IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. HCV 2871 OF 2004

BETWEEN	DAVID ALEXANDER CHIN	CLAIMANT
A N D	EARL ANTHONY CHIN	DEFENDANT

Mr. Manley Nicholson and Miss Gayle
instructed by Nicholson, Phillips for Claimant

Mr. L.F. Smith for Defendant

Heard: 18th December, 2006

MORRISON, J (Ag.)

The parties in this case are at loggerheads over property left by the deceased, Adolph Chin, who died in July 1997, leaving a Will. The litigants herein are, nephew and uncle, respectively. The former lives at 105 Groomsbridge Court, Chapel Hill, North Carolina, United States of America, while the latter lives at 12 Bedford Park Avenue, Kingston 10, St. Andrew.

Pursuant to the said will, the Claimant was made executor and trustee thereof on the 23rd day of June 1999. Probate of the above will was obtained by the Claimant. The Testator after directing that his just debts, funeral and testamentary be paid, left the rest, residue and remainder of his estate

whatsoever and wheresoever situate as to realty in fee simple and as to personalty absolutely to David Chin, the Claimant.

The devise and bequest to David Chin were qualified suffice it to say that the survival of the Claimant has rendered the qualification nugatory. There are three properties involved. One is at 12 Bedford Park Avenue, Kingston 10, St. Andrew another at 63 Old Hope Road, Kingston 5, St. Andrew and the third is at 14442 S.W. 117th Terrace, Miami Florida, U.S.A.(Miami property)

Permit me to quote from the Will of Mr. Adolph Elgin Chin. At paragraph 2 onwards of the said will one finds –

"I appoint my son David Alexander Chin of 9303 S.W. 39th Street, Miami, 33165, Florida, in the United States of America, Bio-Chemist to be the Executor and Trustee of this my Will, but in the event he predeceases me or is unwilling or unable to act, I appoint in his stead my brother Earl Anthony Chin of 16 Bedford Park Avenue, Kingston 10 in the parish of St. Andrew, Businessman." At paragraph 5 of the said Will the Testator directs "my Executor to pay my just debts, funeral and testamentary expenses."

Upon the "Order on Fixed Date Claim Form" coming up for hearing on the 6th day of June 2006 before The Honourable Mrs. Justice Sinclair-

Haynes it was declared and ordered that the parties were the equal joint owners of the properties at 63 Old Hope Road and 12 Bedford Park Avenue.

Also, that the Claimant is entitled to one half of all the rental income from 12 Bedford Park Avenue and for the Defendant to render an account of one half of all the rental income he has received from the said property for a specific period.

A number of affidavits were filed by the parties including one from a Mary Chin, aunt of the Claimant and sister of the Defendant, who resides at the Miami property.

In respect of this latter property the Defendant asserts that he paid monies due from the Claimant for its maintenance and upkeep and that as such he is entitled to set off the amount so paid against such sums as may be found to be due to the Claimant arising from the order made by the Honourable Mrs. Justice Sinclair-Haynes. When the matter came before Anderson, J on 13th December 2005 he ordered, inter alia, that the undated financial statements prepared by a Mr. Charles O'Conner, be updated to June 2005 and that this be done by 31st January 2006 at the instance of the Claimant.

Further, that the Defendant is to provide an affidavit setting out any additional sums purportedly owed to him or advanced by him for the benefit

of the Claimant and that such affidavit be served on the Claimant by January 14, 2006. It was further ordered that the attorneys for the parties shall review the updated accounts by 28 February 2006.

The Claimant claimed against the Defendant the sum of $1,445,532.86 being the amount adjudged to be owed by the Defendant pursuant to the account ordered by Anderson, J. It is this claim that was resisted by the Defendant by way of set-off.

Thus the claim for set-off raises a jurisdictional issue seeing that the property is located in Miami, Florida, United States of America.

The Claimant contends that the Jamaican courts is not the proper forum to hear the matter whereas the Defendant advanced the contrary view. It is the Claimant's contention that since the claim for set-off raises issues which are outside the jurisdiction of the Jamaican Courts the Defendant's claim ought not to be a part of the hearing before this Court but is to be determined in the United States having regard to where the property is located.

Further, asserts the Claimant, as the Defendant's claim is one which seeks to oblige the Claimant to restore the benefit of the enrichment obtained purportedly at the Defendant's expense, that it is not sustainable in law.

In this regard the Claimant posits that the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. He referred this Court to "The Conflict of Laws Volume 2, (13th edition) co-authored by Dicey & Morris.

The Claimant reasons by saying he makes no admission as to the existence of the alleged implied contract as asserted by the Defendant but, to para-phrase, even if this were so, then the proper law for its determination is the choice of law provisions applicable to the alleged contract. He cites **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.** [1942] 2 All.E.R. 122 in defence of the above proposition.

Again, contends the Claimant, a claim for the restitution of a benefit obtained in connection with a person's ownership of land is governed by the *lex situs* of the land. Yet again, he relies on Dicey & Morris, supra; **Pettkus v Beecher (1981) 1 D.L.R. 257** and **Batthyany v Walford (1887) 36 Ch. D at p. 269.**

Lastly, the Claimant submitted that the Defendant's claim should be subjected to the law with which the alleged obligation has its closest and most real connection, that is, the law of the place where the purported enrichment occurred. Likewise, he cites Dicey & Morris in support of his argument. By way of omnibus the Claimant urges that as there are triable

issues between the parties the forum for the disposition of the matter between them is the State of Florida, U.S.A. The triable issues are, inter alia, the legality of a party in making payment for a mortgagor without the mortgagor's express or implied consent /permission; whether Mary Chin's unilateral discharge of the joint mortgage in 2002 relieved David Chin of any mortgage obligation and thus rendered her solely responsible for the entire mortgage from December 2002; whether the co-owners are each jointly or severally obligated as co-owners/mortgagors for mortgage payments.

Mr. L.F. Smith, with economic expenditure of presentation resisted the Claimant's several contentions. I must now train my gaze upon his contention that is, there was an implied request by the Claimant to repay the Defendant for monies advanced on his behalf. There is not one iota of evidence from which this comes or from a primary source from which it can be inferred. In fact none has been offered. The Defendant relied on the case of **In Re Cleadon Trust Limited (1939) 1 Ch. 286 at 299** and **Brewer Street Investment Ltd. v. Barclays Woollen Co. Ltd. (1953) 3 W.L.R. 869**. Further he submits, relying on Chitty on Contracts, 27th edition, Volume 1, paragraphs 30-004, that where the transaction involves more than one country, the proper law which applies is to be determined, either from

the express terms of the contract, or inferred or implied from the contract or conduct of the parties or, where neither of these is of assistance then from the system of law with which the transaction has the closest and most real connection." It is the latter emphasized alternative that finds its coincidence with the Claimant's submissions, however, with the exception:" There may also be situations in which it is arguable that the law of the country in which the loss was sustained is more closely connected with the enrichment than the law of the country in which the benefit was obtained." The Defendant then goes on to the say that all the facts and circumstances of the case are to be looked at, citing **Coast Lines Ltd v. Hudig & Veder Chartering N.V. [1972] 2 Q.B. 34** and quoting Chitty, supra, as saying -"in the place where the contract was made the place where the contract has to be performed – the place of residence or business of the parties ".

Manifestly, from the considerations quoted above it would require the skill of a mental legerdemain to say that this set of criteria as to jurisdiction is more consonant with the Defendants submissions as opposed to that of the Claimant.

In the undated affidavit of David Alexander Chin, supplied in the Judge's bundle, the affiant says that he denies that, "Earl Chin has been paying any part of my share of expenses for the maintenance and upkeep of

property at 14442 S.W. 117th Terrace, Miami, Florida, 33186 in the United States of America, and that he has been doing so since the death of my father, the late Adolph Chin." So far as is relevant to this matter before me, the affiant asserts that pursuant to his father's will he acquired a beneficial interest in this property upon his

father's death. Further, upon the grant of probate in the United States in February 2002 his name was registered on the title in the said property as tenant-in-common with that of Mary Chin, his aunt. Significantly, "when my name was registered on title, the mortgage balance was approximately US$67,000.0 …." The Claimant secured refinancing and subsequent to this he alleges that Mary Chin unilaterally discharged the refinanced mortgage and refinanced the property with a new mortgage of US$94,000.00 in her name solely. This Mary Chin has not repudiated. They David Chin and Mary Chin now hold the property together as joint tenants and the refinancing that was agreed between them is to be borne by Mary Chin who would continue to be responsible for the mortgage payments, taxes, upkeep, maintenance etc. of the property. Also, that at no time was there any agreement between Mary Chin and himself whereby, " I would be under any obligation to make mortgage payments," nor was there any agreement or

arrangement between himself and Earl Chin for the latter to make any mortgage payments on his behalf.

It is the affidavit evidence of David Chin that he has instructed his attorney in Miami to commence litigation there for a determination of the issues of his ownership of the Miami property and the matter of his obligation for mortgage payments.

Not unsurprisingly, and generally speaking both Earl Chin and Mary Chin, in their respective affidavits, deponed to the contrary.

What is the law?

In Chapter 34 of the Conflict of Laws by Dicey & Morris, supra, the following is stated: The obligation to restore the benefit of an enrichment obtained at another persons' expense is governed by the proper law of the obligation.

The proper law of the obligation is determined as follows:

a) if the obligation arises in connection with a contract, its proper law is the law applicable to the contract;

b) if it arises in connection with a transaction concerning an immovable (land) its proper law is the law of the country where the immovable is situated;

c) if it arises in any other circumstances its proper law is the law of

the country where the enrichment occurs.

The learned authors say that, "the law of restitution has come to greater prominence in the realm of domestic law as a result of an increasing acceptance by courts in common law countries that restitution can be described and organized as a coherent and independent category within the law of obligation."

In to the instant case I do not find that there was any agreement expressed or implied between David Chin and Earl Chin for the latter to make mortgage payments on behalf of the former. What is clear from the bequest is that both David Chin and Earl Chin are the joint owners of the property in Miami. The question is whether or not by their joint ownership whether David Chin has an obligation in respect of the mortgage payments. To my mind David Chin would be accountable, if indeed he is, to Mary Chin and not Earl Chin based on the former's unilateral refinancing of the mortgage and about which Earl Chin is silent in his affidavit evidence. Thus, any mortgage payment by Earl Chin, not evidenced at that, would have had to be at his own stirring or at the behest of Mary Chin and, as such ,I regard any payment by Earl Chin on behalf of David Chin as gratuitous. There is no documentary proof or otherwise of any demand for repayment by David Chin moving from Earl Chin – not the slightest whiff or hint is

suggested that a demand was made on David Chin by Earl Chin. Even if I am wrong, it is clear beyond doubt that the proper law of obligation would be where the unjust enrichment took place, that is, Miami, Florida, U.S.A. and moreso because the United Sates is where both Mary Chin and David Chin reside.

To quote the learned authors again, "where a claimant seeks to enforce the rights created by and arising under a contract the validity of the contract and the consequences of validity, termination and discharge will in principle be governed by the choice of law rules for contracts. But if the application of these rules leads to the conclusion that a supposed contract is invalid or ineffective, any right of recovery cannot arise from the contract itself." On this account I would hold that the proper forum is in Miami, Florida, U.S.A.. Indeed the application of the law which governs the contract does not imply that the legally distinct or unjustifiable enrichment is to be treated as if it were a contractual claim. The claim for unjustifiable enrichment is determined by the same law as that which governs the underlying transaction in order to apply as far as possible one legal system only to all aspects of a unitary situation.

In the case of obligations arising from the ownership of land this is governed by the *lex situs* of the land. In **Batthyany v Walford (1887) 36**

Ch. D. 269 the tenant for life of land in Austria and Hungary sued the English executor of the previous tenant for permissive waste in accordance with Austrian law. The Court of Appeal held, inter alia, that the applicable law was that of Austria.

Where money is paid to, or a benefit is conferred upon another person with whom no prior contract, or supposed contract exists, and it is alleged that the money or the value of the benefit is recoverable the enrichment is likely to be most closely connected with the country in which it occurred and the obligation to restore is to be governed by the law of that country, so says Dicey & Morris, supra.

Applied to the instant case no doubt can be entertained as to the proper forum being Miami, Florida, U.S.A on the basis of the **Batthyany** case and on the proper law of the obligation.

I do not find the case of **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All. E.R. at p. 122** to be useful in determining the issue before me. Plainly, it is distinguishable on its peculiar facts, and subject-matter.

The Defendant relied also on **Spiliada Maritime Corp v. Cansulex Ltd. [1986] 3 All. E.R. at 843.** The condensed facts are that the Respondents were sulphur exporters in British Columbia. One load of

sulphur was placed on the Spiliada for its shipment to India and the other had aboard the Cambridgeshire owned by an English company. The Spiliada was managed partly in Greece and partly in England. Both cargos were wet when loaded and as a consequence caused severe corrosion to the holds of both vessels. The owners of the Cambridgeshire commenced proceedings in England claiming damages against the Respondents. The owner of the Spiliada briefed the said attorneys in the Cambridgeshire. The appellants were granted leave to serve the Respondents out of the jurisdiction. The Respondent applied for the discharge of the leave. This was rejected by the Judge as it was in the interest of efficacy, expedition and economy that the Appellant's action proceed in England and not British Columbia. The Respondents appealed this decision. The Appellants argued that since the limitation period for bringing the action in British Columbia had expired they would be deprived of a juridical advantage if they were forced to bring their action in British Columbia. It was held by the House of Lords that the fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and, also, the grant of leave to serve proceedings out of the jurisdiction was that the court could choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice. It was

determined that the burden was on the Respondent to show that another forum was distinctly more appropriate than the English one. In considering this aspect, the Court would look for that forum with which the action had the most real and substantial connection of convenience and expense, availability of witnesses, the law governing the relevant transaction and the place where the parties resided or carried on business. To my mind the instant case support the contention of the Claimant and not the Defendant.

This case of the **Spiliada,** though cited by the Defendant in support of his contention that the Jamaican Court is the more appropriate forum is clearly self-defeating . The Defendant is hoisted by his own petard. All the relevant factors point to Miami, Florida, U.S.A.. The witnesses Mary Chin and David Chin reside in the United States of America, the law governing the relevant transaction (mortgage) is in Miami, Florida. Further, this venue of Florida, I would think, save in practical terms, expenses and prove to be more convenient, all things being considered.

I hold therefore that the proper forum is Miami, Florida, U.S.A. for the disposition of this action.

In the upshot then, on a totality of the affidavit evidence and the applicable law, I find that there is considerable merit in the Claimant's submissions. Judgment is awarded in favour of the Claimant.

Costs are to go to the Claimant and if it is not agreed then it is to be taxed.