

**IN THE CARIBBEAN COURT OF JUSTICE  
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF  
THE EASTERN CARIBBEAN SUPREME COURT (Dominica)**

**CCJ Appeal No. DMCV2019/001  
Dominica Court of Appeal No. 0032 of 2011**

**BETWEEN**

**HILARY SHILLINGFORD**

**APPELLANT**

**AND**

**ANGEL PETER ANDREW**

**1<sup>st</sup> RESPONDENT**

**GLORIA BURNETTE nee SHILLINGFORD**

**2<sup>nd</sup> RESPONDENT**

**Before The Honourables**

**Mr Justice W. Anderson, JCCJ  
Mme Justice M. Rajnauth-Lee, JCCJ  
Mr Justice D. Barrow, JCCJ  
Mr Justice A. Burgess, JCCJ  
Mr Justice P. Jamadar, JCCJ**

**Appearances**

**Mr Douglas Mendes SC, Ms Gabrielle Gellineau and Ms Cara Shillingford for the  
Appellant**

**Mr Michael E Bruney and Ms Lisa De Freitas for the First Respondent**

**Ms Gloria Brunette nee Shillingford, the Second Respondent, appearing in person**

**JUDGMENT**

**of**

**The Honourable Justices Anderson, Rajnauth-Lee, Barrow,  
Burgess and Jamadar**

**Delivered by**

**The Honourable Mme Justice Rajnauth-Lee  
on the 14<sup>th</sup> day of February 2020**

## **Introduction**

- [1] This is the second appeal to be heard by the Caribbean Court of Justice (“the Court”) in relation to the disputes which arose among the parties to this case. In relation to the first appeal, the judgment of the Court was delivered on 6 February 2019. That appeal was instituted by Gloria Shillingford (the second respondent in this appeal and referred to in this judgment as “Gloria”). The respondent in the first appeal was Angel Peter Andrew (the first respondent in this appeal and referred to in this judgment as “Angel”). Hilary Shillingford (the appellant in this appeal and referred to in this judgment as “Hilary”) was not a party to the first appeal and did not seek to participate in that appeal. In the first appeal the Court made it clear that the judgments of the courts below were affirmed in relation to the parties to the first appeal only.
- [2] In this second appeal, Hilary seeks to have overturned the judgment of the Court of Appeal of the Eastern Caribbean Supreme Court which affirmed the decision of Cottle J, the trial judge, who had given judgment in favour of Angel. Two main issues have been raised in this appeal. The first relates to a pleading point which is being taken for the first time in this matter. Hilary contends that Angel never alleged in his pleadings that Hilary and Gloria had concocted the exclusive agreement (also “the exclusive contract”) in order to defraud him of his money. It was therefore argued that it was plainly wrong for the trial judge to make the finding that the exclusive agreement was a fiction or concoction. The second issue raised on behalf of Hilary concerned the validity of the exclusive agreement. It was submitted that the exclusive agreement was a validly subsisting sole agency contract granting Hilary the exclusive right to find and introduce buyers within a six-month period.

## **Background Facts**

- [3] Briefly, this matter concerned the sale of certain lands in Dominica by Angel. Angel and Gloria are brother and sister, and Hilary is their cousin. Angel resided in the United Kingdom and therefore when he wished to sell the lands, he executed a

power of attorney authorizing Gloria to sell the lands, as well as to do other things in relation to the sale. The first attempt to sell the lands, and the first agreement for sale, were aborted when the purchaser could not complete. The second agreement for sale was entered into in May 2007 and this agreement was completed. The lands were sold for \$4.5 million. Gloria paid a commission of \$112,500.00 to each of the two agents who had introduced the purchaser. She also paid \$2,564.170.20 to Angel. Angel accepted before the trial court that he had approved the payment of certain sums to third parties but denied that Hilary was entitled to be paid a commission under the exclusive agreement. Angel alleged that Gloria had told him that the lands were sold for \$3 million and that he did not know of the exclusive agreement. Gloria on the other hand alleged that Hilary was owed sums representing loans made to Angel, which Angel denied.

- [4] In addition, Gloria and Hilary claimed that not long before Gloria entered into the agreement with the two agents who found the purchaser, she entered into the exclusive agreement with Hilary. It was executed with the full knowledge and consent of Angel, who during a telephone call to Hilary and Gloria, agreed to its terms. By virtue of the exclusive agreement, a minimum purchase price of \$3 million was set and once the lands were sold at a price in excess of that sum, Hilary would be paid that excess as a commission. Angel denied knowing and approving of the exclusive agreement and alleged that Gloria did not have the authority to enter into the exclusive contract.

#### **The Judgment of the Trial Judge**

- [5] Cottle J stated that he did not find the evidence of Gloria to be credible. He rejected roundly the evidence of Hilary and Gloria that Angel had orally agreed to the exclusive contract. Cottle J was of the view that their evidence relating to the making of the exclusive contract did not make common sense. Only a few months earlier a buyer was willing to pay the sum of \$4.4 million for the lands and had deposited almost \$1 million in total. There was no good reason for Angel to promise

Hilary a commission equivalent to any sum over \$3 million obtained as a sale price. There were no documents or other supporting evidence of any loans to Angel. The trial judge believed Angel's testimony and rejected the evidence advanced on behalf of Gloria and Hilary. At the conclusion of his judgment, Cottle J said<sup>1</sup>:

*"...The payments to Hilary were made without authority. I have found that there were no unpaid loans to Angel by Hilary. The exclusive agreement is no more than a fiction concocted by Hilary and Gloria in an effort to withhold from Angel a substantial part of the proceeds of the property. Hilary must repay the sums which have improperly come into his hands."*

### **The Judgment of the Court of Appeal**

[6] Hilary, Gloria, and Gloria's daughter, Rashida Pierre, who has not featured as a party in any of the two appeals to this Court, appealed the decision of the trial judge. The Court of Appeal (Baptiste, Michel and Thom JJA) closely considered the grounds of appeal and agreed with the judgment of Cottle J. In the well-written judgment of Baptiste JA, the Court of Appeal noted that Cottle J had made important findings of fact with which they agreed. As to the exclusive agreement, the Court of Appeal held:

*"[56] Cottle J was scathing of the exclusive agreement and likewise scathing with respect to the credibility and honesty of Hilary. He gave cogent reasons for so finding. Cottle J described the exclusive agreement as a "fiction concocted by Hilary and Gloria in an effort to withhold from Angel a substantial part of the proceeds of his property". In my judgment, it was entirely open to him on the evidence to so find. He found that the payments to Hilary were made without authority. He also found that there were no unpaid loans by Angel to Hilary. He found that the exclusive agreement was invalid. The judge's conclusions with respect to the central factual issues in this appeal present a formidable, if not a complete impediment to the success of the appeal on the factual issues. The findings made by the judge were clearly open to him on the evidence and could not be said to be against the weight of the evidence. Cottle J was correct in dismissing Hilary's counterclaim.*

### **The First Judgment of the CCJ**

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<sup>1</sup> [50] of the judgment of Cottle J

[7] In a judgment delivered by Barrow JCCJ on 6 February 2019, this Court pointed out that the appeal was necessarily against concurrent findings of fact, which Gloria no longer sought to reverse.<sup>2</sup> The Court concluded at [9] that the verdict of Baptiste JA that the appeal to the Court of Appeal could not succeed on the facts, became irrefutable in this Court, as there had been no appeal against the findings of fact. It was therefore an undisturbed fact that the exclusive agreement was concocted and a fiction. Accordingly, the finding that there was no genuine agency agreement between Gloria and Hilary, and that the physical document purporting to constitute such agreement was a fiction, meant that there could be no discussing its validity. The Court further concluded that there could be no discussing whether Gloria had power to make the exclusive agreement, because she did not make it. There could be no discussing whether Angel should be bound by the exclusive agreement, because it was not made.

### **The Pleading Point**

[8] Mr Mendes SC argued on behalf of Hilary that Angel never pleaded that Hilary and Gloria had concocted the exclusive contract in order to defraud him. He contended that it was plainly wrong, given the state of the pleadings, for Cottle J to make the crucial finding of fact that the exclusive agreement was no more than a fiction concocted by Hilary and Gloria. There is no disputing that Angel's pleadings did not allege that the exclusive agreement was not made or that it was a fiction.

[9] Mr Mendes' first contention on this point was that since the existence of the exclusive agreement was not contested in the proceedings in the courts below, and since it was entered into evidence, when the trial judge referred to it as a fiction, he could not have meant that it did not exist. Mr Mendes submitted that the trial judge could have only meant that the exclusive agreement was brought into being

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<sup>2</sup> Gloria Shillingford v Angel Andrew [2019] CCJ 2 (AJ)

dishonestly by Hilary and Gloria solely for the purpose of robbing Angel of the proceeds of sale.

[10] Mr Mendes' second contention was that the trial judge's finding of fiction and concoction was nothing short of a finding of fraud against Hilary and Gloria. Allegations of fraud must be specifically pleaded and particularized. Angel had failed to do so in this case. Accordingly, it was argued, the trial was unfair; the trial judge erred in law, and the Court of Appeal erred in upholding the trial judge's finding.

[11] An examination of the evidence before the trial judge reveals that Angel's testimony was replete with responses that much of what Gloria and Hilary had alleged in their witness statements was "*fiction*", "*complete fiction*" and "*just fiction*". Indeed, Angel described the circumstances relating to the making of the exclusive agreement as alleged by Gloria and Hilary as "*fiction*". Further, during the trial, when he was questioned by Mr Bruney, his Counsel, about the conversation in which he allegedly gave his consent to Hilary and Gloria for the making of the exclusive agreement, Angel's response was that "*there was no such conversation and no such contract*". Indeed, in Hilary's cross-examination, it was put to him that he had "*made up*" the exclusive agreement, and that he was "*trying to do it in secret, clandestinely*". Hilary denied this. Hilary's case was that Angel had given him instructions to prepare the exclusive agreement, and that he had put the document together with the assistance of his daughter, who was doing law in Barbados. Although Mr Prevost was Angel's Attorney in Dominica, and this was known to Hilary, Mr Prevost had nothing to do with the preparation or signing of the exclusive contract. It was further put to Hilary that Angel never gave him such instructions. This he also denied.

[12] We note that there was no objection to Angel's evidence of fiction and Hilary's cross-examination that he had made up the exclusive agreement. Further, when

Hilary and Gloria appealed to the Court of Appeal, they never included the pleading point in their grounds of appeal.

[13] As noted earlier, the Court of Appeal was of the view that the finding made by the trial judge that the exclusive agreement was a fiction concocted by Hilary and Gloria was entirely open to him on the evidence, and could not be said to be against the weight of the evidence. We entirely agree.

[14] An apex court is normally reluctant to allow a new point to be taken before it. In the case of *Byron v Eastern Caribbean Amalgamated Bank (Antigua and Barbuda)*<sup>3</sup> the Privy Council considered whether they should allow a new argument to be raised for the first time before it. Lady Hale made the point that the Board would be normally most reluctant to allow a party to take a fresh point at this late stage in the proceedings. The Board, however, bore in mind the nature of the proceedings, not being ordinary civil proceedings, but proceedings which emanated from the Industrial Court and governed by the Industrial Court Act. Provisions of the Act allowed for flexibility in the hearing of such disputes, and that the court should act in accordance with equity, good conscience and the substantial merits of the case. In those circumstances, the Board was minded to permit the party to put forward the case with the fresh points.

[15] The appeal before us raises issues very different to *Byron*. These proceedings have been ongoing since 2008. The judgment of Cottle J was delivered on 19 October 2011. A point as basic as this pleading point ought to have been taken at the very earliest opportunity; either during the trial or at the very least before the Court of Appeal. Instead, it was not taken, and the Court of Appeal proceeded to hear the matter on the basis that the pleaded case allowed the trial judge to make the finding of fact that the exclusive agreement was a fiction. In the interests of justice, we are not prepared to allow Hilary to make this fresh point at this stage.

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<sup>3</sup> [2019] UKPC 16 [28]

[16] Accordingly, we adopt the approach of the Court in the first appeal. This appeal is against concurrent findings of fact and there are no exceptional circumstances which would cause us to review them<sup>4</sup>.

[17] In the circumstances we also do not consider it necessary to determine the validity of the exclusive agreement.

**Disposition of this Appeal**

[18] The appeal is dismissed, and the judgments of the courts below are affirmed.

[19] Hilary will pay to Angel basic costs of this appeal in the sum of \$34,020.00.<sup>5</sup>

[20] Gloria was not represented at the hearing of this appeal, and simply relied on the submissions which had been filed on her behalf in the first appeal. She was the appellant in the first appeal and a basic costs order was made against her. We are satisfied that we should make no order as to costs in favour of or against Gloria.

/s/ W Anderson

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**The Hon Justice W Anderson**

/s/ M Rajnauth-Lee

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**The Hon Mme Justice M Rajnauth-Lee**

/s/ D Barrow

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**The Hon Mr Justice D Barrow**

/s/ A Burgess

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**The Hon Mr Justice Burgess**

/s/ P Jamadar

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**The Hon Mr Justice Jamadar**

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<sup>4</sup> *Ramdehol v Ramdehol* [2017] CCJ 14 (AJ)

<sup>5</sup> Part D, Schedule 2 of the Caribbean Court of Justice Appellate Jurisdiction Rules 2019