In The Supreme Court of Bermuda

COMMERCIAL COURT
2008: No. 264

BETWEEN:

PAUL RODRIGUES

Plaintiff and
Defendant to Counterclaim

-and-

M & M EXCAVATION LTD

Defendant and
1st Plaintiff to Counterclaim

and

MICHAEL MACLEAN

2nd Plaintiff to Counterclaim

Date of Hearing: 3rd August 2010

Dennis Dwyer of Wakefield Quin, for the Plaintiff; and
Ben Adamson of Conyers Dill & Pearman for the Defendant and the Plaintiffs to the Counterclaim.

JUDGMENT

1. This matter came before me on the trial of two issues raised by the Counterclaim, which were tried as preliminary issues pursuant to an order of Kawaley J of 10th September 2009[1]. The two issues directed to be tried were:

> (1) Who owned the pool business that was trading under the name of Geronimo Pools at the time of the Amalgamation Agreement?

[1] That Order was made by consent. It also transferred the action to the Commercial List.

(2) If the answer to (1) above is Rodrigues Trucking and Excavation Ltd, was the said pool business sold to M&M Excavating (*sic*)[2] Ltd. as part of the said Amalgamation Agreement signed between Rodrigues Trucking and Excavation Ltd. and M&M Excavation Ltd.

2. I heard the matter on 3rd August 2010, and during the trial took oral evidence from the parties and their witnesses. At the conclusion I found in favour of the position contended for by the Counterclaim, namely that Rodrigues Trucking and Excavating Ltd ('RTE') owned the pool business that was trading under the name of Geronimo Pools at the time of the Amalgamation Agreement, and that it was sold to M&M Excavation Ltd. as part of the amalgamation agreement. I promised to give written reasons for my decision at a later date, and now do so.

3. Many of the background facts are agreed. The plaintiff is the former owner of RTE. In or about July 2008 he essentially sold his business to the first defendant ('M&M'), which is owned by the second defendant. The transaction consisted of the sale of some real estate and the amalgamation of the two companies, the latter being effected pursuant to an Amalgamation Agreement of 15th July 2008.

4. Disputes arose between the parties, and litigation ensued. The heart of the questions before me is whether a pool installation business, Geronimo Pools ('Geronimo'), which the plaintiff contends he operated personally, was separate and distinct from the business of RTE, or was otherwise carved out from the sale and amalgamation of the businesses and retained by the plaintiff.

5. I find that Geronimo had no separate existence from RTE. It was operated by it, using its equipment and personnel. Its accounting was managed through RTE's accounts. It described itself as a subdivision of RTE.

6. Thus, in a fax of 17th May 2005 to the Department of Immigration on RTE letterhead, Geronimo was described as a subdivision of RTE, the letter stating "we sell fibreglass pools and install them into the ground."

[2] The names of the companies as set out in the Amalgamation Agreement are Rodrigues Trucking and Excavating Ltd and M&M Excavation Ltd, and I take those to be correct forms.

7. In a letter of 4th August 2005 signed by the plaintiff, he wrote:

> "I respectfully request permission to employ Mr. Celio Senoni, as Mason here at Geronimo Pools, a subdivision of Rodrigues Trucking and Excavating Ltd.
>
> It is vital that I fill this post full time as soon as possible, as we have numerous contracts held under Rodrigues Trucking; for installation of pools. To complete the process of installation we require full time qualified masons to complete the decking and construction of the pool area."

That letter was on letterhead which read:

GERONIMO POOLS

RODRIGUES TRUCKING AND EXCAVATING LTD.

8. In a letter to the Chief Immigration Officer of 1st September 2007, this time on RTE letterhead, someone wrote:

> "We also have a sub-division company know as Geronimo Pools; which supplies fiberglass pools at an inexpensive price compared with regular pools to our community. With this division added to our profile we are able to self-generate business within our company and keeping quality control of our finished product from start to finish."

In this context, given the letterhead, "we" and "our company" can only mean RTE. The second page of the letter is missing, so it is not possible to say definitively who wrote this on behalf of RTE, but Tereza Martins accepted that it was probably her. Ms. Martins was the office administrator of RTE, and also managed the company's financial matters and did the book-keeping. She was in a personal relationship with the plaintiff.

9. A printed brochure[3] was issued jointly for both entities, RTE and Geronimo, and it described Geronimo as 'a subdivision of' RTE.

10. The plaintiff's own evidence was that all the management and accounting functions, including the payment of payroll tax, for Geronimo were performed by or through RTE. However, he said that there did come a time after 2007 but before the sale, when Geronimo was treated as a separate entity for

[3] It can be found at Tab 11 of the Trial Bundle A.

immigration purposes, so that the work-permits of Geronimo's employees were held in its name, rather than RTE's, and this was said to be because that facilitated obtaining their grant. It also seems that there came a time when Geronimo was treated separately for payroll tax purposes. The application for this was made on 27th March 2006, and by letter from the Office of the Tax Commissioner of 28th March 2006 it was given a separate Payroll Tax Account Number, being No. 990-190381. It thereafter made separate returns under the name 'Geronimo Pools', initially for two employees, increasing to three in the first quarter of 2008. However, as the letter to the Chief Immigration Officer of 1st September 2007 (see above) shows, RTE continued to hold out Geronimo as a 'sub-division' of the company.

11. Moreover the financial statements, which were used for the purposes of the amalgamation negotiations[4], were produced on a consolidated basis. They included the revenue generated by the pool business, Geronimo, and contained no note or other indication that it was a separate business[5]. It may well be that track was kept of the revenue attributable to the pool business in the underlying accounts, and that the defendant's accountant, Kumi Bradshaw, could separate it out when looking at the books, but that does not detract from the fact that the Financial Statements for RTE of 31st December 2007 (which included the years 2003 – 2007) included that revenue as RTE's.

12. In those circumstances, it seems to me, as a matter for fact, that Geronimo and the pool business were an integral part of the business of RTE, and held out as such during the negotiation process.

13. The answer to the first question, therefore, is that RTE owned the pool business that was trading under the name of Geronimo Pools at the time of the Amalgamation Agreement.

14. As to the second question, by operation of law the pool business, as an asset of RTE, went with it and became the property (and a potential liability) of the amalgamated company. This is the effect of section 109 of the Companies Act 1981, which provides in part –

> **"Effect of certificate of amalgamated companies**
> 109 On the date shown in a certificate of amalgamation—

[4] See p. 2 of the witness statement of Tereza Martins, who was a witness for the plaintiff.
[5] See the statement of Kumi Bradshaw

(a) the amalgamation of the amalgamating companies and their continuance as one company shall become effective;
(b) the property of each amalgamating company shall become the property of the amalgamated company;
(c) the amalgamated company shall continue to be liable for the obligations of each amalgamating company;
. . ."

15. The plaintiff counters that by advancing a factual case that it was separated out during the negotiation process. In his witness statement he said:

> "I provided M&M with a complete list of all the assets, employees and dealerships which were to be included in the original price of $6 million. This all occurred in early 2008. However during the course of the ongoing negotiations, the price gradually came down to the eventual sum of $4.4 million but for consideration of reducing the price, there was to be excluded some of the equipment which had originally been included (see Tab 1). What was specifically excluded was the business of Geronimo Pools which was the trade name for my pool business and also excluded was the three employees connected with it, certain tools and equipment and the Peugeot van."

16. It emerged during cross-examination that he only attributed about $50,000 of that $1.6 million reduction to the value of Geronimo, so to the extent that the passage might be read as implying that the reduction was largely due to the exclusion of Geronimo, that would be incorrect.

17. In any event, I reject the plaintiff's evidence on this point. I do so partly because, having seen the parties cross-examined, I prefer the evidence of Mr. Maclean. I also do so because there is no trace of such an agreement in the documents. The whole transaction was carefully documented, with the parties giving each other warranties as to the accuracy of their disclosure and of various representations that they made as part of the deal. There is nothing about carving out Geronimo or the pool business in any of that. Indeed the structure of the transaction is to the contrary, for under it M&M expressly received the sole right to the crucial dealership with San Juan Pools, which was registered in the name of 'Geronimo Pools'[6], and which underlay the pool business. The plaintiff also entered into a non-competition and non-solicitation agreement, embodied as Schedule 7 to the Amalgamation Agreement,

[6] See the letter of 13th July 2010 at Tab 12 of Trial Bundle A from San Juan Pools. According to that the dealership had been registered in April 2002 by the plaintiff under the name 'Geronimo Pools',

and this expressly included “pool installation”. All of that is really incompatible with Geronimo having been carved out.

18. I do not think that the plaintiff’s arguments about the distinction between pool importation and pool installation, do anything to offset this. Nor does the fact that the three employees of the pool business do not appear in the list of employees of RTE disclosed as part of the pre-amalgamation negotiations. Indeed, the argument that the omission of their names indicates that Geronimo was excluded from amalgamation, is a circular argument. If Geronimo was included, their names should have been included on the list, and the failure to do so is a breach of warranty. The omission of the names is equally consistent with either position, and in the absence of some independent evidence of the exclusion of Geronimo, it demonstrates nothing.

19. Nor, at this stage, is it either necessary or appropriate for me to consider what, if anything, is left of the pool business after the dealership and non-competition clauses are taken into account, or what loss or damage M&M might suffer if its right to the pool business is not recognized. Those matters do not arise on the preliminary issues as defined by agreement and embodied in the order of Kawaley J.

20. I find, therefore, that neither the pool business nor Geronimo were carved out of the Amalgamation Agreement, or reserved to the plaintiff in some way. But that finding may not be necessary in any event. The Amalgamation Agreement contained an “entire agreement” clause in the following terms:

> “20.5 This Agreement constitutes the entire agreement of the parties in relation to the amalgamation of Amalco and RT&E and supersedes all earlier agreements or understandings of the Parties.”

In my judgment that is enough to exclude any collateral agreement of the sort alleged by the plaintiff.

21. For those reasons I find on the second issue that the pool business was effectively sold to M&M Excavation Ltd. as part of the Amalgamation Agreement.

22. In the event the parties agreed the following form of Order:

> "1. The pool business trading under the name of Geronimo Pools belonged to Rodrigues Trucking and Excavating Ltd at the time of the amalgamation.
>
> 2. The pool business trading under the name of Geronimo Pools was included in the amalgamation of M&M Excavation Ltd and Rodrigues Trucking and Excavating Ltd and accordingly belongs to M&M Excavation Ltd."

Although that differs in minor respects from the formulation of the preliminary issues, I consider that it better expresses the matters which I determined, and I accordingly signed the Order submitted in those terms.

23. I heard the parties on costs at the end of the hearing. I considered that this was the final trial of part of the matter, and that there was no reason to depart from the general rule that costs should follow the event. I therefore awarded the defendant its costs of the preliminary issue in any event, to be taxed at the end of the proceedings if not agreed,

Dated the 25th day of August 2010

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Richard Ground
Chief Justice