SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2004

BETWEEN:

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Appellant

and

CONSTANCE VIOLA MITCHAM

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C — Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C — Justice of Appeal
The Hon Madam Suzie d'Auvergne — Justice of Appeal [Ag]

Appearances:

The Hon. Delano Bart for the Appellant
Ms. Marguerite Foreman for the Respondent

2004: November 3;
2005: February 14.

JUDGMENT

[1] GORDON J.A.**:** The Respondent is a Barrister-at-Law, having been called to the Bar of the Federation of Saint Christopher, Nevis and Anguilla, as it then was, in 1972. In 1982, the then Government of the Federation, who were the majority shareholders in the National Bank of St. Kitts-Nevis-Anguilla (hereafter "the National Bank"), recommended to the Board of Directors of that bank that the Respondent be appointed as the legal adviser to the National Bank. The Respondent was appointed as legal adviser, and, in that capacity attended board meetings and gave legal advice to the board. The National Bank paid the Respondent a retainer of $2,000.00 per month, and in addition the Respondent benefited from her association with the National Bank by virtue of customers of the bank

having to pay the legal expenses of the bank incurred in various loan agreements entered into by the bank with such customers.

[2] The Development Bank of St. Kitts and Nevis (hereafter "the Development Bank) is wholly owned by the Sate of Saint Christopher and Nevis and, in practical terms, the Government of the day controls who sits on the Board of the Development Bank. Some time in 1980 or 1981 the Respondent was appointed the legal adviser to the Development Bank at a monthly retainer of $1,500.00. In addition the Respondent enjoyed similar benefits as those she enjoyed with the National Bank. The Respondent continued in her capacity as legal adviser to both the National Bank and the Development Bank until 1995.

[3] In 1984 the Respondent offered herself as a candidate in the General Elections of that year and was successful. Following the elections Dr. Kennedy Simmonds, the political leader of the PAM party was appointed Prime Minister and invited the Respondent to join his Cabinet of Ministers, an invitation the Respondent accepted. The Respondent remained an elected member of Parliament, a Minister and Cabinet member until 1995 when the Respondent chose not to offer herself for re-election at the General elections of that year. Upon the appointment of the Respondent to the Cabinet of Ministers, the Respondent employed her cousin, Ms Benjamin, a qualified Barrister at Law to run the day to day affairs of her law office. The office then practiced under the style of Mitcham & Benjamin.

[4] The Respondent continued as the legal adviser to the two banks until 1995. At the General Elections of that year the hitherto opposition party was successful in gaining a majority of seats and so formed the ensuing government. The Respondent was, in consequence, replaced in due course as legal adviser to the two banks.

[5] By virtue of the number of years the Respondent served as an elected member of Parliament, she was entitled, upon ceasing to be a member of Parliament, to a pension at age 50, and also to a gratuity. In 1997, the Respondent reached the age of 50 whereupon she demanded her pension and gratuity, which demand was refused. She sued for them.

Judgment was given on her claim (there being no real dispute as to her entitlement) but the Government resisted paying by way of filing a Counter-claim. The Counter-claim claimed against the Respondent that whilst being a Minister of Government she continued to carry on private practice as a solicitor acting for two of her major clients which were the banks above referred to, which banks were either wholly owned or controlled by the Government, of which she was a member; that by so doing she was in breach of her fiduciary duty as a Minister which gave rise to constructive trusts and in that circumstance the Respondent must account to the Government of the Federation for the monies obtained or fees earned therefrom. The amount sought to be accounted for by the Respondent was $1,449,454.18.

[6] In the course of his judgment the learned trial Judge expressed the issue in these words:[1]

> "The Hon Attorney General submits that upon Ms Mitcham's appointment as a Minister of Government, there came into existence a fiduciary relationship between herself on the one hand and the government and the people of the Federation on the other. Counsel for Ms Mitcham does not dispute that proposition. Counsel for the defendant submits that Ms Mitcham breached that fiduciary duty. That is in dispute. That is the issue which the court is called upon to determine in this case…
>
> The submission is that her failure to resign placed the banks in an untenable position. Even if they had wanted to terminate her services, they could not realistically have done so because they would, in effect, have been intimidated by her position as a minister of government. The result was that she became a constructive trustee of the fees that she received for her service to the two boards while she served as a Minister and she held them in trust for government."

[7] The learned trial Judge found that while the Respondent may have been in breach of some code of ethics, she had not breached any law. He concluded that "in the absence of a statutory regime created by Parliament, the judicial branch of government will not intervene in what is essentially a matter for political decision".

[8] I would express the issue for decision by this Court in the following terms: Was the Respondent a constructive trustee; if that question is answered positively, then a second question arises, and it is who or what was the beneficiary of the trust.

[1] Para 12, 13 judgment of Mitchell J.

[9] Quoting from Keeton and Sheridan's The Law of Trusts[2] "The term *constructive trust* covers a variety of relationships having few features in common…A constructive trust is created by equity in the interests of good conscience to compel a person who has title to property to transfer it to, or hold it for another person who ought to have it…When a person clothed with a fiduciary character avails himself of it to obtain some unauthorized personal advantage, he becomes a constructive trustee of all profits for the person to whom the fiduciary duty is owed."[3] As a definition, this is not particularly helpful and one must seek further refinement in the evolution of the concept to be derived from the decided cases.

[10] In Bray v Ford[4] Lord Herschell said:

> "It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the Respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and his duty conflict. It does not appear to me that this rule is, as has been said, founded on principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it may be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing."

[11] In Regal (Hastings) Ltd v Gulliver and others[5] Lord Wright, in similar vein, had this to say:

> "[The] question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and knowledge, or either, resulting from it, is entitled to defeat the claim on any ground save that he made the profits with the knowledge and assent of the other person. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is without the knowledge of his principal) acquired by him in the course of his agency. The authorities show how

[2] 12th Ed. 1993 at page 215
[3] Rule in Keech v Sandford (1726) Sel. Cas. T. King 61
[4] [1896] A.C. 44
[5] [1942] 1 All E. R. 378

manifold and various are the applications of the rule. It does not depend on fraud or corruption."

[12] In Boardman v Phipps[6] Lord Hodson expressed the rule thus:

> "The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made on him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and knowledge, or either, resulting from it, is entitled to defeat the claim on any ground save that he made profits with the knowledge and assent of the other person

[13] Finally in Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) et al [7] Edmund Davies LJ expressed himself in this way:

> The basic question raised by this appeal is whether the defendants hold the moneys of the plaintiff as constructive trustees.
> THE AMERICAN RESTATEMENT OF RESTITUTION sets out to define a constructive trust by declaring in para. 160 that:
>
> > "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."
>
> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal advantage is not a sine qua non. Thus, in *Nelson v. Larholt* [8], it was not suggested that the defendant was himself one penny better off by changing an executor's cheques; yet, as he ought to have known of the executor's want of authority to draw them, he was held liable to refund the estate, both on the basis that he was a constructive trustee for the beneficiaries and on a claim for money had and received to their use. Nevertheless, the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call "want of probity", a feature which recurs through and seems to connect all those cases drawn to the court's attention where a constructive trust has been held to exist. SNELL'S EQUITY (26th Edn.) at p.201, expresses the same idea by stating that:
>
> > "A possible definition is that a constructive trust is a trust imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties."
>
> It may be objected that, even assuming the correctness of the foregoing, it provides no assistance, inasmuch as reference to "unjust enrichment", "want of probity" and "the demands of justice and good conscience" merely introduces

[6] [1966] 3 All E.R. 721
[7] [1969] 2 All ER 367 at p.381
[8] [1947] 2 All ER 751

> vague concepts which are in turn incapable of definition and which, therefore, provide no yardstick. I do not agree. Concepts may defy definition and yet the presence in or absence from a situation of that which they denote may be beyond doubt. The concept of "want of probity" appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to the many authorities cited to this court. It is because of such a concept that evidence as to "good faith", "knowledge" and "notice" plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do. Not even gross negligence will suffice." (Emphasis added)

[14] The statement of the rule in terms that a trustee must not put him/herself in a position where fiduciary duty conflicts with personal interest acknowledges that the rule does not apply where the conflict is created deliberately by the person in the position of the settlor or testator. This was recognized by Nourse LJ in Sergeant v National Westminister Bank Plc[9] where the testator left farms on trust, having previously granted the trustees (who were his children and were two of the three beneficiaries under the trust) agricultural tenancies of the farms beneficially. The Court of Appeal held that because of the creation by the settlor of their multiple positions as tenants, beneficiaries and trustees, and as they had done nothing to create a conflict of duty or interest, the trustees could (as trustees) sell the farm subject to their own tenancies. Their duties as trustees to get the best price reasonably obtainable did not oblige them to give up their tenancies so as to allow a sale with vacant possession, which would have fetched a better price.

[15] It seems to me, therefore, that what is to be derived from the above cases is that the Appellant must prove that the Respondent, in the giving of legal services to the two banks was acting as the 'agent' of a principal; that the Appellant made a profit by so acting; and, that the principal was ignorant of the Respondent's making a profit. It goes without saying that in the vast majority of cases, where a lawyer works for a client, he expects to be paid, and such payment, assuming that the only relationship between the lawyer and the client is that of lawyer/client, is in no sense profits deriving from a fiduciary relationship for which account must be made to the client by the lawyer. The alternative view would make the legal profession one of the larger charitable organizations in the world. Thus, as I

[9] (1990) 61 P. & CR 518

understand the case of the Appellant, there is no quarrel concerning the fees earned by the Respondent from the time she was appointed legal adviser to the two banks until 1984 when she became a minister of government.

[16] It was the submission of the Hon. Attorney General on behalf of the Appellant that the Cabinet of Ministers were trustees of the people of the Federation. Whilst one recognizes such a statement as having political relevance and weight, no legal authority was offered for the proposition. Indeed, I find it difficult, in the context of this case, to ascribe the relationship of principal and agent to the Respondent and the peoples of the Federation, or even to the Respondent and her Cabinet colleagues if Cabinet were to be regarded as representing the interests of those peoples.

[17] I am of the view that there is a very real difference between a person using her Ministerial position to derive a secret benefit (for example to acquire lands cheaply in the knowledge of some government project which will enhance the value of such lands) and the position of the Respondent. Indeed, it is to be noted that in each of the cases cited above, even if the relationship of trustee and beneficiary can be established, provided that there is knowledge and acquiescence in the beneficiary of the benefit being derived by the trustee then there is no obligation to account for such profit. In this case the evidence of Dr. Kennedy Simmonds, Prime Minister at the time that the Respondent was appointed a Minister, is clear that he and his cabinet colleagues were aware that there was a financial consideration passing from the banks to the Respondent's firm for legal work done.

[18] Much was made both in argument and in the judgment of the trial Judge of conflict of interest. Indeed the learned trial Judge at paragraph 16 of his judgment said the following:

> "As a general rule, if a minister of government who is also an attorney at law continues to earn fees from her chambers while those chambers serve as legal advisers to a government-controlled entity, she would be in conflict with her duties as minister of government. No vogue or practice can reduce or alter the duties owed by a minister or make a conflict of interest go away. The Hon Attorney-General is correct that the proper thing for a minister to do, if she agrees at the request of the Prime Minister to serve as legal adviser to a government controlled bank, is to resign as minister of government. If she prefers to remain a minister, she cannot properly act as paid legal adviser to a government-controlled

> corporation. I would go further, though it is not contended for this case, and say that no attorney at law who is appointed a Minister of government can properly continue to do private work and to earn fees at the practice of law. Such an attorney on appointment as a minister of government is required by any standard of ethics to take steps to show that she has completely severed herself from her previous law practice."

[19] With the greatest of respect to the learned trial Judge, I am of the view that he ventured into fields of opinion inappropriate for this Court to frolic in. The Nova Scotia Barristers' Society has authored a publication entitled "Legal Ethics and Professional Conduct, A Handbook for Lawyers in Nova Scotia". A whole chapter in the handbook is devoted to the lawyer in public office. The handbook does not suggest that a lawyer holding public office should not practice law, but rather lays down guidelines for such situations. I am of the view that this is an area that Bar Associations should self-govern, and, failing that, governments should legislate. It is no business of the court to lay down a moral code for attorneys at law, ministers or legislators.

[20] In conclusion, I would dismiss this appeal and confirm the order of the learned trial Judge. Regarding costs, there has been no Counter-Notice of appeal by the Respondent and so I would award costs at two thirds of the costs awarded in the Court below excluding the sum awarded for disbursements.

Michael Gordon, Q.C.
Justice of Appeal

I concur.

Brian Alleyne, S.C.
Justice of Appeal

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]