IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO HCV 00705 OF 2007

BETWEEN	FACEY COMMODITY COMPANY LTD	FIRST CLAIMANT
AND	MUSSON (JAMAICA) LIMITED	SECOND CLAIMANT
AND	STANLEY MOTTA LIMITED	THIRD CLAIMANT
AND	PRODUCTIVE BUSINESS SOLUTIONS LIMITED	FOURTH CLAIMANT
AND	JOSEPH JARRET (T/A JOSEPH JARRETT & COMPANY ATTORNEYS-AT-LAW)	DEFENDANT

IN CHAMBERS
John Vassell Q.C. and Courtney Bailey instructed by DunnCox for the claimants
Joseph Jarrett in person

February 26, 27, March 1 and 16, 2007

APPLICATION TO VARY FREEZING ORDER, APPLICATION TO DISCHARGE FREEZING ORDER, FIDUCIARY DUTY, SECTION 21 OF THE LEGAL PROFESSION ACT

SYKES J.

1. At the end of three days of dealing with this matter, the area of dispute between the parties has been narrowed considerably as far as this particular claim is concerned. I am restricting myself to the barest minimum of facts because there is still a trial to come in this matter and also a related claim filed by Mr. Jarrett in which he is alleging, among other things, that he was wrongfully or constructively dismissed (HCV 00291/2007). Even with this reservation, it is difficult to see how Mr. Jarrett can successfully resist the declarations sought in paragraphs one and two of the claim (set out below) against him in light of the admissions made during the hearing. It would seem to me also that Mr. Jarrett is going to have grave difficulty resisting paragraph 3 of the claim. I say this because, as Mr. Vassell Q.C. pointed out, section 21 of the Legal Profession Act now regulates how disputes relating to fees owing between an attorney at law and his client are to be resolved. The statute does not contemplate the self help remedy embarked on by Mr. Jarrett.

2. I delivered an oral judgment on March 1, 2007 and promised to reduce my reasons to writing. These are the promised reasons.

3. The current issue arose in the context of a real estate transaction in which Mr. Jarrett was acting on behalf of Facey Commodity Company Limited ("Facey") which was selling property located at 693 Spanish Town Road, Kingston 11 to Rudisa Holdingmaatschappij N.V. for US$5,000,000.00. He was employed by Facey as an attorney at law and he was acting for Facey in the real estate transaction. It seems that under the terms of the contract with Facey, Mr. Jarrett was permitted to act for clients other than Facey. His chambers were located on premises owned by Facey. The other three claimants allege that Mr. Jarrett was also employed to them - an allegation contested by Mr. Jarrett.

4. The firm of Grant Stewart Phillips and Company ("Grant Stewart") was acting for purchasers. Grant Stewart sent two cheques in the sum of US$260,000.00 and US$60,460.73 to Mr. Jarrett. The express purpose for which the first cheque was sent to Mr. Jarrett was to pay stamp duty and transfer tax on the agreement for sale. Mr. Jarrett gave an undertaking to that effect. The second cheque was accompanied by a letter dated January 11, 2007, from Grant Stewart, which stated that the total amount due to Mr. Jarrett as vendor's attorney's fees was US$445.00. Mr. Jarrett alleged that he was due a commission from the second cheque in addition to his fees. Even so, the letter earmarked the cheque to be used for paying general consumption tax, half stamp duty, half cost registration fee on transfer. This amounted to US$60,115.73. There is nothing in this amount to accommodate a commission payable to Mr. Jarrett as alleged by him and there is nothing in the letter that speaks to this.

5. After Mr. Jarrett received these funds, the relationship between himself and Facey imploded. He alleges that he was unfairly dismissed, barred from his chambers which were located on Facey's building. He also alleges that he was owed legal fees by the claimants and he is entitled to damages for unfair dismissal. His next move was to deal the two cheques given to him by Grant Stewart in a manner inconsistent with his undertaking and the capacity in which he received the money. The cheques were not used to pay the relevant taxes and registration fees. Instead Mr. Jarrett took the proceeds claiming that he is setting them off against fees owed to him. He finally admitted that the proceeds were not in Jamaica and at the end of the three days he did not disclose the whereabouts of the money representing the proceeds of the cheques.

6. The claimants filed a claim form seeking the following:

> 1. a declaration that the defendant has no lien over the sum of US$320,460.73 received by him as attorney at law for the first claimant which sum is now in the defendant's possession, power or control;

2. an order that the said sum be paid forthwith to the first claimant along with any interest earned thereon;

3. The claimants severally claim:

   a. a declaration that the defendant has no lien over files, papers and other documents which were, at the date of termination of his retainer/employment in the defendant's power or possession as attorney at law/employee for each claimant and which are currently in his possession, power or control.

   b. an order that the said files, documents be delivered up forthwith to the claimants' attorney at law, DunnCox, whose offices are situate at 48 Duke Street, Kingston

   c. damages;

   d. interest

   e. costs

7. The declaration at paragraph 3 arose because the claimants allege that Mr. Jarrett has refused to hand over a number of files to them. Mr. Jarrett filed a document headed *Defence and Counterclaim*. In that document, he denies that the claimants are entitled to any of the reliefs claimed. He alleges that he is owed outstanding fees by the claimants and consequently he is entitled to a lien on the files pending payment of his fees. He also claims that he is entitled to a set off against all four claimants and that is the justification for appropriating the proceeds of the cheque. There are other matters set out in the document which in my view are not relevant to the issue at hand.

8. Assuming Mr. Jarrett is correct and succeeds in his claim he has, at best, a claim for unliquidated damages against the claimants but that does not have anything to do with the money specifically entrusted to him to be applied in a particular way. This was so obvious that I was quite astonished that Mr. Jarrett felt he could successfully resist paragraphs 1 and 2 of the claim. He claimed to have some authority that establishes that a fiduciary who receives property for a specific purpose and there is no permission to use the property for his own purposes can appropriate it to his own use if his principal owes him money.

9. The claimants were granted a freezing order, ex parte, by Beswick J. on February 8, 2007. The order was in very wide terms and it is this order Mr. Jarrett wants varied, in the first instance and then discharged. The terms of the order were:

> 1. That the defendant be restrained and an injunction granted restraining him until or further Order whether by himself or by his servants and/or agents or any of them or otherwise howsoever from selling, removing from the jurisdiction or taking any steps to remove from the jurisdiction, disposing of, transferring, withdrawing, charging, diminishing the value of,

parting with possession of or in any way however dealing with any of his property or asset, whether in his own name and whether solely or jointly owned, wheresoever the same may be situate (whether within or outside of the jurisdiction) said assets and property including (but not limited to) bank accounts, real and personal up to a maximum sum of US$320,460.73.

2. That the defendant be restrained and an injunction granted restraining him until February 26, 2007, in this action or further Order whether by himself of by his servants and/or agents or any of them or otherwise howsoever from destroying, altering, discarding, parting with or dealing with in any way prejudicial to the interests of the claimants, all files, deeds, papers, writing or documents whatsoever including copies of documents in his possession in relation to matters belonging to the said claimants, and the defendant is hereby ordered to preserve and keep safe the said files, deeds, papers, writing or documents whatsoever including copies of documents in his possession until the determination of this action.

3. That the defendant shall forthwith upon service of this order disclose to the claimants full information concerning the nature and location of its assets in this jurisdiction and do disclose all relevant documents in their (sic) possession, custody or control or power concerning such assets identifying with full particularity the nature of all such assets and their whereabouts and whether the same be held in his own name or by nominees or otherwise on his behalf and the sum standing in any account, such disclosure to be verified by affidavits to be made by the defendant and filed and served on the claimant's attorneys within 7 days of notice of this order being given to it. In case of any bank, building society or other account the defendant must give the name(s) in which it is held, the name of the bank, building society or entity, the address of the branch at which the account is held and the number of the account.

The application to vary the freezing order

10. On February 26, 2007, which was the return day of the order Mr. Vassell took the point that the application to discharge the order was short served and further that he needed time to file an affidavit in response but he was prepared to deal with the variation of the order. The application to vary order was set for February 27, 2007, and the application to discharge was set for March 1, 2007, over the objections of Queen's Counsel.

11. On February 27, 2007, Mr. Vassell took the preliminary point that there had not been full compliance with order of Beswick J. Specifically, he submitted that there had not been compliance with paragraph 3 of the order and as such Mr. Jarrett should not be heard on the application to vary the order. Queen's Counsel referred to the affidavit of Mr. Jarrett filed February 22, 2007 and pointed out that no disclosures were made as required by the order. He reinforced his position by highlighting the fact that Mr. Jarrett had said that he was not prepared to disclose the whereabouts of the money entrusted to him.

12. Learned Queen's Counsel also submitted that the Legal Profession Act (section 21) provided the procedure that must be followed in cases where counsel wishes to sue their client for outstanding fees. For all these reasons, according to Mr. Vassell, Mr. Jarrett should not be heard on his application to vary.

13. I reserved my decision in order to examine the cases referred to by Mr. Vassell. When I came to deliver judgment on February 28, Mr. Jarrett had filed a further affidavit on February 28, 2007, in which he identifies a number of accounts with a commercial bank and building society as either his personal account or his clients' accounts. He also identified real estate and personal property held by him.

14. Mr. Courtney Bailey, one of the attorneys for the claimants also filed an affidavit in support of an application for a variation of the freezing order to extend to disclosure of assets outside of the jurisdiction.

15. Further submissions were heard on Mr. Jarrett's affidavit filed on February 28, 2007. Mr. Jarrett submitted that he was now in full compliance with Beswick J.'s order and so his application for variation should be heard. He expressly admitted, on February 28, 2007, that the US$320,460.73, was received by him for the purpose of paying stamp duty and transfer tax. Mr. Jarrett also confirmed that he received US$260,000.00 for transfer tax and stamp duty. He confirmed receipt of the US$60,460.73. However, in respect of this latter sum he alleged that he was owed a commission and that there was included in the amount a commission for the real estate agents who facilitated the transaction. As I said before, the letter accompanying the US$60,460.73 did not speak to any commission for Mr. Jarrett or the real estate agent. If that were so I would have expected Mr. Jarrett to raise that matter with Grant Stewart. There is no evidence, at this stage, that this was done. Significantly and distressingly, Mr. Jarrett has not indicated the whereabouts of the fund he received pursuant to an undertaking given by him in his capacity as an attorney at law to another firm of attorneys at law.

16. Mr. Vassell submitted that Mr. Jarrett has not provided any documentary support for the disclosures he has made in the affidavit as required by paragraph 3 of Beswick J.'s order. I agree. No adequate reason has been give for not complying fully with the order. In addition, Mr. Jarrett has not applied the funds for the

purpose for which they were given. He also gave an undertaking not to use the money for any other purpose. Mr. Jarrett made the submission that he was no longer bound by his undertaking because the relationship between himself and Facey collapsed. Mr. Jarrett seemed to have forgotten that the undertaking was given to Grant Stewart. It was the word of counsel on which Grant Stewart was entitled to act. Mr. Jarrett has regrettably overlooked the important fact that even if his client owes him money the cheques were received in his capacity as an attorney at law for Facey and he had specific direction on how these particular funds were to be applied. It seems to be that there must be something wrong with a person who is a trustee of funds, even on their account of events, refusing to disclose the whereabouts of the trust property to which he still has access and may even be using to ask the court to vary this order on the ground of hardship. I therefore refuse to hear his application for variation of the order.

The application to discharge the freezing order

17. The application to discharge the order was heard by me on March 1, 2007. Mr. Jarrett has not disclosed the whereabouts of the money. In my view, Mr. Jarrett's submission that he has a right of set off is misconceived. I am not aware of any law that permits a fiduciary who receives property in that fiduciary capacity, for a specific purpose, particularly an attorney at law, to use that money as if it were his own without clear permission for him to do so. The fiduciary, in this case, has no personal proprietary interest in the money. The law is clear that "where a person has been given possession of or control over another's property for some purpose, but has not at the same time been granted any right to use that property in any way for his own benefit, the courts will readily characterise his position as a fiduciary one" (see para. 194 of *Finn P.D., **Fiduciary Obligations**,* (1977) Law Book Company). As Bowen L.J. puts it in ***Soar v Ashwell*** [1893] 2 Q.B. 390, 397:

> *It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: Chalmer v. Bradley; Marquis of Cholmondeley v. Lord Clinton; and this confidence or trust imposes on him the liability of an express or direct trustee.*

18. It is important to note how Bowen L.J. makes the point. Lord Justice Bowen refers to a person occupying a fiduciary relation. Implicit in this is that there must necessarily be an analysis of the facts to see whether the recipient of property is in

a fiduciary relationship and if so, the next question is, did he receive the property in that capacity? If he did receive the money as a fiduciary, then his liability flows out of that. While Bowen L.J. undoubtedly accepted that in construction of law the fiduciary would be, in terms of liability, that of a constructive trustee, he was prepared to base the liability, not on construction of law, but on the basis of an express trust, meaning that the fiduciary is to be treated, for the purposes of liability, as if he were appointed under a trust instrument and thereby an express trustee. There is no higher basis of being a trustee. The implication of this is that the fiduciary, like the express trustee, if found liable is to restore the property and to disgorge any profit he made from it. This very robust view sounds the death knell of Mr. Jarrett's position. His Lordship's conclusion that receipt as a fiduciary imposes on the recipient the liability of a direct trustee means, in the case before me, that Mr. Jarrett, in relation to the moneys received by him for payment of transfer tax, consumption tax and stamp duty cannot use any monies received by him to set off against fees allegedly owed to him by his employer.

19. It is plain, therefore, that Mr. Jarrett was entrusted with US$320,460.73 less US$445.00 to be used in a specific manner and for no other purpose. In addition, Mr. Jarrett also had a fiduciary relationship with Facey. I wish to emphasise that it is not the fact that Mr. Jarrett is an attorney at law why he is in fiduciary relationship with Facey. He is in that relationship because of the duties he undertook in relation to the transaction. He was employed to advise and act for Facey in relation to this transaction. The stamp duty, transfer tax and registration fees and such like are payable by parties to real estate transactions. When an attorney receives money to be used for these purposes he is obliged to use that money for that purpose and that purpose only unless he is permitted to use the funds for some other purpose. His specific obligation was to apply the monies received by him from the purchaser's attorneys to the purpose for which it was received. It is this which makes him a fiduciary. This conclusion is reinforced by the fact that he gave an undertaking to Grant Stewart, when he received the cheques, not in his private capacity, to effect business for and on behalf of Facey which was his employer. He simply cannot use the funds for any other purpose unless he is permitted to do so by the person to whom he owes the fiduciary duty.

20. In light of my conclusion that Mr. Jarrett is in a fiduciary relationship with Facey then if he wants equity he must come with clean hands. Clean hands here mean disclosing the location of the money entrusted to him. He has failed to do this and so I decline to exercise the discretion to discharge the order. It is important that I state specifically that Mr. Vassell suggested that he was prepared on behalf of the claimants to have the disputed money placed in an account in the names of his instructing firm and Mr. Jarrett pending the resolution of this matter. Mr Jarrett would have none of this. Application to discharge freezing order is dismissed with costs to the claimants to be agreed or taxed.