory reinforcement by virtue of section 23(1). The marginal note 'Form of transfer' to article 27 is, to my mind, not without significance in this connection. The subject-matter of article 31, on the whole, is not the manner or form, but rather restrictions on the right, of transfer.

[42] I am equally aware of the importance, for present purposes, accorded by the judge below to the provisions of section 122 of the Companies Act, set out at para [26], pp 20-22 above. (As is well known, the model for that Act is the Companies (Consolidation) Act, 1908 (UK). It is a fact, however, that the provisions of section 122 are more similar to those of sections 28 and 29 of the former Companies Act, 1948 (UK) than to those of section 121 of the Act of 1908.) Mr Nelson's submissions on the present relevance of section 122 centred, rightly in my view, on the terms of the proviso to subsection (4). While a

private company is by definition, under subsection (1), one which, inter alia, restricts, by it articles, the right to transfer its shares, the proviso realistically deals with cases in which such a company may be spared by the courts from the otherwise harsh consequences of non-compliance with articles which restrict the right to transfer its shares. This, as Mr Nelson submitted, is a clear indication that articles conferring pre-emption rights are not to be regarded as applicable to every conceivable share transfer, least of all one (such as the one at issue here) forming part of a larger transaction entered into by a company's directors, exercising, in its vast plenitude, their power to raise money and acting in good faith, in furtherance of the best interests of the company and with the consent of the relevant shareholder.

[43] I have considered it necessary to refer to these statutory provisions since the point needs clearly to be made that *Guinness* concerns the dominance of the memorandum over the articles and, obviously, not over statutory provisions.

[44] Accordingly, I conclude that ground 3.1 (in which 3.4(a), as necessarily modified above, is subsumed) succeeds in full and ground 3.4(b) succeeds in all material respects, and that the appeal should be allowed. The appellant is, in my opinion, entitled to the orders set out numbered (1) to (4), and the declaration set out numbered (5), in its claim form, and should have its costs, to be taxed if not agreed, here and in the court below. I would read the order numbered (1) in the claim form as referring to the 50,000 shares of Evan X Hyde in Krem which are numbered 1 to 50,000. With regard specifically to the part of the order of the

judge below requiring the repayment to Sagis of the sum of $25,000.00 with interest, I wish, for the sake of completeness, to note that it was an order never sought by Sagis and to express the view that, being wholly inconsistent with the relief to which I consider Sagis to be entitled, it must be set aside together with the rest of the order in question, even though not expressly mentioned in any of the grounds of appeal.

____
SOSA JA

CAREY JA

INTRODUCTION

[45] We are concerned in this appeal with the tension which, it was said, exists between the memorandum of association and the articles of association of Radio Krem Limited (Krem), a private company limited by shares whose objects include the operation of a radio station known as "KREM Radio". Its shares are held by a small number of persons including a father and son who are directors. Some time in 1994, the company found itself in dire financial straits and therefore sought financing. It required a transmitter to enable a wider area of coverage of the country for its broadcasts.

[46] It is not altogether clear how Krem and the appellant (Sagis) ever got together in light of the fact that the Hydes, father and son, disavowed any knowledge of Sagis. But this seeming mystery is not of importance as it has no relevance to resolving the issues which arise in this appeal. Sagis is an investment company and is a subsidiary of Belize Holdings Inc. of whose group it and the Belize Bank Ltd. are members.

[47] In the event, the financing was arranged in this way. A share transfer was executed by Mr. Evan X. Hyde, a director of Krem, whereby he transferred to Sagis for a consideration of twenty five thousand dollars, fifty thousand shares out of his own shareholding in Krem. This represented ten percent of the company's issued share capital. Krem also issued to Sagis a promissory note in the sum of seventy-five thousand dollars against a loan made by Sagis. Although the funds were passed to the respective beneficiaries, there never has been a delivery of the shares. Both proceeds, that in respect of the share transfer and that in respect of the promissory note, were lodged in the account of Krem. That state of quietude continued until 28 March 2007 when the attorneys acting for the appellants wrote Mr. Evan X. Hyde of Krem requesting the delivery of the fifty thousand shares transferred to Sagis.

[48] Finally, the appellant filed suit against Krem in which it sought, so far as material, the following relief:

> "(1) A Order that the Defendant shall rectify its register of members by striking out the name of Evan X. Hyde as the holder of the Shares and by inserting in lieu thereof the name of the Claimant as the holder of the shares;
>
> (2) An Order that the Defendant give notice of the rectification to the Registrar of Companies;
>
> (3) An Order that the Defendant issue and deliver to the claimant a share certificate in the claimant's name in respect of the shares;
>
> …"

The respondent's defence was synoptically stated in these terms by the Chief Justice and I gratefully adopt his rendition:

> "…The defendant for its part has denied that claimant is entitled to be registered as a member. In the main, it is the contention of the defendant that by its Articles of Association, the 50,000 shares could not have been validly transferred by Mr. X. Hyde to the claimant. In particular, the defendant says that by Article 31(2) of its Articles of Association a shareholder is not permitted to transfer shares in it "unless the right of preemption hereinafter conferred shall have been exhausted". The defendant also states that at no

time did it receive a transfer notice from Mr. X Hyde as is required by Article 31(3) of its Articles of Association or at all The defendant further avers that the matter of the intended transfer of shares from Mr. X. Hyde to the claimant was never tabled before its Board of Directors, or discussed or dealt with by the Board. Finally, the defendant denies that the claimant is entitled to any Declaration it seeks."

[49] The Chief Justice, in a reserved judgment, refused the orders and declaration sought but ordered the appellant to repay the sum of twenty-five thousand dollars plus six percent interest from 17 June 1994 to 9 November 007. He fixed the costs at thirty thousand dollars. Sagis appeal the decision to this court and prays the court to reverse the order made by the Chief Justice. Alternatively, it sought an order

(1) for an account of profits in equity in respect of:

(a) the 10% shareholding in the Respondent together with all dividends and profits sharing that would have been due to the Appellant but for the fraudulent misrepresentation;

(b) the sums due and owing by the Respondent to the Appellant under the Promissory Note dated or 17 June 1994;

(c) the Bz$2,750 advanced by the Appellant to Musa & Balderamos; and

(d) compound interest in respect of the above; and

(2) alternatively, for damages and/or for exemplary damages.

THE APPEAL

[50] It is beyond debate that Krem was in financial straits. It required injection of capital which could not be provided by the shareholders. It is also beyond debate that it obtained an injection of capital, One hundred thousand dollars which enabled it to purchase the transmitter it required in order to extend the range of its cover. It is beyond debate that the three Directors at the time of this transaction, namely, Evan X. Hyde, Charles B. Hyde and Rufus X, were well aware of its details. Given that factual matrix, the question which must arise is, did they have the power to enter into such a transaction? Mr. Nelson, Q.C. counsel for the appellants, did ask this question and referred us to clause 3(21) of the appellant's Memorandum of Association. It states as follows:

> "To borrow, raise money or secure obligations (whether of the company or any other person) in such manner as the company may thing fit and in particular by the issue of debentures, debenture stock (perpetual or terminable) bond mortgages, or any

> other securities, founded or based upon all or any of the property and rights of the company (both present and future) including its uncalled capital, or without any such security; and to purchase, redeem or pay off any such securities".

His emphatic submission was that the appellant's Memorandum of Association confers on the appellant clear and broad powers to raise money. He also referred to clause 3(b) therein: It states:

> "(b) the objects specified in each of the paragraphs of this clause shall be regarded as independent objects, and accordingly shall in no wise be limited or restricted (except where otherwise expressed in such paragraphs, by reference to or inference from the terms of any other paragraph but may be carried out in as full and ample a manner and construed in as wide a sense as if each of the said paragraphs defined the objects of a separate and distinct company."

This clause, he argued, makes it clear that the objects set out in the Memorandum are to be interpreted independently and to their fullest extent. Unless there is a conflict, within the clauses of the Memorandum itself, he continued, clause 3(21) is not to be limited or restricted, and may be carried out in a full and ample manner and shall be construed in a wide sense. In amplification of this point, as set out in his skeleton arguments,

Mr. Nelson, Q.C. contended that the power given to the company, was not simply a power to "borrow" but to "raise money" and "secure obligations (whether of the company or any other person) and" to do all such things as may be deemed incidental or conducive to the attainment of the above objects or any of them" (clause 3(35)). Thus clauses 3(21) and 3(35) together, he concluded, construed in a wide sense pursuant to clause 3(b) is much wider than the simple power. "to borrow". That wide sense, it would follow ineluctably, includes the right to borrow and/or raise money by agreeing to sell shares of a shareholder in the company, with that shareholder's consent.

[51] Mr. Michael Young, S.C. arguing on behalf of Krem, submitted that on the facts and the evidence this was not a case of borrowing. But he did not seek to characterize it. The Chief Justice for his part gave a restricted construction to clause 3(21). He expressed himself in these terms (p.376):

> "41 These are indeed, wide borrowing powers that any modern company may think necessary to have. But the breadth of these powers notwithstanding, I find, however, that they are not at odds with the Articles of Association of the defendant that are in issue here. That is, those relating to a transfer of its shares. In exercise of the borrowing power granted it by clause 3(21) of its Memorandum of Association, the defendant could issue debentures, debenture stock, bonds, mortgages or any other

securities founded or based on all or any of its property and rights including its uncalled capital in order to secure any loans to it. But it could not however, I find transfer any of the shares of its members. I therefore find the two provisions in question here here, that is, the power to borrow by the company as provided for in clause 3(21) of the defendant's Memorandum of Association, and the transfer of its shares as provided for in clause 31 of its Articles of Association, are <u>not</u> in opposition one to the other. Rather, in my view, they deal with two distinct and separate issues, viz. the power to borrow and the transfer of the defendant's shares."

In the result, he held that on the facts of the case, and given the Articles of Association of Krem on the transfer of its shares, there could not be a proper transfer of any of the shares of any of its members without the consent of that member consistent with those Articles.

[52] I fear I cannot agree. In the first place a company is managed by its directors who by virtue of their position as directors are required in exercising their powers, to act bona fide in what they consider to be the best interest of the company. No one, it has ever been suggested, coerced Mr. Evan X. Hyde to sign the agreement evidencing the transfer of his shares to Sagis, the appellant. There was a valid agreement. The appellant paid the consideration stipulated in the contract and it was paid into the company's bank account. The transfer of the shares was part of the agreement to raise funds to further the company's

interest. To assert that there was no borrowing is more than startling. It is to stand common sense on its head: in short, it is an absurd proposition, the moreso, when it is not said, what was the effect of the transaction. The construct of clause 3(21) propounded by the Chief Justice, ignores the effect of clause 3(35) which authorizes the Company, acting through its directors to do such other things as may be deemed incidental or conducive to the attainment of the objects and, in the instant case, in relation to clause 3(21). It is, with respect difficult to appreciate how the words – "to borrow, raise money" becomes somehow limited to borrowing or raising money only by the issue of debentures, etc. by the words "in particular". As Mr. Nelson submitted correctly, as I think, it merely provides particular examples of what is within the powers of the company under that clause. The submissions deployed by Mr. Nelson, Q.C. on the proper construction of clause 3(21) and which I have summarized above are in my opinion well founded and accordingly, I agree with them. In my judgment clause 3(21), on a true interpretation, is apt to include the transaction into which the directors of the company voluntarily entered to enable them to raise funds to secure the purchase of a transmitter.

[53] I turn then to consider the question of the right of pre-emption conferred on the shareholders in Krem under the Articles of Association. Article 31(2) provides as follows:

"(2) Except as hereinafter provided no shares in the company shall be transferred unless and until the rights of pre-emption hereinafter conferred shall have been exhausted.

At the time of the transaction there were six shareholders whom I set out below with their shareholding:-

(i)	Evan X. Hyde	-	200,000
(ii)	Rodolfo Silva	-	100,000
(iii)	Rufus X	-	100,00
(iv)	Charles B. Hyde	-	70,000
(v)	Randolph Enriquez	-	25,000
(vi)	Godwin Hulse	-	5,000

It is, I would suggest tolerably clear that none of the shareholders were financially able to invest in the company. In those circumstances, it would be a hollow farce to offer any of them a right of first refusal. It is also plain that the Articles germane to a transfer of shares were totally ignored and it matters not whether this was the result of inadvertence or ignorance or a realization that it would have been a real waste of time. The defence put forward was that the Articles were breached and that, accordingly, the purported transfer of the shares would not be effectual and would be a nullity." para 16 of the defence. The burden of the arguments advanced on behalf of the respondents was that the preemption scheme is

peremptory and exhaustive. Thus Ms. Young, S.C. alluded to Article 32(10) which provides as follows:

> "Notwithstanding the foregoing provisions of this Article, the Directors may refuse to register any transfer of a share where:
>
> (a) the company has a lien on the share
>
> (b) the Directors do not approve of the proposed transferee and the share is not a fully paid one".

He argued that the provisions demonstrate that the preemption provisions and procedure are absolutely compulsory and the directors (whether acting unanimously or by a majority) cannot deal with transfers outside of or contrary to such procedures. Further, even when the procedure has been employed and adhered to, the approval of the transfer is not automatic. It must be considered by the Board which has a residual (though conditional) power to refuse to register the transfer. The evidence, he said, was that it was never tabled. In support, he cited *Lyle & Scott Ltd. V. Scott's Trustee [1959] 3 WLR 133 and Cotrell v. King 2004 EWHC 397* but I regret that I did not find these cases of much assistance.

[54] The Articles of Association order the internal governance of the company. Consequently it is a matter of no little surprise to note that the respondent is

seeking to rely on its own breach of its Articles of Association to justify its failure to transfer shares which it agreed to transfer and makes bold to argue that the transaction is a nullity. The Board, it is said, for example did not approve the transfer. This must be solemn farce when the directors agreed to the transaction. That is why they obtained the rescue funds from the appellant. Reality dictates that there would have been no formal meeting for approval. With respect, these technical objections are divorced from the practicalities in this case. The respondent did not, in my opinion, meet frontally the arguments cogently advanced on behalf of the appellant. He was satisfied to examine the principles governing the rights of preemption. The Chief Justice was of opinion that a prudent and business-like person would have inspected "these public documents" viz., the Memorandum and Articles of Association of the company to see if there were any restrictions on the transfer of its shares. By the same token, the prudent business-man would have seen from the Memorandum that the directors could raise funds. Was there any requirement of due diligence on the part of the appellant? But the question is rhetorical. The conclusion is inevitable from what has been said, that on any fair reading of the clauses identified above, the directors had the power to raise money, obtain a loan and make such arrangements as would conduce to the obtaining of funds. In my judgment, they had power to raise funds in the manner they did because it was within the ambit of clause 3(21). It follows therefore that the Articles must yield to the primacy of the Memorandum of Association. The authorities are clear: a company's articles of association cannot modify any of the statements in the memorandum. See *Guinness v. Land Corporation of Ireland (1882) 22 Ch.D*

349. Bowen LJ in dealing with the question of any possible tension between these documents, observed at p. 381:-

> "There is an essential difference between the memorandum and the articles. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of **the creditors, and the outside public**, as well as of the shareholders. The articles of association are the internal regulations of the company … In any case it is, as it seems to me, certain that for anything which the Act of Parliament say shall be in the memorandum you must look to the memorandum alone. If the legislature has said that one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument." (Emphasis supplied).

Absent any suggestion that the directors were abusing their powers or were not acting bona fide, then, it follows they must have been acting in the interests of the company itself. In the peculiar circumstances of this case, the process of offering the shares would have secured no benefits to the company, a fact which must have been very evident to the directors.

CONCLUSION

[55] I would allow the appeal for the following reasons:-

(a) Clause 3(21) gave the directors power to raise funds

(b) They exercised that power in the interest of the company.

(c) The transfer of shares was a part of the transaction to raise funds

(d) The transferee was a director and part of the management team and was aware of the nature and consequence of his signature voluntarily affixed.

[56] The appellant is entitled to costs both here and below.

[57] The judgment of the court below is set aside and the appellant would be entitled to the relief claimed in paragraphs 4(3), (4), (5), (6), (7) of its Notice of Appeal namely:-

"(3) That the Respondent rectify its register of members by striking out the name of Evan X. Hyde as the holder of the shares and by inserting in lieu thereof the name of the Appellant as the holder of the shares;

(4) that the Respondent give notice of the rectification to the Registrar of Companies

(5) that the Respondent issue and deliver to the Appellant a share certificate in the Appellant's name in respect of the shares

(6) that the Respondent shall file its annual list of members and summaries with the Registrar of Companies in accordance with section 27 of the Companies Act for the period 1999 to 2006;

(7) a Declaration that all its rights and entitlements of shareholders of the Respondent since 17 June 994 (including but not limited to any rights derived from the 50,000 shares numbered 1 to 50,000 in the Respondent such as dividends, shares distributors and other entitlements such as share subscription rights) should be given to the Appellant as a member of the Respondent in order to ensure, inter alia; (i) its holding of ten per cent (10%) of the issued share capital of the Respondent is maintained and has not been unlawfully diluted in any way; and (ii) that it receives everything it is entitled to receive since 17 June 1994.

[58] Before parting with this appeal, there is one remaining matter with which I should deal. The Chief Justice made an order for the repayment of $25,000 plus 6% interest thereon to the claimant from 17 June 1994 to 9 November 2007 when proceedings were commenced. The appeal included this order but the basis on which this award was made, was not challenged by any of the grounds of appeal nor did the appellant seek any order in that respect in the relief it sought. There was an application made at the death so to speak, to the Chief Justice to amend the statement of claim to include a claim for fraudulent misrepresentation which he refused. He did so having regard to "the nature of the issues joined between the parties on their respective statements of case, namely the claim by the claimant to be registered as a member of the defendant company and the denial of that claim by the defendant and to avoid opening up a new vista … which would have undoubtedly necessitated an adjournment." Mr. Nelson, Q.C. said the judge fell into error but it is necessary where a party wishes this court to interfere with the exercise of a discretion, to show, inter alia, that the order made was so aberrant, that no reasonable judge could have made such an order. The question is not whether this court would not have made the order. It seems to me that given the fact that the application was made so late in the day after the issues which were raised on the pleadings had been agitated, the judge was entitled to rule as he did. I do not consider his ruling so aberrant as to call for interference by this court. The matter which the parties chose to put into protracted hibernation, should not be allowed to get new life and be further prolonged. The appellant has received what he sought on his claim. The judge, it is true, ordered the repayment of $25,000.00 plus interest which had not been

made part of the action. This, in my opinion, he had no basis on the pleadings for doing. I do not see on what basis this court could restore his order in that regard.

____
CAREY JA

MORRISON JA

The background

[59] This is an appeal from a judgment of the Chief Justice given on 27 May 2008, refusing an application by the appellant ("Sagis") for an order rectifying the register of members of the respondent ("Krem") and other consequential orders. However, the Chief Justice ordered payment by Krem to Sagis of the sum of $25,000.00, with interest at the rate of 6% per annum, from 17 June 1994 to 9 November 2007.

[60] Sagis is an investment holding company, which is empowered by its memorandum of association to lend money and hold shares in other companies as part of its investment portfolio. In 1994, it was part of the Belize Holdings Inc. group, as was Belize Bank Ltd ("BBL"). Krem is a private company limited by shares. It operates in Belize a radio station known as "Krem Radio".

[61] As at 17 June 1994, the share capital of Krem was $500,000.00, divided into 500,000 shares of $1.00 each as follows:

Evan X Hyde	-	200,000
Rudolfo Silva	-	100,000
Rufus X	-	100,000
Charles B. Hyde	-	70,000
Randolph Enriquez	-	25,000
Godwin Hulse	-	5,000

[62] Messrs Evan Hyde, Charles Hyde and Rufus X were the directors, while Mr Charles Hyde was the secretary of Krem.

[63] In 1994, Krem was struggling to survive financially and in urgent need of funds for use in the company generally, as well as to purchase a radio transmitter in order to strengthen its radio signal. By the time of the trial, recollections differed as to how Sagis and Krem came to enter into discussions with each other with a view to meeting this need. For reasons which are not known, one of the important players, Mr Said Musa, the attorney-at-law who acted for Krem in the transaction, was not called as a witness and the Chief Justice accordingly placed no reliance on his witness statement.

[64] But in the result, an agreement was arrived at between the parties, resulting in the execution of two documents, as follows:

(i) A promissory note dated 17 May 1994, signed on behalf of Krem by Messrs Evan Hyde and Rufus X, in the presence of Mr Charles Hyde, whereby Krem, "For value received", unconditionally promised to pay Sagis the principal sum of $75,000.00, with interest at 10% per annum, in the manner set out in the document.

(ii) A form of share transfer ("the share transfer") dated 17 June 1994 and executed by Mr Evan Hyde, whereby he purported to transfer 50,000 of his shares in Krem to Sagis for a consideration of $25,000.00.

[65] Nothing now turns on the terms of the promissory note, but as the Chief Justice observed in his judgment (at paragraph 6) the share transfer is "central to the issues in this case", and I accordingly set it out below:

RADIO KREM LIMITED

I, EVAN X HYDE, of Buttonwood Bay, Belize City in consideration of the sum of Twenty-Five Thousand Dollars ($25,000.00) paid to me by SAGIS INVESTMENT LIMITED (hereinafter called the transferee), do hereby transfer to the transferee the shares numbered 1 to 50,000 in the undertaking

> **called RADIO KREM LIMITED to hold unto the transferee subject to the conditions laid down in Radio Krem Limited's Memorandum and Articles of Association on which I hold the same immediately before the execution hereof; and we the transferee do hereby agree to accept and take the said shares subject to the conditions aforementioned.**

[66] The evidence before the Chief Justice was that these documents formalised the agreement which had been struck between the parties, which was that Sagis would make available to Krem the total sum of $100,000.00, broken down as to $75,000.00 by way of loan and $25,000.00 by way of a 10% equity investment by Sagis in Krem. Again, recollections differed as to the detail of the discussions which led to this agreement, but there is no dispute that both documents are completely authentic.

[67] On 17 June 1994, Sagis gave instructions to BBL to credit Krem's current account #502-0023 at the bank with $97,250.00 and to prepare a cheque for $2,750.00 payable to Musa & Balderamos, the firm of attorneys-at-law acting for Krem in the transaction. There is no dispute that Krem's account was duly credited with $97,250.00 and that a cheque for $2,750.00 was delivered to the attorneys in settlement of their bill of costs, on Krem's instructions. The evidence is that the $75,000.00 was used to purchase the radio transmitter, while the remainder went, as Mr Evan Hyde put it, "into Radio Krem's business."

[68] Under cover of a letter dated 24 June 1994, the executed share transfer was sent to the Registrar General for stamping and, on 29 June 1994, the document (referred to as duly executed and "registered", which was probably an error for "stamped"), was sent by BBL to Mr Charles Hyde. The covering letter concluded:

> "I would be grateful if you could kindly arrange with the Company Secretary of Radio Krem Limited for the issuance and delivery of the above certificate to us for Sagis Investment Limited in respect of the shares numbered 1 to 50,000 as set out in the transfer agreement."

[70] Mr Charles Hyde subsequently could not recall having seen this letter, but he did say in his evidence that "I believe that a copy of the transfer instrument was delivered to me." However, despite a reminder from BBL in January 1995 (in a telephone call made by a representative of Sagis to Mr Musa, as Krem's attorney-at-law), Mr Charles Hyde was emphatic that the share transfer was never tabled or discussed at any meeting of Krem's board of directors.

[71] There the matter appears to have rested until early 2007, when Sagis, having realised that a share certificate had never been delivered to it, instructed its attorneys-at-law to write requesting it. Correspondence and discussions between attorneys-at-law for Sagis, Krem and Mr. Evan Hyde bore no fruit and

finally, on 9 November 2007, the claim form was issued by Sagis in these proceedings.

The pleadings

[72] Sagis' claim was as follows:

(1) An Order that the Defendant shall rectify its register of members by striking out the name of Evan X Hyde as the holder of the Shares and by inserting in lieu thereof the name of the Claimant as the holder of the Shares;

(2) An Order that the Defendant give notice of the rectification to the Registrar of Companies;

(3) An Order that the Defendant issue and deliver to the Claimant a share certificate in the Claimant's name in respect of the Shares;

(4) An Order that the Defendant shall file its annual list of members and summaries with the Registrar of Companies in accordance with Section 27 of the Companies Act for the period 1999 to 2006;

(5) A Declaration that all and any rights and entitlements of shareholders of the Defendant since 17 June 1994 (including but not limited to any rights derived from the 50,000 shares numbered 1 to 50,000 in the Defendant such as dividends, share distributions and other entitlements such as share subscription rights) should be given to the Claimant as a member of the Defendant in order to ensure, inter alia, (i) its holding of ten per cent, (10%) of the issued share capital of the Defendant is maintained and has not been unlawfully diluted in anyway, and (ii) that it receives everything it is entitled to receive since 17 June 1994.

(6) An Order that the Court appoint a competent inspector in accordance with Section 110(1) of the Companies Act to investigate the affairs of the Defendant and to report thereon in the form of a written report to the Claimant pursuant to Section 110(6) of the Companies Act once the Registrar of the Court has received a copy;

(7) Costs; and

(8) Any or such other relief which the Court thinks fit.

[73] Krem filed a defence, the essence of which is at paragraphs 7 – 10:

7. In further answer to paragraphs 3 through 12 of the Statement of Claim the Defendant states that by article 31(2) of the Defendant's Articles of Association a shareholder is not permitted to transfer shares in the Defendant "until the rights of pre-emption hereinafter conferred shall have been exhausted." [See copy of Articles and Memorandum of Association of Radio Krem Limited – D2.]

8. The Defendant further states that at no time did it receive a transfer notice from Evan X Hyde as required by article 31(3) of the Defendant's Articles of Association, or at all.

9. The matter of any purported or intended transfer of shares from Evan X Hyde to the Claimant was never tabled before the Board of Directors of the Defendant Company or discussed or dealt with by the said Board.

10. The procedure for the protection of pre-emptive rights mandated by the Articles of the Defendant Company were neither commenced nor pursued prior or subsequent to any purported transfer of shares from Evan X Hyde to the Claimant and purported transfer of the shares would not be effectual and would be a nullity.

[74] Krem also pleaded acquiescence on the part of Sagis and by a subsequent amendment, added a paragraph to say in the alternative that the claim was barred by section 4(a) of the Limitation Act, both of which were denied by Sagis in its reply. Neither point arises on appeal.

[75] Witness statements filed on behalf of Krem confirmed the assertions in paragraphs 7 – 10 of the defence, Mr Evan Hyde stating that it was only in March 2007, when Sagis' attorneys wrote requesting a share certificate, that it was brought to his attention "that the purported transfer of the 50,000 shares to [Sagis] was contrary to the Articles of Incorporation of [Krem] and therefore void and [Sagis] is not the owner of the 50,000 shares." In consequence, Mr Hyde renewed an offer, which had already been made on his behalf, to refund the $25,000.00 paid by Sagis for the shares, with interest.

Article 31

[76] At the heart of the case, therefore, is article 31 of Krem's articles of association, which provides, as far as is relevant for present purposes, as follows:

> 31 (1) For the purposes of this Article, where any person is (unconditionally entitled) to be registered as the holder of a share he and not the

registered holder of such share shall be deemed to be a member of the Company in respect of that share.

(2) Except as hereinafter provided no shares in the Company shall be transferred unless and until the rights of preemption hereinafter conferred shall have been exhausted.

(3) Every member, who desires to transfer any share or shares (hereinafter called the vendor) shall give to the Company notice in writing of such desire (hereinafter called transfer notice). Subject as hereinafter mentioned, a transfer notice shall constitute the Company the vendor's agent for the sale of the share or shares specified therein (hereinafter called the said shares) in one or more lots at the discretion of the Directors, or, in case of difference, at the price which the Auditor of the Company for the time being shall, by writing under his hand, certify to be in his opinion the fair value thereof as between a willing seller and a willing buyer. A transfer notice may contain a provision that unless all the shares comprised therein are sold by the company pursuant to this Article, none shall be so

sold and any such provision shall be binding on the Company.

(4) If the Auditor is asked to certify the fair price as aforesaid, the Company shall, as soon as it receives the Auditor's certificate, furnish a certified copy thereof to the vendor and the vendor shall be entitled, by notice in writing to the Company within ten days upon him of the said certified copy, to cancel the Company's authority to sell the said shares. The cost of obtaining the certificate shall be borne by the Company unless the vendor shall give notice of cancellation as aforesaid, in which case he shall bear the said cost.

(5) Upon the price being fixed as aforesaid, and provided the vendor shall not give notice of cancellation as aforesaid, the Company shall forthwith, by notice in writing, inform each member other than the vendor of the number and price of the said shares and invite each such member to apply in writing to the Company within twenty-one days of the dispatch of the notice (which date shall be specified therein) for such maximum number of the said shares

(being all or any thereof) as he shall specify in such application.

(8) During the six months following the expiry of the said period of twenty-one days referred to in paragraph (5) of this Article, the vendor shall be at liberty to transfer to any persons and at any price (not being less than the price fixed under paragraph (3) of this Article) any share not allocated by the Directors in an allocation notice PROVIDED that, if the vendor stipulated in his transfer notice that unless all the shares comprised therein were sold pursuant to this Article, none should be so sold, the vendor shall not be entitled, save with the written consent of all the other member of the Company, to sell hereunder only some of the shares comprised in his transfer notice.

(10) Notwithstanding the foregoing provisions of this Article, the Directors may refuse to register any transfer of a share where

(a) the Company has a lien on the share;

(b) the Directors do not approve of the proposed transferee and the share is not a fully paid one or

(c) the registration of the share would cause the number of members to exceed the maximum permitted by Article 3.

[77] I gratefully adopt the Chief Justice's (in my view accurate) summary of the effect of these provisions, which is as follows:

> "A read through of the Articles of Association of the defendant company would therefore readily disclose that there are restrictions and conditions on the transfer of its shares, even among its members or to persons who are not already among its membership. These restrictions and conditions relate in the main to the right of pre-emption or right of first refusal secured for the existing members of the defendant company in the event of any transfer of its shares by a current shareholder. The other condition or qualification on the transfer of its shares is the **price** of the shares to be transferred: if there is a difference between the proposed seller and the company, which is constituted by the transfer notice, the agent of the vendor, then the auditor of the

company shall certify in wiring his own opinion as to what the fair value of the shares is as between a willing seller and a willing buyer. Then the other existing members of the company are given 21 days within which to apply for the shares on offer. Then six months after the 21 days the shares may be offered (transferred) to any other person, but at a price not less than that which the Auditor of the company might have determined as a fair value between a willing seller and a willing buyer."

The result of the trial

[78] The Chief Justice found that there was no evidence that any attention was paid to the articles in 1994 and that, in the light of Article 31, the document executed by Mr Evan Hyde could not be regarded as anything more than a "purported transfer.": The document itself, he observed, was expressly made "subject to the conditions laid down in [Krem's] Memorandum and Articles of Association." The Chief Justice therefore concluded that Krem's defence succeeded primarily on the following bases:

(i) There was no evidence that "the restrictive provisions on the transfer of the shares of [Krem] had been displaced or intended to be displaced" (paragraph 36). In such circumstances, the rights of pre-emption secured for existing members of the company by article 31 "put a clog upon the power to transfer outside the ring of

members of the company" (per Lord Greene MR in **Greenhalgh v Mallard and Others** [1943] 2 All ER 234, 236)

(ii) There was no evidence that the other shareholders of [Krem], apart from the two Hydes and possibly Mr. Rufus X, were in any way informed or involved in the transaction that resulted in the purported share transfer by Evan X Hyde to [Sagis]. The articles constitute a statutory contract between the shareholders themselves and between them and the company and "if the other shareholders are to forego (their) right of pre-emption or first refusal, there must...be some evidence of this" (paragraph 36).

(iii) The position was unaltered by the fact that the directors, who knew about the transaction, had wide powers of borrowing under the memorandum of association which should, in these circumstances, prevail over the provisions of article 31. There was no complaint between those powers and article 31 which dealt with "two distinct and separate issues" (paragraph 41).

[79] Having thus found the purported transfer of shares to be ineffective, however, the Chief Justice was concerned about "the fate" of the $25,000.00 paid by Sagis for the shares. Taking into account the fact that on the evidence that money went into Krem's bank account (notwithstanding Mr Evan Hyde's acknowledgement of receipt of and offer to repay it), the Chief Justice ordered

that the company should repay it to Sagis, with interest at 6% from June 1994 to November 2007.

[80] Before turning to the appeal itself, I must advert to one other matter which arose during the trial and is of continued relevance, which is the refusal by the Chief Justice of an application by Sagis at an advanced stage of the trial (just before addresses) to amend its case to claim an account of profits and damages and/or exemplary damages for fraudulent misrepresentation.

[81] It is common ground that this application was provoked by some evidence given by Mr Charles Hyde under cross-examination to the effect that Mr Evan Hyde, despite having signed the share transfer form in 1994, had never really had any intention of selling his shares to Sagis. The Chief Justice refused this application, given the issues joined in the case and, as he put it, "… to avoid opening up a new vista by going into the claim for fraudulent misrepresentation, which would undoubtedly have necessitated an adjournment of the trial, the length of which could not then be determined …" (paragraph 5).

The appeal

[82] Dissatisfied with this result, Sagis filed six grounds of appeal. This is Mr Nelson QC's summary of the grounds:

(a) The respondent was empowered under its memorandum of association with wide powers to borrow and raise money. It was those powers which the respondent exercised when entering into the agreement with the appellant. The exercise of those powers cannot be restricted by the pre-emption provisions in the articles because the memorandum is the dominant document.

(b) Even if the articles could be said to restrict the powers in the memorandum, the effect is not that the share transfer is a nullity. The effect is that the appellant has a beneficial interest in the shares which are the subject of the share transfer.

(c) The appellant has an alternative claim to (a) and (b) above for fraudulent misrepresentation against the respondent and Conteh CJ erred in refusing permission for the appellant to amend the claim form and statement of case in order to plead this claim.

[83] On issue (1), Mr Nelson submitted that the Chief Justice erred in finding that the provisions of article 31 were an effective bar to Sagis' claim for rectification of the register. He pointed out that Krem was invested by its memorandum of association with wide powers to borrow and raise money, which

were the powers the company exercised when entering into the agreement with Sagis to raise $100,000.00, a condition of which was the transfer to Sagis of 10% of its share equity. He submitted that the memorandum of association is the dominant document and as a result the exercise by directors of Krem of the powers contained in the memorandum cannot be restricted by the pre-emption provisions in the articles of association.

[84] The effect of the Chief Justice's conclusion, in Mr Nelson's submission, was to allow the articles to operate in a way that fettered the powers conferred on [Krem] by the memorandum of association, leading to "absurd results", that is, to stymie the efforts of the directors to raise funds desperately needed by the company to survive, in circumstances where the members themselves were unable to provide those funds.

[85] In support of these submissions, Mr Nelson referred to and relied on a trio of well known decisions on the primacy of a company's memorandum of association, viz, **Guinness v Land Corporation of Ireland** (1882) 22 Ch. D. 349, **Scottish National Trust Co. Ltd** [1928] S.C. 499 and **Re Duncan Gilmour and Co. Ltd** [1952] 2 All ER 871.

[86] On issue (ii), Mr Nelson's submission was that even if the articles could have the effect of restricting the powers in the memorandum, the share transfer was not to be treated as a nullity. Sagis would nevertheless be "entitled to its rights as beneficial owner of the shares … including those which have accrued

since the share transfer was entered into." In support of this submission, he cited **Hawks v McArthur and Others** [1951] 1 All ER 22 and **Rathner v Lindholm et al** [2005] VSC 399, a decision of the Supreme Court of Victoria.

[86] And finally, on issue (iii), Mr Nelson submitted that Conteh CJ ought to have permitted Sagis to amend its claim to plead fraudulent misrepresentation, given that all the evidence upon which it could rely in this regard was already before the court. No "new vista" was therefore being opened so as to necessitate an adjournment.

[87] Mr Young SC disagreed with Mr Nelson on all three issues. On issue (i), he submitted that there was no interpretational conflict between the memorandum and the articles and that there was no need for the terms of the latter to yield to the former. In respect of the $25,000.00 paid for the shares, he submitted this was not a case of borrowing, so the power of the company to borrow did not arise. What did arise was the right of Mr Evan Hyde to transfer his shares to Sagis, and in respect of this the pre-emption regime set out in article 31 was "peremptory and exhaustive", in the absence of any evidence that the pre-emption rights were waived by all the shareholders.

[88] On issue (ii), Mr Young conceded that Sagis "may" (the word that he was careful to use) have an equitable interest in the shares, but he pointed out, the company "is obliged to treat only with the holders of legal title to the shares" (Companies Act, section 28).

[89] And with regard to issue (iii), Mr Young maintained that the Chief Justice was correct in his refusal to permit the late amendment and that the application was, in any event, misconceived. He pointed out that, despite the answers given by Mr Charles Hyde in cross-examination, Mr Evan Hyde himself had been consistent in stating that he had signed the share transfer in 1994 with the intention of transferring the shares to Sagis and that, when he was cross examined at the trial, no contrary suggestion had been put to him on behalf of Sagis.

[90] Mr Young also referred to and relied on a number of authorities on what he described as the binding nature of pre-emption provisions, among them **Lyle & Scott Ltd v Scott's Trustees** [1959] AC 763 and **Hurst v Crampton Bros (Coopers) Ltd and others** [2002] EWHC 1375 (Ch).

Issue (i) – the memorandum of association and the pre-emption clause

[91] The starting point of Mr Nelson's submissions on this issue is clause 3(21) of the memorandum of association, which empowers Krem as follows:

> "To borrow, raise money, or secure obligations (whether of the Company or any other person) in such manner as the Company may think fit and in particular by the issue of debentures, debenture stock, (perpetual or terminable), bonds, mortgages, or any other securities, founded or based upon all or any of the property and

> rights of the Company both present and future including its uncalled capital, or without any such security; and to purchase, redeem or pay off any such securities."

[92] Clause 3(35) also empowers the company "To do all such things as may be deemed incidental or conducive to the attainment of the above objects or any of them"; and clause 3(b) states that the objects "shall be regarded as independent objects" and "may be carried out in as full and ample a manner and construed in as wide a sense as if each of the said paragraphs defined the objects of a separate and distinct company."

[93] I accept, as the Chief Justice observed, that these "are indeed, wide borrowing powers that any modern company may think necessary to have." (paragraph 37). I also accept Mr Nelson's submission that the memorandum of association "is the primary constitution of a company". As Bowen LJ put it in **<u>Guinness v Land Corporation of Ireland</u>** (at page 381):

> "The memorandum contains the fundamental conditions upon which clause the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as the shareholders."

[94] Similar language is to be found in the **<u>Scottish National Trust Co. Ltd.</u>** case, where Lord Sands observed (at page 503) that "The memorandum of

association is regarded as a peculiarly sacred document in the constitution of a company." It follows from this, that in construing the provisions of the memorandum, the first step is to endeavour to construe the relevant clauses "standing alone" (per Wynn-Parry J in **Re Duncan Gilmour Ltd.**, at page 874). It is only where that exercise reveals either an area of ambiguity or silence in the memorandum that it is permissible to have resort to the articles, which may serve to explain or to supplement the memorandum. It further follows that if there is any inconsistency between the memorandum and the articles, it is the memorandum which must prevail.

[95] The articles of association are, as Bowen LJ said in **Guinness v Land Corporation of Ireland** (at page 381), "the internal regulations of the company." One of the distinguishing features of a private company, which Krem is, is that the right to transfer its shares is restricted (Companies Act, section 122(1)(a)). This is what article 31 seeks to achieve. In the absence of such restrictions, the shares in a company would otherwise be freely transferable as personal property (see per Lord Greene MR in **Greenhalgh v Mallard**, at page 237). The explicit purpose of such a clause in the articles is therefore to restrict membership of the company to the class of members defined in the articles, as a result of which "an outsider can only come in if no member is willing to buy" (see per Jacob J in **Hurst v Crampton Bros. (Coopers) Ltd.,** at paragraph 15 and also per Lord Reid in **Lyle & Scott v Scott's Trustees**, at page 77).

[96] I have already set out and adopted the Chief Justice's summary of the effect of article 31 (see paragraph 18 above). Article 31(2) states the prohibition against the transfer of shares in the company ("…no shares in the Company shall be transferred…"), save in accordance with the procedures set put in articles 31(3) to (9) ("… unless and until the rights of pre-emption hereinafter conferred shall have been exhausted"). Article 31(10) reinforces the control of the directors over the transfer of shares in the company by giving them the power to refuse to register any transfer of a share in certain circumstances.

[97] In **Lyle & Scott v Scott's Trustees**, Lord Reid described a shareholder who offers to transfer his shares otherwise than in accordance with the pre-emption regime in the articles as "[doing] something which is in breach of his obligations under the article" (page 779), and in **Hunter v Hunter** [1936] AC 222, 261 Lord Atkin described a pre-emption provision as providing "the means and the only means by which a member of the company can form an agreement for the sale of the shares."

[98] **Tett v Phoenix Property and Investment Co. Ltd** [1984] BCLC 599 and [1986] BCLC 149, was a case in which a shareholder executed a transfer form in favour of a stranger. The company refused to register the transfer on the grounds that the shares had not been offered to the class of shareholders entitled to the benefit of the pre-emption clause and the Court of Appeal held that the company had acted correctly (see also **Hurst v Crampton Bros (Coopers) Ltd**, especially paragraphs 14-19).

[99] And in **<u>Knox v Dean and others</u>** (Privy Council Appeal No. 9 of 2004, judgment delivered 28 June 2005), a decision that was brought to counsel's attention by Sosa JA during the hearing of the appeal, the Board appears to have proceeded on the basis that the agreement by counsel in the case that the party entitled to the benefit of a pre-emption clause would be entitled to an injunction to restrain a transfer in breach of the clause, was correct.

[100] In the light of the terms of article 31 itself and the authorities, it therefore seems to me that Mr Young was entirely accurate in his characterisation of the pre-emption scheme in this case as "peremptory and exhaustive." Or, as the Chief Justice put it, also correctly, in my view, article 31 "…prescribes as it were a comprehensive code for the transfer of shares…" by members of the company (paragraph 29).

[101] But the question still remains whether, in the light of the wide power of the company to borrow given by clause 3(31) of the memorandum, the pre-emption procedure of in article 31 can be said, in Mr Nelson's graphic formulation to "trump the exercise of the company of that power." In other words, does the memorandum prevail over the articles of association in the circumstances of the instant case.

[102] The Chief Justice held that the provisions were not "at odds" with each other:

> "I therefore find the two provisions in question here, that is, the power to borrow by the company as provided for in clause 3(21) of [Krem's] Memorandum of Association, and the transfer of its shares as provided for in clause 31 of its Articles of Association, are <u>not</u> in opposition one to the other. Rather, in my view, they deal with two distinct and separate issues, viz, the power to borrow and the transfer of the defendant's shares" (paragraph 41, emphasis in the original).

[103] I respectfully agree. In my view, the two provisions cover entirely different fields, clause 3(21) dealing, as one would expect in the memorandum, with the question of vires, and article 31 dealing with a question of the internal regulation of the company. It does not follow, it seems to me, that, because a transfer of shares is proposed to support a borrowing within the powers of the company, the procedures laid down in the articles to enable such a transfer can be ignored purely on the basis that the borrowing is intra vires.

[104] Mr Nelson did not suggest that any issue of waiver of the pre-emption rights by the shareholders as a body arose. For, despite the fact that, as the Chief Justice found, both Mr Charles Hyde and Mr Evan Hyde "knew of the condition of the loan" (paragraph 42), (as, it also seems likely, did Mr Rufus X), there is not even a hint in the evidence that Messrs Rodolfo Silva, Randolph Enriquez and Godwin Hulse (who held between them just over a third of the issued shares of the company) had any knowledge of the transaction. Neither do

I see a basis for imputing any such knowledge to them. I would therefore conclude, again in agreement with and for substantially the same reasons as the Chief Justice, that "the purported transfer of 50,000 shares representing 10% of the share capital, was ineffective and contrary to [the] Articles of Association" (paragraph 30).

Issue (ii) – an equitable interest in the shares?

[105] **Hunter v Hunter** (supra), was a case in which there was no appeal from the earlier decision of the Court of Appeal affirming an order for rectification of the register of shareholders of a company, which had been sought on the ground that various transfers and registrations had been made in contravention of the pre-emption provisions in the company's articles. In the course of his judgment on the remaining issues canvassed on appeal to the House of Lords, Lord Atkin went on to state (at page 261) that the purported transfer in breach of the provisions gave rise to "…no rights…under any contract of sale either equitable or legal."

[106] As Vaisey J pointed out in **Hawks v McArthur and Others** [1951] 1 All ER 22, 27, "Lord Atkin meant, of course, 'no rights either equitable or legal'". But **Hunter v Hunter** has since been distinguished and in at least two subsequent English decisions (neither of them at the level of the House of Lords) it has been held that a sale and transfer of shares in contravention of a company's constitution is, though ineffective to transfer the shares, not a complete nullity.

Although the purchaser under such a sale and transfer obtains no rights as against the company, he may nevertheless obtain equitable rights in the shares as against the vendor of the shares (see **Hawks v McArthur,** per Vaisey J at pages 26 and 27, where the disregard by all concerned of the articles was described as "almost scandalous", **Tett v Phoenix Property** and **Rathner v Lindholm,** especially per Whelan J at paragraphs 78 – 102).

[107] Commenting on this development, Gower (Principles of Modern Company Law, 6th edition, 1997, page 349) observes that "it must be right (at any rate if the price has been paid) that the buyer obtains such rights as the transferor had [though] this will not benefit the buyer if all the shares are taken up when the transferor is compelled to make a pre-emptive offer, but it does not follow that all of them will be taken up and, If not, the transferee has a better claim to those shares not taken up than has the transferor "

[108] In allowing that Sagis "may" have an equitable interest in the 50,000 shares, Mr Young nevertheless directed our attention to section 28 of the Act, which provides that "no notice of any trust, expressed, implied or constructive, shall be entered on the register or be receivable by the Registrar." It is clear, I think, that whatever rights Sagis may have if its transfer is unregisterable must be against Mr Evan Hyde and not the company. But given the nature of the application that was before the Chief Justice, that is, an application to rectify the register, I do not think it is possible in these proceedings to make any declarations in Sagis' favour, which is what it asks the court to do.

[109] Section 33(3) of the Act states the powers of the court in the following terms:

> 33.-(1) If -
>
> (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
>
> (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,
>
> the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register...
>
> (3) On any application under this section, the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

[110] This section makes it clear, it seems to me, that the powers of the court are restricted to deciding questions "necessary or expedient to be decided for rectification of the register." Having decided that Sagis has not made out its case for rectification in this matter, therefore, I do not think that the court has any additional or remaining jurisdiction to make any other kind of order in Sagis' favour. I believe that this is what the Chief Justice had in mind when he concluded on this point as follows (at paragraph 45):

> "I must state here that, of course, my conclusion on this, is without prejudice, to any contract or undertaking an individual shareholder might have entered into to transfer any of his shares. But this does not, I hold, entitle the promisee of that contract or the would-be beneficiary of that undertaking to the right to be registered as a member of the defendant company by virtue of any purported transfer of shares to him that is not in conformity with the company's Articles of Association on the transfer of its shares."

<u>Issue (iii) – the late amendment</u>

[111] The amendment which the Chief Justice refused to permit was to allow Sagis to maintain a claim for fraudulent misrepresentation against Krem, in the light of some evidence given by Mr. Charles Hyde in cross-examination. The decision whether or not to grant an amendment is one entirely for the trial judge's

discretion, with which this court would normally and naturally be reluctant to interfere.

[112] In this instance, the application for an amendment was made at an advanced stage of the trial. Even if, as Mr. Nelson urged on us, the granting of an amendment would not necessarily have required an adjournment, since all the evidence upon which Sagis intended to rely was already in, it would certainly have required a distinctly different focus in terms of addresses and what matters were to be left for the trial judge for his consideration. In seeking to strike a balance in this regard, the Chief Justice would have been fully entitled to take into account the fact that the evidence of Mr. Evan Hyde himself, upon whose conduct it was primarily intended to base the pleading of fraudulent misrepresentation, was to the effect that he had always intended to transfer his shares to Sagis, albeit reluctantly. Further, and significantly, he had not been challenged on this when he was cross-examined.

[113] In these circumstances it was in my view a matter for the trial judge to consider whether the relative strength of the alleged fraudulent misrepresentation justified the inconvenience that allowing the late amendment might entail and, in striking the balance as he did by refusing the application, I cannot say that the Chief Justice did not act in accordance with proper principles.

Conclusion

[114] With regard to the Chief Justice's order that Krem should repay the sum of $25,000.00 with interest to Sagis, while I fully understand what motivated him to make it, I do not think that it is an order that could properly be made on an application to rectify the register under section 33. Sagis also appealed from this order, though perhaps because it was completely tangential to its primary focus, it was not pressed in argument. However it is, I think, an order that must be set aside. Subject to this, I would therefore dismiss the appeal, with costs to Krem to be agreed or taxed.

[115] I cannot however leave this case without recording that the conclusion I have reached on the law gives me absolutely no satisfaction. To say, as Mr Young pointed out, that all of this could have been avoided by a proper due diligence exercise on the part of Sagis and its advisors in 1994, or that additional shares could have been made available to Sagis by the relatively simple device of an increase in the share capital of Krem (both of which seem likely), does not excuse what can only be described as scandalous behaviour on the part of Krem. I doubt very much if article 31 could have been designed to promote a result such as that which I have felt constrained to declare in this case.

____
MORRISON JA