

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2004

BETWEEN:

REST HAVEN LIMITED

Appellant

and

KISHU CHARDIRAMANI

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon Mr. Denys Barrow, SC

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

Appearances:

The Appellant appears by Mr. Masfield Nesbitt, a director of the Appellant
Mr. Charles Wilkin, QC with Mr. Damien Kelsick for the Respondent

2005: April 7;
June 27.

JUDGMENT

- [1] **GORDON, J.A.:** At the commencement of the hearing of this appeal Dr. H. Browne, of Counsel, indicated that he had recently been asked to assist the Appellant in this appeal. Having studied the record, Dr. Browne said he had advised the Appellant of the course he was prepared to take. The Appellant was dissatisfied with the advice and as a result Dr Browne asked to be relieved of his obligations in this appeal. The Court gave its consent to Dr. Browne's withdrawal from the matter. The Appellant then asked for an adjournment so that he might secure the services of other Counsel. His application was vehemently resisted by learned Queen's Counsel for the Respondent on the grounds that not only had he had to rearrange his schedule three times to accommodate the Appellant, but also

learned Counsel who he had been advised would appear for the Appellant and who the appellant alleged to be ill had not in any way communicated with him, which, if she were still interested in the matter, would have been the courteous thing to do. The Appellant denied the allegation that he was trying to manipulate the Court and stated that he would argue his own appeal.

[2] The Appellant Company is a family-owned company and was the owner of a hotel called the Rest Haven Inn on the island of Nevis. The shareholders of the Appellant were Mr. Almon Nisbett MBE, now deceased, as to 50% and his five children as to 10% each. The Respondent is a well-known businessman from St. Kitts. It would appear that Mr. Almon Nisbett and the Respondent had been friends for a number of years. In 1993 the Appellant ran into financial difficulties and Mr. Almon Nisbett approached the Respondent for a loan. After some negotiations, the Respondent agreed to lend to the Appellant the sum of \$1,500,000.00 to complete certain renovations of the Appellant's hotel and to pay off an existing mortgage debt. In return the Respondent demanded, and the Appellant agreed to give and did give, a mortgage on the hotel property securing the borrowing of the \$1,500,000.00. The Memorandum of Mortgage recited that it was made in consideration of the Respondent lending to the Appellant the sum of \$1,500,000.00. The learned trial Judge found that the \$1,500,000.00, or substantially that sum, had been disbursed by the Respondent to the benefit of the Appellant (about which see further paragraph 6 below). The first installment of repayment of the loan was due by the Appellant to the Respondent in October 1994. It was paid, but no other installment was.

[3] The Respondent wrote on many occasions requesting that he be paid but he was not. It is to be noted that apart from that first installment payment made by the Appellant in October 1994 no further payments were made by the Appellant to the Respondent against either principal or interest though the Respondent did deduct accrued interest from the loan amount in a sum of almost \$150,000.00. It would appear that the Respondent was a man of commendable patience. On March 1st,

2000 the Respondent gave notice to the Appellant that he intended to proceed with the sale of the Appellant's hotel property under the terms of the Memorandum of Mortgage. The sale was advertised and conducted on the 25th March 2000. There being no other bidders, the Respondent bid the upset price of \$2,000,000.00 which bid was accepted by the auctioneer; and it is that event that triggered the proceedings in this case.

- [4] The Appellant sued the Respondent, inter alia, for damages for breach of contract, namely not lending the monies to the Appellant in the agreed manner; damages for trespass on the property of the Appellant; and setting aside of the sale of the Appellant's property. The Respondent filed a defence and counterclaim seeking a declaration that on the 25th March 2000 he was entitled to exercise the power of sale under the Memorandum of Mortgage; a declaration that he is the beneficial owner of the Rest Haven Hotel consequent upon the knockdown to him of the same at the public auction; payment of the balance of \$1,262,746.23 due on the mortgage debt and interest thereon at the rate of 13% per annum from December 2000, or alternatively, if the sale to the Respondent is void, payment of the sum of \$3,262,746.23 being the balance of the debt secured by the Mortgage on the Appellant's property.
- [5] The learned trial Judge gave judgment for the Respondent declaring him to be the beneficial owner of the Rest Haven Hotel and ordering payment of the sum of \$1,262,746.23. The Appellant was dissatisfied with that judgment and has appealed to this Court on grounds both of factual and legal error on the part of the trial Judge.
- [6] One of the principal bones of contention between the parties as raised before the trial Court was that in February 1994 the Respondent paid the sum of \$700,000.00 to the Nevis Cooperative bank for the account of Mr. Almon Nesbitt, who it will be remembered was a 50% shareholder of the Appellant. The Appellant alleges that the payment of that sum had nothing to do with the Appellant and that such

payment was never authorized and that it was a purely private arrangement between Mr. Almon Nesbitt and the Respondent. The Respondent's evidence on this point is that in about October 1993 Mr. Almon Nesbitt informed him that the Nevis Cooperative Bank was about to foreclose on a property owned by him on Main Street, Charlestown. Mr. Nesbitt requested that \$700,000.00 be paid from the loan facility arranged on behalf of the Appellant to avoid that circumstance. The Respondent met with both Mr. Almon and Mr. Masefield Nesbitt on two occasions who both assured him that if he would agree to this pressing demand, they would undertake to find funds from other sources to complete the renovations of the Rest Haven Inn. The learned trial Judge found as follows on this issue:

"A further claim is that the later advance of \$700,000.00 was as a result of a second agreement with Mr. Nesbitt acting on his own behalf. The claim is that this amount is not owed by Rest Haven. However, the evidence is that all the directors agreed to this disbursement, and repeatedly confirmed in writing its being part of the loan. They cannot come now and repudiate a debt they acknowledged in writing in the absence of some fraud or mistake. There is no hint of fraud as claimed. Nor is there any suggestion in the evidence of negligence, improper conduct or unfairness."

The learned trial Judge did not find Masefield Nesbitt to be truthful in respect of his evidence on this subject. There was more than ample documentary evidence emanating from the directors of the Appellant acknowledging and accepting the statements of account generated by the Respondent and sent to the Appellant which statements contained the disbursement of \$700,000.00. There is no basis or reason for disturbing the learned trial Judge's finding.

- [7] The Appellants also sought to challenge the accounting methods of the Respondent in the preparation of his statements to them. Throughout a period of some six years, during which time the Respondent submitted regular statements of the indebtedness of the Appellant to him, there was never any challenge. Indeed, as stated in the paragraph above there was considerable documentary evidence of the acceptance of those statements of account and not one of rejection. Further, in the cross-examination of Masefield Nesbitt, a director of the

Appellant and its sole witness, he concedes that at no time was the amount claimed by the Respondent ever challenged. The challenge to the balance due by the Appellant to the Respondent is entirely without merit.

[8] A final ground of appeal in this matter was that the Respondent failed to discharge his duty to act in good faith to achieve the best possible price for the hotel at the auction in that the auction had not been adequately advertised. There is no reference to this fact in either the witness statement of Masfield Nesbitt or in his cross-examination. This ground, like the other is entirely without merit.

[9] I would dismiss this appeal with costs on a prescribed costs basis. The order of the trial Judge is confirmed. Learned Queen's Counsel for the Respondent calculated the prescribed costs to be \$100,392.38 for the Court below and \$66,928.26 for the appeal. I adopt that calculation.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal [Ag.]