IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 1772/2004

BETWEEN	DIAMINE COMPANY LIMITED	CLAIMANT/RESPONDENT
A N D	REGINALD S. FRASER	1ST DEFENDANT/APPLICANT
A N D	FRASER & AITCHESON	2ND DEFENDANT/APPLICANT
A N D	TAX AUDIT & ASSESSMENT DEPARTMENT	3RD DEFENDANT
A N D	ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT/APPLICANT

Mr. Keith Bishop instructed by Bishop and Fullerton for Claimant/Respondent.

Mr. Walter Scott and Miss Georgia Hamilton instructed by Chancellor & Co. for 1st and 2nd Defendants/Applicants.

Mr. Peter Wilson instructed by The Director of State Proceedings for 3rd and 4th Defendants/Applicants.

Application to strike out Statement of Case/for Summary Judgment

Heard: 20th, 24th June and 6th July 2005

BROOKS, J.

It is not usual for a vendor's attorney - at - law to be asked to stand the cost of paying the property tax for the property the subject of the sale, but that is just what Diamine Company Limited seeks to have ordered.

By an Agreement for Sale dated 27th February 2002, Shiprock Holdings Limited agreed to sell to Lynval Wright and others the fee simple interest in approximately thirty-eight acres of land at Snow Hill in the parish of Portland. Mr. Reginald Fraser, a principal of the law firm of Fraser & Aitcheson is the Attorney - at – Law who had conduct of the carriage of sale for his firm.

Mr. Wright and his co-purchasers nominated Diamine as their vehicle by which to take title in the land. The title was transferred to Diamine on 23rd April 2003, the purchase price having been paid. The transaction was completed but Shiprock failed to pay the property tax due up to the date of completion. Diamine claims that the outstanding tax amounts to $1,251,173.50.

Although Shiprock is registered in Jamaica with a registered office situated in Jamaica its principals apparently reside out of the jurisdiction. Diamine, entreated Mr. Fraser, without success, to have Shiprock pay the outstanding tax. It has therefore brought this claim against Mr. Fraser and his firm asserting that they had a duty to it to ensure that the property tax was paid, and that they failed in performing that duty.

Diamine has also joined the Attorney General of Jamaica as a defendant. This is on the basis that the Stamp Commissioner's Office of the Tax Audit and Assessment Department, failed in its duty to ensure that the property tax was paid before it stamped the Agreement for Sale.

Mr. Fraser, his firm, and the Attorney General have all applied to have Diamine's Statement of Case struck out as disclosing no cause of action or having no reasonable prospect of success. The applications are made pursuant to rules 15 (2) (a) and 26 (3) (1) (c) of the Civil Procedure Rules 2002 (the CPR).

At the beginning of the hearing of the applications, Mr. Bishop for Diamine conceded that since the Tax Audit and Assessment Department was not a legal entity it ought to be removed as a defendant to the claim. As between the remaining parties the broad question to be answered by the court is whether Mr. Fraser, Fraser and Aitcheson and the Stamp Commissioner, or any of them had a duty to Diamine to ensure that the

property tax was paid. I shall first consider the question in relation to the Stamp Commissioner and thereafter in relation to the Attorneys - at - Law.

The Stamp Commissioner's obligations

Diamine pleaded its case in respect of the Stamp Commissioner's omission thus:

"3. The 3rd Defendant has the responsibility in law pursuant to Section 79, subsection 3 of the Stamp Duty Act to ensure that where an instrument of transfer is presented for stamping that it is accompanied by a Certificate from the Collector of Taxes of the parish in which the land is situated indicating whether all taxes due on the land has been paid. That the 4th Defendant is sued pursuant to the Crown Proceedings Act as agent and/or servant of the Crown in that it was negligent in permitting or allowing the stamping of the Agreement for Sale and Transfer without the Certificate from the Collector of Taxes indicating the taxes due on the parcels of land have been paid."

"4. That the law imposed a duty on the 3rd Defendant, agent and/or servant of the Crown but the 3rd Defendant failed or neglected to comply with the provisions of the law."

Section 79 of the Stamp Duty Act states as follows:

"79. (1) The Commissioner may require to be furnished with all documents and with such other evidence as he may deem necessary in order to satisfy himself as to whether all the facts and circumstances affecting the liability of the instrument to duty or the amount of duty chargeable thereon are fully and truly set forth in any instrument intended to be stamped.

(2) Any person who refuses or wilfully fails to comply with any requirements under subsection (1) shall be liable to a fine not exceeding fifty thousand dollars.

(3) Where any instrument referred to in section 32 (3) relates to land in Jamaica, any application to have it stamped shall be accompanied by a certificate from the Collector of Taxes of the parish in which the land is situated indicating whether all taxes or penalties due on the land have been paid or, if not, what arrangements have been made for payment.

(4) The Commissioner may defer the stamping of any such instrument as is referred to in subsection (3) until the Collector of Taxes certifies that the taxes or penalties have been paid or that arrangements for payment satisfactory to the Collector have been made." (Emphasis mine)

Mr. Bishop submitted that the word "shall" as used in subsection 3 imposes a duty on the Commissioner to ensure that the items identified therein are provided.

I cannot agree with Mr. Bishop. A reading of the section as a whole makes the intent of Parliament clear. Subsection 1 stipulates what the Stamp Commissioner may require. The requirement is for the purpose of his ascertaining the correct duty to be paid.

Subsection 2 imposes a penalty on the person who refuses to comply with a requirement under subsection 1.

Subsection 3, contrary to what Mr. Bishop has submitted, imposes a duty, not on the Commissioner, but rather on the party requesting the stamping of, in this case, the Agreement for Sale or perhaps the instrument of Transfer. (It is perhaps ironic that Section 32 (3) to which Section 79 (3) refers, imposes the liability for non-stamping on the purchaser, but that is an aside and does not affect the issue here.)

I find that subsection 3 does not create a duty in the Stamp Commissioner to any party to the transaction. It is a measure for the protection of the revenue; a supplemental method of ensuring that property taxes are paid.

I draw support for this view from the use in the subsection of the words "or, if not, what arrangements have been made for payment". Those words do not provide protection for a purchaser or transferee such as Diamine is. What if the arrangements, as proposed, fail to materialize, does the Commissioner become a guarantor? The answer must be in the negative.

In this particular case the Agreement for Sale presented to the Commissioner stipulated that the parties had agreed that "Taxes, Water Rates, Rent and Other Outgoings" were "to be apportioned as of the date of possession." That arrangement

wouldn't necessarily have protected the revenue by ensuring payment of the property tax. It would however, have informed the Commissioner that the parties to the Agreement for Sale had contemplated the revenue liability and their respective positions concerning it.

Finally, subsection 4 does not oblige the Commissioner to refuse to stamp the instrument in the event that there is a failure to comply with the provisions of subsection 3. On the contrary, it stipulates his discretion to defer the stamping. The context of the section as a whole and subsection 4 in particular, does not allow for an interpretation that "may" in this case means "must".

Mr. Wilson sought to refer to the court the Memorandum of Objects and Reasons provided for in the Bill by which Parliament inserted subsections 3 and 4 into section 79. I agree with Mr. Bishop that there is no need to refer to the Reasons and Objects as an aid to interpreting the section. The section is clear in its terms.

In my judgment the section does not impose any duty to Diamine on the Commissioner. The action brought against the Attorney General is therefore misconceived. It would be an injustice to maintain the Attorney General as a party to this action up to the stage of trial, if there were to be one.

I now turn to the case against Mr. Fraser and his firm (together hereinafter referred to as "the Attorneys – at – Law".

The obligations of the Attorneys – at - Law

Mr. Scott on behalf of the Attorneys – at – Law has submitted that the issue of the obligations of the Attorneys – at – Law arising from their conduct of the sale may be dealt with by considering four questions. The questions posed may be summarized thus:

> Is there any obligation to pay the property tax placed on the Attorneys –at – Law by statute or by the law of contract, tort or agency?

(a) Is there any obligation imposed by statute?

This question may be answered very quickly in the negative.

Section 4 of the Property Tax Act imposes the liability for payment of property tax on the person in possession of the property that is liable to the tax.

The Attorneys – at – Law, in paragraph 7 of their Statement of Case, have denied ever being in possession of the land and neither side makes any assertion to the contrary in the affidavit evidence provided. There is therefore no statutory liability.

(b) Is there any contractual liability to pay the property tax?

Diamine has pleaded in its Particulars of Claim that it had a contractual arrangement with the Attorneys – at – Law to see the property tax paid. Paragraphs 9 and 10 are the relevant portions. They state as follows:

> "9. The Claimant paid to the 1st and 2nd Defendants the sum of $600,000 as its Attorneys – at – Law to protect its interest and represent it in the sale. As a result, the 1st and 2nd Defendant, without complaint, ensured that the premises were free of squatters before the Claimant was put in possession, paid for the repairs of the house on the premises and paid for the missing items of furniture and appliances, paid the outstanding water bill of over $200,000 and paid all outstanding bill (sic) to the Jamaica Public Service Company Limited. That the 1st and 2nd Defendants owe a duty in law and otherwise to the Claimant based on the previous contractual relationship between them and the many promises made by the 1st and 2nd Defendants to the Claimant's agents that the land taxes would be paid."

> "10. That for several years while the 1st and 2nd Defendants represented the Claimant as its Attorney – at – Law and even after, the 1st Defendant made representation to the Claimant that the property taxes would be paid, especially since the 1st and 2nd Defendants have been in possession of the full proceeds of sale for many years before the Agreement for Sale was stamped and the premises transferred to the Claimant."

The Attorneys – at – Law, for their part, plead in their Statement of Case, though not in these words, that they had no contract with Diamine. The Attorneys – at – Law plead that the firm of Fraser and Aitcheson acted for Mr. Lynval Wright, Paul Harris and Leroy Latty in a previous contract for the purchase of the same land, which previous contract was eventually terminated.

In his affidavit sworn to on 9th May 2005, on behalf of Diamine, Mr. Paul Harris exhibited and relied on the contents of a letter dated February 5, 2002 (a date prior to the date of the Agreement for Sale). In that letter Messrs. Fraser and Aitcheson indicated that they expected to be instructed by Messrs. Wright, Harris and Latty, "as to which company in which to take title". The letter went on to say that Messrs Fraser and Aticheson were committed to "deliver title to the premises to (Wright, Harris and Latty), registered in the name of their nominee company".

It is important to note that Messrs Fraser and Aitcheson wrote this letter, on Mr. Harris' account, to his "new Attorney – at – Law". (Paragraph 4 of his affidavit.) In that very paragraph Mr. Harris went on to state that after that letter of February 5, "fresh instruction were given that led "to the new agreement dated the 27th February 2002 when (Mr. Fraser) was placed under tremendous pressure by me to complete the sale".

These statements combined with the fact of who were the parties to the Agreement for Sale make it clear that Diamine had no contract with the Attorneys – at – Law, but was the nominee of Messrs. Wright, Harris and Latty to accept the transfer of the registered title.

I find that there is no evidence that there was ever a contract between Diamine and the Attorneys – at – Law. In conducting this exercise I am keenly aware that I am

not permitted to try the claim on affidavits (See Chin v. Chin P.C. App. No.61 of 1999), but I find that there is no dispute of fact on this issue that warrants a trial.

I find that Diamine has not shown that the Attorneys – at – Law owed it any obligation in contract or in quasi-contract.

In his submissions in this area Mr. Bishop spoke of the contractual entitlements of "the purchasers" and "the purchaser" but nowhere has it been demonstrated that any such entitlements were assigned to Diamine.

(c) Do the Attorneys – at – Law have any liability in tort to Diamine?

The emphasis on the dispute between Diamine and the Attorneys – at – Law, lies in the issue of whether a contract existed between them. That, I think, is rightly so, for a purchaser's rights in a conveyancing transaction lie in the contract with the vendor. The vendor's lawyer, in his own right, and without more, owes no duty to the purchaser.

In addition, I accept Mr. Scott's submission that the Attorneys – at – Law could not properly utilize the vendor's monies (for that is what the purchase price is when paid by the purchaser) to pay the property tax without "clear unequivocal instructions from the vendor" to do so.

I therefore find that in failing to see the property tax paid the Attorneys – at – Law breached no duty to Diamine, which would sound in damages for negligence or other tort.

(d) Are the Attorneys – at – Law liable as agents of the Vendor to Diamine?

It is well-established law that in the absence of any external factor, the agent of a disclosed principal is not liable for the actions or defaults of the principal. In Montgomerie v. United Kingdom Steamship Association [1891] 1 Q.B. 370 at p. 371 Wright J. expressed the general rule thus:

> "The contract is the contract of the principal, not that of the agent, and *prima facie* at common law the only person who can sue is the principal and the only person who can be sued is the principal."

Shiprock was the registered proprietor of the land. The Agreement for Sale stipulated that its registered office was 379 Spanish Town Road, Kingston 11, in the parish of Saint Andrew. Its Tax Registration Number is also stipulated in the contract. A director of the company signed the Agreement for Sale.

There is nothing which prevents Diamine from bringing its action against Shiprock, or which exposes its Attorneys – at - Law to liability for Shiprock's defaults.

Mr. Bishop has submitted that the Attorneys – at – Law have consistently failed, despite requests made of them, to disclose the particulars of the directors of Shiprock. That failure, I find, does not create a liability for Shiprocks's debt, though it may expose the Attorneys – at – Law to being deemed proper persons upon whom to effect substituted service of a claim form.

Conclusion

On the evidence before the court, Shiprock has acted in breach of a term of its contract. This term stipulated that it would pay outstanding property tax. The breach however, does not, by itself, create a liability in the Attorneys – at – Law to pay the tax.

The Attorneys – at – Law owe no duty of care to Diamine, it being only a nominee for the purposes of accepting transfer of the title in the land. This is so because there is no privity of contract between them.

The Attorneys – at – Law also had no statutory liability to pay the property tax, as they were not shown to have ever been the occupiers of the land. It is the occupier who bears the liability under the statute.

The Stamp Commissioner owed no duty to Diamine to ensure that property tax was paid in respect of the land prior to stamping the relevant documents.

Messrs. Wright, Harris and Latty must pursue Shiprock for the remedy undoubtedly due to them. Diamine has no prospect of success in this arena against these Defendants. Rule 15.2 of the CPR therefore applies. (See Swain v. Hillman [2001] 1 All E.R. 91.)

The order is therefore as follows:

1. The Claim is hereby struck out as against the 3rd Defendant as it is not a legal entity.
2. Summary judgment on the claim in favour of the 1st, 2nd and 4th Defendants as the Claimant has no real prospect of success in respect of same.
3. Costs to the 1st, 2nd, Defendants jointly in the sum of $30,000.00 and costs to the 4th Defendant in the sum of $14,000.00.