

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2007

CLAIM NO: SKBHCV1983/0036

ANTHONY ROSS

AND

BANK OF COMMERCE (ST KITTS & NEVIS)
TRUST AND SAVINGS ASSOCIATION LTD.

Appearances:

Mr. Courtney Able for the Claimant
Mr. Sylvester Anthony for the Defendant

2008: March, 18th

WRITTEN JUDGMENT

- [1] **BELLE J.** The Court delivered its decision at the end of the trial on 18th December 2007 and promised written reasons which follow.

FACTUAL BACKGROUND

- [2] On 6th November 1981, The Honourable Sir Dennis Byron, then a practicing lawyer acted as legal counsel to James A. Molans, Attorney at law with respect to the deposit of funds with the Defendant Bank in St. Kitts. He was present at the Bank when Mr. Molans deposited US\$500,000.00; US \$250,000.00 on the behalf of Alington Company, N.V.

and US\$250,000.00 on behalf of Mill Valley Finance Construction Company, N.V. An earlier deposit on the behalf of Mill Valley was redeemed and paid and the Bank undertook to pay the value of the Certificate to Clear Skies on November 10, 1981 along with funds to be transferred to Molans' trust account and to place the remaining funds on 30 day time deposits in favour of Mill Valley and Almington.

- [3] The Honourable Sir Dennis Byron was also present at the Defendant Bank when Mr. Molans sought further security for the deposits as supported by Certificates 958 and 959 and the Bank agreed to do this and documented this agreement for the payment to Mill Valley and Almington and, by pledge of original deeds to two properties which it owned and which in his opinion were clear of any encumbrances and together with a security agreement provided an equitable mortgage on the two properties. The documented undertakings of the Bank were set out in a second letter of November 6th, 1981 signed by R.D.H. Lewis together with Security Agreement: Secured Party In Possession, naming Mr. Dennis Byron (as he then was) as Trustee. The document was signed sealed and delivered to Sir Dennis by R.D.H. Lewis on the Bank's behalf.
- [4] On November 18, 1982, Sir Dennis was again present as the sitting judge at the High Court in Montserrat when Mr. Molans and the Claimant Mr. Ross attended at the Court with an assignment documents for the sale, assignment and transfer of "any and all rights and /privileges, current and or contingent and the like at law and in equity" to Mr. Ross. The assignment documents were signed sealed and delivered in Montserrat before John Kelsick, Barrister-at-law who signed as witness to the transaction and so swore to before a Commissioner of Oaths in Montserrat. According to Sir Dennis Mr. Molans was present at the time of the execution and delivery of the assignment and transfer of the documents. This was the assignment of the powers given to him as agent and trustee in relation to the deposits of November 1981.
- [5] The Defendant Bank had operated in St Kitts for some time before it ran into difficulties and eventually was wound up in 1985. Mr. Walter B. Simmonds of Bird Rock St Kitts, accountant, was appointed Liquidator by the Court on May 9 1985. Thereafter the

Company came under his control. On being appointed Liquidator among Mr. Simmonds' duties would have been the duty to receive proofs of debt and to conduct the defence of the Bank in any civil suit. It is assumed that the Liquidator would assess these proofs of debt from creditors before making any payments to creditors. This case arises from the claim of a creditor even before the liquidation was ordered by the court.

- [6] The Bank and its principals acknowledged the receipt and obligation to pay sums of money to a number of Mr. Molans' clients Almington Company N.V and Mill Valley Finance Construction Company, N.V and his solicitor Mr. Dennis Byron. It also gave notice of the grant of an equitable mortgage on two properties one at the Circus in Basseterre and the other at White House, St Peters to secure the repayments of the monies acknowledged. However when a demand was later made for payment of the sums due the President of the Bank Mr. Eugene Walwyn by letter dated October 13, 1982 addressed to Hon Dennis Byron, Attorney –at-law, Trustee acknowledged the debts owed to Mill Valley Finance Construction Company and Almington Company N.V. both in the amounts of US\$205,000.00 and promised to pay the sums due in 90 days when the Bank would be in a position of sufficient liquidity to pay in full.
- [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 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.
- [8] Mr. Ross recalls the said meeting of October 13 1982 in his evidence in chief and notes that there was a demand for payment on the deposits but the President of the Bank asked for forbearance which was confirmed in a letter of the said October 13, 1982 addressed to Hon. Dennis Byron, Attorney-at-Law, and Trustee in which it was promised that the bank

would be in a position of sufficient liquidity to pay in full the amounts of principal and interest due on both of the above referenced certificates in 90 days.

[9] Indeed we heard the said Mr. Molans give evidence in this court and say that the money should be handed over to Mr. Ross. We have no evidence that the companies passed a resolution objecting to Mr. Ross' appointment neither has anyone appeared challenging the documents by which Mr. Ross purports to act. Whether or not these documents would be classified as correct or legal for the purpose for which they were made, they provide evidence that Mr. Molans had agreed to change the named trustee on the said documents for the purpose of dealing with the funds on the bank. This was something he was obliged to do of necessity.

[10] When the formal notice to pay the said sum of \$410, 000.00 i.e. two payments of US\$205,000.00, was made on 19th November 1982 the sum was not paid. The liquidator acknowledged receipt of the letters dated June 1985 and October 3, 1986 asking about the funds deposited by Mr. Molans clients. These letters were written by Mr. Anthony Ross. But Mr. Simmonds refused to release any funds to Mr. Ross on the basis that there were no records of the transactions which Mr. Ross claimed to have taken place establishing that the bank held the sum of approximately US\$410,000.00 .on account for the companies.

[11] Mr. Simmonds claimed that the numbers which the two companies' deposit certificates purportedly carried along with the names of the beneficial owners and their agents Molans, Byron and Ross did not appear in the records of the bank. It would therefore not be correct for him to hand over the money on the basis of Mr. Ross' insistence. I understand Mr. Simmonds' predicament. He was obliged to be cautious in handing over money under such circumstances.

LEGAL ISSUES

- [12] Indeed Counsel for the liquidator Mr. Simmonds argues that the Claimant has no cause of action because he cannot establish agency for the companies who are the alleged owners of the US\$410,000.00. Counsel submitted that the Claimant was never appointed by resolution to be their agent and the person who was so appointed, the agent on record could not delegate his position to anyone else. The first point is based on commercial practice. The second arises from the law of agency.
- [13] This case is largely about the force and effect of documents for example the assignment of the agency, the deposit certificates, letters promising to pay the sums due on the certificates, whether the companies ratified or passed resolutions approving the assignment of the agency or indeed approved the agency agreement in the first place. The Liquidator is focused on the form of these documents it seems and not on the substance of the entire course of dealings.

COMPANY RESOLUTIONS

- [14] The demand for a resolution of the company is a practice in banking circles in English Corporate law which requires that the decisions of a company would be made by resolution of the directors or shareholders based on the company's articles. This is so according to English Corporate law, but there is no evidence that the companies which made the relevant deposits were Companies subject to English law who conducted their business in this way. Furthermore the documents produced in the case tend to imply that the companies were never asked for a company resolution appointing anyone to act as agent of the company. It is also clear that the management of the Bank fully accepted that Mr. Molan was the companies' lawyer and Sir Dennis (Mr. Byron at the time), was their trustee in St Kitts. Indeed although the Bank in its defence challenged the validity of the assignment under which Mr. Ross was appointed to act for the companies, Mr. Walwyn the Bank's president always acknowledged that Mr. Molans was entitled to collect the money

and would hand over the money to him as long as he came and demanded it. Paragraph 6 of the Defence reads as follows:

“The defend denies paragraphs 5, 6, 7, 8 and 9 of the Statement of Claim and says that the Plaintiff has no account with the defendant, and that the defendant will pay to James A. Molans as promised in the course of its business dealings with him.”

DELEGATION/ASSIGNMENT OF AGENCY

[15] On the point of law then whether the agent can delegate his powers to someone else the general rule is that this cannot be done. However there are known exceptions to that rule. In a case such as this I find that the ordinary rule would be waved. It was absolutely necessary that a new agent be appointed because the incumbent could not act in that capacity any longer having been appointed as a judge of the High Court. Further the principals through their lawyer Mr. Molans are seen by their signatures on the assignment to be indicating that they had no problem with the agency which he had created on the behalf of the companies he represented being assigned to Mr. Ross and with Mr. Ross thus receiving the money deposited to the Bank's accounts. Having held Mr. Molans out as their spokesperson, I do not see how they could refuse to take responsibility for his actions.

[16] In the twenty fifth edition of Chitty On Contracts Vol. II dealing with Creation of Agency the learned author states as follows at para 2229 :

“The maxim delegatus non potest delegare especially applies where the personal skill of the agent is essential, or where there is a trust, confidence, or discretionary power reposed on the agent. But the assent of the principal may and ought to be implied wherever from the conduct of the parties to the original contract of agency, or from usage of trade, or from the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties originally intended that the agent should have such authority, or where, in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute.”

- [17] The authenticity of the assignment of the agency from Sir Dennis (by then Hon. Justice Byron) to Mr. Ross has not been refuted by the Defendant. The Defendant only objected to the late injection of evidence relating to the apparent resolutions ratifying the signing of the assignment by principals of Alington Company, N.V and Mill Valley Finance Construction Company, N.V. permitting the assignment of agency to take place. I did not find it necessary to make a final determination on this issue since nothing turns upon it.
- [18] The Defendant at no time asked to amend its defence. The defence only states that the defendant would not pay Mr. Ross. But the defence could be seen as part of a delaying tactic on the part of the Bank having failed to make the promised payments by the 90 day deadline. Nevertheless the promise to pay and the stated willingness to pay Mr. Molans are sufficient in the context of this case to establish Mr. Ross' right to demand the money acting on the behalf of Mr. Molans.

EQUITY RELIES ON SUBSTANCE

- [19] With regard to the Liquidator's focus on form it is important to note that equity relies on substance rather than form. Equity will acknowledge the substance of the transactions involved over and above the form. Focusing on the form will enable the Bank to enrich itself unjustly.
- [20] In the twenty fifth edition of Snell's Principals of Equity under the rubric Maxims of Equity on page 37 the learned author states in the words of Lord Romilly M.R. in **Parkin v Thorold** (1852) 16 Beav. 59 at 66 ;
- “ Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated , it holds it be inequitable to allow a person to insist on such form and thereby defeat the substance.”*

CONCLUSION

- [21] I conclude that it would be unconscionable to permit the Bank or its Liquidator to reject a claim for the money due to be returned to the agent for the named companies on the basis that the correct documents were not produced when the Bank accepted the mere assignment of the agency at the time it was assigned. I therefore reject the arguments that the companies' agency could not be delegated in these circumstances and that the companies had not passed resolutions to authorize the agents to act in the capacity in which they did. Indeed the bank and liquidator are both estopped in my view from raising such an argument because of the bank's earlier acknowledgements and stated intentions to pay and because it did not demand any resolutions at the time of the deposit nor at the time of the assignment. These newly demanded documents were never part of the course of dealings.
- [22] I have already acknowledged that Mr. Simmonds had a real difficulty because of the absence of documentation in the records of the company identifying the deposits for the companies in the sums of US\$205,000.00 on the behalf of each company. Mr. Simmonds did acknowledge that there was a record of a deposit made in November 1981 of US\$410,000.00 advanced from Caribank on November 9th 1981. But there are no records of the Certificates of Deposit in the names of the companies mentioned by the Claimant's witnesses. But this court can make a decision in relation to the funds which the bank acknowledges it has on account on a balance of probabilities.
- [23] I am satisfied on a balance of probabilities that the documentary evidence and the viva voce evidence point to the fact that the Bank is responsible for the payment of the debt of US\$410,000 to the two companies by way of their named agent. In the absence of the funds the Claimant should be able to rely on the security granted by the Bank in the form of the equitable mortgage over the two properties in St. Kitts to realize the funds due. Further, based on the fact that the bank acknowledged that it owed Mr. Molans the money and would pay him, along with the fact that Mr. Molans states that the money should now be paid to Mr. Ross, I see no need to go further looking for another person to pay or

another person to make a similar demand. As I said before, no-one from either one of the companies had challenged Mr. Ross' authority. The companies were recognized to have authorized Mr. Ross when the assignment was made and presented to the Bank. The Bank asked for no additional proof of the power to make the assignment. It is assumed that what was required to be done was done.

[24] I therefore order the liquidator of the defendant company to pay the sum of US \$410,000.00 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. But I will impose certain conditions because of the absence of a perfect documentary paper trial. I will order that the sum of USS\$ 410,000 plus interest be paid to Mr. Ross not later than 30 days after notice of the court's order has been published in two editions of a popular local newspaper with wide circulation. This notice is to be published in the newspaper(s) within 7 days of this order.

[25] The Liquidator is to pay the Claimant his prescribed costs pursuant to Part 65 of the CPR 2000 from the proceeds of the liquidation. The Defendant liquidator should be also be paid his reasonable costs from the proceeds of the liquidation.

Francis H V Belle
High Court Judge