COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2002

BETWEEN:

SUPER INDUSTRIAL SERVICES LIMITED

Appellant

and

THE ATTORNEY GENERAL OF DOMINICA
SERVICE MASTERS LIMITED
GANESH LALLA

Respondents

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. K. Harrikssoon for the Appellant Mr. Alick Lawrence with him
Mr. Commodore for first named respondent, Ms. Sandra Julien and Ms. Pearl Richards with him
No appearance by or behalf of the second and third named respondents

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2003: March 26;
May 12.

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JUDGMENT

[1] REDHEAD J.A.: On 26th April 2001 the government of the Commonwealth of Dominica entered into a written contract with Service Masters Limited, the second named respondent in this appeal. By that contract Service Masters Limited agreed to construct a stadium comprising a Netball Court and other sporting facilities for the Government at a total cost of EC$6,635,900.

[2] By Clauses 6.1 and 6.2 commencement date would have been 19th March, and completion on or before the 28th June 2001. Clause 9(3) of the contract provides as follows:

> "save as provided in this clause the company [Service Masters Limited] shall not assign underlet charge or otherwise deal in anyway with the benefit of this agreement in whole or in part without the prior consent of the client [the government]."

[3] About three months after the commencement of the work on the construction of the stadium there was a cessation of work. From the evidence it is clear that the cessation was as a result of financial difficulties which Service Masters Limited was experiencing. Mr. Felix Gregorie, Permanent Secretary, in the Ministry of Sports and Youth Affairs wrote to Mr. Derek Hamilton, Chief Executive Officer of Service Masters Limited seeking information concerning the halting of the construction of the project and reminding him that time was of the utmost importance and also of the completion date as stipulated in the contract.

[4] Mr. Gregorie also enquired from Mr. Hamilton whether his company would be able to continue the construction of the Netball Court and if so whether it would be able to complete the project on time. On 28th May, 2001, Mr. Chadeesingh Attorney for Service Masters Limited replied to the letter written by Mr. Gregorie. Paragraph 4 of the letter reads as follows"

> "The Royal Bank of Trinidad and Tobago Limited had approved our client's application for the project finance only on 25th May. We have been advised that the Bank has informed you of same. In the circumstances our client will continue with the project but subject to the variation that the facility will not be completed until 30th July, 2001. However sufficient work will be done so that the competition on the 15th July could be held on the facility."

[5] The Lawyer also requested in that letter on behalf of the company.

> "A sovereign guarantee as agreed from your government to repay the entire loan of US$2,500,000.00 or EC$6,600,00.00"

[6] Mr. Felix Gregoire responded by letter to the above. In that letter he said, among other things.

> "that the waiver of penalties for the entire complex will apply until August 31 2001. Any further delays beyond that date will carry penalties; that the Government has agreed to pay the entire loan of six million, six hundred thousand dollars [EC$6,600,000.00]; that the Government agrees to pay directly to Royal Bank of Trinidad and Tobago Ltd. the semi-annual payment as contained in the sub-lease;

that a letter certifying a satisfactory hand over of the facility upon completion will be submitted to Service Masters."

[7] On 3rd August 2001, Mr. Gregoire wrote to Mr. Ganesh Lalla, the third named respondent. In that letter Mr. Gregoire commended Mr. Lalla's firm on its outstanding effort in enabling Dominica to host the 2001 America's Federation Netball Association Tournament in July 2001.

[8] However, Mr. Gregorie expressed serious concern about the company's ability to hand over the facility to the Government by August 31, 2001.

[9] Having regard to subsequent events it is beyond doubt that Service Masters was able to complete the Netball Complex on 31st August, 2001 as stipulated in the revised term of the contract.

[10] On 4th September 2001 Mr. Alick Lawrence Solicitor for Super Industrial Services Limited, wrote to the Minister of Sports of the Dominica Government. The relevant part of the letter reads as follows:

> "On the 26th day of April 2001, the Government of Dominica entered into a written agreement with Service Masters Limited for the construction of a multipurpose sporting complex at Stock Farm. The benefit of this agreement was assigned to our client in June 2001 (a fact of which you are aware)
>
> At present 83% of the works are completed and our client is desirous of completing the said work pursuant to the contract but is denied from doing so because of certain directives issued by your Government.
>
> You are hereby requested to take the necessary steps within 7 days to rescind such directives. Our client is able, ready and willing to complete the same and we look forward to your response within the time herein stipulated."

[11] On 14th September 2001, the Permanent Secretary Ministry of Education, Sports and Youth Affairs wrote back to Mr. Alick Lawrence stating that the Government had no agreement with Super Industrial Services Limited of Trinidad & Tobago. He also stated that he was not aware that the benefits of the agreement between Government and

Service Masters Limited of Trinidad & Tobago for construction of a multi-purpose Sports Complex at Stock Farm were assigned to Super Industrial Service.

[12] The Permanent Secretary informed the lawyer that the government was unable to accede to the request of Super Industrial Services, within 7 days to take the necessary measures to rescind any directive.

[13] In the result Super Industrial Services could not do any work on the project. On 13th November 2001 Super Industrial Services Ltd issued a claim against the government of Dominica, Services Master Limited and Ganesh Lalla. The Attorney General is sued in his official capacity. Mr. Ganesh Lalla, the third named respondent is styled in the claim as the alter ego of Service Masters Limited, the third named respondent.

[14] In paragraph 6 of its statement of claim, the claimant alleges that Service Masters Ltd. was not in a financial position or had the technical skills or equipment to perform the agreement and as a result assigned the agreement to the claimant on or about the 1st day of June 2001 with the knowledge consent and/or approval of the relevant state agencies. Paragraph 7

> "Pursuant to the assignment of the contract, the claimant signed a guarantee in favour of the second named [respondent] in the sum of US$2,000,500.00 permitted the third named [respondent] to act as Project Manager on the understanding that the profits would be shared between the claimant and the second named [respondent] in accordance with a written undated agreement prepared by one Mr. Chan Chadeesingh, Attorney-at-Law in Trinidad.

[15] By paragraph 8 Super Industrial Services Limited alleges that from the 8th June 2001 it mobilized its task force and shipped to Dominica plants, equipments, building materials tools and vehicles and continued until it was prevented from doing so by the respondents.

[16] By paragraph 13 of its statement of claim Super Industrial Services Limited alleges that it had been denied access to its plant vehicles tools and building materials and that Ganesh Lalla has converted two of its vehicles to his own case.

[17] Super Industrial Services Limited claimed among other things

1. A declaration that the agreement made between the government of the Commonwealth of Dominica and Services Masters Limited was validly assigned to Super Industrial Services Limited.
2. Specific performance of that agreement
3. Alternatively damages for breach of contract
4. Payment of all monies due and owing to Super Industrial Services Limited
5. A declaration that Super Industrial Services Limited is entitled to remove all its equipments building materials, plants, vehicles, tools and accessories from the project and thereafter from the Commonwealth of Dominica without any hindrance and/or any form of prohibition.

[18] The Government of the Commonwealth of Dominica denied any knowledge of the agreement. Denied that there was any consent to any agreement. Denied that it was notified of any agreement between Super Industrial Services Ltd. and Service Masters Limited.

[19] In its defence the government also denied Super Industrial Services Limited owns any plants equipments tools and or building materials in Dominica and stated that the government to the best of its knowledge and belief all such plants, equipments tools and/or buildings materials are the property of Service Masters Limited which have been allowed into Dominica by the Government on a duty free basis for the construction of Stock Farm Multi-purpose Sporting Complex.

[20] The learned trial Judge rejected Super Industrial Services' claim. He held that there was no assignment by Service Masters Limited of the contract to Super Industrial Services Limited and therefore the latter had no locus standi to bring the action. The learned trial judge awarded judgment to Government and costs to be assessed by a Master. Super Industrial Services Limited is dissatisfied with the judgment and appeals to this court. Basically there are two grounds of appeal:

3.1 The Learned Judge erred in law

3.1.1 In holding that there was no assignment of any contract between the second named defendant and the claimant

3.1.2 In failing and/or refusing to consider the other claims for relief by the claimant against all the defendants

3.2 The decision cannot be supported having regard to the evidence

[21] I deal now with the first ground of appeal, that is the challenge by Super Industrial Services that the learned trial Judge erred in law in holding that there was no assignment by Super Motors Limited to it.

[22] In the written agreement entered between the government and Service Master's Limited, paragraph 9.3 states:

> "Save as provided in this clause the company shall not assign underlet charge or otherwise deal in anyway with the benefit of this agreement in whole or in part without the prior consent of the client [i.e. the Government."]

[23] In the latter written by Mr. Alick Lawrence on 4th September 2001 to the Minister of Sports, it stated in part:

> "The benefit of this agreement was assigned to our client [Super Industrial Services Limited] in June 2001 (a fact to which you are aware)"

[24] Even if the lawyer is correct that the Government is "aware" of a purported assignment of the agreement by Service Masters to Super Industrial Services that cannot satisfy or comply with clause 9.3 of the agreement which specifically states that it must be with the prior consent of the Government.

[25] Mr. Einool Jimmy Hosein, a Director of the appellant said in cross-examination in answer to counsel for the first named respondent that there was no written assignment.

[26] In Helstan Securities Ltd v Hertfordshire County Council 1978 3 All ER 262 the facts which are not too dissimilar from the instant case. The Plaintiff, County Council entered into an agreement with the defendant contractor to carry out road works. The contract contained a stipulation that the contractor was not to assign the contract or any part

thereof or any benefit or interest therein or thereunder, without the written consent of the council. The contractor got into financial difficulties and, without obtaining the council's consent, assigned to the plaintiff the amount alleged to be owing by the council. When the plaintiff attempted to obtain payment of the debt from the Council it refused to pay. The plaintiff brought an action against the council to recover payment contending that, while the contract prohibited the assignment of the contract and certain choses in action arising under it, it did not prohibit the assignment of debts which arose under it. (my emphasis)

[27] Held if the parties to a contract, the subject matter of which was a chose in action, agreed that the chose in action was not to be assigned, any purported assignment was invalid. (my emphasis) The debt from the council to the contractor was both "a benefit or interest" under the contract and accordingly the contractor could not validly assign it without the council's consent. The council was therefore entitled to refuse payment.

[28] Similarly, the corresponding clause in the contract that the "company shall not assign underlet charge or otherwise deal in anyway with the benefit of this Agreement" would have prevented Super Industrial Services Limited recovering any monies which it claimed owed to Service Masters by the Government on this purported assignment.

[29] But Super Industrial Services Limited is not making any such claims that monies are owed by Government of Montserrat to Service Masters Limited which were assigned to it.

[30] The case as put forward by Super Industrial Service Limited is that Service Masters Limited assigned the contract with the Government and Super Services Limited to Super Industrial Services Limited. I am firmly of the view that there was no assignment of the contract by Super Service Masters Limited to Super Industrial Services Limited.

[31] I am also inclined to the opinion that building contracts cannot be assigned without the written approval of the employer. In support of my opinion I quote from the judgment of Croom-Johnson in Helstan at page 264.

[32] "The way in which the plaintiff put their case is this, that there is a distinction to be drawn between debts and other choses in action, and they say the decided cases lean towards that distinction. On that basis that there is such a distinction, the plaintiffs go on to say that condition 3 prohibits the assignment of the contract and certain choses in action arising from it, but on its construction does not prohibit the assignment of debts. Is there any such general distinction? In my view, No. A debt is but one instance of a chose in action, though it may be a common one. Do the authorities support such an argument?"

[33] The learned trial Judge however, rejected that there is a difference between a debt and other choses in action and the argument that there is a prohibition against the assignment of a contract and certain choses in action. He referred to many authorities including Brice v Bannister (1878) United Dominions Trust [Commercial] Ltd. v Parkway Motors Ltd. 1955 2 All ER 557.

Spellman v Spellman 1961 2 All ER 498

[34] The learned trial judge also referred to a passage by Bramwell L.J. in Brice v Bannister (supra) in which the learned Lord Justice opined:

> "It does seem to me a strange thing and hard on a man, that he should enter into a contract with another and then find that because the other has entered into some contract with a third, he, the first man, is unable to do that which is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; may be if in the contract with A. it was expressly stipulated that an assignment to B should give no rights to him, such a stipulation should be binding. I hope it would be."

[35] I find force in the argument of the learned judge when he said at page 266:

> "The clause is obviously there to let the employer retain control of who does the work condition 4 which deals with subletting, has the same object. But closely associated with the right to control who does the work, is the right at the end of the day to balance claims for money due on the one had against counterclaims for example, for bad workmanship on the other. The plaintiffs say that such a counter-claim maybe made against the assignee instead of against the assignors. But the debtors may only use it as a shield by way of set off and cannot enforce it against the assignee if it is greater than the amount of the debt Young v Kitchin

> [1878 3 EX D 22]. And why should they have to make it against people whom they may not want to make it against, in circumstances not of their choosing when they have contracted that they shall not?"

[36] In my judgment having regard to the above quoted passage I entertain great doubt as to whether a building contract generally can be assigned without the written approval of the employer because of the personal relationship which exists between employer and contractor. I am clear in my mind that there could be no valid assignment of a building contract if there is a clause which stipulates that the contract or a benefit under the contract must not be assigned without the written consent of the employer unless that written consent is first obtained.

[37] In my judgment there is a difference with other choses in action such as a debt. The reason being, it seems to me that no personal obligation is attached to the collection of a debt.

[38] Another problem which Super Industrial Services is faced with its lawyer was writing on 4th September informing the Government that this purported assignment took place in June. The letter also states "a fact to which you are aware" when did the government allegedly become aware of that fact, was it subsequent to the purported assignment? Of course the letter is silent in that regard.

[39] The learned trial Judge at paragraph 26 of his judgment said:

> "Counsel for the claimant has conceded that the assignment was not legal it was not evidence in writing but argues forcefully citing numerous textbook authorities and decided cases that there was an equitable assignment by the second defendant (the assignor) [Service Masters Limited] to the claimant (the assignee) [Super Industrial Services Limited]"

[40] There was no argument before us that the learned trial Judge was wrong when he wrote that the learned counsel for the claimant conceded that the assignment was not legal. I make the observation that the same counsel who appeared in the Court below appeared before us.

[41] An equitable assignment usually arises where there is a clear intention to assign a debt but one of the requirements of section 136 of the Law of Property has not been satisfied. No particular form is required provided the meaning is clear and a clearly defined fund is specified. (see Law and Practice of Building Contractors 3rd Ed. by Donald Keating). The learned trial judge was justified on the evidence and the material before him in holding that there was no assignment by Service Masters Limited.

[42] Learned Counsel Mr. Harriksoon argued strenuously that learned trial judge ought to have considered and given damages to the appellant on the basis of Quantum Merit, damages against the government and damages for conversion and a declaration that the Super Industrial Services Limited is entitled to the return of the tools, vehicles, plant and equipment and an injunction.

[43] I shall address all of the above individually. First of all I deal with the claim by Super Industrial Services Ltd. for an order to have the tools, machinery, plant and equipment return to it or alternatively damages against the government for their retention.

[44] The Government, the first named respondent, entered into a written contract with the Service Masters Limited.

[45] Clause 11.5 of the agreement reads as follows:

> "If for any reason this agreement, is terminated by either party then without prejudice to the accused (sic) [accused] rights or remedies of either party the following should be the respective rights and liabilities of the company [Service Masters Limited] and the client [the Government]

Clause 11.5.2.2 the company shall

11.5.2.2.2 "Deliver up to the client possession of the site together with all completed and partially completed works on it and all building and other, materials and plant and (equipment if any) on the site belonging to the company which shall henceforth become the property of the client."

[46] The terms of clause 11.5 are clear and require no comment. Mr. Commodore argued that there was a termination of the agreement by Service Masters Limited. Whereas Mr.

Harrikssoon argued on behalf of Super Industrial Services Limited that there was no termination of the agreement.

[47] To my mind this a very interesting argument on behalf of Super Industrial Services Limited because it not being a party to the contract with the Government must of necessity rely on the claim that the contract between Service Masters Limited and the Government was assigned to it. Having decided that there was no assignment there can be no argument on behalf of Super Industrial Services Limited that there was no termination of the contract. Super Industrial Services Limited being an absolute stranger to the contract.

[48] There is no doubt that by the terms of the agreement that if there is a termination of the agreement the Government would have a lien on tools equipment, plants etc. As I understand the arguments so far between Government and Super Industrial, although not being a party to the contract, is that there is a dispute as to whether there was a termination. If there is such a dispute then that dispute would have to be resolved by Court between Service Masters Limited and the government.

[49] Very pertinent to this issue is the evidence that Super Industrial Services Limited permitted Service Masters and Ganesh Lalla to import into Dominica and insure the vehicles, tools and equipments as though Service Masters own them.

[50] In other words there was a representation to Government, the other contracting party, that these things were owned by Service Masters. As a result Service Masters was able to obtain under the agreement duty free concessions for the importation of the vehicles, tools, machinery and equipments into Dominica.

[51] Super Industrial Services is basing a claim as I understand it in the alternative, that is, if there is no legal assignment, there was an equitable assignment.

[52] In order therefore for Super Industrial Services Limited to advance the argument that it is entitled to the vehicles plants equipments tools etc. Super Industrial Services Limited must

admit that it was engaged in a deception on the government of the Commonwealth of Dominica by representing to the government that the tools, equipment, machinery vehicles were owned by Service Masters in order to obtain duty free concessions under the agreement whereas in fact they were owned by Super Industrial Services Limited who was not entitled to the concessions. A Court of Equity in those circumstances cannot grant relief to Super Industrial Services Limited.

[53] In Hudsons Building and Engineering Contract 10th Edition at page 74 the learned authors state:

> "In construing express terms in ordinary building and engineering contract, and the leading cases in Brown v Bateman Reeves v Barton (1884) and Hast v Porthhgain Harbour Co. (1903) leave little doubt that the courts will give effect to the prime purpose of vesting and seizure clauses alike, namely the provision of the security for the due completion of the works which may entail defeating the claims of third parties whether made through the employer or the builder, at least until completion of the works."

[54] On the face of it seems to me that having regard to the terms of the contract that the Government has a lien on the tools, the equipment vehicles and the machinery. It is also clear to me that the only person who can challenge that claim is Service Masters Limited. The claim therefore for damages for conversion fails. The declaration that Super Industrial Services Limited is the owner of the vehicles, plant tools and equipment is refused.

[55] I now turn to examine the question of damages based on a quantum merit basis. Mr. Harriksoon argued on behalf of Super Services that it cannot be disputed that Super Services did the bulk of the work. Learned Counsel for the Government does not accept that.

[56] However even if the Super Industrial Services Ltd. were able to establish that it did most of the work, in order to succeed in damages on a quantum merit basis, it will have to prove that it had a `contractual' relationship with the Government. This it is unable to do. I have

ruled that there was no assignment legal or equitable by Service Masters Limited to Super Industrial Service Limited.

[57] It is to be observed that this undated agreement between Service Masters Limited and Super Industrial Services Limited, which is the purported assignment refers to Service Masters Limited as the contractor and Super Industrial Services Limited as the subcontractor. If as argued so forcefully by Counsel and as stated Service Masters Limited was not in a financial position or did not have the technical skills to perform the task and as a consequence Super Industrial Services took over the project, why is it being referred to as the subcontractor and Services Master as the contractor?

[58] The claim for damages on a quantum merit basis therefore fails.

[59] The appeal is dismissed with costs of $100,000.00 in the court and this court below to the first named respondent to be paid by the appellant.

Albert J. Redhead
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Ephraim Georges
Justice of Appeal [Ag.]