

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. M29 of 1998
Grand Court Cause No. 312 of 1994

BETWEEN:

MARY BODDEN

APPELLANT/ Plaintiff

- AND -

- (1) EDMUND CLYDE (JACK) BODDEN**
- (2) EDWARD CARDINAL (JILL) BODDEN**
- (3) MARJORIE JANE BODDEN**

RESPONDENTS/Defendants

BEFORE: The Rt. Hon. Edward Zacca, President
The Rt. Hon. Telford Georges, Justice of Appeal
The Hon. Gerald Collett, Justice of Appeal

*Notice
- file*

The Appellant appearing in person.
No one appearing for the Respondents.

April 9, 1999

JUDGMENT

GEORGES, J.A.

The applicant appears in person seeking leave to appeal from an order of Graham J. striking out an action filed by her against the three defendants and numbered as Cause No. 312 of 1994. The first respondent Edmund Clyde Bodden is her former husband. The second defendant Edward Cardinal Bodden is the twin brother of the first respondent and the third respondent is the wife of the second respondent. The complaints resulting in this action are part of the dispute which arose in the ancillary proceedings for maintenance and division of property consequent on the break up of the marriage of the applicant and the first respondent.

The ancillary proceedings were concluded by a judgment of Smellie J. (as he then was) delivered on 24 December 1997 from which there has been no appeal. The opening paragraphs of that judgment pithily encapsulate the history of the litigation:

“This case has assumed since its inception exceptionally unwarranted proportions while it has remained essentially ancillary proceedings for the allocation of matrimonial assets, over more than eleven years it has engaged the attention of several judges, preoccupied many different attorneys and has generated I am told, more than a hundred different orders of the Court.

Its unwieldy protraction has been the result, in large part, of the abiding suspicion of the petitioner that there exists between the respondents, members of his family and others, a conspiracy to defeat her entitlements to matrimonial assets.”

One of the principal assets of the first respondent was a quarter share in a property in George Town known as the Jack and Jill Building. Among the other joint owners were the second respondent and his wife, the third respondent. In the course of litigation of the ancillary proceedings the first respondent transferred his share in that property to his brother. The applicant alleged that the transfer was to defeat her claim to a proper share of the matrimonial property.

The principal claims in the action which has been struck out are based on this allegation. They read:

“ AND THE PLAINTIFF’S CLAIMS

1. A DECLARATION that the purported transfers of the First Defendant’s ¼ share in the property registered as George Town Commercial Block OPY Parcel 33 (hereinafter referred to as “the property”) by the First Defendant to the Second Defendant on 13th October, 1988 and thereafter by the Second Defendant to himself and the Third Defendant jointly on 13th October, 1988 and thereafter by the Second Defendant and the Third Defendant to the third Defendant only on 7th February, 1989 were intended to defraud and/or prejudice the Plaintiff.
2. THAT the purported transfers of the property referred to above be cancelled and the property re-registered in the name of the First Defendant and held by him until further Order of the Court.
3. FURTHER AND/OR ALTERNATIVELY an Order pursuant to Section 140 of the Registered Land Law (Revised) that the Land Register pertaining to the property be amended by restoring the First Defendant as the registered owner of the property.
4. A DECLARATION that the First, Second and Third Defendants conspired together to prevent and/or hinder the Plaintiff from enforcing the Orders made by the Grand Court of the Cayman Islands in her favour on the 22nd day of August 1986 and 24th April 1987 against the First Defendant and from obtaining a proportion of the

property and/or a proportion of the income from the property on her divorce from the First Defendant.

5. Damages for the wrongs and/or torts committed by the First, Second and Third Defendants referred to in paragraphs 1-4 hereof.”

In his judgment already referred to Smellie J. dealt with the first respondent’s interest in the Jack and Jill Building as follows –

“The first above-mentioned of the respondent’s breaches is now the subject of a separate action in Cause 312 of 1994, in which the petitioner seeks a declaratory order setting aside the purported transfer to his brother of his interest in the Jack and Jill Building. I have already indicated in the course of arguments, the intended manner of my treatment of that issue. I am not prepared in the settlement of the present ancillary issues, to accept that that transfer was valid. Apart from obviously having been made in contempt of an order of this court, on its face, it purports to be a transfer for no consideration but for “natural, love and affection.” However there is evidence presented to me that the transfer was in fact made in consideration of the respondent’s brother having redeemed certain corporate liabilities on behalf of Executive Air Services in respect of which the respondent was obliged, as shareholder, proportionately to contribute. That evidence puts the falsity to the purported transfer for no consideration, and thus reveals the fraudulent nature of the transfer itself. Such a transaction is an offence under Cayman Islands law. Accordingly this court will not recognize it: *ex turpi causa non oritur actio*. And where a party has purported fraudulently to divest himself of his assets, the court will look at the substance of the transaction and work on the assumption that he retains control of them. See for example Brett v Brett [1969] 1 All E.R. 1007.

Accordingly, and for other reasons to follow below, I shall treat with the respondent’s interest in the Jack and Jill building, for the present purposes, as if it were still registered in his name. And so, although the evidence shows it to have been acquired prior to the marriage, its income-yielding potential will figure as part of the respondent’s assets.”

He later assessed the income potential of the first respondent’s share in the building as at least \$2,500 a month and proceeded on that basis to make the allocation of assets.

Assuming that there was a conspiracy to transfer the asset as alleged the applicant has suffered no loss since Smellie J. calculated her entitlements on the division of the matrimonial assets on the basis that the first respondent still held the share purportedly transferred.

Mrs. Bodden argues that although Smellie J. stated that he had acted on that basis, in fact the result he reaches established that he had not. If that was the case the proper course would have been to appeal from his judgment and demonstrate the inconsistency.

The failure to establish loss as a result of the conspiracy was fatal to the action. The application for leave to appeal is refused.

Georges, J.A.

Zacca, P.: I agree.

Collett, J.A.: I agree.