Privy Council Appeal No. 36 of 1988

Larry Hone *Appellant*

v.

Canadian Imperial Bank of Commerce *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER 1989

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Oliver of Aylmerton**]*

The Canadian Imperial Bank of Commerce, which is the respondent in this appeal, commenced proceedings on 19th November 1981 in the Supreme Court of the Commonwealth of The Bahamas against the appellant and joined as second and third defendants a company incorporated in the Turks and Caicos Islands, known as Far East Trading Association Limited, and an organisation described as an Anstalt under the name of "Spectrum Establishment" and having its seat in Vaduz in the principality of Liechtenstein. It will be convenient to refer to these defendants as "Far East" and "Spectrum" respectively.

The respondent's claim in the proceedings was for the recovery of a sum of US$100,000 together with interest which had been mistakenly credited to the account of Far East on 3rd October 1980 and had subsequently been transferred, on the appellant's instructions, to the account of Spectrum with a Swiss Bank.

The action was tried before Georges C.J. who, on 12th June 1986, dismissed the respondents' claim. On 30th October 1987 the Court of Appeal by a majority (Luckhoo P. and Henry J.A., Smith J.A. dissenting) allowed an appeal by the respondent, reversed the decision of the Chief Justice and ordered that

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judgment for the sum claimed be entered against the appellant. It is from that order of the Court of Appeal that the appellant now appeals to their Lordships' Board.

Since the questions raised by this appeal depend almost entirely upon what view is taken of the inferences which were capable of being drawn from the evidence given at the trial and the appellant's refusal to disclose matters which must, on the trial judge's findings, clearly have been within his knowledge, it is necessary to set out the background in a little detail. The appellant describes himself as a diamond dealer and real estate investor residing in Palm Beach, Florida. In May 1980 he instructed a Bahamian attorney, Mr. Edward Roberts, to incorporate Far East in the Turks and Caicos Islands as a company limited by shares. That was done and three shares in the capital of Far East were issued to Mr. Roberts and two of his employees, Miss Howson and Miss Clarke. Mr. Roberts became President and Miss Howson Secretary of Far East. Neither Mr. Roberts nor either of his two employees claimed any beneficial interest in the shares and Mr. Roberts' evidence was that he was a nominee President taking his instructions from the appellant. The appellant throughout purported to be acting on behalf of Spectrum, an entity in Liechtenstein then described as "Spectrum International Limited" and Miss Howson and Miss Clarke each signed a declaration of trust declaring that her share was held upon trust for Spectrum.

On 30th July 1980, again acting on the appellant's instructions, Mr. Roberts and Miss Howson arranged for the opening by Far East of a bank account with the respondent bank on which each of them was an authorised signatory. There was an initial deposit in the account of US$5,000. There was, it appears, no evidence given at the trial regarding the origin of this sum and no significance attaches to it. On 12th September 1980 the respondent was instructed by cable by the Union Bank of Switzerland (UBS) to credit the account of Far East with a sum of US$100,000 and to notify Mr. Roberts. That was done and Mr. Roberts, acting again on the appellant's instructions, directed the respondent to place the sum on fixed deposit on daily call. Owing to a muddle in the respondent's office, the Far East account was credited in error on 3rd October 1980 with a further sum of US$100,000 for which in fact the respondent had received neither instructions nor cover. Mr. Roberts was notified by the respondent and, again on the appellant's instructions, directed that the sum be placed on fixed deposit on seven day call.

The respondent's mistake remained undiscovered until March 1981 and by the end of February the amount standing to be credited to Far East's account with the

respondent exceeded US$213,000. On 27th February 1981 Mr. Roberts, on instructions from the appellant, wrote to the respondent requesting that a sum of US$210,000 be remitted by cable to UBS "attn Paul Haefelin re Spectrum" and that the balance be placed to the credit of Far East's current account. That request was complied with by the respondent which cabled the sum to UBS for the credit of Spectrum by order of Mr. Roberts.

The mistake having been discovered, the respondent advised Mr. Roberts of an overcredit of US$106,696.07 (which included accrued interest) and by letter dated 27th March 1981 sought reimbursement of this sum. Mr. Roberts immediately consulted the appellant who, it appears, said that he needed time to consult his Swiss bankers.

On 16th April 1981 the appellant had a meeting with the manager of the respondent's Nassau branch in the course of which he announced that he had throughout acted as agent for Spectrum, that he was out of favour with Spectrum as a result of the overpayment and that Spectrum was claiming that it was his responsibility. An enquiry as to the identity of the person or persons who owned or controlled Spectrum produced no answers save that the appellant was about to consult a Mr. Trenchard, a Bahamian attorney. However, the information sought was never forthcoming. Instead, on 6th May 1981, Mr. Trenchard, ostensibly acting on behalf of Far East, wrote repudiating any liability to reimburse the respondent. It seems that before receiving this letter the respondent's manager had learned from Mr. Roberts that Trenchard had advised that neither the appellant nor Mr. Roberts was under any such liability.

The respondent then sought, through its Zurich branch, to obtain recovery of the sum in Switzerland and to find out the identity of the person or persons having control of Spectrum. This met with no success. The only information received about Far East and Spectrum, which seems itself to have been based entirely on a hearsay account, was that the appellant had been approached but had denied any connection with Far East and that he was "probably a partner of Spectrum", though whether this was intended to mean that he was in partnership with Spectrum or that he, in partnership with someone else, controlled Spectrum is not clear.

On 29th July 1981 the appellant had a meeting with the respondent's area manager, Mr. Cotter, at the respondent's Nassau branch with a view to discussing repayment. In the course of this he said that he had acted merely as agent for Far East and denied having received any personal benefit from the repayment. He did, however, make what seems a rather curious

proposal from one who disclaims any personal liability for repayment of a very large sum of money. He suggested that if the respondent would lend a sum of 1 to 1.2 million dollars to a company owned by him and his wife in order to enable it to purchase an island known as Whale Cay, he would arrange for the respondent to receive a sum equivalent to the amount of the overpayment by means of what he described as a "finder's fee". The respondent's counter-suggestion that the money should be reimbursed in full before the initiation of negotiations for the proposed loan was rejected.

Nothing emerged from this discussion and the proceedings from which this appeal arises were then commenced by the respondent. It is of a little importance to see how the bank's case was pleaded. The first three paragraphs of the statement of claim were formal, simply describing the respondent, the appellant and Far East and pleading that Far East was incorporated on the instructions of the appellant given to Mr. Roberts, an allegation which, surprisingly, was specifically denied in the defence. Paragraph four describes Spectrum as a "judicial entity" (which perhaps was a misprint for "juridical entity") known as an Anstalt which had been represented by the appellant to be the beneficial owner of the shares in Far East and of which the appellant was at all material times the beneficial owner. Paragraph five pleaded the account of Far East with the respondent and that it was operated on the instructions of either Mr. Roberts or Miss Howson, who in turn took their instructions from the appellant - allegations which it might be thought were uncontentious but which were again, rather surprisingly, specifically denied in the appellant's defence. Paragraphs six to fourteen pleaded the facts already recounted regarding the credits to Far East's account, the transfer to Spectrum and the refusal of the defendants to repay the sum credited to Far East's account in error. Paragraph fifteen pleaded that the appellant had disclaimed responsibility averring that he was not the owner of either Far East or Spectrum but that he had throughout acted as agent for Spectrum the identity of whose owner he had failed to disclose. The statement of claim concluded with a submission that the appellant was estopped from denying that he was the owner of Spectrum or alternatively that he was personally liable on the ground that he was an agent for an undisclosed principal.

Neither Far East nor Spectrum served a defence but a defence was served on behalf of the appellant which in effect denied the entirety of the statement of claim other than the first two formal paragraphs. The only other allegation admitted was that contained in paragraph fifteen that the appellant claimed to have acted as agent for Spectrum.

At the trial before Georges C.J. the respondent led evidence to prove the incorporation of Far East, the opening of the account and the facts in relation to the mistaken payment and its transfer to Spectrum's account in Switzerland. Mr. Roberts also gave evidence that he acted throughout on the appellant's instructions alone in relation to the affairs of Far East and its finances and that the shares in Far East were beneficially owned by Spectrum. His evidence was that from the outset the appellant had said that he was acting as Spectrum's agent and that he (Mr. Roberts) incorporated Far East on behalf of Spectrum. Objections on the ground of professional privilege having been waived by the appellant, Mr. Roberts produced the declarations of trust which had apparently remained in his custody. He knew, he said, of no beneficial interest in the appellant. He knew nothing about Spectrum apart from its address but said that the appellant had never told him whether he had any beneficial interest in Spectrum. He had ceased to act for either the appellant or Far East about a year after the events giving rise to the action.

The only other evidence called by the respondent relative to the beneficial ownership of Spectrum was that of Mr. Cotter, who had been the respondent's area manager in Nassau at the material time and who produced and testified to various contemporary memoranda relating to meetings with the appellant- and in particular the meeting relating to the proposed loan for the purpose of Whale Cay - and reports from the respondent's Zurich branch with regard to the ownership of Spectrum. These were entirely hearsay but seem to have been put in and received by the judge without objection. In cross-examination he said that he was not aware that the appellant was an agent for anyone and that "he always spoke to me as a principal". At the meeting on 22nd April the appellant gave no information that there was anyone else interested in either Far East or Spectrum. The bank's case was, perhaps, summed up in the penultimate answer which Mr. Cotter was recorded in the judge's note as having given in his cross-examination:-

> "I did not know he was acting as agent. The only person we saw was Hone. The only person who responded when we sent a message to Zurich was Hone. We never heard of any one but Hone."

That was really the sum total of the evidence adduced by the respondent to support a case which rested upon an allegation that the appellant either had estopped himself (in some way never particularised) from denying that he was the beneficial owner of Spectrum or actually was its beneficial owner. It had not been suggested in the pleadings nor did it appear to have been urged or suggested at the trial that the appellant was aware, at the time of the transfer to Spectrum or at any time before the mistake was discovered by the

respondent, that the credit to Far East's account had been made in error. The claim against him, therefore, had to rest upon satisfying the court that it was he, the appellant, personally who had been unjustly enriched by the sum paid in error either because he had received the money himself or because it had been received by Spectrum as his alter ego.

The appellant's own evidence did little to cast further light on the matter though not, it appears, for want of trying on the part of counsel for the respondent. The appellant confirmed Mr. Roberts' evidence that he had given the instructions for the formation of Far East on behalf of Spectrum in order, he said, to set up an off-shore organisation for dealing in diamonds. He was remarkably unforthcoming about his principal in this transaction. His instructions, he said, emanated from a man called Pinter in Geneva but he denied that he knew then or now who owned Spectrum. He denied that he had received any benefit from the overpayment remitted to Spectrum and he denied having been a signatory on Spectrum's account or having held shares in or had any beneficial interest in either Spectrum or Far East. He did, he said, seek to have Spectrum return the overpayment. His story was that Pinter held some merchandise (presumably diamonds and presumably for Spectrum) which was sold to some buyers for US$200,000, which sum was to be remitted to Far East. On receipt of that sum, he was to tell Pinter (as, he said, he subsequently did) so that the goods could be released. No explanation was tendered of whence the funds came or why he was expecting them (if he was) in two tranches of US$100,000. He had, he said, no dealings with Spectrum before the incorporation of Far East and none after the overpayment apart from contacting Pinter who, he said, had said he would look into it and take care of it. The payments made into Far East's account had been retained on deposit until February 1981 because they might be needed for a deal which he (the appellant) was negotiating for the purchase of stones from the Soviet Union. That deal fell through and the money was then remitted to Switzerland.

His evidence was, as Georges C.J. observed in the course of his judgment, a complete repudiation of his defence, which he denied ever having seen before the commencement of the hearing - a denial which Georges C.J. plainly found himself unable to accept. Having denied in his defence that he had represented Spectrum to be the beneficial owner of the shares in Far East, he now asserted in his evidence that he had throughout acted as Spectrum's agent. Yet from first to last he produced not a single document indicating his appointment or manifesting any instructions which he received. This and the fact that the declarations of trust were produced at the trial from the custody of Mr. Roberts, who had previously been his attorney

even though his evidence was that he had ceased to act for Far East some four years before the trial, led Georges C.J. to conclude that, in incorporating Far East, the appellant was not acting, as he claimed, solely as agent for Spectrum but must also have had some beneficial interest in it. He pronounced himself, however, quite unable to determine on the evidence what was the extent of the appellant's interest. The evidence did not show that he had held himself out as having a beneficial interest so that the case on estoppel must fail. Nor was it possible to deduce a liability to repay from the mere fact that the appellant had a beneficial interest of some unascertained extent. As regards the alternative claim based upon the appellant having acted as agent for an undisclosed principal, Georges C.J. found the basis for this contention (as do their Lordships) difficult to grasp. It was not suggested that the respondent ever had any dealings with the appellant personally prior to the overpayment. In these circumstances, Georges C.J. found that the respondent had failed to substantiate its claim and dismissed the action.

The respondent appealed to the Court of Appeal, contending that the Chief Justice ought to have inferred from the evidence before him that the appellant was the sole beneficial owner of Spectrum, so that the receipt by Spectrum was tantamount to a receipt by him. There was no appeal against the rejection of the alternative ground of liability contended for in the court below. The Court of Appeal, by a majority, allowed the appeal holding that the evidence sufficiently established that the appellant was the sole beneficial owner of Spectrum and that, accordingly, its separate corporate existence could be ignored for the purposes of establishing his liability to repay.

Smith J.A. dissented, holding that the evidence was barely sufficient to justify an inference that the appellant had any beneficial interest and was certainly incapable of supporting an inference that he was the sole beneficial owner of Spectrum. That is the principal - indeed really the only - question raised by the appeal. Nothing turns here upon the advantage which the trial judge had in seeing and hearing the witnesses. He clearly disbelieved the appellant and the only question is whether, in the light of that disbelief and of his finding of fact that the appellant had a beneficial interest of some sort, the court could draw the further inferences necessary to satisfy the burden of proof which the respondent assumed of establishing that Spectrum was in truth beneficially owned by the appellant and thus properly to be regarded as his alter ego.

In their Lordships' view the inferences which the majority of the Court of Appeal drew were, in the

circumstances, not only permissible but were inferences properly to be drawn in circumstances where the only person with personal knowledge of the truth and therefore capable of giving evidence of the precise position declines to do so. The problem has to be looked at in the light of the circumstances in which the appellant came to defend the action and to give his evidence. At the close of the respondent's evidence it could be said that there were numerous facts proved which, if they did not conclusively establish, clearly lent support to, a conclusion that the appellant was the man behind Spectrum. To begin with there was the fact that, from first to last, the only person who initiated any action was the appellant. It was the appellant who caused Far East to be incorporated; it was the appellant who gave the instructions for the opening of the account; it was the appellant who gave instructions for placing the funds on deposit, for taking the funds off deposit and for remitting them to Spectrum in Switzerland. It was from the appellant that all information about Spectrum emanated and when enquiries were made in Switzerland it was from the appellant that such inconclusive answers as were given were derived. In relation to the declarations of trusts held by Mr. Roberts long after he had ceased to act for Far East it was the appellant who waived the privilege. When it came to discussions about repayment, it was the appellant who, as an inducement to the respondent to lend money to his company, professed himself able to arrange for reimbursement. So from beginning to end nobody connected with the case had any contact with anybody but the appellant.

It was against this background that the appellant, on whose behalf a patently false defence had been served, went into the witness box. In support of his assertion that he had throughout acted solely as agent he produced nothing but assertion. Not a single document, not a single instruction, no letter of appointment was ever produced. Although he claimed the arrangement was that he was to be rewarded by a commission, he was compelled to admit that he had never drawn it. Moreover, the monies credited to Far East's account and claimed by the appellant to be Spectrum's were, on the appellant's own account of the matter, left by him on deposit in order to finance a deal which he was negotiating with a third party in The Bahamas. Against this background the appellant's assertion that he never knew and still did not know who owned Spectrum and his assertion that he acted solely as agent for an organisation in which he had no interest at all and of which he knew nothing beyond that it existed stretches credulity to breaking point. It is no surprise that the judge rejected his evidence. But the rejection of that evidence necessarily involves the contrary proposition that the appellant knew the relevant facts about Spectrum and who was its beneficial owner but that he was declining to disclose them.

The appellant, as the only person who introduced Spectrum onto the scene and the only person who knew or could know anything about its constitution, composition or ownership, can hardly complain if, when he refuses to disclose anything at all of what he must clearly have known, an inference is drawn that Spectrum is his creature. The trial judge was prepared to go no further than to draw an inference that he had some beneficial interest, but once he was prepared- and, clearly, justifiably prepared - to draw that inference, there was, in their Lordships' view, no reason for making, in the face of a persistent refusal by the appellant to cast any light on the matter by disclosing what his interest was, an assumption that it was anything less than 100%. Such an inference was entirely consistent with all the facts which had emerged in the evidence and it was one which the court was well entitled to draw. The Court of Appeal was in as favourable a position to draw it as the trial judge and their Lordships are unpersuaded that their conclusion was wrong.

The question then arises as to the consequences. It is objected that the respondent led no evidence as to nature of the entity known as an Anstalt and the extent to which those who control and conduct its affairs can be made liable for its obligations either under its constitution under the law of Liechtenstein or by lifting the corporate veil. There is, however, a simple answer to this, which renders the adducing of such evidence unnecessary. The action is one for money had and received and is based on unjust enrichment. If it was permissible, as in their Lordships' view it is, to infer that the appellant was the beneficial owner of Spectrum and thus that Spectrum was his alter ego, it really becomes quite unnecessary to speculate upon Spectrum's constitution and nature. The money was received and the unjust enrichment occurred when the appellant caused it to be remitted for his own benefit to Spectrum. It was he who received it; it was he who was unjustly enriched; and it is he who is liable to repay it.

Objection is also taken that the case found by the Court of Appeal to be established was not the case pleaded by the respondent. What was relied on in the respondent's pleading was an estoppel in the first instance or, as an alternative, an allegation that the appellant acted as agent for an undisclosed principal. Both were rejected and the case made on the basis of the Court of Appeal's conclusion of beneficial ownership was not, it is submitted, the case pleaded. Their Lordships are unimpressed by this argument. The real issue in the case, that of the appellant's beneficial ownership, was quite clearly and distinctly raised on the pleadings, however the consequences of it were there expressed as a matter of law. Once that beneficial ownership was established, the conclusion that Spectrum

was no more than the appellant's alter ego was both permissible and indeed inevitable in the absence of evidence from the appellant to the contrary which he could, if it existed, easily have given but declined to give.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs before the Board.