Privy Council Appeal No. 3 of 1983

Michael B. Marcus and Others *Appellants*

v.

Erik J. Lawaetz and Another *Respondents*

FROM

THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH APRIL 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRIGHTMAN
LORD TEMPLEMAN
LORD GRIFFITHS
LORD ACKNER

*[Delivered by **Lord Griffiths**]*

In 1971 the first respondent, Mr. Lawaetz, was the principal shareholder in the second respondent, Grand Anse Beach Company Limited ("the company"), which owned an undeveloped estate of some 1,900 acres on the coast of Saint Lucia. The appellants are a group of American investors who were interested in the possibility of developing the estate as a holiday resort. Mr. Lawaetz also wished to develop the estate and it was in these circumstances that the appellants and Mr. Lawaetz entered into a joint venture agreement ("JVA") for the development of the estate.

The JVA dated 1st June 1971 runs to some fourteen foolscap pages and it is unnecessary to set out its full terms. It commenced by setting out certain representations by Mr. Lawaetz none of which is now material to the resolution of this appeal. There then followed a number of undertakings by the appellants. In summary, the appellants undertook to finance and commission a preliminary feasibility study for the development of the estate together with more detailed plans for the development of the first hundred acres of the estate as a holiday complex

which they and Mr. Lawaetz would then present to the Government of Saint Lucia in the hope of obtaining government backing and approval for the development. In the event of obtaining such approval, the appellants had sixty days within which to decide whether to continue with the project. If they decided to continue they undertook to pay to Mr. Lawaetz US$250,000 (see paragraph II (3) and (8)). In the event of their continuing with the project, they also undertook to commission further more detailed financial estimates and construction plans for its development. They also undertook to raise finance by forming a United States limited partnership which would provide or raise the finance to enable the company to commence construction of the development project. The company would grant to the limited partnership a fifty-year lease of the land on which building took place and the limited partnership would buy the buildings at a figure showing a reasonable profit to the company. As an aid to raising the necessary finance, the limited partnership would mortgage its leasehold interest in the land.

The agreement went on to make provision for the payment to Mr. Lawaetz of a further sum of US$1,750,000 in return for which he would transfer to the appellants 50% of the shares of the company. It was envisaged that this sum of US$1,750,000 would be paid by the company out of profits generated by the sales to the limited partnership. As events turned out this arrangment was superseded by a later agreement and it is unnecessary for their Lordships to pause to consider the legality of such a remarkable transaction: but it should be noted that whereas the sum of US$1,750,000 was to be paid to Mr. Lawaetz by the company out of monies it received from the limited partnership the sum of US$250,000 was to be paid by the appellants. It is not necessary at this stage to refer to any other terms of the JVA.

It was a most ambitious project and had no hope of success unless the appellants were able to raise, through the limited partnership or otherwise, very large sums of money running into many millions of dollars. It is obvious that the appellants had difficulty in raising the necessary finance. By the end of 1972 they had formed the limited partnership, but the funds raised thereby were little more than US$400,000 whereas the first phase of development involved expenditure in the order of US$20,000,000.

The appellants failed to perform their obligations under the JVA within the time scale anticipated by the agreement. At the trial, Mr. Marcus put forward various excuses for this, all of which were rejected by the trial judge and which have not been further canvassed in this appeal. One cannot but suspect

that the root cause of the delay was that the raising of finance proved far more difficult than the appellants anticipated. It is to be observed that under the JVA it was only such leaseholds that the limited partnership acquired that could be used as security. There was no other provision that provided that the land of the company could be used to provide security for a development loan.

It was not until the end of October 1972 that the first presentation of the development project was laid before the Minister of Trade, Industry, Agriculture and Tourism.

This approach received an encouraging response from the Minister contained in a letter dated 11th January 1973: but the letter made clear that the government's co-operation was contingent upon the existence of a binding agreement for the commencement and completion of the development, the first phase of which would involve expenditure of no less than $20,000,000 EC. to be invested over a period of not more than three years.

Against this background the parties entered into two further agreements both dated 25th January 1973. Although these agreements are supplemental to the JVA, they radically altered some of the terms of that agreement and involved the payment of large sums of money by the appellants to Mr. Lawaetz. They were nevertheless drafted by one of the appellants, Mrs. Van Tiem, apparently without the assistance of a lawyer. One of the parties to the agreement is described as the Saint Lucia Investment Company Limited. It is however common ground that the agreements are to be read as though the appellants were parties thereto and personally bound by their terms and it is on this basis that this litigation has been conducted.

When these agreements were made Mr. Lawaetz had not yet been paid any part of the US$250,000 provided for under the JVA. One of the agreements dealt with the payment of this sum. The relevant part of the agreement provides as follows:-

> " Addendum to Agreement dated June 1, 1971 between MICHAEL B. MARCUS, representing a DETROIT GROUP now known as ST. LUCIA INVESTMENT COMPANY, LTD. (SLICL) and ERIC J. LAWAETZ (LAWAETZ), representing himself and the GRANDE ANSE BEACH COMPANY LTD. (BEACH CO.) both jointly and severally.
>
> WHEREAS: SLICL is proceeding with the development of Grande Anse Beach Property (2,000 acres) in St. Lucia, West Indies.

WHEREAS: LAWAETZ is desirous of a change in the monthly payment schedule of $50,000.00 per month for five months or $250,000.00 as outlined in the agreement, it is AGREED AS FOLLOWS:-

SLICL will agree to change the payment schedule as follows:

$165,000.00	upon signing of this addendum
85,000.00	February 28, 1973
$250,000.00	

For the above consideration LAWAETZ agrees to subordinate the Grande Anse Beach Property, St. Lucia consisting of between 1,900 and 2,000 acres for the purpose of SLICL obtaining interim and mortgage monies."

It is unnecessary to reproduce the remainder of the addendum as it is repeated in the other agreement which provides:-

" Agreement between Eric J. Lawaetz of St. Croix, U.S. Virgin Islands and Grande Anse Beach Company Ltd., organised under the laws of St. Lucia, West Indies, hereinafter called "Beach Co.", and St. Lucia Investment Company Ltd., a partnership pursuant to the Partnership laws of the State of Michigan hereinafter called SLICL.

WHEREAS, SLICL is desirous of purchasing the remainder of land owned by BEACH CO., with the exlusion of 10% which will be held by LAWAETZ, it is hereby agreed as follows:-

1. LAWAETZ will arrange to purchase the stock now held in the BEACH CO. by Mrs. J.C. Daugherty or by anyone else holding stock in said BEACH CO.

2. LAWAETZ will assign said stock and all but 10% which he will retain as 10% ownership in the development by SLICL of Grande Anse Beach consisting of approximately nineteen hundred to two thousand (1,900-2,000) acres upon fulfilment of the following conditions by SLICL:

a. IT IS AGREED THAT SLICL will pay Lawaetz the following amounts on the following payment schedule:

April 30, 1973	$350,000.00
August 30, 1973	150,000.00
December 31, 1973	500,000.00
December 31, 1974	500,000.00
December 31, 1975	500,000.00
December 31, 1976	500,000.00
	$2,500,000.00

Interest will accrue on all instalment payments due after December 31, 1973 at the rate of 6%. Upon payment of the $2,500,000.00 (Two Million Five Hundred Thousand Dollars and no cents) SLICL will then own outright, free and clear of any debts or incumbrances, ninety per cent (90%) of BEACH CO. which consists of between nineteen hundred and two thousand (1,900 and 2,000) acres known as Grande Anse Beach, St. Lucia. With the above payment, the agreement dated June 1, 1973, will be succeeded by this agreement and all indebtedness and incumbrances and terms outlined in that agreement will be cancelled.

With each of the above payments, LAWAETZ will cause the Escrow Company to release a proportionate number of shares from Escrow to be assigned to SLICL at time of each payment.

3. LAWAETZ agrees to release BEACH CO. from all indebtedness incurred by him or BEACH CO. upon receipt of $1,000,000.00 under this agreement and to release BEACH CO. from a proportionate share of its indebtedness after receipt of each instalment payment.

4. LAWAETZ agrees to obtain approval of SLICL prior to incurring any obligations or transacting any business on behalf of BEACH CO.

5. LAWAETZ agrees to cause the election of three nominees of SLICL to the Board of Directors to BEACH CO. for a term to run to December 31, 1976, or until such time as payment is made in full, whichever comes first.

6. LAWAETZ agrees to grant SLICL the first right of refusal on the sale of his 10% of the outstanding stock of the BEACH CO. of the 2000 acres known as GRANDE ANSE BEACH."

By about the beginning of April 1973, Mr. Lawaetz had received the US$250,000 but not before a cheque for US$100,000 had been returned marked "NSF" and had had to be re-presented and the final instalment had been paid late, a state of affairs which, as the Court of Appeal observed, was calculated to shake the faith of Mr. Lawaetz in the financial viability of the venture.

At the same time the appellants were pressing Mr. Lawaetz to agree to the subordination of the company's property for the purpose of raising finance and the appointment of the appellants as directors of the company. In April the appellants were elected directors of the company but Mr. Lawaetz refused to allow the company to pass a resolution subordinating its property for the purpose of raising finance. His

stance was not that there was no obligation to subordinate but that the time had not yet come when the question of subordination could properly be considered because the appellants had not yet complied with various obligations that must necessarily be completed before the question of subordination could properly be considered by the company.

By letter dated 12th May 1973 lawyers acting on behalf of the appellants wrote to Mr. Lawaetz in the following terms:-

> "3. Our clients consider, and have been advised, that Mr. Lawaetz and Grand Anse Beach Company Limited by their respective conduct and by their respective statements have repudiated the aforesaid agreements.
>
> 4. On behalf of our clients, we wish to inform you that our clients consider themselves, in view of paragraph 3 above, to be no longer bound by the terms of the said agreements and will take immediately such action as they may be advised."

This was followed by a writ endorsed with the statement of claim dated 22nd May 1973 by which the appellants claim damages for breach of contract against both Mr. Lawaetz and the company and the return of the US$250,000 which they had paid to Mr. Lawaetz. By their defence, Mr. Lawaetz and the company denied liability and Mr. Lawaetz counterclaimed damages for breach of contract and other expenses.

The outcome of the litigation depended upon whether Mr. Lawaetz's refusal to pass a resolution subordinating the company's property was a breach of the addendum dated 25th January 1973 that entitled the appellants to repudiate the JVA and the two later agreements. If it was, the appellants were entitled to succeed, if not, the appellants were clearly in breach themselves by repudiating the agreement and Mr. Lawaetz was entitled to succeed on the counterclaim.

The appellants' claim against the company was misconceived. The trial judge dismissed it. His decision was upheld by the Court of Appeal and there is no appeal against that part of the judgment.

The trial judge held that Mr. Lawaetz was not in breach of the addendum agreement and that accordingly the appellants' claim failed and that Mr. Lawaetz was entitled to succeed on the counterclaim. The judge awarded him $20,000 EC. and held that the appellants were not entitled to recover the US$250,000 that they had already paid.

The Court of Appeal upheld the judge's finding on the issues of breach of contract and Mr. Lawaetz's entitlement to retain the US$250,000 but increased the award of damages to $500,000 EC.

In this appeal the appellants challenge all three findings of the Court of Appeal. On the question of breach they submit that on the true construction of the addendum dated 25th January 1973, Mr. Lawaetz was in breach of the agreement by refusing, when called upon to do so by the appellants, to cause the company to pass a resolution agreeing to hypothecate its property in order to secure loan finance for the development. There is no express term to this effect in the addendum agreement but it is submitted that it is a necessary implication to be read into the actual wording which provides:-

> "For the above consideration LAWAETZ agrees to subordinate the Grande Anse Beach Property, St. Lucia consisting of between 1,900 and 2,000 acres for the purpose of SLICL obtaining interim and mortgage monies."

Their Lordships are satisfied that no such term is to be implied. It was argued that such a term must necessarily be implied in order to enable the appellants to hold preliminary discussions with prospective lenders. But such a resolution, a proposed draft of which was placed before their Lordships during the course of argument, would add virtually nothing by way of assurance to a prospective lender to that which is contained in the clause in the addendum set out above.

The term to be implied to give business efficacy to the clause is that the company would mortgage its property as security in order to assist the appellants to obtain a loan provided upon reasonable and prudent terms. Until the time that such a proposal could be placed before Mr. Lawaetz and considered by him and the company the obligation to subordinate did not arise. Their Lordships agree with the trial judge and the Court of Appeal that the time for Mr. Lawaetz to cause the company to mortgage its property had not arrived at the date when the appellants repudiated the agreements. It follows that the appellants were rightly held to have wrongfully repudiated the agreements.

It was next submitted that even if the appellants had wrongfully repudiated the agreements they were nevertheless entitled to the return of the US$250,000 that they had already paid to Mr. Lawaetz. Their Lordships agree with the judge and the Court of Appeal that this sum is not recoverable. By the time this sum was paid Mr. Lawaetz had done all that was required of him to earn it. He had introduced the

appellants to the project, he had held the property available for development by the appellants for some two years and he had co-operated as required in the presentation of the development to the Government of Saint Lucia. The general rule is that where the innocent party treats a contract as discharged by the other's breach he can retain any monies paid under the contract prior to discharge. To this there may be exceptions in the case of contracts for sale of land or goods but in the circumstances of this case their Lordships can see no ground upon which the general rule should not apply.

Finally, the appellants submitted that the Court of Appeal's award of $500,000 EC. was wholly excessive and that the judge's award of $20,000 EC. should be restored.

At the trial it had been submitted on behalf of Mr. Lawaetz that he was entitled to damages which represented the difference between the market value of his shares in the company at the date of the breach and the price which the appellants had agreed to pay for them under the agreement dated 25th January 1973. Evidence was called on his behalf from both an accountant and a surveyor. The surveyor valued the estate at $1,521,605 EC. as at 31st December 1976 and said that he would not consider that the value of the land had changed (presumably since 1973). The accountant basing himself upon the surveyor's valuation of the land which was the company's only asset arrived at a valuation of the issued share capital of $1,410,452 EC. On these figures the difference in value between the contract price of the shares and the market value of the shares was $3,664,053 EC.

The judge however made no award of damages under this head and limited his award to $20,000 EC. which he appears to have regarded as the expenses incurred by Mr. Lawaetz.

The Court of Appeal recognised that upon generally accepted principles Mr. Lawaetz's approach to the calculation of his damages was what they described as the correct 'academic approach'; but thought it right in the circumstances of this case that the sum so arrived at should be heavily discounted upon a number of grounds thus reducing it to a figure of $500,000 EC.

Mr. Walker, on behalf of the appellants, has attacked the assessment of the Court of Appeal on the ground that neither the judge nor the Court of Appeal can have accepted the evidence of the surveyor or the accountant as a proper valuation of either the property or the shares at the date of the breach in 1973. Mr. Walker points out that in the JVA agreement

Mr. Lawaetz represented that the property was appraised by the Bank of Nova Scotia in 1967 as having a value of US$3,000,000. In the body of the agreement it is recorded that the value of the property should be considered to be US$4,000,000. If the value of the property was US$4,000,000 in 1973 it would follow that Mr. Lawaetz's shares were worth more in the market than the US$2,500,000 that he was to be paid for them and that consequently he had suffered no damage. This, says Mr. Walker, must be the explanation for the judge failing to award any damages for loss of the bargain.

Their Lordships are not persuaded by this argument. There was very little cross-examination of either the accountant or the surveyor and no serious challenge was presented to their evidence. The appellants called no evidence as to either the land or share value in 1973. No evidence was given as to the basis of the 1967 valuation or the valuation set out in the JVA. Their Lordships are driven to the conclusion that two years having elapsed between the trial of the action and the date upon which he gave judgment, the learned judge must have overlooked this element of the damages. If he was going to base his assessment on the rejection of the evidence of two professional men whose evidence was virtually unchallenged he would surely have said so in his judgment.

Their Lordships are quite satisfied that the Court of Appeal did not proceed upon the basis that the evidence of these two witnesses should be rejected. The judgment of the Court of Appeal proceeds upon the basis that their evidence is acceptable to establish what they refer to as the sum of damages assessed on the 'academic approach'. Nowhere is it suggested by the Court of Appeal that this sum should be discounted because the valuations are unreliable.

Their Lordships are therefore satisfied that the evidence justified the Court of Appeal taking as their starting point in the assessment of damages the comparison between the contract price of the shares and the market value of the shares as established by the accountant and the surveyor.

Although the sum of $500,000 EC. is very much less than this sum, Mr. Lawaetz is content to accept it and their Lordships have not been invited to consider any of the reasons given by the Court of Appeal for discounting the 'academic' sum so heavily. It is therefore sufficient to dispose of this final ground by saying that their Lordships are not persuaded that $500,000 EC. is an excessive estimate of Mr. Lawaetz's damage.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

The appellants will pay the costs of the respondents.