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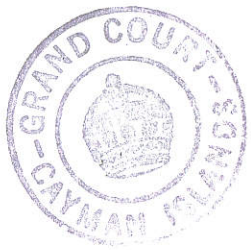
In Chambers

In the Grand Court of the Cayman Islands

- Civil

Cause No: 29 of 2002

Before: The Hon Mr. Justice Sanderson



Between:

Joanne Langdon Foster

Plaintiff

And:

Captain Rudland Clindon Foster

Defendant

Appearances:

Mr. Eliot Simpson for the Plaintiff
Mr. Emil George, QC for the Defendant

Heard 25th July 2002

REASONS FOR JUDGMENT

The Plaintiff sues her former father-in-law, for US$250,000 plus interest, which she claims is the unpaid balance owing pursuant to an agreement in writing, whereby the defendant agreed to pay to the Plaintiff, a total of $500,000 payable in 100 monthly instalments of

$5,000 each commencing on 1st August 1990. The plaintiff says that there is $250,000 unpaid on this agreement.

The Defendant's position is, that he has paid the entire $500,000, plus more and that there is, therefore, no debt owing.

The Defendant applies to strike out the Plaintiff's claim pursuant to Order18 Rule 19 (1) (b) & (d) of the Grand Court Rules, on the basis that it is scandalous, frivolous and an abuse of process of the Court.

Alternatively, the Defendant applies for a summary judgment pursuant to Order 14 Rule 13 of the Grand Court Rules on the basis that there is no prospect of success, because the Defendant has a valid defence of *res judicata*.

The Plaintiff was previously married to the Defendant's son, Mr. Robert Foster. The Plaintiff and Robert Foster separated on June 16 1990 and Mrs. Foster petitioned for divorce on Aug 7 1992. An order for interim maintenance in favour of Mrs. Foster and her two children was granted.

The Plaintiff sought a final order of maintenance for herself and her children and this Court granted judgement, making a final order for maintenance on August 15 1995.

During the course of those proceedings, Mrs. Foster sought significant monthly maintenance for herself and her children. Mr. Robert Foster lead evidence, to the effect, that he did not earn significant income and was not in a financial position to pay the Plaintiff the maintenance that she was seeking in those proceedings. Mrs. Foster lead evidence and took the position that Mr. Robert Foster's father, the defendant in these proceedings, had paid her significant amounts of money prior to August 15, 1995 which really amounted to maintenance or at least support for herself and her children. She lead that evidence, in an attempt to pursued the trial Court in the divorce proceedings, to make a significant award of maintenance on the basis that Robert Foster had the support of his father, who is reported to be a wealthy individual. She lead this evidence to persuade the Court that Robert Foster's father would

indeed pay and had paid the significant amount of money for her support and the support of the children.

She also lead evidence in the divorce proceedings, that she remained in Grand Cayman with her children, only on the basis that Robert Foster's father had made these significant payments with the view to keeping Mrs. Foster and her children here and in the hopes that his son and daughter–in-law reconcile.

The defendant in these proceeding, Captain Foster also gave evidence in the divorce proceedings. His evidence was that the money he had paid to Mrs. Foster was not payment of maintenance or payment of his son's obligations, but rather payment made pursuant to the written agreement and therefore in reduction of the $500,000 debt.

Mrs. Foster was represented by Counsel in those proceedings, as was Robert D. Foster. The matter was heard by Mr. Justice Schofield. He concluded that the payments that were made by Captain Rudland Foster where, in fact, payments made under the

written agreement and were not to be considered as maintenance payment or gifts to Mrs. Foster. He concluded that the full amount of the $500,000 indebtedness had been repaid by Captain Rudland Foster. In his reasons for judgment Schofield J said this at page 10:

> "there is a dispute between the parties over what these payments are meant to represent and although it has little effect upon the outcome of the case perhaps I ought to deal with the issue...."

> "His evidence (Captain Rudland Foster) is that the agreement to pay the wife US$500,000 bore no relation to commercial reality and was meant to provide the wife with funds to enable her to live on the island with her children in some degree of comfort. In this regard, I prefer the evidence of the husband's father. If in July 1990 the US$500,000 was meant to represent payment for the wife's interest, in a company shares, there is no reason why the agreement should not have said so, rather than purport to be an consultancy agreement. I accept that the US$500,000 was meant to enable the wife to become self sufficient..."

> "That desire did not bear fruit and the wife is far from self sufficient and demands from her husband a substantial settlement or maintenance. Her father in law honoured his responsibilities under the deed of gift and has gone a substantial step further and met

demands from the wife for payments over and above the US$5,000 per month, at least until September 1994. The wife, on her own evidence, received from July 1990 to September 1994 a total of US$680,341.10 from the husband's father. She alleges that of that total US$250,000 represented payments under the deed of gift, US$347,718.40 represented maintenance payments paid by the husband's father on behalf of her husband and US$82,622.70 was assistance given to her to set up a beauty salon business.

The husband and his father tell a different story. They both deny that any payment was made to the wife as maintenance on behalf of the husband. The husband's father says that it became apparent that the wife could not afford to live on US$5,000 per month so a practice developed weekly he met various bills of her directly and she would furnish him with a list of bills to be paid. Whenever he protested she would say she could no longer afford to live on the island and intended to leave and take the children with her. The prospect of losing his grandchildren distressed the husband's father and his wife and he invariably relented. He regarded the payments as being an advance on the gift of US$500,000. The payment of US$82,622.70 towards the beauty salon he paid out of the goodness of his heart. The husband's father has computed that between June 1991 and the end of July 1994 the wife had received from him sums totalling US$594,399.44. He did not take into account in that total the amount of US$5,000 per month received by the wife for the period July 1990 to May 1991 under the consultancy agreement with the dive business.

> The husband's father wrote to the wife through his attorneys on 20th September 1994 to the effect that he considered that he had satisfied the terms of the deed of gift and that no further payments would be made under it."

It is apparent, that Schofield J made a finding after hearing evidence from the Plaintiff and from both Captain Rudland Foster and Robert Foster, that the monies paid by Capt Rudland Foster to Joan Foster were in repayment of the $500,000 obligation.

It is that obligation which forms the subject matter of this lawsuit.

The defendant, therefore, applies in these proceedings for an order dismissing the plaintiff's claim on the basis stated above.

The primary submission of the defendant is that this claims should be struck out as vexatious, frivolous or an abuse of process on the bases that the Plaintiff is attempting to relitigate a question which in substance has already been determined in a previous proceedings. The defendant relies upon the decision in *Northwest Water Ltd. v Binnie & Partners* [1990] 3 All ER.546 where Drake J held that where an issue had for all practical purposes been decided in a Court of

competent jurisdiction, the Court should not allow that issue to be raised in separate proceedings between different parties which arise out of identical facts and are dependant on the same evidence, since not only was the party seeking to relitigate the issue prevented by estoppel but it would also amount to abuse of process. The Defendant also relied upon the decision in *Ashmore v British Coal Corporation* [1992] 2 All ER. 981 were and employee tried to relitigate an issue that had been litigated by 14 other employees in similar circumstances. The Court of Appeal refused to allow such litigation. Finally the defendant referred to the decision by the House of Lords in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727.

The Plaintiff submits that her claims should not be stuck out because there were a number of matters that were not put before Mr. Justice Schofield, or where not fully argued before him. Those matters are set out in the skeleton argument of the Plaintiff and are summarised as follows:

> "(1) In 1990 the Plaintiff informed the Defendant that she would release all of her shares, 50% of Don Foster's Dive, Grand Cayman Limited, and her shares in related companies for a settlement of US$250,000 in July 1990 and the balance of US$250,000

over four years ending in 1994. At first the Defendant agreed, but the next day he told the Plaintiff that he and his wife were afraid that the Plaintiff would leave the Cayman Islands if she received a lump sum payment. The Plaintiff was therefore offered US$5,000 per month for 100 months.

(2) In the autumn of 1991 the Plaintiff asked the Defendant for an advance on the payments to allow her to attend university. The Defendant responded that there would be no advance, as he did not want the Plaintiff to leave the Cayman Islands with the children.

(3) There were other occasions on which the Plaintiff asked the Defendant to make advances against the deeded US$5,000 per month but were refused.

(4) In a letter of 16 October 1992, the Plaintiff wrote to Don Foster with a copy to the Defendant to complain about the lack of maintenance and support that she was receiving from him. The Plaintiff spoke to the Defendant shortly afterwards and the Defendant stated that he was afraid that if he did not pay maintenance on behalf of Don Foster the Plaintiff would seek orders from the court and/or leave the Cayman Islands with the children. Thereafter, the Defendant routinely made payments to the Plaintiff in lieu of maintenance of Don Foster.

(5) These facts support the Plaintiff's contention that sums paid in addition to

US$5,000 per month were not advances on the Deed of Covenant.

(6) In April 1994, the Defendant gave the Plaintiff the sum of CI$6,000 for the purpose of paying a deposit on a Toyota Camry motorcar. The defendant was aware that the Plaintiff would be unable to meet the monthly payments and insurance cost for that car without his assistance and that the payments would continue for some years. This indicates that the Defendant (like the Plaintiff) considered that payments to the Plaintiff under the Deed of Covenant (and possibly additional payments) would continue for some years.

(7) At the time that the deed of Gift was entered into, there was no suggestion that the Plaintiff had received more than US$5,000 per month under the Agreement. The Deed recited only that she had received US$5,000 per month and that those payments would continue until November 1998.

(8) The Plaintiff has prepared a schedule of payments showing the regular receipt of US$5,000 per month, together with additional and less regular sums. This is exhibited at page 1 of the exhibit to the Plaintiff's affidavit. The schedule demonstrates that payments under the Agreement and the Deed were distinct from other sums paid for maintenance."

Mrs. Foster asserts that, it is, therefore, not clear that Mr. Justice Schofield had the benefit of all of the evidence that will be advanced in the present claim.

The Plaintiff relies on the comments on Mr. Justice Drake in *Northwest Water Ltd v Binnie & Patners* [supra] at page 561 where he said:

> "I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence wish may properly be called on those issues in the new action."

Mr. Justice Drake further noted in his judgment that a plea may not be struck out where there is new evidence that was not put before the court in the first case. He applied the test pronounced by Earl Cairns LC in *Phosphate Sewage Co. v Molleson (1879)* 4 App Cas 801 at 814:

> "that is to say the new evidence must be such as "entirely changes the aspect of the case... and was not and could not by reasonable diligence have been ascertained before..."

Finally, Mr. Justice Drake made the following comments at page 557:

> "I have no doubt that, in every case where issue estoppel or an abuse of process is being considered against the wish of a party to introduce fresh evidence, the overall justice of the decision to be made should be an important, and it may be, and overriding consideration."

Mr. George Q.C. conceded that this was the correct test to be applied, namely that the overriding consideration is the overall justice to the parties.

I have examined with some care, the new evidence that the Plaintiff wishes to rely on. I am of the view that, all of that evidence was available to the Plaintiff to lead in the previous proceedings. Further, some of that evidence is merely supportive of the testimony that she gave at trial, which testimony was not accepted by the trial judge. In other words what the Plaintiff seems to be doing is trying to put forward the same case but improve her evidence or add additional evidence to support her testimony. This is a practice which should,

accept in a rarest of circumstances be, disapproved of. To do otherwise would create never-ending litigation. The party who is unsuccessful at trial would always come back attempting to lead new evidence to better their position and change the result. This would be manifestly unfair to every successful litigant to have to reargue the case on the bases of new evidence. I am aware of the fact that Captain Rudland Foster was not a named party in the previous proceedings. There is, however, no doubt that the issue of his $500,000 liability pursuant to the deed of covenant was argued and then decided in his favour.

Secondly, some of the evidence that the Plaintiff intended to introduce did not in my judgment necessarily to assist the plaintiff. Rather it may tend to support the conclusion reached by the learned trial judge.

Finally, I cannot say that any of the evidence that was to be introduced would entirely change the aspect of the case.

Overall, the purposed evidence may have made Mrs. Foster's case stronger and it might have changed the result. I do not however,

think it is the Courts function to carefully examine the evidence that was before trial court, carefully examine the purposed new evidence and conclude whether or not that new evidence might have changed the results. The test that has been laid down; namely, "that the new evidence must entirely change the aspect of the case and was not and could not by reasonable diligence have been ascertained before. should be followed, subject of course, to the overriding consideration of achieving justice between the parties. Overall justice cannot be achieved in circumstances like the present unless there is finality to litigation.

While I am sympathetic to Mrs. Foster's position that some of the new evidence that she proposed to rely on, might have lead to a different conclusion, I am, however, satisfied that it would not be just to allow this issue to be reargued. Accordingly, the Defendant's application is granted.

If costs cannot be agreed they may be spoken to.

31st July, 2002

D. Sanderson
Judge of the Grand Court