EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2010/0001

BETWEEN:

[1] COLIN TURNER
[2] GRAND CITY LIMITED

Appellants

and

TERRANCE SANSOM

Respondent

BEFORE:

The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC with him Mr. Dane Hamilton, Jr. for the Appellants
Ms. E. Ann Henry, QC with her Mrs. Debra Burnette for the Respondent

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2012: October 30;
2013: May 6.

Civil Appeal – Unwritten agreement in relation to the acquisition and development of property by a company – Terms of such agreement – Whether funds provided were a loan to the company or consideration for the issue of shares in the company – Effect of breach of agreement – Whether action maintainable by person with a claim to be registered as shareholder for relief due to a company – Whether non-citizen can acquire title to shares in land-owning company

The first appellant, a citizen of Antigua and Barbuda, and the respondent, a non-national, entered into an unwritten agreement for the acquisition and development by a company of property located in Antigua ("the property") for inter alia the operation of a bar and restaurant thereon. The company was incorporated with all issued shares held by the first appellant pending the grant of an alien's landholding licence to the respondent. The property was purchased in the second appellant's ("the company's") name with the respondent contributing substantially the entire purchase price.

Relations broke down between the first appellant and the respondent so that the respondent was excluded from the operations of the bar and restaurant. The first appellant alleged that the respondent was in breach of the agreement to finance the

completion of the construction of the condominium development on the property and that despite the respondent's claim that he failed to finalise the architectural plans for the development, it was the respondent who failed to provide financing for same. The respondent asserted that the financing of the construction of the condominium development was to be by way of a further loan to the company. He maintained his allegations that the first appellant failed to finalise the architectural plans for the development in breach of their agreement.

The court below was asked to determine whether the parties had agreed that the funds provided by the respondent were to be treated as a loan to the company or as the consideration for the allotment and issue of 52% of the shares in the company to him and whether the respondent had agreed to make further loans to the company for the proposed condominium development on the property. The respondent sought declarations as to the shareholding in the company and an injunction restraining the first appellant from dealing with the assets of the company and orders for accounts of the first appellant's dealings with the company.

The learned judge determined that the issue for determination was whether the evidence supported the respondent's averment that the 48% of the purchase money provided by him was a loan to the first appellant which money was to be used to purchase the property. On that premise, the learned judge concluded that that there was such a term relating to the 48% shareholding of the first appellant. He indicated that the term comprised: (i) 52:48 % shareholding between the respondent and first appellant respectively; (ii) the first appellant did not "earn his equity" as contemplated by the parties and it would be inequitable for him to hold his shareholding without payment therefor; (iii) the first appellant must repay the respondent the loan with respect to his 48% shareholding; and (iv) the first appellant held the respondent's 52% shareholding on trust for him, given the respondent's inability in law to hold same. The learned judge found that there was no agreement regarding the term of the loan or interest and that the first appellant had repudiated the agreement between the parties. He ordered that (1) the first appellant provide an accounting of monies received by him as trustee or agent of the company (2) must pay to the company such sums as may be found due upon taking the said account and (3) an injunction restraining the first appellant from disposing of or dealing with any of the assets of the company within the jurisdiction.

The first appellant appealed the findings and orders of the learned judge.

Held: allowing the appeal and ordering that the matter be remitted to the High Court with no order as to costs, that:

1. The learned judge's conclusions arose from an incorrect reformulation of the first issue as an issue whether there was a loan by the respondent to the first appellant for the acquisition by the first appellant of his shares in the company. This was not pleaded by either of the parties and no evidence was given by either party of such an agreement.

2. The relevant legislation does not prevent a non-citizen from acquiring title to shares in a land-owning company. The title to such shares however is voidable as they are liable to forfeiture at the discretion of the Crown.

Young and Another v Bess (1995) 46 WIR 165 applied.

3. The first appellant was the one responsible for the management and operation of the bar and restaurant. The plea by the respondent that he had been excluded from the business and that the first appellant has failed and/or refused to account to him in respect of the operation of the business carries the necessary implication that the first appellant had been conducting the business of the bar and restaurant. Accordingly, the learned judge's finding that the first appellant did not "earn his equity" cannot stand.

4. A company is the proper claimant to seek relief concerning the protection of its assets except in circumstances where a shareholder may bring a derivative claim on behalf of the company for the relief. At the material time, the respondent was not a shareholder of the company. He was merely a beneficial owner of shares or a person with a right to compel the company to issue shares to him. As such he had no standing to seek such orders.

   Prudential Assurance Co Ltd v. Newman Industries Ltd. and Others (No. 2) [1982] 1 AER 354

5. As the learned judge did not deal with the crucial issues of the terms of the agreement between the parties with respect to the financing of the purchase of the property by the company and whether the respondent had accepted the first appellant's breach of the agreement, both of which could only be established by oral evidence, the matter would be remitted to the High Court for re-trial on certain issues.

JUDGMENT

[1] CARRINGTON JA [AG.]: At the end of the oral arguments in October 2012, the Court suggested to the parties that an attempt be made to resolve the issues arising in this appeal by mediation. Counsel agreed and the Court accordingly reserved its judgment on the appeal pending the outcome of the mediation. During the course of February 2013, counsel for the parties reported to the Chief Registrar that the mediation was not successful. The Court has therefore been required to render its judgment on the appeal.

[2] The first appellant, a citizen of Antigua and Barbuda, and the respondent, an Englishman, entered into an unwritten agreement around May 2005 in relation to the acquisition and development of parcel 11, Block 45 1596B, McKinnons Registration Section ("the property") and the operation of a bar and restaurant thereon under the name "Putters".

[3] The pleadings show that the parties do not dispute that the terms of the agreement included that the property would be purchased and developed through a company. The second appellant ("the company") was incorporated for this purpose and the property was purchased in its name. There appears to be no dispute that the first appellant was to hold 48% of the issued shares in this company and the respondent 52%.

[4] There is also no dispute that the respondent provided the funding of over EC$2.3million towards the purchase price of the property although the exact sum is not agreed.

[5] It was also agreed that the first appellant would manage the company, i.e. the operation of the bar and restaurant and manage and supervise the agreed condominium construction on the property and that the income from the operation of the bar and restaurant would be used to meet its operating expenses.

[6] The pleadings show that the court below was required to resolve issues such as whether the parties had agreed that the funds provided by the respondent were to be treated as a loan to the company or as the consideration for the allotment and issue of 52% of the shares in the company to him and whether the respondent was to make further loans to the company for the proposed condominium development on the property.

[7] There appears to be little dispute that the relationship between the parties broke down around 2007 and that the respondent was excluded from the operation of the bar and restaurant. There are allegations that the first appellant may have taken steps to cause the Government of Antigua and Barbuda to rescind its decision to grant a licence to the respondent to hold the shares in and become a director of the company. The Court was informed by Ms. Henry, QC during the hearing, however, that the relevant licences were eventually granted to the respondent.

[8] The appellants counterclaimed for damages arising from the breach of the respondent's agreement with them to finance the completion of the

construction of the condominium development on the property. The respondent's response was that this financing was to be by way of a further loan to the company and that it was the first appellant who failed to finalise the architectural plans for the development in breach of their agreement. The first appellant denies this and asserts that the plans were finalized but payment for them, which was the responsibility of the respondent, is outstanding.

[9] Witness statements were made by the respondent and the first appellant and his wife. All the witnesses agreed that the first appellant was to get 48% of the shares issued by the company for his provision of services in relation to the management of the business of the company and the construction of the condominiums. The respondent maintained that he was entitled to 52% of the company for providing loans thereto that were repayable over an indeterminate period of years from revenue from the business without interest. The first appellant and his wife stated that the respondent's 52% interest in the company was for his investment in the project.

[10] The transcript of oral evidence from the trial runs to 259 pages. The respondent indicated under cross examination that the first appellant was to get his share of the company based on his agreement that no money was to come out of the company until the loans to the respondent had been paid. Subsequently this was amplified by his response that the first appellant's share of the company was to be the consideration for his carrying out the construction of the condominium project on funding provided by the respondent.

[11] Under cross examination, the first appellant agreed that the agreement between the parties was that he would manage the construction on the property for which he would get 48% of the shareholding in the company.

[12] The evidence of the first appellant under cross examination also revealed that he had written to the Minister of Tourism in Antigua in 2005 indicating that the respondent was willing to finance the construction of the condominiums but required to be the legal owner of shares in the company before he invested more money.

[13] The first appellant subsequently attempted to advance that this letter did not reflect his agreement with the respondent, which was that the respondent was to finance the purchase of the property and the construction of the condominiums on it without being a shareholder in the company. This latter evidence was correctly rejected by the learned judge as being inconsistent with the contemporaneous correspondence from the first appellant himself. The result is that the counterclaim in the court below was bound to fail. The appellants did not seek to appeal the learned judge's dismissal of the counterclaim.

[14] After summarizing the issues arising on the pleadings and the evidence, the learned judge concluded, in my view, correctly, that there were three main issues for him to resolve, the first being whether there was any term of the agreement between the first appellant and the respondent relating to a loan by the respondent for the purchase of the property. However, after further summarizing the pleadings and submissions on this issue, the learned judge stated:

> "At this point, it is necessary to reduce the equation to the following: Does the evidence support the Claimant's [respondent's] averment that the 48% of the purchase money provided by him was a loan to the First Defendant [i.e. first Appellant] which money was to be used to purchase the property now vested in the Second Defendant [i.e. second Appellant]?"[1]

[15] The learned judge then proceeded to analyze the evidence based on this re-formulation of the first issue and concluded that he agreed with the submissions of the respondent that there was such a term relating to the 48% shareholding of the first appellant. He went on to find that the parties had agreed a 52:48% shareholding in the company between the respondent and first appellant respectively; that the first appellant did not "earn his equity" as contemplated by the parties and it would be inequitable for him to hold his shareholding without payment therefor; that the first appellant must repay the respondent the loan with respect to his 48% shareholding; and that the first appellant held the respondent's 52% shareholding on trust for him, given the respondent's inability in law to hold same.

[1] See lower court judgment at p. 39, para. 129.

[16] In my opinion, these findings cannot stand because they stem from an incorrect premise, namely the learned judge's reformulation of the first issue as an issue whether there was a loan by the respondent to the first appellant for the acquisition by the first appellant of his shares in the company. This was not pleaded by either of the parties and no evidence was given by either party of such an agreement.

[17] The learned judge further erred in his conclusion that the first appellant must hold the 52% of the shares of the company in trust for the respondent due to the latter's inability to hold same. Such a finding is inconsistent with the decision of the Privy Council in Young and Another v Bess[2], to which the learned judge's attention was not drawn, that the relevant legislation does not prevent a non-citizen from acquiring title to shares in a land-owning company but that the title to such shares is voidable as they are liable to forfeiture at the discretion of the Crown.

[18] The finding that the first appellant did not "earn his equity" is also surprising in the light of the pleaded cases of the parties. The respondent's pleaded case was that:

> "… in consideration of the work and labour to be provided by the First Defendant [i.e. first Appellant] in the business operated on the Property, initially the operating of the Bar and Restaurant known as "Putters", the first Defendant would be entitled to 48 per cent of the shareholding of the Company."[3]

The amended defence admitted this pleading.

[19] The further plea by the respondent that he had been excluded from the business and that the first appellant has failed and/or refused to account to him in respect of the operation of the business carries the necessary implication that the first appellant had been conducting the business of "Putters". The finding by the learned judge that the first appellant's equity was "not earned" as contemplated by the parties so that he had to repay a loan therefor to the respondent therefore does not appear to be supported by any of the pleadings, the evidence or the relief sought on the claim.

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[2] (1995) 46 WIR 165.

[3] Para. 4 of the claim form.

[20] The more appropriate question for the court below would have been the exact nature of the agreement between the parties as to the entitlement of the first appellant to the shareholding in the company in light of the fact that all the contemplated businesses to be carried out on the property had not materialized at the time of the breach by the first appellant. Regrettably the learned judge did not address this question or, as is demonstrated below, the question whether the agreement still subsists with the result that the first appellant may still have the opportunity to perform his side of the bargain.

[21] Having determined the first issue, the learned judge then addressed the second issue, namely the entitlement of the respondent to the reliefs claimed. The respondent sought declarations as to the shareholding in the company; a declaration as to his entitlement to "the full benefit of all monies invested by him in the second Defendant"[4]; accounts and inquiries concerning the dealing by the first appellant with the monies of the company with consequential orders; an injunction restraining the first appellant from dealing with the assets of the company; and costs.

[22] The learned judge ordered the first appellant to provide an accounting of monies received by him as trustee or agent of the company from and after 1st May 2005; made a declaration that the first appellant must make good all sums received by him as trustee or agent of the company and not duly accounted for with interest thereon at the rate of 5% per annum from the respective dates of receipt therefor until same have been made good; ordered that the first appellant must pay to the company such sums as may be found due upon taking the said account, including interest thereon; and granted an injunction restraining the first appellant from disposing of or dealing with any of the assets of the company within the jurisdiction.

[23] This group of orders was clearly directed towards the protection of the assets of the company. In such circumstances the company is necessarily the proper claimant to seek such relief although in the appropriate circumstances a

[4] Para. 3 of the amended claim form.

shareholder may bring a derivative claim on behalf of the company for the relief.[5]

[24] In the instant case, the respondent was not a shareholder of the company at the time of bringing the claim and as either merely a beneficial owner of shares or a person with a right to compel the company to issue shares to him, he had no standing to seek such orders. The learned judge therefore erred in making these orders and they are accordingly set aside. For the avoidance of doubt, the order outlining the procedure by which the account should be made is also set aside.

[25] The other orders made by the learned judge dealt with the agreement between the first appellant and the respondent and he granted declarations that the terms of the agreement were that the respondent would make a loan with respect to the first appellant's 48% shareholding of the company; that the respondent and first appellant are beneficial owners of 52% and 48% respectively of the shareholding of the company; and that the first appellant must repay to the respondent the 48% of the purchase price less any amount by way of a contribution to such purchase price that is supported by documentation.

[26] As indicated previously in this judgment, these orders appear to be based on the learned judge asking himself the wrong question. They therefore must also be set aside.

[27] The remaining orders of the learned judge are in relation to (i) his finding that there was no agreement regarding the term of the loan or interest and (ii) his finding that the first appellant had repudiated the agreement between the parties.

[28] Logically, the findings concerning the term of the loan and interest could only be in relation to his finding that the agreement was for a loan from the respondent to the first appellant. These findings are therefore equally tainted

[5] See Prudential Assurance Co Ltd v. Newman Industries Ltd. and Others (No. 2) [1982] 1 AER 354.

by his misstatement of the issue concerning the agreement and should be set aside.

[29] There appears to be support in the evidence for his finding that the first appellant repudiated the agreement with the respondent and I would therefore uphold this finding. The learned judge, however, did not make any finding whether this repudiation had been accepted by the respondent thereby bringing the agreement to an end or whether the agreement continues to subsist between the parties subject to any right of the respondent to claim damages for the breach.

[30] I would therefore allow the appeal. However, merely to do so does not bring this matter to any satisfactory conclusion as this Court, because of the misstatement in the reformulation of the main issue by the learned judge, finds itself unable to substitute its own judgment for that of the trial judge on the critical question of the terms of the agreement. This is an issue that had to be determined at least in part by oral evidence of the witnesses and so the trial judge's consideration of the credibility of the witnesses was crucial to its proper determination.

[31] I therefore propose that the matter be remitted to the High Court for re-trial on the following issues:

(a) whether the parties had agreed that the funds provided by the respondent comprised an interest free loan to the company for the purchase of the property in consideration of which the respondent was to be issued 52% of the shares of the company or were provided as consideration for the acquisition by the respondent of 52% of the shares of the company;

(b) whether under the agreement between the first appellant and the respondent, the provision by the first appellant of his services towards the refurbishment and management of "Putters" between 2005 and 2007 entitled him to 48% of the issued shares of the company or if not, to what proportion of such shares, if any, is he entitled; and

(c) whether the respondent ever accepted the repudiation by the first appellant of the agreement or if not, whether their agreement still subsists and if so, what are the remaining terms of the agreement between them.

[32] Although the appellants have been substantially successful on the appeal, in the light of my conclusion that the real nub of this matter is yet to be determined, I do not propose to award them costs of the appeal. I believe the more appropriate order to meet the justice of this case is that the costs of this appeal and of the proceedings from which it arose shall follow the costs of the remitted matter in the High Court.

John Carrington
Justice of Appeal [Ag.]

I concur.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Tyrone Chong
Justice of Appeal [Ag.]