

JERSEY / JUDGMENT

Representation of Christopher Ernest Inns [2013] JRC 231 (22 November 2013)

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judgment

the commissioner: 1. The representor, Mr Inns, by his representation dated 14 th November, 2013, seeks the urgent assistance of the Court in procuring the sale today by his wholly beneficially-owned company Hayfield Limited ("Hayfield") of its only asset, namely No 3, Easton Close, Bagatelle Lane, St Saviour, ("the property") for £612,500 to enable it to repay the loan due to the respondent ("Mr Harrison"), which as at the 4 th June, 2013, was in the sum of £532,456.25. Mr Inns seeks the assistance of the Court because Sinels , acting for Mr Harrison, have declined to indicate the precise amount that will be due to release the charge over the property or to give the usual undertakings that upon receipt of the amount due, the charge will be cancelled. 2. It is necessary to delve briefly into the background to try to understand why a creditor should, on the face of it, appear reluctant to be paid in full. 3. Mr Harrison owns a company called Nautech Services Limited (" Nautech ") which is engaged in the business of managing a database of maritime and seismic workers across the world. Mr Inns commenced employment with Nautech in or around June 2008 as operations manager. Mr Inns did not have housing qualifications and Nautech obtained J Category status for him. In order to acquire a property for Mr Inns' occupation, it was a requirement of the Housing Department that it be held in a company, hence the formation of Hayfield. The Housing consent issued on 2 nd May, 2008, imposed a number of conditions on the purchase of this property including:- (i) That it be occupied by Mr Inns for the duration of his employment not beyond the 30 th April, 2013, now extended to November 2013; and (ii) That there would be no change in the beneficial ownership of Hayfield from that of Mr Inns without the consent of the Minister. 4. The property was acquired by Hayfield in May 2008 for £745,000 with the benefit of a loan from Mr Harrison of £700,000. It would appear that in order to provide that funding Mr Harrison himself took out an interest-only facility from Barclays in the maximum sum of £1.2 million secured over the shares in the company that owned his property. It seems only to have been drawn down to the extent of the loan made to Hayfield. The facility was for a term of 7 years, expiring on 14 th of December, 2015. 5. Hayfield executed a loan agreement with Mr Harrison on 2 nd May, 2008. That too was interest-only with capital repayments to be at the discretion of Hayfield, with full repayment to be made upon the expiration of 15 years. Notwithstanding this it was expressed as being repayable on demand. The agreement stipulated that the loan was made with the security of a promissory note, a billet and a

guarantee and security interest agreement of the same date, copies of which were appended. Under the latter document Mr Inns guaranteed the loan and purported to give Mr Harrison a security interest over the shares in Hayfield of which Mr Inns remained the sole director. 6. Earlier this year Mr Inns ceased to be employed by Nautech and along with eight other defendants is the subject of proceedings brought by Nautech before the Royal Court alleging a conspiracy on their part to extract confidential information from Nautech for their benefit. Those proceedings are being defended. 7. On 4 th June, 2013, Mr Harrison, through Sinels , made demand for the immediate repayment by Hayfield of the loan in full, which by then had reduced to £532,426.25. The only means by which that repayment could be effected was through the sale by Hayfield of its only asset, the property, which had been on the market since February 2013. Notice was also given that if the loan was not repaid within 7 days, recourse would be had to the security of the shares. 8. On 7 th June, 2013, Mr Harrison procured the registration of the promissory note in the sum of £700,000 dated 2 nd May, 2008, as a first charge over the property. 9. On 25 th June, 2013, Mr Syvret, for Mr Inns, started an exchange of correspondence with Sinels in which it was pointed out that a transfer of the shares in Hayfield required the consent of the Minister, which under current policy was unlikely to be forthcoming, but as Mr Harrison was secured both by a security interest over the shares and a charge over the property, it would be more cost effective for Mr Inns to continue marketing the property, rather than Mr Harrison who would only be required to do the same, accounting to Hayfield for the balance after repayment of the loan. Quoting from Mr Syvret's letter of 24 th July, 2013, he said this:- "In those circumstances would it not be better for my client to continue with his endeavours to identify a buyer and achieve a sale? That will achieve exactly the same position that your client would be required to undertake pursuant to Article 8(6) of the Law, that is to say a sale within a reasonable time and for a price corresponding to the value on the open market, but without your client having the inconvenience and time cost of dealing with that. If your client is to press his position there is potential debate as to the open market value of the property and consequently the balance to be paid to my client. Surely it would be preferable for my client to deal with the sale whilst your client's position is protected by the security in possession and the registered charge? It is wholly appreciated that your client is entitled to repayment of his capital and endeavours are being made to achieve that repayment at the earliest possible moment. In short a pragmatic approach will achieve that end without the anguish and distress that would be engendered by a dispute in this matter." 10. Without going into detail over the correspondence the following occurred:- (i) Following representations from both sides the Minister's consent to a transfer of the shares of Hayfield to Mr Harrison was not forthcoming; (ii) On the 4 th September Sinels made demand upon Mr Inns under the guarantee and security interest agreement which had the effect of increasing the interest payable by Hayfield or in practice Mr Inns. (iii) On the 5 th September, 2013, Mr Harrison exercised powers purportedly given to him by an irrevocable power of attorney under the terms of the guarantee and security interest agreement to appoint himself as sole director of Hayfield and to resign Mr Inns; (iv) Notwithstanding substantive issues raised by Mr Syvret over the purported use of this power of attorney, on the 27 th September, 2013, Sinels wrote to Indigo Estates, who were marketing the property, saying that Mr Inns was not the owner of the property. It belonged to Hayfield, for whom Sinels acted, which was in the process of

taking possession and re-assessing any marketing strategy. Indigo were told that they were not authorised to offer the property for sale. This letter appears to have been ignored; (v) On the 1 st October, 2013, a cash purchaser was found for the property and Benest/Syvret asked Sinels for a settlement figure and the usual undertakings to enable the sale to proceed. Sinels maintained its position that it acted for Hayfield and that Mr Inns was not a director; (vi) On 30 th October, 2013, notice was given that unless Sinels responded, proceedings would have to be issued; (vii) The representation was brought before the Court on the 15 th November, 2013, (notice having been given to Sinels) and the Court fixed yesterday the 21 st November at 2:30pm for the hearing of the matter. Sinels skeleton argument and bundle was not filed until 12:40 yesterday and the Court was unable to read it in advance of the hearing. 11. Both counsel addressed us in the short time available on the provisions in particular of the guarantee and security interest agreement. Advocate Benest submitted inter alia:- (i) That there is no security interest under Article 2(3) of the Security Interest (Jersey) Law 1983 because Mr Harrison does not have possession of the share certificates - no-one seems to know where they are; (ii) That there is no security interest under Article 2(6) of the Security Interest Law because clause 4.10 of the guarantee and security interest agreement requires the giving of notice as contemplated by a non-existent clause 4.13(a) before a valid security interest is created; (iii) The power of attorney is given for the limited purposes set out in clause 10.2 of the guarantee and security interest agreement which essentially concerns the security over the shares and does not extend to the appointment and resignation of directors; (iv) Pursuant to Article 5(2) of the Powers of Attorney (Jersey) Law 1995 the power of attorney is itself dependent upon the existence of a valid security interest which as stated above is, on Advocate Benest's submission, open to doubt. 12. What was clear from the submissions of Advocate Sinel is that Mr Harrison is concerned to obtain control of the equity of the property for the purposes of the civil proceedings brought, not by him, but by Nautech . Indeed that is what he formerly makes clear in his skeleton argument at paragraph 37. It is for that reason that he does not want the property sold and his loan repaid leaving the equity in the hands of Mr Inns, who Advocate Sinel described as a serious flight risk. Thus what the Court is faced with is a debtor, in essence Mr Inns, ready and willing to repay a loan in full and a creditor who wishes to keep the loan in existence for ulterior purposes. 13. Hayfield is a special purpose vehicle formed to hold this one illiquid asset and the parties to the loan agreement must have realised that the only way the loan could be repaid was through the sale of that asset; something that would be bound to take time. We question therefore whether on its true construction clause 2.4 of the loan agreement should not be construed as meaning the loan shall become repayable upon "reasonable" demand i.e. with enough time to market and sell the property. To demand its "immediate" repayment, as Sinels did, is in the context of these facts, manifestly unreasonable. We have reservations therefore as to validity of the "immediate" demand made in this case. Mr Inns had not taken this point as he has accepted from the outset, as far as we can see, that the loan should be repaid and has been actively marketing the property; indeed he has now found a buyer and has moved out in readiness for the sale. Apart from failing to repay the loan "immediately" as demanded, it is clear that Hayfield is not otherwise in default in any material way; the interest payments having all been paid up to date. 14. There is no question, in our view, where justice lies in this matter and that is in Hayfield being allowed to go ahead with the sale

today and this loan being repaid. We can take judicial notice that the housing market is not buoyant and the purchaser has indicated that if the sale does not proceed today she may well withdraw. Not only would there then be a delay before a new purchaser could be found, but the price could well be lower. This would be manifestly unfair to Mr Inns. Upon sale and repayment of the loan all of the security will fall away. If Nautech feels it is entitled to injunct the net equity, then, as Advocate Benest pointed out, it can apply for injunction in the usual way but at its own risk as to costs. 15. There are three problems that need to be addressed to allow this to happen. Firstly, it is Hayfield that has to appear in Court represented by a director or attorney duly authorised to represent it. There is uncertainty as to whether Mr Harrison or Mr Inns is the sole director. An interesting point arises here in relation to the position of any director and that is that the powers of the directors have to be exercised in the interests of the shareholders as a whole - in this case Mr Inns who is the sole shareholder. Thus if Mr Harrison is the sole director he has to exercise his powers in the interests of Mr Inns; not in the interests of himself or his company Nautech . We have little doubt that the interests of the shareholders as a whole of Hayfield lie in the sale taking place and the loan being repaid and we express the view that if Mr Harrison were to procure otherwise, he would be in breach of his fiduciary duties. However, as we understand the position, we have no supervisory role over directors of the kind we have over trustees and we cannot direct Mr Harrison, if he is a director, as to how he should exercise his powers. 16. We need to decide therefore whether the power of attorney contained in the guarantee and security interest agreement has been validly exercised by Mr Harrison so as to appoint himself as a director and to resign Mr Inns. Clause 10.2 is in the following terms:- "In accordance with Article 5(2)(a) of the Powers of Attorney Law, the Guarantor hereby irrevocably appoints the Secured Party (with full power of substitution in accordance with Article 8 of the Powers of Attorney Law) for the Guarantor and in the name and on behalf of the Guarantor to sign, seal, deliver, file, register acknowledge, perfect and complete any transfer, assurances, instruments, agreements, certificates, consents or other documents whatsoever and to do any and all such acts and things in relation to any matters dealt with in this Agreement and/or which the Secured Party may deem necessary or desirable for creating, perfecting, maintaining or enforcing its security in the Collateral in order to give full effect to this Agreement or for securing or protecting the rights of the Secured Party hereunder. The Guarantor hereby covenants with the Secured Party and the persons deriving rights under the Secured Party to ratify and confirm any lawful exercise or purported exercise of the power of attorney granted in this Clause 9.2." 17. It can be seen that the powers granted relate to all such acts and things in relation to matters dealt with in "this Agreement" and to giving full effect to "this Agreement" and the rights of Mr Harrison thereunder. The "Agreement" is concerned with securing the shares in Hayfield not with the exercise by the directors of their powers. That delineation is recognised implicitly by the only other part of the Agreement that expressly relates to the directors and that is clause 5.1 which is in the following terms:- "To procure that the board of directors of the Debtor will, upon the request of the Secured Party (or its agent), forthwith register the Secured Party (or its agent) and any purchasers of the Collateral as shareholders of the Debtor and issue share certificates in respect thereof; And clause 5.13(b) which reads:- "The Guarantor shall deliver to the Secured Party, or to its order, undated letters of resignation in a form acceptable to the Secured Party

signed by each of the directors of the Debtor, together with signed irrevocable authorities from such directors to the Secured Party to date and deliver such letters upon an Event of Default." No such letters appear to have been delivered. 18. The composition of the board of Hayfield is controlled through the exercise by the shareholders of their voting rights under the shares or by the board itself. If Mr Harrison seeks to control the composition of the board then he has to do so through the shares. Having heard both counsel, in our view, as a matter of construction, the powers granted under clause 10.2 do not extend to the exercise by Mr Harrison of Mr Inns' powers as a director of Hayfield, whether to appoint new directors or to resign and we therefore will declare the exercise by Mr Harrison of this power on 5 th September, 2013, to be invalid and of no effect. Even if Mr Harrison were armed with an undated written resignation by Mr Inns, which he appears not to be, that could not, in our view, be put into effect as it would leave Hayfield with no director contrary to Article 61 of the Articles of Association which provide that there shall be a minimum of one director. 19. Mr Sinel argues that Mr Harrison could bring about his appointment as a director and the removal of Mr Inns by other means i.e. through the exercise of the voting rights under the shares but the fact is that he has not done so. It is clear that it is through the power of attorney that he purports to have appointed himself and removed Mr Inns. 20. Secondly, under Part II of the schedule to the loan agreement, Hayfield undertook "Not to sell the property without the prior written consent of Mr Harrison." Mr Harrison has not given that consent. When the loan agreement was entered into there was no charge on the property and one can see that this undertaking was necessary to protect the interests of Mr Harrison. There is now a charge on the property but in any event Hayfield wishes to sell in order to repay the loan; indeed it is the only way it can meet the demand that has now been made upon it. This undertaking has to be construed therefore as having no application to a sale of the property for the very purpose of repaying the loan in full. We will therefore declare that by proceeding with the sale of the property in order to repay the loan, Hayfield will not be in breach of this undertaking. 21. Thirdly, Benest & Syvret need a settlement figure for next Tuesday, assuming a sale goes through today, and Mr Harrison was ordered on 15 th November to provide information to enable that to be ascertained. Subject to counsel's further input, that figure is £534,874.97. We will declare that on payment of that sum plus £60 stamp on the 26 th November, 2013, the loan will be discharged in full and the judicial hypothec created on the 7 th June, 2013, shall be cancelled by Sinels and the guarantee and security interest agreement of 2 nd May, 2008 and any security interest created thereunder shall be terminated. 22. If for any reason the sale is delayed by a week until Friday 29 th November then, subject again to counsel's input on the figures, we will make the same orders in relation to a payment made on Tuesday 3 rd December in the sum of £534,874.97 plus £36.47 per day from the 27 th November to 3 rd December and the stamp of £60. 23. Finally, we mention just two points raised by Advocate Sinel. Firstly he submitted that this matter should have been dealt with by an order of justice and not a representation. There is no substance in that point. Secondly, he said that there had been a failure to put the full matrix of facts to the Court when the representation was first made. In our view the representation did give a balanced view but in any event, only a convening order was made to what was an inter parties hearing and we are not aware of any obligation of full and frank disclosure arising in that context. Advocate Sinel was informed of the convening order within minutes of it being made

and had nearly a week to prepare. 24. Therefore to summarise:- (i) We declare that the exercise on 5 th September, 2013, by Mr Harrison of the power of attorney contained in the guarantee and security interest agreement to be invalid and of no effect, so that Mr Inns is the sole director of Hayfield able to exercise all the powers of the directors and, in particular, to represent Hayfield before the Court in order to sell the property; (ii) We declare that by proceeding with the sale of the property for the purpose of repaying the loan in full, Hayfield will not be in breach of its undertaking in the loan agreement not to sell the property without the prior written consent of Mr Harrison; (iii) Subject to Counsel's final input on the figures, we declare that on payment of the sum of £534,874.97 by Benest & Syvret to Sinels plus £60 stamp on the 26 th November, 2013, the loan will be discharged in full, the judicial hypothec created on 7 th June, 2013, cancelled by Sinels and the guarantee and security interest on the 2 nd May, 2008, terminated, together with any security interest created thereunder. We make the same declaration in respect of a payment on 3 rd of December, 2013, in the sum of £534,874.97 plus £36.47 per day from 27 th November to 3 rd December and the £60 stamp. 25. We hereby convene Hayfield to these proceedings to take the benefit of these declarations. 26. We otherwise adjourn the representation for a date to be fixed for a final hearing. 27. We give liberty to apply. Authorities Security Interest (Jersey) Law 1983. Powers of Attorney (Jersey) Law 1995. Page Last Updated: 17 Aug 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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