The Court of Appeal for Bermuda

CIVIL APPEAL No. 3 of 2010

Between:

INTERINVEST (BERMUDA) LIMITED
-and-
DR. HANS P. BLACK

Appellant

-V-

REGULA ADOBIE

Respondent

Before: **Zacca, President**
Ward, JA
Auld, JA

Date of Hearing: **Wednesday, 9 June 2010**
Date of Judgment: **Thursday, 17 June 2010**

Appearances: Mr. D. Duncan for the Appellant
Mr. J. Pachai for the Respondent

JUDGMENT

WARD, JA

1. On the 16 January Judgment in default of Defence was entered against the Second Defendant in favour of the Plaintiff in the sum of seven million three hundred and five thousand Swiss Francs together with unliquidated damages to be assessed.

2. On the 13 February 2009 the Second Defendant applied to set aside this default judgment. The Application was refused on the ground that the Second Defendant had not met the primary test for setting aside the default judgment by demonstrating the existence of a Defence with real prospects of success.

3. Nevertheless, for reasons given in paragraph 28 of the Ruling of 1st June 2009, the learned Judge set aside the default judgment against the Second Defendant on terms that the Second Defendant pay into Court within 28 days or otherwise secure the sum of $1 million and that there be trial of a preliminary issue on an expedited basis.

4. On the 1st June 2009 Kawaley J made a Ruling that the Plaintiff's Summary Judgment Application against the First Defendant be granted in the minimum amount of US $5 million plus interest and damages to be assessed, with costs to be taxed, if not agreed. The learned Judge held that the First Defendant's defence does not raise any triable issues with respect to the Plaintiff's claim for damages for the failure to repay the monies she placed with the company for investment, although the precise sum due in excess of the minimum amount of US $5 million (and as converted into Swiss Francs) is unclear. The learned Judge granted the First Defendant

unconditional leave to defend with respect to the claim in excess of US $5 million.

5. It is not disputed that the First Defendant received US $6 million in three tranches of $2 million each on or about the 5th and 17th November 2004 and 5th September 2005 from the Plaintiff at the request of the Second Defendant, the Chairman of the First Defendant, for the purpose of investment on her behalf in a fund called the Hedge Hog and Conserve Fund. That money has not been repaid, notwithstanding demand was made on the 31 May 2007 and thereafter. The learned Judge found that on the 18th June 2007 the Second Defendant emailed the Plaintiff indicating that because the Hedge Hog Fund and Conserve Fund investment was with a Hedge Fund, redemption would only take place in accordance with the Fund's rules and the next redemption date was 15 November 2007 for value 31 December 2007. By return email of 19th July 2007, the Plaintiff insisted that she was entitled to redeem at any time pursuant to clause seven of the Agreement. By email of the 28th November 2007, the Plaintiff again demanded immediate redemption under the Agreement. The monies have not yet been repaid.

6. The money was invested under an Investment Advisory Agreement dated 27th May 2004 and made between Interinvest (Bermuda) Limited and Mrs. Regula Dobie of Niarobi, Kenya. It is signed by Hans P. Black as director of Interinvest and Regula Dobie as client. Under Schedule A thereof, the only client named is Mrs. Regula Dobie and her address is that given for receiving notices. On the 13th July 2005 the Second Defendant wrote to the Plaintiff in London, England assuring her that they had "gotten off to a reasonable start and we have been able to accumulate some of our favourite companies at good prices." It is clear that the monies invested were accepted as being the property of the Plaintiff.

7. At all material times Dr. Black was dealing with Mrs. Dobie. After demand was made on the 31st May 2007 for repayment, Dr. Black wrote to Mrs. Dobie on the 18th June 2007 and he assured her,

> *"Your investments in Hedge Hog which were made in the fall of 2004 and then again in 2005 have shown good performance."*

He continued,

> *"Although we regret your decision to close your investment in Hedge Hog, we do need to point out that the investment in this Fund which was made with your approval cannot simply be cashed out at any time. As with other Hedge Funds, there are certain redemption dates in place each year for this process….. The next redemption date limit is November 15 for year end 2007 value."*

On 22nd October 2007 Dr. Black wrote to Mrs. Dobie in part,

> *"It is our understanding that you wish to redeem these shares at the end of this year which would be the next available redemption date for this Fund."*

8. The end of the year passed without the repayment of the $6 million investment.

9. The Second Defendant on behalf of the First Defendant has applied for leave to appeal out of time against the Ruling of 1st June 2009 on the ground that fresh evidence be admitted as new information has come to the First Defendant's knowledge that the Plaintiff is not the proper party to the proceedings, that Amina Holdings Limited, thought to be controlled by the Plaintiff, is the proper Plaintiff and holds shares in Hedge Hog and Conserve Fund in a nominee name, and that Hedge Hog and Conserve Fund has more shares issued than the number of shares recorded. The Application for Leave to Appeal Out of Time to set aside the default Summary Judgment is also based on alleged factual errors on the part of the Judge.

10. On the 7th April 2010 the First Defendant was granted Leave to Appeal on the ground that fresh/additional evidence might be admitted before the Court of Appeal based on the proposition that Mrs. Dobie was not the correct Plaintiff but that a company controlled by her, namely, Amina Holdings Limited, is the proper party to be named as Plaintiff.

11. On the 19th April 2010 the Plaintiff/Respondent filed a Preliminary Objection under Order 11 Rule 14 that the Appellant is not entitled to rely upon fresh evidence for the purposes of this appeal by reason of the fact that the Applicant could with reasonable diligence have produced the said fresh evidence at the initial hearing of the Summary Judgment Application since it was in the possession of the Appellant's former attorneys in advance of the said hearing and sought an order setting aside the Ruling of 7th April 2010.

12. In the final analysis the Preliminary Objection was not vigorously pursued, and it was conceded that in Bermuda the test with respect to fresh evidence is less restrictive than that which operates in England following *Ladd v Marshall* [1954] 3 All E.R. 745. This is because the language of Section 8 (2) of the Court of Appeal Act 1964 and section 14 (5) of the Civil Appeals Act 1971 confers on the Court full discretionary power to admit fresh evidence on appeal without the constraints of the English Order 59 Rule 10 (2) of the Rules of the Supreme Court 1999 under which further evidence on appeal would only be admitted "as to matters which have occurred after the date of the trial or hearing except on special grounds." So the question now before the Court is not whether fresh evidence can be admitted but rather whether leave should be granted for its admission in the circumstances of this case.

13. As Kawaley J said on granting leave to appeal on 7th April 2010, such leave was only granted, "Because the Applicant's attorneys

had the ingenuity to construct an arguable appeal in circumstances where the merits in terms of general notions of justice lie heavily on the Respondent's side." We entirely agree. The advancement of technical points which have more value as student examination questions should not be encouraged where the result would be to produce more delay and would defeat the ends of justice.

14. At all material times Dr. Black was dealing with Mrs. Dobie. We are not satisfied that the introduction of fresh evidence would materially affect the outcome, for whether the investment of $6 million was provided by the Plaintiff in her personal capacity, or through her alter ego, Amina Holdings Limited, who could be joined as a co-plaintiff, the receipt of the monies and the failure to repay it are beyond dispute.

15. Leave to adduce fresh evidence is refused and the Summary Judgment of the 1st June 2009 is confirmed.

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Ward, JA

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I agree — Zacca, President

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I agree — Auld, JA