

IN THE COURT OF APPEAL Appeal CL/AP No 14/2023
THE TURKS AND CAICOS ISLANDS

BETWEEN

DUNCANSON & CO. (Beryn Duncanson dba)

Appellant

And

(1) EAST WIND DEVELOPMENT COMPANY LTD

(2) WILLIAM DEAN REEVES

(3) RICHARDSON ARTHUR

(4) JEFFREY HERMAN

(5) RONNIE MOORE

(6) JOHN FLEMING

(7) WILLIAM MADDOX

(8) WB CORPORATE MANAGEMENT LTD

(9) SAUNDERS & Co. (Norman Saunders Jr, dba)

And

(1) The Registrar of Lands

2) The Attorney General of the Turks and Caicos Islands

Respondents

And



East Wind Development Limited

Interested Party/

Registered Proprietor

Coram: The Hon Mr Justice Adderley, JA, President (Ag.)
 The Hon Mr Justice John, JA
 The Hon Mr Justice Turner, JA

Appearances: Mr Beryn S. Duncanson for the Appellants
 Mr Conrad Griffiths, KC and Devonte Smith with him
 for the Respondents
 Ms Clemar B. Hippolyte, Sr. Crown Counsel, for the
 Attorney General and Registrar of Lands

Hearing Date: 17 October 2023

Judgment handed down 27 October 2023

***Appeal – Attorney’s Lien – Restrictions – Registered Land Ordinance –
 Interest in Land – Trust - Equitable Interest –***

CL Action No 150 of 2022 begun by Originating Summons claims against the defendants that at all material the settlement agreement under which he claims created at common law a trust for sale and an equitable interest in all future net proceeds of sale and an unregistrable equitable interest in all “Phase II Lands 40311/31&32), that East Wind Development Ltd (“EWD”) at all material times was and is trustee of same for the plaintiffs, and that any deviation from the settlement agreement without the plaintiffs consent constitutes a breach of trust. On this basis the appellant applied to lodge a caution on lands belonging to the Respondents. This was refused by the Registrar of Lands. Subsequently the Registrar on his own accord lodged a restriction on the said lands belonging to the respondents and stated a case for the opinion of the Supreme Court under

S. 146 of the Registered Land Ordinance seeking clarification on his decision to lodge such a restriction.

Selochan J. decided that the Registrar of Lands had erred in the exercise of his discretion under s.132 of the Registered Land Ordinance in registering Restrictions against lands (40311/31 & 32) in which the appellant alleged to have an interest. The Appellant appealed the decision of Selochan J.

HELD: The learned judge was right that the appellant did not have an interest in the property of the Defendants required by the RLO for a restriction to be registered against their properties and the Registrar of Lands was wrong in law to do so. We therefore dismiss the appeal with costs to the respondents to be taxed if not agreed.

Cases Considered

- 1. *Bott & Co Solicitors v Ryanair DAC 2022*] UKSC 8; [2022]2WLR 634**
- 2. *Candey LTD v Crumpler and Another (as Joint Liquidators of Peak Hotels and Resorts Ltd 2022*] UKSC 35**
- 3. *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018]* UKSC 21; [2018] 1 WLR**
- 4. *Lysaght v Edwards (1876)* 2 ChD**
- 5. *Attorney General of the Turks and Caicos Islands and another v Richardson (as Trustee in bankruptcy of Yellowstone Club World LLC [2013]* UKPC 9**

Judgement

Adderley P (AG)

[1] This appeal is a part of a series of interlocutory appeals pending by the appellant namely, CL AP **No 8 of 2023** which relates to the refusal of a stay by Gruchot J after dismissing an application for his recusal, CL AP **No 11 of 2023**

whereby Selochan J refused an application to adjourn *sine die* after dismissing an application to stay proceedings pending an application for judicial review into the validity of the judge's appointment, CL AP **No 12 of 2023** whereby Selochan J refused an adjournment after an application for his recusal, CL AP **No 13 of 2023** whereby Selochan J dismissed an application for a stay pending the appeal against his decision not to recuse himself, and **CL AP No 14** of 2023 an appeal against Selochan J's decision that the Registrar of Lands under the Registered Land Ordinance exercised his discretion wrongly when he removed restrictions had placed on registered land 40311/31 &32, East, Middle Caicos.

[2] The overarching issue in these proceedings is CL Action **No 150 of 2022** ("the Main Action"). That action which was begun by Originating Summons filed 11 October 2022 ("the Originating Summons") claims against the defendants [the same as in this action] or seeks the determination of the court on a number of questions. The appellant claims that under a settlement agreement with the respondents the indebtedness to his firm including compound interest has accumulated to over \$12 million dollars.

[3] The claims or questions include:

1. that there was at all material times a binding written settlement agreement between the parties for legal services to be provided by the plaintiff on terms set out in paragraph 1 of the originating summons.
2. That the terms created at common law a trust for sale and an equitable interest in all future net proceeds of sale and an unregistrable equitable interest in all "Phase II Lands 40311/31&32) of East Wind Development Ltd ("EWD") at all material times EWD was and is trustee of same for the plaintiffs.
3. That any deviation from the settlement agreement without the plaintiffs consent constitutes a breach of trust, and certain other specific allegations.

[4] The plaintiff claims that there have been misrepresentations and fraudulent breaches of the settlement agreement both in relation to him and the

public revenue including among other things sales at an undervalue and that the relevant transfers be set aside, and he claims specific performance of the settlement agreement.

[5] He prays for full disclosure of the Defendants' assets, bank accounts and so forth both in and out of the jurisdiction, damages, an accounting from all of the defendants, an order for payment of sums found due, and that a Charging Order be registered for the benefit of the plaintiff as against all of the Turks and Caicos known properties [listed in paragraph iii of the Relief claimed].

[6] He asks that a charging order be made in respect of all those parcels remaining in the name of the 1st defendant within the Phase II parcels of Block 40311, East Middle Caicos including without generality the claim as listed in the Originating summons.

[7] This application was by Notice of Motion dated 21 August 2023 whereby the appellant asked the judgment and order of Mr Justice Chris Selochan, made in Supreme Court Action No.150/22 on 18 August 2022 be set aside or varied. That judgment and Order had declared that the Registrar of Lands had erred in the exercise of his discretion under s.132 of the Registered Land Ordinance in registering Restrictions against lands (40311/31 & 32) in which the appellant alleged to have an interest. That interest was claimed by virtue of the alleged settlement agreement dated 14 June 2007 between himself and the first and second respondent.

[8] The alleged settlement appears on Duncanson and Co's letterhead and is signed by both parties. It reads as follows:

"Mr Dean Reeves
East Wind development Company Ltd
Providenciales

By hand

Dear Dean,

Re: East Wind Development Company Ltd;40311/31 &32, East, Middle Caicos, Second Phase Legal Fees by Agreement

I refer to our recent discussions by way of expansion of this firm's fee note dated 27 September 2004. By agreement with you on behalf of East Wind Development Company Ltd, this firm's legal fees shall be payable on the 2nd phase as follows:

1. \$20,00 upon the conveyance of Phase II registered in East Wind's name;
2. 1.5% on the full market value of all Closings of all sales and transfers from the Company in the 2nd phase, SUBJECT to MINIMUM fee of \$9,000 for such conveyance;
3. This firm is entitled to a brokerage fee of net 10% of the sale price or value for any independently brokered sale of East Wind Development lands (East Wind to ensure this arrangement with any listing agent/realtor)

Yours truly
Duncanson & Co

Sgd Beryn Duncanson

Sgd

Dean Reeves, Director
Accepted and agreed on
behalf of East Wind
Development Ltd
This 14th June 2007

[9] Mr Duncanson helpfully outlined the chronology of events to place in context the registration of the restriction and its removal. It shows that after these appeals were listed, on Monday 18th September 2023 the Appellant filed a Petition for the Winding-Up of EWD [new Action W-1/2023]. On or about the Friday 22nd September 2023 the 1st respondent filed a Summons to restrain publication of any advertisement of the Winding Up Petition. The appellant also voluntarily gave his undertaking to the Court not to advertise the Petition for Winding-up until a determination of the respondent's respective application thereto.

THE APPELLANT'S APPEAL

[10] The appellant submitted that the letter is referred to in the Notice as a Settlement Agreement , and came about as part of the culmination of negotiations over several years as outlined in paragraph 1 of the Originating Summons

[11] It therefore created a lawyers lien, he submits.

[12] He relied on authorities which were not relied on in the court below to support the view that lawyer's liens can arise from legal work carried out where there was a settlement and no litigation. He cited the authorities of **Bott & Co Solicitors v Ryanair DAC**¹ , applied in **Candey LTD v Crumpler and Another (as Joint Liquidators of Peak Hotels and Resorts Ltd**², and submitted that those authorities supported his view that the settlement agreement gave him an equitable interest in **40311/31 &32, East, Middle Caicos** owned by the company.

[13] Mr Griffiths KC countered that an attorney's lien does not arise in non-contentious work. It also only applies to work already carried out, not to future work as provided for in the letter which he submits in any event is not a settlement agreement but simply a demand for fees.

[14] The grounds of appeal are set out in the Notice of Appeal filed 21 August 2023. In summary as it relates to this issue:

- (i) the judge had no jurisdiction to address the restriction question (Ground 1);
- (ii) the judge erred by changing the status quo before trial (Ground 2);

¹ [2022] UKSC 8; [2022]2WLR 634

² [2022]UKSC 35

[15] The appellant argued that having notice of the fraud claims in the Originating Summons was the major reason why the Registrar had imposed the restrictions in the first instance because s.132(1) of the LRO specifically empowers the Registrar to impose a restriction to prevent fraud. It was not as alleged by the respondents because of “any other reasons”

[16] Based on well-known authorities some of which the cited, he argued that the Registrar having already exercised his discretion to impose the restriction, an appeal tribunal ought not lightly to interfere with a discretion properly exercised by a lower tribunal. The discretion had been exercised properly, and as pointed out in a letter addressed to Mr Griffiths KC dated 23 February 2023, he had not appealed against the registration of the restriction. Under s.147 of the RLO there was only a 30-day window in which to do so.

Has the settlement agreement created an interest in land?

[17] As recited by the judge, the Interested Party brought an application for removal of the restriction via Notice to the Registrar of the Supreme Court on 13 February 2023 within **CL AP 97/22** seeking among other things the following relief:

“An order pursuant to inter alia Order 29 of the Rules by way of interim relief and section 134 of the Registered Land Ordinance CAP 9.01 (“the Ordinance”) directing the Respondent, the Registrar of Lands, to forthwith remove the restrictions registered on title to parcels 40311/44-50, 53-56, 61-75 (“the Properties”) on the ground that:

- (i) No sufficient basis for the registration of the restriction exists in law under section 132 of the Ordinance as the Appellant has disclosed no legal or equitable interest in the Properties.
- (ii) The Appellant has neither shown or disclosed any sufficient basis for alleging fraud or improper dealing and in any event absent any interest in the Properties no proper basis for a restriction exists; and

- (iii) The request for a caution and the consequent restrictions are improperly made and obtained in that the Registrar of Lands has no statutory power to provide de facto injunctive relief to an alleged creditor claimant hereby usurping the role of the Supreme Court and section 124 of the Ordinance

[18] Mr. Duncanson categorically rejects the contention that the Appellant has no beneficial interest in the lands of the proprietor. He states that the settlement agreement is a sufficient memorandum in writing which identifies the land in question (Phase II lands 30311/31 & 32) to satisfy the provision of section 37(2) of the RLO creating an equitable interest therein in favour of the appellant. Section 37(2) states:

(2) “Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised:

[19] He therefore contends that the settlement contract created a trust for sale which gave the appellant an equitable interest in the property by virtue of the valid contract, and therefore entitles him to lodge a restriction.

THE LAW

[20] The relevant provisions of the Registered Land Ordinance are set out below for easy reference:

Effect of registration with absolute title

s.23. Subject to the provisions of section 27 of this Ordinance, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests. [except limited interest set out in the Ordinance]

Overriding interests

Section 28 sets out the limited number of overriding interest which may affect the registered land. The appellant's claim does not fall within these. It provides: *unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—*

- (a) *rights of way, rights of water and any easement or profit subsisting at the time of first registration under this Ordinance;*
- (b) *natural rights of light, air, water and support;*
- (c) *rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other written law;*
- (d) *leases or agreements for leases for a term not exceeding two years, and periodic tenancies within the meaning of section 2 of this Ordinance;*
- (e) *any unpaid moneys which, without reference to registration under this Ordinance, are expressly declared by any written law to be a charge upon land;*
- (f) *rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;*
- (g) *the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed;*
- (h) *electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected constructed or laid in pursuance or by virtue of any power conferred by any written law:*

Restrictions

Section 132 sets out the authority of the Register of Lands to register a Restriction. It provides

s.132 (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

- (2) *A restriction may be expressed to endure—*
 - (a) *for a particular period; or*
 - (b) *until the occurrence of a particular event; or*
 - (c) *until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.*

(3) *The Registrar shall order a restriction to be entered in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.*

Notice, and effect of restriction

Section 133(1) provides that upon the entry of a restriction the Registrar shall give notice thereof in writing to the proprietor affected thereby and

(2) So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar.

Removal and variation of restrictions

By s.134(1) The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.

Power of Registrar to state case

146. Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Ordinance, the Registrar may and shall if required to do so by an aggrieved party state a case for the opinion of the Supreme Court; and thereupon the Supreme Court shall give its opinion thereon, which shall be binding upon the Registrar.

Appeals

S.147(1) The Permanent Secretary, Finance or any person aggrieved by a decision, direction, order, determination or award of the Registrar may, within thirty days of the decision, direction, order, determination or award, given notice to the Registrar in the prescribed form of his intention to appeal to the Supreme Court against the decision, direction, order, determination or award.

THE CASE LAW

[21] In **Candey**³ Lord Kitchin described the nature of the solicitor's lien at paragraph 2 as follows

“2. The nature of the solicitor's equitable lien was explored in the decision of this Court in **Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd** [2018] UKSC 21; [2018] 1 WLR 2052. As Lord Briggs explained, at paras 3 and 4, the solicitor's equitable lien is a security interest and is enforceable against the proceeds of the litigation up to the amount contractually due to the solicitor, in priority to the interest of the successful client, or anyone claiming through the client. The interest is in the nature of an equitable charge and, as such, may be enforced **in personam** against anyone whose conscience is affected by having notice of it, either to prevent him from dealing inconsistently with it, or by holding him to account if he does....[emphasis added]

5. The issue which divided this Court in **Bott**⁴ was whether it is a requirement for the creation of an equitable lien that there be a dispute, either existing or reasonably anticipated, in connection with which the services of the solicitor are sought. The majority decided that it was not and that, assuming the solicitor is acting for a potential claimant, the appropriate test for a solicitor's equitable lien is whether the solicitor provides services (within the scope of the retainer) in relation to the making of the client's claim, with or without legal proceedings, which significantly contribute to the recovery of a fund by the client.”

[22] There are several aspects of the authorities which could be noted. The lien is payable out of a fund from the fruits of the recovery a portion from which the successful client is entitled to recover his costs in priority to all other persons. The lien seems is enforceable as a remedy in **personam** not **in rem**. The lien is only enforceable against property in the solicitor's or client's possession or to which they have a right to possession.

The judge's Decision on the “restriction” issue

³ [2022]UKSC 35

⁴ [2022]UKSC 8; [2022]2WLR 634

[23] Question 7 from the Registrar of lands asked the following question of the judge: “Whether as a further issue, the Registrar was correct to have ordered and registered a restriction against disposition pending determination of case CL 150/22 on his determination that the service of proceedings gives “sufficient cause” from such restriction on disposition”.

[24] The learned judge at paragraph 56 of his judgment gave the following answer “...***the court is of the opinion that the Registrar was incorrect to have ordered and registered a restriction against disposition pending determination of case CL 150/22 on his determination that the service of proceedings gives “sufficient cause” for such restriction on disposition.***”

[25] A Tribunal must give reasons for its decisions. It is evident from the question that the Registrar appears to have made his decision on the fact that proceedings had been served. Part of the gravamen of those proceedings was breach of contract and fraud. On the pleadings the fraud has not come to an end and is ongoing. That fact was self-evidently the reason for imposing the restrictions. It is not open to the court as another tribunal to conclude that the service of proceedings based on those facts is not “sufficient cause” unless they concluded that no reasonable tribunal could make that decision; or that he made a mistake in law, it would amount to that tribunal exercising the discretion *de novo* which they are not allowed by law to do.

[26] We therefore feel that the judge fell into error in giving the answer that he did.

[27] However, the judge by his judgment dated 17th day of August, 2023 after hearing all the parties found at paragraph 54 of his judgment that:

- a. The Plaintiff has failed to establish any legal or equitable interest in any of the Interested party's properties so as to justify the registering of the restriction.
- b. There was no charging order at the time of the registration of the restriction and the Plaintiff's claim could not have created a charge over the Interested Party's lands, the claim being primarily a contractual claim which acts in personam and which would not affect the lands of the Interested Party unless and until a charging order is made.
- c. The Plaintiff's claim at this stage is for an unliquidated debt. Even if the Plaintiff is successful in his action on the issue of liability, the issue of quantum would remain in dispute.

[28] We would only question paragraph c. of that conclusion because in the settlement contract there appears to be a formula to make the quantum of damages certain.

[29] Ms Hippolyte in argument before us dealt with the ground in a commendable fashion and so I take the liberty of quoting from her skeleton arguments verbatim:

"93. Section 132. of the Registered Land Ordinance deals with the entry of restrictions. Section 132 (1) provides as follows: -

For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

Section 132 (2) provides:

(2) A restriction may be expressed to endure— (a) for a particular period; or (b) until the occurrence of a particular event; or (c) until the making of a further order, and may

prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall order a restriction to be entered in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.

94. The Registrar of Lands did not direct any inquiries to be made, nor did he cause notices of the application for restriction be served on the proprietor, nor did he conduct a hearing to have the matters fully ventilated before him. It was clear that the Registrar registered the restrictions in direct response to the appellant's application and acted on the assumption that the appellant was a person interested in the land and that the lodging of the originating summons constituted sufficient interest for making the entry.

95. As was set out by Mr Justice Martin in his judgment dated 10 June 2011 and referred to in the Privy Council decision of ***Attorney General of the Turks and Caicos Islands and another v Richardson (as Trustee in bankruptcy of Yellowstone Club World LLC [2013] UKPC 9*** at paragraph 23:

“an interest in land” for the purpose of the Registered Land Ordinance could only mean an interest recognized by that Ordinance. He held that the obligation to pay stamp duty did not create an interest in land; it created a civil debt. He explained that the only circumstance in which a debt is recognized by the Ordinance as enforceable against land (without more) is where it constitutes an overriding interest within section 28(e): which

required that the debt be “expressly declared by any written law to be a charge upon land”. As the judge pointed out, the Stamp Duty Ordinance “does not expressly declare any such thing”.

96. The same principle is applicable to the proceedings under consideration. The Claim for unliquidated outstanding legal fees at its highest can only amount to a civil debt and did not on its own create an interest (whether legal or equitable) in land. It is not a debt which was expressly declared by any written law to be a charge upon the land. Therefore, the Learned Judge was correct in his finding that a mere fee Claim did not amount to a cause sufficient to create an interest in land as contemplated by section 132 of the Registered Land Ordinance.”

[30] On the appellant’s claim that the settlement agreement created a trust for sale thereby giving him and unregistrable equitable interest in the properties this appears to be an attempt to draw on the familiar principle that a proposed purchaser of land under a valid contract for sale of that land is the owner in equity of that land from the date of the contract until closing (***Lysaght v Edwards (1876) 2 ChD***). The difficulty here, as correctly pointed out by Mr Griffiths KC, is that the settlement agreement is not a contract for the disposition of land or an interest in land and so that principle does not apply.

[31] The appellant also discussed the balance of convenience and the need to maintain the status quo. However, the discussion was devoid of any considerations of other essential aspects of injunctions namely the need for an undertaking and fortification of damages from the beneficiary of an injunction.

[32] It would appear that the appellant was alive to this fact because as indicated in paragraph [5] above in the Main Action he asks that a charging order be made in respect of all those parcels remaining in the name of the 1st defendant within the Phase II parcels of Block 4031, East Middle Caicos.

CONCLUSION

[33] For all the above reasons we conclude that the learned judge was right that the appellant did not have an interest in the property of the Defendants required by the RLO for a restriction to be registered against their properties, and the Registrar of Lands was wrong in law to do so. We therefore dismiss the appeal with costs to the respondents to be taxed if not agreed.

Adderley JA, President (Ag)



John, JA

I agree

Turner, JA

I also agree