ROYAL COURT (INFERIOR NUMBER)

1977/1

Before: Mr. P.L. Crill, Deputy Bailiff,
Jurat R.E.Bailhache, O.B.E.,
Jurat J.H. Vint.

Raymond William English Plaintiff

v.

Horace Reuban Hyams Defendant

Advocate L.A. Wheeler for the plaintiff

Advocate W.J. Bailhache for the defendant

At the time of the transactions between the plaintiff and the defendant, which are now in dispute, the Bahamas were going through a period when it was profitable to speculate in property. So great appeared to be the demand that on occasions it was possible to sell a plot of ground even before one had paid the purchase price for one's own purchase. In circumstances like this it is not surprising that the lure of quick profits was such as to anaesthetise normal business practice. We say this because it appears from two letters, one from the plaintiff to the defendant of the 23rd September, 1968, and the other from the defendant to the plaintiff of the 3rd February, 1969, that if either of them were approached by a prospective purchaser in respect of the lands covered by the agreement (to which we will turn in a moment) the interest of the other party was not to be disclosed. He could then advise the prospective purchaser as to the potential value of the land. Indeed in the case of the purchase by a Lady Nugent of Plot 7E, according to the evidence of Mr. English, she bought the

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plot through the intermediary of a Mr. Reynolds, at that time a co-employee with Mr. English of a development company called Real Estate (Grand Bahama) Limited. That he was so employed is denied by the defendant. The connection with Mr. English does not appear to have been disclosed to Lady Nugent and she was subsequently advised by him as to the potential site value. We make these observations because we think that neither the plaintiff nor the defendant particularly cared how they affected their business transactions provided that both of them were able to make a quick profit.

We are here, however, not to pass judgment on the business practices appertaining during this property boom, but to ascertain what agreements, if any, were entered into between the plaintiff and the defendant, and what are the legal consequences.

The plaintiff claims that he entered into an agreement with the defendant and that the commencement date was in fact the 15th Novemner, 1967, although the written agreement was not signed until sometime in June or July 1968, on the defendant's yacht, in the waters adjacent to Jersey during a visit to France. That agreement, the plaintiff claims, covers merely the land owned by a company called Lothbury Limited, which he and the plaintiff had agreed would be owned beneficially equally between them. Negotiations as regards this transaction were completed towards the end of 1967. It is unnecessary for us to detail the protracted negotiations that went on as to the exact method by which the plaintiff and the

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defendant were to own one half of the company; suffice it to say that that issue has never been in doubt. The company owned Plot 2 on the plan which was produced to us, and we were told that that area could have had built upon it some seven or eight houses. It therefore follows that the agreement referring as it does to the development of land, could apply equally to that site as well as any other site not owned by the company. However, the plaintiff also said that there was a subsequent verbal agreement under which the defendant agreed that if he, the plaintiff, were able to sell other land owned by the defendant in that case he, the plaintiff, would be able to receive one half of the profit realized from such sales. There is no dispute between the parties that the defendant, before meeting the plaintiff in 1967 (or, according to the defendant, meeting him again, a matter on which we express no opinion), had acquired a site at Cannon Bay which he had sold for a satisfactory profit. We have little doubt that he was eager to repeat the process. The plaintiff says that in pursuance of the verbal agreement only one transaction took place, that to which we have already referred, namely the sale to Lady Nugent, upon which there was realised a profit of nearly £9,000. He has not been paid his half share of that profit and he has therefore brought this action to claim it. The plaintiff says also that as a result of his dealings with the defendant over Lady Nugent's site and the latter's failure to pay him his half share of the profits, he agreed to dispose of his share in Lothbury to the plaintiff and have nothing more to do with him. He says that the Lothbury transaction was separate from and over and above the verbal agreement and that subsequently after a lot of negotiations the defendant agreed to purchase his half share of Lothbury for £12,500 and at a meeting in London at the West Air Terminal either in a car, or in the terminal

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itself, it is immaterial where the exact site was, an agreement was reached to that effect. He claims that that agreement has not been honoured and he therefore seeks judgment for that amount.

The defendant, on the other hand, denies that there was any such subsequent agreement. He says that the agreement in writing was the only agreement of partnership between them and covered not only the land owned by Lothbury but also all other land that the defendant might acquire. He asserts that the partnership is continuing and that as a result of his not having received his ten per cent from the partnership assets over a period of years, which clause (d) of the agreement entitles him to do, the partnership as such is indebted to him, and he counterclaims accordingly.

It is unfortunate that this case has come to trial after such a long period of time because inevitably the parties' memories are not as clear as they might have been had the issue been heard earlier and we have had to rely to a great extent on a very limited bundle of documents. By the parties' reluctance to put very much into writing, apart from the agreement and some correspondence, we have been deprived of what probably might have been very valuable material upon which to base our judgment. Particularly we have not had supplied to us any accounts of the partnership, which existed as a result of the agreement according to the defendant, nor have we had the opportunity of having any evidence from Mr. Evans, the senior partner of Coopers & Lybrand in the Bahamas at that time. We think he could have thrown a good deal of light on the position between the parties. However, we have to do the best we can with the evidence that was tendered. The only independent witness was Mr. Hall the Manager of the Library Place Branch of the Midland Bank, St. Helier. There was some mystery surrounding the disappearance from Mr. Hall's custody of an undated cheque issued by the defendant for the payment

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of his half share in Lothbury and drawn on his account with the Royal Bank of Canada in the Bahamas, but we are not called upon to decide exactly how this cheque came to the possession of Mr. Hyams, nor are we called upon to speculate why having been paid for his half share he kept the cheque. He explained to us that it was highly unlikely that a cheque of that nature, drawn in the way that it was, undated and with the address of the branch altered would be likely to be met had it been presented in the Bahamas.

There is no doubt however, as the property boom petered out during 1968, and into 1969, that the relationship between the parties quickly turned sour. Mr. English said that he lost interest in such arrangements as had been made when he was not paid his half share of the profit on Lady Nugent's site. Mr. Hyams, however, considered that the plaintiff had been negligent and slack in not securring sales of the other sites and was therefore in breach of an implied term in the contract between them. It may be asked, if the ordinary rate of commission on a sale of a plot of ground was, as we were told by Mr. English, some twenty-five per cent, why the defendant would enter into a separate agreement with the plaintiff which would enable the plaintiff to receive fifty per cent of the nett profits on the deals when an ordinary principal and agent agreement with the plaintiff's firm would have meant that the defendant would have had to pay only a lesser sum of twenty-five per cent commission. We think that the answer lies in the experience that the defendant had already had with land in the Bahamas when he had made a substantial and quick profit by the sale of his Cannon Bay site. We think that he was prepared to pay a higher rate of commission on profit sharing with the plaintiff because he thought that by doing so he would achieve a quicker sale than otherwise. It is to be noted that at no time were any of the parcels of land subsequently acquired by the

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plaintiff and defendant jointly. After the agreement of the 15th November, 1967, they were held either in the defendant's name or to his order. It appears that Lothbury was used as a vehicle for holding some of the sites in trust, or as it was called in the Bahamas, "In street form". Mr.Corry was, as he told us, in the Hotel business in the Bahamas and did not "close sales". He recalled meetings between the plaintiff and the defendant at which he had been requested to obtain purchasers for the land in which both the plaintiff and the defendant were interested and to this end was offered ten per cent commission and ten per cent on the profits. No specific parcels of land were mentioned; it may well have been the Lothbury land. He recalled the parties mentioning the sharing of profits equally or fifty-fifty.

From such evidence as was adduced, including the correspondence, and in particular the jointly signed letter of the 5th November, 1968, we have come to the conclusion that the testimony of the plaintiff is to be preferred as regards the allegation that there was in fact a separate agreement apart from that affecting the Lothbury land. Following the first hearing we agreed to sit again to decide whether to admit further correspondence that had come to light. At the second hearing the plaintiff produced a photocopy of a letter he said he had written to the defendant, dated 28th January, 1969, which if written, supported his allegation concerning the existence of a second agreement. The defendant suggested that no such letter had been written on the stated date and that, probably, the plaintiff had concocted it after the first hearing. If this were so that would not explain the office stamp dated 25th May, 1973, of a London firm of solicitors, who the plaintiff said was acting for him at that date. The defendant inferred that it was possible to fake such a stamp. We reject his evidence on that point and find

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that the letter was written as alleged by the plaintiff who gave us an acceptable reason why it had not been found earlier. However, that does not entirely dispose of the matter. The second verbal agreement as opposed to the first or Lothbury agreement, was that if the plaintiff was able to sell the plots of the defendant at a profit, that profit would be shared equally. We conceive that this was in essence another partnership agreement, in which the defendant contributed the land for the purpose of enabling the partnership to make a profit, and the plaintiff contributed his experience and business ability to dispose of the land. That being so, we find that the plaintiff impliedly repudiated the partnership by failing to continue to find buyers for the defendant's land. We think that the time of this repudiation could have been somewhere in the beginning of 1969. It is impossible to be more precise in the absence of more detailed evidence. We think, therefore, that the partnership between the parties as regards the second agreement having been dissolved at that time requires the assets to be valued as at that time and the claims settled between them. However, the essential part of the second agreement, which is different from the Lothbury agreement, is that in this case the defendant is not entitled to charge a percentage on the land to service his purchase.

We have had no detailed figures given to us in evidence and it is therefore impossible to give a judgment with any preciseness.

We think however, that it would be right to give judgment for the plaintiff on his claim to one half share of the profits of the Lady Nugent transaction, less any out-goings which might have been incurred in respect of that plot up to the 31st March, 1969. As regards the remaining land still owned by the defendant he admitted that as regards any capital loss it was he that had to bear it and as the market has now fallen there that loss must lie. However,

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on his counterclaim against the plaintiff for failure to act diligently in finding purchasers for the rest of the land, we think that the plaintiff was entitled to receive his half share of the Lady Nugent profit as and when it was ascertained. There was nothing in the second or oral agreement to the contrary. We therefore dismiss the conounterclaim for damages for the plaintiff's failure to exercise dilegence as regards the second agreement.

We turn next to the issue on Lothbury. Here again the evidence is equally imprecise. However, again we think that the plaintiff's evidence and recollections on this matter are likewise to be preferred. We believe that an agreement was reached in London at the West Air Terminal between the parties that the defendant should buy out the plaintiff for £12,500. By doing so, the defendant must be deemed to have waived his claim for the ten per cent interest on the partnership assets. The only issues that were outstanding were first, when should the payment be made and second how it should be made? It was in the defendant's mind that he wished, so it seems to us, to avoid making a direct payment to the plaintiff, but rather to affect some sort of an exchange with him of property in England or through a Jersey company.

Our judgment therefore is; first, that the defendant shall account to the plaintiff for the profits on the sale of the Lady Nugent site as at the 31st March, 1969, less any proper outgoings incurred in respect of that site alone and not including any ten per cent deduction, and, secondly the defendant shall pay to the plaintiff the sum of £12,500, being the price for the plaintiff's half share in Lothbury Limited. As regards interest on the two sums we think it would be right not to order interest on payment of the half share in respect of the Lady Nugent site, but it would be right that the defendant should pay interest on the sum of £12,500 from the 22nd October, 1969, to date at the rate of eight per cent. The defendant will pay seventy-five per cent of the plaintiff's costs in this action.