

International fraud and asset tracing litigation - Spring: Attorney General of Zambia v. Meer Care & Desai (a firm)

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Nicola Haye

PROFESSIONAL SUPPORT LAWYER | UK

CATEGORY:
[ARTICLE](#)

[2008] EWCA Civ. 1007 Court of Appeal 31 July 2008

Facts of the Case

In June 2007, after 51 days of trial, some of which took place in Zambia, Mr Justice Peter Smith handed down two judgments against 13 Defendants. The primary Defendants, former Zambian Government Ministers and Officials, and the former President Frederick Chiluba, were found liable for conspiring to defraud the Republic of Zambia of sums in excess of \$45m. Two English law firms and their respective partners were judged to be liable for dishonestly assisting in the misappropriation of funds. The English lawyers, who had participated fully in the trial, lodged Notices of Appeal. One appeal was compromised with the result that the Court of Appeal heard only the appeal of Mr Meer and Mr Desai.

Mr Meer's primary ground of appeal was that the Judge's decision that he had known that what he was assisting was dishonest conduct on the part of Mr Kabwe and Mr X F Chungu was wrong, not being based on proper or sufficient findings against him, or a proper consideration of his evidence and the circumstances generally.

The primary ground in Mr Desai's appeal was that the Judge's decision that he was vicariously liable for Mr Meer's acts under s10 of the Partnership Act 1890 was inconsistent with the Judge's findings of fact, and that such finding as might have supported the decision were not justified by the evidence.

The key facts were that Mr Meer was asked by Mr Kabwe, an accountant he had known for a long time and trusted to be a honest and reputable man, to assist his company to provide services for the Zambian Security Services. Mr Meer had good reason for wishing to help the Zambian State and believed in their need for secrecy. In April 1995 Mr Kabwe told Mr Meer that he was setting up a new company, Access Financial Services Ltd ('AFSL') to provide financial services to businesses in Zambia and that he would like Meer Care & Desai to act as AFSL's London solicitors.

During the period 30 November 1995 to 21 May 1996, there were 18 payments out of the relevant ledger number 2531/1 and identified as 'FM Kabwe Commercial'. Mr Meer stated in his Witness Statement that he probably ought to have identified this new ledger as relating to AFSL not Mr Kabwe. In each case of a payment out, Mr Meer acted in the same way – by implementing Mr Kabwe's instructions without question.

The essence of Mr Meer's case was that he trusted Mr Kabwe, that he believed Mr Kabwe was trusted by the Zambian Security Services, ZSIS and that the arrangement was for ZSIS and Mr Kabwe to agree between themselves what Mr Kabwe was to do on behalf of ZSIS, and what payments were to be made to whom, and it was not his task or responsibility to enquire or satisfy himself that the payments he was told to make were proper, so that enquiry on his part was not necessary. After May 1996, as Mr Meer received instructions to make payments out of the funds he had received from Zamtrop, he proceeded in the same way from 1996 to June 2002. The Court of Appeal were impressed by Mr Justice Peter Smith's question as the Trial Judge when he asked Mr Meer:

'Why should such an experienced solicitor at the pinnacle of his career become involved in a dishonest conspiracy with no apparent financial benefit accruing to him?' (The Court of Appeal held that the word 'apparent' from that quote should be disregarded as there was no evidence of any financial benefit and the possibility of such a benefit must therefore, they held, be excluded from consideration.)

The decision

The Judge did not set out in terms the reasoning which led him to conclude that Mr Meer was dishonest, and not merely foolish or incompetent but honest. This enabled the Court of Appeal to reconsider the evidence. It held the Judge's conclusions were undermined by several misdirections and errors as regards the evidence, the contentions and in one respect the law. The misdirection of law was as to the burden of proof in relation to the propriety of disbursements.

The critical question the Court of Appeal decided was whether Mr Meer acted in blithe or blinkered ignorance and innocence, taking the instructions as no more than Mr Kabwe was entitled to tell him to do on behalf of AFSL, or whether he knew, or at least clearly suspect, that by requiring the money to be paid out in the given way, Mr Kabwe was, in effect, stealing Zambian Government money and applying it for his own or other private benefit.

The Court of Appeal considered on the one hand the large sums of money that were passing through Mr Meer's client account, much of it emanating from the Zambian Government and according to Mr Meer's instructions to be applied in connection with activities undertaken by AFSL on behalf of ZSIS. Mr Meer knew nothing about many or most of the payees, but he knew that some payments were either to Mr Kabwe himself or to or for the benefit of his family. His client account was being used as, in effect, a bank. That was not a proper thing for Mr Meer to have allowed.

On the other hand, Mr Meer was a man of integrity and honesty at least up to and including his meeting with Mr Kabwe and Mr Chungu in the autumn of 1995 at the Churchill Hotel. He did not enter into a conspiracy at that stage nor did he perceive anything at that time which put him on his guard and the Judge's finding to this effect carried the necessary implication that Mr Meer was entitled to take the proposals made at that meeting at face value and that he did so. He had no motive for assisting the fraud that was being practised by Mr Kabwe and Mr X F Chungu on Zambia. Not only did Mr Meer not get anything out of it, tangible or intangible beyond a modest amount of professional fees altogether insufficient as a motive for dishonesty, but he would have jeopardised a successful international career, and a notable status of being the trusted lawyer of one of the most prominent and respected of all Africans at the time, Mr Mandela.

In reconciling these two conflicting considerations, the Court of Appeal found that the answer lay 'in the fact that Mr Meer was much less knowledgeable and experienced, in relevant matters than he may have thought himself to be or held himself out as being.' This was supported by a number of factors including his inability to recognise that he was providing, in effect, a banking service to AFSL and by failure to understand a number of characteristics of typical money laundering situations when put to him in cross-examination.

The Court of Appeal considered that the Judge identified the position accurately when he put this to Mr Meer during the trial:

'Isn't the reality, Mr Meer, you did not look at it anyway? You just had Mr Kabwe who you knew and Mr Chungu who you knew as the ZSIS man and that was enough for you? You did nothing else. What they said went. Isn't that the position?'

The Court of Appeal found that the question whether Mr Meer was dishonest or not was to be answered in favour of honesty unless fraud is proved on the balance of probabilities, bearing in mind the need for cogent evidence for an allegation as serious as fraud. The Court of Appeal held that on the material before the Trial Judge, the more probable explanation for Mr Meer's conduct was that he was honest, albeit foolish, sometimes very foolish, and far from competent in his understanding, as well as in his application and observance, of relevant professional duties, above all the need to comply with the warnings about money laundering. While they agreed with the Judge that Mr Meer should have acted differently, they did not agree that Mr Meer's failure to do so showed that he knew or suspected what was going on, and chose not to ask questions in order not to be told the truth. Holding that Mr Meer was not liable for dishonest assistance for conspiracy left no liability to be attributed vicariously to his partner Mr Desai.

Points of interest

The burden of proof required to prove dishonesty was on the balance of probabilities and here had to be weighed against the fact that Mr Meer received no financial benefit from the alleged dishonest assistance to the fraud. The Court of Appeal required what they described as 'cogent evidence' for such an allegation. The burden to prove that the Defendant knew that a disbursement was for an improper purpose required the claimant to prove both the improper purpose and also the Defendant's knowledge of the impropriety: it was not for the Defendant to disprove the impropriety of the payment made.

Authors

Nicola Haye

PROFESSIONAL SUPPORT LAWYER | LONDON

Litigation and arbitration

 +44 20 7597 6389

 nicola.haye@withersworldwide.com