1992.

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Civil

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

BEFORE THE HON. THE CHIEF JUSTICE

ON the 26th August, 3rd, 4th, 7th, and 8th September 1992

No 515/91

BETWEEN	MAHOGANY ESTATES LTD	PLAINTIFF
AND	MALCOLM STEPHENSON	1ST DEFENDANT
AND	RAUL GONZALES	2ND DEFENDANT

Mr. Enos Grant instructed by
Keith Collins & Co for the plaintiff

Mr. Alan Turner in structed by W. S. Walker & Co
for 1st and 2nd defendants

MALONE C.J. JUDGMENT

This case is about the purchase of a tractor, No. D8H46A14986 for use on a land development carried on by the plaintiff. Two conflicting versions of the transaction are given on behalf of the plaintiff and the defendants and each version claims to be supported by documentary evidence. In the plaintiff's version lots 11 and 12 of the development, sometimes referred to as lots 79 and 80 play so significant a role that I shall begin my consideration of the evidence presented at the trial by evaluating the facts relating to those lots.

Lots 11 and 12 are two lots of a housing development on lands of the plaintiff forming part of the estate of Thomas Berry, deceased. Lorenzo Berry is the administrator of that estate and on the 23rd of November 1987 he formed the plaintiff to develop those lands. The first defendant, who is an architect, was engaged by the plaintiff to lay out the development. It is common ground between the plaintiff and the defendants that the development of the land was to be carried out in phases and that for his professional services the first defendant was to be given lots in the development. Which lots, and how many lots is in

dispute but it is not in dispute that lots 11 and 12 were two lots that the plaintiff assigned to the first defendant as such reward.

Lots 11 and 12 are now the property of a Dr. Barksdale of Nebraska U.S.A. The Land Register records the transfers to Dr. Barksdale as taking place on the 17th September 1989. It shows the previous owner to be Lorenzo Berry as administrator of the estate of Thomas Berry. It is, however, clear that on the 8th September, 1989, C.I. $24,900.00 received from Dr. Barksdale was deposited to the first defendant's account at the Bank of Nova Scotia in George Town.

The relevance of lots 11 and 12 to this case is to be found in the plaintiff's allegation in the amended reply, set-off and defence to counterclaim that:

> "the 1st Defendant had assured the said Lorenzo Berry that the purchase price and expenses of the said tractor were being paid out of the proceeds of sale of lots 11 and 12 to one Dr. Barksdale;"

For it is said by the plaintiff that the parties had an arrangement whereby the proceeds of sale of those lots would be used to reimburse the first defendant expenses incurred by him in the purchase of the tractor and any advances made by him to complete payment for the tractor. The first defendant denies there was any such arrangement.

The facts earlier considered disclosed the parties to be agreed that lots 11 and 12 were assigned by the plaintiff to the first defendant as a part of the first defendant's reward for his services. Related to those facts are three General Sales Agreements and two transfers of land under the Registered Land Law. The first in time of the General Sales Agreements is dated the 2nd August 1988 and concerns lot 11. The plaintiff is the vendor under that agreement and the first defendant and his daughter are the purchasers. The two other General Sales Agreements are dated the 19th July 1989. In each case the vendor is the first

defendant and the purchaser is Dr. Barksdale. One of those documents concerns lot 79 and the other, lot 80. The two Transfers of Land relate to lots 79 and 80 and are transfers by the plaintiff to Dr. Barksdale dated the 7th September 1999. Save that there is no General Sales Agreement as between the plaintiff and the first defendant in respect of lot 12 the documentary evidence, to my mind, supports the agreed verbal testimony of the parties. Indeed there is no suggestion by either party that the documentary evidence is at variance with the agreed verbal testimony. It is, however, submitted by the plaintiff that the agreed verbal testimony does not encompass all of the facts. In particular that it fails to take account of the fact that the first defendant in order that the development of the land should be kept going agreed to re-assign lots 11 and 12 to the plaintiff. That is disputed by the first defendant. There are no documents that effect the re-assignment of lots 11 and 12. Their absence is of greater significance than is the absence of a General Sales Agreement between the plaintiff and the first defendant in respect of lot 12 since the assignment of lot 12 is not in dispute whereas the re-assignments of lots 11 and 12 are in dispute. Further, without an assignment to the first defendant of another lot re-assignments of lots 11 and 12 would mean a loss to the first defendant of the reward for his services. That loss in the case of lots 11 and 12 which were sold to Dr. Barksdale for C.I.$15,000.00 each amounts to C.I.$30,000.00. A sum which it is unlikely to my mind, that the first defendant would donate to the plaintiff.

A further feature that questions the re-assignment evidence of Lorenzo Berry is that the proceeds of sale from the two lots were paid into the first defendant's account at the Bank of Nova Scotia. That payment is significant also from another point of view. It was made the day after Lorenzo Berry signed the Land Transfers which acknowledge a purchase price of C.I. $15.000.00 for each lot. The same price that is quoted in the General Sales Agreements. Accordingly I find it difficult to believe Lorenzo

Berry when he says that he knows nothing of the transactions which the first defendant said he had with Dr. Barksdale. As there are no agreements for sale between the plaintiff and Dr. Barksdale in respect of lots 11 and 12 but there are such agreements in respect of those lots between the first defendant to Dr. Barksdale, the Land Transfers signed by Lorenzo Berry would seem to relate to the agreements for sale between the first defendant and Dr. Barksdale. Can Lorenzo Berry then honestly say that he knew nothing of the transaction between the first defendant and Dr. Barksdale?

Before I answer the questions I have posed I must consider the evidence relied on by the plaintiff in support of the evidence of Lorenzo Berry that lots 11 and 12 were re-assigned to the plaintiff before they were sold to Dr. Barksdale. That evidence is in the ninth and tenth paragraphs of a letter of the 22nd June 1990 from the first defendant to the plaintiff, and in the tenth paragraph of a letter of the 21st September 1990 from the first defendant to the plaintiff. The relevant paragraphs are as follows:

> "Nor do we feel it necessary to go into the help the architect gave the developers by way of allowing them to sell those lots already assigned to enable capital to be put into the development; nor into the extramural work affected."
> .....
> "We must now insist that our fees be honoured, and that we be given contracts of sale for six (6) lots showing that these lots have been paid for in full, and your written assurance that the liens on those properties be removed from their registration."
> .....
> "Over and above our brief, we have .....
>
> (d) allowed the sale of lots upon which we had agreements of sale made out in our name and signed by Mr. Lorenzo Berry. (Note: This to increase the monthly income of the company)."

Under cross-examination the first defendant denied that he had re-assigned lots 11 and 12 to the plaintiff and said that neither in his letter of the 22nd June 1990 nor in his letter of the 21st September 1990 was he saying that he had given back six lots. He acknowledged that in his letter he claimed six lots but

that he said was because:

> "Berry had made various claims that I was entitled to no lots to one lot or more. I had two lots therefore to reinforce my position I said I wanted contracts of sale for the lots."

The first defendant's statement that in neither letter was he saying that he had given back six lots was contradicted by Mr. Grant in his closing address. He said:

> "In addition there are two letters written by the first defendant claiming he had given back the lots. Because he is saying he gave back six lots the first defendant is corroborating Berry ..... Both clearly say he gave back the lots."

In the letters will not be found in express terms the statements attributed by Mr. Grant to the first defendant. Mr. Grant arrives at his interpretation of the letters by a process of deduction which is as follows. Since the first defendant had earlier, in his cross-examination admitted to having had six lots assigned to him the statement in his letter of the 22nd June 1990 that he allowed them:

> "to sell those lots already assigned to him"

and his claim for six contracts of sale showed that he had re-assigned those six lots. Consequently as lots 11 and 12 were two of the six lots to which he was entitled he had re-assigned those lots. The flaw in Mr. Grant's reasoning is that it assumes the statement in the letter to be accurate. That is an assumption which the documentary evidence contradicts. As regards lot 11, the documents record agreements of sale to the first defendant and from him to Dr. Barksdale and no re-assignment by the first defendant to the plaintiff. The documentary evidence relating to lot 12 is less complete as it lacks an agreement of sale to the first defendant by the plaintiff but otherwise it is the same as the documentary evidence relating to lot 11 and again there is no document that re-assigns the lot to the plaintiff. The assumption is put in question also by the evidence of the first defendant that he did not sign back lots 11 and 12 and by the explanation given for demanding six contracts when he knew that he had two lots and

that six was his entitlement. An explanation which acknowledges the statement in the letter to be inaccurate. Further the assumption is put in question by the unsatisfactory evidence of Lorenzo Berry to which I have referred. On the facts I find that there was no re-assignment of lots 11 and 12 and that Lorenzo Berry was aware of the transactions between the first defendant and Dr. Barksdale in respect of those lots. So I find also that Lorenzo Berry is not to be believed when he says:

> "the first defendant told me that the sale of lots 11 and 12 had to do with purchase of the tractor"

and that the money received from the sale of lots 11 and 12 to Dr. Barksdale would go to reimburse the first defendant the expenses incurred by him in the purchase of the tractor and any advances made by him to complete the payment for the tractor.

The price of the tractor was U.S.$40,000.00. In addition there were expenses of shipping, insurance and Government and Port Authority charges which, added to the price of the tractor, makes a total of U.S.$56.636.00. Included in that total is U.S.$10,000.00 which the first defendant admits came from the plaintiff's account and was the down payment on the tractor. The first defendant claims to have funded the balance. That claim is not directly challenged by the plaintiff. The claim is indirectly challenged by the plaintiff since the challenge is founded on the alleged arrangement with respect to the proceeds of sale derived from the sale of lots 11 and 12 to Dr. Barksdale. That is a challenge which does not query the amount spent by the first defendant on the tractor and the expenses described. Indeed it is to my mind not open to query as there are documents which clearly show the origins of the funds to be advances by the first defendant from loans obtained by him from the bank of Nova Scotia. I, therefore, accept U.S.$46,636.00 as the amount contributed by the first defendant towards the purchase of the tractor and the additional expenses. Before leaving this aspect of the case it must be mentioned that the finding that U.S.$46,636.00 was advanced

by the first defendant provides further reason for holding that no arrangement was made to reimburse the first defendant out of the proceeds derived from the sale of lots 11 and 12 since C.I.$29,400.00 derived from the sale of those lots is not compensation for U.S.$46,636.00.

Mr. Roger Bodden is the Assistant Manager in the credit department of the Bank of Nova Scotia. His evidence is of a meeting that took place at the bank towards the end of July or early August in connection with the purchase of a tractor to work on a land development of the plaintiff. At that meeting, Mr. Bodden said were Lorenzo Berry, Mr. Blecher, the first defendant and himself. Lorenzo Berry denied he was there and claims to know nothing of the meeting. I simply do not believe him. I believe Mr. Bodden who has no reason to be false and whose evidence on that point is corroborated by that of the first defendant. It seems to me that Lorenzo Berry has adopted towards this meeting precisely the same attitude that he adopted towards the sale of lots 11 and 12 by the first defendant to Dr. Barksdale. That is to say, to know nothing.

Mr. Bodden's understanding, of the outcome of the meeting, was that:

> "the first defendant would purchase the tractor and would be renting it to the plaintiff. He was to have some ownership interest in the tractor."

The decision to give the loan to the first defendant was taken, Mr. Bodden said, because the plaintiff was in overdraft and it was considered by the bank that as an architect with interests outside of the plaintiff the first defendant could better support the loan. Mr. Bodden explained that as a temporary measure a loan of U.S.30,000.00 secured by a C.D. deposit of the first defendant was first made. Subsequently on the 11th September a bill of sale as security for a loan of U.S.$40,000.00 repayable by monthly instalments of U.S.$1,111.11 plus interest was granted over the tractor by the first defendant as "beneficial owner". The

security, he said, was discussed at the meeting and confirmed by a letter of the 12th September 1989 from the bank to the first defendant.

The first defendant's understanding of the nature of the transaction is expressed by him when, in answer to the qustion:

> Q: What was your understanding as to ownership of the tractor?

He replied:

> A: That it would be in my name. That was our understanding as it was so agreed. A bill of sale made on the 11th September 1989 between myself and Nova Scotia says:
> 'Borrower as beneficial owner.....'
> security was discussed and it was to be the bill of sale over the tractor. This was agreed at the meeting between Berry, Blecher, R. Bodden and myself. I was to be reimbursed in full all costs plus interest on the loan. The money was to come from the plaintiff."

The two versions are not the same in all respects but they are the same as to the giving of security to the bank by a bill of sale over the tractor in the name of the first defendant. I accept that evidence. It imports that the first defendant was to have a proprietary interest in the tractor which, at that time, was not registrable under the Law of the Cayman Islands. A proprietary interest in the first defendant plainly was necessary as without it the document signed as a bill of sale would be ineffective. Mr. Bodden conceived of that interest as one of outright ownership of the tractor which would enable the first defendant, as was agreed, he said, to hire the tractor to the plaintiff. The evidence of the first defendant is that hiring was discussed but it was never agreed. The fact that there was never an agreement of hire, corroborates the first defendant. The conflict between the two is not, I think, of significance although it has a bearing on the extent of the first defendant's proprietary interest in the tractor. Mr. Bodden, I venture to think, was not aware that a down payment had been made on the tractor by the plaintiff. I think that is shown by his answer:

"so be it"

to the question:

> "By the beginning of August they had put down a part payment of $13,000.00 on a particular payment."

The sum was actually $10,000.00 as the $5,000 was the payment for a device called a ripper. The first defendant, Lorenzo Berry and Blecher were, on the other hand, well aware of the down payment. They knew of the sale of the tractor to the plaintiff. With that knowledge I think it is to be expected that the payments made by the first defendant were neither made by him nor accepted by the plaintiff as payments for the purchase by the first defendant of the entire proprietary interest in the tractor. They were recognised to be payments made for the purchase of a portion of the proprietary interest in the tractor so that the interest of the plaintiff in the tractor was diminished but not extinguished. The portion would have been a three quarter share based on the value of the tractor as the plaintiff had paid U.S.$10,000.00 towards the purchase price of U.S.$40,000.00. That the payments were given that recognition, is, I think, evidenced by the fact that the plaintiff used the tractor free of any charge. So it came about that the plaintiff and the first defendant became co-owners in common with a distinct and several title to their shares which were not equal. Mr. Bodden made no mention of repayment of the payments made by the first defendant, but both the plaintiff and the first defendant speak of repayment. The omission by Mr. Bodden is explicable as such repayment was of no interest to him. Further the logic of the situation impels one to believe that there would be repayment since the first defendant had no need of a tractor whereas the tractor was wanted by the plaintiff. What the first defendant wanted, as he said in evidence, was to get back his money. I therefore accept the evidence of the first defendant and the plaintiff that the first defendant was to get back his money. As I have not accepted the plaintiff's story that the money to be repaid was to come from the proceeds of sale from lots 11 and 12, I accept the first defendant's evidence that it was to come from the plaintiff with interest. Naturally, one would expect the interest

to be the same as the interest payable under the Bill of sale on the loan from the bank. In the context in which they appear I think the following words of the first defendant express that understanding.

> "I was to be reimbursed in full all costs plus interest on the loan".

That interest was "base + 2%". As the transaction under review created a co-ownership in common, the repayment of the payments made by the first defendant would result in the acquisition by the plaintiff of the entire proprietary interest in the tractor.

The claim of the plaintiff lies in trespass to land and/or goods, and/or conversion and/or detinue and/or conspiracy. The pleading describes the conspiracy as follows:

> "The defendants conspired among themselves and others to trespass on and/or detain and/or convert the said tractor to their own use."

There is evidence that on the 21st September 1990 the first defendant by a letter of that date, demanded repayment of the payments he had made towards the purchase price of the tractor. His letter was ignored. He then authorised the seizure of the tractor by the second defendant who took it from the plaintiff's premises on the 23rd November 1991 and transported it to his compound where, with the authorisation of the first defendant, he put it to use at the public garbage dump in the performance of a contract made with the Government. After about a fortnight the plaintiff seized the tractor from the second defendant.

An owner in common is not guilty of conversion against his co-owner if he merely makes use of the property in a reasonable way. In this case the first defendant did nothing more than that. Therefore the claim in conversion fails against

him and against the second defendant who acted on his authority. The claim in detinue also fails against both defendants as the second defendant acted on the authorisation of the first defendant and the latter having obtained the tractor had, as a co-owner in common, a right to the possession of the tractor when the goods were detained. As I have held that the use made of the tractor by the first defendant after its seizure was reasonable, and as I have also held that the first defendant was a co-owner in common, a trespass to goods was not committed by the first defendant. Nor was a trespass to goods committed by the second defendant who acted with the authority of the first defendant. For the foregoing reasons there was no conspiracy on the part of the first and second defendants to commit a trespass to goods or to:

> "detain and/or convert the said tractor to their own use".

There remains for consideration whether there was a trespass to land and whether there was a conspiracy to trespass on land.

By the 23rd November 1991 the relationship between the plaintiff and the first defendant that had led to the purchase of the tractor had long since ended. The first defendant still had an interest in the tractor but he had no interest in the land. To my mind neither his interest in the tractor nor his demand for repayment can justify his entry on the plaintiff's land. Both defendants were trespassers but neither did damage. Therefore the damages payable are nominal.

Damage is an essential element of conspiracy. In this instance there was none. The use made of the tractor by the first defendant on whose authorisation the second defendant acted was reasonable. Further the definition of conspiracy for the purposes of the claim is so pleaded that it seems not to include a conspiracy to trespass on land.

For the foregoing reasons judgment is entered for the plaintiff on the claim of trespass to land with damages jointly and severally payable by the defendants in the sum of C.I.$100.00. The claims made by the plaintiff against the defendants for trespass to goods, conversion, detinue and conspiracy are dismissed.

I turn now to the first defendant's counterclaim in which the following claims are made:

"(1) A declaration that the First Defendant has a legal and/or beneficial proprietary interest in Caterpillar Tractor No. D8H46A14986.

(2) A declaration that the first Defendant has a controlling interest in Caterpillar Tractor No. D8H46A14986.

(3) An order that the Plaintiff do deliver Caterpillar Tractor No. D8H46A14986 forthwith to the First Defendant.

(4) Further and/or alternatively repayment by the Plaintiff of the sums totalling U.S.$56.636.00 paid by the First Defendant in respect of Caterpillar Tractor No.D8H46A14986.

(5) Interest.

(6) Costs.

(7) Such further and/or other relief as to this Honourable Court may seem appropriate.".

As I have earlier said, the first defendant has a proprietary interest in the tractor as a co-owner in common and he is entitled to U.S.$46,636.00 from the plaintiff with interest. His proprietary interest is not exclusive. Therefore he is entitled only to the first of the declarations sought. Accordingly, I declare that the first defendant has a legal interest in the

caterpillar tractor No. D8H4A14986 and order that U.S.$46,636.00 be paid forthwith with interest at 2% over the Bank of Nova Scotia base lending rate for United States Dollars in the Cayman Islands as from the 8th September 1989. on U.S. $40.000.00 thereof.

Sir Denis Malone

9th October, 1992.