

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 1396/2005

Cv. No. 2919/2006

BETWEEN

MARLON HENRY

Plaintiff

AND

JOEL SUSSMAN & OTHERS

Defendants

Before The Honourable Madame Justice Dean-Armorer

APPEARANCES

Mr. Orrin Kerr for the Plaintiff.

Mr. Vashist Maharaj for the Defendant.

JUDGMENT

Introduction

1. These proceedings had been instituted on behalf of the estate of the late Herman Lee Mou against seven (7) separate defendants. On the eve of the trial, the Plaintiff was able to achieve a compromise in respect of six (6) out of the seven (7) Defendants. This judgment pertains therefore only to the dispute between the Plaintiff and the Sixth (6th) Defendant.

2. In the course of this decision, the Court considered whether the Sixth Defendant had intermeddled with the estate of Mr. Lee Mou and whether a resulting trust had been created, in favour of the estate.

Procedural History

3. These proceedings remained in pre-trial mode for many years and passed through many different Courts under the 1975 Rules and through the dockets of two different Judges under the *Civil Proceedings Rules 1998*. As stated above, on the day fixed for trial, the Court entered consent orders in respect of six of the seven defendants.
4. The Court heard the evidence of five (5) witnesses for the Plaintiff:
 - i. The Plaintiff himself, Marlon Henry;
 - ii. Angelio Gonzalez;
 - iii. Neil Goberdhan; and
 - iv. Dew Michelle Cornwall.

Of these witnesses, all were cross-examined except Dew Michelle Cornwall, whose evidence was not relevant to the dispute between the Plaintiff and the sixth Defendant. The Court also heard the evidence of the Sixth Defendant, Mr. Maniram Maharaj.

5. After having heard the cross-examination of witnesses for both the Plaintiff and the Sixth Defendant, the Court gave standard directions for the filing of written submissions. There was however no compliance on behalf of the Sixth Defendant.

The Court was therefore forced to prepare this decision without the assistance of counsel for the Sixth Defendant.

Facts

6. Herman Lee Mou had been a businessman, who had lived in Vistabella, San Fernando. Mr. Lee Mou passed away on 12th June, 1997. At the date of his demise, he was domiciled in Tampa County, Florida, United States of America. He was however seized of both real and personal property in Trinidad and Tobago. Among his items of personal property were male and female race horses whose names are set out in Appendix 1 to this judgment. The entire proceedings to which this decision pertains concerned the race horses and the Sixth Defendant's dealings with them.
7. Prior to his death, Mr. Lee Mou had prepared a will dated the 6th February, 1997. He had been engaged in a common law relationship with the Second Defendant, Rowena Rampersad. Nonetheless, two other persons were named as executors and trustees of his will, namely Joel Sussman, the First Defendant herein and Lawrence Fuentes. It is also undisputed that the Plaintiff, Mr. Marlon Henry, was one of six beneficiaries named in the will of Mr. Lee Mou.
8. On the 4th November, 1997, Joel Sussman obtained a Grant of Probate from the Circuit Court of the 13th Judicial Circuit in and for Hillsborough County, Florida. The Plaintiff alleged that he obtained Letters of Exemplification in respect of the property held in Trinidad and Tobago.

9. This action proceeded on the basis that the Plaintiff had received letters of exemplification of Mr. Lee Mou's will in Trinidad and Tobago. The documents proving this grant were however never disclosed and were never tendered into evidence.
10. There appeared however to be no dispute that the Plaintiff had been granted letters of exemplification and that he held the right to institute these proceedings on behalf of the estate of Herman Lee Mou. Accordingly, for the purpose of these proceedings, the Court regarded as undisputed the Plaintiff's allegation that Marlon Henry held letters of exemplification in respect of Mr. Lee Mou's estate in Trinidad and Tobago.
11. At the time of his death, Mr. Lee Mou owned stables which were housed at the Arima Race Club. At his Arima stables, Mr. Lee Mou kept horses which included Miss Drew, Stepping Quick and Budgie Baby.
12. Four issues of fact arise between the Plaintiff and the Sixth Defendant. The determination of these issues was critical to the final outcome of this matter.
13. The first issue related to the Plaintiff's allegation that Mr. Lee Mou's Arima stables were outfitted with tacklings, air condition units and other utilities, all of which were appropriated by the Sixth Defendant. This allegation was denied by the Sixth Defendant. The Plaintiff relied on the testimony of his witness, horse groom Mervin Daniel. Under cross-examination, however, Mr. Daniel admitted that his knowledge as to the tacklings and air condition units came from information supplied to him by Ms. Rowena Rampersad. This evidence in my view was inadmissible and therefore ought to be rejected. In view of the

- Defendant's denial of this allegation, it is my view that the Plaintiff has failed to establish that tacklings, air condition units or other utilities had been taken over by Mr. Maharaj and accordingly, Mr. Maharaj cannot be held accountable for these items.
14. The second issue of fact concerns the Plaintiff's pleaded allegation that sometime in the month of May, 1998, the Sixth Defendant took possession of race horses belonging to the estate of Mr. Lee Mou¹. Thirdly, the Plaintiff alleged that in August, 1998, the Sixth Defendant purchased the horses from Ms. Rowena Rampersad² and having obtained an export licence, exported the horses to the Republic of Guyana.³ These allegations form the foundation of the Plaintiff's claim against the Sixth Defendant.
 15. In support of these allegations, the Plaintiff relied mainly on the evidence of former employees of Mr. Lee Mou, namely Angelino Gonzales, horse trainer; Neil Goberdhan, foreman and groom; and Mervin Daniel, horse groom. The Plaintiff himself provided no evidence in his witness statement in support of the allegations against the Sixth Defendant.
 16. Accordingly, it was the evidence of the former employees to which the Court was forced to have regard in considering whether the Plaintiff had proved his allegations.
 17. In respect of the second and third issues identified above, the Court found the testimony of Mr. Angelio Gonzalez to be very unhelpful. This witness was not

¹ Statement of Claim filed 18th July, 2005 paragraph 40

² Statement of Claim filed 18th July, 2005 paragraph 41

³ Statement of Claim filed 18th July, 2005 paragraph 40

fluent in English therefore the Court was assisted by a professional interpreter when Mr. Gonzales was under cross-examination. However, Mr. Gonzalez was unable to recall many events. Moreover, he stated categorically that he had not been employed at the farm after July, 1997 and was not therefore equipped to testify as to events in May, 1998. Accordingly, the Court found Mr. Gonzalez to be altogether unhelpful.

18. The second witness, Mr. Marvin Daniel, had been employed with Mr. Lee Mou as a horse trainer. In his evidence-in-chief, Mr. Daniel stated that he worked for Mr. Lee Mou until September 1997, which renders it impossible for Mr. Daniel to provide evidence as to events in May, 1998, the date identified in the pleaded case.⁴
19. The third witness, Neil Goberdhan had been employed by Mr. Lee Mou as a foreman/groom. Mr. Goberdhan testified that the Plaintiff, Marlon Henry had been suspended on 28th June, 1998 and that on the following day Ms. Rowena Rampersad, former common law spouse of Mr. Lee Mou, took the keys and dismissed existing employees. This evidence establishes that Ms. Rampersad took control of Mr. Lee Mou's property on the 29th June, 1998. There is however no support for the further allegation that Ms. Rampersad sold property to the Sixth Defendant or that he ever took control of same.
20. Moreover, the available evidence establishes that Ms. Rampersad took over Mr. Lee Mou's property at the end of June, 1998, rendering unlikely the Plaintiff's pleaded case that Mr. Maharaj took possession of chattel belonging to the estate in May, 1998.

⁴ See footnote 1 supra

21. In respect of the allegation that Mr. Maharaj exported horses to the Republic of Guyana, there is nothing in the evidence-in chief of witnesses for the Plaintiff to support this allegation. Neither the Plaintiff nor his supporting witnesses made any reference to this allegation.
22. Accordingly, it was to admissions contained in the evidence of Mr. Maharaj himself that the Court had recourse in order to decide whether there was a case against him.
23. There was no evidence to support either the purchase of horses by Mr. Maharaj or their export to Guyana. There was no production of the export licence and no other documentary proof to whom the horses had been exported, or on what date or for what price they had been exported. The denial of Mr. Maharaj in my view prevails against this entirely bald allegation and I find on a balance of probabilities that the Plaintiff has failed to establish that horses belonging to the Lee Mou estate had been exported to Guyana.
24. Mr. Maharaj, the Sixth Defendant, denied that he purchased any chattel from Ms. Rampersad. It was his testimony, by way of his evidence in chief, that following the death of Mr. Lee Mou, Ms. Rampersad asked him to take the horses to Bob's Farm because of outstanding debts. Under cross-examination, Mr. Maharaj was consistent in asserting that he took the horses to Bob's Farm because Ms. Rampersad so requested.
25. The Court accepts this admission of the Sixth Defendant as well as the evidence which he provided at paragraph 17 of his witness statement that sometime in June,

- 1997, Ms. Rampersad approached him and requested his assistance to have the horses stabled at Bob's farm.
26. Mr. Maharaj under cross-examination admitted that he removed horses belonging to Mr. Lee Mou from the horses' paddock at the Arima Race Club. Mr. Maharaj admitted that at the time of removal he was aware that the horses belonged to the estate of Mr. Lee Mou. Mr. Maharaj stated that he had not made an inventory, because he transported the horse in small batches and that altogether four horses had been moved. Both cross-examining Counsel, Mr. Kerr and Mr. Maharaj were unable to recall the names of the horses.
27. Mr. Maharaj admitted as well that he had been appointed trainer of horses, which had belonged to Mr. Lee Mou. Mr. Maharaj told the Court that he could not recall the date of his appointment as trainer but that he had been appointed by Ms. Rampersad and that the document by which Mr. Rampersad appointed him was to be found at the Arima Race Club.
28. Mr. Maharaj was shown a letter dated the 5th February, 2002, which had not been signed by him. This document was not tendered into evidence. However, Mr. Maharaj made the following admissions: at the date of the letter, February, 2002, the following horses were stabled at his farm: Dancing Glory, Filly Path to Progress/Dancing Glory, Trouble Rips It and Indian Trouble. Mr. Maharaj admitted that the horses came to his farm in 1998. The Court accepts Mr. Maharaj's account of the circumstances in which the horses came to his farm. In early 1998, Ms. Rampersad came to Mr. Maharaj, who presumed that she was

executor of the estate of Mr. Lee Mou. Mr. Maharaj said: “*She gave me that impression*”

29. The Court accepts that Mr. Maharaj himself had no knowledge of the date or the circumstances of the Grant of Probate of Mr. Lee Mou's will in Florida and relied on information given to him by Ms. Rampersad, who was known to him as the common law partner of Mr. Lee Mou. I accept his statement in Mr. Maharaj's witness statement that prior to the death of Mr. Lee Mou, 90% of the instructions concerning the horses came from Ms. Rampersad and that such instructions had never been reversed. Moreover, Mr. Maharaj was credible in his claim that he viewed Mr. Lee Mou and Ms. Rampersad as “*decent people*” and that he would do what they asked of him. Accordingly, I find as a matter of fact that there had been a course of dealing between Mr. Maharaj and Mr. Lee Mou, whereby the latter communicated through Ms. Rampersad. Having regard to this course of dealings Mr. Maharaj relied on the representation of Ms. Rampersad that she was executor.
30. Having regard to the admissions of Mr. Maharaj, the Court must consider whether his having removed and kept the horses constituted intermeddling and whether Mr. Maharaj is constituted a resulting trustee in respect of the horses. To this question, the Court will return under the heading ***Reasoning and Decision.***
31. An issue of fact arises as well in respect of the Counterclaim, where the Sixth Defendant claims reimbursement for stable fees which were incurred between 1998 and 2006. In my view both the counter claim of the Sixth Defendant and his evidence lacked particulars. There was no breakdown in terms of monthly fees or

information as to how the debt had been incurred. There were no receipts or other documentary evidence. The allegation was simply flung at the Court with an implied mandate that the Court should work it out. In my view the quality of the evidence fails to discharge the burden of proof.

Law

Resulting Trusts

32. In **Westdeutsche Landesbank v Islington L.B.C.**⁵, which concerned a failed interest swap agreement between the parties, Lord Browne Wilkinson, at page 705 of his judgment noted that:

- (i) *Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).*
- (ii) *Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an*

⁵ [1996] A.C. 669

express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

- (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.*
- (iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.*

33. The learned Law Lord, at page 708, further explained:

“Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the

money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trusts and Trustees*, pp. 317 et seq.; *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid.* and *Quistclose Investments Ltd. v. Rolls Razor Ltd (In Liquidation)* [1970] A.C. 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J. in *In re Vandervell's Trusts (No. 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona

vacantia: see In re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts [1971] Ch. 1."

Executor de son tort

34. The meaning of the term 'executor de son tort' is set out in the *Halsbury's Laws of England*⁶:

"An executor de son tort is one who takes upon himself the office of an executor, or intermeddles with the goods of a deceased person, without having been appointed an executor by the testator's last valid will or by a codicil to that will, or without having obtained a grant of administration from a competent court; and the term is thus equally applicable in the case of an intestacy as in the case of a testacy for there is no such term known as an administrator de son tort."

35. Paragraph 754 further states:

"The slightest circumstance may make a person an executor de son tort if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor or administrator. Demanding payment of debts due to the deceased, paying

⁶ Fourth Edition, Volume 17, paragraph 702

the deceased's debts, carrying on the business or disposing of goods may make a person executor de son tort.”⁷

36. An executor de son tort is not entitled to apply for a grant of representation but such conduct merely fixes him with liability for his actions towards the creditors and beneficiaries of the deceased as if he were the lawful representative. Essentially, an executor de son tort has the liabilities and none of the privileges of an executor.⁸

Reasoning and Decision

37. Having accepted the evidence of Mr. Maharaj, this Court finds as a fact that Mr. Maharaj transported horses to his farm and kept them there at the request and pursuant to the direction of the Second Defendant, Ms. Rowena Rampersad.
38. I accept the explanation of Mr. Maharaj that he was under the impression that Ms. Rampersad was the executrix of Mr. Lee Mou's estate and that this impression was pursuant to a course of dealing between Mr. Maharaj and Mr. Lee Mou, where instructions from the latter were conveyed through Ms. Rampersad.
39. Accordingly, it is my view that when Mr. Maharaj removed the horses and when he continued to keep them, he operated under the impression that he had been authorised by Mr. Lee Mou's duly appointed personal representative. If there was any intermeddling in that portion of the estate which pertained to the horses, it is my view that it was on the part of the Second Defendant and not Mr. Maharaj.

⁷ Halsbury's Laws of England, Fourth Edition, Volume 17

⁸ Carmichael v Carmichael (1846) 2 Ph CC 101

40. I turn now to consider whether Mr. Maharaj's possession of the horses gave rise to a resulting trust. In the recent House of Lords decision in *Westdeutsche v Islington B.C.*, Lord Browne-Wilkinson defined the boundaries of the resulting trust. In his judgment referred to *supra*, Lord Browne-Wilkinson limited the incidence of the resulting trust to only two situations: where A makes a voluntary payment to B, the law presumes that A did not intend to make a gift and will hold that B should hold the voluntary payment on trust for A. The second situation occurs where there has been an attempt to create an express trust but the trust declared fails to exhaust the whole of the beneficial interest as had transpired in *Re Vandervell*⁹. In my view it is fairly clear that Mr. Maharaj's involvement with the horses fall into neither category identified by Lord Browne-Wilkinson.
41. Learned Counsel for the Plaintiff submitted only that a resulting trust had arisen in favour of the Lee Mou estate. Learned Counsel, Mr. Kerr made no submission on the possibility of a constructive trust. Even if such a submission had been made however, in my view a constructive trust could not have been imposed on Mr. Maharaj because he had no knowledge that his possession of the horses was without the authority of the personal representative of the Lee Mou estate.¹⁰
42. In *Westdeutsche*, the Learned Law Lord reiterated that equity operated on the conscience of the holder of legal estate. Lord Browne proceeded to state that a person cannot be trustee of property "*if and so long as he is ignorant of the facts alleged to affect his conscience ...*"

⁹ *Re Vandervell Trusts No. 2 [1974] Ch. 269*

¹⁰ See *Westdeutsche Landesbank v. Islington L.B.C.*

43. In the context of the facts of this matter, Mr. Maharaj had been ignorant of the fact that the Second Defendant lacked the authority which she claimed to have. Had he been fixed with such knowledge, his dealings with the horses would have rendered him a constructive trustee. However, his ignorance of facts which would affect his conscience exonerates him as long as he did not know.
44. Since the inception of these proceedings, however Mr. Maharaj must have become aware that Ms. Rampersad was not the executrix of the estate. Any horses which had belonged to Mr. Lee Mou and which he continues to hold would be held on trust for Mr. Lee Mou's estate. In my view, equity requires and I so direct that the Sixth Defendant provide an account of those horses, if any.
45. As to the Counterclaim, the Court has found as a matter of fact that the allegations were entirely unsupported by evidence. Even if the sixth defendant had provided evidence, it would have been impossible for him to escape from his own allegation that expenses had been incurred pursuant to the instructions of Ms. Rampersad, who was not acting with authority. It would be unfair to require the estate to meet expenses incurred pursuant to the unauthorized instructions of the second defendant.

Accordingly the Counterclaim is dismissed.

Orders

1. The Sixth Defendant do file an account of horses originally belonging to Mr. Lee Mou which are currently in his possession.

2. The Sixth Defendant do pay the Plaintiff's costs associated with this action to be taxed by the Registrar in default of agreement.
3. The account to be filed within 30 days of this order.

Dated this 31st day of March, 2011

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Mira Dean-Armorer

Judge

Appendix 1

1. Indian Trouble
2. Special Gem
3. Bolden Express
4. Mr. Drew
5. Ms. Drew
6. Budgie's Baby
7. Indian Trouble
8. Here Comes Trouble
9. Talk about Trouble
10. Dancing Glory
11. Filly Path to Walovan/Dancing Glory
12. Filly Path to Progress/Dancing Glory
13. Trouble Rips It
14. Filly – Native Idol/Trouble Rips It

15. Bob's Master piece
16. Good Friday
17. Tweet Tweet
18. Budgie's Boy
19. Native Idol
20. Good Friday
21. Budgie's Boy