ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.1 of 1995

BETWEEN:

VERE MURPHY

Appellant

and

(1) CYNTHIA QUIGG

(2) ROGER QUIGG

Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. C.M. Dennis Byron - Justice of Appeal
The Honourable Mr. Albert N.J. Matthew -Justice of Appeal [Ag.]

Appearances: Dr. F. Ramsahoye Q.C. and Mr. D. Halstead for the Appellant
Mr. G. Watt for the Respondents

1996: June 12;
July 22.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

On 2nd January 1992, 99 ordinary shares at $1.00 each in the capital of Caribbean Water Sports Limited (the company) were issued to the appellant. Those shares represent 99% of the issued shares in the capital of the company. The respondents (husband and wife) assert and the appellant denies that those shares are held by the appellant in trust for the respondents.

The principal asset and breadwinner of the company was a boat called "Kohoma Cat." That boat was destroyed by fire in October 1993 and its insurers await the outcome of this litigation.

On 14th April 1 993. the second respondent (Roger Quigg) issued an Originating Summons whereunder he claimed relief on the basis of the alleged

trust. The Originating Summons was heard by Redhead J. By judgment dated and delivered on 7th December 1994, the learned judge ordered as follows:

> "(1) It is hereby declared that the 99 fully paid ordinary shares of $1.00 each in the capital of CARIBBEAN WATERSPORTS LIMITED now standing in the name of the first named defendant VERE MURPHY are held by him in trust for the plaintiffs absolutely.
>
> (2) The first named defendant is hereby ordered to transfer the said 99 shares to the second named plaintiff.
> (3) The first named defendant is hereby ordered to transfer the said 99 shares in the names of the first and second named plaintiffs.
> (4) An injunction is hereby granted restraining the first named defendant whether by himself, his servant or agents or howsoever from dealing with shares and or assets of the second named defendant in a manner prejudicial to the interests of the plaintiffs.
> (5) Costs to the plaintiffs to be taxed, if not agreed."

The appellant is dissatisfied with the judgment and has appealed against it. The pertinent issues in this appeal are (1) whether the appellant holds the 99 shares on an express trust in favour of the respondents (2) whether the appellant holds the 99 shares on an implied, constructive or resulting trust in favour of the respondents (3) whether the trust is legal and enforceable and (4) whether the order to transfer the shares to the respondents was premature.

(1) The Express Trust

The respondents specifically rely on an express trust said to be embodied in a document which purports to be a Trust Deed and which was executed by and between the appellant and the respondents. The Trust Deed reads as follows:

> "THIS TRUST DEED is made the day of , 1991 BETWEEN VERE MURPHY of Creek Side in the Parish of Saint John in Antigua and Barbuda (hereinafter called "the Trustee") of the ONE PART AND ROGER QUIGG and CYNTHIA KRAMER QUIGG of English Harbour in the Parish of Saint Paul in Antigua and Barbuda (hereinafter called "the Beneficiary") of the OTHER PART.
>
> WHEREAS
> (1) The Beneficiary has lately caused to be issued to the Trustee the shares specified in the Schedule hereto.

(2) The said issue was made to the Trustee as a nominee of the Beneficiary and it was agreed prior to the date of such declaration of trust as is hereinafter continued.

NOW THIS DEED WITNESSETH as follows:

1. The Trustee hereby declares that he holds the shares specified in such Schedule hereto and all dividends and interest accrued or to accrue upon the same or any of them upon trust for the Beneficiary and his successors in title and agrees to transfer pay and deal with the said shares and the dividends and interest payable in respect of the same in such manner as he or they shall from time to time direct.

2 ……3……

4……..

5. This Trust shall be for a period of five (5) years from the date hereof.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and affixed their seals the day and year first abovementioned.

SIGNED by VERE MURPHY the within) Trustee before and in the presence) of:) (Sgd) Vere Murphy) …… (Sgd.)Ann Henry-Goodwin) Solicitor

SIGNED by ROGER QUIGG and CYNTHIA KRAMER QUIGG the within named) Beneficiary before and in the) (Sgd) R. Quigg presence of:) (Sgd) Cynthia Kramer Quigg ……..

(Sgd) Ann Henry Goodwin
Solicitor

SCHEDULE HEREINBEFORETO

CHARTERED INVESTMENT LIMITED	51 shares
CARIBBEAN WATERSPORTS LIMITED	99 Shares"

The appellant impugns the Trust Deed on the triple ground (inter alia) that (1) it is expressed to have been executed in the year 1991 but is otherwise undated (2) the shares were issued after the execution of the Trust Deed and (3) the Schedule was inserted after the execution of the Trust Deed and without the authority of the appellant.

With regard to the datelessness of the Trust Deed, I am guided by **Halsbury's Laws of England** (Fourth Edition) Vol.12 paragraph 1486 which reads:

"Extrinsic evidence is admissible to prove the date of delivery of a deed, or of the execution of any other written instrument. A deed takes effect from

delivery, and any other written instrument from the date of execution, and though the date expressed in the instrument is prima facie to be taken as the date of delivery or execution, this does not exclude extrinsic evidence of the actual date; and the actual date, when proved, prevails, in case of variance, over the apparent date…….”

The learned judge resolved the datelessness as follows:

"Mrs. Ann Henry Goodwin gave evidence that as to the preparation of the Trust Deed she said:- “The document would have been prepared by me before the end of the year (1991) before my marriage, early December not before 15th December earliest November."

I concluded from this testimony that the Trust Deed was prepared between sometime in November and 15th December 1991. I agree with Mr. Watt’s submission that parole evidence could be used to determine what date the Trust deed was executed.

In any event, even if the date of the execution of the trust is uncertain that by itself, in my view cannot invalidate the Trust Deed."

With regard to the anticipation of the shares in the Trust Deed, I accept the principle stated in **Halsbury’s Laws of England** (Fourth Edition) Vol.48, paragraph 552 which reads as follows:

"There cannot be a trust of future property, as that would be a trust of nothing at all. It is immaterial whether the settlor makes a purported voluntary assignment of future property to trustees on declared trusts or whether he purports to declare that he himself is holding future property on certain trusts. If the future property subsequently materialises into existing property the intended beneficiaries have no enforceable claim to it. However, if the settlor had received valuable consideration for creating a trust of future property then once the future property materialises into existing property equity treats the settlor as holding the property on trust for the beneficiaries. As he received consideration his conscience is bound so that, on becoming at last entitled to specific property, he may not claim to retain it for himself."

If, therefore, the 99 shares constituted future property, as I shall later explain, the appellant received valuable consideration for creating a trust thereof. For this reason, the principle stated above applies to the 99 shares.

With regard to the allegation that the Schedule was inserted after the execution of the Trust Deed and without the authority of the appellant, I adopt the conclusion of the learned judge in these words:-

"Even if the defendant did not take the document and obtain legal advice, having regard to the intelligence of and experience of the defendant; managing director of a prestigious corporation, in my view, he would not have signed the document if there was no schedule attached when the body of the document itself refers to a

> schedule. The defendant said under cross-examination, that he realised the document was defective that is without a schedule. He was trying to make out that the document did not have one when he signed it. If in fact there was no schedule, he would have realised then that the document was defective and he would not have signed it.
>
> I therefore, have no doubt that when the defendant signed the document, the schedule was attached thereto."

For these reasons, I conclude that the triple objection to the Trust Deed is untenable. In my judgment, the Trust Deed is evidence of the appellant's intention to hold the 99 shares on express trust for the respondents.

(2) The implied, constructive or resulting trust

Where a claimant proves that he or she has made a substantial contribution to the acquisition or improvement of property in circumstances from which the Court may reasonably infer a common intention on the part of the legal owner of the property and the claimant that the claimant would have a beneficial interest in the property by reason of that contribution, the legal owner will be deemed to hold the property on an implied, constructive or resulting trust in favour of the claimant to the extent of the claimant's contribution. Such a trust is established merely by proof of the substantial contribution and the common intention.

The circumstances from which the necessary common intention may reasonably be inferred as various. However, for the purposes of this case, only two such circumstances may be considered. The first is where there was an express agreement (including a promise, arrangement, undertaking or admission) by the legal owner that the claimant has or will have a beneficial interest in the property and where, in reliance on the express agreement, the claimant significantly altered his or her position to his or her detriment. The second is where the claimant made a direct financial contribution to the

acquisition of the property either by payment of part or the whole of the purchase price of the property or the deposit thereon.

These two pertinent circumstances were specifically considered by the House of Lords in **Lloyds Bank plc v Rossett** (1990) 1 A.E.R. 1111. There, Lord Bridge (delivering the sole judgment of the House) said (at pages 1118 & 1119):

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.
>
> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to each such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

In the present case, the appellant made no direct or indirect financial contribution towards the cost of the acquisition of the 99 shares or towards any of the costs and expenses of the company. This was virtually conceded by counsel for the appellant in his Skeleton Arguments where he stated that “The appellant had no monetary investment in the Company but there was a limitation in the trust. It would terminate after a five year period."

The appellant’s status was described by the learned judge in these words:

> "The defendant was being paid US$1500.00 plus 10 per cent on the net profits of the company, what for? As Counsel for the plaintiff put it colloquially for 'fronting’ for the plaintiff."

By contrast, the respondents totally financed the company. The crucial question is whether the 99 shares were intended to be the consideration for any part of the monies which the respondents made available to the company.

The "Kohoma Cat" originally belonged to the respondents who later transferred the ownership thereof to the company. The consideration for the transfer was a promissory note subscribed by the company in favour of the respondents in the sum of US$250,000.00 payable on demand.

The respondents also bore all the legal fees, stamp duty and other costs of incorporation of the company. In this connection, the learned judge said:

> "I do not accept that there were any arrangements for the payment of the fees or charges met by Roger Quigg. In fact in my view, the defendant did not know much about the payment of these fees and charges as he said he suspected that they were paid by Roger Quigg."

The respondents were never refunded the costs of incorporation of the company. Nor were they given any undertaking or security in regard thereto. Accordingly the proper inference to be drawn from these circumstances is that the 99 shares were intended to be the consideration for the payments made by the respondents to and on behalf of the company.

This is therefore a case where the respondents paid the full price and more for the 99 shares and caused the shares to be issued in the appellant’s name with the common intention on the part of the appellant and the respondents that the respondents would have the entire beneficial interest in those shares. That common intention may reasonably be inferred firstly from the express agreements and promises in the Trust Deed and from the respondents’ significant alteration of their position in reliance on those agreements and promises and secondly from the respondents’ payments and direct contributions which represented the price or value of the shares. In those circumstances, the

appellant must be deemed to hold the 99 shares on an implied, constructive or resulting trust in favour of the respondents.

(3) The illegality or otherwise of the trust

Counsel for the appellant submitted that the trust (if any) of the 99 shares is illegal, void and unenforceable because it is prohibited by or contravenes section 1 4 of the Non-citizens Land Holding Regulation Act (Cap 293 of the Laws of Antigua and Barbuda).

Section 14 provides as follows:

> "(1) This section applies to the following property only, namely, land situate in Antigua and Barbuda, mortgages of such land, and shares and debentures of any company incorporated in Antigua and Barbuda.
>
> (2) With a view to preventing evasion of the foregoing provisions of this Act, no person shall without the licence of the Governor-General hold any property to which this section applies in trust for a non-citizen and any such property so held shall be forfeited to Her Majesty.
>
> (3) Any person who intentionally contravenes the provisions of this section shall be guilty of a misdemeanour punishable summarily by a Magistrate or on indictment, but the punishment on summary conviction shall not exceed a fine of five hundred dollars.
>
> (4)…… (5)……"

In **Young v Bess** (1995) 46 W.I.R. 65, the Privy Council was required to interpret the Aliens (Land Holding Regulation) Act of Saint Vincent and the Grenadines which for all practical purposes is identical with the Non-citizens Land Holding Regulation Act of Antigua and Barbuda. Delivering the judgment of the Board, Lord Jauncey said (at p1 70):

> "Construing section 3 in the context of sections 5 and 1 6, it is apparent that the legislature did not intend forfeiture to be automatic but rather that prohibition on land holding by an unlicensed alien could be enforced by a discretionary power of forfeiture vested in the Crown. The position in relation to section 4 is similar. It follows that the words "shall be forfeited" in sections 3 and 4(2) must be construed as "shall be liable to be forfeited" and "the time when the forfeiture took place" in section 5(1) is the time when the liability for forfeiture arose. Their Iordships accordingly consider that *Lehrer v Gordon* (1964) 7 WIR 247 and *McMillan v Peters* (1 988) (unreported) were correctly decided and that *Chase Manhattan Bank NA v Kaffka* (1984) 33 WIR 132 and *Ramsaran v Attorney-General of St.Christopher and Nevis* (1986) 38 WIR 1 60 should be overruled.
>
> This construction means that the title remains in the alien until the Crown has obtained judgment under sections 5(1) and 1 6 when it vests in Her Majesty as from the time above referred to. There is no vacuum, the result is that the alien's title is voidable until the Crown obtains judgment

and a bona fide purchaser from him would be protected ……."

I venture to repeat what I said in **Village Cay Marina Limited v John Acland** and others (British Virgin Islands Civil Appeal No.8 of 1995):

> "However, the Non-Belongers Land Holding Regulation Act is not an invalidating Act. It does not invalidate a non-belonger's title to land or mortgages or his title to shares in a company or his offices in a company. As explained by the Privy Council in **Young v Bess** (1995) 46 WIR 165, such an Act merely renders such titles or offices voidable at the discretion of the Crown. The Act does not prescribe or indicate any immutable public or social policy which the Court is required to enforce. There can be no public or social policy involved in the concept of statutory voidability per se."

In any case, the fact that a contract, trust or other transaction is illegal in the sense that it is prohibited by statute or at common law does not necessarily invalidate every claim or title which is contaminated by the illegal transaction. A plaintiff's claim is enforceable if it is based on a legal or equitable title or on facts which generate such a title and if the plantiff can sustain the claim solely by reference to that title or to those facts and without the need to disclose, invoke or rely on illegality.

In **Tinsley v Milligan** (1994) 1 A.C. 340 at 371, Lord Browne-Wilkinson said:

> "Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction."

In the present case, the respondents' title to the 99 shares is based alternatively on an express trust or on an implied, constructive or resulting trust. The respondents can establish an equitable title to the shares merely by proving the implied, constructive or resulting trust. This they can do and have done by

proving that they paid for the shares and that there was a common intention on the part of the appellant and the respondents that the respondents should have the beneficial interest in the shares by reason of that payment. There is no need for the respondents to disclose, invoke or rely on any illegality. In those circumstances, the respondents' claim to the beneficial interest in the shares is enforceable notwithstanding any illegality surrounding the trust.

(4) The prematurity or otherwise of the order

Counsel for the appellant contends that the order for the transfer of the 99 shares was premature. He relies on clause 5 of the Trust Deed which provides that the trust shall be for a period of five years. This contention predicates the legality and validity of the Trust Deed (including clause 1 thereof).

Assuming that the Trust Deed is legal and valid, clause 5 must be read subject to clause 1. Under clause 1, the appellant agreed to transfer the 99 shares in such manner as the respondents shall from time to time direct. By the Originating Summons, the respondents directed the appellant to transfer the shares to the respondents. This the appellant failed to do. In ordering the transfer of the shares to the respondents, the learned judge was merely ordering the appellant to do what he contractually undertook to do.

(5) Conclusion

I would dismiss the appeal and affirm the learned judge's judgment and orders. I would order the appellant to bear the respondents' costs in this appeal.

SIR VINCENT FLOISSAC

Chief Justice

I concur. C.M.DENNIS BYRON
Justice of Appeal

I concur. ALBERT N.J. MATTHEW
Justice of Appeal (Ag.)