IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 321 OF 2000

BETWEEN	*ALLAN TOPPIN*	*PLAINTIFF*
A N D	*RAYMOND LEE*	*1ST DEFENDANT*
A N D	*DESMOND LEE*	*2ND DEFENDANT*
A N D	*STEPHEN CHUNG*	*3RD DEFENDANT*

Paul Beswick and Ballentyne instructed by Ballentyne, Beswick & Co., for the Plaintiff.

Maurice Manning instructed by Sandra Soares for the Defendants.

Heard 16th,17th,19th,20th,23rd,24th, 25th & 30th July 2001, 10th December 2001, 17th & 18th February, 2002 & 19th December 2002.

Pitter, J.

Entertainment Systems Limited is a limited liability company incorporated under the Companies Act with its registered office at 115¼ Old Hope Road, Kingston 6 in the Parish of Saint Andrew.

It is a private company engaged in providing and supplying cable television (STV). Its share capital is $300,000.00 divided into 300,000 ordinary shares held equally by each defendant.

The first and second defendants are brothers and the 1st Defendant is married to the plaintiff's sister.

In this action, the plaintiff's claim is for a declaration that he is the equitable owner of 10% of the issued share capital of Entertainment Systems Ltd., and consequential ancillary orders to determine the value owed to him by the defendants, and payment of such value as determined by the Court.

It is the plaintiff's case that in 1996 he became involved with the company when the cable business became regulated by Government, and a licence was needed to carry on the business . The first and second defendants expressed their concern regarding the state of the industry and the threat by the Broadcasting Commission the regulatory body, to close down unlicensed companies. Faced with this dilemma, they invited him to assist them in obtaining a licence for the company. He agreed and expressed his desire to purchase shares in the company and to become an equal partner. The third defendant who said that the company was worth $9 to $10 million was unwilling for shares to be sold to him. The first defendant, his bother-in-law however agreed to sell him 9% shareholding in the company from his allotment at a price of $780,000, to be paid for by the sale of 12 satellite dishes at a price of $68,000 each. He said it was later agreed by all three defendants that they would together sell him a further 1% of the issued

share capital of the company divided equally amongst them as compensation for work done previously to his formal association with he company. The transfers were executed by all the parties in September 1996.

He said that between March 1996 and September 1997 he worked with the company functioning as a director in various capacities. He was placed on a salary of $16,000 per month and was instrumental in preparing and submitting applications for a licence, the first of which failed. He never shared in the profits of the company. The relationship between himself and the defendants began to sour and his activities in the company reduced. The defendants subsequently requested that he return the 1% share transferred to him because of his failure to secure the licence in the first round. In January 1998, his services with the company were terminated whereupon he offered to sell them back the shares. He denied that the agreed price for the 9% shareholding in the company was $900,000 and further denied that the satellite dishes given to the first defendant were to be sold on the open market and the proceeds applied to the purchase price of these shares. He also denied that the satellite dishes were 7 in number and the sale of them realized $360,000.

The defendants' case is that the first defendant agreed to sell the plaintiff from his allocation, 9% of the company's issued share capital for

$900,000. That $360,000 was realized from the sale of 7 satellite dishes the sum to the applied to the purchase price of $900,000 leaving a balance of $540,000. That all three (3) defendants agreed to transfer to the plaintiff a further ⅓ of a share each, conditional upon the successful outcome of a licence on the first application, and hence the recall of this share and subsequent refusal to transfer same. The failure to register the sale of the 9% shareholding is as a result of the plaintiff failing to fully pay for them.

The first determination to be made is the price the 9% shareholding was to be sold for. On the one hand the plaintiff is claiming that the agreed price is $780,000 and this was paid for by the sale to the 1st defendant of 12 satellite dishes valued at of $780,000.

On the other hand the 1st defendant contended that the sale price of the shares is $900,000 and that he received from the plaintiff 7 satellite dishes, the sale of which was to be applied to the cost of the shares. That $360,000 was realized from the sale leaving a balance of $540,000 which remains unpaid, hence the refusal to register to transfer of the shares.

It is common ground that the first defendant had been in the satellite dish business for years and recognizing that cable was overtaking the dish business, he along with the other two defendants formed Entertainment Systems Limited to enter the cable market. The plaintiff a pilot, and former

member of the Jamaica Defence Force and the first defendant were engaged in the importation and sale of satellite dishes. The rapid growth of cable and the unavailability and unreliability of cards for the dish system coupled with fierce competition from cable and other satellite dish importers made dishes difficult to sell. The prices declined sharply.

Given the familial relationship between the plaintiff and the defendant, it is more probable that the dishes were given on consignment bearing in mind that particular difficulty in selling them. I accept the evidence of the first defendant that it was 7 dishes he received on consignment from the plaintiff and that the sale for them realized $360,000 and which was to be applied to the purchase price of the 9% share capital.

A further determination to be made is the agreed price for the 9% share capital. Here again as with the sale of the dishes, there is no documentary evidence. The familial relationship between the plaintiff and the first defendant again came into play. They both trusted each other.

The plaintiff admitted in cross-examination that whilst the first and second defendants said that the company was valued at between $9 and $10 million the third defendant puts the value at $25 million. I regard this latter figure as highly inflated brought about by the unwillingness of the third defendant to part with any of the company's shares to any outsider.

The value therefore of 9% shares would be either $810,000 or $900,000, the latter figure being the amount the first defendant claimed as the agreed price for the shares.

In any event, even if as the plaintiff claims the sum of $780,000 is the value for 12 dishes, this sum would fall well below either the $810,000 or the $900,000 with the result that a balance is outstanding. If the value of the company is $10 million it follows that 9% would be $900,000. It is inconceivable that the defendant would accept $780,000 as full consideration. This certainly explains why the shares have not been registered but remains in the hands of Mr. Beswick, the Attorney-at-Law who acted as stakeholder.

There is also a discretion by the directors of the company to withhold the registration of shares. This is to be found in article 27 of the Articles of Association of the company. It reads:

> 27. The Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid sum.

It is my finding therefore that agreed price of the shares is $900,000 and I accept the first defendant's evidence that $360,000 was realized from

the sale of 7 dishes which when applied to the agreed price leaves a balance of $540,000 owed by the plaintiff.

Regarding the claim for the 1% shareholding, the plaintiff testified that the defendants announced at a meeting with him that they intended to give him an additional 1% share capital to round off his share allotment to 10%. He said the third defendant made the offer in recognition of the work he had done in preparing the first application to the Broadcasting Commission. He said he paid no money for the additional 1%. The defendants on the other hand said that the 1% share was contingent on the successful outcome of the first application. The plaintiff admitted that after the failure of the first application all three defendants requested the return of this additional 1% share. It is rather strange that the defendants would be demanding the return of this 1% share if they had given the plaintiff this in recognition for work already done. I find on a balance of probabilities that the transfer of this 1% share was contingent on the successful outcome of the application.

Mr. Manning submitted that the offer of the 1% share should be regarded as past consideration which would preclude the plaintiff from relying on it to prove his claim. He relied on the case of **Re McArdle**

(deceased) **McArdle v. McArdle (1951) 1AER 905** where **Jenkins L J,** in delivering his judgment said:-

> "The true position, however, was that, as the work had all been done and nothing remained to be done by Mrs. McArdle at all, the consideration was wholly past, and, therefore, the beneficiaries agreement for the repayment to her of the £488 out of the estate was *nudun pactum* – a promise with no consideration to support it. That being so, it is impossible for Mrs. McArdle to rely on this document as constituting an Equitable assignment for valuable consideration".

Mr. Beswick cited the case of **Pan On et al v. Lau Yiu et al (1979) 3 AER 65** where it was held that an act done before the giving of a promise to make a payment or to confer some other benefit could be consideration where:

(i) the act was done on the promisor's. request

(ii) the parties understood that the act was to be remunerated either by payment or the conferment of a benefit and

(iii) the payment or conferment of a benefit was legally enforceable.

On the facts of this case it could not be that the plaintiff expected to be remunerated for preparing and submitting the application when he was already earning a salary from the company. The case of **Pan On et al Lu Yiu** (Supra) is distinguishable from that of **Re McArdle,** (supra) and in the circumstances I uphold Mr. Manning's submission that the plaintiff cannot

succeed on this limb of the claim as it is based on past consideration. In any event I have already found that the transfer of the 1% share was contingent on the successful outcome of the first round application which had failed.

Mr. Manning submitted that the share transfers are of no assistance to the plaintiff as these documents were not stamped and are therefore inadmissible to prove the plaintiff's case based on the provisions of the Stamp Duty Act as also the Transfer Tax Act. The Stamp Duty Act provides that documents of this nature ought not to be admitted in evidence if they are unstamped.

Regarding the validity thereof, the Act reads as follows:

> Section 36. No instrument, not duly stamped according to Law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.

In response, Mr. Beswick submitted that the issue of admissibility of the document must be taken at the time they were introduced into evidence and not afterwards. He said further, that the share transfer instruments were part of Exhibit 1, a bundle of agreed documents which the defendants were a party to placing before the Court, and, that the defendants cannot now claim the documents are inadmissible to prove their content, having been a willing party to their admission in evidence.

In this regard, the law is clear and unambiguous. The requirement for stamping is absolute its breach cannot be countenanced by the Court, even by agreement between the parties. The plaintiff is therefore precluded from using these documents to enforce his claim.

The non-stamping of these documents re-inforces the 1st defendants' claim that registration of the sale of the shares was contingent on payment for them in full.

As regards the stamping of the instruments Mr.Beswick argued that it is the vendor of the shares who is bound by Section 3 (1) of the Transfer Tax Act to suffer the liability for the applicable tax. Accordingly, it is the first defendant who bore the burden and obligation and who has failed to discharge it, and that where it is required under Section 18 (1) of the Transfer Tax Act, that the tax imposed on a transfer "shall be paid to the Commissioner of Inland Revenue by the transferee", must be read as being subject to the ability of the transferee as having the means to pay the tax. This submission is without merit. Nowhere in the Act does it make any reference to "ability to pay"

Sec. 3 (1) of the Transfer Tax Act provides:

> "Subject to and in conformity with the provision of this Act, tax shall be charged at the rate of seven and one half *percentum* of the amount or value of such money or moneys' worth as is, or may be treated

> under this Act as being, consideration for each transfer after the third (3rd) day of April, 1984, of any property, and tax charged in respect of any such transfer shall be borne by the transferor".

Sec.18 (1) of the Transfer Tax Act provides:

> "Subject to the provision of this Act, all tax imposed on a transfer in respect of any transfer shall be paid to the Commissioner of Inland Revenue by the transferee, who shall notwithstanding anything to the contrary provided or agreed, be entitled to recover the amount of the tax by way of deduction from any consideration for the transfer".

The act places an obligation on the transferee to ensure that the Transfer Tax is paid. The Plaintiff has not so done.

ILLEGALITY

The plaintiff's evidence is that the agreed purchase price for the 9% shareholding bought from the first defendant was $780,000. Cross-examined he admitted signing documents regarding the transfer of these shares to reflect that he had paid only $28,000 for them. He further admitted that the document did not accurately reflect what he had paid for them as he in fact paid $780,000 for them and it was not true that he paid $28,000.

The first defendant's evidence which is uncontroverted and which I accept as a fact is that the sum of $28,000 was a figure advised by Mr. Bewsick who prepared the instruments so that they would pay less tax.

The Stamp Duty Act makes void any instrument expressing a consideration which is less than actually paid:

> Section 37. If with intent to evade this Act a consideration or sum of money shall be expressed to be paid in any instrument less that the amount actually paid, or agreed to be paid, every instrument shall be null and void.

Mr. Manning submitted that the conduct of the parties is illegal.

Mr. Beswick contended that there was nothing in its face illegal about the transfer of these shares which equalled the par value of the 28,000 shares being transferred at $1 each. He further submitted that the consideration stated on the share transfer instruments was intended to avoid paying excess statutory duties beyond what was required based on the par value of the shares and that this is a common business practise. Continuing he said that "even if the consideration was incorrectly stated on the Share Transfer instruments, in order for the transfer to be deemed illegal, both parties would have to be found to have the intention to enter into the transaction illegally. That the extension of the criminal law principle of *mens rea* is fundamental to any determination of an intention to defraud the revenue. Since both parties are sanguine that they acted on the advise of an Attorney-at-Law, indeed the 1st Defendant was adamant that he took advise entirely and made no independent decision as to the value to be expressed on the Share Transfer instrument, it is open to the Court to find that the parties had no

intention to defraud the revenue or enter into an illegal transaction but were merely acting on the advise of an Attorney-at-Law given to both parties at the same time. Accordingly, the required intention to defraud must be found to be lacking and that the Court should hold that the transaction was by no means illegal and therefore remains enforceable".

I regard this line of reasoning as wholly erroneous as this is the very mischief that the Act seeks to prevent. It matters not which of the parties had the burden of paying the tax as both parties instructed by Mr. Beswick knew that the amount appearing on the share transfers was false and was calculated to avoid paying the correct tax which would have been very much higher had the true sales price been stated. This brings into operation Section 37 of the said Act (supra) which makes the contract null and void. It renders the contract illegal, hence the plaintiff will not be allowed to rely on this illegal act as such transaction is tainted with illegality and disentitles either party to sue on it in a court of law.

The case of **Napier v. National Business Agency Limited (1951) 2 AER 264** illustrates this. The defendants in this case engaged the plaintiff to act as their secretary and provisions were made in the contract of employment to deceive the revenue authorities. It was held that:-

(i) the provisions of the service agreement relating to expenses were intended to mislead the taxation authorities and evade tax and therefore the agreement was contrary to public policy.

(ii) although the plaintiff sought to enforce the provisions of the agreement relating to salary, those provisions were not severable from the rest of the agreement and were equally unenforceable.

Lord Evershed in delivering the judgment of the Court said:

> "If those were the facts, what is the inference? It must surely be that by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat the claims of the Inland Revenue and to avoid altogether ,or at least to postpone, the proper payment of Income Tax. If that is the right conclusion, it seems to me equally clear (subject to the point which I shall mention in a moment) that the agreement must regard as contrary to public policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and if the parties make an agreement which is designed to do the contrary, i.e. to mislead and delay, it seems to be impossible for this Court to enforce that contract at the suit of one party to it".

I adopt the foregoing and would only add as Lord Denning did in his judgment in the said case where he warned that this decision will have a very salutary effect if it stops people putting in fictitious figures. The maxim *ex turpi causa non oritur actio* applies.

"The rule *ex turpi causa non oritur actio* is, of course not a matter by way of defence" stated by **McKinnon CJ in Harry Parker Limited v. Mason (1940) 4AER 199** where he said that one of the earlier and clearest enunciations of it is that of **Lord Mansfield CJ., in Holman v. Johnson (1) at page 343**

> "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant, it is not for his sake, however, that the objection is even allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident if I may say so. The principle of public policy is this; *ex dolo malo no oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to to arise *ex turpi causa,* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff..... The Court denies both parties from its presence : *procul este, profani.....*"

PART PERFPRMANCE

Mr. Beswick argued that the doctrine of part-performance protects the plaintiff who has not only paid a sum of money for the, but has also altered his position to his detriment in reliance of the due performance of the contract between himself and the first defendant to transfer 9% of the

ordinary shares in the company. He relied on the case of **Steadman v. Steadman (1974) 2 AER 977**, where he said that the House of Lords laid down the general rule that in order to establish part-performance, a plaintiff should show that he acted to his detriment and that the acts in question were such as to indicate on a balance of probabilities that they had been performed in reliance of a contract with the defendant which was consistent with the contract alleged. To bolster .his argument he quoted from Lord Blackburn's speech in his judgment in the case of **Maddison v. Alderson** (1883) 8 App. 467 who said:-

> "The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Whenever that is the case, I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party".

Mr. Manning in his reply said that the doctrine of part-performance has no applicability in the instant case on the following grounds:-

(i) The suit is not one of specific performance of a contract relating to land.

(ii) The doctrine is based on equity and the illegality of the transfer instruments will bar equitable relief.

(iii) The purported acts of part-performance referred to are consistent with the plaintiff being a salaried employee and a friend of the defendants.

(iii) The plaintiff did not plead part-performance to the contract as an alternative basis of his claim.

He relied on the case of **Steadman v. Steadman** (supra) where **Lord Morris of Borth-y-Gest**, said inter alia:-

> "As the whole area of law relating to part-performance relates to contract for the sale of other disposition of land or any interest in land, I would have thought that it followed that on a consideration of alleged acts of part-performance it has to be decided whether their reasonable explanation is that the parties must have some contract in relation to land such as the contracts alleged. I read the speeches in **Maddison v. Alderson** as being produced on that basis. Thus, in the part of his speech in which he said that it was settled that part-performance of purchase price was not enough to amount to part performance, Lord Selbourne L.C. said that the best explanation of that was that payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land".

The above extract clearly demonstrates that the doctrine of part-performance is applicable only to contracts relating to the sale of or other disposition of land. It is certainly not applicable to contracts concerning the sale of shares.

Mr. Beswick's submission in this regard fails.

SHARES

There is no evidence to support a finding that the directors held the shares in trust for the plaintiff.

Under the heading **SHARE AND VARIATION OF RIGHTS** contained in the Articles of Association of the company Entertainment Systems Limited article 10 provides:

> 10. Except as required by law, no person shall be recognized by the company as holding any share upon trust, and the company shall not be bound or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent further or partial interest in any share or any interest in any fractional part of a share or (except only as by these regulations or Law otherwise provided) any other rights to the entirety in the registered holder.

Regarding the transfer of shares article 25 states:-

> 25. The instrument of transfer of any share shall be executed on or behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of a members in respect thereof.

Mr. Beswick is correct when he observed that the plaintiff's case commenced in the jurisdiction of equity. It is only in a Court of equity that

the abuses complained of can be addressed. To be successful therefore, the relevant maxims of equity relative to this action must be strictly observed. Of paramount importance is the maxim. "He who comes to equity must come with clean hands".

I find on the claim to the entitlement of the 1% share capital, the plaintiff in submitting his application for a licence for the company, who by his own admission, said that he assisted in providing inaccurate financial information regarding the application and agreed with the others to do this was a misrepresentation designed to influence the outcome of the application. He also misrepresented the true purchase price of the 9% shareholding bought from the first defendant which in effect was intended to deceive and defeat the just claims of the Inland Revenue. He has not come before this Court of equity with clean hands. His claims are tainted with illegality and the Court as a matter of public policy will not allow either party to enforce their agreement. Other areas of the claim were not highlighted and this is deliberate as severance is not an option open to the plaintiff. Having found that the plaintiff's claim is tainted with illegality the entire claim fails, hence no further pronouncements or determination will be made. There is therefore no basis to grant the relief sought by the plaintiff. The plaintiff's summons is dismissed with costs to the defendants to be agreed or taxed.

There are two matters on which I would like to comment: The first concerns the priority given to this case to be listed as one for speedy trial when there was absolutely no good reason why this should be so.

The second is the part played in this affair by Mr. Beswick, to have advised the parties as he did regarding the price paid for the shares is unethical, and to have acted for the defendants in forming the company and to prepare instruments of transfer acting on their behalf. (N.B. statement of account) and then to represent the plaintiff in this suit conflicts with the ethics of his profession.