JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 30/2003

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	ALLAN TOPPIN	APPELLANT
AND	RAYMOND LEE	1ST RESPONDENT
AND	DESMOND LEE	2ND RESPONDENT
AND	STEPHEN CHUNG	3RD RESPONDENT

Christopher Dunkley instructed by **Cowan Dunkley & Cowan** for the Appellant
Mrs. Georgia Gibson-Henlin, Miss Tavia Dunn and Taneisha Brown instructed by **Chandra Soares & Company** for the Respondents.

27th, 30th, 31st March, 4th, 5th July, 2006 and 20th December, 2007

PANTON, P:

I have read in draft the reasons for judgment that have been penned by my learned brother, Smith, J.A. I agree with his reasoning and conclusion, and see no point in adding thereto.

SMITH, J.A.

This is an appeal against an order of Pitter, J. whereby he dismissed the Appellant's summons filed on the 17th day of August, 2000. Two affidavits were

filed in support of the Appellant's Originating Summons. The first was filed on the 12th January, 2001 and the second on the 24th January, 2001.

On the 30th January, 2001 Clarke J. ordered that the matter should proceed as if begun by a Writ of Summons. The Appellant filed and served a Statement of Claim on the 1st day of March, 2001.

The Appellant's claims in the Originating Summons were restated as follows:

> "1. A declaration that the Plaintiff [now the appellant] is the equitable holder of 10% of the issued share capital of the enterprise known as Entertainment Systems Ltd. Company #51,551 in the companies register of the Registrar of Companies ("the Company");
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> 2. An account of the earnings of the Company's (sic) from the 13th day of September 1996, to determine the proper net profit on earnings, and payment to the plaintiff by the defendants of the proportionate share of 10% of the said net profit so found on the taking of the accounts, together with interest thereon at such rate and for such period as to this Honourable Court may seem just;
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> 3. An account of the gross value of the Company's assets, and payment to the plaintiff by the defendants of the proportionate share of 10% of the gross value so found on the taking of the accounts with interest thereon at such rate and for such period as to this Honourable Court may seem just and alternatively an order that the Company be wound up and the net value remaining after the payment of creditors approved by the Court be distributed as to10% with interest thereon as aforesaid to the plaintiff, and the remainder to the defendants;
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> 4. An enquiry into whether any and what amounts of the Company's income have been used to purchase land and/or assets in the names of the defendants, in particular, an enquiry into the purchase of land situate at No. 97 Hope Road, Kingston 6, in the parish of Saint Andrew, registered at

Volume 480, Folio 59 of the Register Book of Titles, registered in the joint names of the defendants pursuant to Instrument of Transfer No. 1117497 registered on the 3rd day of August, 2000 and the repayment to the company by the defendants of any amounts found to be used to purchase such land or assets in the names of the defendants with interest thereon at such rate as to this Honourable Court may seem just from the date or dates of distribution to the date of repayment;

5. Costs and Attorney's costs;

6. Such further and other relief as to this Honourable Court may seem just.

It is not in dispute that the Respondents are engaged in the business of providing, among other things, cable television services. To that end they incorporated Entertainment Systems Ltd. (the Company) a limited liability Company with issued share capital of $300,000.00. The Respondents are the subscribing shareholders each holding 100,000 ordinary shares. The first and second Respondents are brothers. The Appellant, an airline pilot, is the brother-in-law of the first Respondent (the first Respondent is married to the appellant's sister).

The Appellant's Case

The Appellant's claim to be entitled to 10% of the shares of the Company is based on the following averment:

(a) An agreement with the 1st Respondent whereby the latter agreed to sell him 9% of his shares in the Company in exchange for twelve (12) satellite dishes each valued at $65,000.00 making a total of $780,000.00.

(b) An agreement with the Respondents that each would transfer 1/3% of his shares to the Appellant in recognition of the work already done by the Appellant for the Company in its application to the Broadcasting Commission for a CATV licence.

The Appellant also claimed that the Respondents appointed him a director of the Company and agreed to pay him a flat director's fee of $16,000.00 per month and an amount representing the proportionate part of the residual monthly earnings of the Company after payment of expenses.

In pursuance of the agreement the Respondents issued instructions to the Attorneys-at-Law Messrs Ballantyne, Beswick and Company to prepare the share transfers. The said Instruments were prepared and signed by all the parties on the 13th September, 1996.

In April, 1997 the Company was advised that its first application for a licence to provide cable services was not successful. A second application was filed in September, 1997.

In January, 1998 the 2nd Respondent advised the Appellant that the Company would no longer be paying the Appellant's director's fees of $16,000.00 and that his employment with the Company was terminated with immediate effect. The Appellant was also advised that he would continue to be entitled to a share in the Company's profit on a *pro rata* basis.

The Appellant indicated his willingness to sell his shares to the Respondents but his offer was declined. With the approval of the Respondents the Appellant

continued to market the Company and negotiated and obtained contracts on behalf of the Company.

The Appellant said that in February, 2000 he had discussions with the first Respondent who offered him $3,000,000.00 for his shares in the Company. The Appellant said that he, at first, declined the offer but later changed his mind. The 1st and 3rd Respondents he said, agreed to this but later recanted.

It is the contention of the Appellant that he would not have done all the work he did for the sum of $16,000.00 per month but for the fact that he was led to believe that he was entitled to a share in the Company as well as a share in the profits *pari passu* with the Respondents.

The Respondents' Case

The Respondents deny that the Appellant is entitled to any shares in the Company. The Respondents say that shortly after the government signified its intention to regulate the provision of cable television services (CATV) the Appellant informed them that he knew the Chairman of the Broadcasting Commission and was in a position to get the necessary information regarding the application for cable licence. It was agreed that the Appellant would assume the responsibility of getting the necessary information. He was not paid to do this.

In July 1996, the Appellant expressed a desire to purchase shares in the Company and to become a part of it. The 1st Respondent agreed to sell 9% of his shareholding to the Appellant for $900,000.00 and not in exchange for 12

satellite dishes as the Appellant claims. He also agreed to sell some satellite dishes on behalf of the Appellant. However, he did not accept the dishes in exchange for the shares, but to sell them and apply the proceeds of sale to the cost of the shares. He sold seven dishes and realized only $360,000.00 leaving a balance of $540,000.00.

As a result of the Appellant's failure to pay the balance due on the shares, the Respondents refused to register the sale of the 9% shareholdings to him. The Respondents accept that there was an agreement to transfer a further 1% shareholding in the Company to the Appellant but contend that this agreement was contingent on the successful application for a licence. The Respondents say that they were advised by Messrs Ballantyne, Beswick and Company that the share transfers would be held pending full payment of the $900,000.00 and the successful application for a licence.

The application was not successful and to date the Appellant has failed to pay the balance of $540,000.00. The Respondents claim that the employment of the Appellant was terminated because he had stopped performing duties for the Company. They deny that the Appellant continued to market the Company.

As stated at the outset, Pitter, J. found for the Respondents and dismissed the Appellant's claims with costs to the Respondents.

The Appeal

Seven (7) grounds of appeal were filed:

(a) The Learned Judge erred and/or misled and/or misdirected himself in his findings of fact and law as stated at paragraph 2 hereinbefore, and thereby occasioned a substantial wrong or miscarriage of justice to the Appellant.

(b) The Learned Judge ought to have found that:-

(i) the 1st Respondent received 12 satellite dishes from the Appellant in consideration of the sale to the Appellant of 9% share capital of Entertainment Systems Limited;

(ii) the agreed sale price of the said shares was $780,000.00;

(iii)the agreement to transfer an additional 1% share from the Respondents to the Appellant was in consideration for the Appellant's contribution to the parties' first and the subsequent successful second application to the Broadcasting Commission for a licence to provide and supply cable television.

(iv)(sic)The Appellant's monthly receipt of $16,000.00 from the said company was his share of its profits as a director of the same, and was not a salary.

(c) The Learned Judge erred by his reliance on the said share transfer instruments to find illegality, although he found that the same were not stamped and were therefore inadmissible in evidence to prove the Appellant's case.

(d) The Learned Judge erred by finding that the contracts concerning the sale of the shares were illegal acts calculated to defraud the revenue, and thereby rendered the said contracts null and void.

(e) Alternatively, the Learned Judge ought to have found that if the Appellant's interest in the said shares was acquired as a result of an illegal transaction, the Appellant was still entitled to recover his equitable interest if he could establish his title without reliance on his own illegality, even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction.

(f) The Learned Judge ought to have found that the doctrine of part-performance is applicable to contracts concerning the sale of shares.

(g) The Learned Judge failed to address or determine adequately or at all the questions asked by the Appellant in the Originating Summons dated the 17th day of August, 2000."

Grounds (a) & (b)

The complaint of the Appellant in these grounds is that the learned trial judge misdirected himself in his findings of fact and law. In his Notice of Appeal the Appellant challenges five (5) findings of fact. The first finding of fact challenged by the Appellant involves the learned judge's acceptance of the 1st Respondent's evidence that the agreed price for the 9% shareholding sold to the Appellant was $900,000.00.

The question is: Did the judge misdirect himself? It is not in dispute that at the time of the agreement the Company was valued at nine or ten million dollars. The dispute arose as to the agreed price of the 9% shareholding. The Appellant contends that he gave the 1st Respondent twelve (12) satellite dishes valued at $65,000.00 each in exchange for the shares. Thus, according to the Appellant the sum of $780, 000.00 would be the price he paid for the dishes.

The evidence of the 1st Respondent is that he agreed to sell the Appellant 9% of his shares in the Company for $900,000.00 and that he received from the Appellant seven (7) satellite dishes to sell and to apply the proceeds of sale to the cost of the shares.

In accepting the evidence of the Respondent, the learned judge took into account the following factors:

(a) There is no documentary evidence.

(b) The family relationship between the Appellant and the 1st Respondent.

(c) The fact that the value of the Company was between nine and ten million dollars. This means that the value of 9% of the shares would be $810,000.00 or $900,000.00.

(d) The fact that there was a decline in the satellite industry and the consequent reduction in prices due to the rapid growth of cable and the unavailability and unreliability of cards for the dish system.

I accept the submission of Mrs. Gibson-Henlin that the learned judge did not misdirect himself on this issue and that his findings were reasonable.

The Appellant also complains that the learned judge erred in finding that the 1st Respondent sold seven dishes and realized $360,000.00 leaving a balance of $540,000.00. The learned judge noted the discretion of the directors of the Company to withhold registration of shares and then stated that he accepted the defendant's (1st Respondent's) evidence that $360,000.00 was realized from the sale of seven dishes which sum was applied to the agreed sale price leaving a balance of $540,000.00 The learned judge thereby rejected the

Appellant's claim that non-registration of the shares was due to the Respondents resiling from their promise to admit him to the Company.

It was clearly the view of the learned judge that the fact that the instruments of transfer of the shares were not registered but remain in the hands of Mr. Beswick, the attorney-at-law who acted as stakeholder, suggested that a balance was outstanding. In my view, this conclusion is reasonable in the absence of any other evidence as to why the transfer was not registered. The judge did not, in my judgment, misdirect himself.

The third finding of fact which the Appellant challenges is that the transfer of an additional 1% share from the Respondents to the Appellant was contingent on the successful outcome of the parties' first application to the Broadcasting Commission for a licence to provide and supply cable television.

The Appellant's evidence is that the Respondents 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 3rd Respondent made the offer in recognition of the work he had done in preparing the first application to the Broadcasting Commission. He paid no money for the additional 1%. The Respondents, on the other hand, said that the 1% shareholding was contingent on the successful outcome of the first application for the licence.

After repeating the above evidence of the parties, the learned judge continued:

> "The plaintiff [now the Appellant] admitted that after the failure of the first application all three

> defendants [now the Respondents] 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."

Counsel for the Respondents submitted that the assertions by the Appellant, in para. 25 of his Statement of Claim, are inconsistent with his evidence. At paragraph 18 of his first affidavit in support of the Originating Summons the Appellant stated that he became involved in the licensing process before any final agreement was reached with the Respondents as to his involvement with the Company.

At paragraph 25 of his Statement of Claim the Appellant stated that:

> "at no time would he have been willing to provide the services he in fact provided for the Company in the preparation of both licence applications to the BCOM for fees of $16,000.00 per month except in the expectation that as a part owner and Director of the Company, when the application was approved and the licence ultimately granted, he stood to earn large emoluments and profits from the earnings of the Company."

In light of this, counsel submitted, correctly, in my view, that the learned judge could not be faulted in rejecting the Appellant's evidence.

The fourth complaint concerning the finding of fact was not pursued by Mr. Dunkley, counsel for the Appellant.

The fifth complaint concerns the judge's statement at page 10 of the judgment that "the non-stamping of these documents reinforces the 1st defendant's claim that registration of the sale of the shares was contingent on payment for them in full" by the Appellant.

It is not disputed that the instruments of transfer were not stamped. The learned judge was merely using the fact that the instruments were not stamped, as is required by law before they could be registered, to support his finding that the shares were not fully paid for by the Appellant. This therefore relates to the second finding of fact (supra). The appellant has not shown that the learned trial judge misdirected himself in law or fact. His findings of fact have not been shown to be plainly wrong.

Grounds (c), (d) and (e) concern the effect of illegality on the Appellant's claim. The Appellant's evidence is that the agreed purchase price for the 9% shareholding sold to him by the 1st Respondent was $780,000.00. The Instrument of Transfer of Shares dated the 13th day of September, 1996 and signed by the 1st Respondent and the Appellant in the presence of a Justice of the Peace states the price paid to be $28,000.00. The Appellant, during cross-examination, admitted signing the document. He also admitted that the instrument did not accurately reflect the sum he paid, as he had in fact paid $780,000.00. The first Respondent's evidence, which is uncontroverted and which the learned trial judge accepted as fact, is that Mr. Beswick who prepared the instrument

advised the parties to use the figure of $28,000.00 so that they would pay less tax. Section 37 of the Stamp Duty Act provides:

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

The learned trial judge at page 13 of the judgment states:

> "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) [Stamp Duty Act] 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."

In my view it is not correct to say that section 37 of the Stamp Act renders the contract null and void. The Act provides that the "instrument shall be null and void" (emphasis mine). However, an agreement to defraud the revenue is illegal at common law on grounds of public policy. Such an agreement would be clearly injurious to society. Now an agreement to sell and buy shares in a company is certainly not by itself unlawful. On the evidence it seems reasonable to conclude that the contract between the parties was lawful in its inception. However, the evidence indicates that the parties intended to perform it illegally. The Appellant and the Respondents are at one that

instructions were given to their attorneys-at-law to prepare Instruments of Share Transfer. This, of course, was for the purpose of executing or performing the agreement.

By virtue of section 2 of the Stamp Duty Act, stamp duty is payable on instruments of share transfer. Instruments not duly stamped are not admissible in evidence for the enforcement thereof. We have seen that section 37 makes instruments which have a fictitious figure inserted as consideration with intent to defraud the revenue, null and void. We have also seen that the unchallenged evidence is that both parties knew that the consideration was understated in the instruments of transfer so that they would pay less tax.

The question then is: What is the consequence where a contract which, *ex facie,* is lawful in its inception, is intended to be illegally executed or performed?

The Learned Trial Judge was of the view that the insertion of the fictitious figure tainted the transaction with illegality and disentitled either party to enforce the contract. He referred to the case of ***Napier v. National Business Agency, Ltd.*** [1951] 2 All E.R. 264. In that case the defendants engaged the plaintiff to act as their secretary and accountant at a salary of £13 a week together with £6 a week for expenses. Both parties were aware that the plaintiff's expenses could never amount to £6 a week, and in fact they did not exceed £1 a week. Each week the appropriate tax was deducted from the £13 and returns made to the Inland Revenue Commissioners.

The plaintiff was summarily dismissed and claimed payment from the defendants in lieu of notice of £13 for a certain period. It was held that the provisions in the agreement relating to expenses were intended to evade taxation and accordingly the agreement was contrary to public policy, and although the plaintiff sought only 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.

The Appellant's submission in this regard may be summarized as follows:

(i) The trial judge failed to distinguish between an illegality which founds a transaction and an illegality which is a consequence of a transaction.

(ii) The judge failed to distinguish between the transfer instruments and the agreement for the sale and purchase of the shares.

(iii) There is no evidence to suggest that the decision to sell shares was founded on any presumed intention to defraud the revenue.

(iv) The Appellant's claim is founded on the principle of resulting trust.

(v) The decision to understate the consideration in the instrument of transfer cannot defeat the resulting trust which had already been created by the Appellant's acquisition of a beneficial interest in the Company's shareholdings.

The Appellant relied heavily on the decision of the House of Lords in ***Tinsley v. Milligan*** [1993] 3 All E.R. 65.

The Respondents submitted that the understating of the consideration for the purpose of defrauding the revenue makes the transaction illegal by statute.

Counsel for the Respondents further submitted that the learned trial judge was right in holding that the agreement was tainted with illegality and could not be enforced by either of the parties.

As I have indicated before, the agreement in question is not illegal as to its formation, however, the authorities show that the illegality may arise because both or one of the parties intend to perform the contract in an illegal manner. The court will deny its assistance where both or one of the parties intended to perform the contract in an illegal manner. If one of the parties, without the knowledge of the other, intends to perform the contract in an illegal manner, then in those circumstances the guilty party will suffer the full impact of the maxim **ex turpi causa non oritur actio** and all remedies will be denied him, (see ***Alexander v. Rayson*** [1936]1KB 169). However, where both parties knew that the contract was intended to be performed in a manner which was legally objectionable, neither can sue upon the contract.

In the instant case both parties knew that a fictitious figure was inserted in the instrument of transfer for the purpose of evading tax. The instrument of transfer which was signed by both parties is necessary for the performance or execution of the contract. The contract consists of the promise on the part of the Respondents to transfer shares to the Appellant and the promise of the Appellant to pay a certain sum therefor.

In my opinion the execution of the instrument is an integral part of the performance of the contract and is not severable. The agreement cannot be

enforced without a proper instrument of transfer. Indeed section 74 of the Companies Act provides that "... it shall not be lawful for the Company to register a transfer of shares in or debentures of the Company unless a proper instrument of transfer has been delivered to the Company". Article 25 of the Company's Articles of Association provides that the transferor shall be deemed to be the holder of the share until the name of the transferee is entered in the register of members.

As I have already stated, transfer tax is payable on instruments of share transfer, and a Company may not register an unstamped instrument.

Counsel for the Appellant founded his submissions on the majority decision of their Lordships in ***Tinsley v. Milligan*** (supra). In that case, by a majority of 3-2, their Lordships held that at page 66:

> " Where property interests were acquired as a result of an illegal transaction a party to the illegality could recover by virtue of a legal or equitable property interest if, but only if, he could establish his title without relying on his own illegality even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction."

It will be readily seen that the instant case can be distinguished from the ***Tinsley v. Milligan*** case. In the latter the plaintiff had acquired property interests. In the instant case the learned judge found as a fact that the Appellant had not paid the purchase price of the shares in full. Further, the instrument of transfer is null and void. Thus property in the shares had not passed to the Appellant pursuant to the agreement. The Appellant, therefore, cannot rely on the

principles of resulting trust, as his counsel contends, since by operation of law the shares were not transferred to him. It would be otherwise, in my view, if the instruments of transfer were valid. In such a case the presumption of a resulting trust would probably arise.

Ground (f):

As regards this ground, that is, the Appellant's submission on part performance, I need only say that their Lordships in ***Tinsley v. Milligan*** (supra) made it abundantly clear that the Court will not, at law or in equity, enforce an illegal contract which has been partially, but not completely performed.

It is not necessary for the purposes of this judgment to consider whether or not the doctrine of part performance is applicable only to contracts affecting interest in land. I should say however, that, in my view, the illegality of the instrument of transfer would bar equitable relief.

Finally in ground (g) the Appellant complains that the judge failed to address or determine adequately or at all the questions asked by him in the Originating Summons dated 17th day of August, 2000.

This ground was not pursued by the Appellant. However, as the Respondents in their written submissions contend, the Appellant in his Statement of Claim abandoned the questions asked in the Originating Summons. This complaint is clearly without merit.

Conclusion

For the reasons given, I would dismiss the appeal and affirm the order of the Court below with costs of this appeal to the Respondents to be taxed if not agreed.

McCALLA, J.A

I have read in draft the reasons and conclusions of Smith J.A., with which I agree entirely and have nothing further to add.

ORDER:

PANTON, P

The appeal is dismissed. The judgment of the Court below is affirmed and costs are awarded to the Respondents; such costs to be agreed or taxed.