

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2005

BETWEEN:

OTHNEIL SYLVESTER

Intended Appellant

and

[1] FAELLESEJE, A DANISH FOUNDATION

Intended Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C.
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Sir Henry Forde Q.C., Mr. Russel Martineau S.C., Mr. E. Robertson and Ms. Nicole Sylvester for the appellant
Mr. Karl Hudson Phillips Q.C., Mr. Stanley Marcus S.C., Mr. Bertram Commissiong Q.C., and Ms. Mira Commissiong for the respondents

2005: December 19;
2006: February 20.

JUDGMENT

[1] **BARROW, J.A.:** There are two parts to the burden that rests upon the intended appellant ("the appellant") in his application for leave to appeal the master's refusal to strike out the Statement of Claim in proceedings brought by the intended respondents ("the respondents"). The appellant needs to show that the intended appeal has a real prospect of success¹, which is a heavier burden than showing only that he has an arguable appeal, according to the view, which I respectfully adopt, of the English Court of Appeal in **ED&F**

¹ Practice Note – Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840

Man Liquid Products Ltd. V Patel.² But in addition, because he seeks to appeal against the exercise of a judicial discretion, he needs to show a real prospect that he will be able to persuade the appellate court that the master's decision did "not consider the case to be sufficiently plain and obvious to warrant striking out at this stage", was clearly or blatantly wrong.³

[2] These are the first stages of proceedings commenced in the High Court by the respondents claiming the recovery of money paid to the appellant and alleging breach of trust and (arguably) fraud against him and, therefore, the less said about the claim the better, in the event the proceedings do continue. It is emphasized that the summary which follows and any apparent statement of facts that appears to be made herein, are only the version of events given by the respondent and are not findings of facts. In a forty-five paragraph statement of case the respondents set out their claim beginning in July 1984, when the respondent decided to purchase a group of estates in north eastern St. Vincent, called the Orange Hill Estates. The appellant acted as the lawyer for the respondents in the transaction and advised them on arrangements to avoid paying to the Government the fee of approximately US\$200,000.00 that would be payable if the respondents, who were aliens for the purposes of the relevant law, were required to obtain an alien's landholding licence. A number of companies was formed, one to hold title to the land and the others to own the shares in the titleholder. The respondents say the appellant expressly confirmed that the arrangements accorded with the law. The respondents provided the money for the price and the legal and other costs. Shortly after, the Government compulsorily acquired the lands.

[3] Compensation was paid by Government to the appellant in 1993 but the respondents say he concealed this fact from them and they did not find out that compensation had been paid until they read of it in a newspaper in 1996. In 1997 the appellant paid over to the respondents the sum of EC\$1,485,000.00. The respondents say the appellant refuses to pay a balance of EC\$5,646,900.00 to them. They say that the appellant denies that they

²[2003] EWCA Civ 472

³ Dufour v Helen Air Corporation [1996] E.C.L.R. 95

are entitled to any money and that the appellant contends that they committed an illegal act in evading the requirements of the law that they must obtain an alien's licence to own land and so cannot rely upon their illegality to claim the beneficial ownership of the lands and the proceeds of sale. The respondents allege deceit, breach of trust and the production of fictitious balance sheets.

- [4] As gathered from the Reasons for Decision⁴ given by the master, in the application to strike out the appellant contended that the claim is barred by the **Limitation Act**,⁵ that the Statement of Claim reveals that the claim is based on an illegality, that the Statement of Claim reveals no reasonable grounds to bring the claim, and that the claim is scandalous, frivolous, vexatious or otherwise an abuse of the process of the court.

The limitation and the illegality points

- [5] The limitation point that the appellant took was that section 7 of the **Limitation Act** prevents the bringing of any action founded on simple contract after 6 years from the date on which the cause of action accrued. The appellant notes that the compensation money was allegedly paid in 1993 and the claim was brought in 2004.
- [6] The master adverted to the respondents' argument in response that their claim was for fraudulent breach of trust and that section 23 of the **Limitation Act** prevented time from running in such a case. The master stated that at that stage of proceedings, without the benefit of pleadings from the defendant or evidence from either side, he declined to hold that the claim was statute barred.
- [7] Before this court counsel for the appellant said he was reserving the limitation point in relation to the illegality point, which counsel for the appellant argued along with the limitation point, counsel observed that the desired declaration that the respondents were seeking to obtain, to the effect that the shares were held in trust for them, would

⁴ In St. Vincent and the Grenadines High Court Claim No. 86 of 2004, dated 10th June 2005. On 16th February 2005 the master had rendered his decision without giving reasons.

⁵ Cap. 90 of the Revised Laws, 1990 edition.

necessarily import that the shares were held in trust for an alien in breach of the provisions of the **Aliens (Landholding Regulation) Act**.⁶ However, I did not gather that it was being submitted, at this stage that the prospective legal consequence of such a declaration is to make the claim not maintainable and doomed to be struck out. Before the nature and the consequence of the alleged illegality can be determined it seems to me that all the relevant facts must be established and I am unable to see any prospect of an appellate court holding otherwise.

- [8] The related observation by counsel for the appellant was that fraud was not pleaded and so the foundation for the section 23 (fraudulent breach of trust) claim was not laid. It is true that the word fraud was not used in the statement of case but the statement of case alleged deceit, concealment of receipt of alleged trust money, breach of trust to procure a personal financial benefit, reliance by the trustee on an illegality that he had advised to be performed and had represented to be lawful, and reliance on a false balance sheet. I find, therefore, that the foundation for the fraudulent breach of trust claim does exist. Therefore, I see no prospect of the appellant succeeding on an appeal in persuading the court that the master was wrong in deciding that it was open to the respondents to maintain their claim.

No reasonable grounds

- [9] The argument that there were no reasonable grounds for bringing the claim relied upon the legal relationship of the respondents with the title owning company and with the appellant. The appellant's argument is that seven of the nine items of relief stated in the claim form relate to the respondents' claim to be paid the compensation money and an eighth relief seeks a declaration that the respondents were the beneficial owners of all the shares, issued and unissued, of the title holding company. None of these reliefs was available to the respondents, it was argued.

⁶ Cap 235 of the Laws of Saint Vincent & The Grenadines 1990 Revised Edition.

- [10] As regards the ownership of the unissued shares, the appellant argued that legally there could be no beneficial ownership in unissued shares. Counsel cited no authority for this proposition nor did he show why it mattered, even if legally sound, in view of the respondents' contention that they were the beneficial owners of the issued shares. It is not a contention that impacts the application for leave to appeal.
- [11] As regards the ownership of the issued shares, counsel for the appellant submitted that the respondents could only claim beneficial ownership if they had paid for those shares and the shares were issued in the name of another, so as to create a resulting trust. Nowhere in the statement of case is it alleged, counsel argued, that the respondents paid for the issued shares, which the respondents say were registered in the names of the appellant and members of his family. Counsel stated that the nearest the respondents got to that contention was to allege that they paid to incorporate the title holding company but that does not give them beneficial ownership of the shares in the company.
- [12] It seems to me to be an eminently reasonable proposition that the respondents, having paid to incorporate the company and, according to their allegation, having paid for the land which was conveyed to the company, and having had the implicit assurance of the appellant that he would issue shares according to the instructions of the respondents, must be entitled to argue, on a number of bases, that those who held the shares held them for the benefit of the respondents. Equitable notions of dishonest assistance, knowing receipt and the like spring readily to mind as possibly available bases for this allegation. It is worth emphasizing that these are merely preliminary, unresearched and unconsidered thoughts of possibilities and my advertence to these notions must not be taken as any support for them. Subject to that qualification, I am quite clear that there is not the slightest prospect of the appellant succeeding on an appeal in showing that the respondents had no real prospect of succeeding with their case that the shares in the title holding company were held for the benefit of the respondents.
- [13] The ownership of the compensation money, or the entitlement to it, was also included as part of the appellant's case that the respondents had no reasonable ground for bringing

the claim. The essence of the argument was that the compensation money belonged to the title holding company and not to the respondents. The respondents, it was argued, were not entitled to claim payment of this money or to claim that it was held on trust for them or to claim for an account because they never had an interest in the land for which the compensation money became the substitute. The appellant argued that the respondents' statement of case alleged that the title holding company gave a promissory note to the respondents in consideration of the company's obligation to repay the purchase money and this showed that the company owed a debt to the respondents but did not hold the land in trust for them. The appellant likened the situation to the case of an individual who borrows money from a bank to buy a house; the bank may take a charge on the house to secure the debt but the bank gets no legal or beneficial interest in the land.

- [14] Stating it very briefly, so as not to pre-empt possible litigation on this aspect, it seems to me that the question, what were the arrangements between the respondents and the holding company, is fundamentally a question of fact. It was simply not open to the master to determine that the respondents could have no claim to a beneficial interest in the land or the compensation money purely on the basis that the respondents had taken a promissory note from the title holding company to secure repayment of the purchase price. The giving of the promissory note may well support the appellant's contention at the trial, but it may equally be explained away as in no way inconsistent with the trust. The respondents have already proffered the explanation that the giving of the promissory note was a requirement imposed by the bank from which the respondents borrowed the purchase money and (implicitly) that it did not represent the true nature of the arrangements they had with the title holding company. The truth of this explanation needs to be determined at a trial; hence, there must be a trial. It follows that there is no prospect of the appellant succeeding on appeal in showing that the master's decision was wrong.

Conclusion

- [15] On none of the matters that the appellant would argue on appeal do I see the appellant having any real prospect of success. I would therefore refuse the application for leave to

appeal with costs to the respondents, to be assessed before the Registrar of this court and to be paid forthwith after such assessment.

Denys Barrow SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal