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

ON 1st and 2nd MAY, 1989

BEFORE THE HON. THE CHIEF JUSTICE

CAUSE NO. 24 OF 1985

CAUSE NO.110 OF 1989

BETWEEN JAMES E. MACDONALD, JR. PLAINTIFF

AND (1) EXECUTIVE AIR SERVICES LTD.  
(2) EDMUND BODDEN DEFENDANTS  
(3) MARJORIE JANE BODDEN

AND

BETWEEN JAMES E. MACDONALD, JR. PLAINTIFF  
AND EDWARD (\*JILL\*) BODDEN FIRST DEFENDANT  
AND MRS. MARJORIE JANE BODDEN SECOND DEFENDANT

Mr. A. Foster of W. S. Walker & Co. for the Plaintiff  
Mr. P. Lamontagne Q.C. for the Defendants

COLLETT C.J. JUDGMENT.

Before me are two summonses filed by the attorneys

representing Edward (Jill) Bodden and his wife, Marjorie Bodden, who are the third defendant in Cause 24 of 1985 as well as first defendant in Cause 110 of 1989 and the second defendant in the latter cause, respectively. They seek the discharge of orders of this Court made on 4th April, 1989 upon the ex parte application of the Plaintiff in both actions. James E. MacDonald, the one restraining Mr. Bodden from transferring selling or otherwise disposing of any of his assets within the jurisdiction of the Court and the other appointing Mr. Robert Johnson, who is a chartered accountant, to be the receiver and manager of Mrs.

Bodden's whole interest (a three-quarter undivided share) in a substantial office building known as the Jack and Jill Building in George Town, Grand Cayman.

These proceedings have their genesis in a written agreement dated 17th October, 1978 whereby the Plaintiff as lessor leased a certain Aero Commander Aircraft to a local company, Executive Air Services for five years at a stipulated rental. Mr. Bodden who was a director of that company together with his brother Edmund, also a director, further entered into unconditional personal guarantees to the Plaintiff of the due performance by the company of its obligations under that agreement. Those obligations included the due payment of the stipulated rentals, the maintenance of the aircraft in good operating condition and the delivery up of the same to the Plaintiff at the conclusion of the term of lease on 17th October, 1983.

It is not in dispute that with the exception of a few rental payments made in 1979 the stipulated rentals were not paid to the Plaintiff; nor was the aircraft delivered up to the Plaintiff on termination of the lease, although subsequently he was able to secure its return after it had been detained for some time by officials of the United States Customs. Cause No. 24 of 1985 was commenced by the Plaintiff for the purpose of recovering inter alia the amount of the unpaid rentals together with damages for breach of contract or alternatively of damages for alleged conversion of the aircraft by the Company, the first Defendant in those proceedings. Mr. Bodden and his brother, Edmund, were also joined as defendants therein for the purpose of enforcing against them their personal guarantees of the Company's contractual obligations under the lease.

For some years that action went to sleep. No statement of claim was delivered but on 19th September, 1988 the Plaintiff filed a notice of intention to proceed and thereafter a summons for leave to file a statement of claim out of time. The Defendants then filed a cross-summons to have the action dismissed

for want of prosecution. These summonses were heard together by Schofield J. who in a reserved judgement delivered on 15th February, 1989 granted the Plaintiff's application and dismissed that of the Defendant's.

Meanwhile on 13th October, 1988, Mr. Edmund Rodden had registered transfer of his existing interest in the Jack and Jill building to his sister-in-law Mrs. Marjorie Rodden, and Mr. Edward Rodden on the same day had transferred his interest in the same building into the joint names of himself and his wife, Marjorie.

On 30th March, 1989 upon ex parte application the Plaintiff obtained from this Court an order appointing a receiver and manager of the business and undertaking of the Company, Executive Air Services Ltd. and also of the whole interest of the Defendant Mr. Edward Rodden in the Jack and Jill Building which was then thought still to exist. The receivership of the Company was however subsequently discharged by a consent order made on 25th April, 1989 after the Receiver had reported to the Court that it appeared to him to serve no useful purpose. The receivership of the building interest remained in place.

On 4th April, 1989 further ex parte applications by the Plaintiff came before me in Chambers, the Plaintiff's attorneys having discovered that unbeknown to him the whole interest of Mr. Edward Rodden in the Jack and Jill Building had already been transferred by him to his wife, Marjorie Rodden, by an instrument of transfer registered on 7th February, 1989, that is to say, during the period intervening between the hearing of the summonses by Mr. Justice Schofield on 31st January, 1989 and his delivery of reserved judgement thereon. The effect, of course, was to nullify ab initio the whole receivership of his interest in the building by a transfer to a person who was not a defendant in Cause 24 of 1985 and not a guarantor of the Company's obligations under the 1978 lease contract.

The reaction of the Plaintiff's advisors was to launch immediate proceedings in Cause No.110 of 1989 against Mr. and Mrs.

Bodden claiming to have the transfer of 7th February, 1989 set aside as being intended to defraud the creditors of Mr. Bodden and they applied ex parte once more in these new proceedings for the appointment of Mr. Johnson to be extended as receiver and manager of Mrs. Bodden's whole interest in the Jack and Jill Building together with an interim injunction to prevent her disposition of that interest. They also applied in the earlier proceedings for an injunction of the maraeva type to prevent the disposition by Mr. Bodden of any of his assets in the Cayman Islands. Orders in terms of both applications were granted on 4th April, 1989.

The principal ground upon which the Defendants now seek to obtain the discharge of these orders is alleged failure on the part of the Plaintiff to make full and frank disclosure of all material facts to the Court in the affidavits upon which reliance was placed in support of his ex parte applications. The obligation of a party seeking orders of the Court upon an ex parte application to make such full and frank disclosure is not in doubt, nor is the importance which the court attaches to such disclosure being made: see *Lloyds Bowmaker Ltd. v Britannia Arrow Holdings plc* (1988) 3 AER 178 and *Brinks MAT Ltd v Elcombe* (1988) 3 AER 188. The obligation to disclose extends to all facts which the party concerned could have discovered if he had made proper enquiries. Failure to make such disclosure will result in a discharge of the orders made ex parte unless the Court considers that the non disclosure was innocent and that, in its discretion the orders should continue on the footing that they could properly have been granted even had the full facts been disclosed before they were made.

The first instance of non disclosure relied on by these Defendants concerns the ownership of the aircraft. Although Mr. MacDonald contracted with the Company throughout as the person having the legal right to possession of it, in fact as he has now disclosed in his second affidavit, the Aero Commander was at all material times the property of a family corporation registered in Ohio under the name Crosley Building Corporation later changed to Forty-three Public Square Corporation the beneficial owners of

which are a family trust. The aircraft was purchased with corporate funds but Mr. MacDonald who was a director and chief executive officer of the corporation was authorised by it to have the aircraft registered in his own name and to contract with Executive Air in its regard personally. Mr. MacDonald regarded himself as a trustee or fiduciary for the company of the aircraft and he likewise regarded these arrangements between himself and the Company as a private arrangement which it was unnecessary to disclose to the Boddens.

Non-disclosure of facts is therefore proved but the question remains as to what facts material for the consideration of this Court upon the various applications made *ex parte* in these actions for the appointment of the Receiver and for a *mareva* type injunction? Mr. Lamontagne for the Defendants has strongly contended that it was most material in that the undisclosed beneficial interest of the Corporation vitally affects the ability of Mr. MacDonald to recover either the unpaid rental under the contract, damages for its breach or damages in tort for conversion of the aircraft. He submits that the Plaintiff, although apparently contracting in his own name was in fact doing so solely as an agent for the Company and as such is a stranger to the contract, unable in law to maintain the action in Cause No.24 of 1985. If he cannot do that, counsel submits, he cannot enforce the Guarantee against Mr. Bodden and still less can he claim to set aside the transfer of the interest in the building to Mrs. Rodden as a device to defraud creditors. Thus the first requirement for the obtaining of orders of receivership and interim injunction, that a plaintiff must show a strong arguable case is undermined and had the true facts been known the Court would not have made the orders of 4th April, 1989 in either action.

In reply Mr. Foster for the Plaintiff submits that the non-disclosure is wholly immaterial in that in law the existence of the corporate interest in the aircraft in no way vitiates his client's right to maintain cause No. 24 of 1985 based as it is upon a contract which he concluded ostensibly on his own account

and upon his right to possession of the aircraft subject to the terms of that lease which the Corporation had entrusted to him.

The common law doctrine as to the right of an agent who contracts with a third party on behalf of a principal whose existence is not disclosed to sue and to be sued upon the contract personally does not appear to me to be in any doubt despite the absence of any modern authority directly in point and despite the apparent illogicality of that doctrine as it has emerged over the centuries. If the undisclosed principal elects not to sue himself upon the contract then the united opinion of the text book writers is that in general the agent may himself do so. Passages from Bowstead on Agency, 15th Edition p. 432, Fridman's Law of Agency 5th Edition paragraphs 221-223 and 234, Chitty on Contracts 25th Edition paragraph 2278 and Halsburys Laws of England 4th Edition. Vol 1, paragraph 864 are all to the same effect.

Moreover, I have carefully examined the old cases cited by these textbook writers in the relevant footnotes as authority for their views, such as *Short v Spackman* (1831) 109 E.R, *Simms v Bond* (1833) 110 E.R. and *Fisher v Marsh* (1865) 123 E.R. as well as the decision of the Privy Council in *Allen & Others v O'Hearn* (1937) A.C. 213 at p. 218. All these decisions appear either to assume or to proceed upon the basis that the doctrine relied upon by the Plaintiff is correct in law. Its origins and the reasons for its existence may be obscure but the existence of the doctrine is too well established for this Court to do otherwise than to follow and apply it to the facts of the present litigation. In consequence the failure of Mr. MacDonald to disclose that he was acting in that capacity has little or no materiality in the context of these *ex parte* orders.

Other instances of non-disclosures said to be material are, firstly the fact that Mr. MacDonald filed for bankruptcy in the United States in 1986. The circumstances of that event are explained by him in his second affidavit sworn on 2nd May 1989. The bankruptcy proceedings resulted from litigation brought against him in Texas which subsequently was settled and the bankruptcy order was then discharged in June, 1987. I am

satisfied that if these facts and circumstances had been brought to this Court's notice upon the hearing of the ex parte applications it would not have affected the outcome and, insofar as the undertaking of the Plaintiff in damages is concerned, I have ruled that this should on account of his foreign residence be fortified by a local undertaking in the maximum amount of \$30,000 which undertaking has now been provided. Secondly, there is included in the bankruptcy proceedings file an unsigned and unidentified hand written memorandum which asserts that the alleged breaches of the lease agreement had been waived by Mr. MacDonald upon improvements being made to the aircraft at an unspecified date subsequent to 1979. Mr. MacDonald has sworn that this statement is inaccurate. At no time formally or informally has the Company or Mr. Rodden asserted a defence based upon a waiver of the breaches of contract now alleged. Therefore the non-disclosure of this document does not appear to be of any great materiality in regard to the issues arising in the ex parte applications. Furthermore its location buried in the U.S. Court bankruptcy files in Massachusetts was such that the failure of the Plaintiff to discover its existence by having his attorneys conduct a thorough search is entirely excusable having regard to the time frame appropriate to an ex parte application of these kinds in the prevailing circumstances.

Further matters detailed in the written submission prepared by Mr. Lamontagne were relied upon by him as constituting non-disclosure but, having considered each of these, I am satisfied that they relate to peripheral issues which would not have weighed to any extent with the judge on considering the ex parte applications had the material now before it been disclosed at that time and put before the Court.

In relation to cause No.110 of 1989 and the receivership of Mrs. Rodden's interest in the building counsel further sought to impugn the basis of those proceedings by submitting that there was no evidence that the statute of 13 Elizabeth I Ch 5, upon which the Plaintiff relies for the proposition that the transfer between the Boddens is unlawful and void as being intended to

defraud creditors, is or ever has been in force in the Cayman Islands. He drew attention to the wording of S. 40 of the Interpretation Law and the observations of Bryan Edwards C.J. in the Jamaican case of *Magnus v Sullivan* (1866) *Stephens Reports* at p. 862 in relation to the identical words of the Jamaican statute. Section 40 reads as follows:

"40. All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap.1, esteemed, introduced, used, accepted, or received, as laws in the Islands shall continued to be laws in the Islands save in so far as any such laws or Statutes have been, or may be, repealed or amended by any Law of the Islands."

In reply I was referred by Counsel for the Plaintiff to Halsburys Laws of England 4th Edition Vol. 6 paragraph 1028 where it is stated that in settled colonies, such as the Cayman Islands is, settlers from the mother country carried with them such portions of English statute and common law as were applicable to their new situation. Since the date of settlement of the Cayman Islands cannot have been prior to the enactment of this Statute of Elizabeth I it follows that, despite the absence of any evidence of the actual enforcement of the statute here prior to 1727 there is a presumption that it was esteemed used or accepted here from the earliest times of settlement provided only that the terms of the statute are perceived as suitable to the situation of an infant colony. Having considered the instances given of statutes perceived as suitable or unsuitable in similar situations noted by Halsburys Laws at paragraph 1196 of the same Volume, the views of Kenneth Roberts Wray at p. 546 of his 'Commonwealth and Colonial Law', and the decision of the Privy Council in *Cooper v Stuart* (1887) 14 App. Cases 286 as well as the universal nature of the mischief of the statute, i.e: the wiles of dishonest debtors to defeat their creditors' claims, I must conclude that there is indeed a strong argument for deciding that the statute does indeed apply locally. That is sufficient to dispose of this particular point in relation to the present applications to discharge.


Although I was not specifically urged to do so by counsel for the Defendants, I have further considered whether or

not in the light of the altered circumstance that the receivership of Executive Air Limited has been discharged since these ex parte orders were made, the receivership of Mrs. Bodden's interest in the Jack and Jill Building ought now to be continued or also discharged. Unlike the receivership of Executive Air, it has so far proved productive in securing income estimated at between \$6000 and \$7000 per month which will be available to satisfy any judgement which may be in due course obtained. Even if the receivership were to be discharged, if the maraeva type injunctions were to remain in place the capital assets covered by them, including the interest in the building would remain secured against dissipation. There is, however, a mortgage on the building to be taken into account. No real prejudice is caused to Mrs. Bodden by reason of the receivership other than the cost of the receiver's services in collecting and safeguarding rental payments meanwhile.

Bearing these factors all in mind as well as the chronology of the proceedings put before the Court by Mr. Lamontagne and briefly alluded to earlier, in the absence of any material non disclosure of facts and in the absence of any other good reason why these orders ought to be discharged in response to the present applications I have reached the conclusion that they should be allowed to stand and without variation.

The Defendants' summonses are therefore dismissed. The costs will be Plaintiff's in any event.

Dated 11th May, 1989.



CHIEF JUSTICE.