SAINT LUCIA

Comment [a1]: Final copy. Issued to parties on June 7, 2001.

IN THE HIGH COURT OF JUSTICE
(Civil)

ADM. No. 4 of 2000

BETWEEN:

BAS SPUYBROEK

Plaintiff

and

THE MOTOR YACHT "DIAMANTE"

Defendant

Appearances:
Mr. Anthony McNamara for the Plaintiff
Mr. Peter I Foster for the Defendant

2001: March 26; 29.

JUDGMENT

[1] **BARROW, J. (Ag.)** This is an action in rem in which the Plaintiff claims possession of the Motor Yacht "Diamante" or alternatively £110,000.00 as the purchase price. The ship is under arrest by process of the Court. . The Plaintiff claims to be the sole owner of the yacht. Mr. Kenneth Hazard entered an appearance and said that he is the registered owner. In an affidavit filed subsequently, he claimed to be the sole legal and beneficial owner.

[2] It is a straight forward question that I have to decide: who is the owner of the vessel? It is accepted by both sides that up to the 2nd November 2000 the Plaintiff was the sole owner. The Plaintiff lives in the Netherlands and kept the vessel in Spain at a Port in Alicante near to premises owned by his parents. He put up the vessel for sale with yacht brokers, "Kavi Yachts". After about six months Kavi Yachts found a buyer, Mr. Keith Albert Hazard Shepherd. Mr. Shepherd agreed with Kavi Yachts to buy the vessel for £115,000.00. The Plaintiff agreed with Kavi Yachts to

accept a price of £107,000.00. Kavi Yachts disclosed to neither buyer nor seller that there was this £8,000.00 difference. They were going to take this as their commission and split it with the person who put the deal their way.

[3] Kavi Yachts prepared a yacht sale agreement which Mr. Hazard signed. This document was sent to the Plaintiff. The Plaintiff saw that certain portions of the document were blocked out, including the address and other particulars of the buyer. He became suspicious and went to Alicante over the weekend of Friday, the 29th September 2000 accompanied by the father of a friend of his, Mr. Van den Temple. They went to the vessel on Saturday the 30th, and they met Mr. Hazard there. Both parties discovered the difference between the purchase price which each had been told and they decided to confront Kavi Yachts.

[4] Before this, Mr. Hazard had wire-transferred the full £115,000.00 purchase price to the bank account of Kavi. It was Mr. Hazard, I accept, who wished to do the transaction in pounds. Kavi received this money on the 26th September 2000. They tried by telephone to contact the Plaintiff to inform him of this and were unsuccessful and by e-mail on the 28th of September, they conveyed the information to the Plaintiff that they had received full payment of the purchase price. Kavi Yachts also couriered the Bill of Sale, partly filled out by them, to the Plaintiff for him to sign. This was received by the Plaintiff on the 29th September, the same day on which he travelled from the Netherlands to Spain. It later turned out that from as early as the 27th September Mr. Hazard had already registered the vessel as a British ship with Albert Hazard as owner.

[5] It was not until the Monday morning, the 2nd October, that the seller and the buyer were able to confront Kavi. The encounter proved to be a heated one with the Plaintiff calling one of the principals a “big thief”. Kavi

Yachts withdrew from the transactions and agreed to hand over all monies and not to take any commission or any further part in the transaction. The buyer and the seller then proceeded, immediately after the confrontation with Kavi Yachts, to deal directly with each other and it is from this that the present dispute arises.

[6] The Plaintiff's claim is that Mr. Hazard promised to pay the purchase price once he received the return of the monies from Kavi Yachts and that at the request of Mr. Hazard and after deliberation and further discussion the Plaintiff signed and handed over to Mr. Hazard the Bill of Sale which had been partly filled out by Kavi Yachts. The Plaintiff's case is that he and Mr. Van den Temple had a plane to catch early that Monday afternoon to go back from Spain to the Netherlands. The Plaintiff stated that it was always his intention and that it was clear and accepted by Mr. Hazard that the receipt of the purchase price by the Plaintiff was a condition precedent to the passing of property or ownership of the Diamante. He deposed that this was specifically accepted by Mr. Hazard who said don't worry we are all gentlemen everything will be arranged. It was on this basis, according to the Plaintiff, that he handed over the Bill of Sale to the Defendant. The Plaintiff and Mr. Van den Temple then hurriedly left to catch their flight.

[5] The Plaintiff related the numerous times that Hazard confirmed his intention to pay and produced the phone records which, I am told, show he made some 51 telephone calls to Mr. Hazard. The Plaintiff thereafter went through various efforts to find Mr. Hazard who had left the state and Diamante first in Gibraltar and then in Palma de Mallorca and then in England and then in Martinique where he finally found the boat and Mr. Hazard. The Plaintiff described the meeting in Martinique and the kidnapping of Mr. Hazard, as Mr. Hazard called it, and the intervention of the French Police. Mr. Hazard then brought the boat over to St. Lucia.

The Plaintiff and his associate, Mr. Van Stenis, travelled to St. Lucia where the boat was found and arrested.

[6] The Defendant's case differs in some significant respect to that of the Plaintiff but the main story as to what took place before "the sale" is largely confirmed. The difference really flows from the fact that Mr. Hazard says that he and Mr. Spuybroek agreed on a purchase price of £105,000.00, and that they agreed that costs totalling approximately £4,000.00 plus the sum of £16,000.00, which was sufficient to provide security for the payment of VAT, if it proved that VAT needed to be paid, were to be withheld from the purchase price . It is the major part of the case for the Defendant that Mr. Spuybroek, the Plaintiff, wanted the £85,000.00 in cash.

[7] Mr. Hazard testified that after the parties decided to deal directly with each other, and after they had therefore cancelled the deal with Kavi Yachts, that Mr. Hazard returned to Kavi Yachts and then went to the bank with one of the principals of Kavi, and that the sum of £115,000.00 in the form of a draft was returned to him. The draft was sent by courier to Mr. Hazard's bank and because of the desire on the part of the Plaintiff for cash Mr. Hazard arranged with his business partner, Ken Garner, to send out in cash the sum of £85,000.00 from England which Mr. Hazard sent his son, David to collect in Lyons, in France. On David's return to Spain with the money, according to Mr. Hazard, he called the Plaintiff who came over to the boat. The money was on the boat in a suitcase.

[8] Mr. Hazard said they left the money there, on the boat, unattended, and he and the son David and Mr. Spuybroek went to Kavi Yachts. There Ms Victoria Iturria, one of the principals of Kavi, prepared a Bill of Sale which was filled out by Ms Iturria in her own handwriting. It was presented to Mr. Spuybroek to sign and it was witnessed by Ms Iturria and her address and

occupation were stamped on it. This, according to the testimony of Mr. Hazard, took place on Tuesday the 3rd October in Spain. The testimony, it will be recalled, of Mr. Spuybroek, is that he left on the 2nd October, and he was not in Alicante, Spain, on the 3rd October and no transaction took place.

[9] Of the two versions of what took place between the parties I am clear in my mind that it is the Plaintiff who is telling the truth. I considered the credibility of the two parties as witnesses and I was satisfied that the testimony of the Plaintiff under strong and skillful cross-examination was straight-forward and convincing. I found that the Defendant, under equally skillful cross examination, impressed me as being evasive and shifty in his responses. I looked also at the strength of the cases put forward by the respective parties. Apart from himself, the Plaintiff brought three other witnesses, plus his Dutch lawyer, to court in St. Lucia. He presented a significant amount of confirmatory material as evidence. I do not need to decide what is hearsay or what is otherwise inadmissible because I do not place reliance on any of it to prove any disputed fact. I have regard the material only for the purpose of seeing what it shows of the Plaintiff's efforts to prove his case and of his belief in the truthfulness of his case.

[10] In contrast the Defendant brought only his son as a witness and he most significantly did not bring Ken Garner, the man who allegedly sent the £85,000.00 pounds in cash to pay for the boat. I have further regard to the fact that Victoria Iturria came from Spain to St. Lucia to testify for the Plaintiff. She is one of the principals of Kavi Yachts, the very one whom the Plaintiff himself cursed as a "lying thief". I find that she is completely disinterested in the outcome of this matter and would have come to tell the truth for either party. She made a very impressive witness in the witness stand and I readily believed her testimony. Her testimony that the Plaintiff

was not present on the 3rd October and did not sign the Bill of Sale in her presence was really the death knell for the Defendant's case.

[11] In contrast the testimony of the Defendant's son, David, was far from convincing. The conflicts between his version of events and the version given by his father confirmed the sense that I got from observing him in the witness stand that perhaps he was only doing his filial duty. Among the differences that impressed me was the time he says he left Alicante to drive to Lyons in France. He said he left the afternoon at about 2 o'clock whereas in his father's witness statement, the father said that he left "that night". The conflict is significant, as well, in the variation given between David and his father as to the time that it took to make that return journey. The father, when confronted with the impossibility of David having gone and returned in the time that the father gave, said that the journey would probably have taken, given the speed in which David is capable of driving, only some 5 or 6 hours each way. David testified that it took him at least 11 hours each way.

[12] I also have regard to the fact that the registering of the boat subsequently in the name of David "Vickerstaff" was explained by the father saying that David was adopted by David's stepfather, to explain his using a different surname. David, in evidence, testified quite categorically that he was not adopted.

[13] Further, I have regard to the fact that it was obvious that the Plaintiff trusted Mr. Hazard because, even on the version of events given by Mr. Hazard, it is confirmed that there was trust extended by the Plaintiff. According to Mr. Hazard the Plaintiff trusted him by allowing him, Mr. Hazard, to withhold £20,000.00 of a purchase price of £105,000.00. I venture to think that the fact that Mr. Hazard had actually transferred £115,000.00 previously, to Kavi Yachts, made him a man of substance in

the Plaintiff's eyes. I find it is by no means inconceivable, in those circumstances, that the Plaintiff should have extended this kind of trust to Mr. Hazard.

[14] I am also impressed with the efforts of the Plaintiff in pursuing Mr. Hazard and the boat. First to Gibraltar, then to England, then to Martinique and then to St. Lucia. This, it seems to me is not the effort of a person who is simply trying a scam. Those are only some of the factors which inform my decision. Others, upon which I need not dwell, include my disbelief of the Defendant's story that it was the Plaintiff who wanted cash which is why the Defendant can produce no documentation to show payment of this money. I found it astonishing that there was no record of, say, a debit from the Defendant's bank in England of this £85,000.00. I do not dwell either on the refined quality of the english in the letter supposedly written by the Plaintiff, who is obviously not fluent in english, dated 18th November, allegedly sent by the Plaintiff to the Defendant which was produced by the defendant to establish that by then the Plaintiff must already have been fully paid, hence no word of protest.

[15] My decision on the facts really disposes of this case. The issue of the legal effect of the Bill of Sale requires hardly any consideration, in my view. Mr. Hazard accepted in cross-examination that he had always agreed in relation to this transaction that if he did not make the payment he would not get a transfer of title. I take this as the intention of the parties throughout. There is the case of **David Offshore Ltd v Emerald Field Contracting Ltd** [1992] 2 Lloyd's Report at page 142 which confirms what is sufficiently obvious in my mind, namely, that property passes under a contract when it is intended to pass, so that the fact that there was in that case a perfectly executed Bill of Sale delivered to the other side did not have the effect of varying the intention of the parties that property should pass when they intended that it should pass. I find,

further, that the Bill of Sale is an instrument for the transfer of title and it is separate from the agreement for sale between the parties. I find as a fact that the Bill of Sale was delivered to Mr. Hazard as an escrow. The testimony of the Plaintiff that he expressly stipulated in handing over the document to Mr. Hazard that it was being handed over conditionally, to my mind, does not need to be believed. This is because I find it to be so obvious an intention, in this particular case, that I would readily imply that when it was handed over without payment of the purchase price, it was intended to be held as an escrow and that it was intended that Mr. Hazard would not be authorized to use it as an instrument of transfer until he paid the purchase price. As I have found that he never paid the price I find, therefore, that he never had any right to the benefit of that Bill of Sale.

[16] **Article 1164 of the Civil Code** says that testimony cannot contradict or vary the term of valid written instrument. I accept Mr. McNamara's submission that this was not a valid written instrument because when it was handed over to the Defendant there was, significantly, not included the name of any transferee; it simply reflected, I think, the intention to provide some significant piece of documentation for the Defendant to hold on to in earnest, as it were, of the intended transfer to him. I do not need, I think, to canvass the learning in Chitty as to collateral contracts but I think that that learning readily applies as well in this transaction.

[17] In the result there will be judgment for the Plaintiff. I find that he was at all times the beneficial owner of the yacht and he is still to be regarded as the legal owner or entitled to be registered as the legal owner. I therefore order possession to the Plaintiff or, alternatively, the payment of the purchase price in the sum of £110,000.000. There will be costs to the Plaintiff and I will hear the parties as to quantum, in Chambers, in the course of next week.

Denys A. Barrow
High Court Judge (Ag.)