

Motor & General Insurance Company Limited

Appellant

v.

Sonny Gobin

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1986

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*Present at the Hearing:*

LORD KEITH OF KINKEL

LORD TEMPLEMAN

LORD ACKNER

LORD OLIVER OF AYLERTON

SIR IVOR RICHARDSON

*[Delivered by Sir Ivor Richardson]*

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The respondent, Sonny Gobin, to whom it is convenient to refer as "the plaintiff" was managing director of the insurance agency in Jamaica of the appellant, Motor & General Insurance Company Limited ("the company"). On 17th August 1982 the company granted the plaintiff an option to purchase the Jamaican and Barbadian operations of the company. The crucial provision of the agreement is paragraph 1 which reads as follows:-

"1. In consideration of Five Hundred Dollars (\$500.00) this day paid by the Vendor (the receipt whereof the Vendor Acknowledges) the purchaser shall have an option of purchasing the Jamaica and Barbados operation of Motor and General Insurance Company Limited, inclusive of the right to use the vendor's name, its Goodwill, Assets and Liabilities existing outstanding and or due to or from the Company in the Islands of Jamaica and Barbados, West Indies, together with all furniture, fixtures, office equipment and stationery at the price of SIX HUNDRED AND FIFTY THOUSAND DOLLARS (\$650,000.00) Trinidad and Tobago Currency, to be paid to the Vendor in the Island of Trinidad, in addition to

20,000 shares valued at \$7.00 per share held by the Purchaser, in the share capital of the vendor to be transferred to any nominee of the Vendor."

The option was expressly subject to the approval of the Superintendent of Insurance in Jamaica or other relevant authorities and it was common ground in the proceedings that ultimately ensued that the approval of the Supervisor of Insurance in Barbados required under that provision was never obtained. On 11th February 1983 the plaintiff purported to exercise the option, paid \$650,000.00 in Trinidad and Tobago currency to the company and tendered the relevant share certificates and instruments of transfer. The company subsequently declined to transfer the operations to the plaintiff but at the same time retained and has continued to retain the \$650,000.00.

The plaintiff commenced proceedings in the Supreme Court of Judicature of Jamaica seeking specific performance of the agreement, an injunction restraining the company from parting with any part of its Jamaican or Barbadian operations, damages for breach of contract and alternatively the return with interest of the \$650,000.00 paid to the company. The company filed a defence and counterclaim and also issued separate proceedings against the plaintiff. The plaintiff's action was adjourned to 8th December 1983 when the company was granted leave to amend its defence and paragraph 14 of the amended defence was in these terms:-

"The Defendant further says that the 'option' agreement is an illegal transaction in that it provides for the Defendant company buying its own shares and as a consequence of the said illegality the Plaintiff is not entitled to the return of the sums paid thereunder."

Following a short adjournment and by and with the express consent of the parties the plaintiff's action proceeded to trial on the basis:-

- "1. That the question of the right of the Plaintiff to recover the down payment of TT\$650,000.00 be argued and determined in the light of the issue raised in paragraph 14 of the Amended Defence.
2. If the Plaintiff is adjudged to be entitled to recover the amounts paid that Judgment be entered for the Plaintiff against the Defendant for
  - (a) the sum of TT\$650,000.00 plus interest at such rate and from such date as the Court may determine and until the date of repayment.
  - (b) and the sum of J\$173,000.00.

3. That Judgment be entered for the Plaintiff on the Counterclaim.
4. That Defendant discontinue Suits C.L. M277/83 filed in the Supreme Court of Jamaica and 838/83 filed in the High Court of Trinidad and Tobago and abandon all claims arising out of the matters referred to in the said suits."

The only evidence adduced at the trial was that of the plaintiff relating to the rate of interest payable. His evidence was that he had borrowed the \$650,000.00 from two Trinidad banks paying 16% interest per annum and that commercial banks in Trinidad paid 12% on deposits of the amount involved here. The trial judge, Mr. Justice Wolfe, held the plaintiff entitled to recover the sum of TT\$650,000.00 with interest at 16% from 11th February 1983 down to the date of payment. He concluded that the approval of the Supervisor of Insurance was a condition precedent which had never been fulfilled and accordingly it could not be said that the amount had been paid under an illegal contract. He added that the agreement could have been performed legally by means of a reduction of share capital sanctioned by the Court. And he fixed the interest payable by the company at the 16% per annum which the plaintiff had been paying.

The Court of Appeal of Jamaica dismissed the appeal by the company but, in terms of a concession made by counsel for the plaintiff that the appropriate rate of interest was the 12% rate referred to in the evidence, varied the order made in the Supreme Court in that respect. In separate judgments Rowe P., Carey and Campbell JJ.A. rejected the illegality argument on the ground that the agreement as to the transfer of shares to a nominee of the company could have been performed in a perfectly legal manner and therefore the plaintiff in suing for the return of the \$650,000.00 was not relying on an illegal contract. Carey and Campbell JJ.A. would also have found for the plaintiff on the condition precedent argument.

The argument before the Supreme Court and Court of Appeal proceeded on the understanding that the relevant legislation of Trinidad and Tobago was to the same effect as section 66 of the Companies Act of Jamaica but on the hearing before their Lordships the company sought leave to adduce expert evidence as to the precise provisions of the Insurance Act 1966 of Trinidad and Tobago in that regard. Their Lordships are content to assume as is contemplated by paragraph 1 of the consent order read together with paragraph 14 of the amended defence that under the relevant law applying in this case an agreement for the purchase

by a company of its own shares is tainted by illegality. There is no need for present purposes for any greater specificity and the application to adduce further evidence is dismissed.

Mr. Daley's first point on the argument of the present appeal was that under the consent order it was accepted by both parties that the contract was illegal. On the contrary it is clear from the terms of that order considered against the pleadings that the first issue between the parties was whether or not the agreement was to be characterised as an illegal transaction in that respect. The company's contention (in paragraph 14 of the amended defence) was that the option agreement provided for the company to buy its own shares. The plaintiff in his reply had specifically joined issue with the company on its defence and in terms of the consent order the question of the right of the plaintiff to recover the \$650,000.00 he had paid fell to be determined in the light of that issue raised in paragraph 14 and put in issue by the plaintiff in his reply.

That question is one of the proper construction of the agreement. If the agreement could have been carried out in a legal manner then that is the end of the case; the plaintiff is to be regarded as seeking the return of money had and received by the company in circumstances where the company cannot justify its retention of money. On this branch of the case Mr. Daley was driven to the argument that "nominee" must be read narrowly as meaning trustee for the company. Their Lordships are unable to agree. In the context of paragraph 1 the word "nominee" bears its ordinary meaning, that is a person nominated by another for a purpose, the purpose here being to become the transferee of the shares which were valued at \$140,000.00. Had it been the intention of the parties to the agreement that the shares should be purchased by the company itself and be held by a trustee there was no need to specify that they be "transferred to any nominee of the vendor". In short the language used does not signify that the nominee will necessarily be trustee or agent for the company. It simply means any person nominated by the company and is clearly wide enough to include a transferee of the shares paying for the shares from his own resources. In order to succeed on the illegality argument it raises the company must establish that the option agreement necessarily provides that the company is to buy its own shares. This it has not done and it does not now lie in its mouth to say that it would have performed the agreement in an illegal manner. In the result their Lordships are not called on to consider the various questions which would arise on the alternative argument (canvassed in the courts of Jamaica) that the option agreement could have been carried out without illegality by means of a reduction of capital of the company.

The further submissions for the company which relate to the award of interest can be disposed of very shortly. Paragraph 2(a) of the consent order contemplated the award of interest if it was held that the plaintiff was entitled to recover the \$650,000.00 it had paid to the company. Under the relevant legislation the Supreme Court has jurisdiction to allow interest at such rate as it thinks fit in any proceedings for the recovery of any debt and the contemplation by the parties in the consent order that interest would be awarded rested on the simple principle that the plaintiff had been kept out of his money and the company had had the benefit of the use of it. Mr. Daley's submission was that the plaintiff could not be regarded as an expert in interest rates. As to that their Lordships are satisfied that having regard to the unchallenged evidence the plaintiff gave as to the interest rates paid the Court of Appeal was well entitled to fix the interest payable by the company at 12% per annum.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.

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