[2016] UKPC 25
Privy Council Appeal No 0044 of 2015

JUDGMENT

Cenac and others (Appellants) *v* Schafer (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge
Sir Kim Lewison

JUDGMENT GIVEN ON

2 August 2016

Heard on 19 July 2016

Appellants	*Respondent*
Seryozha Cenac Leslie Prospere (Instructed by Campbell Chambers)	Peter I Foster QC Renee T St Rose (Instructed by Charles Russell Speechlys LLP)

SIR KIM LEWISON:

1. Like many places in and around the Caribbean the law of Saint Lucia restricts the holding of land by aliens without a government licence. The principal issues on this appeal concern the legal effect of those restrictions on a transaction between US citizens.

2. In 1986 Mr and Mrs Cenac, who are both citizens of Saint Lucia, owned a parcel of land extending to about eight acres known as La Battery. It was registered in the Land Registry as Block 0031B, Parcel 20. By a deed of sale dated 29 August 1986 Mr and Mrs Cenac sold the land to Dr and Mrs Smith, who are US citizens. The deed recited that Dr and Mrs Smith were duly licenced to hold the land by virtue of a licence granted under the Aliens (Landholding Regulation) Act (No 10 of 1973). The licence had been granted by the Governor-General on 30 August 1985, and was made subject to the conditions in its Second Schedule which read:

> "THE PROPERTY is to be used for the purpose of building a residence and developing agriculture - the building to be completed within three years of the date of issue of this licence."

3. Dr and Mrs Smith were registered as proprietors of the land at the Land Registry on 27 July 1987. Although the Smiths began some construction work, they did not complete the building of a residence within the three years given by the licence. By letter dated 4 March 1991 Dr and Mrs Smith purported to sell the land to Mr Hedrick for US $150,000. They acknowledged receipt of US $75,000; and the balance was to be paid within 18 months. One half of the purchase price is much more than a conventional deposit. Mr Hedrick was also a US citizen; and although he held licences under the Aliens (Landholding Regulation) Act to hold other land in Saint Lucia, he did not have a licence to hold La Battery. Belle J, the trial judge, found that at some time in 1991 Mr Cenac and Mr Hedrick had lunch together in the course of which Mr Hedrick told Mr Cenac that Dr Smith had agreed to sell the land to him for US $150,000. On 20 March 1991 Mr Hedrick placed a caution on the register of title at the Land Registry. He made the final payment of the agreed purchase price in February 1994.

4. On 29 April 1994 Dr and Mrs Smith granted Mr Hedrick an irrevocable power of attorney which authorised him to negotiate and agree to a sale of the property; and to sign all deeds necessary to transfer its ownership.

5. On 15 October 2001 Senior Crown Counsel from the Chambers of the Attorney-General wrote to Dr and Mrs Smith, informing them that they were in breach of the licence, stating that the Government intended to commence proceedings for the forfeiture of the land, and inviting representations by 19 November 2001. A copy was sent to Mr Cenac whose name and address appeared on the register as the contact point for Dr and Mrs Smith. Mr Cenac wrote back seeking to dissuade the Government from taking forfeiture proceedings. In the course of his letter he made it clear that he knew that Dr and Mrs Smith had agreed to sell the land to Mr Hedrick, that Mr Hedrick had paid them US $75,000 and that Mr Hedrick had lodged a caution. In the result no forfeiture proceedings have in fact been begun.

6. Mr Hedrick died on 2 July 2004; and probate of his estate was granted to his son-in-law Mr Schafer on 15 September 2004. Mr Schafer is also a US citizen. In February 2005 Mr Schafer successfully applied to be substituted as cautioner at the Land Registry. The alteration was made on 15 February 2005.

7. On 16 February 2006 Dr and Mrs Smith entered into a deed of sale with Mr and Mrs Cenac. By that deed they purported to sell La Battery to Mr and Mrs Cenac for EC $560,120. The terms of the deed recited the agreement between the Smiths and Mr Hedrick, asserted that the deposit but not the outstanding balance had been paid, recited the caution lodged by Mr Hedrick, and that Mr Hedrick had "clearly abandoned his former intention to proceed", but purported to make the sale subject to the caution, which was to rank as a first charge on the property. Following the execution of that deed of sale Mr and Mrs Cenac applied to remove the caution in order to procure their own registration as proprietors of La Battery. Mr Schafer objected; and so the matter came before the court. In the interim Mr Schafer obtained, so their Lordships were informed, approval for the holding of, the requisite alien's licence to hold La Battery.

8. Belle J found in favour of Mr Schafer and dismissed the claim to have the caution removed. He awarded Mr Schafer his costs. He also awarded Mr Schafer damages for breach of trust against Dr and Mrs Smith; damages for procuring a breach of trust or breach of contract against Mr and Mrs Cenac; and directed that the Registrar of the High Court be authorised to execute a deed of sale to Mr Schafer on registration of an alien's land holding licence. The Court of Appeal (Baptiste, Mitchell and Blenman JJA) dismissed an appeal. The grounds of appeal before the Board are diffuse, and are not marshalled in a logical order. Their Lordships will take the grounds of appeal in what appear to them to be a more logical and structured order.

9. It is common ground that Dr and Mrs Smith are aliens as defined by the Aliens (Landholding Regulation) Act 1973 and before his death so was Mr Hedrick. So, too, is Mr Schafer. Section 3 provides:

> "(1) Subject to the provisions of this Act, neither land in Saint Lucia, nor a Debenture or mortgage thereon shall, after the commencement of this Act, be held by an unlicensed alien, and any land or mortgage so held shall be forfeited to Her Majesty."

10. Section 5 provides that land forfeited under the Act does not vest in Her Majesty "unless and until a judgment is obtained declaring the forfeiture"; and a judgment declaring a forfeiture "shall operate to vest" the land in the Crown. Section 15 empowers the Attorney-General to apply to the High Court for a declaration that any right, title or interest "is forfeited to the Crown".

11. Section 13(1) provides:

> "No person shall, without the licence of the Cabinet, hold any land in Saint Lucia … in trust for an alien."

12. Section 13(4) defines "trust" widely, but the definition is stated not to include:

> "(c) the duties of a vendor to the purchaser pending payment of the purchase money, or after payment of the purchase money, if within three months after such payment the property sold is vested in the purchaser or his interest therein is extinguished ..."

13. Section 17 provides that a licence granted under the Act is subject to stamp duty.

14. There is little doubt that as a matter of the general law of England and Wales, upon entry into a specifically enforceable contract for the sale of land the vendor becomes a trustee of the land for the purchaser, subject to his paramount right to receive the purchase price; and that when he has received the whole of the price he holds it on trust for the purchaser absolutely: *Shaw v Foster* (1872) LR 5 HL 321. The nature of the trust is a constructive trust. By section 916A(2) of the Civil Code Cap 4.01 of the Revised Laws of Saint Lucia 2001 constructive trusts arise in the same circumstances as they arise under the law of England. In *Murphy v Quigg* (1996) 54 WIR 162 in a judgment delivered by Sir Vincent Floissac CJ the Court of Appeal of the Eastern Caribbean applied these principles.

15. In *Young v Bess* (1995) 46 WIR 165 the Board considered legislation in very similar form which applied to Saint Vincent and the Grenadines. Their Lordships explained that the effect of the legislation was not that forfeiture occurred automatically, but that the title of an unlicensed alien was liable to forfeiture at the suit of the Crown.

They also approved the decision of the British Caribbean Court of Appeal in *Lehrer v Gordon* (1964) 7 WIR 247 in which it was held that breach of conditions in a licence required under similar legislation in the Leeward Islands did not result in an automatic forfeiture. Prima facie, therefore, Dr and Mrs Smith's failure to comply with the conditions attached to their licence did not divest them of title; and the equitable interest they created in favour of Mr Hedrick was likewise not automatically invalidated by his failure to comply with the Aliens (Landholding Regulation) Act.

16. In *Murphy v Quigg* the Court of Appeal of the Eastern Caribbean held that non-compliance with restrictions on land holding by aliens did not entail the conclusion that the court should refuse to give effect to an equitable interest arising under an implied, constructive or resulting trust. The existence of such a trust was proved by evidence that the buyer paid the purchase price, and that there was a common intention that the buyer should acquire a beneficial interest by virtue of that payment. Since the claimant was not compelled to rely on any illegality in order to prove the existence of a trust, the principles on which the courts refuse to enforce illegal contracts did not apply.

17. In *Hughes v La Baia Ltd* [2011] UKPC 9 the Board considered alien land holding restrictions applicable in Anguilla. The trial judge (upheld by the Eastern Caribbean Court of Appeal) ordered specific performance of a contract for the sale of land to an alien, despite the lack of a valid licence under the applicable legislation. At para 40 their Lordships approved the following statement by Byron LJ (Ag) in *Equipment Rental and Services Ltd v Texaco (West Indies) Ltd* (Civil Appeal No 16 of 1997, Eastern Caribbean Supreme Court, Dominica):

> "The law is well settled. The Aliens Landholding Licence legislation does not affect the contractual and other relationships between vendor and purchaser and lessor and lessee. The rights, powers and privileges to forfeit land held by the unlicenced alien vests in the state, and not in the individual citizen. Any such land or interest in land, including a 25-year lease, is merely liable to forfeiture. The forfeiture is not automatic nor is it mandatory. In effect this means that the unlicenced alien can hold the land or interest in the land subject to the right of the state to initiate steps to forfeit it."

18. The Board therefore upheld the order for specific performance.

19. Counsel for the appellants argued that there was a distinction to be drawn between an alien who had been granted a licence but was in breach of its conditions and an alien who had never applied for a licence. In the former case the Government could be expected to know that an opportunity to forfeit had arisen, whereas in the latter case

the Government would have no means of knowing that that opportunity had arisen. Their Lordships can find no trace of such a distinction in the case law. *Young v Bess* was itself a case where the alien had no licence; and the Board in that case drew no such distinction. On the contrary it applied *Lehrer v Gordon* (which was a case about breach of condition) to the case before it. Their Lordships reject this argument.

20. Counsel for the appellants next contended that the contract between Dr and Mrs Smith and Mr Hedrick had been used as a means of evading the latter's obligations under the law: principally the obligation to obtain a licence to hold the land and an obligation to register title under the Land Registration Act (Cap 5.01). Stamp duty would have been payable on both occasions, and the failure to comply with these obligations amounts to a fraud on the public revenue. In addition the execution of the power of attorney showed that Mr Hedrick's purpose was to speculate in land because he was thus enabled to sell the land without going through the formalities required by law. In support of that submission the appellants relied on the decision of the Board in *Chettiar v Chettiar* [1962] AC 294 in which a claimant had to rely on the illegal purpose of an agreement in order to advance his case. In *Murphy v Quigg* the Court of Appeal applied the principles laid down by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 as those upon which the court will refuse to enforce an allegedly illegal contract. They concluded that enforcement of the equitable interest created by payment of the purchase price in full was not precluded by the principles of illegality. That is also consistent with the view of the Board in *Young v Bess*, which their Lordships consider to have accurately stated the law at the time. Their Lordships observe that on the day after this appeal was heard the Supreme Court of the United Kingdom handed down its judgment in *Patel v Mirza* [2016] UKSC 42. In that case the majority departed from the "reliance test" that had underpinned *Tinsley v Milligan* in favour of a wider-ranging test proposed by Lord Toulson at para 120. Their Lordships do not consider that the adoption of this broader test would lead to any different outcome in this appeal, largely for the reasons given in *Equipment Rental and Services Ltd v Texaco (West Indies) Ltd* and approved by the Board in *Hughes v La Baia Ltd*.

21. Registration of title is governed by the Land Registration Act. Section 23 provides that the registration of a person with absolute title of a parcel "shall vest in that person the absolute ownership of that parcel". In common with many other systems of land registration it is the fact of registration that transfers legal title. Section 37(2) contemplates that an unregistered instrument (such as the contract between the Smiths and Mr Hedrick or the deed of sale between the Smiths and the Cenacs) may take effect as a contract. Thus until registration interests created by contracts and deeds take effect only in equity: see *Spiricor of St Lucia Ltd v Attorney General of St Lucia* (Civil Appeal No 3 of 1996) per Byron CJ (Ag).

22. Mr Hedrick registered a caution against the land under section 86 of the Land Registration Act which permits registration of a caution by any person "who … claims any unregistrable interest whatsoever in land." Counsel for the appellants argued that

despite this apparently wide wording, Mr Hedrick did not in fact have a cautionable interest. He relied on two propositions: first, that in order to be valid a caution must be lawfully registered; and second that there must be an interest in the land at the time when the caution is registered. The argument is that the registration of a caution by an unlicensed alien was not enshrined in legislation until the enactment of section 7 of the Aliens (Licensing) Act 1999, which had no retrospective effect. There was no provision to that effect in the Aliens (Landholding Regulation) Act 1973. Although *Young v Bess* and the cases which follow it stand for the proposition that an unlicensed alien may enforce his rights under the contract against the seller, he does not acquire a proprietary interest capable of binding the whole world which is capable of protection by a caution. All he has is a personal right of action against the seller. An alternative submission was that a proprietary right, if capable of being created, ceased to be proprietary after the three-month period mentioned in section 13(4)(c) as the period during which the vendor remained bound by his obligations to the purchaser. Thus the initial registration of the caution was unlawful, or became unlawful after three months. The fact that Mr Schafer procured the substitution of his name for that of Mr Hedrick in February 2005 makes no difference because the caution registered by Mr Hedrick always was and remained a nullity; or, if originally a proprietary interest, ceased to be one on the expiry of the three-month period.

23. Their Lordships do not accept this argument. The interest that Mr Hedrick claimed was an equitable interest arising out of the combined circumstances of the contract of sale, payment of the whole of the purchase price and the common intention that he should have such an interest. An equitable interest of this kind is both an interest in the land and also one that cannot be independently registered under the Land Registration Act. It is therefore an unregistrable interest. Their Lordships do not consider that the lack of any express specific provision enabling registration of a caution by an unlicensed alien detracts from the wide words of section 86, particularly as the holding of land by an unlicensed alien is, as a result of the long line of cases to which their Lordships have referred, not unlawful in itself. In addition in their Lordships' view the submission conflicts with the Board's approval in *Hughes v La Baia Ltd* at para 30 of the decision of the Court of Appeal on a similar point.

24. Counsel for the appellants also argued that an examination of the various transactional documents giving effect to the bargain between Dr and Mrs Smith and Mr Hedrick showed that the primary purpose of the bargain was not to confer title on Mr Hedrick but to enable Mr Hedrick to sell the land without having first procured his own registration; and, therefore, without having acquired the necessary licence as an alien to hold the land. Since this was the overall objective, so the argument ran, Mr Hedrick's interest should be regarded as a purely monetary interest rather than a proprietary interest capable of protection by caution. Their Lordships do not wish to cast doubt on the proposition that a purely monetary claim is not a claim that can be protected by a caution, as Leigertwood-Octave J held in *Riley v Gerald* (MNIHCV 2004/0009). However, the essence of the constructive trust created by the payment of the purchase price in full under the contract for sale is that beneficial ownership of the land itself

passes to the purchaser. Equity has not, in those circumstances, regarded the purchaser's interest as being solely a monetary interest. Indeed that perception of equity is the foundation for the principle that, in general, equity will decree specific performance of a contract for the sale of land, rather than leaving a purchaser to a financial remedy. Their Lordships therefore reject this argument.

25. Counsel for the appellants next contended that *Young v Bess*, and the later cases which have considered its implications, have been reversed by later legislation. That legislation is now contained in the Aliens (Licensing) Act (Cap 15.37) which came into force on 25 October 2002. Section 5 of that Act provides:

> "(1) An unlicensed alien shall not, after the commencement of this Act unless as otherwise provided for in this Act, hold land.
>
> (2) Where an unlicensed alien contravenes subsection (1) the land, held by that alien shall be forfeited to the Government."

26. Section 7 provides:

> "An agreement to hold land shall not vest an interest in the land in the purchaser, where the purchaser is an alien, unless a licence to hold the land is first obtained but nothing in this section shall prevent a person, who has paid a deposit under an agreement for the sale of the land, from placing a caution against the land in accordance with the Land Registration Act."

27. The difficulty with the argument, as it applies to this case, is that section 22 provides that the Act does not affect the estate or interest of an alien in any land held by the alien at the commencement of the Act; and does not apply to a trust in favour of an alien subsisting at the commencement of the Act. Mr Hedrick had acquired his equitable interest in the land long before the Act came into force, and in consequence the new legislative scheme does not apply. Further section 5 of the Aliens (Licensing) Act (Cap 15.37) retained the provision of the 1973 Act that an unlicensed alien would not hold land "unless as otherwise provided for in this Act".

28. Under the Land Registration Act the registration of a caution has two effects that are relevant for present purposes. First, under section 30 every proprietor acquiring any land is deemed to have notice of the registered caution; and under section 38(3) a purchaser in good faith has a duty to search the register. Second, under section 87(2) so long as a caution remains registered, no disposition which is inconsistent with it may be registered without the consent of the cautioner or by order of the court. Counsel for the

appellants submitted that the registration of a caution was intended to protect a transient interest, such as an executory contract of sale. After the three-month period prescribed by section 13(4)(c) of the Aliens (Landholding Regulation) Act 1973 the effect of the caution lapsed. This is a variant of the argument that the equitable interest created in Mr Hedrick's favour itself lapsed at the end of the three-month period. Their Lordships have already rejected that argument. Once that argument has been rejected, there is nothing in the Land Registration Act which would warrant the conclusion that the caution ceased to have effect. On the contrary such a conclusion would conflict with the express terms of section 87(2).

29. The Land Registration Act does not explicitly prescribe the circumstances in which the court may order the registration of a disposition which is inconsistent with a registered caution. Their Lordships consider that whether to do so is to be decided in accordance with the general principles of the law. This is consistent with the decision of the Court of Appeal in *Marie v Lowrie* (Civil Appeal No 11 of 1991) in which it was held that a caution does not confer any interest upon or give priority to the cautioner. Its effect is simply to give the cautioner an opportunity to object to the registration of a disposition. The general principle, where competing equitable interests are in play, is that where the equities are equal the earlier in time prevails. That points towards a refusal to register the disposition in favour of Mr and Mrs Cenac. So, too, do the facts that not only were Mr and Mrs Cenac deemed to have notice of Mr Schafer's claim by virtue of section 30, but also that Mr Cenac had actual knowledge of the sale by Dr and Mrs Smith to Mr Hedrick. The appellants argued that there were countervailing factors that ought to have tipped the balance in their favour. Those factors were that Mr Hedrick was an unlicensed alien and for that reason the contract was unenforceable; that Mr Hedrick (and after him Mr Schafer) failed to comply with their legal obligations to obtain a licence to hold the land and to register it at the Land Registry; that Mr Schafer had sought to sell the property; that Mr Hedrick (and after him Mr Schafer) had failed to pay stamp duty or alien licensing fees; and that by failing to register his full interest for 14 years Mr Hedrick (and after him Mr Schafer) led Mr and Mrs Cenac to believe that there was no subsisting claim to the property. In addition Mr and Mrs Cenac entered into the deed of sale in good faith.

30. Their Lordships are not persuaded that these factors, either individually or cumulatively, mean that Mr and Mrs Cenac's equitable interest should prevail over that of Mr Schafer. In so far as the appellants relied on the facts that Mr Hedrick was an unlicensed alien who failed to obtain a licence and register his interest, their Lordships have already rejected the argument that this made the contract unlawful or otherwise precluded a decree of specific performance. The reliance on speculation in land is two-edged. As the trial judge said, if anyone indulged in land speculation it was Dr and Mrs Smith rather than Mr Hedrick. At the very least it cannot be said that his conduct was any worse than theirs. Moreover, since the Government has now granted Mr Schafer the requisite licence it cannot be said that performance of the contract is contrary to any head of public policy. So far as Mr and Mrs Cenac's belief is concerned, the very fact that the caution remained on the register ought to have given them clear warning of the

risk that they were about to undertake. As the trial judge said, due diligence cannot be conducted by ignoring notice to the whole world of Mr Schafer's interest in the land. Good faith alone is not enough. Equity will protect a bona fide purchaser for value *without notice*; but Mr Cenac had notice. Their Lordships have not been taken to any case in which, in the absence of some particular scheme of registration, the purchaser of an equitable interest, who took with actual knowledge of a prior equitable interest, has been given priority over the earlier interest. The case of *Rice v Rice* (1853) 2 Drew 73, on which the appellants relied, was a case in which the acquirer of the later equitable interest (which was a mortgage) had no notice of the earlier equitable interest (which was a vendor's lien for the unpaid purchase price) not least because the vendor had executed a conveyance which contained an acknowledgment of receipt of the purchase price. That is a quite different case.

31. Counsel for the appellants also relied on the long delay in completion of the contract between the Smiths and Mr Hedrick. However, in order to resist a claim for specific performance on the ground of delay, it is necessary to show that prejudice has resulted from the delay. The trial judge made no such finding. This argument also fails.

32. As mentioned, the judge entered judgment against Mr and Mrs Cenac for damages for procuring a breach of trust or a breach of contract. That is contained in para 6(ii) of his order. Since Mr Foster QC accepted on behalf of Mr Schafer that that part of the judge's order cannot stand their Lordships can deal with this point shortly. The law of England and Wales does not recognise the blanket concept of procuring a breach of trust. It was not suggested that the law of St Lucia is any different. A person may be liable for dishonest assistance in a breach of trust, or for knowing receipt of trust property (or both). Each form of liability has its own ingredients. In the case of dishonest assistance dishonesty is the acid test: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. The trial judge made no finding of dishonesty against Mr and Mrs Cenac; and they did not receive any trust property. Thus a vital ingredient of each of these forms of liability was missing. There was no finding that Mr Schafer had suffered any loss as a result of the transaction between Dr and Mrs Smith and Mr and Mrs Cenac with the consequence that an essential ingredient of the tort of procuring a breach of contract was also missing.

33. The final ground of appeal against the substantive order is an allegation of bias against the trial judge. This arose out of a submission that in considering the effect of the Aliens (Landholding Regulation) Act 1973 the judge ought to have considered statements made by the ministers responsible for the passing of the Act. The judge remarked that no previous case had found it necessary to do so and added:

> "Perhaps the reason is that politicians are quite capable of saying one thing and doing another."

34. The allegation of bias is made because Mr Cenac is a former politician. This argument was not pressed in oral submissions before their Lordships and quite rightly. It is unarguable that a single semi-jocular remark such as that amounts to apparent bias against a litigant who once was, but no longer is, a politician.

35. The appellants also advanced an argument directed to varying the judge's order for costs. However, this was not an argument that was put to the Court of Appeal; so their Lordships do not have the benefit of the considered views of that court on what is in essence a question of local practice and procedure. Nor did their Lordships have the materials upon which they could themselves have come to an independent considered view. Their Lordships therefore decline to enter into this ground of appeal.

36. For these reasons their Lordships will humbly advise Her Majesty that para 6(ii) of the judge's order should be discharged; but that otherwise the appeal should be dismissed. Their Lordships' preliminary view is that the respondent should be awarded the costs of the appeal but that the parties have 21 days to lodge written submissions if a different order is sought.