

Spiricor of St. Lucia Limited

Appellant

v.

**(1) The Attorney General of St. Lucia and
(2) Hess Oil St. Lucia Limited**

Respondents

FROM

THE COURT OF APPEAL OF ST. LUCIA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 1st December 1999

Present at the hearing:-

Lord Browne-Wilkinson
Lord Hope of Craighead
Lord Clyde
Lord Millett
Mr. Justice Henry

[Delivered by Mr. Justice Henry]

The issue in this appeal is whether a contract of sale for land and buildings was lawfully rescinded by the vendor for repudiation by the purchaser.

Background

The property in question is known as the Cul-de-Sac Distillery, situated near Castries in St. Lucia. The distillery was acquired by the Crown in 1984 following the liquidation of Intercontinental Distilleries Ltd. Negotiations for its purchase were then entered into in 1986 by M. Pierre La Traverse, former owner of Intercontinental Distilleries, who incorporated the appellant (Spiricor) for the purposes of the intended purchase. On 20th July 1987 a deed of sale was executed between the Crown and Spiricor. Under its terms Spiricor purchased the distillery for a price of US\$1,130,000, of which the sum of US\$250,000 was then

paid with the balance to be paid within five years, secured by what is known as a Privilege of Vendor under the Civil Code. Book 18 in the Code contains provision for registration of such a security. Interest on the unpaid balance was also payable under the deed. Pursuant to the agreement evidenced by the deed, Spiricor took possession and went into occupation of the distillery. A manager was appointed, insurance policies were effected, and security and other personnel were employed by Spiricor. The manager left St. Lucia in September 1987, and did not return. Thereafter Spiricor ceased to pay the insurance premiums and the wages of the security personnel and from August 1988 to March 1990 these outgoings were paid by the Government. Spiricor never completed its purchase by registration of its title, either under the Civil Code or under the Land Registration Act 1984 (which effectively replaced Book 18 in the Code) and accordingly at all relevant times the Crown remained the registered owner of the distillery. There were several developments over the ensuing period which will require further elaboration. They evidenced financial difficulties being experienced by Spiricor, and correspondence between the parties ensued. On 9th August 1988 the Crown by letter notified Spiricor that for reasons set out in the letter it was terminating the agreement for sale, and intended to repossess the property on 15th August. Ultimately, on 1st February 1990 the Crown entered into an agreement to sell the distillery to the second respondent (Hess Oil) for approximately US\$1,250,000. Hess Oil went into possession and registered its interest on the property on 12th February 1990. The first registration of any interest claimed by Spiricor was on 10th December 1993.

The present claim was issued on 29th November 1991. In its statement of claim Spiricor pleaded the deed of sale of 20th July 1987, and continued possession of it through to 9th February 1990. By paragraphs 8 and 10 it averred:-

- “8. By virtue of the said Deed at all material times on and after the date of its execution the Plaintiff was and is the proprietor of the CUL-DE-SAC DISTILLERY and the first-named Defendant ceased to be the owner thereof.

10. By virtue of Article 1418 of the Civil Code, by the said Deed the first-named Defendant

impliedly warranted the Plaintiff against eviction from the whole or any part of the CUL-DE-SAC DISTILLERY by reason of the act of the first-named Defendant.”

The claim then averred that by the sale to Hess Oil, the Crown wrongfully purported to be the owner of the distillery, and that Hess Oil, with knowledge of Spiricor’s interest, wrongfully agreed to buy the distillery. The Crown’s right of ownership was denied, and a conspiracy between the Crown and Hess Oil to injure Spiricor was also averred. Wrongful eviction was said to give rise to loss and damage, for which compensation was sought. The relief claimed was against the Crown and Hess Oil, and included declarations confirming Spiricor’s ownership and right to possession, as well as other consequential damages.

The Judgments

In the High Court d’Auvergne J. in giving her conclusions first considered the case against Hess Oil and in particular the contention that the Crown was not the owner of the distillery when the contract with Hess Oil was concluded. She held that as at that date, 1st February 1990, the Crown was the registered owner. The judge also found as a matter of fact that Spiricor was not in actual possession of the distillery, despite its claim of having been so until evicted on 9th February 1990. She also found that Hess Oil was not subject to any overriding interest held by Spiricor under the Land Registration Act 1984, Hess Oil being protected by reason of having registered a caution on 12th February 1990, prior to the registration of any interest claimed by Spiricor. The judge then considered the claim based on conspiracy (possibly pursued as one for inducing breach of contract), and held that knowledge by Hess Oil of the existence of the Spiricor caution was not established.

As regards the claim against the Crown, the judge held that the contract evidenced by the deed of sale of 20th July 1987 had properly been avoided by the Crown by the letter of 9th August 1988. That letter will require further consideration, but the right to avoid relied upon was founded on what was held by the judge to be a fraudulent misrepresentation made on behalf of Spiricor in respect of its Alien’s Landholding Licence. As the Court of Appeal

held, the argument based on fraudulent misrepresentation was misconceived by the Crown and can now be disregarded. The judge also held that there had been actual breach of performance by Spiricor. Spiricor was wholly unsuccessful at trial. A counterclaim by the Crown to recover salaries, wages and insurance paid by it in respect of the distillery also failed, for the reason that they were payments made by the Crown “to protect its property”.

In the Court of Appeal, Singh J.A. and Redhead J.A. concurred with the judgment delivered by Byron C.J. (Ag.). Four grounds of appeal were identified by the Acting Chief Justice. Contentions that the Crown was not the owner of the land in February 1990, that Spiricor then had an overriding interest in it and was also then in possession were rejected. He further held that there had been repudiation of the contract by Spiricor, and this had entitled the Crown to rescind which it did by letter of 9th August 1988. The issue was put by Byron C.J. (Ag.) in this way:-

“However, at that time, there were a number of terms which the appellant had to perform.

1. The appellant had to complete the transfer by registration of title.
2. The appellant had to give effect to the Vendor’s Privilege by registration.
3. The appellant had to preserve the value of the property while there was an unpaid balance on the purchase price.
4. The appellant had to pay the unpaid balance on the purchase and the interest thereon.

The appellant never performed these obligations. The issue for the court to determine was whether the first respondent was justified in concluding that the appellant had evinced an inability to perform them. The undisputed factors which made it so apparent were:

1. The appellant failed to pay the stamp duty on the deed of conveyance and was therefore unable (i) to complete the transfer of title by

registration and (ii) to provide security for the unpaid balance of the purchase price.

2. The appellant's use of dishonoured cheques evidenced impecuniosity and unreliability and established its inability to meet the fundamental obligation to pay the purchase price.
3. The appellant was unable to maintain possession of the property. In view of the improbability of payment and the absence of security for the balance of the purchase price the respondent was under a duty to mitigate his loss. Although the law does not define the manner of such mitigation it is clear that retaking possession of the property and securing it and negotiating its sale was an effective method of such mitigation.
4. The appellant expressed its abandonment of the idea to develop the distillery and was trying to renegotiate the arrangement so that it could sell, or lease it to another developer or enter into a different arrangement with the first respondent as a partner. These negotiations could only be effected if it was accepted that the original deal was terminated.
5. The unfortunate but clear conclusion was that the appellant could not get anyone to invest in its undertaking, which was a natural result of the unsavoury reputation which the appellant's financial dealings must have earned.

In my opinion those circumstances would lead a reasonable man to believe that the appellant could not perform his contractual obligations. The evidence is clear that the first respondent so concluded, and I agree with the learned trial judge's finding that the letter of 9th August 1988 was an unequivocal termination of the contract."

As to conspiracy, the Acting Chief Justice held that because no contract as between the Crown and Spiricor was in existence after 9th August 1988, the claim based on conspiracy or inducing breach of contract necessarily failed.

The issues

Before their Lordships the argument was confined to the question of repudiation. The two broad issues were whether the Crown was entitled to rescind the sale for repudiation or anticipatory breach, and whether it had in fact effectively rescinded.

Their Lordships initially had a measure of concern in deciding the appeal on this basis having regard to the way in which the arguments appear to have run in the courts below, and also because of the lack of clarity in the pleadings. However they accede to the request of both parties to adopt a broad approach and bring finality to this litigation by determining the two issues. As to the first issue, the test is whether the conduct of Spiricor was such as to lead a reasonable person to believe that it did not intend, or was not able, to perform the contractual obligations undertaken.

The anticipated breaches of express terms relied upon by the Crown are Spiricor's obligations to pay the balance of the purchase price within five years of 20th July 1987, and to pay interest annually on the outstanding balance. In respect of the latter it was also contended there had been an actual failure to pay the first year's interest. It is necessary first to consider the obligation to pay interest which Mr. Guthrie submitted, in common with the obligation to pay the balance of the principal, did not arise until the fifth anniversary of the date of the deed of sale. The relevant portion of the deed reads:-

“... in consideration of the sum of ONE MILLION ONE HUNDRED AND THIRTY THOUSAND U.S. CURRENCY (\$1,130,000.00 U.S.) part whereof to wit, the sum of TWO HUNDRED AND FIFTY THOUSAND DOLLARS U.S. CURRENCY (\$250,000.00 U.S.) has been paid at the execution hereof by the PURCHASER to the VENDOR (receipt whereof the VENDOR hereby acknowledges) and the remainder whereof, to wit, the sum of EIGHT HUNDRED AND EIGHTY THOUSAND DOLLARS U.S. CURRENCY (\$880,000.00 U.S.) which is hereby secured by Privilege of Vendor, the PURCHASER hereby covenants with the Vendor to pay to the Vendor

within five years from the date hereof with interest thereon or on such part thereof as may remain unpaid in the meantime and until final payment at the rate of Eleven per centum (11%) per annum, the VENDOR hereby sells and conveys free and clear of all encumbrances ...”

Their Lordships are unable to give the provision the construction contended by Spiricor. The “within five years” stipulation clearly governs only the covenant to pay the balance of the principal, and is not directed to payment of interest. In the meantime interest is to be paid at a specified annual rate on the unpaid balance until final payment is made: the words “until final payment” govern the liability to pay interest, and are inconsistent with a liability which is postponed until the end of the five year period even if the principal is repaid earlier. That interest is payable annually is supported by the commercial reality of the situation. The interest stipulated is simple, not compound; a significant portion of the purchase price was left outstanding, and effectively advanced to the purchaser; the period was substantial, as would be the amount of the accumulating interest. It is also not without some significance that Spiricor itself in a letter of 11th August 1988 claimed that interest payments had been agreed to be deferred, which implies acceptance of an original contractual obligation to pay interest annually. There can be no doubt that was the intention of the parties.

The Court of Appeal relied upon a series of factors in reaching the conclusion that Spiricor had evinced an inability to perform its contractual obligations. Those of particular significance include:-

1. An actual failure to pay the first annual interest instalment. It is clear no such payment was made. Although there were discussions, possibly leading to agreement in principle, they foundered when it became clear that the Government had been given false assurances about the availability of finances. The evidence does not establish any binding agreement to vary or postpone that contractual obligation.
2. Failure to pay stamp duty on the deed of conveyance. This meant that Spiricor was unable to complete the transfer

to it and secure title by registration. It also meant that the vendor's privilege, contemplated by the deed as providing the Crown with proper security for the unpaid balance, was not perfected by registration. The clear inference from the evidence is that Spiricor was financially unable to meet this payment, the importance of which to both Spiricor and the Crown was stressed in a letter of 21st August 1987 to Spiricor from its own solicitor. In fact stamp duty was not paid until after the trial had commenced, and then only to enable the deed of sale to be adduced in evidence.

3. Spiricor's distillery manager left in September 1987, and thereafter Spiricor did not pay either the security staff or the insurance premiums, both measures essential to the protection and preservation of the distillery and of concern to the Crown.

4. Spiricor effectively went out of possession of the property in September 1987, and afterwards entered into negotiations which were indicative of an inability on its part to complete the transaction as originally intended, namely to bring into operation a refurbished distillery.

5. A cheque for payment of the Alien's Landholding tax had been dishonoured in June 1987 and a resulting debt with Barclays Bank remained outstanding. It was a payment made by the bank in reliance on the dishonoured cheque which enabled Spiricor to obtain and hold the licence necessary to its right to carry on the distillery business. The Crown eventually refunded the money paid out by the bank.

6. No attempt to repay any part of the principal was made. Spiricor's apparent inability as at August 1989 to meet its future obligations was confirmed by its failure at any time thereafter to make or tender payments of interest or principal and its ongoing unsuccessful efforts to obtain the assistance it needed.

7. There was an absence of evidence to negate the inference of inability to perform, which in the circumstances it was reasonable for the Crown to draw.

Notwithstanding Mr. Guthrie's emphasis on the five year time limit, their Lordships are therefore satisfied that it was

open to the Court of Appeal to find that Spiricor's inability to perform its two essential contractual obligations had been adequately established, and they are not persuaded there are sufficient grounds to interfere with that finding.

As to the second issue of rescission, the first point taken by Mr. Guthrie was that the letter of 9th August 1988 which was relied on by both courts below as effectively terminating the contract was not pleaded by the Crown as its act of rescission. The Crown's pleadings alleged that acceptance of Spiricor's repudiation was communicated to Spiricor by letter dated 15th February 1990. It appears the reference is in fact to a letter of 9th February 1990 from the Prime Minister to Mr. La Traverse which states:-

“Sir

CUL DE SAC DISTILLERY

I have seen your Fax message to Mr. Leon Hess dated February 8 requesting clarification of my Fax of February 6.

The Government of St. Lucia as the sole owner of the distillery at Cul de Sac St. Lucia, and the lands comprising the curtilage of the said distillery have sold the said property to Hess Oil (St. Lucia) Ltd and has placed Hess Oil into possession of the same as from February 1, 1990.

Please be guided accordingly.

Yours faithfully

PRIME MINISTER”

The letter of 9th August 1988 is couched in definite terms, also from the Prime Minister to Mr. La Traverse:-

“

CUL DE SAC DISTILLERY

I am returning your cheque No. 021 for \$25,000.00 which is intended as consideration for the deferment of the interest due on the capital sum for the Cul de Sac Distillery.

You will recall that the agreement for the deferment was made only after you had given firm assurances that you had made satisfactory arrangements for financing the operations of the distillery and the marketing of the products, and to this end you introduced representatives of two companies who you stated would be associated with you in this venture.

I have since received a 'privileged and confidential' correspondence from one of the companies which you introduced as an associate in this project, stating that that company had terminated discussions with you and had no further interest in the project.

Because of your failure to meet numerous undertakings previously given by you regarding the distillery, including the non-payment of (1) interest, (2) the insurance on the property, (3) the workers' wages, (4) your attorney's fees and (5) the dishonouring of one cheque presented to pay the Alien's Licence fees, Government no longer has any confidence in your ability to meet your commitments to get the distillery operational and consequently is terminating any agreement Government may have made for the sale of the property to your company.

Government intends to repossess the property on the 15th August 1988. Government however as an ex gratia gesture will refund you in full the deposit made on the purchase price and will pay to Barclays Bank the cheque for the Alien's Landholding Licence which has been dishonoured by the Bank upon which it was drawn, and which is now the subject of litigation in St. Lucia.

I regret that Government has been forced to resort to this drastic measure, but it is important that in a venture such as this, Government should have full confidence in any one to whom such a valuable property is entrusted.

Yours faithfully

PRIME MINISTER"

The pleading point has no substance. The letter of 9th August 1988 obviously featured at trial, and its use could not have taken Spiricor by surprise. Its case did not turn on whether the Crown claimed to have rescinded in August 1988 rather than February 1990. Moreover no complaint was made before the Court of Appeal, the challenge in that Court being that termination was irrelevant because ownership and title lay with Spiricor, and further there had been no failure to perform any of the terms of the agreement. The letter itself, as both courts below have held, purported to and in fact did operate to terminate the agreement. It sufficiently identified the anticipated breach of the fundamental term to pay the balance of the purchase price as stipulated, and it also identified matters which were relevant to that assessment. As earlier discussed, there were sufficient reasons from the accumulation of a number of factors to justify termination. Their Lordships have not been taken to any subsequent actions or communications by the Crown which are inconsistent with termination of the contractual relationship with Spiricor, or which are indicative of its continued existence.

Their Lordships being in agreement with the Court of Appeal that there was no existing contract between the Crown and Spiricor when the transaction with Hess Oil was negotiated and later settled, the claim in conspiracy as against both the Crown and Hess Oil had to fail.

For the above reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of both respondents before their Lordships' Board.