

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Hurley v. Power, 2008 NSSC 363

Date: 20081215

Docket: Sn No. 225235

Registry: Sydney

Between:

Robert Wallace Hurley

Plaintiff

v.

John Bernard Power, John Wayne Power, Gail Susan Power and Beach Road
Fisheries Limited

Defendants

Judge: The Honourable Justice Frank Edwards

Heard: November 12, 13, 14, 20, 25, 2008, in Sydney, Nova
Scotia

Written Decision: December 15, 2008

Counsel: William Burchell, for the plaintiff
Vincent Gillis, for the defendant John Bernard Power
Christopher Conohan, for the remaining defendants

By the Court:

[1] This case is about the Plaintiff Robert Hurley's (Hurley) claim that he paid \$130,000.00 cash for a lobster boat and licence. Hurley alleges that he made the payment sometime in April 2002. During an evening meeting in New Waterford at the home of the Defendant John Wayne Power (Wayne), Hurley says he gave \$130,000.00 cash to the Defendant John Bernard Power (John). According to Hurley, along with Wayne and himself, those in attendance at the meeting were the following:

1. Kimberly Young (Kim) - Hurley's common-law spouse;
2. John Bernard Power - Defendant and father of Wayne;
3. Betty Ann Aucoin (Betty) - John's spouse;
4. Gail Power (Gail) - Wayne's spouse.

[2] Hurley says that Gail and Betty were downstairs at the time the money changed hands. Gail and Betty therefore did not see the money. He says he brought the money in a Sobey's bag. Approximately \$100,000.00 was in hundred dollar bills and the rest in fifties. Hurley says that John and Kim counted the money. John and Betty then left immediately because, according to Hurley, John said he was going to PEI in the morning to purchase a piece of heavy equipment.

[3] At the time, Hurley was not a qualified fisherman and therefore could not have a lobster licence in his name. He was satisfied to have the licence transferred to Wayne until Hurley himself did qualify. Wayne would effectively hold the licence in trust for Hurley. Hurley also agreed (or at least did not object) to title to the boat being held by the Defendant Beach Road Fisheries Limited (Beach Road). The Company was owned by John, who transferred ownership to Gail. There was no legal impediment to the boat (unlike the licence) going into Hurley's name.

[4] Hurley says that the April meeting was the culmination of a negotiation he had had with Wayne and John. Hurley says that, weeks or months previously, he and Wayne had first discussed the idea of purchasing John's boat and licence. Hurley said he and Kim went with Wayne to John's home in Cheticamp on two occasions. Hurley says that they met John's spouse Betty in Cheticamp. He also says that, though price had previously been agreed upon, the Cheticamp meetings were necessary to work out the details of how the transaction was going to work. Hurley did not consult his lawyer and there was no documentation (not even a receipt) regarding the purchase of the boat and licence. Hurley says that he completely trusted John and Wayne.

[5] Kim corroborates Hurley's account of the April meeting and the payment of the \$130,000.00. She also confirms Hurley's evidence that they travelled to John's home in Cheticamp on two occasions. Kim says that she met Betty in Cheticamp.

[6] The Defendants say simply that the April meeting did not take place. John says he was never paid the \$130,000.00 by Hurley. Betty says that she was never at Wayne's home when Hurley and Kim were present. She says she has never met Hurley and Kim. Betty insists "I have never seen them at our house."

[7] John did transfer the lobster licence to Wayne on April 16, 2002 (Exhibit 3). He also transferred Beach Road (which held title to the boat) to Gail on April 18, 2002. John explains the coincidence of events (i.e. the alleged payment and the transfers) in this way: In 1999, John says he bought the licence from Wayne for \$45,000.00. Wayne had a longstanding drinking problem and was in financial difficulty at the time. The \$45,000.00 was used to wipe out Wayne's debts. Wayne transferred the licence to John's designate James MacIsaac on May 3, 1999. (John already had one licence and could not legally hold another). As part of the deal, Wayne would continue to have employment on the boat fishing with James MacIsaac.

[8] By April 2002, John says that he had decided to return the licence to Wayne. He did this even though Wayne was still drinking heavily and was again in financial trouble. John says Wayne was not getting ahead financially and would soon have to pay for a daughter in university (Wayne's daughter was 15 in 2002). I shall return to John and Betty's evidence later.

[9] Wayne and Gail also deny that the April 2002 meeting took place. Furthermore, Wayne says that he never drove Hurley and Kim to Cheticamp to speak with his father.

[10] At this point it should be noted that, as of February 2002, Wayne and Hurley were involved in a tavern business together. Hurley had been engaged in the illegal sale of tobacco and alcohol for many years prior to 2002. He has several convictions related to this illegal activity and in 1999 served six months of a one-year jail sentence. In 2000, Hurley went bankrupt. Hurley would not have been able to hold a liquor licence in his name. Hurley therefore needed Wayne's name on the tavern business.

[11] Hurley and Wayne disagree upon the exact nature of their relationship in the tavern business. Wayne claims that he was a full partner. Hurley claims that Wayne was a “straw man”. Hurley insists that Wayne put no money into the business and played no role in its operation. On this issue, I believe Hurley.

[12] What is important, as far as this action is concerned, is that the relationship between Hurley and Wayne soured. There is conflicting evidence regarding the time good relations lasted. I am satisfied that problems with Wayne’s drinking were apparent from the outset. I am also satisfied, however, that the relationship did not completely rupture until sometime in the second or third quarter of 2003. Wayne complained that Hurley was not paying the bills and creditors were coming to Wayne. Hurley complained that Wayne was constantly drunk and abusive to customers at the tavern. Hurley wanted Wayne to stay away from the business and Wayne wanted his name removed. By the time Wayne finally got out, on April 1, 2004, the two were not on speaking terms.

[13] Meanwhile, Wayne fished the licence along with James MacIsaac for the 2002 lobster season (May 15 - July 15). Beach Road paid Hurley \$750.00 per week for fourteen weeks (\$10,500.00) for the 2002 season. (The extra weeks are

typically for pre-season preparation and post-season cleanup.) Hurley, however, never went anywhere near the lobster boat. Hurley felt he was paid because he had bought the licence. Wayne says Hurley was paid to compensate for Wayne's absence from the tavern. I believe Hurley and not Wayne on this issue. I am satisfied that Wayne's absence from the tavern for the eight week season made no difference to Hurley. I am satisfied that Wayne did very little if any work at the tavern. I am satisfied that Wayne never had any intention of employing Hurley in the fishery. The sole purpose of the weekly payments was to show Hurley some return on his \$130,000.00 investment.

[14] In November 2002, Hurley took a two-day marine safety course. He also registered as a part-time fisher for the 2003 and 2004 seasons. These steps were necessary if Hurley eventually wanted to get the licence in his own name. They would probably also be necessary if he wished to qualify for employment insurance as a part-time fisher. They would therefore be of little assistance in sorting out the factual issues in this case were it not for the fact that Beach Road paid for Hurley's courses (Exhibit 2, tab 29). These payments are consistent with Hurley's claim that he had invested in the fishery business.

[15] As mentioned, the relationship between Hurley and Wayne soured in 2003 over the tavern business. Hurley says he was also dissatisfied with the fishing business as he was getting nothing out of it. Hurley says that he and Kim went to see Gail about getting ownership of the boat transferred. Hurley says Gail told him that the title to the boat was going to stay where it was. Hurley testified that Gail asked, in an aside to Kim, what was wrong with Robert, “he’s not satisfied with unemployment stamps?” (Hurley transcript p. 37.) I believe Hurley’s recollection of this conversation. It is important because it is an indication that Gail did not know the exact nature of the deal between John and Hurley. I am satisfied that Wayne probably did not share that information with Gail. Gail may have been satisfied with Wayne’s story that Beach Road should pay Hurley to compensate him for Wayne’s absence from the tavern.

[16] Presumably, Wayne and MacIsaac fished the licence for the 2003 and 2004 seasons. The bulk of the correspondence between Counsel for the parties between June 2003 and April 2004 relates to the tavern business. There is one rather oblique reference to the fishery licence issue in a letter dated December 2, 2003 from Hurley’s counsel to Wayne and Gail’s counsel. “... my client has instructed me to explore all legal avenues available to him involving both this matter (the

tavern) and *one other encompassing your client, his wife and father.*” (Emphasis added). There is no reference to the highlighted matter in any subsequent correspondence between Counsel. Obviously the priority for both sides was the resolution of the tavern dispute. I assume there must have been some oral dialogue on the licence issue but there is no evidence one way or the other. In any event, Hurley commenced this action on June 28, 2004.

[17] The next important development occurred in April of 2005. By that time Wayne says he was in serious financial trouble due to his drinking and gambling. He says that he had decided to sell his boat and licence because he needed the money.

[18] Wayne says that one night at the Casino in Sydney, he stepped outside for a smoke. There he struck up a conversation with one Bernard MacIntyre whom Wayne says he did not previously know. During the conversation with MacIntyre, Wayne mentioned that he was selling his lobster licence for \$50,000.00. MacIntyre then contacted one Anthony Hendrikson to see if Hendrikson wished to buy a licence.

[19] Hendrikson is a partner with one Rodderick Jeffery (Jeffery) in a firm known as Three Port Fishery Ltd. Jeffery is a very close friend of both John and Wayne. In fact, John and Jeffery are presently partners in a tavern business (not the same tavern Wayne and Hurley were involved in). Jeffery was interested in acquiring another licence. Jeffery already had a licence in his name so he would have to put any additional licence in someone else's name. Jeffery says he put up the money for the "flip" which occurred on April 13, 2005.

[20] The so-called flip involved three licences; one owned by Hendrikson; another by MacIntyre; and the third by Wayne. MacIntyre's licence went to Hendrikson; Hendrikson's licence went to Jeffery's father; and Wayne's licence went to MacIntyre. The professed rationale for the flip was that MacIntyre's licence included a groundfish licence while Hendrikson's licence did not. For business purposes, Hendrikson wanted the groundfish licence.

[21] MacIntyre says that all he got out of the deal was a \$5,000.00 finders fee. Wayne says he got the \$50,000.00 from MacIntyre. Jeffery says that he paid a lump sum of \$50,000.00 - \$55,000.00 but that he did not pay MacIntyre the \$5,000.00. I am satisfied that Wayne is not being truthful. I have no doubt but

that, if Wayne actually got paid anything, that money came directly from Jeffery. I have no doubt but that MacIntyre got his \$5,000.00 from Jeffery.

[22] Jeffery did not impress me. Jeffery was called by the Plaintiff and therefore could not be cross-examined by Plaintiff's Counsel. There was no application to have Jeffery declared an adverse witness yet Jeffery was obviously just that. Jeffery went out of his way to demean the Plaintiff whom he believes is responsible for the destruction of Jeffery's boat by fire shortly after the licence transfer.

[23] Jeffery is a successful businessman who is very impressed with his own ability to wheel and deal. One cannot help getting the impression that he feels that he is the smartest one in the room no matter who else may be present. I have little doubt but that the "flip" was orchestrated by Jeffery. The alleged chance meeting between MacIntyre and Wayne outside the Casino is pure fabrication.

[24] At about the same time that the licence transfer took place, Beach Road, through Gail, sold the boat. Again Jeffery was actively involved in this

transaction. It was Jeffery who approached the eventual buyer several times to encourage the sale. Beach Road sold the boat for \$36,000.00.

[25] Hurley got wind of the proposed boat sale. Hurley went to the buyer, Tom Head Sr. (Head), and told Head that he, Hurley, in fact owned the boat. Head apparently told Hurley that title had been cleared by the lawyers. The sale went ahead.

[26] I reject Wayne's evidence that he sold the licence for \$50,000.00 because he needed the money right away. The boat and licence was worth \$150,000.00 in 2005 (John Power agreed with the \$150,000.00 estimate). Wayne says he was too embarrassed to go back to his father to get his father to buy the licence back. I do not believe him. Wayne has never been embarrassed about going to his father for money. The sale for \$50,000.00 was not a flip – it was a sham. If the \$50,000.00 actually changed hands, then it was a loan from Jeffery, who holds *a* lobster licence (then worth at least twice that amount) for security. I have no doubt but that Wayne's main intent in doing the sham sale was to attempt to defeat Hurley's interest in the licence.

[27] The fact that John bought the licence from Wayne for \$45,000.00 in 1999 has no bearing on the actual market value of the licence. The 1999 deal was a bargain between father and son. John was clearly trying to prevent his son from losing the licence and ensuring that Wayne continued to have employment. In addition, John did extensive renovation to the boat. John's evidence indicates that his payment was more in the nature of a loan that he hoped would be reimbursed from future profits from the licence. John may have expected to transfer the licence back to Wayne at some point in the future if Wayne got control of his drinking and gambling. Unfortunately, Wayne never did. In any event, the evidence is clear that in 2005 the licence was worth \$150,000.00 and, I am satisfied both John and Wayne knew it.

[28] As noted, Jeffery's boat was burnt shortly after the licence transfer. Jeffery then paid Wayne \$750.00 a week allegedly to keep watch over his wharf to prevent further acts of vandalism. Wayne's home apparently overlooks the wharf. Again, I do not believe that that was a *bona fide* transaction. I am satisfied that the so-called watchman's role was concocted after the fact to justify the weekly payments. I suspect that the \$750.00 payments were part of the "flip" transaction. They would compensate Wayne for loss of the licence just prior to the 2005 lobster

season and probably enable him to collect employment insurance. If Wayne is suggesting that he fished with his father for the 2005 season, I saw no evidence to verify that fact.

[29] In July 2005, less than a year after the licence transfer and the sale of the boat, Wayne and Gail went bankrupt. In her Statement of Affairs sworn on July 26, 2005, Gail reported the sale of the boat and licence for \$86,000.00 (boat \$36,000.00; licence 50,000.00). With that money, Gail says they paid \$28,000.00 on their home mortgage, “repaid \$33,000.00 on family loans, \$10,000.00 on furniture loan and my husband lost the balance gambling”.

[30] During cross-examination, Gail said that the \$33,000.00 comprised repayment of \$8,000.00 to her brother and \$25,000.00 to John, Wayne’s father. John had already testified that he had not received the \$25,000.00. He later relented and allowed that he might have. Gail testified that she later learned from Wayne that in fact Wayne had not paid the \$25,000.00 to his father but had gambled the money away. Wayne testified to the same effect. I do not believe Wayne or Gail. I am satisfied that they were using Wayne’s gambling problem to attempt to repair the problem with his father’s evidence. John was obviously not

aware of what Wayne and Gail had sworn they had done with the \$86,000.00. I believe what John said first – that he did not get the \$25,000.00.

[31] Gail's evidence about the \$10,000.00 on the furniture loan is also suspicious. She now says this money was actually paid to Wayne's mother whom, Gail says, had financed the purchase of the furniture. Of course, there is no documentary evidence for this loan.

[32] In cross-examination, Gail and Wayne were shown a loan application they signed on April 19, 2001. In their list of assets, they show \$150,000.00 as the value of the "Boat/licence/gear". In 2001, they did not own such an asset. When confronted with the document, they sought refuge in the fact that the notation in question is handwritten on a typed document. They wish me to infer that someone had written it in after they had signed. A previous application dated December 11, 2000 had no such notation. At that time, they were applying to borrow just \$1,650.00. In April 2001, they were applying for \$14,640.00. I am satisfied that they lied about the \$150,000.00 asset in April 2001.

[33] In short, Wayne and Gail are not credible witnesses. When they testify that the April meeting between John and Hurley did not take place, I do not believe them. Also, the failure to account for the \$86,000.00 supposedly obtained through the sale of the boat and licence reinforces my belief that the sale was a sham. There is at least \$35,000.00 (\$25,000.00 for John plus \$10,000.00 for furniture) of the alleged \$50,000.00 payment not accounted for.

[34] In fairness to Gail, as I indicated earlier, I am satisfied that she was probably not completely aware of the deal between John and Hurley. Like Betty, Gail was downstairs at the time the \$130,000.00 was paid. Her aside to Gail (see above p.8) indicates that she was under the mistaken impression that she was the outright owner of the boat rather than the owner in trust for Hurley. As noted, I doubt that Wayne would have told Gail about the \$130,000.00 payment. Gail acknowledged that Hurley and Kim were at her home on many occasions regarding tavern business. She may have had no reason to believe otherwise when they were present for the \$130,000.00 transaction.

[35] I now turn to an analysis of the evidence of John and Betty. Much of their evidence focussed upon refuting that they could have been in the New Waterford

area in mid April 2002 and, more particularly, on April 18, 2002. For that reason, Betty's employment record for April 2002 was introduced to show that she worked Monday to Friday every day during the relevant time. That fact suggested that Betty was therefore unlikely to have made the two-hour drive back and forth to New Waterford. They also introduced their telephone record for April 2002 mainly to show that one of them had to be at home in Cheticamp on the evening of April 18, 2002.

[36] The foregoing evidence is largely unhelpful because all the other evidence in this case does not establish that the \$130,000.00 meeting necessarily took place on April 18, 2002. Hurley's evidence was that the meeting occurred in March or April "sometime before the fishing season". Kim's evidence indicates the meeting was sometime in April. As noted, Exhibit 3 shows the licence transfer to Wayne occurring on April 16, 2002.

[37] I am satisfied that the meeting could have occurred on one of Betty's days off (i.e. a weekend) or on a Friday evening when she did not have to face the prospect of rising early for work the next day. The fact that Beach Road changed

hands on April 18, 2002 is more consistent with the deal having been done prior to that date than that the meeting necessarily took place at that time.

[38] Betty Aucoin was an impressive witness. I have a lot of trouble believing that she would shade the truth even for her husband whom she obviously loves and admires. I am confident that Betty probably does not know that her husband received the \$130,000.00 from Hurley. If Betty was aware, or later became aware, of the boat and licence transfer, I am sure she would see it as yet another act of a generous father. She would readily assume or accept that no money was involved. After all, this was a man who did everything he could to help his family. He was the man who had gifted his daughter a home assessed at over \$90,000.00.

[39] Betty obviously has high regard for John's business ethics and John would not want her to know that he had done anything untoward. If she was at Wayne's home during the meeting in question, I am sure that she was downstairs as Hurley says and therefore did not see the money or hear any pertinent discussion. If she was there, there is no evidence to suggest that she took notice of Hurley and Kim or that, if she did, she would have any particular reason to recall it.

[40] Betty is relying upon her attempted reconstruction rather than her independent recollection of an event that occurred over six and one half years prior to her testimony. That “event” would have been meaningless to her at the time because John likely would not have told her what was going on. She would have no specific reason to etch that event in her memory. Betty therefore relies upon her usual practice of just going to New Waterford on special occasions. I am satisfied that Betty is honestly mistaken about her trip to New Waterford in April 2002.

[41] Similarly, I am satisfied that Betty is mistaken about Hurley and Kim’s two visits to Cheticamp. Again, she is trying to recall a possibly momentary introduction that occurred over six and one half years earlier. Hurley and Kim do not recount any conversation with Betty. Their evidence is simply that she was home at the time. Hurley’s evidence is clear that it was John who showed he and Kim around the premises.

[42] It is also important to keep in mind that John and Betty’s home is also a business. They run a bed and breakfast and also some cabins. There are therefore many strangers regularly visiting the premises. It would be interesting to know the number of such visits which have occurred in the last six and one half years. The

point is that in March - April, 2002, Betty would have no particular reason to make a specific mental note of Hurley's and Kim's visits. She could thus readily and honestly agree with John's assertion that they were never there.

[43] Other than to fulfill his bargain with Hurley, John had no credible reason to transfer the boat and licence to Wayne in April 2002. Wayne had not changed since John had bailed him out financially and taken over the licence three years earlier. Wayne was still drinking heavily and gambling. According to Gail, Wayne was constantly in financial trouble.

[44] John could have found a better way to ensure that Wayne's fifteen year old daughter eventually had her university education paid for. In April 2002, she still had over two years left in highschool. John had the means (he claims to have a net worth of over \$4 million) to easily take care of his granddaughter's university. (John gave evidence that he bought a vehicle for another grandchild attending university.)

[45] It is probably fair to say that John did not accumulate his fortune by passing up opportunities. Here, no doubt with some persuasion by Wayne and Hurley,

John saw an opportunity. Even to John, \$130,000.00 cash is a lot of money. At the same time, he would incidentally benefit his oldest son. Wayne would continue to have employment and, as they no doubt told John, Wayne would get one half of the profits from the fishing business.

[46] The last point is key to understanding why John on March 24, 2003, would spend \$6,000.00 for a herring/mackerel licence for Wayne. At that time, the lobster licence was still in Wayne's name and Wayne was due one-half of whatever the boat and licence made. Even though he had technically sold the lobster licence to Hurley, John knew that the mackerel/herring licence would directly benefit Wayne. I am satisfied that John bought the mackerel/herring licence before he realized that things were coming apart for Wayne and Hurley at the tavern. Moreover, John would have been well aware that, without a trust agreement, Hurley would be hard-pressed to force Wayne to transfer the licence. (John had had a trust agreement with James MacIsaac when John owned the licence between 1999 - 2002.)

[47] John was a strong and intelligent witness. His business success, work ethic and devotion to his family are admirable. He faltered during cross-examination

when asked about the \$25,000.00 loan he had supposedly been repaid. As I noted earlier, he first denied repayment but then backtracked when he realized the implications of his denial. His assertion that, because of his wealth, he could have forgotten the repayment is not believable. It is a demonstration that John is not beyond fudging the truth if it will benefit his family.

[48] In short, in the context of all of the evidence, I do not believe John when he denies that he received the \$130,000.00 payment from Hurley. This is an example of a witness who, though, for the most part, apparently forthright and direct, is nevertheless untruthful. On the contrary, a witness like Hurley, who was vague and evasive, can sometimes be truthful.

[49] Hurley and Kim were not credible witnesses. If Hurley's case rested solely on his credibility, I would have summarily thrown it out. It was tempting to do so in any event. I have no doubt but that the \$130,000.00 Hurley paid John was money he made illegally selling alcohol and tobacco. Hurley was trying to launder the money by investing it in a legitimate business. The absence of documentation suited this purpose.

[50] During cross-examination Hurley was pressed about the fact that he had used a lawyer and left a paper trail with the tavern business. The implication was that he would hardly refrain from doing the same when far more money was involved with the fishing licence. That line of argument has two problems: first, Hurley did not use his own money in the tavern purchase, he borrowed from John and then repaid John with proceeds from the tavern; second, unlike the fishing licence, the tavern involved outside third parties such as the vendor and the bank. Lawyers had to be involved.

[51] I am further satisfied that Hurley had hidden this money from the tax man, his other creditors, and his trustee in bankruptcy. Hurley admitted that he lied to both the trustee and his creditors. My hope is that the Canada Revenue Agency is now paying attention in the event that Hurley realizes any cash from this lawsuit. (The Canada Revenue Agency may also be interested to know that John got \$130,000.00 for his boat and licence.)

[52] Kim was also not credible. Her insistence, for example, that she continued to sell illegal cigarettes after 2000 without Hurley's knowledge is demonstrative of her ability to lie.

[53] Of course, I am free to accept all, part or none of what a witness says. In the context of all of the evidence I have heard, Hurley's assertion that he paid John the \$130,000.00 is the only scenario that makes sense. Put another way, in the context of all the evidence, the payment is the only reasonable inference I can draw from the proven facts. I believe Hurley when he says he paid John \$130,000.00 for the boat and licence. I am satisfied that Hurley has proven on a balance of probabilities that he paid John the \$130,000.00.

[54] *What is Hurley's remedy?* The Defendant John accepted Hurley's "dirty" money without hesitation. I have no doubt but that John either knew about the source of Hurley's funds or was wilfully blind to it. Wayne was well aware of Hurley's background and the likely source of his funds. I agree with the Plaintiff's position outlined in his brief on the current Canadian position.

'The current Canadian position seems to be that, in general, illegality does not prevent a trust from arising on ordinary principles, notwithstanding that it involves or is connected with some form of illegality. This is certainly the case where a resulting trust arises out of a transaction which was intended to facilitate fraud. However, such a trust will not be enforceable by the beneficiary if he or she must lead evidence of the illegality in which he or she is implicated to show that the trust exists – the so-called 'reliance' principle: *Turbide v. Moore 2006 Carswell NS 127 (SC)*.

With respect to the matters at issue in the case at bar, it may at once be noted that there was nothing illegal about the substance of the transaction concluded between the Powers and Hurley. It is well established that private agreements respecting fishing licences and/or fishing vessels are enforceable by the courts.

In particular, the registered holder of a DFO fishing licence and/or a fishing vessel can bind himself or herself contractually respecting not only the disposition of the 'property' but also the ongoing economic benefits therefrom, and that conversely non-licence holders can enforce agreements with licence holders in that regard: *Loder v. Citifinancial Canada Inc.* 2007 NLCA 78; *Green v. Harnum*, 2006 NLCA 46; *Therriault v. Corkum* (1993), 121 N.S.R. (2d) 99 (N.S.C.A.); *Cabot v. Hicks* (1999), 176 Nfld. & P.E.I.R. 48 (N.L.T.D.); *British Columbia Packers Ltd. V. Sparrow* (1989), 35 B.C.L.R. (2d) 334 (B.C.C.A.).

In the *Turbide* case, Forgeron J. quoted from Snell's Equity, Thirtieth Edition as follows:

‘The maxim (He who comes into equity must come with clean hands) must not be taken too widely; Equity does not demand that its suitors shall have led blameless lives. ‘What bars the claim is not a general depravity but one which has an immediate and necessary relation to the equity sued for,’ and is not balanced by any mitigating factors.’

In the case at bar, the ‘illegality’ upon which the Defendants would seek to rely refers to the source of Hurley’s funds, and possibly to his failure to disclose their existence to a relevant authority - in other words, his ‘general depravity’. However, the source of the purchase funds need not be established to prove the existence of the trust relationship arising between the parties in respect of the property purchased. The underlying ‘illegal transaction’, if indeed one exists, is simply not relevant.

Moreover, illegality should only exceptionally lead to such a severe consequence as the forfeiture of a person’s property, especially where that forfeiture would be in favour of a person who was a willing party to the illegality.’

[55] It would appear that John is off the hook. John did all that Hurley asked him to do after he got the money. John transferred the licence to Hurley’s designate Wayne. John also transferred the boat to Gail (Beach Road) and Hurley obviously concurred.

[56] Hurley must therefore now look to Wayne, Gail and Beach Road for a remedy. They held the boat and licence in a resulting trust for Hurley. Wayne,

Gail and Beach Road were therefore obliged upon request to transfer the boat and licence to Hurley or his designate. Instead they sold the boat to Read or his son, and transferred the licence to another party. Transfer of the boat and licence is not now feasible. Gail did not know about the \$130,000.00 deal and, therefore was unaware that she, through Beach Road, was actually holding the boat in trust for Hurley. It was Wayne's deception that caused Gail to sell the boat. Wayne is therefore solely liable to compensate Hurley for both the boat and the licence. I am dismissing Hurley's claim against Gail and Beach Road.

[57] Hurley also seeks an accounting of the profits for the use and operation of the licence. I doubt that there were any such profits. In any event, that claim was not pursued at trial. Hurley should be content with the return of his \$130,000.00 without interest.

[58] Similarly, I am dismissing Wayne's counterclaim for an accounting of the profits of the tavern and a valuation of that business. I have accepted Hurley's evidence that Wayne was indeed a "straw man" and therefore had no financial stake in the tavern.

[59] **Costs:** Each of the parties will bear their own legal costs. Hurley, though the successful litigant, took the risk that his effort to hide his ill-gotten gains would leave him legally exposed. He chose to dispense with the safeguards that a properly documented transaction would afford him.

[60] John Power, though not liable to Hurley, has not been vindicated. He was untruthful with the Court in an attempt to protect both himself and the other Defendants. Had John been truthful, Hurley likely would not have pursued his claim against John.

[61] Gail and Beach Road were unwitting dupes in Wayne's scheme to defeat Hurley's interest in the boat and licence. Hurley had no choice but to seek recovery from them. Strictly speaking, it was Wayne who ensnared Gail and Beach Road in this lawsuit. It is therefore Wayne who should be responsible for Gail's and Beach Road's legal costs. Obviously, in the circumstances I have described above, an Order of costs against Wayne *vis a vis* his wife and Beach Road would be meaningless.

Order accordingly.

J.