

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED
HIGH COURT OF JUSTICE
(CIVIL)**

GDAHCV2004/0235

BETWEEN

**REYNOLD C. BENJAMIN
R.C. BENJAMIN & CO. A FIRM
WINSTON WHYTE, ET AL**

Claimants

AND

BLUE LAGOON REAL ESTATE CORPORATION

Defendant

Appearances:

Dr. Francis Alexis, Q.C. and Ms. Etienne for the Claimants
Mr. Ian Sandy and Ms. Claudette Joseph for the Defendant

2010: September 15th

JUDGMENT

- [1] **HENRY, J.:** The first and third named claimants, (hereinafter Mr. Benjamin and Mr. Whyte), claim against the defendant unpaid commission of 15% of US\$2.9 million, the amount agreed to be paid to the defendant by the Government of Grenada as compensation for the defendant's property at Lagoon Road, St. George's. Additionally, Mr. Whyte claims against the defendant unpaid monthly stipend of \$5,000.00 for the period he allegedly served as Managing Director along with certain out of pocket expenses amounting to a total of US\$160,990.37.
- [2] Originally there were six claimants with various claims for wages and other fees. On 25th May, 2007, the Court granted summary judgment in favour of the second, fourth, fifth and sixth claimants. It was directed that the claims by the first and third claimants proceed to trial as there were issues of fact.

THE CLAIM FOR 15% COMMISSION

- [3] In the Statement of Claim Mr. Benjamin and Mr. Whyte state that they were, at the material time, by virtue of a Power of Attorney dated 26th August, 1997, the local Directors and agents in Grenada of Blue Lagoon Real Estate Corporation (hereinafter Blue Lagoon). Blue Lagoon, is a company incorporated in the British Virgin Islands and registered in Grenada under the provisions of the Companies Act 1994. Additionally, Mr. Whyte states that he was, at the material time, the Managing Director in Grenada of Blue Lagoon on a monthly stipend of EC\$5,000.00. They state that, as Directors, they were asked by the company to negotiate with the Government of Grenada for payment of compensation on the terms that they will jointly receive a commission of 15% of the amount agreed to be paid; that they conducted negotiations as agreed but, while such negotiations were being conducted, the Trustees for the shareholders, through others and unknown to Benjamin and Whyte, surreptitiously conducted other negotiations and purportedly concluded an agreement with the Government for payment of compensation in the sum of US\$2.9 million. In addition, on or about 5th December, 2002, the Company revoked their appointment as directors and agents; that the Company has made no arrangement with the directors for payment of the commission agreed. They assert that the Company owes them each US\$217,500.00.
- [4] In its Defence, the Company pleads that the Power of Attorney dated 26th August, 1997 was unlawful insofar as it purported to appoint them directors of the Company and in any event that the said Power of Attorney was revoked. The Company further pleaded that it was not aware of any agreement between itself and Mr. Benjamin and Whyte with respect to them negotiating with the Government of Grenada for compensation for the acquisition of the Company's property and in particular denies that any agreement was made between itself and Benjamin and Whyte for the payment to them of 15% commission.
- [5] In the Claimant's Reply, Mr. Benjamin and Whyte averred that even if their appointment as directors was unlawful, the Company is estopped from relying on its own unlawful actions as a defence; that at all material times they were the directors of the Company authorized to conduct business in Grenada and as such conducted negotiations with the Government of Grenada with respect to the sale and/or

acquisition of the Company's assets in Grenada. They indicated their intention to rely on certain documents.

The Commission Agreement

- [6] In paragraph 12 of his witness statement, Mr. Benjamin refers to the arrangement in respect of payment of commission. He stated that he relies on documents #55 to 62 as setting out the dealings between himself and the firm of SJ Berwin & Co. and Richard Slowe. SJ Berwin & Co. held the bearer shares of Blue Lagoon on pledge and sought and obtained the authority of the named trustees, Schroder Trust AG and the beneficiary Dr. Jitka Chvittak to continue to retain the services of R.C. Benjamin & Co. as Attorneys and to contract with Benjamin and Whyte to negotiate a sale of the Company's assets in Grenada for a consideration of 15% commission. He further avers that in pursuit of that agreement the trustee, Schroder Trust AG delivered the original title deeds into his custody and that they are still in his custody.
- [7] On cross-examination it was suggested to him that the arrangement he had with Mr. Slowe was for payment of 15% commission in the event that he was successful in negotiating a sale of the property. His answer was "negotiating a sale either to the Government of Grenada or to a private individual". It was further put to him that the authority granted was to negotiate and report back to Mr. Slowe for approval of the negotiated figure. He agreed. He was then asked if he had negotiated a sale to the Government. His response was that they were in the process of negotiating a sale to the Government when the property was acquired and the arrangement went on for them to negotiate the sum for compensation from the government. On the question of whether the authority given to them to negotiate a sale of the property was exclusive, Mr. Benjamin's evidence is that as far as he was concerned, it was. With regard to the US\$2.9 million agreed, he was asked "would you agree that you did not negotiate that figure?" His response was "we did not negotiate \$2.9 we wanted \$5.5 million to which the Government did not agree or respond."
- [8] The evidence of Mr. Whyte is in agreement with Mr. Benjamin in regard to the extent of the authority granted to them to negotiate a sale.
- [9] The category into which a particular agent falls is to be determined by interpreting his instructions. Both Mr. Benjamin and Mr. Whyte rely on a series of e-mails and faxes

between themselves and Mr. Slowe as setting out the terms of the agreement between the parties.

[10] In response to a fax dated 15th May, 2001, Mr. Benjamin emailed Mr. Slowe in the following terms:

"Mr. Slowe, Let us have the personal, irrevocable authority of the stated beneficiary, if possible, and, or, of ourselves to dispose of the assets of Blue Lagoon Real Estate Corp. in Grenada, at our discretion.....This authority to be directed to Reynold C. Benjamin and Winston M. Whyte, Directors of the Company in Grenada, and will be held by us as a private and confidential document. It should also authorise us to pay the proceed of sale of the company's assets to your firm on behalf of the parties entitled. For our efforts, we are entitled to 20% of consideration received. Please confirm this arrangement."

Mr. Slowe responded by letter dated 21st May, 2001 in the following terms:

"This letter serves as your authority on behalf of ourselves and the beneficiary to remit the proceeds of sale of the Blue Lagoon Estate to SJ Berwin's client account.

You may deduct 10% OF THE PROCEEDS AT SOURCE AND 20% in relation anything you achieve over US\$5million.

SJ Berwin will be responsible to account to Dr. Chvatik for the balance due to her.

.....Subject to that please accept this letter as your authority to proceed on our behalf as attorneys (and to you and Winston Whyte as directors) to negotiate (but not to contract) the disposal of the estate at the best price obtainable. I look forward to receiving your report as to what can be achieved for approval and authority to enter into a binding contract."

[11] The Court was also referred to No. 57 on the claimants' list of documents. It is a copy of a fax dated Thursday May 24, 2001 11:21 am and addressed "Dear Reynold". It reads in part:

"I refer to our telephone conversation last evening and can now confirm that we will pay a flat commission of 15%."

[12] From the above emails and letters, the agreement between the parties was that Mr. Benjamin and Mr. Whyte were authorised to negotiate (but not contract) the disposal of the estate for the best price obtainable. Both Mr. Benjamin and Mr. Whyte in their evidence confirmed that the agreement gave them authority to negotiate a sale of the estate and that any figure negotiated had to be referred to Mr. Slowe for approval. The agreement also provided for a 15% commission to both Mr. Benjamin and Mr. Whyte. It is to be noted that while Mr. Benjamin's email requested an irrevocable authority, this condition was not confirmed and therefore was not a term of the agreement.

[13] The agreement is also silent on whether the authority granted to act as agent in negotiating the sale of the estate was an exclusive one. It is quite open to a property owner to agree that an agent shall have the sole right to dispose of the property and that no one else, whether another agent or the owner himself, shall deal with the property. If however, such a bargain is intended, then clear words must be used. See **Bentall, Hoesley and Baldry v Vicary** [1931] 1 K.B. 253. No such clear word having been made a part of the instructions to the claimants, I hold that the authority granted on the above instructions to act as agent in negotiating a sale of the estate did not create a sole or exclusive agency.

[14] The gist of Mr. Benjamin's and Mr. Whyte's claim to the commission is that the authority granted on the above instructions carried over and became applicable when, in the process of negotiating the sale of the estate, the Government of Grenada compulsorily acquired the property. They claim that the arrangement went on for them to negotiate the sum for compensation from the Government of Grenada. Proof of this new arrangement, they say, can be found in the fact that after the Government published a Notice that the defendant's property was likely to be required for public purpose, Mr. Slowe, by email of 25th June, 2001, had the **Gairy** case forwarded to Mr. Benjamin "as being helpful to our negotiations with the Government of Grenada." Counsel asserts that by this email, Mr. Slowe showed that his commission applied to negotiations for compensation to be paid by the Government. Furthermore, Counsel points out that on 7th May, 2002, Mr. Slowe requested Mr. Benjamin to obtain a valuation of the property; that the email stated "once the valuation is to hand, I would appreciate it if you would let me have a copy before you approach the Government so that we can discuss the appropriate next step to make in the matter". Counsel concludes that this email constitutes clear evidence that the commission applied to negotiations for compensation for the compulsory acquisition of the property. Counsel further asserts that Mr. Benjamin and Mr. Whyte negotiated with the Government asking for compensation of US\$5.5 million. Counsel's position is that Mr. Slowe had Mr. Benjamin very much in the thick of negotiation for compensation for the compulsory acquisition of the property.

[15] Mr. Richard Slowe gave evidence at trial. His position is quite different from that of the two claimants. His evidence is that at the time of his email in June 2001, when he

agreed to the 15% commission, he was already aware of the Government's stated intention to acquire the property, by virtue of the Notice in the Gazette. He stated emphatically that it was quite wrong to say that the commission arrangement applied to acquisition by the Government. According to Mr. Slowe, the purpose of the sale was to avoid having to deal with the Government; that the contractual documents with the claimants was against the background that they were trying to get the Government to withdraw; that the whole intention was to avoid sale to the Government. Mr. Slowe was adamant that he did not authorize Mr. Benjamin to enter into negotiations with the Government other than to dissuade them from proceeding with the acquisition.

[16] With regard to sending Mr. Benjamin the Gairy case, Mr. Slowe's evidence is that he does not recall sending the case, but that they were trying to put pressure on the Government to back off and allow a purchaser to come in and take over. Mr. Slowe denies that his email dated 21st May, 2001 confirmed instructions to Mr. Benjamin to participate in the negotiations with the Government.

[17] When one looks at the confirmed instructions as set out in the correspondence in May and June 2001 against the background of the notice by the Government in the Gazette of 15th December, 2000, a very different picture is presented. If, at the time of the instructions to the claimants to negotiate the sale of the estate, both parties were aware of the Notice in the Gazette, then the evidence of Mr. Slowe that the intention was for the claimants to pressure the Government to back off while they found a buyer seems quite plausible. Even though the evidence pointed out by Counsel for claimants shows that Mr. Benjamin was involved in the negotiations with the Government, there is no clear instructions on any of the documents evidencing an agreement to pay a commission in respect of negotiations with the Government for compensation.

[18] Even if, as they claim, the initial agreement was carried over and applied to negotiations for compensation with the Government, both Mr. Benjamin and Mr. Whyte admit that they did not negotiate the US\$2.9 million compensation agreement with the Government. Their last offer to the Government was for \$5.5 million dollars to which they never received a response. Both Mr. Benjamin and Mr. Whyte accepted that their initial instructions, based on the various correspondences, were to negotiate the sale of the estate and that any figure negotiated by them had to be approved by Mr. Slowe. If their position is that this agreement also applied to negotiations for compensation to be

paid by the Government, then it means that they had to negotiate the figure for compensation and that it had to be approved by Mr. Slowe. Mr. Benjamin and Whyte never fulfilled this condition of the agreement. They never negotiated the compensation amount. I have already concluded that the instructions did not create a sole or exclusive agency, therefore the Trustees were perfectly free to negotiate themselves with the Government, and there would be nothing surreptitious about it. It therefore follows that Mr. Benjamin and Mr. Whyte are not entitled to the commission.

CLAIM BY MR. WHYTE FOR UNPAID STIPEND AND OUT OF POCKET EXPENSES

- [19] Mr. Whyte claims US\$160,990.37 as wages and out of pocket expenses. In his Amended Witness Statement he states that prior to August 26, 1997, he was introduced to Viktor Kozeny by a friend, Peter Capellar. Mr. Kozeny was then sole owner of the company Daventree Limited incorporated in Cyprus, and Havard Capital Management (Worldwide) Limited, registered in the Bahamas. Mr. Whyte discussed the Grenada Yacht Services Hotel project with him and invited him to Grenada and later Mr. Kozeny agreed to purchase the property and to undertake the development.
- [20] According to Mr. Whyte on instruction of Mr. Kozeny and Daventree Limited the company Blue Lagoon Ventures Corp was incorporated in the BVI as a holding company for the company Blue Lagoon Real Estate Corporation of BVI. Blue Lagoon Real Estate Corporation was then registered to do business in Grenada under the provisions of the Companies Act 1994. The Company Blue Lagoon Ventures Corp, according to the statement, is owned 80% by Daventree Limited, 5% by Peter Capeller and 5% by the claimant Winston Whyte. Mr. Whyte also avers that he and Mr. Reynold Benjamin were appointed directors and agents in Grenada for the purposes of the Companies Act 1994. According to him, prior to the registration of defendant company in Grenada, he was the sole agent of the company Daventree Limited in Grenada and acted for the principal and President of Daventree, Viktor Kozeny in the negotiating and arrangement of the purchase of the property. It is against this background that Mr. Whyte asserts that on the registration of the defendant company, he was appointed Managing Director.
- [21] In his evidence Mr. Whyte indicated that he relied, in respect of his appointment as director of the company, on the Power of Attorney filed 29th August, 1997; that it was on Mr. Kozeny's authority that the document was prepared and that in respect of his

appointment as Managing Director, Mr. Kozeny made the recommendation and that it came through Mr. Hans Bodmer, Mr. Kozeny's personal Lawyer. His evidence is that from the time discussions commenced regarding the project, he was identified as the Managing Director. He stated his remuneration as Managing Director as EC\$5,000.00 per/month. However, no documentary evidence was submitted in support of this arrangement.

[22] The defendant's position is that it is not aware of any service contract between itself and Mr. Whyte; that in the absence of any contract of retainer or proof of services rendered at its request, it could not become indebted to Mr. Whyte for the amount claimed. Furthermore, that the appointment of Mr. Benjamin and Mr. Whyte was unlawful.

[23] In the Reply, Mr. Whyte avers that even if their appointment as directors was unlawful, the defendant is estopped from relying on its own unlawful actions in so appointing them. Furthermore, that the defendant, its servants and agents and shareholder Mr. Kozeny and Dr. Chvatik have dealt with both Mr Benjamin and Mr. Whyte as Directors of the company and with Mr. Whyte as Managing Director and have held them out to be such.

[24] Sections 9.1 and 9.7 of the Articles of Association of Blue Lagoon Real Estate Corp. provide:

"9.1 The first directors of the Company shall be elected by the subscribers to the Memorandum; and thereafter, the directors shall be elected by the members for such terms as the members determine.

9.7 With the prior or subsequent approval by a resolution of members, the directors may, by resolution of directors, fix the emoluments of directors with respect to services to be rendered in any capacity to the Company."

[25] From a cursory reading of the above sections, it is clear that the appointment of Mr. Benjamin and Mr. Whyte as directors was not in accordance with the Articles of Association. But does this mean that Mr. Whyte cannot recover stipend for his services.

[26] Mr. Whyte states that he had sole conduct of the management of the company's affairs in Grenada from the inception. The business of the company comprised the running of the marina, negotiations with freehold owners of neighbouring land for the acquisition of those lands, negotiations with existing tenants, negotiations with sublease holders,

negotiations with Government and squatters for removal and resettlement of squatters, and employment of and liaison with experts in planning the development of the project. That these services were performed by Mr. Whyte has not been contradicted, and I accept his evidence. I accept also the evidence that he has not been paid for these services.

[27] Mr. Whyte further directs the court to several pieces of correspondence during the period 1997 and 2000 between himself, as Managing Director and Viktor Kozeny and Hans Bodmer. Some of these letters were copied to Peter Capella the other shareholder. Furthermore when in the year 2000 Schroder Trust wrote to the company informing them that it was now the Trustee of the ultimate owner of the majority of the shares of Blue Lagoon Ventures Corp, it was Mr. Winston Whyte as Managing Director to whom the correspondence was forwarded.

[28] In the case of **In Re Duomatic Ltd.** [1969] 2Ch. 365, it was held that where it could be shown that all the shareholders with the right to attend and vote at a general meeting had assented to some matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in general meeting. Here section 9.1 provided that the first directors shall be elected by the subscribers and thereafter, directors shall be elected by members for such term as the members determine. At the time the company was registered in Grenada the two first directors were in place. All subsequent directors should therefore have been elected by members or shareholders of the company.

[29] Mr. Whyte has no resolution of members evidencing such an election. The shareholders of the company at the time were Viktor Kozeny, Mr. Capella and Mr. Whyte. From his course of dealing with Mr. Whyte, Viktor Kozeny clearly assented to him as Managing Director. The correspondence also shows that Mr. Capella was aware that he was Managing Director. There were not only letters but meetings between them, one in London with the representative of Mr. Kozeny. I find from the evidence that the shareholders were aware that Mr. Whyte held the position of, and performed the function of Managing Director; that not only did they fail to object but, by treating with him in that capacity, they consented. Therefore by reason of the Duomatic principle, such assent is as binding as a resolution in general meeting.

[30] With regard to the amount of the stipend claimed, there is some evidence that Viktor Kozeny assented to the sum. This is evident both from Mr. Whyte's testimony and from the company's accounts which were sent to Mr. Kozeny. However, there is no evidence that the other shareholder, Mr. Capella was aware of or consented to the stipend to be paid to Mr. Whyte. I do not believe that this is fatal, however, since Mr. Whyte has performed the duties of Managing Director, he is entitled to be paid a reasonable sum for his services. The sum of \$5,000.00 is not unreasonable.

[31] Mr. Whyte claimed the stipend from 1997 to March 2004. However, after several changes in the ownership of the shares of the company, in December 2002 Mr. Whyte was notified of the revocation of the Power of Attorney upon which he indicated that he relied upon for his appointment. He therefore could only rightly claim fees in this respect up to December 2002. The company was incorporated in BVI on 27th May, 1997. The Power of Attorney was filed in Grenada on 29th August, 1997. I would therefore award stipend in the amount of \$5,000.00 per/month from September 1997 to December 2002 for a total of EC\$320,000.

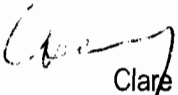
[32] In regard to out of pocket expenses claimed, I do not find this head proved. No bills or receipts evidencing payment have been put into evidence. I therefore make no award for this item claimed.

[33] I therefore find as follows:

1. In respect of the claim by Mr. Benjamin and Mr. Whyte for 15% commission, I find that they are not entitled to the commission claimed and therefore find for the defendant on this aspect of the claim.
2. In respect of the claim by Mr. Whyte for stipend in regard to his services as Managing Director, I find for the said claimant in the sum of EC\$320,000.00
3. In respect of the claim for out of pocket expenses, I find this item has not been proved and therefore find for the defendant dismissing this aspect of the claim.

[34] I award interest on the sum of EC\$320,000.00 at the rate of 6% per/annum from the date of the filing of the claim to judgment.

Parties to file submissions on cost.


Clare Henry
HIGH COURT JUDGE