

Eustace Potter

Appellant

v.

Port Services Limited

Respondent

FROM

**THE COURT OF APPEAL OF
ANTIGUA AND BARBUDA**

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

Delivered the 6th February 2003

Present at the hearing:-

Lord Hoffmann
Lord Browne-Wilkinson
Lord Hope of Craighead
Lord Scott of Foscote
Sir Andrew Leggatt

[Delivered by Lord Hoffmann]

1. Port Services Ltd is a company controlled by Miss Makeda Mikael which carries on the business of managing aircraft and handling cargo and passengers. In December 1993 it was in financial difficulties. One day at the airport Miss Mikael met the appellant Mr Potter, who was on his way to Miami. He had experience of the airline industry, having recently retired after 23 years service with Eastern Airlines. Miss Mikael asked Mr Potter whether he would take over the management of the company. After brief consideration Mr Potter agreed and began work just before Christmas 1993.

2. A draft agreement between the company and Mr Potter was drawn up. It provided that Mr Potter was engaged as consultant for two years from 22 December 1993. Clause 4 dealt with remuneration:

"In consideration of the services to be rendered by the consultant hereunder the company shall pay to the consultant a fee equivalent to 40% of the net annual profits of the company or EC\$60,000 per annum whichever is greater. PROVIDED ALWAYS that payment of the said fee shall be contingent upon the company's ability to pay. If the company is unable to pay the fee in full it shall pay to the consultant an amount to be agreed between the consultant and the company. The balance shall be carried over to the following year and credited to the consultant."

3. This agreement was never signed but on 12 May 1994 Miss Makaël and Mr Potter made an agreement for a joint venture with a new company which, as of 1 June 1994, would take over the business of the old. It provided that Mr Potter would provide EC\$100,000 and take a 35% shareholding. Clause 6 said that an employment contract should be entered into between Mr Potter and the new company and clause 7 provided that "The Company shall turn over to the new company ... the outstanding monies owed Eustace Potter for services January-May 1994 ...".

4. Nothing came of this joint venture. Mr Potter did not produce the EC\$100,000 and relations between him and Miss Mikael deteriorated until eventually he left the company just before Christmas 1994, almost exactly a year after he had joined. Up to then he had been paid just EC\$2,000 by way of salary.

5. On 2 October 1995 Mr Potter issued a writ claiming a year's salary at the contractual rate of EC\$60,000 a year. The defence was that there was no contract of services between Mr Potter and the company. It had no contractual obligation to pay anything. In paragraph 6 it pleaded that he took over the

day-to-day management of the company with full knowledge that he would not be paid any money as the company was not in a position to pay him anything. The company then pleaded the agreement of May 1994 between Mr Potter and Miss Mikael and said that in breach of that agreement. Mr Potter never provided the money he was required to invest.

6. At the trial before Allen J. the submission of Miss Henry for the company was that the unsigned employment agreement was "simply a collection of ideas for discussions which were never agreed". There was, she said, no agreement for EC\$5,000 a month salary. But the judge found as a fact that "it was always agreed and understood by and between the plaintiff and the defendant that the plaintiff would be paid \$5,000 a month." The judge noted that clause 7 of the May agreement, which Miss Mikael had signed, expressly contemplated that the company would owe Mr Potter a salary for services January-May 1994 and that when the new company was formed, it would be substituted as debtor. Dealing with Miss Mikael's substantive reliance on the May agreement, the judge said:

"The gist of Miss Mikael's contention is that things fell apart when the plaintiff was not able to inject new capital into the business as he had promised because everything was contingent upon this. She considered that the plaintiff had breached faith with the company by not providing the collateral he promised, not becoming a shareholder and failing to turn the company around.

I believe the evidence of the defendant on all matters relating to the plaintiff's promise to bring money into the company to use his property to do so, to take shares in the company and to turn the company around but there is no counterclaim. This is simply a claim for work done over a period of twelve months in operating and managing the defendant company."

7. The judge therefore found that Mr Potter was prima facie entitled to the agreed salary for services rendered. But he also said that for part of the time Mr Potter was in breach of his duty to give full time services to the company and, after giving the company credit for the \$2,000 already paid, awarded him the reduced amount of \$48,000.

8. The Court of Appeal, in a judgment given by Singh JA, allowed the company's appeal. He said that the judge had treated the unsigned agreement as evidencing the agreement between the parties. But he had not given effect to the proviso to clause 4. The effect of the proviso was that no sum had fallen due for payment:

"It was accepted that the venture failed. In his judgment, the learned trial judge observed that the respondent did not live up to his promised expectations. It was also accepted that the respondent rendered services but that no agreement was reached as to the remuneration of the respondent for whatever services he may have rendered to the appellant, the venture having failed. Also, there was no claim of the respondent on a quantum meruit."

9. Their Lordships consider that if the company had relied upon the proviso, it might well have been a defence to Mr Potter's claim. The effect of the proviso was that although his right to salary would accrue at the rate of \$5,000 a month, the salary would not become payable until the company was able to pay. Salary remaining unpaid in the current year would be carried over into the following year and it seems to their Lordships arguable that even in the following year, the arrears of salary would not become payable until the company was able to pay.

10. But the proviso was never pleaded or relied upon. This is perhaps not surprising in view of the company's stance that the draft agreement had no contractual force whatever. But their Lordships consider that the burden of pleading and proving the company's inability to pay lay upon the

company. The matter would be peculiarly within its own knowledge and Mr Potter could not have been expected to prove the contrary.

11. The result of the company's failure to rely upon the proviso meant that the question of whether at the date of issue of the writ the company was able to pay the claimed salary was never put in issue between the parties or investigated at the trial. Miss Mikael said in evidence that during the time Mr Potter was with the company, neither he nor she was paid a salary "because there was no money to pay us" but at the trial in October 1997 she said that the company was still operating and there is nothing to show what the position was in October 1995, when the proceedings were commenced. Their Lordships consider that if at that date the company was able to pay, Mr Potter would have been entitled to claim his salary.

12. The observation of Singh JA in the Court of Appeal that "it was accepted that the venture failed" does not seem to their Lordships to fill this gap in the company's evidence. The judge appears to have meant that nothing came of the expected joint venture in which Mr Potter was going to invest. But that does not appear to their Lordships to be relevant. The judge observed that there was no counterclaim and it is difficult to see how there could have been a counterclaim, given that the May agreement was between different parties and contemplated investment in a different company.

13. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of Allen J restored. The respondent must pay the costs in the Court of Appeal and before their Lordships' Board.

