IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL NO. 25 OF 2006

Between:

WENDELL HOLLIS

First Appellant

and

JOSEPH C. H. JOHNSON

Second Appellant

and

ALEXANDER SCRYMGEOUR

Respondent

Before: Hon Justice Zacca. President
Hon Justice Evans, J.A.
Hon Justice Ward, J.A.

Date of Hearing: **4th & 5th June 2007**
Date of Judgment: **15th June 2007**

Judgment

President:

This is an appeal by the Trustees of the decision of the learned trial judge in which he found that an advance made by John Scrymgeour (John) towards the purchase of Greensleeves Cottage was not a loan.

In 2001, John Scrymgeour ("John) was living in the cottage with his third wife Dana. He was renting it but the owner decided to sell. The father wanted to buy the property but he could not, because he did not have Bermudian status. He hoped to acquire the status sometime in the future, but something swifter was required if he was to buy the cottage as his own.

On the other hand, his son the respondent (Alex) did have Bermudian status and therefore was eligible to buy the freehold. His attorney and close friend devised a scheme to achieve what the father wanted.

On November 6th 2001, a trust was formed called the Interior Trust. The attorney (Mr. Hollis) and the second appellant were the Trustees. Alex was the sole beneficiary. The Trust bought the cottage with moneys provided by the father, $1.2 million in cash and $500,000 borrowed by the Trust from The Bank of Bermuda and secured by a First Mortgage which the father undertook to service. Completion took place on 31 January 2002.

John remained in occupation and paid the First Mortgage outgoings. No written agreements were drawn up apart from the initial Trust Deed (which listed the Trust Capital as $100) and the First Mortgage with the Bank. The informal arrangement was that father rented the cottage from the Trust and paid the mortgage outgoings in lieu of rent. This continued until early 2003 when John fell ill and moved to New York. The cottage was empty for a time, and then in June 2003 Alex moved in with his family. John remained in New York as his health deteriorated and he died in late August 2003. But before he died he either obtained or became eligible for Bermudian status himself. Both Trustees were named Executors of the Estate of John.

There was ample evidence that from the time he decided to move to New York John wanted Alex to be able to live in the cottage and bring up his family there. He kept to this view even after he became eligible to own the cottage himself, having obtained Bermudian status in August 2003. However, he came under pressure from his wife Dana, not Alex's mother, to claim it for himself, presumably by becoming a beneficiary under the Interior Trust. It is unclear whether she wanted him to do this so that she would have the right to live there after his death or whether she merely hoped that it would form part of his estate. Whichever it was, John was against making any change and none was made. It appears that Alex ceased to occupy the cottage before his father died, but the reason is unclear.

That is the story in outline. The issue is whether the $1.3 million provided by John which enabled the Trustees to make the purchase was a loan to them which is now repayable to his estate, or a further contribution to the Trust assets which the Trustees now hold for Alex, the sole beneficiary of the Trust.

Mr. Hollis, the attorney and trustee, who is also an executor of father's will, now claims that it was a loan. He relies upon a letter which he wrote to the Bank on 10th December 2001 soliciting the First Mortgage loan and stating that the balance of the purchase price would be borrowed by the Trustees from John who would become the Second Mortgagee and who would occupy the property as tenant under an agreement to be drawn up. Mr. Hollis stated that this letter was written having received instructions from the father.

However, none of these further documents was ever executed, and Mr. Hollis seemingly forgot that the advance was intended to be a loan. He invariably assured Alex that the property was his and he would be able to continue living there after his father died.

But he said in evidence that after father died and he became executor of the estate, he looked through his files and found his letter to the Bank saying that the payment was intended as a loan. This reminded him, he said, that those were his instructions at the time, though no other record of them exists. (He also found a Balance Sheet of John's asset which proved to be of no evidential value.)

Mr. Hollis added one piece of evidence about John's intentions. He said that at one stage he spoke to John about the second mortgage but John told him "to leave things as they were", or words to that effect. This he said occurred soon after the purchase of the cottage. If the advance was a loan to the Trustees, the implications are quite extraordinary. The Trustees became potentially liable to repay it, but initially they had insufficient Trust assets to do so. The payment included more than $200,000 for the costs of purchase etc. which would only be covered by an increase in the market value of the property over time. Secondly, if the payment was 100 per cent repayable to John or his estate, Alex had insufficient means to do this and it was impossible to regard the property as a future home for himself and his family. Yet that was the assurance he was given, both by his father and by Mr. Hollis, many times and even after his father died. As the trial judge put it, if the advance was a loan, the gift was illusory.

This is a sorry story and the less said about the legal implications of it, the better. The overwhelming inference is that the Trust was devised as a legal means of enabling John to buy the cottage for his own use until he died, by taking advantage of Alex's Bermudian status. When he died, Alex as sole beneficiary effectively would inherit the right to live there. (There seems to have been no suggestions that he would have to wait until the death of the survivor or that his step-mother would have a prior right to remain in occupation when John died.)

The reality was that John was buying the cottage for his own use during his lifetime. This made the loan theory nonsense; John was not lending the money to himself. And it was also nonsense to suggest that the Trust of which Alex was a sole beneficiary was liable to repay the full amount of the advance made by John, because that would mean that its total obligations to the Bank and to John or his estate were more than $200,000 greater than the market value of the property at the time. Even if the property value increased sufficiently to cover this deficit, Alex would not be able to continue living there.

If the loan suggestion had been seriously thought through (which it almost certainly wasn't) it would have had to be abandoned or modified, and it is perhaps unsurprising that no loan documents, let alone a formal second mortgage deed, were ever produced. They would have exposed the shortcomings in the scheme, as belatedly this litigation has done.

What is clear, however, that when circumstances changed – John no longer needed a home in Bermuda, but Alex did - John made it clear that he wished Alex to regard it as his own.

That was inconsistent with there being an outstanding loan obligation to him or his estate and was equivalent to treating the equity value of the cottage, after repayment of the Bank's mortgage loan, as the property of the Trust. John's intention at that stage was clear, and it probably was his intention throughout.

Whether the initial arrangements for which Mr. Hollis was responsible achieved that result may be open to question, but that is no longer material.

Much play has been made in argument with the legal concepts known as the 'presumption of advancement' and the so-called 'presumption of loan'. Neither of these, in my view, plays any useful part in the analysis of this transaction. Ironically, perhaps, the circumstances in which the payment of $1.3 million was made may demonstrate that the presumption did not apply. John's reason for making the payment, nominally to the Trustees, was not to benefit Alex but to obtain for himself the advantages of his son's Bermudian status.

The evidence disclosed that Mr. Hollis did not mention or discuss the loan with Alex and that Alex knew nothing about the trust.

When Dana requested Alex to vacate the cottage, Hollis said to Alex "she doesn't have the right to do that. The property belongs to the trust and you are the beneficiary".

Mr. Hollis stated that he assumed that the father would cover the advance of funds from his bank account by a promissory note or some other loan document as he had done with the apartment in New York.

When questioned by counsel for Alex at the trial about the discussion with the father about finalizing the loan, Mr. Hollis stated in evidence:

> "No we discussed it, and I said to him, does he wish to have the security that a second mortgage would give him and he indicated that he did not, that he was satisfied with the way it was."
>
> Q. And so in other words you asked him "Did he want a second mortgage, And he didn't want one"?
>
> A. "Exactly."

There were several telephone conversations between Alex and Mr. Hollis in which Alex discussed ways of using Greensleeves Cottage to provide funding for his father's illness.

The preponderance of evidence shows that the father intended that this cottage was to belong to Alex. This could have not have been achieved if the money advanced was a loan.

The trial judge in his judgment stated:

> "I am therefore satisfied that at the time Greensleeves Cottage was purchased, father intended to loan the Interior Trust $1.1 million which was to be secured by a second mortgage". This finding was based on the letter to the Bank.

The trial judge also stated:

> "Matters do not end there. Mr. Hollis subsequently approached John and sought instructions as to whether he was to formalize the second mortgage. Mr. Hollis said John asked him what is entailed. Mr. Hollis explained to John that the second mortgage involved drawing of a deed and the payment of stamp duty. John then responded "no leave it like it is. Mr. Hollis took from this exchange that John did not want to incur further legal expense on stamp duty and was satisfied with having an unsecured loan."
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> "In my opinion John's response "no leave it like it is" is somewhat ambiguous. I am also somewhat surprised that Mr. Hollis did not suggest that the loan be memorialized by a promissory note which would have attracted stamp duty of one thirtieth of the per cent of the amount loaned."
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> "I am satisfied John's subsequent conduct helps to resolve the ambiguity presented by his response "no leave it like it is."
>
> "In my view when John repeatedly told Alexander that Greensleeves Cottage was his and that he wanted him to raise his family from Greensleeves Cottage in Bermuda, John intended that Alexander should receive Greensleeve Cottage unencumbered by the $1.1 million provision of the purchased price.
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> "In my opinion John would not have led Alexander to believe Greensleeves Cottage was to be his, if he intended the gift to be illusory because of the $1.1 million loan."

Finally the trial judge held:

> "In the circumstances I am satisfied that when John told Mr. Hollis "no leave it as it is", he was attempting to convey to Mr. Hollis that he did not want to formalize the loan on the property. I therefore find that John's provision of the balance of the purchase price of Greensleeves Cottage was not by way of a loan."

Based on the evidence which was before him, we are of the view that it was open to the trial judge to come to the conclusion he did. I found no error in his decision. Whatever had been the position when the letter was written to the Bank, the evidence clearly shows that John did not wish Alex to have the Cottage encumbered by a loan which would have defeated his wish for Alex to have the house for himself and his family.

In the circumstances, the appeal is dismissed and the decision of the Trial Judge affirmed. Costs of Appeal to be the respondent to be taxed if not agreed. Costs to be paid by the Executors of John's estate.

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Zacca, E. President

I agree _____

Evans J.A.

I agree _____

Ward J.A.