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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE #110 OF 1992

BETWEEN (1) HERVIN EBANKS PLAINTIFFS
(2) COLDEV DEVELOPMENTS LTD.
AND MORRITT PROPERTIES (CAYMAN) LTD. DEFENDANT

The first plaintiff in person
No appearance by the second plaintiff

For the defendant: Pierre Lamontagne QC, instructed by
Truman Bodden & Co.

HARRE C.J. JUDGMENT

By Originating Summons the applicants sought a declaration that the principal and interest in respect of which a mortgage was entered on the Land Register against George Town East Block 20 Parcel 195 as numbers 9 and 10 in favour of the defendant, Morrirt Properties (Cayman) Ltd. ("Morrirt") is not owing to Morrirt; and injunctive and other relief.

The issues arise from two written agreements dated respectively 23rd August and 16th October 1989. The 23rd August Agreement was made in contemplation of the later one, which I shall call the Main Agreement.

In the 23rd August agreement it was recited that Morrirt had made

certain advances to the first plaintiff ("Ebanks) for the purchase of a boat being constructed at that time by Corinthian Yachts, Inc. of St. Petersburg Florida. That boat was the subject of a vessel purchase contract dated 1st August 1989. The buyer referred to in the purchase contract was Coldev Developments Ltd. (Coldev) a company owned by Ebanks. The intent as set out in the 23rd August agreement was that the parties should henceforth extend good faith efforts to ensure that a number of transactions which were listed in schedules to that agreement were all effected and that Morrirt's attorneys should prepare the Main Agreement covering the parties' respective rights and obligations in connection therewith. Morrirt was to loan US\$500,000.00. to Ebanks secured by a first mortgage on the boat and charges against property owned by Coldev and Ebanks' personal home. Ebanks was to arrange for Coldev to assign to Morrirt its interest in the vessel purchase contract. The agreement also provided that Morrirt should reassign ownership of the boat upon the granting of the first mortgage on it. 30% of the gross income from the operations of the boat was to accrue to Morrirt until the loan was repaid in full.

The Main Agreement purported to consummate the transactions contemplated by the 23rd August Agreement. It governed the terms and conditions of the US\$500,000.00 loan and various securities that Ebanks and Coldev were making available to Morrirt to secure it. Among the conditions precedent for the drawdown of the balance of the loan were that Ebanks should deliver to Messrs Truman Bodden & Co. an executed copy of the assignment to Morrirt of Coldev's interest in the vessel purchase contract; an executed copy of the first mortgage on

the boat; and a duly executed copy of an assignment of the agreed 30% of the income contemplated from the boat's operation. The main agreement also contained the following clauses.

"7. Entire Agreement

"This main agreement and the 23rd August agreement which is hereby incorporated by reference contains the whole of the agreement between the parties concerning the loan and the transactions referred to herein and there are no collateral representations, warranties, agreements or conditions not specifically set forth herein. No modification, amendment or variation hereof shall be effective or binding on the parties unless agreed to in writing and signed by each of the parties. In the event any discrepancy between the main agreement and the 23rd August agreement exists or arises the main agreement shall govern..."

9. Waiver

No delay in exercising or omission by any party to exercise any right or power vested in them under this Main Agreement shall impair such right or power or be construed as a waiver of or as an acquiescence in any default by any party and no waiver by any of the parties thereto of any breach of condition, covenant or agreement herein shall constitute a waiver of such condition, covenant or agreement except in so far as the waiving party

shall notify in writing to the party in default in respect of a particular breach giving rise to such waiver."

Evidence in this case was given partly by affidavit and partly orally. According to Ebanks there was, notwithstanding the provisions of the Main Agreement to which I have referred, an oral variation of it made between him, acting personally and also on behalf of Coldev, to provide that Morrith would take title to the vessel rather than a mortgage and Coldev would take possession of the vessel when it arrived in Grand Cayman, operate it as a commercial pleasure craft and pay Morrith the purchase price of U.S.\$500,000 by instalments. That was supported in an affidavit of Richard Roberts, the Managing Director of Morrith at the time. He ceased to be employed by Morrith on 27th August 1990 but was available for cross-examination. I reject his version of the matter as it is inconsistent with the documentary record.

In the event the vessel ran aground off Cuba on its voyage from Florida to Grand Cayman. Issues of both fact and law arise as a consequence of that.

The first plaintiff declined to cross-examine on the affidavit evidence on which the defendant relied. That evidence consists of affidavits by Mr. Roger Nelson and Mr. Blake Longacre, a director of the defendant. The defendant's case is that what took place was wholly governed by and in accordance with the 23rd August Agreement

and the Main Agreement; the defendant took title to the boat pursuant to the assignment to it of Coldev's interest in the Vessel Purchase Contract as provided for in the Main Agreement and was consequently the owner of the boat when it ran aground. The ownership was by way of security for the loan of \$500,000.00 which the defendant made, and it was not obliged to reassign the boat or discharge that security until all outstanding liabilities of the plaintiffs to the defendant had been paid in full, or until a first mortgage of the boat was given to the defendant. It is not in dispute that neither of these events occurred.

A review of the contemporary documents shows that Rollin Jackson of Bluewater Ventures Ltd. was the person most closely involved in the efforts to recover the boat and get her to Grand Cayman. This is not surprising, since that company, which is controlled by Ebanks, was to operate the vessel and stood to lose money as a result of any delay in starting that operation. There is also documentary evidence of transactions relating to equipment for the boat and alterations, expressed as being required by Ebanks and a Miss Walsh, who was associated with Blue Water Ventures and signed cheques on its behalf. All this is in itself inconclusive as to whether any amendment to the written agreements as to ownership of the boat had been made, but if the defendant regarded itself as having taken ownership of the boat outright, rather than by way of security for a loan, greater interest in it was to have been expected. The description of Rollin Jackson as "owner of the Emerald Eyes" in a towing agreement dated 5th January 1990 is, on any view, inaccurate, but it is more compatible with the

terms of the written agreements than with the verbal amendment to these agreements alleged by the plaintiff.

Once the vessel had arrived in Grand Cayman it was operated by Blue Water Ventures Ltd. without any written lease or charter agreement with Morrirt. That would be a remarkable situation if the defendant was considered to be the owner otherwise than by way of security.

On 18th September 1990, the first plaintiff sent a facsimile transmission to Blake Longacre of the defendants which purported to be "a Sales agreement drawn up as per our conversation". That read as follows -

"AGREEMENT FOR SALE OF THE M/V EMERALD EYES
TO HERVIN EBANKS FROM MORRITT'S TORTUGA CLUB.

MORRITTS TORTUGA CLUB agrees to sell the vessel M/V
EMERALD EYES TO HERVIN EBANKS under the following
conditions:

1. \$300,000.00 U.S. Cash.
2. \$220,000.00 U.S. repayable upon retirement of \$300,000.00 obligation to CIBC Bank and Trust Co.
3. Release of lien held by MORRITT'S TORTUGA CLUB on MR. HERVIN EBANKS home for use as collateral to secure loan from CIBC Bank and Trust Co.
4. Upon retirement of \$300,000.00 obligation to CIBC, MORRITT'S TORTUGA CLUB may place lien on MR. EBANKS

home and on vessel M/V EMERALD EYES until \$220,000.

U.S. obligation to MORRITT'S TORTUGA CLUB is retired."

It is significant that the communication from Ebanks is described as an "offer to settle our business dealings under the contract dated October 16th 1989". No reference is made to any verbal amendment. Moreover, the tenor of the reply from Morrirtt dated 20th September 1990 and in particular the reference to "release" of the vessel, is consistent with the existence of a loan against which it is being held as security. There is no reference in that reply to any amendment of the Main Agreement. On the contrary, there is an express reference to business dealings under that agreement.

On the 24th September 1990, the following notice appeared in the Caymanian Compass -

"NOTICE

65 FOOT CORINTHIAN YACHT

Intending purchasers are given notice that:

1. The beneficial owner of the 65 foot Corinthian Yacht (Identification number KR1650) ("the Vessel") is Coldev Developments Company Ltd.
2. The Vessel is subject to a mortgage in favour of Morrirtt Properties (Cayman) Ltd ("the Mortgagee").
3. The Mortgagee's right to sell the vessel is disputed by reason of the fact that it is in breach of an

agreement dated 16th October, 1989.

4. Further or alternatively, there are claims against the Vessel for salvage.

DATED 20th September, 1990

Hervin Ebanks, Director

Coldev Developments Company Ltd."

That is quite inconsistent with Ebanks' present assertion that Morrith had taken beneficial ownership of the boat. The reference (albeit inaccurate) is to Morrith as holder of a security, the rights under which are in dispute.

I am satisfied that there was no purported oral modification of the written agreements. Even if there had been, it would have been ineffective in view of the provisions of clause 7 of the Main Agreement. The defendant held title to the boat as security for the loan made to or on behalf of the plaintiffs pending conclusion of a mortgage agreement. That transaction was never concluded because of the grounding of the boat in Cuba on its way to Grand Cayman. The real issue in this case is where the burden of the failure of the venture must fall. The whole thrust of the first plaintiff's case is that it is unfair tht it should all fall on him and that he was not given a chance to get the venture going. But if I were to make the declaration and orders sought in the originating summons I would be placing that burden on the shoulders of the secured lender. Security for a loan is taken for the very purpose of avoiding that. In consequence I must decline to make the declarations and orders and dismiss the summons as it relates to the first plaintiff, Ebanks.

The second plaintiff, Coldev, was not represented, and I had acceded to an application by the defendant at the beginning of the hearing that Coldev's application should be dismissed with costs and that paragraphs 2 and 3 of the summons, which related to the property owned by Coldev, should be struck out. The hearing consequently proceeded on the issues between Ebanks and Morrill in relation to paragraph 1 of the originating summons.

Costs to defendant.

G. E. Harre
Chief Justice

10th March 1994.