

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0030

BETWEEN

ALIC HUMPHREY

CLAIMANT

and

GORDON HENRY

DEFENDANT

Appearances:

Mr. Sten Sergeant for the claimant.

Mrs. Ronnia Durham-Balcombe for the defendant.

2017: Sept. 28
Dec. 21

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** Mr. Alic Humphrey and Mr. Gordon Henry are embroiled in a dispute over the alleged breach of a contract for sale of a building and land located at Georgetown, Saint Vincent and the Grenadines. The paper title owner of the property is Bayroad Enterprises Limited ('Bayroad Enterprises') a corporation. Mr. Humphrey said that his deceased parents Mr. Errol Humphrey and Merle Humphrey are the named shareholders. He contended that he and his sister are therefore the beneficial owners of the company.

- [2] Sometime in or around March 2013, Mr. Humphrey agreed to sell and Mr. Henry agreed to purchase the property from him at a price of \$800,000.00. They signed an 'agreement' dated 8th March 2013 by which they purported to conclude that arrangement. It did not capture the legal description of the property. Instead, it referred property situated in Canouan, one of the islands of the Grenadines. The agreement provided that Mr. Henry would pay the purchase price in installments, failing which Mr. Humphrey was entitled to re-possess the property. Mr. Henry has since left the property.
- [3] Mr. Humphrey claimed that Mr. Henry defaulted in making the payments, thereby rendering the agreement null and void. He brought this action seeking orders for recovery of possession, an injunction to restrain Mr. Henry, his servants and agents from remaining on the property, general damages and costs.
- [4] Mr. Henry countered that it was Mr. Humphrey and not he who breached the terms of the contract. He alleged that he paid a total of \$180,615.00 towards the purchase price and carried out extensive repairs and other developmental work to the building. He claimed that he rented part of the subject property and that Mr. Humphrey started collecting the rent without his consent. Mr. Henry contended that Mr. Humphrey is not the registered owner of the property and therefore does not have the necessary legal standing to pursue the claim against him.
- [5] He filed an ancillary claim for recovery of the sums paid towards the purchase price; recovery of rent from February 2015 until the determination of the case; full compensation for the repairs and improvements he made to the building; general damages for breach of contract; interest and costs. I have found Mr. Humphrey liable.

ISSUE

- [6] The issues are:
1. Whether Mr. Humphrey has *locus standi* to bring this claim?
 2. Whether a valid contract was created by the parties?
 3. Whether Mr. Humphrey or Mr. Henry breached the contract?
 4. To what relief is Mr. Humphrey or Mr. Henry entitled?

ANALYSIS

Issue 1 – Does Mr. Humphrey possess the necessary *locus standi* to pursue this claim?

- [7] Mr. Humphrey alleged in his statement of claim that he owns the subject property known as Big Shop. Mr. Henry said that he met Mr. Humphrey in the United States in January 2013 and learnt from him that his father had passed away and left Big Shop to him as an inheritance. He said that he knew that Errol Humphrey owned that 'mall'. pleaded that Mr. Humphrey held himself out as the owner. He called on him to prove that assertion at trial.
- [8] In response, Mr. Humphrey acknowledged¹ that Bayroad Enterprises was the owner. He added that he and his sister Lues Humphrey are the beneficial owners. He testified that his deceased parents Errol and Merle Humphrey were the former beneficial owners. Mr. Humphrey explained that he and his sister are in the process of completing the administration of their father's estate '... to amend the Grant to include more assets ... to pay the legal costs and fees associated as time goes by.'
- [9] Although Mr. Humphrey has conceded that the property is registered in the name of a company, he maintained that he is one of two beneficial owners of that company. At times he claimed to be the sole beneficial owner. He provided no documentary proof of the shareholdings or directorships in Bayroad Enterprises Ltd. as at the date of execution of the agreement between him and Mr. Humphrey.
- [10] By challenging Mr. Humphrey's lack of capacity, Mr. Henry is claiming that Mr. Humphrey is not the right party to seek the reliefs claimed, which naturally flow from a breach of the impugned contract. Mr. Henry submitted that '*locus standi*' is defined² as 'a place of standing in court, a right of appearance in a court of justice, or before a legislative body, on a given question.'
- [11] He quoted from the judgment of Barrow J. in the case of **Edward Phillip Mathurin et al v. Magdalene Wilson et al**³ where His Lordship opined:

¹ In his Reply filed on 1st July 2015.

² In Black's Law Dictionary, 7th Edn. at page 848.

³ SLUHCv1999/026.

‘... a litigant must have some recognizable legal or other interest in the issue not being merely intellectual prospective or indirect. The rational for the requirement of locus standi is well established.’³

[12] Mr. Henry submitted that Mr. Humphrey did not produce any documentary or other evidence to establish that he is:

1. the owner of the subject property;
2. the “owner’s son”; or
3. entitled to an interest in it.

[13] Mr. Henry contended that a company has a legal personality and can own property in its own name. He submitted that there is not one iota of evidence to establish that Mr. Humphrey is entitled to an interest in the subject property. He argued that Mr. Humphrey relies solely on his bare assertion to this effect. He concluded that this is inadequate to surmount the burden and standard of proof on a balance of probabilities.

[14] He pointed out that there is no evidence that Mr. Humphrey’s father owned the property. He submitted that even if there was such evidence, the legal and equitable interests in the property would be vested in the bank. Mr. Henry submitted also that while the mortgage subsists, the legal interest in the property is vested in the Bank while the equitable interests belong to Bayroad Enterprises. He reasoned that Mr. Humphrey’s claim should therefore fail since he has neither a proven interest nor ‘any better legal right in the property’ to bring the present action for possession.

[15] Mr. Humphrey submitted that the lynchpin of contract law since the nineteenth century is the *laissez-faire* principle. He argued that a party is free to enter into a contract as long as he is not a minor, is not at the material time in a state of drunkenness or labouring under some mental disability. He submitted that the learned authors of **Halsbury’s Laws of England**⁴ recognize that parties enter contracts on this good faith principle. These statements outline established principles of law which are not in issue.

⁴ (2012), Contract, Vol. 22, at para. 213.

- [16] Mr. Humphrey submitted further that the *dicta* of Slade LJ in **Banque Financiere de la Cité SA v Westgate Insurance Co Ltd**⁵ articulated the proposition that the Court cannot police the fairness of every commercial contract. He argued that the Court cannot police who may be parties to a contract at the time of making it. He reasoned that it follows logically that the doctrine of privity of contract 'is not concerned with whom ought to have been a party, if they could have been, but ... with whether a person who is not a party cannot as a general rule enforce a contractual right under it.'
- [17] He echoed the learned authors of **Halsbury's Laws of England** regarding the ability of non-parties to invoke 'contractual rights and obligations' under a binding legal agreement. They explained that this is permissible in exceptional cases. They stated:
- 'As a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it. In the first instance, this raises the question of who are the parties to the contract, but even a non-party may sometimes be entitled to enforce the contract, or a particular term of it, under exceptions to the general rule created at common law, or by statute.'⁶
- [18] Mr. Humphrey contended that he was open in his affairs with Mr. Henry, informed him that both his parents were deceased, and that he and his sister Lues Humphrey were the beneficiaries of the subject property. Mr. Henry did not admit this. He indicated that Lues Humphrey 'was brought into the know' when he made the first deposit of US\$10,000.00 towards the purchase price. I understand this to mean that as far as he was aware Ms. Humphrey was not informed of the agreement before then. He acknowledged that Mr. Humphrey told him that he had the right to convey legal title of the property to him, which he accepted and to which he agreed.
- [19] Mr. Humphrey submitted that the Court should have no difficulty in finding as a fact that Mr. Henry knew that Errol Humphrey of Georgetown was the owner of the 'Georgetown Mall' or 'Big Shop' at Mt. Bentick Bay Road in Georgetown and was also his father. While the parties are at odds over

⁵ [1989] 2 All ER 952.

⁶ (2012), Contract, Vol. 22, at para. 206.

the ownership of Big Shop, Mr. Henry acknowledged that Errol Humphrey was Alic Humphrey's father. I accept that Errol Humphrey was known to be his father.

- [20] Mr. Humphrey pointed out that the mortgage to St. Vincent Corporative Bank was disclosed during the negotiations, and was captured in clause 2 of the contract. Mr. Henry admitted as much. Clause 2 states:

‘For the duration of the life of this agreement, the seller will be responsible for making all monetary payments towards the mortgage of the property, so as to alleviate the possibility of sale of property by the financial institution holding said mortgage.’

- [21] Mr. Humphrey submitted that the evidence established that there was a clear meeting of minds between the parties because Mr. Henry was satisfied that he (Mr. Humphrey) could pass title to the land by virtue of his father's interest in it. He implied that this was enough to create a binding contract for the sale as contemplated by the parties. He argued that it is trite law that ownership of property may be held ‘in legal form’; or equitably, in which case such interest can be converted to a legal one.

- [22] Mr. Humphrey's position appears to be two-pronged. On the one hand, he invites the court to find that he acted legitimately on Bayroad Enterprises Ltd.'s behalf when he purported to execute the agreement for the sale of Big Shop. On the other hand, he suggests that he owns an interest in the company which makes him the *de facto* owner of the company's shares absolutely or jointly with Lues Humphrey. Based on this ‘interest’ he contended that he was entitled to dispose of the property by sale. This dual approach obliges the court to evaluate his legal capacity in both scenarios. I will first look at his claim that he acted on the company's behalf.

Locus standi – servant, agent or principal of Bayroad Enterprises Ltd.

- [23] Mr. Humphrey cited the case of **Kelson Layne v Alison Balcombe et al**⁷ in which Thom J. adopted the pronouncement of Lord Denning MR in **Moorgate Mercantile Company Ltd v Twitchings**⁸. In both cases, the court addressed the concept of estoppel and opined that a litigant

⁷ SVGHCVPT2006/186 at p. 13.

⁸ [1976] 3 WLR 66 at p.84.

will not be permitted to escape the consequences of his promises and behavior whereby he leads another person to accept a certain 'reality'. They explained that the promisor will be bound by his representations if injustice would result from him reneging. Lord Denning stated:

'Estoppel is not a rule of evidence, it is not a cause of action. It is a principle of justice and equity. It comes to this, when a man by his words or conduct had led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust and inequitable to do so.'

- [24] In the **Kelson Layne** case, the parties agreed to the sale and purchase of land. The buyer was allowed to occupy the land and cultivate it for a period of time, during which he was expected to pay for the land. He failed to make payment within 3 years of going into occupation. The agreement did not stipulate a deadline for payment of the purchase price. The seller re-entered the land. The buyer then brought action against him for specific performance of the agreement. It appears that the registered owner of the land was a company which was also named as defendant along with the managing director.
- [25] Thom J. held that two years was a reasonable period for the seller to wait on the buyer to make full payment. She denied the 'buyer's' claim for an order of specific performance of the contract. The judgment did not turn on whether the managing director had authority to sell the land. That issue did not arise. Therefore, that case does not assist this court in determining whether Mr. Humphrey:
1. was authorized by Bayroad Enterprises to:
 - a) contract to sell the subject property to Mr. Henry; or
 - b) bring this claim seeking possession of the subject property and injunctive relief; or
 2. possesses the requisite legal capacity to pursue this claim for damages for breach of contract.
- [26] The determination of whether Mr. Humphrey has the legal capacity to pursue the instant claim involves consideration of the applicable company and contract law principles. Mr. Humphrey claimed recovery of possession of Big Shop, an injunction to restrain Mr. Henry, his servants and agents from remaining there and general damages for breach of contract.
- [27] The court must examine the facts to decide who is entitled to seek those reliefs from the court and whether Mr. Humphrey is that person. Part of this necessitates an evaluation of whether Mr.

Humphrey could have entered a valid contract (in his personal capacity) to sell the subject property to Mr. Henry.

[28] The subject property was registered in the name of Bayroad Enterprises as evidenced by Deed of Conveyance No. 2623 of 2003⁹ a copy of which was exhibited by Mr. Humphrey. A copy of Deed of Mortgage No. 2628 of 2003¹⁰ was also provided. It revealed that the property was subsequently mortgaged to the Saint Vincent Co-operative Bank Limited. The mortgage was executed by Errol Humphrey and Merle Humphrey as director and secretary respectively of Bayroad Enterprises Ltd.

[29] I deduce that they were officers of the company at that time. It is common ground that Mr. Errol Humphrey is deceased. Mr. Henry did not refute that Merle Humphrey is also deceased. However, no death certificate or other proof of her demise has been produced. It was therefore not established. In any event, no documentary proof was provided of the shareholdings or directorship in the company at the date of the impugned contract between Alic Humphrey and Mr. Henry.

[30] The Companies Act¹¹ provides that a company's directors shall exercise its powers through employees or agents of the company. In the words of Gordon JA in the Court of Appeal judgment in **John Paul De Joria et al v Gigi Osco-Bingeman et al**¹²:

'The fundamental and underlying principle of company law is that a company is a separate and distinct legal entity from its incorporators. As it is put in Halsbury's Laws of England¹³:

"Effect of incorporation. From the date of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become

⁹ Registered on the 13th August 2003.

¹⁰ Registered on the 13th August 2003.

¹¹ Cap. 143 of the Revised Laws of Saint Vincent and the Grenadines, 2009, section 58.

¹² Civil Appeal No. 4 of 2005 (unreported) judgment delivered on 24th April, 2006, at para. 18.

¹³ 4th Ed. 1996 Reissue Vol 7 (1) paragraph 92.

members of the company, are a body corporate by the name contained in the memorandum, separate and distinct from individual members of the company.”

The usual authority quoted for the above proposition is **Salomon v A. Salomon & Co Ltd ([1897] AC 22, ...’**

- [31] Those statements summarize the applicable law and practice governing the conduct of a company’s business. The sale of the company’s property must therefore be conducted by its directors or duly authorized servants or agents.
- [32] There is no evidence that Alic Humphrey is or was a shareholder, director, other officer or agent of Bayroad Enterprises Ltd. Even if the court accepts his *viva voce* evidence that Errol Humphrey was the main shareholder, this does not necessarily supply full and complete details about the company’s shareholdings, liabilities or other obligations that would irrefutably lead to a finding that Alic Humphrey has inherited all shareholdings in the company. It falls short of establishing Mr. Humphrey’s claim to ownership of any interest in the company.
- [33] Moreover, no company’s resolutions, share records, notices of directors or other company records were produced for Bayroad Enterprises which shed light on the state of its business that creates a connection between it and Mr. Humphrey, to confirm his assertions that he acted for the company. In those circumstances, Mr. Humphrey has failed to establish that he had such interests in Bayroad Enterprises and/or Big Shop which would authorize him to execute a contract for sale on the company’s behalf.
- [34] While the law makes provision for the corporate veil to be pierced to identify shareholders who may in limited circumstances, be personally charged with a company’s liabilities, that approach is not contemplated in the instant case and was not advocated by either party. In any event, there is insufficient factual basis on which to arrive at an authoritative finding regarding such matters.
- [35] Significantly, Lues Humphrey was not a witness. There is very little evidence that she agreed to or acquiesced in the proposed sale of the property. Even if she did, in the absence of proof that Mr. Humphrey was authorized prospectively or retrospectively, to contract on behalf of Bayroad Enterprises Ltd., his authority for doing so is not anchored in law.

[36] Mr. Humphrey made submissions regarding privity of contract. He acknowledged that obligations and rights under a contract apply only to the parties with few exceptions. He referenced **Halsbury's Laws of England**¹⁴ where the learned authors write:

'The general common law rule is that a contract cannot impose burdens on anybody who is not a party to it. A and B cannot contract that C shall be subject to an obligation to perform in favour of B even if C has actual notice of that provision... On the other hand, the agreement between A and B might impose liabilities on C indirectly, as for instance where it creates in favour of B, a lien, or a lease, or gives rise to a constructive trust affecting property, and C later acquires the property in question...'.¹⁴

[37] Mr. Humphrey correctly set out the applicable law regarding privity of contract. The agreement between Mr. Humphrey and Mr. Henry was produced in evidence. Paragraph 1 identified the parties. It states:

'I Alic Humphrey (herein after known as "the seller"), owner of the property in Georgetown known as the Mt. Bentick Big Shop," will sell this property (Deed #534/2000) to Mr. Gordon Henry (herein after known as "the purchaser") of Georgetown.'

[38] It made no mention of Bayroad Enterprises or Lues Humphrey. Mr. Humphrey and Mr. Henry acknowledged that the signatures which respectively appear in the signature clause above the words 'Seller' and 'Buyer' are theirs. By signing the 'agreement' as owner and seller of the subject property, Mr. Humphrey excluded Bayroad Enterprises from the arrangement. There is nothing in it to suggest that it was in the parties' contemplation that the company was even relevant.

[39] In his Defence, Mr. Henry directly challenged Mr. Humphrey's claim to be the owner. However, throughout his testimony he referred to Mr. Humphrey as the owner. His submissions on the *locus standi* point are centred on this conflict. From all of the evidence, it appears that when he signed the agreement he was unaware that the property was owned by Bayroad Enterprises. Likewise, it seems that Mr. Humphrey conducted all of his dealings with Mr. Henry as if he was the sole owner.

¹⁴ (2012), Contract, Vol. 22, at para. 329.

[40] I note that the parties testified Mr. Humphrey was making payments to the bank towards the Bayroad Enterprises' mortgage. Mr. Humphrey did not indicate the contractual or other basis of that arrangement. The court will not speculate. Suffice it to say that the bank's willingness to treat with Mr. Humphrey does not on its face establish that he was acting on authority from Bayroad Enterprises. This was not proved.

[41] It does not escape the court's attention that Mr. Humphrey appeared poised to pursue this claim without making mention of Bayroad Enterprises' interest in the subject property. In this regard, he only introduced documentation and statements about that after Mr. Henry filed his Defence. He implied that as a beneficiary of his father's estate he is entitled in law to obtain a part or all of his father's shares in Bayroad Enterprises Ltd.

[42] Mr. Humphrey hinted that he thereby became full or partial owner of the property known as Big Shop, and therefore had legal authority to sell it and to initiate this claim to recover possession, injunctive relief and damages for breach of contract. This argument pre-supposes that on his father's demise, he (Alic) automatically:

1. succeeds him (Errol) as owner of the shares; and
2. replaces any director or directors of the company.

[43] This is not so. Errol Humphrey's shares in the company (if any) would have passed to his heirs through administrative and legal processes, either:

1. in accordance with the Administration of Estates Act,¹⁵ if he did not make a will disposing of them; or
2. pursuant to his wishes as outlined in a Will.

[44] If Errol Humphrey was a director at the time of his death, that directorship would have lapsed, necessitating the appointment of a replacement director by company resolution passed in accordance with the Companies Act or the company's by-laws.¹⁶ Similarly, a decision to sell the subject property, to contract for its sale, to bring an action to recover possession or appointing an

¹⁵ Cap. 486 of the Revised Laws of Saint Vincent and the Grenadines, 2009, section 62.

¹⁶ Sections 72 and 75 of the Companies Act.

agent to do so would have had to be made in like fashion. No evidence has been presented which demonstrates that any such actions were taken by Bayroad Enterprises.

[45] Another workable alternative would require that Bayroad Enterprises be joined as a claimant in this action. It was not. The company could also have adopted the sale and purchase agreement as its own, thereby retroactively validating Mr. Humphrey's bid to sell the subject property. There is no evidence that this was done.

[46] The court cannot ignore the very real interest that the Saint Vincent Co-operative Bank had in the subject property at the material times. No indication was given as to whether the mortgage is being serviced or has been discharged.

[47] In light of all the evidence, I am not satisfied that Bayroad Enterprises authorized Mr. Humphrey to enter into a contract with Mr. Henry for the sale of the subject property or to initiate this action against Mr. Henry. There is no satisfactory proof of either. Mr. Humphrey's *ipsi dixit* would not suffice in either instance. Furthermore, there is no assertion that Bayroad Enterprises approved Mr. Humphrey's actions retroactively.

[48] Mr. Humphrey has failed to satisfactorily establish any basis on which he was entitled to:

1. contract with Mr. Henry for sale of Big Shop; or
2. prosecute this claim for recovery of possession, injunctive relief or breach of contract;

as principal, agent or servant of Bayroad Enterprises.

[49] I find that there is none. In the premises, Mr. Humphrey has failed to prove that he has the necessary *locus standi* to pursue this claim for those reliefs. Accordingly, in respect of those limbs, his claim fails and is dismissed.

Locus standi – beneficiary

[50] The parties have each advanced claims in respect of the impugned agreement. Mr. Henry has acknowledged its existence and viability. To the extent that their respective claims for breach of

contract are unrelated to Bayroad Enterprises' independent legal personality, different legal considerations may apply on the issue of *locus standi*. In this regard, Mr. Humphrey represented that he has an interest in the subject property which is separate and apart from Bayroad Enterprises'. I now turn to examine that aspect of his claim as it relates to Mr. Henry's *locus standi* objection.

[51] Mr. Humphrey invited the court to hold that the agreement was based on his entitlement as a beneficiary. He submitted that in such circumstances, he would be able to enter into a contract for sale of the property. He cited the Guyana Court of Appeal's judgment in **Shiek Mohamed Adam v Mohamed Mursalin**¹⁷ as authority for that position.

[52] He quoted Chief Justice George extensively, who stated:

'...a defaulting defendant who has a right to take action to have title vested in him ought not to be permitted to take advantage of the technicality of the legal estate not being in him to avoid the consequences of a suit for specific performance (see *Elliot v Pierson* [1948] 1 All ER 939).

The fact at the time of the making of an agreement, a beneficiary, in the circumstances of the deceased defendant, may only have had a beneficial interest in land is not a defect in the title so as to prevent him from passing transport of that interest...

Indeed, there is ample authority for the view that it is incumbent upon a vendor to use his best endeavours in order to ensure that title to property he has contracted to sell is in fact transferred to the purchaser (see *Engell v Fitch* (1868) LR 3 QB 314, *Bain v Fotherhill* (1874) LR 7 HL 158 and *Malhotra v Choudhury* [1979] 1 All ER 186...'.¹⁸

[53] The court notes that the position of the seller in **Shiek Mohamed Adam v Mohamed Mursalin** was somewhat different from Mr. Humphrey's. Firstly, in that case, legal title to the property was not registered or vested in a company as in the instant case, but rather in an individual's estate. Secondly, the relevant beneficial interest belonged to a gentleman who inherited land and had a duty and a viable legal avenue to convert the equitable interest into a legal one.

¹⁷ (1989) 43 WIR 257.

¹⁸ At p. 270 b – e.

- [54] That equitable interest was convertible to a legal interest by the seller (the beneficial owner) applying for letters of administration *cum testament annexo de bonis non*. In fact, the court found that even though it was incumbent on him to do so to effect transfer of his interest to the buyer, he did not. Thirdly, no doubt about his interest in the land arose in that case as in the instant matter. Unlike the beneficiary there, Mr. Humphrey has not satisfactorily established that he is entitled to the shares in Bayroad Enterprises and by extension some proprietary interest in Big Shop. For those reasons, that case does not advance Mr. Humphrey's claim to entitlement as a beneficiary and without more, does not establish his legal capacity to personally sue under the contract.
- [55] Mr. Humphrey argued that Mr. Henry admitted that Lues was informed of the contract between them. He contended that the written agreement reveals that Lues Humphrey was a witness to the execution. He submitted that a legal question arises from her absence as a party to the claim, namely whether she was bound (by the agreement) to pass title if Mr. Henry had completed the payments. Mr. Humphrey contended that she was.
- [56] He submitted that he can find no authority at common law or statute for the proposition that a contract is invalid, void, voidable, illegal or otherwise if it is not entered into by both beneficiaries who are entitled to beneficial interests in it. He contended that the case of **Murphy v Quigg**¹⁹ is instructive. He explained that the case concerned the validity of a trust of shares held by a non-citizen contrary to section 14(2) of the Non-Citizen Land Holding Regulation Act of Antigua and Barbuda.
- [57] In delivering judgment, Sir Vincent Floissiac CJ opined:
- ‘... the fact that a contract, trust or other transaction is illegal in the sense that it is prohibited by statute or at common law does not necessarily invalidate every claim or title which is contaminated by the illegal transaction. **A plaintiff's claim is enforceable if it is based on a legal or equitable title or on facts which generate such a title and if the plaintiff can sustain the claim solely by reference to that title or to those facts and without the need to disclose, invoke or rely on illegality.**’²⁰ (bold added)

¹⁹ (1996) 54 WIR 162.

²⁰ At p.169 *j* - p.170 (a).

[58] Relying on that pronouncement Mr. Humphrey argued that neither party in the case at bar has pleaded or relied on illegality at common law or statute. He submitted that ‘the reality and effect of what the parties agreed is rooted in the correlation between the common law and equity’. He reasoned that if one beneficiary entered into a contract for sale of property in which the other party could have been a party, and receives money in pursuance of such contract, the first beneficiary becomes a trustee of those funds. He argued that the second beneficiary is not without an equitable remedy. He submitted that in such a case the first beneficiary has a duty to account to the second for the purchase monies.

[59] These submissions highlight the fundamental question of whether a de facto shareholder (if Mr. Humphrey can be so characterized) can legally contract to sell the company’s property. No legal authority has been advanced which demonstrates that a shareholder may do so except where he is acting as a principal, agent or servant of the company. The answer will illuminate a pathway to determining if Mr. Humphrey has the legal capacity in his own right to take action in this claim.

[60] That issue was considered in the **John Paul De Joria case**. The Court of Appeal responded in the negative. Gordon JA framed the issue as follows:

‘... whether a company, wholly owned by a single shareholder can be forced to perform obligations undertaken by the shareholder in his own name.’

Repeating the words of Wilmer LJ in **Tunstall v Steigmann**²¹ he remarked:

‘The problem which has arisen in this case is one of engaging simplicity, but I do not find it at all easy of solution. ... Even the holder of one hundred per cent of the shares in accompany does not by such holding become so identified with the company that he or she can be said to carry on the business of the company.’

[61] I wholeheartedly adopt and apply that ruling to the instant case. Mr. Humphrey has adduced no facts which prove that he exercised such control over Bayroad Enterprises’ operations either factually or legally which would have empowered him to finalize a binding contract for the sale of the subject property.

²¹ [1962] 2 All ER 417.

- [62] Moreover, no birth records, Will, Letters of Administration or other probate documentation were produced to enable the court to make conclusive findings of fact (on a balance of probabilities) regarding Mr. Humphrey's or his sister Lues' 'interests' in the subject property. Mr. Humphrey disclosed no such documentation in his standard disclosure. In those circumstances, he has fallen short of proving that he and/or his sister was or is a 'beneficiary' with interests in the company and/or the subject property.
- [63] Even if the court accepts that Mr. Humphrey and Lues are the sole beneficiaries of Errol Humphrey's estate and entitled to ownership of his shares in Bayroad Enterprises, this does not without more:
1. answer whether Lues Humphrey agreed to or acquiesced in his actions;
 2. provide proof of the complete shareholdings in the company;
 3. prove that Bayroad Enterprises Ltd. owned the interests in the property which Mr. Humphrey was purporting to sell;
 4. regularize Mr. Humphrey's purported exercise of company powers to contract for sale of the property to Mr. Henry.
- [64] Mr. Humphrey has failed to satisfactorily establish an equitable or legal title in the subject property or any other basis on which he could contract with Mr. Henry for its sale. He admitted that he is named as owner in the agreement and he acknowledged that Bayroad Enterprises was the registered owner. Both scenarios are mutually exclusive.
- [65] The parties are agreed that Mr. Henry vacated the property in or about 2016. Mr. Humphrey's claim for recovery of possession is therefore not maintainable. Similarly, Mr. Humphrey made no allegations that Mr. Henry has threatened to re-occupy Big Shop. The claim for injunctive relief is therefore factually baseless.
- [66] Mr. Humphrey's claim for damages for breach of contract is predicated on the premise that he and Mr. Henry executed an enforceable contract. As indicated earlier, by signing the contract for sale as owner, Mr. Humphrey effectively purported to assume the role of a director, agent or servant of Bayroad Enterprises. There is no evidence that he disclosed this to Mr. Henry. I infer that he did not.

[67] In the absence of evidence that he was authorized to represent the company in this manner, I find that the contract was unenforceable as against Bayroad Enterprises. By identifying himself in the agreement as owner of the subject property Mr. Humphrey was not merely undertaking to take all necessary steps to transfer the property at the appointed time. He was representing that he owned the property (which he did not) and agreeing to sell it in that capacity.

[68] In the **De Joria case**, the Court of Appeal considered a scenario involving two individuals who each owned controlling interests in separate companies. They executed an agreement by which they agreed that on the death of one shareholder, his executor would be bound to sell his shares to the survivor. Having found that the companies were not bound by that agreement, the Court also considered whether it should imply or supply terms to the agreement to ensure its commercial effectiveness.

[69] The Court applied the ‘necessity test’ crafted by the House of Lords in **Liverpool City Council v Irvin**²² and applied in **Shell U.K. Ltd v Lostock Garage Ltd**²³. In the latter case, Ormrod LJ noted that ‘... where the parties have entered into a carefully drafted written contract containing the detailed terms agreed between them ... the court should only imply a term or terms if it is “necessary” to do so.’

[70] The Court of Appeal in the **De Joria case** examined the testimony of the lawyer who drafted the agreement. He said that his instructions were to prepare a contract which was binding on them and on the companies. This testimony did not convince the Court to imply any term into the agreement to mandating the companies to ‘procure that their wholly owned companies deal with the shares in accordance with the agreement.’ It declined to do so.

[71] It also declared that there was nothing ‘intrinsically illegal’ with the agreement; and that it was valid and enforceable to its tenor. It qualified this pronouncement by noting approvingly that the trial judge had ruled that the contract was not valid and enforceable as a matter of Anguilla law; while

²² [1976] 2 WLR 562.

²³ [1976] 1 WLR 1187.

making it clear that her decision related specifically to the enforceability of the contract in the context of the *lis* between the companies and other parties in the claim; and did not go to the legality of the contract in its strict sense.

[72] The parties testified that the agreement in this matter was drafted by Mr. Henry. He incorporated details about the mortgage but made no reference to the registered owner. It is safe to infer that he did not know that it was Bayroad Enterprises. It provided for payment of the purchase price of \$800,000.00 over a period of time starting with an initial down payment of US\$10,000.00. By signing it, Mr. Humphrey signaled his agreement with its contents. In fact, both men operated carried into effect aspects of the agreement. In this regard, Mr. Humphrey was put into possession of the property and he made payments to Mr. Humphrey.

[73] It is important to note the distinguishing features between the contracting shareholders in the **De Joria case** and Mr. Humphrey. Firstly, there was no doubt about the shareholder's interests in the companies in the former whereas much exists in this case. Secondly, the evidence adduced in the **De Joria** case established on a balance of probabilities that they shareholders held a commanding share in the respective companies. There is not one scintilla of evidence along such lines in the case at bar. Just as significantly, there is no hint of the existence of such evidence even in Mr. Humphrey's list of documents.

[74] Applying the referenced principles to the case at bar, I am constrained to hold that this court may not imply any terms into the agreement between the parties to effect commercial efficacy. Moreover, such course could create a myriad of legal problems referenced previously. As noted before, Mr. Humphrey has not produced any credible evidentiary proof that establishes either that Errol Humphrey is/was a significant or controlling shareholder of the company at the relevant times; or in such case, his entitlement to succeed Errol Humphrey in either capacity.

[75] Regarding Mr. Humphrey's contentions about the creation of a trust, I make the observation that even if Ms. Humphrey could potentially have a claim against Mr. Humphrey in trust for the monies he received from Mr. Henry, this does not validate his legal standing. Likewise, Mr. Henry's

acquiescence in proceeding to contract in the face of the stated disclosures does not legitimize an irregular or void contract. In addition, the questions surrounding potential interests of other shareholders remain unanswered.

[76] Mr. Henry submitted that Mr. Humphrey could not make a valid agreement for the sale of the property as he had no title to the land. Mr. Henry contended that the legal rule expressed in Latin as *nemo dat quod non habet* was applicable. He stated that the legal proposition expressed by that rule is to the effect that a person cannot in law purport to sell, pass title to, make a trust of or authorize another to exercise authority over property to which he has no legal title.

[77] He relied on the decisions in **Donald Locker v Charles Weekes et al**²⁴ and **James Ronald Webster et al v Beryl St Clair Fleming (as personal representative of the estate of Samuel Henry Hodge)**²⁵ which he advanced as being illustrative of that concept. In the **Donald Locker** case Redhead J. ruled that a party who did not own a particular piece of land could not legitimately give anyone permission to occupy it; and accordingly such permission was of no effect, null and void.

[78] In **James Ronald Webster** case the Court of Appeal held that a potential 'beneficiary' could not and had no right to pass title to property which formed part of his grandfather's unadministered estate; and further that such a sale was of no effect. Both authorities are authoritative and the latter is binding on this court.

[79] In light of the foregoing, I have no hesitation in finding that the agreement between Mr. Humphrey and Mr. Henry was void and unenforceable. It created no legal obligations on Mr. Henry to pay for property in which Mr. Humphrey had no discernible legal or equitable interest. In those circumstances, there is no basis on which he could legitimately prosecute this claim against Mr. Henry. I so hold.

Issue 2 – Did the parties create a valid contract?

[80] This issue was explored as part of the considerations under the previous headings. Mr. Humphrey

²⁴ MNIHCV2008/0015 (unreported)

²⁵ [1995] ECSCJ No. 32.

made further submissions which were not considered above. He contended that Mr. Henry has alleged no misrepresentation as a basis for rescission of the agreement. That is so. He added that Mr. Henry is therefore estopped from resiling from this position - presumably from challenging Mr. Humphrey's claim to be the owner. Mr. Humphrey submitted that there was consensus between the parties that he had a sufficient equitable interest to create legal title to pass the property.

[81] He argued that for this reason, Mr. Henry would be coming to equity with unclean hands if he demands repayment of monies paid under the contract, solely because he (Mr. Humphrey) did not have legal title to the property at the time of contract.

[82] I understand this submission to mean that because Mr. Henry:

1. at the time of contract, accepted Mr. Humphrey's representations that he was the owner, with all legal rights to sell the property; and
2. has not alleged misrepresentation in his counterclaim;

he is barred in equity, from escaping legal obligations under the agreement. Mr. Humphrey advanced no authority for this submission. I am aware of none.

[83] The learned authors of Halsbury's Laws of England²⁶ described the doctrine as follows:

'A court of equity refuses relief to a claimant whose conduct in regard to the subject matter of the litigation has been improper. ... The maxim is not to be applied too rigorously. If it is shown that A has made a voluntary transfer of property into the name of B, intending to conceal his (A's) interest in the property for a fraudulent or illegal purpose, but nevertheless vesting the legal title in B, it might be thought that the clean hands maxim would prevent A from asserting an equitable interest, whether the transaction took the form of a transfer of property by A to B, or the purchase of property by A in the name of B. It is settled, however, that it depends upon whether A is forced to plead or rely on the fraudulent or illegal purpose. ... A can enforce his equitable interest even though the court may be aware of the fraudulent or illegal purpose, and even though this purpose has been carried out.'

²⁶ Equitable Jurisdiction (Volume 47 (2014) Para 112.

[84] It seems to me that Mr. Humphrey may not avail himself of the benefits of this maxim as articulated by him. I find nothing in Mr. Henry's conduct which can properly be characterized as being improper within the meaning of the expression. As stated in the referenced text:

'The maxim does not mean that equity strikes at depravity in a general way; ... the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal, as well as in a moral, sense.'

I therefore make no finding that Mr. Henry is thereby precluded from seeking the reliefs he has claimed. As indicated before, the agreement which is the subject of this claim is void for the reasons already outlined.

Issue 3 – Did Mr. Humphrey or Mr. Henry breach the contract?

[85] Based on the foregoing discussion, I am satisfied that the parties had no valid enforceable contract which could be the subject of a breach. Mr. Henry is entitled to be made whole by being placed in the position in which he would have been, had he not purported to enter into an agreement with Mr. Humphrey.

Issue 4 – To what relief is Mr. Humphrey or Mr. Henry entitled?

[86] Mr. Humphrey did not deny that he received several payments from Mr. Henry including the initial down payment and a subsequent sum which amounted to USD\$50,000.00. He denied that it totaled \$180,615.00 as alleged by Mr. Henry. He admitted that Mr. Henry made a number of mortgage payments to the bank after they agreed to a variation of the contract. He did not dispute that Mr. Henry made considerable improvements to the building.

[87] I accept Mr. Henry account that he invested a lot of money in the property over the years re-wiring the building, painting it, and repairing damage from vandalism and the weather. Mr. Humphrey admitted that Mr. Henry left the property when he (Mr. Humphrey) put locks on the doors. Mr. Humphrey did not impress me as a witness of truth. I preferred Mr. Henry's testimony to his. Mr. Henry said that Mr. Humphrey gave him a receipt in respect of the payment of US\$50,000.00 but not for other installment payments although he promised him receipts for the other payments. I believe him.

[88] Mr. Henry produced a copy of the receipt for \$50,000.00. He also exhibited a copy of a letter from the bank in which the bank acknowledged receipt of \$30,270.00 from him. I am satisfied that Mr. Henry was speaking the truth when he described and outlined his payments to Mr. Humphrey and the bank in respect of the purchase price. It would be inequitable to permit Mr. Humphrey to retain any portion of that payment because he failed to provide Mr. Henry with receipts. In all the circumstances, I accept Mr. Henry's *viva voce* evidence and find that he did pay Mr. Humphrey and the bank the sum of \$180,615.00.

[89] I do not accept Mr. Humphrey's assertions that he purported to terminate the contract because Mr. Henry failed to make the payments as they fell due. His claim that he served Mr. Henry with consecutive notices of intention to terminate the contract is rejected. Mr. Henry's testimony that the three notices were presented to him at the same time bears the ring of truth and I accept that version of events.

[90] Mr. Henry's claims for rent and damages for breach of contract are founded on the existence of a valid contract. I make no order for such recovery or damages in light of the findings on its validity. Although he claimed recovery of personal belongings and other property which he left at the building, he provided no evidence of that. That aspect of his claim is accordingly disallowed.

[91] Mr. Henry has prevailed in this matter. He is entitled to recover the monies he expended to repair, develop and maintain the property in Georgetown known as Big Shop, including any amounts he expended towards installation of electricity; with interest at the statutory rate of 6% per annum²⁷; and prescribed costs pursuant to CPR 65.5 (2) (a). He is required to file and serve on or before January 31st 2018, an application for assessment.

ORDER

[92] It is accordingly ordered:

1. Alic Humphrey's claim is dismissed.

²⁷ Pursuant to section 4 of the Interest Act, Cap. 27 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

2. Judgment is entered for Gordon Henry on his ancillary claim.
3. Alic Humphrey shall repay Gordon Henry the sum of \$180,615.00 that he paid towards the purchase price of the subject property.
4. Alic Humphrey shall pay to Gordon Henry compensation for repairs or other developments undertaken by Mr. Henry on the building described as 'Big Shop', to be assessed on application to be filed and served by Mr. Henry on or before 31st January 2018.
5. Alic Humphrey shall pay interest on the judgment sums at the statutory rate of 6% per annum, from the date of judgment until full satisfaction.
6. Alic Humphrey shall pay prescribed costs to Gordon Henry pursuant to CPR 65.5 (2) (a) based on the final judgment amount including any award assessed to be due and payable pursuant to sub-paragraph (4).

[93] I wish to gratefully acknowledge the assistance of both counsel in their written submissions.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar