

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2003

BETWEEN:

BENOIT LERICHE

Appellant

and

LEON CHERRY

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Brian Alleyne, SC

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Kenneth Foster, QC for the Appellant
Mr. Kenneth Monplaisir, QC for the Respondent

2003: October 20;
2005: February 16.

JUDGMENT

[1] **ALLEYNE JA.:** The Appellant and the Respondent are brothers. Leon Cherry, the Respondent, has become a Canadian citizen and was found by the learned trial Judge to have attained 'a reasonable standard of living in Canada.' The Appellant, Benoit Leriche, remained all his life in Saint Lucia, engaged in 'family activity' and appears to have enjoyed only a modest standard of living.

The Trial Judge's Findings

[2] The learned trial Judge found that two parcels of land, along with other property, were purchased by Mr. Leriche. One of these portions, at La Borne, was bought in 1979, the other, at Mongiraud, was purchased in 1985. The titles to both portions of land are

registered in the name of Leriche only. Mr. Cherry claims a share in the land on the basis that the land was wholly or partially paid for by him. Mr. Leriche denies this claim and asserts, on his part, that the land was purchased with his own money and belongs exclusively to him.

[3] The learned trial Judge said, at paragraph (4) of his judgment:

“Fundamentally this case turns on issues of fact. Counsel did not disagree on the principles of the law of trusts which govern the case. The court really had to decide the following questions. Was Mr. Leriche his brother’s agent? Whose money paid for the properties that were acquired? In the face of diametrically opposed allegations of fact, to which side does the objective evidence lean?”

[4] The learned trial Judge continued:

“I have little difficulty in finding for the claimant (Mr. Cherry) on almost all the disputed issues of fact. Mr. Cherry’s case was carefully placed before the court and was amply supported by documentary exhibits and relevant oral testimony adduced from persons with nothing to gain one way or another from this action. A Power of Attorney was produced that was registered in March 1983 whereby Mr. Cherry gave his brother wide powers to purchase property and to handle his business affairs in St. Lucia. A receipt from Ms. Altonato Richelieu (the vendor in respect of the Mongiraud property) substantiating that Mr. Cherry had in fact entered into an agreement with her for the purchase of land at Mongiraud. A copy of a banker’s cheque was produced evincing a payment by or on behalf of Mr. Cherry of approximately one half of the purchase price of that land. ... The court also had documentary evidence showing the source of some of the funds Mr. Cherry alleges were used to pay for one of the parcels of land. ... I could go on but suffice it to say that I was very impressed with the candour of the claimant (Mr. Cherry), the manner in which his case was presented to the court and the array of the supporting testimony that was marshalled in support of his allegations.”

[5] On the other hand, the learned Judge held that he found many aspects of Mr. Leriche’s testimony to be incredible. His Lordship cited graphic and telling illustrations of the evidence to which he referred. In sum, the learned Judge said that he did not accept Mr. Leriche as a witness of truth and that wherever his evidence conflicted with that of Mr. Cherry, he preferred to accept that of the latter.

[6] In the end, the learned trial Judge held on the facts that both the La Borne and the Mongiraud lands were purchased by Mr. Leriche for and on behalf of himself and Mr.

Cherry, and that the common intention was that Mr. Leriche would have operated a farm on the La Borne land for the benefit of both brothers.

- [7] Leriche was the registered proprietor of the two parcels of land. The La Borne land measures seven acres two roods and seventeen perches and the Mongiraud land two acres one rood and two perches. There are two houses erected on the La Borne land and a guesthouse on the Mongiraud land. I think that it is desirable to examine the findings and evidence in relation to each parcel separately.

The La Borne land

- [8] The Judge stated he believed that the La Borne land was purchased by Mr. Leriche for and on behalf of himself and Mr. Cherry with the common intention that Mr. Leriche would have operated a farm on the land for the benefit of both brothers."

- [9] In the pleadings neither brother alleged a joint venture. Each of them alleged that the La Borne land was purchased with their own cash. It would follow logically that the learned trial Judge did not believe that Leriche had used his own money in this purchase, although there was some objective support, in that the purchase actually took place nearly one year after Cherry alleged that he gave Leriche the money to purchase that land, the land actually cost \$10,000.00 and not the \$15,000.00 Cherry said he gave Leriche, and there was evidence that Leriche withdrew \$7,000.00 from his bank account at the time that the payment was made to the vendor for the land.

- [10] On the other hand there was no evidence as to the source of the funds in the bank account from which Mr. Leriche made the withdrawal. However, there was objective evidence that indicated that Mr. Cherry had invested in the farm that Mr. Leriche had created on the land. In Mr. Cherry's witness statement (which was admitted as evidence in the case) there was an assertion that he was creating a farm for his brother. He also gave evidence that he had given his brother money to purchase the land to make a farm, purchased a truck for use in connection with the farm, paid for a farm road to be cut and a pond to be excavated,

and purchased livestock for the farm, in addition to miscellaneous other investments in the farm.

[11] It was clear that the two brothers enjoyed a good relationship until the commencement of the litigation as Mr. Cherry stayed at Mr. Leriche's home whenever he was in St. Lucia. Then there was Mr. Leriche's behaviour which remained unexplained, of abandoning the farm in which Mr. Cherry had invested and establishing another farm on a different site. In addition there was ample material to support the Judge's conclusion that Mr. Leriche was less believable than Mr. Cherry.

[12] It would seem to me that this appellate court should be reluctant to set aside the Judge's finding on the facts in the case in accordance with the line of cases on this aspect of the appellate process¹. The areas which would permit some concerns were not sufficiently cogent to require setting aside the order.

[13] I would not set aside the learned trial Judge's finding in relation to the La Borne land.

The Mongiraud Land

[14] Both parties adduced evidence to support their allegations that they had paid the purchase price of \$90,000.00 in full for the land. There was objective evidence that Mr. Cherry had paid \$45,000.00 and Mr. Leriche paid the remaining \$45,000.00 when the transfer documents were being executed. The disputes were that Mr. Cherry alleged that the money Mr. Leriche used to pay for the land was his, and Mr. Leriche alleged that he paid the full \$90,000 from his own resources.

[15] The Judge was very scathing in his rejection of Mr. Leriche's evidence. But it appears that he was persuaded that there was a common intention that the property would be for the beneficial interest of both brothers by evidence adduced by Mr. Cherry; a land surveyor

¹ Grenada Electricity Services Limited v Isaac Peters Civil Appeal No. 10 of 2002 and Lester Bryant Bird v Joseph Horsford Civil Appeal No. 3 of 2003.

and a bank valuer and inspector and that when the dispute developed Mr. Cherry was actively engaged in partitioning the land with Mr. Leriche on the basis that they had equal shares. In fact one of the witnesses described his encounter with Mr. Cherry in terms that Mr. Leriche was entitled to his half share as a donation.

[16] In all the circumstances of this case it does not seem that the factual findings of the trial Judge should be overruled.

[17] In all I must however, comment on the order for costs.

[18] Costs were ordered in the sum of \$45,000.00. The trial Judge offered no basis as to how the figure was computed. The provisions for prescribed costs of CPR 65.5 are applicable in this matter. This was a case in which the only orders made were declaratory orders. There was no monetary judgment. In these circumstances the value of the litigation is fixed at \$50,000.00 by CPR part 65.5(3). Applying the schedule, costs should have been computed in the sum of \$14,000.00.

Order

[19] I would therefore dismiss the appeal and the cross appeal. In the circumstances I would think it only fair that each party bear their own costs of the appeal. I would affirm the order of the court below subject to an order that the same be varied to the extent of changing the costs order to \$14,000.00.

Brian Alleyne, SC
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal