Privy Council Appeal No 85 of 2006

Carlton Campbell *Appellant*

v.

Clarence Royes *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 3rd December 2007

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

---

*[Delivered by **Lord Neuberger of Abbotsbury**]*

1. On 5 November 1981, the appellant, Carlton Campbell and his then wife, Yvonne Campbell, signed an agreement to purchase a property at 15 Lindsay Crescent, Kingston, Jamaica ("the property") for J$60,000, from a Kathleen Barton. The agreement provided for an initial deposit of J$6,000 on execution, a second deposit of J$9,000 in 90 days, with the balance of J$45,000 being paid on completion.

2. The initial deposit of J$6,000 was paid by Mr Campbell direct to Mrs Barton. The second deposit of J$9,000 was paid, several months late, on or

about 9 July 1982, by Mrs Campbell to the attorney acting for the Campbells, Mr Knight. Completion was effected by an undated transfer apparently executed on 26 July 1982. The balance of the purchase price, J$45,000, was provided to the Campbells by way of a loan from Royal Bank Trust Company ("Royal Bank") who, on the same day, took a mortgage over the property by way of security. Also on 26 July 1982, Mr and Mrs Campbell became the registered proprietors of the property.

3. Meanwhile, a company, Lindsay Courts Limited ("the company") had been formed on or about 27 December 1981, the date of its memorandum and articles of association. The issued shares of the company were equally split between the company's four directors, Mr Campbell, his wife, Clarence Royes, the respondent to this appeal, and his wife Carol Royes.

4. The company's certificate of incorporation was signed by the Registrar of Companies on 12 March 1982. In a letter written to the Registrar on 24 March 1982, apparently in answer to a concern expressed about the name of the company, Mr Campbell explained that "the initial plan is to develop properties situated at Lindsay Crescent in Kingston" and that "the name selected [for the company] is relevant to the planned purpose of the directors".

5. Mr Royes is an engineer who, at the time of the acquisition of the property, was employed as managing director of a building company called Clover Construction Company ("Clover"). Shortly before completion of the purchase, he prepared, or arranged for the preparation of, some drawings, and obtained a brief report from a quantity surveyor, in connection with a contemplated development of the property into eight small studios and four one-bedroom apartments. The drawings were available at trial but were subsequently mislaid. The quantity surveyor's "Preliminary Budget Report", dated June 1982, included as part of the "developers budget" not only the cost of all the work involved in converting the property, but also "Land Cost", consisting of J$80,000 for "Land" and J$4,000 for "Interest on Land".

6. This projected development never took place, but a less ambitious set of works to the property was undertaken during the latter half of 1982. These works involved the major part of the property being converted into three flats. Subsequently, in 1985, the remainder of the property, a garage at the rear, was converted into an office. Although the property remains divided into three flats and a converted garage, it appears that these works were intended to be only temporary. It is, however, not clear when the more ambitious development project was finally abandoned.

7. Meanwhile, in early 1982, Mr Royes had opened an account with the Royal Bank in the name of the company. Cheques could be drawn on the

account by any single director of the company, although it appears that only Mr Royes operated the account to any significant extent. Thereafter, on 27 October 1982, the company borrowed J$19,947.60 from the Royal Bank, on the security of a promissory note, signed by Mr Campbell and by Mr Royes in each case as "Director". The promissory note required repayment of the J$19,947.60 to be effected by an initial instalment of J$522.60 and monthly instalments of J$555.

8. Mr Campbell was an airline pilot who spent very little time in Jamaica. It was Mr Royes who was the individual responsible for all aspects of managing the property. Thus, it was he who organised the carrying out of the work to form the three flats in 1982, and the work to form the office in 1985. It was he who arranged the letting of the individual flats, the landlord under the tenancy agreements being the company. It was he who organised the carrying out of repairs and other works to the property as and when they were needed. It was he who applied for statutory consents in relation to the property, and who negotiated a sale of part of the property (albeit that it was ultimately abortive). In addition, he took up occupation of the converted garage in about 1985, by which time he had ceased his employment with Clover. He seems to have carried out a number of commercial ventures, operated through companies owned by him, from the converted garage.

9. The company's bank statements were available at trial. They showed that the monthly payments due under the mortgage and under the promissory note were made from the company's bank account. They also indicate that most (probably all) of the rents payable in respect of the flats were paid into the company's account. However, it is impossible to make out much more from the statements. There is no identification of the sources or the purposes of the payments in, or of the recipients or the purposes of the payments out; particularly after 1985, there are many payments in and out, many of which appear to have nothing to do with the property. It seems that Mr Royes may well have used the company and its bank account in connection with some of his other business ventures.

10. The promissory note was paid off by the stipulated monthly instalments, and was duly cancelled on 25 October 1985, and the mortgage was eventually redeemed by a payment of just over J$29,000 made by Mr Campbell in October 1992. Meanwhile, Mr and Mrs Campbell were divorced in 1986, and it appears that Mrs Campbell transferred her beneficial interest in the property and in the company to Mr Campbell.

11. Mr Campbell and Mr Royes had been close friends since their time together at St Andrew Technical School in the early 1960s, and, for a long time thereafter, their relationship was, according to the evidence, like that of brothers. However, by 1995, the relationship had broken down, and attorneys

acting for Mr Campbell served a notice to quit on Mr Royes in respect of his occupation of the property, on the basis that he was a monthly tenant. This notice expired at the end of May 1995.

12. Proceedings then ensued, and they have taken a fairly leisurely course. In those proceedings, Mr Royes resisted the claim for possession and contended that, although his name had never appeared on the title, the property had been acquired on the understanding that it was beneficially owned by him and the Campbells in equal shares, and that this understanding was confirmed on subsequent occasions by Mr Campbell. He also contended that, in connection with this understanding, he had contributed half the aggregate deposit, namely J$7,500, and that this had been paid by him to Mrs Campbell and had represented the greater part of the second deposit of J$9,000 handed over to Mr Knight in June 1982. Mr Royes further alleged that he had spent a considerable amount of time, effort and money on the property, largely by way of repairs, improvements and lettings, effectively in reliance on the understanding that he owned half the beneficial interest in the property.

13. Mr Campbell denied that Mr Royes had ever had an interest in the property. He also denied that any part of the deposits had been contributed by Mr Royes. While Mr Campbell accepted that Mr Royes had arranged for work to be done to the property and had arranged for lettings of the flats, he contended that this was all done through the company, and anyway gave rise to no interest in the property in favour of Mr Royes. Mr Campbell counterclaimed from Mr Royes possession of the property, an account, mesne profits, and delivery up of certain chattels.

14. The proceedings came on for hearing before Harris J, who heard the matter over nine days in July and October 2002. The principle witnesses from whom she heard were Mr Campbell and Mr Royes. She gave judgment on 13 December 2002, in which she rejected Mr Royes' case, and essentially accepted Mr Campbell's case, although she did not accept all his evidence. Accordingly, she made an order (which was drawn up on 12 February 2003) (a) requiring Mr Royes to deliver up possession of the property to Mr Campbell, (b) ordering Mr Royes to "render an account of all rents and profits received by him prior to June 1995" from the property, (c) ordering him to pay mesne profits to Mr Campbell in respect of the whole of the property from 1 June 1995, and (d) ordering Mr Royes to deliver up certain chattels to Mr Campbell, which Mr Campbell had left in a room in Mr Royes' house. (The order relating to the chattels has not been challenged, and played no part in the appeal).

15. In reaching her conclusions, Harris J rejected Mr Royes' evidence that he had contributed half the aggregate deposit, and his evidence that there had been an agreement that he would have any beneficial interest in the property. She

also rejected any suggestion that he had acquired any such interest as a result of the work and time he had devoted to the property or as a result of any subsequent agreement with Mr Cambell.

16. Mr Royes appealed to the Court of Appeal (Forte P, and Smith and Harrison JJA). After a hearing lasting eight days in October 2004, Mr Royes' appeal was allowed, for reasons given in a judgment delivered by Smith JA, with which with Forte P and Harrison JA agreed, on 3 November 2005. The Court of Appeal considered that the judge had wrongly rejected Mr Royes' evidence that he had contributed half the aggregate deposit, and that, because of that and also in the light of the parties' conduct in relation to the property after its acquisition, the judge had wrongly rejected Mr Royes' evidence that he and Mr Campbell had agreed that he would own half the beneficial interest in the property. Accordingly they allowed the appeal, and set aside the whole of Harris J's order.

17. It is against that decision of the Court of Appeal which Mr Campbell now appeals to the Board. Accordingly, the basic question for the Board is whether the Court of Appeal was entitled to interfere with the conclusions of the judge. In this connection, it is important to bear in mind that her conclusions were ultimately ones of fact. The Court of Appeal essentially overturned the judge's decision by reversing her conclusion on two issues. The first issue, which was one of primary fact, was whether Mr Royes did indeed contribute half the aggregate deposit of the purchase of the property, as he contended. The second issue, which can be said also to be one of primary fact, was whether as Mr Royes contended, he had agreed with Mr Campbell that the beneficial interest in the property would be held for them both in equal shares. However, the reversal of the judge on the second issue was essentially based on her alleged failure to draw the correct inferences from primary facts, namely Mr Royes' actions after the property had been acquired.

18. When it comes to findings of primary fact or drawing instances from primary fact, it is well established that an appellate tribunal should be slow to interfere with the findings made of a first instance tribunal. In that connection, the Court of Appeal correctly referred to observations of Lord Thankerton in *Watt v Thomas* [1947] AC 484 at 487-488 and of Clarke L J in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577, paras 11-16. These observations are well known and their effect was not in any way in dispute in this appeal. The ultimate issue on this appeal is simply whether the Court of Appeal's criticisms of Harris J's judgment were well-founded.

19. The reasoning of the Court of Appeal was based on two main points. The first point was that, in reaching the conclusion that Mr Royes had not

contributed towards the deposit as he alleged, the judge overlooked a contemporaneous letter which supported Mr Royes' case and was inconsistent with Mr Campbell's case. Secondly, the Court of Appeal considered that the judge had not faced up to, or satisfactorily explained, the extent of Mr Royes' involvement with, and commitment to, the property in terms of expenditure of effort and money between 1982 and 1995. The effect of those two points was that, in the Court of Appeal's view, the judge's conclusion that Mr Royes had no beneficial interest in the property could not stand.

20. In the Board's opinion, neither of the two points bears analysis. As to the first point, the contemporaneous correspondence simply does not assist Mr Royes' case against Mr Campbell that he paid J$7,500 towards the second deposit of J$9,000. As to the second point, the various facts relied on by the Court of Appeal either do not assist Mr Royes' case, or were not supported by the judge's findings (as no such findings were necessary on her view of the case), and in some cases were not even suggested by the evidence.

21. As to the first point, Mr Royes' alleged contribution towards the deposit, the judge rightly proceeded on the basis that it was for Mr Royes to establish that he had made the contribution, not for Mr Campbell to establish that he had not. She then concluded, having heard evidence from each of them, that the absence of any written document confirming Mr Royes' payment of the J$7,500, and the absence of any evidence that he had withdrawn this J$7,500 from his bank, led to the "irresistible conclusion that he had not done so". The judge had heard from the two parties with their conflicting stories, she had not heard from other relevant witnesses, there was nothing in the contemporaneous documents, at least as far as she could see, which supported Mr Royes case; in those circumstances her conclusion would, at least on the face of it, appear to be unexceptionable.

22. The letter which impressed the members of the Court of Appeal, and which they considered had been wrongly overlooked by the judge, was dated 23 July 1982 and written by Mrs Barton's attorney, Miss Thompson, to Mr Knight. This letter referred to the second deposit of J$9,000 payable to Mrs Barton as "being handed over to Mrs Campbell". This was regarded by the Court of Appeal as in some way confirming the notion that Mr Royes had contributed J$7,500 towards the second instalment of the deposit. The submissions on behalf of Mr Royes before the Board did not rely so much on that letter, but more on an earlier letter, which was dated 9 July 1982, in which Mr Knight advised Miss Thompson:

> "Mrs Campbell has paid the amount of J$9,000.00 and we agreed in our telephone conversation that amount has been returned to her in part fulfilment of the instructions to you from Mrs Barton."

23. The letter of 9 July 1982 indicates two facts about the second deposit of J$9,000, both of which are also suggested by the 23 July 1982 letter. First, that the money was paid by Mrs Campbell to Mr Knight; secondly, somewhat unusually, that it was then paid back to Mrs Campbell. So far as the first fact is concerned, it is true that it is consistent with Mr Royes' case that the second deposit was paid over by Mrs Campbell (because he said he paid her J$7,500 of the J$9,000). However, it takes matters no further, because Mr Campbell's evidence was also that the J$9,000 was paid to Mr Knight by Mrs Campbell, albeit that he said that it was paid over in his presence. As for the rather mystifying fact that the J$9,000 was then handed back to Mrs Campbell, two points can be made. First, this fact does not in any way assist on the issue of whether the J$9,000 came from entirely from the Campbells or in part from Mr Royes; secondly, it is explained by the fact that, at that time, Mrs Campbell used to work for Mrs Barton, and the J$9,000 was apparently being paid back to her in that connection.

24. If anything, the contents of the letter of 9 July 1982 could be said to be inconsistent with Mr Royes' evidence. That is because Mr Royes said that, after he handed over the J$7,500 to Mrs Campbell, she went into Royal Bank's premises. This could be said to carry with it the implication that she paid the money into the bank, whereas it is common ground she in fact paid the money over to Mr Knight. However, it is not necessary to conclude whether or not there is anything in that argument: the essential point is that the Court of Appeal was, with all due respect, quite wrong to suggest that this correspondence in any way assisted Mr Royes' case, and was therefore wrongly overlooked by the judge.

25. Turning now to the second main issue on which the Court of Appeal considered the judge misdirected herself, Smith JA clearly and helpfully set out the ten centrally important factors which, when taken together, persuaded him that there was what he described as "a common intention that [Mr Royes] should have a beneficial interest in the property".

26. The first of those factors was that the plans and Preliminary Budget Report "were done at [Mr Royes'] expense". While Mr Royes carried out or commissioned the drawings and commissioned the Report, there is nothing in the judge's judgment or in the documentary or oral evidence to indicate that he paid anything for them. Indeed, had he done so, one would have expected him to have said so. It is by no means fanciful to think that professionals would have provided such drawings (which the Board has not seen, through no fault of the

second deposit of J$9,000, and the "inescapable inference" from the ten factors already discussed. As already explained, neither of these two reasons for reversing the Judge's conclusion can be justified.

39. Accordingly, in the Board's view, the Court of Appeal was not entitled to overturn the judge's conclusion that Mr Royes had no beneficial interest in the property. It follows from this that the order for possession which the judge made against Mr Royes ought not to have been reversed.

40. That leaves Mr Campbell's appeal against the reversal by the Court of Appeal of the remainder of the judge's order, namely that Mr Royes should account to Mr Campbell for the income received from the property up to June 1995 (when the notice to quit expired) and that he should pay mesne profits in respect of his occupation of the property from that date. This part of the appeal can be dealt with relatively shortly.

41. The Board has concluded that Mr Royes' claim to a beneficial interest in the property should fail, in so far as it is based on the management of the property and payments in respect of the property, not least because it was the company and not Mr Royes, who was responsible for the management and payments. In those circumstances, it would seem to follow that the judge ought to have concluded that the right accounting party in relation to the rent and any other income received from the property (up to the time of the management arrangement determined) was not Mr Royes but the company. Accordingly it was not right to order an account against Mr Royes.

42. As far as the mesne profits are concerned, it was for Mr Campbell to satisfy the judge that Mr Royes was in occupation of the whole or part of the property from the date that the management arrangement came to an end. The Board is prepared to assume, without deciding, in Mr Campbell's favour, that the arrangement between Mr Campbell (as owner of the property) and the company (as manager of the property) was properly determined by the notice to quit in 1995, even though it was addressed to Mr Royes and treated him as a monthly tenant. Even on that assumption, the judge ought to have concluded that Mr Campbell had failed to establish that it was Mr Royes, as opposed to the company, who had remained in possession of any part of the property after the notice to quit expired. It was the company which managed the property, paid out sums for repairs and other works, received the rents, and granted tenancies of the flats in its own name. It is true that Mr Royes was the individual in occupation of the converted garage, but it seems to the Board more likely than not that the company, which had been managing the property since 1985 from the converted garage, was in possession of the garage, together with the remainder of the property. In those circumstances there was insufficient

evidence to establish that any order for mesne profits should have been against Mr Royes.

43. It is only fair to the judge to mention that the grounds upon which the Board considers that no order for an account or mesne profits should have been made against Mr Royes were not really advanced at trial (or indeed before the Court of Appeal). However, as has been very fairly accepted on behalf of Mr Campbell, if, as the Board considers, anyone has a claim as result of the management and payment of money in respect of the property, it would be against the company rather than Mr Royes. So it is difficult to escape the conclusion that any order in favour of Mr Campbell for an account or (albeit more arguably in relation to the converted garage) for mesne profits, ought to have been against the company and not Mr Royes.

44. In these circumstances, the Board will humbly advise Her Majesty (a) that Mr Campbell's appeal be allowed, to the extent of reinstating the order for possession, on the basis that Mr Royes had no beneficial interest in the property, but (b) that Mr Campbell's appeal be dismissed insofar as it seeks to reinstate the order for an account and payment of mesne profits against Mr Royes.