

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**2004/CLE/gen/000778**

**IN THE MATTER** of all that parcel or lot of land known and styled as Andros Bay Cottages situate on the island of Andros One of the Islands of the Commonwealth of The Bahamas

**AND IN THE MATTER** of an Agreement in writing dated March 2002 made between the Plaintiff and the Defendant

**BETWEEN**

**JOHN R TRAYSER**

**Plaintiff**

**And**

**HENRY BAIN**

**First Defendant**

**And**

**JOSEPH BAIN**

**Second Defendant**

**BEFORE:** The Honourable Mrs Justice Cheryl Albury

**APPEARANCES:** Mr Malcolm Adderley for the Defendants  
Mr Sean Moree for the Plaintiff

**HEARING DATES:** 21 to 24 April 2009, 1 July, 2009

**JUDGMENT**

## ALBURY J

### *Background*

The Bain brothers, Henry, Joseph and Simon Bain, are Bahamian citizens and natives of Behring Point, Andros. The Plaintiff, John Trayser, (Trayser) is a U S citizen. He is a businessman and a sport fishing aficionado, who frequently visited the island on fishing trips. During one of those visits to Andros in late 2001, Simon Bain, who usually acted as Trayser's bone fishing guide, initially invited him to assist him with the completion of a cottage, which was to be part of a bone fishing lodge, being built by himself and his brothers Henry and Joseph Bain. The lodge was to be built on land that was purportedly owned by the Defendants, and would be known as Andros Bay Cottages. After discussions with Henry Bain Trayser agreed to become involved with the project.

2. In March 2002 the Plaintiff, John Trayser, the Defendants, Henry and Joseph Bain, and Simon Bain (the Bain Brothers) entered into a partnership agreement (the Agreement) for the construction of a bone fishing lodge, to be known upon completion as the Bonefish Beach Club (BBC), at that site in Andros.

3. The lodge has been completed, and is now operated by the Defendants under the name of Andros Bay Cottages.

4. The Agreement, inter alia, describes the Plaintiff, John Trayser, as a "major investor" in the BBC, and provides that upon completion of the club the ownership of the property on which it was sited would be transferred from Andros Bay Cottages, a company of which the defendants were principals, to the partnership, i.e. the Bain brothers and Trayser. The construction of the BBC was to be completed in 12 months.

5. It was also a term of the Agreement that all principal invested by Trayser in the project was to be repaid to him before any distribution of revenue shares. Thereafter, during the initial succeeding five years, net profits would be distributed in accordance with the following formula: 40% of the profits would be paid to Trayser, and the remaining 60% would be shared equally between the three Bain brothers.

6. In January 2003, after some delays and prior to completion of the project, the business relationship between the Plaintiff and the Defendants, which had soured, collapsed. There was an explosive and acrimonious meeting between the parties at the building site. The record of that meeting, which was videotaped by the Plaintiff, was introduced into these proceedings as an exhibit.

7. The Plaintiff, by the Re Amended Writ of Summons, filed on 30 October 2008, seeks the following relief:

- (i) an Order of this Honourable Court that the Defendants whether By themselves, their servants, agents or otherwise by whomsoever do not destroy, remove, alter and/or dissipate the assets of the Property styled and known as Andros Bay Cottages.
- (ii) An Order of this Honourable Court to allow the Plaintiff his agents and/or servants to be able to enter upon and have access to the Subject property.
- (iii) Damages representing both the initial investment of the Plaintiff in addition to the profits lost as a result of the Defendants breach of contract and/or fraudulent misrepresentation;
- (iv) Interest;
- (v) Costs;
- (vi) Such further or other relief as the Court deems just.

8. Conversely the Defendants deny all claims made by the Plaintiff, and further contend that the Agreement at issue, between the Plaintiff and the Defendants, is an illegal contract and is, therefore, unenforceable.

#### *The Evidence*

9. During the trial the following witnesses gave evidence: John Trayser, Simon Bain, Henry Bain, Joseph Bain and Leonard Ferguson, a retired Crown Lands officer, who was called as an expert witness.

10. This judgment does not contain the usual recitations of the evidence led during trial and counsels' submissions. This is because of the time constraints which I now face in completing all pending judgments prior to demitting office as a judge of this court. However they have all been duly considered by me in reaching this decision.

11. The questions for me to decide are 1) Whether the Defendants' fraudulently represented to the Plaintiff that they owned the subject land. 2) Whether the Plaintiff entered into the partnership agreement as a result of that representation. 3) What damage was suffered by the Plaintiff if questions 1 and 2 are affirmatively answered and 4) Whether the agreement between the Plaintiff and the Bain Brothers was an illegal contract, and is therefore unenforceable.

#### *The Defendants' Representation as to Ownership*

12. John Trayser's evidence was that he initially came to know of the property, and the proposed project, from Simon Bain, whom he had known through his fishing trips to Andros over the years. Simon asked him to assist him with finance for the construction of a cottage which he was building on land owned by his brothers, Henry and Joseph Bain. However after discussions with Henry Bain he agreed to invest in a larger venture, to be sited on land which he understood was owned by the Defendants at Behring Point, Andros, in the name of Andros

Bay Cottages. Trayser further testified that he accepted the representation made to him by Henry Bain that he and Joseph owned the subject land and, based on that representation, he subsequently entered into the Agreement with the Defendants in March, 2002.

13. Trayser further testified that it was in reliance on the Defendants' representation to him that they owned the subject land that he subsequently invested various sums in the project, commencing with the purchase of specified building materials at the Home Depot Store in Florida. It was his evidence that during the ensuing months he made other purchases for the project, which included building materials, furniture, appliances and bedding. Trayser also testified that he intermittently remitted funds from the U S to Simon Bain, who, pursuant to the terms of the Agreement was charged with overseeing the construction of the project. Those funds, he said were used to purchase building materials in Andros and to pay local persons for labour. He produced copious documentation with regard to his financial outlay for the project, which he said amounted to \$330,000.

14. Trayser testified that the Defendants consistently maintained that they owned the land, however, they never produced to him any documentary evidence of their ownership. Eventually he became concerned as to the ownership of the subject land after the various delays in completing the project, and after Henry Bain's' decision that the ownership of the subject land would not be transferred from Andros Bay Cottages, to the Bonefish Beach Club as provided for in the Agreement, he said. However he received no satisfactory answers to his queries in that regard. Finally, at the meeting in January, 2003 Trayser demanded from Henry Bain produce proof that he owned the land. At that meeting, Henry Bain asserted vociferously, several times, that he owned the land, and he had "papers" for the land, but that he had no duty to show them to the Plaintiff.

15. Simon Bain's evidence corroborated that of Trayser, as to the Defendants representing that they in fact owned the subject land. He also confirmed that he received funds Trayser had sent to him from the U S and that those funds were used by him to pay for building supplies purchased locally and for labour. Simon Bain also produced several invoices and receipts in that regard.

16. Conversely, the Defendants deny making such representation as to the ownership of the subject land, or that it was on that basis that the Plaintiff was induced enter into the partnership agreement. Henry Bain's evidence was that it was only as a result of the Trayser's conversation with Simon Bain concerning the project that he agreed to participate in it rather than any representations which they had made to him. They had subsequently agreed to allow him to be become involved in the project as a partner. Henry Bain further stated that the ownership of the subject land was not "a big thing", up to the time when the business relationship between themselves and Trayser deteriorated

17. Henry Bain also testified that, although they had no legal title to the land, in keeping with the prevailing custom at Andros, they were considered the owners of the land once they had commenced building on it. Henry Bain produced documents which revealed their efforts to acquire ownership of the subject land from the government on behalf of Andros Bay Cottages. Those efforts commenced with the application which was submitted to the Department of Lands and Surveys for the lease of 1½ acres of Crown Land, dated 7 May 1998 by Henry Bain to, "erect cottages, club house and facilities" on behalf of Andros Bay Cottages. There was also exhibited intervening correspondence with that department on Henry Bain's behalf, concerning this application, including his present counsel's letter, in 2003, to then Prime Minister Christie, "seeking assistance with finalization of Mr Henry Bain's application for a crown grant".

18. The Defendants also produced documentary evidence that Henry Bain had been able to procure local planning permission on behalf of Andros Bay Cottages to erect certain structures on the subject land. However that planning permission, on the evidence, was not based not on his ownership of the land.

19. Although there was uncontroverted evidence that Henry Bain had submitted an application to acquire the subject land from the Government, for unknown reasons, that application seems to have faltered. Indeed, even up to the time of the trial the issue had still not been resolved. A further wrinkle has been added by the Plaintiff's subsequent application for a Crown Grant in respect of the same land.

20. Mr Leonard Ferguson, retired Crown Lands Officer confirmed that he had visited the subject land, where he observed the buildings being constructed there by the Defendants. His evidence further confirmed that: meetings were held by the Crown Lands Department at Andros in an effort to resolve the dispute as to its ownership, the still unresolved application for a Crown grant by the Defendants in the name of Andros Bay Cottages, and the subsequent application for a Crown Grant submitted to the Department by the Plaintiff in respect of the same land Mr Ferguson also denied that he had authorised the Defendants to build on Crown land prior to the approval of their application for a crown grant, as alleged by the first Defendant. He also denied the existence of a local custom whereby there was an automatic crown grant to a person once they had built on government owned land, as Henry Bain had asserted during his viva voce evidence.

21. The several letters and documents relied on by the Defendants show that, notwithstanding the application made by Henry Bain for a Crown Grant in 1998 on behalf of Andros Bay Cottages Ltd, subsequent correspondence with the then Director of Lands and Surveys Mr Tex Turnquest, who held meetings in Andros in an attempt to settle the matter, and correspondence with the office of the

Prime Minister, there had been no determination of the application by Henry Bain for Andros Bay Cottages for a crown grant in respect of the subject property. The subject land remains vested in the Crown.

22. I find that the evidence, further shows that the Defendants knew, prior to commencing in negotiations with the Plaintiff in 2001 that they did not possess, either personally or, through Andros Bay Cottages legal title to the land and consequently could not transfer legal title to the partnership when the project was completed. However, the Defendants persisted in making representations to the contrary to the Plaintiff, even after Mr Ferguson had cautioned them concerning the buildings they had erected on land owned by the government. Henry Bain, further, recklessly asserted that he had “papers “to the land during the meeting of 3 January 2003 between the Plaintiff and Defendants.

23. Having duly considered the evidence before me and observed the demeanour of the witnesses, I find that on this issue the evidence of Henry and Joseph Bain is the less credible. Henry Bain’s credibility was significantly shaken during cross examination. His statement that he had “every confidence” that he would own the land fell far short of a genuine belief that, based on any local custom he owned the land. I found Joseph Bain’s evidence was evasive on this issue. Accordingly, where the Defendants’ evidence differs, from that of the Plaintiff I accept the Plaintiff’s evidence as more credible.

24. On the issue of fraudulent misrepresentation Mr Moree for the Plaintiff commended for my consideration the case of **Derry v Peek [1889] 14 App Cas. 337.**

25. Conversely Mr Adderley for the Defendants submits that the Plaintiff had failed to show that the Defendants made any representations to the Plaintiff, with fraudulent intent. Further, he contends that the high degree of probability required to satisfy the civil standard has not been met by the Plaintiff. Counsel

further submits that the Plaintiff has not shown that he was influenced by any representation made to him by the Defendants, which is an essential element in such cases. On these propositions of law counsel commended for my consideration the following authorities: **Hornal v Neuberger Products Ltd (1957)1QB 247, Bradford Building Society v Border (1941) AER, 205.**

26. I am unable to accept Mr Adderley's submission, on this issue, that "the evidence in this case overwhelmingly points to an honest belief on behalf of the Defendants that was based on a custom as supported by Mr Ferguson from Lands and Surveys".

27. The elements of fraudulent misrepresentation were settled in **Derry v Peek [1889] 14 App Cas. 337.** In that case Lord Bramwell stated:

**"When a man makes a contract with another he is bound by it; and, in making it, he is bound not to bring it about by fraud... all persons in all dealings should tell the truth. If they do not they furnish evidence of fraud; they subject themselves to have the contract rescinded."**

28. I am of the view, based on the evidence before me, and on a balance of probabilities, that the Plaintiff has met the threshold requirements to establish a claim of fraudulent misrepresentation. I, therefore, find that the Defendants' fraudulently misrepresented to the Plaintiff that they owned the subject land, and thereby induced the Plaintiff to enter into the partnership agreement with them in March,2002.

#### *The Issue of Damages*

29. The Plaintiff's evidence was that up to the time of the collapse of his business relationship with the Defendants, and pursuant to the terms of the Agreement, he had invested a total of \$330,000 in the aborted project. He said that the initial financial outlay made by him was \$26,000 for the purchase of

building materials from the Home Depot in Florida. Subsequently, he said, he made other purchase of building materials for the project. There were intermittent cash remittances which he sent to Simon Bain, which were used to meet labour costs and for building materials purchased locally. John Trayser testified that he had also spent further sums to purchase appliances and furnishings, including bedding for the completed cottages.

30. Trayser's evidence as to the intermittent cash remittances which he made was corroborated by Simon Bain, who produced invoices, inter alia, for building material purchased from Hanna's Hardware in Andros and payments which he made to local persons for work done at the building site.

31. The evidence of John Trayser and Simon Bain in this regard was corroborated by copious documentation covering the period December 2001 to December 2003. Review of those invoices and receipts exhibited by the Plaintiff shows that they total approximately \$220,000.

32. Mr Moree accounts for the discrepancy between the Plaintiff's evidence and supporting documentation by the fact that in such projects receipts often get lost, or accounts are not always properly maintained.

33. Conversely the Defendants testified that the project was more than half completed when the Plaintiff approached them to invest in it. Their evidence was that the sea wall and dock for Andros Bay Cottages had been substantially completed before Trayser injected any capital into the project.

34. In their Defence Henry and Joseph Bain admitted that the Plaintiff invested a total of \$110,000 into the project for labour and building materials. Henry Bain in his witness statement admitted that the Plaintiff spent \$26,000 for the Home Depot purchases, and that they had received the final cash remittance of \$30,000 from Trayser, which was intended for completion of the buildings.

However, during trial Henry Bain stated “.....I and my brother had agreed that Mr Trayser had invested \$150,000 in the project. That has never been denied....”

35. Joseph Bain’s evidence, however, paints a somewhat different picture on this issue. He denies the extent of financial investment in the project as claimed by Trayser. His evidence was that he had personally purchased large amounts of building materials for construction of the lodge, which he shipped to Andros on the mail boat Lady D, which was captained by a Captain Munroe. However, no corroborating evidence, either viva voce or documentary, was produced in this regard by him. Further, both of the Defendants challenge the amount of funds which Simon Bain stated he had received from the Plaintiff and had been utilized by him for the purpose of the construction.

36. Mr Adderley submits that Joseph Bain’s explanation that he did not keep receipts for expenditure on the project, because he and his brother had been involved in numerous business interests over a period of forty years, without ulterior motive and without any expectation that litigation would eventuate, is credible.

37. Conversely Mr Moree contends that from the commencement of these proceedings to the date of trial, Joseph Bain, acting prudently, could have acquired and produced independent documentary evidence to support his claimed expenditure. He accordingly urged the court to reject that evidence.

38. In this regard I am constrained to observe that Mr. Joseph Bain, a customs officer of some 40 years seniority, would be acutely aware of the efficacy of producing such documentation to buttress his claims.

39. Having duly considered all the evidence on this issue, including the admission of Henry Bain, on behalf of himself and Joseph, that Trayser had

spent \$150,000 on the project I find as a fact, and on a balance of probabilities, that the Plaintiff had invested the sum of \$220,000 toward construction of the bonefish lodge.

40. Where fraudulent representation has been established the aggrieved party is at liberty to rescind the contract and is entitled to be restored to the position which he formerly enjoyed prior to the contract. See **Abram Steamship v Westville shipping [1923] AC 773.**

41. Accordingly I find that the Plaintiff is entitled to damages in the sum of \$220,000, in respect of his financial contribution to the project.

*Illegality of Contract*

42. While the Plaintiff and Defendants differ as to the amount of funds which Trayser had invested in the project, it is common ground between them that some of those funds were in the form of remittances wired from his bank account in the, U S to Simon Bain, who in his viva voce evidence also confirmed this.

43. The terms of the Agreement between provide, inter alia, that upon completion, the BBC would be owned by the four parties to it, i.e. Trayser and the Bain brothers. Thereby Trayser would, in exchange for his financial investment, jointly own the land on which the buildings were constructed, which was indicated as the Defendants' contribution to the project. The underlying assumption, therefore, was that Henry and Joseph Bain, owned the land.

44. Mr Adderley submits that the mere signing of the Agreement could not give the Plaintiff ownership in a Bahamian enterprise. He contends that the Plaintiff, as an investor, would have to be in possession of a permit pursuant to Section 3(1) of the International Persons Landholding Act (the Act), in order to acquire an interest in and in The Bahamas and, by extension, for the Agreement to be enforceable.

45. Section 3(1) of the Act states:

**“A non-Bahamian (other than a permanent resident or non-Bahamian acquiring land or an interest in land under a devise or by inheritance) who intends to acquire land or an interest in land either by way of freehold or leasehold and which acquisition is not within Section 2(1) shall obtain a permit from the Board to make the acquisition by making the requisite application and paying the appropriate fee specified in the schedule to the Secretary of the Board otherwise any acquisition shall be null and void and be without effect for all purposes of law in absence of such a permit...”**

46. Mr Adderley for the Defendants also submits that the Agreement between the parties is subject to Regulation 5(1) and/or (b) of the Exchange Control Regulations (Ch 360), (the Regulations).

Regulation 5 states:

- (a) make any payment to or for the credit of a Person resident outside the scheduled Territories; or**
- (b) make any payment to or for the credit of a Person resident in the scheduled territories By order or on behalf of a person resident Outside the scheduled territories; or**
- (c) place any sum to the credit of any person resident outside the scheduled territories.**

**Provided that where a person resident outside the scheduled territories has paid a sum in or towards the satisfaction of a debt due from him, paragraph (c) of this regulation shall not prohibit the acknowledgement or recording of the payment.”**

47. Regulation 6 states:

**“Except with the permission of the Controller, no person in The Bahamas shall, subject to the provisions of this regulation, make any payment outside The Bahamas to or for the credit of a person resident**

**outside the scheduled territories, and no person resident in the scheduled territories shall in The Bahamas do any act which involves, is in association with or is preparatory to the making of any such payment.**

- (2) Nothing in this regulation shall prohibit the doing of anything otherwise lawful by any person with any foreign currency obtained by him in accordance with the provisions of Part 1 of these Regulations or retained by him in pursuance of a consent of the Controller."**

48. Mr Adderley asserts that the evidence shows that the Plaintiff admits forwarding monies to Simon Bain, and to the Defendants, for the purpose of investing in the bonefishing club project. The evidence, further, shows that the Plaintiff, who is an American citizen resident in the U S, remitted funds, U S currency to The Bahamas, and that the persons with whom he intended to conduct business are Bahamian citizens.

49. Counsel for the Defendants further points out that the Plaintiff, on the evidence, did not have Exchange Control approval to invest in The Bahamas. Also the Plaintiff had not been granted a permit, pursuant to the Act, to hold an interest in land in The Bahamas. In the circumstances, he contends that the Plaintiff has violated both the Act and the Regulations, and in the circumstances the Agreement is null and void, and unenforceable.

50. In support of his submissions Mr Adderley commended for my consideration the case of **Shaw vs Shaw [1965] AE page 639**, and in particular the dictum of Denning, MR, "It has been long settled that no person can found a cause of action on his own illegal act".

51. Mr Adderley also commended for my consideration the case of **Donald Johnson vs Suisse Security Bank Supreme Court No 964 of 1997**, a Bahamian case, where Kearney, J held that the agreement between the parties

was unenforceable by either party, thereto and that its performance was prohibited by the Regulations. Consequently he found that the Plaintiff's claim was based on a contract whose performance was prohibited by law and, in the circumstances, was unenforceable.

52. Mr Moree concedes that Regulations 5 and 6 prohibit payments of funds by a Bahamian to, or for the credit of, a person resident outside the Bahamas without Central Bank approval, with the objective of monitoring domestic funds leaving the jurisdiction. However, he contends that, while the Agreement required sums to be paid eventually to the Plaintiff by the partnership, when profits were distributed, there was no evidence before the court that such payments were ever made.

53. Mr Moree for the Plaintiff further submits that the Regulations do not require that Central Bank approval be obtained prior to entering into a partnership agreement, and in the circumstances Regulation 5 and 6, do not apply. He further asserts that Regulation 31(1) provides for circumstances where agreements include terms whose performance would require exchange control permission.

54. Regulation 31(1) states:

**"It shall be an implied condition in any contract that, where, by virtue of these Regulations, the permission or consent of the Controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required."**

55. Mr Moree for the Plaintiff submits that the effect of Regulation 31(1) is that agreements, such as that made between the Plaintiff and the Defendants, which envision payments being made to a person resident outside the Bahamas, are

not illegal. However, such payments cannot legally be effected before the requisite Exchange Control approval has been obtained.

56. Mr Moree posits that, had the venture progressed as the parties to the Agreement originally intended, once the Plaintiff's share of the profits from the partnership had been quantified, prior to making any intended disbursements to the Plaintiff, Regulations 5 or 6 would have to be complied with. In the circumstances he asserts that the Agreement itself was not subject to Regulations 5 and 6, and consequently no prior approval of the exchange control was necessary. On this issue counsel commended for my consideration the case of **Tony S Joudi v Nathaniel Edgecombe et al, 15 Court of Appeal 12/2003.**

57. Mr Moree for the Plaintiff further contends that Section 3(1) of the Act, is not relevant to these proceedings as the partnership Agreement was not an indenture for the transfer of legal title to land in The Bahamas. While the agreement envisioned the eventual transfer of land, purportedly owned by the Defendants, to the partnership, which included the Plaintiff who is a foreign national, it did not occur because the Defendants, never having owned the land as they had represented, could not transfer it. Counsel contends that in the circumstances the partnership agreement at issue is not illegal and, in the event that it had not been rescinded, the parties could have applied for a permit, pursuant to Section 3(1) of the Act.

58. After due consideration of counsels' completing arguments I am of the view that the agreement between the Plaintiff and the Defendants is not subject to Exchange Control Regulations 5 and 6. I find that the Agreement is consequently legal and enforceable, there being no exchange control prohibition against such a partnership arrangement. In this finding I am fortified by the Court of Appeal's decision in **Tony S Joudi v Nathaniel Edgecombe et al.**

59. I am of the view that the Agreement falls outside the scope of Section 3(1) of the Act. The partnership Agreement provided that upon completion of the project the land would be transferred to the partnership. At a future date, had that eventuality come to pass a permit pursuant to pass title to the subject land to the partnership, which included Trayser, a non Bahamian would become necessary.

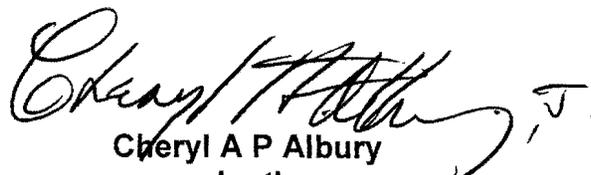
60. However, on the evidence before me neither the Defendants nor Andros Bay Cottages had no legal title to the subject land to acquire a permit for the legal title to transfer of the subject land to the partnership.

61. The Plaintiff seeks, Orders to permit his entry to and occupation of the entity now known as Andros Bay Cottages However, in view of my findings with regard to the Defendants' purported ownership of the subject land, and being satisfied that the legal title to that land is still vested in the Crown, which is not a party to this Action, I am of the view that such relief cannot be properly granted to the Plaintiff and therefore decline to do so.

62. I accordingly, make the following Orders:

- (i) The Defendants are to pay damages to the Plaintiff in the sum of \$220,000
- (ii) The Defendants are to pay to the Plaintiff interest on that sum at the rate of 6% per annum
- iii) The Defendants are to pay the Plaintiff's costs, to be taxed if not agreed.

**Delivered this 21 day of December A D, 2009**

  
**Cheryl A P Albury**  
**Justice**