

Parry Husbands

Appellant

v.

Warefact Limited

Respondent

FROM

**THE COURT OF APPEAL OF THE EASTERN
CARIBBEAN SUPREME COURT
(ST. LUCIA)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 19th March 2003

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hutton
Lord Millett
Lord Walker of Gestingthorpe

[Delivered by Lord Bingham of Cornhill]

1. This appeal against a decision of the Court of Appeal of the Eastern Caribbean Supreme Court raises a novel question: it is whether Queen's Counsel practising in St Lucia may deduct, from money which he holds on behalf of a client, fees for professional services due to him from that client.

2. Mr Parry Husbands QC is the appellant. He is a distinguished man and a former Attorney-General of St Lucia, who has now been a silk in St Lucia for 15 years and was the senior partner in a firm of barristers, solicitors and notaries, Husbands, Hinkson & La Corbinière, practising in Castries.

3. The respondent, Warefact Limited ("the company") is a company incorporated and registered in St Lucia. Its managing director was Mr Lincoln St Rose. It owned a commercial building in Bridge Street, Castries, known as the Voice Building.

4. At trial there were significant issues of fact between Mr Husbands and the company, but having heard oral evidence from Mr Husbands and Mr St Rose (and also Mr Cornell Charles) the trial judge (Neville Smith J) made clear and decisive findings of fact which, although challenged on appeal, the Court of Appeal (Byron CJ (Ag.), Satrohan Singh and Redhead JJA) refused to disturb. Mr Husbands, appearing in person, sought to re-open a number of factual issues before the Board, but he showed no grounds why the Board should depart from its ordinary practice of declining to review concurrent findings of fact in the courts below (*Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508) and the findings were fully justified by the evidence. It is therefore possible to summarise the facts as the judge found them to be.

5. In the course of discussing another building owned by the company, Mr Cornell Charles asked Mr St Rose about the company's intentions regarding the Voice Building. Mr St Rose consulted his fellow-directors and informed Mr Cornell Charles that the company was willing to sell it to Mr Charles' company, J Q Charles Limited ("the purchaser"). Mr Husbands had been professionally involved in the purchase of the Voice Building by the company, but had had nothing to do with the sale proposal until Mr St Rose asked him to attend a series of about four meetings held between the company (represented by Mr St Rose and Mr Husbands) and the purchaser (represented by Mr Cornell Charles and Mr Ferrel Charles) to negotiate the sale. Mr Husbands attended both as negotiator and adviser. The meetings culminated in agreement that the purchaser should buy the Voice Building from the company for EC\$3,750,000.

6. A written agreement giving effect to this transaction was prepared and executed. It was dated 4 October 1995. The agreement acknowledged that a deposit had been lodged in the clients' account of the purchaser's solicitors and provided for payment of the deposit and the balance of the purchase price to the company's solicitors on completion. A deed dated 23 March 1996, intended to dispose of current litigation between the company and a third party concerning the Voice Building, was executed before Mr Husbands acting as a notary. A second agreement in writing was made, dated 20 May 1996, to defer the date for completion. This agreement provided for the deposit to be paid to "P. J. Husbands Esquire Clients' Account", for the staged payment to the company of sums amounting to EC\$700,000 and for payment on completion of the outstanding balance of EC\$2,862,500. There was a further agreement, of which no copy was produced in evidence.

7. In addition to attending and taking part in the negotiating meetings, Mr Husbands also vetted the deed and the agreements. He attended on about six occasions before the Registrar in relation to the paying off by the company of a debt incurred on the purchase of the Voice Building, and attended before the Mayor of Castries on four occasions to settle the company's arrears of taxes. He rendered other, more minor, professional services.

8. Although, regrettably, Mr Husbands did not acknowledge the receipt of money from the purchaser until Mr St Rose was in the course of giving evidence before the judge, and had indeed put such receipt in issue in the proceedings, it is clear that he received the following sums:

4 October 1995	EC\$ 187,500.00
20 May 1996	100,000.00
3 June 1996	200,000.00
18 June 1996	100,000.00
25 June 1996	<u>100,000.00</u>

EC\$ 687,500.00

9. While the facts are not entirely clear, it appears that in June or July 1996 Mr

Husbands orally intimated to Mr St Rose that his fee for his services in this matter would be EC\$250,000. This figure represented 6.6% of the sale price. Mr St Rose considered the figure excessive and rejected it, but offered a fee of EC\$100,000. This was unacceptable to Mr Husbands, who refused to haggle. In a curt letter dated 23 July 1996 the company terminated Mr Husbands' engagement and asked for a statement showing the deposits he had received on the company's behalf and the disbursements he had made. Instead of complying with this request, as he plainly should have done, Mr Husbands replied that he would give an account when his fees had been paid and not before. A fee of EC\$11,867.60 tendered to him for notarial services was rejected. A request that he should hand over to the company's new solicitors the money belonging to the company in Mr Husbands' client account was rebuffed.

10. On 25 October 1996 the company issued proceedings against Mr Husbands claiming an account of all sums received by him to the account of the company and payment of all sums due to the company, with interest. Mr Husbands served a defence making very limited admissions and seeking the dismissal of the claim with costs. He counterclaimed for fees earned by him in relation to the sale of the Voice Building, now in the sum of EC\$490,000. The company served a defence to Mr Husbands' claim.

11. On the second day of the hearing at first instance, Mr Husbands amended his counterclaim so as to reduce his claim for fees from EC\$490,000 to EC\$250,000, the figure shown in a bill dated 21 June 1996 and the figure for which he had earlier asked the company. In the bill the services described above were said to have been rendered "as counsel". Mr Husbands also, for the first time, produced a statement of account. That showed the receipt by Mr Husbands of EC\$687,500 (particularised above) and the disbursement by him, on behalf of the company, of EC\$520,628.98 to the Registrar and the Castries City Council. A total of EC\$166,871.02 remained in his hands.

12. The trial judge made a painstaking and comprehensive assessment of the fees reasonably due to Mr Husbands for the work he had done, and concluded that the sum properly due was EC\$73,697.50. The assessment was one which, subject to the questions discussed below, the judge was entitled to carry out, either on a quantum meruit basis or under section 19(1) of the Legal Practitioners Ordinance (see paragraph 14 below). Mr Husbands contended before the Board that he should have been awarded a fee based on a percentage of the sale price and not a fee based on time spent, but the basis of his fee was not the subject of agreement at any stage and the Board finds no error in the judge's approach. The judge ordered Mr Husbands to pay to the company EC\$93,173.52, the balance of the money which he held on the company's behalf, with interest at 6% from 3 September 1996. The judge touched briefly on an argument advanced by the company that section 5(3) of the Legal Practitioners Ordinance prohibited the recovery of any fees by Mr Husbands, but rejected the argument for want of evidence.

13. On Mr Husbands' appeal, the Court of Appeal dismissed his challenge to the judge's factual findings and assessment of the fees due. The company cross-appealed, contending that the judge's award of fees was excessive, that the interest awarded was at too low a rate and for too short a period and also that professional fees could not be recovered by Queen's Counsel since section 5(3) of the Legal Practitioners Ordinance prevented Queen's Counsel doing solicitors' work and Queen's Counsel were bound by the old common law rule that the relationship between barrister and client is not contractual and gives rise to no enforceable claim for reward. The Court of Appeal upheld this last contention. It did not, therefore, consider whether the fees awarded were excessive, but ordered that Mr Husbands repay the whole balance of EC\$166,871.02 remaining in his hands. The rate of interest was not varied, but interest was ordered to run from 1 July 1996, a week after receipt by Mr Husbands of the last EC\$100,000 instalment.

The legal profession in St Lucia

14. The legal profession in St Lucia is now governed and regulated by the Legal Profession Act 2000, under which qualified practitioners became attorneys-at-law (sections 2(1), 3(2), 6(1)) entitled to perform the functions of a notary (section 54). At the time relevant to these proceedings, however, the legal profession was governed and regulated by the Legal Practitioners Ordinance, originally made in 1915 and later amended. Part I applied to barristers of the Supreme Court. This made provision for the admission as barristers of the Supreme Court of St Lucia of English and Irish barristers, Scots advocates, barristers and advocates of the superior courts of British territories where reciprocal recognition was accorded to barristers of St Lucia, United Kingdom solicitors, Scots law agents and (subject to an educational and practical qualification) those who had passed the examinations of the English Law Society (sections 2, 4). Section 5 is central to this case, particularly subsection (3) which was added by amendment in 1952. It provided:

"5.(1) Every barrister of the Supreme Court shall have a right of audience in all the Courts of Justice in this Colony: Provided that counsel appearing before the Supreme Court, or Court of Appeal, have no right of audience, unless they are clad in dark clothes and wear the robes and bands proper to their calling.

(2) Save as provided by subsection three hereof every barrister of the Supreme Court shall be entitled to practise as a solicitor and notary in the Colony.

(3) No barrister who has the rank of Queen's Counsel shall perform any of the functions which, in England, are performed by a solicitor and are not performed by a barrister; but a barrister who has the rank of Queen's Counsel shall not be precluded from continuing or engaging in partnership with another barrister by reason only

that such last mentioned barrister performs any functions as aforesaid".

Part II of the Ordinance applied to notaries.

Part III contained miscellaneous provisions relating (among other things) to the admission and discipline of barristers and notaries. Section 19(1) conferred a summary power to resolve complaints against legal practitioners:

"19.(1) Where any question arises, or complaint is made, with reference to the powers, duties, rights or obligations of a legal practitioner, the Court or Judge shall decide such question or investigate such complaint in a summary manner, and shall make such order, including directions for the payment of money unlawfully withheld, or for the payment of costs in respect of a complaint unjustifiably made, as justice may require".

15. As is evident from these provisions (and subject to the special position of Queen's Counsel, which calls for separate consideration), legal practice in St Lucia differed from that in the United Kingdom in four significant ways. First, there was a fused legal profession, since barristers were entitled to practise as solicitors and notaries. The historic divide between barristers and advocates on the one hand and solicitors on the other did not obtain. Secondly, barristers were not required (in all but a few exceptional cases) to act only on the instructions of a solicitor. Since barristers were also solicitors, such a rule would make no sense. Thirdly, barristers were entitled to practise in partnership with other barristers, no doubt because they were entitled to practise as solicitors and solicitors in the United Kingdom have always been entitled to practise in partnership. Fourthly, barristers were entitled to sue for their fees. This is because all lawyers were entitled to sue for their fees, as solicitors in the United Kingdom have always been entitled to do. The rule (to which fuller reference is made in paragraph 20 below) that the relationship between barrister and client is not contractual and

that barristers cannot enforce a claim for professional remuneration by action has never been extended to solicitors.

The first question

16. The first question is whether the functions for which Mr Husbands claimed to be remunerated were "functions which, in England, are performed by a solicitor and are not performed by a barrister" within the meaning of section 5(3). These words must be given a contemporary application. The comparison to be made is not with practice in England in 1915 or 1952, but with practice in England at the time when Queen's Counsel in St Lucia performs the functions which are in question. Further, the comparison is not with what, in England, is ordinarily done but with what English rules of conduct permit. The opening words of section 5(3) were intended to protect the status and professional standing of Queen's Counsel in St Lucia, who were therefore prohibited from performing functions which a barrister in England might not properly perform.

17. It was rightly accepted on behalf of the company that Mr Husbands' work in vetting the agreements made by the company and other documents, and attending before the Registrar and the Mayor, was work which a barrister in England could properly do. These services accounted for nearly half of the sum awarded by the judge. It is clear that under the Code of Conduct promulgated by the Bar of England and Wales, reflecting long-established practice, a barrister may not conduct inter partes correspondence on behalf of a client, but the judge awarded Mr Husbands a mere EC\$100 under this head, which may be disregarded as trivial. So the real issue is whether, in attending and taking part in the meetings held to negotiate the sale of the Voice Building, and in advising Mr St Rose on the course of negotiations, Mr Husbands was performing a function which in England is performed by a solicitor and may not be performed by a barrister.

18. These were functions which, in England, may be and almost always are performed by solicitors. The Board's experience of English practice leaves it in no doubt of that. But they are functions which, however exceptionally, an English barrister may be instructed to perform, and there is nothing in the 1998 Code of Conduct which, in the opinion of the Board, precludes acceptance of such instructions. Paragraph 501(c) prohibits the acceptance of instructions to do "excepted work". That expression is defined in paragraph 901 to mean (so far as relevant)

- "(a) the management administration or general conduct of a lay client's affairs;
- (b) the management administration or general conduct of litigation or of inter-parties work (for example the conduct of correspondence with an opposite party); ... "

Since these provisions restrain a practitioner's commercial freedom, they should not be liberally construed. The Board considers it plain that participation in a one-off bout of negotiation, although extending over several meetings, does not fall within them. An English barrister who acted, in this respect, as Mr Husbands did would breach no practice rule. He would do so if he received or handled clients' money, since those functions fall within the definition of "excepted work", but that is not a function for which Mr Husbands claimed to be remunerated. Thus the question posed in paragraph 16 above must be answered in the negative.

The second question

19. The second question is whether, as the Court of Appeal held, Queen's Counsel in St Lucia is precluded from suing for fees or enforcing a claim to them by action.

20. The legal rule that barristers and advocates in the United Kingdom have no contractual relationship with their lay client and may not sue for their fees is of very long standing and has in the past been justified on grounds of high public policy.

So much is clear from cases such as *Kennedy v Broun* (1863) 13 CB (NS) 677, 143 ER 268; *Mostyn v Mostyn* (1870) LR 5 Ch App 457; and *Rondel v Worsley* [1969] 1 AC 191 at 232, 236-240, 260-263, 277-279, 287-288. This legal rule was abrogated by section 61(1) of the Courts and Legal Services Act 1990, but only in England and Wales, and the General Council of the Bar continued to be entitled to make rules prohibiting barristers from entering into contracts or restricting their right to do so.

21. Counsel for the company contended that since the effect of section 5(3) was to assimilate the position of Queen's Counsel in St Lucia to the position of barristers in England the old common law rule considered above, historically binding on English barristers, remained binding on Queen's Counsel in St Lucia, where the rule had never been abrogated. With respect to the Court of Appeal who thought otherwise, the Board cannot accept this conclusion, for a number of reasons. First, there is nothing in section 5(3) which, expressly or impliedly, bears on the power of Queen's Counsel to contract or his right to recover his fees by action. As already noted, the subsection is intended to protect the status and professional standing of Queen's Counsel by restricting the professional work which a practitioner of that rank is permitted to do.

Secondly, since the right to sue for fees is one enjoyed by barristers who are not Queen's Counsel, it would require express terms to remove this right from barristers who become Queen's Counsel and no such provision is found here. Thirdly, it would be anomalous if a right enjoyed by a barrister who was not a Queen's Counsel were to be removed from a barrister promoted to that rank, since any public policy considerations relied on to justify the rule would apply as much to the former as the latter, perhaps more so. Fourthly, since on any showing Queen's Counsel work within a system differing from the English system in three of the four respects highlighted above (they remain members of a fused legal profession, they may be instructed direct, they may form partnerships with other barristers) it would

be strange if the fourth of these features (the right to sue for fees) were to be denied to them, alone among legal practitioners in St Lucia. Lastly, it is noteworthy that the St Lucia Civil Code which went into force in 1879 was copied almost verbatim from the Quebec Code (see White, "Some Problems of a Hybrid Legal System: A Case Study of St Lucia" (1981) 30 ICLQ 862). There has, it is true, been a "massive infusion of common law rules" (*ibid.*, page 880), and even before 1879 there had been "far-reaching institutional changes as English domination triumphed over French-style civilian influences" (*ibid.*, page 863). But in 1884, as this Board recorded in *The Queen v Doutre* (1884) LR 9 App Cas 745 at 750, it was

"not a matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a quantum meruit, in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the Bar".

It would be in no way surprising if a similar rule were favoured in a jurisdiction owing as much to French and Quebec influences as that of St Lucia. The second question, posed in paragraph 19 above, should also be answered in the negative. This makes it unnecessary to consider whether, if the answer were otherwise, the rule would preclude the set-off which Mr Husbands sought to effect.

Conclusion

22. It follows that the Court of Appeal erred in disturbing the order of the trial judge, save as to the date from which interest should run (a minor detail not challenged before the Board), and its order must be set aside. Mr Husbands' appeal in part succeeds.

He was entitled to a fee of EC\$73,697.50 for his services rendered to the company, to be paid by deduction from the sum of EC\$166,871.02 held by him for the company. He must pay to the company the balance of the money held, EC\$93,173.52, together with

simple interest on such balance at the rate of 6% from 1 July 1996 until payment.

23. On 28 January 2003 the company made an open offer to Mr Husbands to compromise the appeal on terms that the Court of Appeal's order should be discharged and the judge's order restored, with generous terms as to costs. The offer was not accepted.

24. The Board will humbly advise Her Majesty that Mr Husbands' appeal should be allowed to the extent indicated, that the judge's costs order should stand, that Mr Husbands should pay the company's costs of his appeal to the Court of Appeal, that the company should pay Mr Husbands' costs of its cross-appeal to the Court of Appeal, that the company should pay Mr Husbands' costs of his appeal to the Board insofar as they were incurred before 1 February 2003 and that Mr Husbands should pay the company's costs of his appeal to the Board insofar as the same were incurred after that date.

