IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 15 of 2013

BEFORE

The Rt Hon Sir John Chadwick, President

The Rt Hon Sir Anthony Campbell, Justice of Appeal

The Hon. John Martin, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

Cause No 84 of 2012

BETWEEN:

1. **WILLIAM MARK CASSIDY**
2. **SOUTHHAVEN DEVELOPMENTS LIMITED**

Appellants (Defendants)

and

40 ACRES LTD.

Respondent (Plaintiff)

Mr Richard de Lacey Q.C. and Mr William Jones of Ogier for the Appellants.

Mr James Austin-Smith of Campbells for the Respondent.

Hearing date: 15 April 2014
Judgment delivered: 6 November 2014

JUDGMENT

Sir Anthony Campbell J.A.

1. Mr Douglas Sell, is a real estate broker in Grand Cayman and the sole director and shareholder of 40 Acres Limited ("40 Acres"), the respondent in this appeal.

2. On 13 February 2009, 40 Acres transferred US$531,540.72 to the account with HSBC of the second-named appellant, Southhaven Developments Limited ("Southhaven") and on 16 February 2009 a further sum of A$811,834.71 to the same account.

3. The first – named appellant, William Mark Cassidy, was formerly the Chief Executive Officer of Southhaven, which is a company registered in the British Virgin Islands, with offices in Hong Kong. Following voluntary liquidation it was struck off the register in the British Virgin Islands on 1 November 2011. On 10 July 2012 it was reinstated with Mr Cassidy as the sole director and shareholder.

4. It is acknowledged by Southhaven that the two payments, referred to in paragraph 2, were made by 40 Acres in February 2009 and credited to its account with HSBC. What is in dispute is the reason for the transfers being made. According to Mr Sell, 40 Acres transferred the money so that Mr Cassidy, with whom he was then friendly, would hold it on his behalf until such time as Mr Cassidy had identified an investment opportunity that interested Mr Sell. Then, subject to Mr Sell's written consent, Mr Cassidy was to invest the funds on his behalf. According to Mr Sell the entire fund was to be held to his order and repayable to him on demand.

5. Mr Cassidy claims, on the other hand, that both transfers constituted the return on money invested with Mr Sell. He says that US$531,540.72 is the return on an investment of US$230,000.00, made by him in late 1997 or early 1998 on behalf of Southhaven, and A$811,834.71 is the return on an investment of A$753,190.00 made by a company called Beaufort Worldwide Limited with Mr Sell in or around 10 August 2007.

6. Following a trial in the Grand Court in April 2013 before the Honourable the Chief Justice, Mr Cassidy and Southhaven were ordered to pay US$ 609,062.97 to 40 Acres. This sum includes interest to the date of the Order (17 May 2013), and in addition interest is to accumulate at a daily rate until payment. They were also ordered to pay A$ 930,024.29 which included interest to 17 May 2013, and further interest continuing at a daily rate until the date of payment.

7. Mr Cassidy and Southhaven have appealed against the judgment of the Chief Justice.

8. The decision of the Chief Justice is one of fact and guidance as to the approach to be adopted by an appellate court in an appeal against findings of fact is found in the judgment of Clarke L.J. (as he was then) in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1WLR 577 580-581.In a passage, which was later approved by Lord Mance in *Datec Electronics Holdings Limited and others v United Parcels Services Ltd* [2007] 1 WLR 1325 at 1347, Clarke L.J. said:

> "14. The approach of the court to any particular case will depend upon the nature of the issues kind of case (sic) determined by the judge. This has been recognised recently in, for example, *Todd v Adam & Chope (trading as Trelawney Fishing Co)* [2002] 2

Lloyd's Rep 293 and *Bessant v South Cone Incorporated* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents.Some findings of primary fact will be the result of direct evidence , whereas others will depend upon inferences from direct evidence of such facts.

15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 'rehearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules 1998…"

Clarke LJ. went on to refer to the following passage in *Todd's* case [2002] 2 Lloyd's Rep 293, at paragraph 129 where Mance L.J. drew a distinction between challenges to conclusions of primary facts or inferences from those facts and an evaluation of those facts:

"…Where the correctness of a finding of primary fact

> or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence…"

40 Acres' case

9. In January 1999 a company called Fantasia Limited, of which Mr Sell was the beneficial owner, invested A$500,000, through Southhaven, in a development known as Noosa Sanctuary at Noosa Heads in Queensland, Australia.

10. On 17 May 2005 in an e-mail message to Mr Cassidy, marked as having been sent at 4.42pm, Mr Sell wrote "…My client has asked to be paid there (sic) original investment of 500k Australian. This was originally supposed to have been paid 18 months from December 1997.This would have made it due on May of 1999. Obviously this means it is six years in default. My client has been extremely patient with this investment and wonders what would of (sic) happened had the roles been reversed. The balance of the money can be paid on completion. This delay in payment has severely affected my client's financial picture. Thank you in advance for your help in this matter."

11. In his response by e-mail, sent on the same date at 6.22pm, Mr Cassidy explained that there are never any guarantees when you invest in property and having referred to the expense incurred in taking the local government to court he wrote "Your client will receive it's share of profits WHEN THE LAND IS SOLD!"

12. Mr Cassidy wrote to Mr Sell on 23 August 2006 and, having referred to a number of difficulties that had arisen with the development, he said that once Noosa settled they would start making offers on another apartment on SMB. (SMB would appear to be a reference to Seven Mile Beach in Grand Cayman).

13. In the following year on 30 April Mr Cassidy sent an e-mail to Mr Sell in which he said:

> "Purchaser of Noosa paid a substantial deposit today and the contract is unconditional. Balance of deposit May 14, settlement June 25. But as we all know not sold until ALL THE MONEY IS IN THE BANK. Hopefully the AUD$ will hold above

.83us.

Will advise on May 14 re balance of deposit. Then please provide Bank details for TT, given “TT time and cleared funds” expect in your Cayman account July 5-7. But not sold until money in BANK!”

14. On 10 August 2007 Beaufort Worldwide Limited (a company of which Mr Sell said that he had no previous knowledge) paid A$753,190.00 into Mr Sell’s personal account with Credit Suisse in Switzerland.

15. According to Mr Sell this money was the return on the investment in Noosa Sanctuary that he made through Fantasia Limited. It was paid into Mr Sell’s personal account as by this time Fantasia Limited had been struck off the register of companies. According to Mr Sell he did not think he would need it any longer and it was struck off on 30 September 2002. It was reinstated by him in February 2012 for the purpose of this litigation.

16. The sources of the money that Mr Sell claims he invested in 2009 through 40 Acres with Mr Cassidy are identified by him as being:

    a) A$753,190.00 that he received from Beaufort Worldwide Limited, (increased by the addition of bank deposit interest to A$ 811,834.71) and transferred from the Credit Suisse Account of 40 Acres to Southhaven’s account with HSBC on 13 February 2009 and

b) US$531,540.72, money earned by him as commission through his real estate business and transferred to the account of Southaven with HSBC from the Credit Suisse account of 40 Acres on 13 February 2009.

17. Mr Sell said that in August 2010 he asked Mr Cassidy to return this money. This request was repeated by e-mail, telephone and in person when they met in the Cayman Islands. He said that Mr Cassidy made excuses as to why he would not return the money. Mr Sell concluded that Mr Cassidy was deliberately avoiding him. In an e-mail to Mr Cassidy, dated 27 August 2010 and headed "Wire Transfer Instructions", Mr Sell wrote " As discussed can you please have your client send the US$ to the following Campbells Escrow Account…"

18. Eventually, Mr Sell's attorneys sent a formal demand for repayment to Mr Cassidy which was delivered to him by hand, on 19 November 2010 at 16 Colonial Club, West Bay, Grand Cayman.

19. This resulted in Mr Cassidy sending an e- mail with an attachment to Mr Sell at 5.00am on 11 December 2010. The attachment, in the form of a letter, is headed Southhaven Developments Limited, and signed William Mark Cassidy CEO. The letter is marked for the attention of Mr Sell, and in the following terms:

"Sir,

“Without Prejudice”

One of the biggest mistakes you have made in your life is to have Campbell’s personal (sic) “banging” on the door of my home. Your claim is without foundation and any attempt to proceed will be vigorously defended by Southhaven. You have embarrassed me with my neighbours, staff and employer.

In the event of any harm coming to my Family, property or me the following will result-

1) The Company’s attorneys will provide information of your Swiss Bank Accounts, there may be others but we now have the details of two, to the US Government Authorities. One would assume, as a US Citizen, you have provided this information on previous tax returns over the past 5 years?

11) In your ownership of the Cayman Company, information contained in the letter by Campbells, will also be provided to the US Authorities. Again there may be others. This would not be an offence under Cayman Law, as your own solicitor has provided the information.

111) A suggestion will be made that the Cayman Authorities study any Affidavit you may have made in your current Divorce Proceedings, or any that you may make in the future.

IV) A further suggestion that the Cayman Authorities audit your Trust Account re possible “money laundering”. This would include any firm with which you have been involved in the past five years.

Under no circumstances are you to contact my Family, the Company or me in the future. Nor have any other parties contact us in person, by email nor phone, we both know of the people to whom I refer!”

The case made by Mr Cassidy and Southaven.

20. Mr Cassidy and Southhaven say that the investment of A$500,000 made by Fantasia Limited in the Noosa Sanctuary Development was repaid in January or February 2001, without interest or compensation for any Forex loss. It was repaid then, according to Mr Cassidy, due to concern on the part of Mr Sell about a fall in value of the Australian Dollar. It was for this reason, it is said, that Mr Sell decided to redeem the investment at that time.

21. No company records of the investments have been retained by Southaven nor have its bankers retained their records. As a result there is no documentary evidence to support the claim that repayment was made in 2001. Mr Cassidy and Southaven rely however, on a note of 19 January 2001. Mr Cassidy said that this note implies that the original investment had already been repaid and that all that remained outstanding was a share of the profits, to be paid in the future to off–set any Forex losses. In the note (which is not signed by Mr Cassidy though it carries his name) he offers by way of compromise, to repay Fantasia’s investment in full without any accrued interest with Fantasia sharing in the

profit, if any, at the conclusion of the investment. Mr Cassidy makes the point in the note that a share of the profit may not exceed the dollar value of Fantasia's Forex loss.

22. It is Mr Cassidy's recollection that this note was sent to Mr Sell by e–mail though Mr Sell denies having received it. According to Mr Cassidy the note only came to light when his brother was clearing out a filing cabinet, at their house in Brisbane.

23. It is part of the case made by Southhaven and Mr Cassidy that Mr Sell was going though divorce proceedings and that in February 2009 it was proposed by Mr Sell that Mr Cassidy should assist him in concealing assets. Mr Cassidy said that he told Mr Sell that he would only consider doing so if the two investments had been repaid. Once the money had been repaid Mr Cassidy declined to provide assistance and Mr Sell was then angry with him.

24. According to Mr Cassidy, late in 1997 or early in 1998 Southhaven invested US$230,000.00 with Mr Sell to be placed in a fund to buy condominiums in the Cayman Islands. The profits were to be re-invested in different projects sold by Mr Sell. Mr Cassidy said that he was not provided with any documentary record of the investments and that he took Mr Sell's word about the performance of the investments.

25. In late January or early February 2009 when Mr Cassidy asked for repayment this was made on 13 February 2009 when Southhaven received a payment of US$531,540.72.

26. Mr Cassidy said that in or around 10 August 2007 Beaufort Worldwide Limited invested A$753,190.00, with Mr Sell for “pre sale-off the plan” condominiums. Again there was no documentation concerning the investment. The figure of A$811,834.71 was paid to Southaven on 16 February 2009 and represented the return on this investment.

The judgment of the Chief Justice.

27. The Chief Justice found Mr Cassidy’s evidence about the provenance of the note of 19 January 2001 which was relied on by him to prove that the investment by Fantasia Limited was repaid in 2001 to be most unsatisfactory. The Chief Justice rejected it as evidence that repayment was made at that time.

28. Mr Cassidy said that it was unnecessary for him to mention in his response to Mr Sell’s e- mail of 17 May 2005 seeking repayment of A$500,000 that it has already been repaid as they both knew this to be the case. The Chief Justice found this to be an unbelievable explanation for the failure to mention that payment of such a sum had already been made.

29. As the Chief Justice said if Mr Cassidy is correct and the initial investment of A$ 500,000 was repaid in 2001 and only accretions from currency fluctuations between 1999 and 2001 remained due, there would now be no way of measuring them

since banking records no longer exist to show when, as is claimed, repayment was made in 2001.

30. Mr Cassidy relied on the absence of any further demands by Mr Sell for repayment between the request for payment in May 2005 and 10 August 2007 when the transfer was made by Beaufort Worldwide Limited as showing that Mr Sell must have been repaid in 2001. The Chief Justice observed that during this period of time there was constant contact and ongoing dialogue between Mr Sell and Mr Cassidy and at least one reference in correspondence to delay in completion of Noosa Sanctuary and to news of offers for it. The Chief Justice took the view that the reason for further delay in repayment would have been both known and understood by Mr Sell.

31. As the investment in Noosa Sanctuary had been made by Fantasia it was suggested by Southaven and Mr Cassidy that Mr Sell would not have allowed Fantasia to be struck off the register in September 2002 if the money was then outstanding. The Chief Justice said that both Mr Sell and Mr Cassidy "transacted through corporate entities used effectively as alter egos doubtless mindful of the tax implications of holding assets in their own names." He accepted that there was a clear understanding between Mr Sell and Mr Cassidy that the repayment would be due to Mr Sell personally and that it was hardly surprising that the payment made by Beaufort Worldwide Limited was remitted to Mr Sell's personal account. The

Chief Justice rejected the contention that Mr Sell found no reason to keep Fantasia on the register because the investment had been returned.

32. In paragraphs 43 to 46 of his judgment the Chief Justice made the following observation with reference to the two transfers of 13 February 2009 :

> "43. Notwithstanding that those two sums together amounted (at the rate of exchange then prevailing) to over 1.3 million USD and so more than twice the value of the amount of AUD753,190 returned to Mr Sell only 18 months earlier on 10 August 2007; Mr. Cassidy's case is that they were paid to him by Mr Sell as being the return on the AUD753,190 which he asserts, was his investment with Mr Sell.
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> 44. In stark contrast with the ample documentation of Mr Sell's investment in Noosa Sanctuary, there is, as already noted, a complete absence of any documentation to support this alleged investment by Mr. Cassidy
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> 45. Taken by itself, his assertion of a magical increase in investment of more than a hundred percent explained by Mr.Cassidy only on the basis that "his" AUD 753,190 had been given to Mr Sell for investment in very profitable 'off the plan" real estate transactions in the Cayman Islands- simply defies belief.
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> 46. When the assertion is considered in the vacuous absence of any documentary evidence whatsoever to support either the payment of the AUD 753,190 as being such an investment or to support the existence of the

alleged “off the plan” investment scheme itself, I am compelled to reject it”

33. As already noted there is an absence of any documentation to support an investment by Mr Cassidy or Southhaven. However, in paragraphs 43 and 45 the Chief Justice appears either to have overlooked that Mr Cassidy claimed that he had invested not only A$753,190 but also US$230,000 on which the return was US$531,540.72 or, as counsel for Mr Sell said, he has added US$531,540 to A$811,834.71 in error. Whichever explanation is preferred the comment is not supported by the evidence.

34. The Chief Justice referred to the absence not only of documentary evidence to support the claim that the money was invested with Mr Sell by Beaufort Worldwide Limited and also of any documentary evidence about the “off the plan” condominiums that were said to be the subject matter of this investment.

35. He found it to be significant that the payment made by 40 Acres to Southhaven of A$811,834.75 was of money (with accrued interest) that had been held in a deposit account in Australian dollars with Credit Suisse ever since it was received by Mr Sell from Beaufort Worldwide Limited. This is shown in the statement of account with the Bank. As the Chief Justice observed, if the money was invested by Beaufort Worldwide Limited in an ‘off the plan’ condominium development, as Mr Cassidy claimed, one would have expected it to have been invested with the developer and not left on deposit in a bank account.

The appeal

36. The first ground of appeal is that the trial judge failed to take into account in paragraph 43 of his judgment that the appellants' case was that US$531,540 was the return on US$230,000 that had been invested in 1997 or 1998. It is accepted by the respondent that there is an error and as explained earlier in this judgment the facts do not support the observation in the judgment at paragraphs 45 and 46.

37. When account is taken of this error it remains difficult to see how the outcome of the proceedings could have been any different. The failure to bring it to the attention of Mr Sell that the investment in Noosa Sanctuary had already been repaid in 2001 when he asked for repayment in 2005; the absence of any documentation to support the suggestion that it was repaid in 2001, save for the note, found at a late stage in circumstances found to be unsatisfactory, all suggest that the investment was repaid in 2007.

38. The claim that Mr Cassidy invested US$230,000 through Mr Sell is again unsupported by any documentation. Even the year in which it is said to have been invested is vague and ranges between 1992 to 1994 in the pleadings and 1998 in the evidence of Mr Cassidy. Equally there is nothing to identify the property in which the money is said to have been invested.

39.The fact that the sum of A$753,190 received by Mr Sell from Beaufort Worldwide Limited remained in a deposit account and in Australian currency does not accord with Mr Cassidy's evidence that it was an investment by Beaufort Worldwide Limited in some unidentified "off the plan condominiums " and repaid to Southhaven as A$811,834.71. Again there is no

documentary evidence to support the case made by Mr Cassidy and Southhaven.

40. Without the error that led the Chief Justice to make the observation about a "magical increase in investment" the remaining evidence leads to the same conclusion, namely that Mr Sell through 40 Acres, transferred US$531,540 and A$811,834.71 to Southhaven with a view to investment and to the rejection of the contention by Mr Cassidy and Southhaven that this was repayment of investments with Mr Sell made by Southhaven and Beaufort Worldwide Limited.

41. The second ground of appeal concerns a passage in the judgment, at paragraph 55, where the Chief Justice with reference to the A$ 811,834.75 and US$ 531,540) said:

> " 55. The payments were actually made to Mr.Cassidy in the name of the plaintiff 40 Acres Ltd- the name in which the Credit Suisse account, of which Mr Sell was beneficial owner, was then held. The monies which were actually held by Mr. Cassidy on bailment or on a bare trust, were repayable on demand."

It is submitted by Mr. Cassidy and Southhaven that this finding is based on an earlier passage in the judgment, at paragraph 6, where it is incorrectly stated that:

> "Mr Cassidy does not deny that the payments were made to him through Southhaven by Mr Sell. Indeed, there are undisputed bank transaction documents evidencing the transfer of the funds from the Plaintiff's Credit Suisse account to Southhaven's account with HSBC Hong Kong."

42. Mr Cassidy said in his evidence " at no point was I a shareholder or a director of Southhaven until its recent reinstatement to the BVI Companies register on July 10, 2012, at which point I became Southhaven's sole director and shareholder." To this extent it is said that Mr Cassidy did deny that the payments were made to him personally through Southhaven.

43. 40 Acres in the Statement of Claim, at paragraph 10, pleaded that "In or around 2009, pursuant to an oral agreement between Mr Sell and Mr Cassidy, it was agreed that Mr Sell would pay to Mr Cassidy further sums for investment by Mr Cassidy in investments that were to be agreed by Mr Sell…" and at paragraph 12 "It was agreed orally inter alia, that the monies paid to Mr Cassidy/the Second Defendant to hold and invest on the Plaintiff's behalf were to be repayable on demand alternatively it was an implied term of the agreement that the monies (or their proceeds) would be repayable on demand." At paragraph 15 "In breach of the terms of the oral agreement referred to above, the First Defendant and to the extent that the Second Defendant was his principal, the Second Defendant have failed to repay the monies paid by Mr Sell through the Plaintiff."

44. Both Southhaven and Mr Cassidy in their Defences denied paragraph 10, save is so far that it was admitted that the two sums referred to were paid on or about 13 February 2009 and 16 February, and denied paragraphs 12 and 15.

45. Mr Sell, in an affidavit said that it was and is his understanding that Mr Cassidy is, or certainly held himself out as, an entrepreneur and investment advisor. In his witness statement Mr Sell said that he invested with Mr Cassidy and that the two sums of money were paid to him through Credit Suisse and US dollar accounts in the name of 40 Acres and into a HSBC account in the name of Southhaven. He went on to say that it

was his understanding that Mr Cassidy would hold the monies and invest on his behalf. He added that he had always regarded Mr Cassidy as the party liable for repayment of these sums.

46. The Chief Justice found that both sums were paid to Mr Cassidy, to be held “on trust” by him to await instructions for investment.

47. It is a question of fact whether Mr Cassidy was acting as an agent for Southhaven, contracting personally or together with Southhaven. This depends upon the intention of the parties when the oral contract was made.

48. Since it is the case made by Mr Cassidy and Southhaven that no funds were invested by Mr Sell in 2009 the only evidence given by Mr Cassidy that bears on this issue is where he said that he was, at the relevant time, the CEO of Southaven and neither a director nor a shareholder.

49. As the Chief Justice noted in his judgment Mr Sell and Mr Cassidy transacted through corporate entities and used them effectively as their alter egos. If it was Mr Sell’s belief that he was contracting with Mr Cassidy, the fact that the transfers were made by 40 Acres into Southhaven’s account would not have indicated to him that he was contracting with Southaven and not with Mr Cassidy. Given that they used companies in the way that they did it would have required Mr Cassidy to make it clear to Mr Sell that he was dealing with Southaven and not with him personally.

50. In my view the Chief Justice was entitled to hold on the evidence that Southhaven was used to clear the funds that were to be invested by Mr Cassidy personally on behalf of 40 Acres and Mr Sell.

51. I would therefore dismiss the appeal and affirm the Order made by the Chief Justice.

Campbell JA

Chadwick P

Martin JA