SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2008/001

BETWEEN:

BANK OF COMMERCE (SAINT KITTS NEVIS)
TRUST AND SAVINGS ASSOCIATION LIMITED

Appellant

and

E. ANTHONY ROSS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Karl Hudson-Phillips, Q.C with Mr. Sylvester Anthony for the appellant
Mr. Courtney Abel for the respondent

2009: May 19;
2010: January 25.

Civil Appeal – Equity and Trusts – absence of consideration – voluntary settlement – whether valid – fiduciary duty of trustee – whether trustee can retain trust property beneficially

In November 1981, the appellant ("the Bank") issued two certificates of deposit in the names of Mill Valley Finance Construction Company NV ("Mill Valley") and Alminton Company NV (Alminton) in the total sum of US$410,000.00 expressed to mature on December 10 1981. To secure the repayment of the Bank's obligations as set out in the certificates of deposit, an equitable mortgage on the Bank's premises was given to Dennis Byron, then a practicing attorney in Saint Christopher and Nevis, as trustee for the companies. This and other transactions were documented by an agreement entitled "Security Agreement: Secured Party in Possession."

By an agreement dated 11th October 1982 ("the 1982 Agreement"), Dennis Byron, acting as Solicitor for James Molans (the authorized agent and attorney for Mill Valley and Alminton), sold, assigned and transferred any and all rights and/or privileges to Anthony

Ross as transferee. Consideration was said to have moved from Anthony Ross, as transferee, to Dennis Byron, as transferor. The 1982 Agreement also certified that Mill Valley and Alminton had reviewed the Agreement and "approved and consented to it, absolutely." In November 1982, Anthony Ross demanded payment of the two certificates of deposit together with interest, costs and expenses. The Bank acknowledged owing the sum of US$410,000.00 plus interest, but denied that Anthony Ross was entitled to that sum.

The Bank was put into liquidation by order of the court in 1985 and a liquidator appointed. The action was set down for trial but nothing further took place until an application for leave to continue the action was filed and subsequently granted on 19th May 2006. At the trial of the action, Mr. Molans stated under cross-examination that Dennis Byron introduced him to Anthony Ross whom he thought would be assigned to act. On 18th December 2007, the court ordered that the sum of US$410,000.00 and interest be paid by the liquidator to Anthony Ross. The Bank has appealed against the finding that the sums owed were due to Anthony Ross (the respondent).

Held: allowing the appeal, setting aside the order of the judge and awarding prescribed costs to the appellant (the Bank) in this court and in the court below:

1. Dennis Byron's only equity in the sums represented by the certificates of deposit was as a trustee holding the equitable mortgage securing payment of the sums represented by the certificates to the owners of the certificates who, based on the face of the certificates, were Alminton and Mill Valley. It is clear therefore that he was not the beneficiary of the funds represented by the certificates of deposit.

2. The 1982 Agreement makes mention only of consideration moving from Anthony Ross as transferee to Dennis Byron, as transferor, but there is no evidence of consideration moving from Dennis Byron to either Alminton or Mill Valley. Notwithstanding Mill Valley's and Alminton's approval and consent to the Agreement, the efficacy of the assignment by these companies falls to be considered in the context of a voluntary settlement.

3. In order to render a voluntary settlement valid, the settler must have done everything which was necessary to be done to transfer the property and render the settlement binding upon him. The absence of endorsement of the certificates of deposit by the named payees (Mill Valley and Alminton) is fatal to the claim of a beneficial interest by Anthony Ross.

   Milroy v Lord 45 ER 1185, (1862) 4 De G. F. & J. 264, applied.

4. At its highest, as a result of the 1982 Agreement, Anthony Ross stood in the shoes of Dennis Byron, as trustee.

5. A trustee may not profit from his fiduciary duties. Even where for one reason or another there is no beneficiary to a trust, trust property cannot go to the trustee.

Snell's Equity, 30th Edition and Lewin on Trusts, 17th Edition referred to.

JUDGMENT

[1] GORDON, J.A. [AG.]: On December 18 2007, after the trial of the suit herein, the trial judge delivered his decision and promised written reasons therefor subsequently. On March 18 2008, the trial judge duly delivered the reasons for his decision in writing.

Background

[2] In November, 1981, Sir Dennis Byron, then a practicing Barrister at Law practicing in the State of Saint Christopher and Nevis, accompanied a Mr. James A. Molans ("Molans"), a U.S. attorney at law, to the appellant bank where certain transactions were accomplished. The net result of those transactions as impacts on this case was that the appellant bank ("the Bank") issued two multiple maturity certificates of deposit, the first, No #958 in the name of Mill Valley Finance Construction Company N.V. ("Mill Valley") and the second, No# 959 in the name of Alminton Company N.V. ("Alminton"). Each certificate of deposit evidenced a deposit in the Bank of US$205,000.00 together with interest at the rate of 10% per annum. Each certificate was dated November 6 1981, and was expressed to mature on December 10 1981, and upon maturity to be payable to the respective payees, Mill Valley and Alminton.

[3] In addition to the certificates of deposit, according to the witness statement of Sir Dennis Byron, the Bank documented its agreements for payment to Alminton and Mill Valley and confirmed that it had given an equitable mortgage on two properties owned by it to secure the payments. This latter fact and the other transactions were documented by an agreement entitled "Security Agreement: Secured Party in Possession" and in a letter dated November 6, 1981 signed by R.

D. H. Lewis on behalf of the Bank. That latter letter does not form part of the record of appeal. What does, however, form a part of the record of appeal is a subsequent letter dated October 13 1982, on this occasion over the signature of Eugene Walwyn acting as president of the Bank, in which the following sentence appears:

> "This letter will also confirm that on the 6th November 1981, this Bank gave to Dennis Byron, as trustee for Alminton Company N.V. and Mill Valley Finance Construction Company N.V., an equitable mortgage on this Bank's premises at the Circus, Basseterre and the White House, St. Peters to secure the repayments of the Bank's obligations as set forth in the two Certificates of Deposit referenced above" [Certificates of Deposit 958 and 959]

[4] On 8th March 1983, the respondent as plaintiff commenced suit against the Bank claiming that:

> "Under an agreement dated the 11th day of October, 1982 and executed by one DENNIS BYRON, Solicitor and agent on behalf of Alminton Company N.V. and Mill Valley Finance Construction Company N.V. the said companies transferred to the Plaintiff certain rights and privileges and the Plaintiff will rely on the terms and conditions contained in the said agreement at the trial of the action."[1]

[5] For the purpose of this judgment, the relevant part of the 11th October 1982, agreement reads as follows:

> "WHEREAS the Transferor, acting in his capacity of Solicitor for James A. Molans (duly authorized agent and Attorney for ALMINTON COMPANY, N.V. and for MILL-VALLEY FINANCE CONSTRUCTION COMPANY, N.V.) did, by document under seal dated the 6th day of November, 1981, and entitled "SECURITY AGREEMENT: SECURED PARTY IN POSSESSION", which document together with other related correspondence signed on the same date as part of the same transaction are attached hereto as Schedule "A", become an equitable mortgagee of certain lands and premises and identified in Schedule "A" attached hereto;
>
> "AND WHEREAS pursuant to the terms and conditions as expressed in the said "Security Agreement", the security was held by the Transferor on trust from ALMINTON COMPANY, N.V. and for MILL-VALLEY FINANCE CONSTRUCTION COMPANY, N.V. jointly and severally;

[1] At paragraph 2 of the statement of claim

> "NOW THIS AGREEMENT WITNESSETH THAT in consideration of the premises and other good and valuable consideration to the Transferor, receipt of which is hereby acknowledged, the Transferor, with the approval and consent of ALMINTON COMPANY, N.V. and MILL-VALLEY FINANCE CONSTRUCTION COMPANY, N.V. as represented by these presents, hereby sell, assign and transfer unto the Transferee and without restricting the generality of the aforementioned, any and all rights and/or privileges, current and/or contingent and the like, at law and/or in equity, to the Transferee, and that the documents referred to in the Schedule including the said memorandum have been handed to the said Transferee to the intent that the within-mentioned sums of Two Hundred and Five Thousand (US$205,000.00) United States Dollars and Two Hundred and Five Thousand (US$205,000.00) United States Dollars respectively as described in Schedule "A" together with interest thereon and all related cost, fees and expenses and the securities therefor should be, and the same are transferred to the said Transferee."

[6] The statement of claim further averred that on the 19th November 1982, the plaintiff demanded payment of the two certificates of deposit together with interest and fees costs and expenses totaling some US$474,960.27. The essence of the defence was that whilst the Bank acknowledged owing the sum of US$410,000.00 and interest, it was denied that the plaintiff, Anthony Ross, was entitled to that sum.

[7] On 9th May 1985, the Bank was put into liquidation by order of the court on a petition filed on the 2nd February 1985, by the Social Security Board of St. Kitts. Mr. Walter Simmonds was appointed Liquidator.

[8] Although on March 20 1984, His Lordship Mr. Justice Lloyd Williams ordered that the action should be set down for trial at the next call-over day nothing further seemed to take place in the action until the filing of an application for leave to continue the action (in the light of the order for liquidation) which leave was granted on 19th May 2006.

[9] As a result of the oral decision handed down on December 18 2007, an order of the court was filed on that same day. The order read in part:

> "It is ordered: 1. That the Liquidator for Defendant Bank pay to the Claimant the sum of US$410,000.00 together with compound interest at 10% per annum from 6th November 1981 until payment in full."

The order for compound interest gave rise to the first challenge to the learned judge's order. Learned counsel for the respondent, however, readily and properly conceded that the order should not have spoken to compound interest, but rather interest at the contractual rate, namely 10% per annum. Indeed, in the written decision of the trial judge he says at paragraph 24:

> "I therefore order the liquidator of the defendant company to pay the sum of US$ 410,000 held on account in the Bank to Mr. Ross the Claimant with interest accruing at 10% per annum from 6th November 1981 until payment in full."[2]

The issues

[10] As I apprehend the disputes between the parties, they may be categorized under the following heads on a cascading basis:

- The assignment, what was the subject matter assigned;
- The winding up order, its effect on the debts of the respondent;
- Interest on any debts found due to the respondent; and
- Costs.

[11] As stated at paragraph 6, the defence of the appellant was not that the monies were not owed, but rather that they were not owed to the respondent. In my view, the trail starts with the "SECURITY AGREEMENT: SECURED PARTY IN POSSESSION" dated 6th November 1981 ("the Security Agreement"), in which the appellant gave to Dennis Byron (as he then was) (described in the agreement as "Secured Party") a security interest "in all money and property this day delivered to and deposited with Secured Party". Nowhere in the Security Agreement is there any reference to the certificates of deposit referred to at paragraph 2 above. The link between the certificates of deposit and the Security Agreement is established

[2] Anthony Ross v Bank of Commerce (St. Kitts & Nevis) Trust and Savings Association ltd. Claim No. SKBHCV 1983/0036 (delivered 18th March, 2008)

by a number of documents, the first of which is the witness statement of Sir Dennis Byron wherein he states at paragraph 3:

> "I was present at the Bank when Molans sought further security for the deposits as supported by Certificates 958 and 959 (referred to in paragraph 2), and the Bank agreed to and so documented its agreements for the payment to Mill Valley and to Alminton and by pledge of original deeds to two properties owned by it and in my opinion were free and clear of any encumbrances together with a security agreement, gave an equitable mortgage on two properties owned by it "to secure the said payments." The documented undertakings of the Bank were as set out in a second letter of November 6, 1981 signed by R.D.H. Lewis on behalf of the Bank. The original deeds to the mortgaged properties were delivered to me by R.D.H. Lewis together with a "Security Agreement: Secured Party in Possession" naming me as Trustee (Secured Party). The document [was] signed, sealed and delivered to me by R.D.H. Lewis on behalf of the Bank."

[12] The letter referred to by Sir Dennis dated November 6 1981, is not a part of the record of appeal though there is a subsequent letter from the Bank dated October 13 1982, over the signature of Eugene Walwyn, an extract from which is quoted at paragraph [3] above.

[13] The Security Agreement is signed by the secretary of the Bank and commences in this fashion:

> "1. In consideration of any financial accommodation given, to be given or continued to the undersigned (hereinafter called Debtor) by Dennis Byron of New Pond Site, Basseterre, St. Kitts, Trustee (hereinafter called Secured Party) and as collateral security for the payment of all debts…"

[14] At the time of the Security Agreement, Sir Dennis, in the words of Molans, was acting as legal counsel to Molans. Molans himself was acting on behalf of clients when he deposited the funds in the Bank for which certificates of deposit Nos. 958 and 959 were issued.

[15] As stated at paragraph [5] above, on the 11th day of October 1982 Sir Dennis Byron entered into an agreement with the respondent, E. Anthony Ross, by the terms of which Sir Dennis as transferor, sold assigned and transferred unto the

respondent any and all rights and/or privileges, current and/or contingent and the like, at law and/or in equity (see paragraph [5] above) to the respondent as transferee. A number of points need to be noted about the Agreement of 11th October 1982 ("the 1982 Agreement"). Firstly, the Transferor (Dennis Byron) was described as "acting in his capacity of Solicitor for James A. Molans (duly authorized agent and Attorney for Alminton Company N.V. and for Mill-Valley Finance Construction Company N.V.)". In other words, Sir Dennis was acting as a representative of an agent and attorney of a principal.

[16] The obvious and crucial question was what could Sir Dennis transfer? Perhaps one of the better known aphorisms in the law is "nemo dat quod non habet". One cannot give that which does not belong to you. In his witness statement, Sir Dennis speaks of he having been named as trustee in the Security Agreement.[3]

[17] The trail becomes more difficult to follow in the witness statement of Molans. He says at paragraph 7 that on October 13, (some two days after the 1982 Agreement) in the presence of Anthony Ross, "I presented Certificates of Deposit Numbers 958 and 959… to the Bank [the appellant] and demanded payment of the amounts due and payable by the Bank." He goes on to recount that the Bank was unable to pay. Then he says, in the same paragraph, "At that meeting, I advised Walwyn that a decision had been taken to assign and transfer all rights and interests of Mill Valley and Alminton in the funds deposited with the Bank and the Certificates of Deposit and security provided by the Bank to Ross [the respondent]". However, in examination-in-chief at the trial Molans says the following when handed the Assignment of 11th October, 1982:

> "Dennis Byron was appointed trustee then became judge. Thought he couldn't continue. Was introduced to Mr. Ross by Mr. Byron. Director of Mill Valley – thought that this would assign Mr. Ross to act."

In cross-examination Molans says:

> "Technically Sir Dennis was trustee for the funds. He was the company's lawyer. He was not my lawyer….. Clearly then attorney was acting on

[3] At paragraph 3

> behalf of Alminton and Mill Valley. Alminton and Mill Valley were my clients. Agreement of 19th November 1982 [sic] is between Dennis Byron and Mr. Ross. Sir Dennis was acting for me as duly authorized agent for Alminton and Mill Valley. Sir Dennis was a trustee for the company…… I don't believe these companies are still in existence. To the best of my knowledge and belief these monies were never paid to either of these companies."

[18] There is one further detail that needs to be highlighted. In the 1982 Agreement, as quoted at paragraph [5] above, it is stated that the sale, assignment and transfer of the rights of the Transferor (Byron) is being done "with the approval and consent of Alminton Company N.V. and Mill-Valley Finance Construction Company N.V. as represented by these presents". On the signature page there appears the legend: "This is to certify that Alminton Company N.V. and Mill-Valley Finance Construction Company N.V. have reviewed this Agreement and have approved and consented to it, absolutely". It therefore is clear to me that the signatures of Alminton and Mill Valley add nothing to the purport of the 1982 Agreement other than to indicate that they have notice of and approve of it. Indeed, this is confirmed by Sir Dennis in his cross-examination where he says:

> "I see the document of assignment signed by me to Anthony Ross in the presence of witness John Kelsick. Third and fourth page of assignment is a Certificate of Approval consent of the companies."

[19] At this point it is necessary to revert to the pleadings, and in particular the statement of claim. Paragraph 2 of the statement of claim stated that under an agreement entered into on the 11th October 1982, "executed by one DENNIS BYRON, Solicitor and agent on behalf of Alminton Company N.V and Mill Valley Finance Construction Company N.V. the said companies transferred to the Plaintiff [respondent] certain rights and privileges and [that] the Plaintiff will rely on the terms and conditions contained in the said agreement…"

[20] The respondent's sole pleaded title to the monies represented by the certificates of deposit is, therefore, the 1982 Agreement. At the risk of repetition, it must be remembered that Sir Dennis' only equity in the sums represented by the certificates of deposit was as a trustee holding the equitable mortgage securing

payment of the sums represented by the certificates to the owners of the certificates who, based on the face of the certificates, were Alminton and Mill Valley.

[21] At paragraph [7] of the written reasons of the trial judge for his decision he says this:

> "[7] Mr. Molans says in his evidence in chief which is unchallenged that on October 13 1982 he had a meeting with the President of the Bank Mr. Eugene Walwyn in the presence of Mr. Ross the Claimant in which he advised Mr. Walwyn that a decision had been taken to assign and transfer all rights and interests of Mill Valley and Almington [sic] in the funds deposited with the Bank and the Certificates of Deposit and security provided by the Bank to Ross. It is noted that the Bank never communicated at the meeting nor over the period which followed prior to the filing of the law suit, that the assignment to Mr. Ross would not be acceptable and that the money would not be paid to the new agent." (Emphasis added)

[22] However, the learned trial judge must have forgotten the evidence of Molans under cross-examination which is reproduced as part of the judge's note of proceedings at page 145 of the record and quoted at paragraph 17 above.

[23] One other issue arises for decision. Could the 1982 Agreement by which Sir Dennis assigned his rights to the respondent have in some way included the rights to the benefit of the certificates of deposit? According to the evidence, both documentary and oral, produced at the trial, at no point is it suggested that the lawyer, Dennis Byron, was ever the beneficiary (by way of assignment or otherwise) of the funds represented by the certificates of deposit. Thus, as a logical inference, the only way that the respondent could have become the beneficiary of those funds was by the 1982 Agreement and the twin facts, namely, that the named beneficiaries signified their consent to the agreement in the following terms: "This is to certify that ALMINTON COMPANY N.V. and MILL-VALLEY FINANCE CONSTRUCTION COMPANY N.V. have reviewed this Agreement and have approved and consented to it, absolutely." And the possibility that the actual certificates of deposit Nos. 958 and 959 were handed over at the

time of the execution of the agreement. It is to be remarked that there is no direct evidence as to the chain of custody of the certificates of deposit, but assuming that they were in the custody of the respondent, then it becomes necessary to determine whether the mere delivery of the certificates without endorsement (and there is no endorsement by the beneficiaries or anyone else on the certificates which were exhibited) is sufficient to transfer the benefit represented by the certificates.

[24] Turner LJ in Milroy v Lord[4] put it this way:

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him."

In this case, there is mention made only of consideration moving from the respondent as transferee to Dennis Byron as transferor in the 1982 Agreement. There is no evidence of consideration moving from Byron to either Alminton or Mill Valley. In the circumstances, the efficacy of any assignment by these latter companies falls to be considered in the context of a voluntary settlement. I am of the clear view that the absence of endorsement of the certificates of deposit by the named payees is fatal to the claim of a beneficial interest by the respondent.

[25] It is clear that the learned trial judge had a measure of discomfort in the order that he made. At paragraph [24] of his written reasons he orders the payment of US$410,000.00 to the respondent but then adds this: "But I will impose certain conditions because of the absence of a perfect documentary trail." He then orders that the pay-out be made not later than 30 days after the court's order has been published in two editions of a popular local newspaper. With great respect to the learned trial judge the only purport of such a condition would be to give Alminton and Mill Valley the opportunity to claim the monies in their names by virtue of the certificates of deposit.

[4] 45 ER 1185 at 1190, (1862) 4 De. G. F. & J. 264

Conclusion

[26] Sir Dennis Byron was appointed a trustee to hold an equitable mortgagee pursuant to the Security Agreement dated 6th November 1981, which mortgage secured the Bank's obligation to redeem the certificates of deposit in the names of Alminton and Mill Valley. In the recitals of the 1982 Agreement pursuant to which Sir Dennis transferred all of his interests acquired by him pursuant to the Security Agreement, it is stated that, "the security was held by the Transferor [Sir Dennis] on trust from ALMINTON COMPANY N.V. and for MILL VALLEY FINANCE CONSTRUCTION COMPANY N.V." At its highest, as a result of the 1982 Agreement, the respondent stood in the shoes of Sir Dennis. Not only is there an absence of a perfect documentary trail to the ownership of the beneficial interest in the US$410,000.00, there is no documentary trail at all.

[27] It is trite law that a trustee may not profit from his fiduciary duties. As Snell's Equity puts it when speaking of fiduciary relationships and fiduciary duties:

> "The distinguishing feature of such a relationship is the fiduciary's duty of loyalty. Thus he must act in good faith, he must not profit from his position, and he must not place himself in a position where his duty and his interest may conflict."[5]

[28] Even where for one reason or another there is no beneficiary to the trust, trust property cannot go to the trustee. In Lewin on Trusts it is put this way:

> "Usually, when all the trusts declared of trust property fail, there is a resulting trust for the settlor or his estate or, where the trusts are declared by will, there is a partial intestacy. Occasionally, however, there is no one to whom the property can result or the testator has died without any next-of-kin, and then the question arises whether the trustees can retain the trust property beneficially. The rule now is that in no circumstances can they do so and that in such a case the Crown or the Duchy of Lancaster or Cornwall takes the trust property as *bona vacantia*. Where the property falls into the intestacy of the testator or settlor this is enacted by section 46(1)(vi) of the Administration of Estates Act 1925. The same rule applies

[5] 30th Edition (2000), at pp. 111-112

where property is held on trust for a corporation which has been dissolved."[6]

[29] In the circumstances, I would allow the appeal and set aside the order of the trial judge in its entirety and order that the respondent do pay to the appellant the costs in the court below on the basis of prescribed costs and of this appeal at two thirds of such prescribed costs on a claim of US$474,960.27, being the amount claimed in the statement of claim.

[30] Given my conclusion above, it becomes unnecessary to resolve the other matters set forth at paragraph [10] above.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Janice George-Creque
Justice of Appeal

[6] 17th Edition, p. 522