



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION**

**CICA (Civil) Appeal No 13 of 2019
(Formerly G 49 of 2018)**

BETWEEN:

MAGDA-ZOE EMBURY

Defendant/Appellant

AND

MCGLYNN ENTERPRISES LTD

Plaintiff/Respondent

BEFORE:

**The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Rt. Hon Sir Jack Beatson, Justice of Appeal**

Appearances:

**Ms. Magda-Zoe Embury in Person
Mr. Andrew Jackson of Appleby, Attorneys for the Respondent**

Heard:

20 April 2021

Oral Ruling delivered:

20 April 2021

JUDGMENT

GOLDRING, President

1. Before giving my judgment in this application for leave to appeal, I just want to observe that in spite of some difficulties, for which we apologise, it was in the end possible to enable Ms Embury, who is applicant in person, properly and fully, to deal with her case.
2. I now turn to the actual substance of the application.
3. Order 14 Rule 1 of the *Grand Court Rules* provides:

"(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to

defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant."

4. Rule 2(1) requires the Plaintiff to provide an affidavit verifying the facts on which the claim is based and stating that in his belief there is no defence to the claim. By Order 14 Rule 3(1):

"Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or that part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried, the Court may give...judgment...for...the plaintiff..."

5. By her judgment of the 22 of January 2019, Acting Justice Gunn found that the applicant, who is a Cayman attorney, had no real or bona fide defence to the respondent's action. Accordingly, she ordered the applicant to pay the respondent the sums he was seeking plus interest. The applicant now seeks leave to appeal that decision, leave having been refused by me on the papers.
6. Before turning, briefly, to the issues, I should observe that the papers before us are those papers which were before me on the application for leave to appeal.

The issues

7. In paragraphs 2-9 of her judgment, the judge set out succinctly the respondent's case. As she put it:

“The Parties

2. *The Plaintiff is McGlynn Enterprises Ltd ('the Plaintiff'); a Cayman Islands exempted limited company.*
3. *Jim McGlynn Sr is the sole director and beneficial owner of the Plaintiff. Mr McGlynn Sr also owns McGlynn Enterprises LLC ('McGlynn USA'), a US-registered company. Ms Lucenti is the Plaintiff's company secretary.*
4. *The Defendant is Ms Magda-Zoe Embury ('the Defendant'), a Cayman Islands Attorney-at-law. At the material time she was a sole practitioner under the*

name Emburys Attorneys.

The Writ

5. *On 19 March 2018 the Plaintiff filed a writ of summons alleging that it had engaged the Defendant to act as its attorney for the purposes of purchasing the property Rum Point Bock 33E parcel 103H16 ("the property"). In the course of that business, the Defendant provided a Completion Statement setting out the various sums necessary to complete the purchase and register the transfer with the Lands and Survey Department ("the LSD"), including -
 - (a) *US\$48,679.94 for stamp duty*
 - (b) *US\$91.46 registration fees; and*
 - (c) *US\$24.39 to obtain a certified copy of the Land Register .**

6. *The Plaintiff alleges that, having transferred funds to the Defendant for these fees, the Defendant failed to pay the stamp duty and registration fee to the LSD, and as a result of the Defendant's failure, the property was not transferred to the Plaintiff. Neither did the Defendant provide the Plaintiff with a copy of the land register evidencing the transfer.*

7. *Upon discovering in June 2016 that the process was incomplete, the Plaintiff took steps to complete registration. In order to do so, the Plaintiff had to pay the sums due in 2012 (US\$48,771.40) as well as additional fees and penalties, totaling an additional US\$73,824.90.*

8. *The Plaintiff asserts that the Defendant was holding the Plaintiff's funds on trust, to apply them for the expressly identified purposes; her failure to apply the funds for their intended purpose (or for the benefit of the Plaintiff at all) constitutes a breach of her fiduciary duty and, consequently, the Plaintiff is entitled to repayment of those funds, with interest.*

9. *Furthermore, (as well as in the alternative to 7 above) the Plaintiff alleges that the Defendant owed the Plaintiff a duty of care to ensure that the stamp duty and registration fees were paid from the funds she received and that the*

transfer of the property to the Plaintiff was registered. The Defendant's failure to apply the sums in a timely manner or at all constitutes negligence and the Plaintiff is entitled to damages in the balance of the funds paid to the Defendant in 2012 but not applied to the transfer as well as the additional costs incurred as a result of late registration. During submissions, Mr Jackson stressed the point that the Plaintiff is not asserting that the Defendant stole the funds, but rather that, for reasons only she knows, she failed to apply the funds as she was obligated to do."

8. There is no doubt that the sums of money were paid over to the applicant attorney for the purposes alleged, that those purposes were never fulfilled, that no money was repaid and, that in consequence, there was some loss. It is, on the face of it, one is bound to observe, difficult in those circumstances to see what the defence can be.
9. The judge summarised the applicant's case in the following way in paragraph 16 of her judgment:

"The Defendant seeks to discharge this burden by establishing that –

(a) she has a good defence to the claims on the merits;

(b) there are multiple issues or questions in dispute which ought to be tried; and

(c) there are other circumstances showing reasonable grounds of bona fide defence."

10. The judge went on to say, in paragraph 18:

"There are obvious conflicts on matters of fact between the affidavits of Ms Lucenti and the Defendant. The summary judgment application is not a trial of the veracity of the affidavits. However, the court does not have to treat all affidavits filed as truthful: Where the proposed defence rests on a question of fact, the court must first ask whether the evidence is credible, when considered with the plaintiff's evidence, and whether there is a fair and reasonable probability that the defendant has a bona fide defence..."

11. Having referred to the relevant authorities, the judge said (paragraphs 20 and 21):

"...when I consider this application I may look at all affidavits critically to

determine whether there is a reasonable probability of the Defendant having a real or bona fide defence.

21. *The Defendant need not show a complete defence to the action, but the Defendant must establish there is a triable issue, i.e. one which merits investigation at trial and which is inappropriate for summary resolution on affidavit evidence."*

12. A number of submissions were made before the judge, some of them rather surprising. It was said that because the applicant was an attorney, she should have leave to defend. Also, that as a matter of principle, she should be entitled to put the respondent to proof. At one stage it was submitted that the respondent should have to prove his case to the criminal standard. It was submitted too that leave to defend should be granted in order to cross-examine Mr McGlynn as to why he established the respondent company.
13. In her draft defence, the applicant stated that she applied the funds as she was contractually obliged to do (see paragraph 28 of the judgment): that they were, in other words, paid over to the Lands and Survey Department. However, she said in her affidavit, she had no "*independent recollection of everything that transpired in the matter.*" She said she had no documentation. She assumed her staff had followed the correct procedure. As to those submissions, the judge said (at paragraphs 32-38):

"32. *At paragraph [sic] 22 and 23 the Defendant states –*

'In this matter, the Transfer of Land documentation was submitted to the Lands & Survey department on or about 10th December 2012...'

'When submitting a Transfer of Land to Lands & Survey, it is a mandatory requirement to submit a draft or cheque for the payment of any stamp duty owed with the Transfer of Land documentation.... The Lands & Survey department will not accept the submission...unless it is accompanied by a draft or cheque for the payment of stamp duty.'

33. *The Defendant exhibits an email from the LSD dated 10 December 2012 confirming submission of the relevant document.*

34. *In summary, to prove that the funds were paid to the LDS, the Defendant*

will seek to rely upon –

(a) Her usual practice;

(b) her personal belief as to the policies and procedures of the Lands and Survey Department; and

(c) an email she received from the LSD.

35. *However, the email (10 December 2012) speaks only to a Transfer of Land document and a 'certified copy' of an unidentified document for the property being received/lodged at the Land Registry. The email does not speak to the LSD receiving payment in any form and, therefore, does not appear to evidence what the Defendant claims it does. This is borne out by the email from Aliceann Kirchmann, Senior Land Registry Advisor (exhibited by the first affidavit of Daniel Hayward-Hughes):*

'A transfer can be submitted without the draft. The email is only acknowledging receipt of the submission.'

36. *Neither has the Defendant spoken to how she intends to prove that the drafts were prepared and delivered, beyond her assertion of the 'usual practice'. She has not spoken positively to her administrative staff being able to confirm that they did carry out these tasks on this occasion. She has not spoken to the existence of bank records, receipts or even a file note confirming the drafts were obtained and submitted. I am bound to conclude that, while the Defendant makes a positive assertion in her draft defence that the drafts were submitted in accordance with her duties, her affidavit evidence lacks credibility to persuade me that there is any evidence to support her case on this issue.*

37. *There is nothing but speculation to support Mr Chapman's argument that the LSD is to blame for the transfer not being completed ('Government loses paper all the time') or that after two years such evidence might yet become available. The Defendant relies entirely on her own understanding of the LSD policies and procedures which is wholly inadequate.*

38. *Neither can I see how the trial process of disclosure, interrogatories and cross-examination might strengthen the Defendant's case as the relevant material would not be in the Plaintiff's possession or knowledge. The Defendant has had two years to obtain the relevant evidence and that*

which she intends to rely upon is seriously lacking."

14. I observe that in her submissions to us the Applicant questioned the appropriateness of the observations made in paragraph 35 regarding the email from Aliceann Kirchmann, the senior land registry advisor. However, it is necessary to read what the judge said in the ensuing paragraphs.
15. In her defence, the applicant asserted she did not have any contract with the respondent company at all but that her contract or her retainer was with Mr McGlynn personally. While there was no formal retainer between the respondent company and the Applicant, the email correspondence, which the judge analysed with care, made it plain that that was an assertion wholly without substance (see paragraphs 43-51 of the judgment).
16. The judge rejected a submission that because the funds came from a McGlynn account in the United States, the respondent company was not entitled to their repayment. The judge found, not surprisingly, this was a payment made on behalf of the respondent company from whatever account it came.
17. The judge also held that the money was paid over on behalf of the respondent company and held on trust by the applicant to be applied in accordance with the instructions which she was given. She found that they were not. She found that that amounted to a breach of the applicant's fiduciary duty. She was plainly right to do so.
18. In another argument mounted by the Applicant before the judge, it was submitted that because the respondent company did not have authority from the finance secretary to hold property, the property in respect of which the payment was made could not be lawfully transferred: that there was merely evidence of an application to enable the property to be held. However, the Applicant had made the application. She continued to progress the transfer of the land. Indeed, she offered to sign as an alternate director. She submitted the form to transfer the land, naming the respondent company as purchaser. The judge rightly rejected the Applicant's argument.
19. The judge also went on to find there was a case of negligence against the Applicant. The allegation was that the applicant owed a duty of care to the respondent company to ensure that the transfer of the property was completed on the 14th of September 2012 as instructed. The defence case was that the applicant's engagement ceased on the closing of the property purchase, as her completion statement, it was argued, set out.

20. The judge, having set out the legal principles, concluded in paragraph 70 of her judgment that:

"It is quite untenable to argument [sic] that ... the Defendant had not agreed to act until registration was complete..."

21. She set out in paragraph 70 (a) to (d) the emails which, in my judgment unarguably correctly, supported her view. She concluded that in the circumstances there was negligence (see paragraphs 71-73 of her judgment).

22. Finally, the judge dealt with what she termed the "*Admission Of Liability*". She said this in paragraphs 75-76 of her judgment:

"75. The most damaging evidence to the Defendant's case are [sic] a series of text messages she sent to Ms Lucenti on 15 March 2017 in which the Defendant appears to accept that she is liable to pay the funds the Plaintiff now claims -

'...I am sending Jim a letter and a legal document...for him to hold personally and in case of my death he can present the documents to my executor to ensure the estate reimburses him for his costs if the bank has not reimbursed me by that point... I hope that the documents I managed to locate so far will help get this resolved.'

'...Long story short Lands is not going to process nor register the documents without the stamp duty. I don't have the BA...BA...CI...Sorry'"

23. As she put it in paragraph 76:

"It is entirely untenable to suggest that the Defendant is not liable for the losses caused to the Plaintiff as a result of her negligence in these circumstances."

The grounds of appeal

24. The applicant submits that there was a triable issue as to whether she applied the original payment for the purposes set out in the Completion Statement. The grounds submit that the judge should not have disposed of the case on the basis of affidavits, that the judge erred in her assessment of the evidence, and that she misidentified the Applicant's defence to the claim.

25. In her submissions to this court, Ms Embury sought to reinforce those submissions by relying upon a recent decision of this court in the case of *Walkers...v Arnage Holdings Limited and others*, CICA (Civil) Appeal 5 of 2020. That was a case very different on its facts from the present, albeit the successful Appellant was a firm of attorneys.
26. Ms Embury submits that like Walkers in that case, a finding against her as an attorney should not be made without a full trial. She has drawn our attention to a number of the specific paragraphs in that authority. I have read them with care. She submits that just as in that case the Chief Justice should not have disposed of the case on a summary basis, so in the present case should not Justice Gunn.
27. She further submits that the judge failed properly to assess the claim for damages and such matters as causation, quantum, the duty to mitigate, “*et cetera*”.
28. As she did to the judge, Ms Embury submitted to us that there is further evidence which would support her case. She asserted that in late 2012 she paid over the money to the LSD. She did not receive a receipt, as it was not the practice for receipts to be issued. She has made enquiries which have revealed that the LSD was in a ‘mess.’ The Applicant accepted there was no evidence from her firm's client account or from HSBC of any transfer of funds. We observe that no further evidence has yet seen the light of day.
29. Ms Embury also submits that there should have been a proper assessment of damages.
30. I have obviously carefully considered each of Ms Embury’s submissions. In my judgment, the judge below very carefully analysed the issues before her. This was a case which, for the reasons which the judge comprehensively set out, she was entitled to consider on the affidavits. In everyday language, it was a clear case in respect of each of the aspects of the findings which the judge made.
31. As to the point about fresh evidence, in her refusal of the application for leave to appeal, Justice Gunn, at paragraph 17, said this:

*"At this stage I am left with counsel's assertions that further evidence might become available that will prove that the funds are either with the bank or CIG. I refer once again to the Vice-Chancellor's dicta in **The Lady Anne Tennant v Associated Newspapers Group Ltd** ... which I set out at paragraph 23 of [my] judgment. It is highly doubtful that, six years after the events, and more than two years since the Defendant was first made aware that there had been problems with stamping and*

registration for this property and had time to investigate the matter, there might be some reliable evidence still to be discovered. I am not persuaded that my conclusions were erroneous or that there is a real prospect that the Court of Appeal might decide the point differently."

32. As to the question of the assessment of damages the judge said in paragraph 27 of that same judgment of refusal for leave to appeal:

"The Defendant submitted that she had not conceded quantum in this matter and that the extent of any damages (if liability is found) is a matter for trial. This was not raised at the substantive hearing and the Plaintiff had submitted records to support their case as to what sums were payable in order for stamping and registration to be completed. Mr Chapman [on behalf of the applicant before the judge] did not expand on this argument and I find that he cannot seek to rely on this issue now, when he did not at least raise the issue at first instance."

33. Moreover, this court has seen the receipt in respect of the payment of the sums claimed.
34. Before concluding this short judgment, I would just make this observation. *Walkers v Arnage and others* was decided on wholly different facts and had a wholly different background. Of course, the court will exercise great care in deciding whether or not it is appropriate to give summary judgment in any case, and will always have in mind the consequences of a finding against an attorney. However, it does seem to me that this was a very clear case in which the judge was entitled to come to the conclusion that she did.
35. In the circumstances, I would refuse leave to appeal.

JUSTICE OF APPEAL FIELD

36. I agree.

JUSTICE OF APPEAL BEATSON

37. I also agree.