SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 0406 of 2001

BETWEEN:

BERND KALTHOFF

Claimant

and

LLEWELLYN XAVIER

Defendant

Appearances:

Ms. Kimberley Roheman for the Claimant.
Mr. Kenneth Monplaisir QC for the Defendant. With him is Ms. Marcellina John.

2002: November 21, 2003: January 30
2003: February 03

BREACH OF CONTRACT…REPUDIATION…DAMAGES

JUDGMENT

1. HARIPRASHAD-CHARLES J: The Claimant, Mr. Bernd Kalthoff is a retired optician from Germany who has been residing in Saint Lucia since 1988. He was at all material times a customer of the Defendant, Mr. Llewellyn Xavier, a renowned Saint Lucian artiste of international repute whose art work is displayed in major international museums including the Smithsonian Institution, Washington D.C., the Metropolitan Museum of Art, New York, the American Museum of Natural History, New York, The Art Gallery of Ontario, Toronto and Oxford University, England to name a few.

2. The Claimant and the Defendant first met in or about 1996. On or about the 29th day of April 1997, the Claimant commissioned the Defendant to do a work of art comprising of

two heavily gilded and embossed panels, mounted on sculptural forms made from pure gold. The pieces were executed and payment was made in two installments, one prior to execution and the other upon completion.

3. On or about the 7th day of May 1999, the Defendant expressly agreed in writing to design and construct four gardens for the Claimant. The following terms are contained in the written agreement:
    (i) Four gardens to include:- (the major part) a miniature rain forest and orchid garden comprising indigenous species and mature plants from Holland.
    (ii) Planning and designing of the garden to take two (2) weeks.
    (iii) Creation of the garden to take three (3) months.
    (iv) Maintenance of the garden for approximately 6 months, or until it is in a manageable state.

4. The cost of the project was estimated at US$50,000.00 requiring a deposit of US$25,000.00 and the balance to be paid on completion. In pursuance of the said agreement, the Claimant paid a deposit of EC$70,000.00 or approximately US$25,000.00 on the 20th day of May 1999.

5. But the design and construction of the gardens could not have been undertaken immediately given the status of the construction work at the Claimant's residence. In or about July 2000, the site became ready for planting and the Defendant was so informed. The Defendant did not commence or state when he would commence work. The once harmonious relationship between these two gentlemen now seemed to be heading into murky waters. Dialogues between them were now reduced to writing. On the 2nd day of August 2000, the Claimant wrote to the Defendant requesting that the agreed work be undertaken. The Defendant responded on 25th day of August 2000. He resented the manner in which the Claimant chided him over the telephone. He wished not to be treated like a child or a servant. Nevertheless, he was prepared to overlook those hurdles and move on. He agreed to install the garden.

6. Three months passed and the garden was still not in sight. It was not installed. So, on the 1st day of December 2000, the Claimant again wrote to the Defendant stating that the contract was at an end and he requested a proper account of the deposit of EC$70,000.00. On the 4th day of December 2000, the Defendant responded and regretted that the Claimant has decided to "finish the contract". The Defendant explained that the deposit of EC$70,000.00 was used to propagate, purchase and import rare and exotic plants for the garden. Then on the 6th day of December 2000, the Claimant finally wrote to the Defendant seeking the delivery of the plants and to send a serious bill. On the 22nd day of December 2000, the Defendant's accountant send an invoice showing a balance of US$23,960.27 with an annotation in the following words "you have not been billed for the 'Two Gardens at Horizon.' "

7. Of course, the Claimant, a retired businessman by profession sought immediate legal advice. On the 1st day of February 2001, his solicitor wrote to the Defendant. The letter denounced the unacceptable situation endured by the Claimant and called for a final attempt at settlement. The letter requested that the Defendant complete the agreed work within the three-month period contracted and ending 30th day of April 2001 whereupon the balance of the contract price will be paid. In the alternative, the Claimant requires the return of the deposit less the sum of EC$2,399.00 i.e.EC$67,601.00.

8. The Defendant did not respond to the solicitor's letter. On the 3rd day of May 2001, the present proceedings were instituted against the Defendant seeking return of the deposit of EC$70,000.00, damages for breach of contract, interest and costs. The Defendant defended the claim and counterclaimed not only for the balance of EC$64,410.00 due on the contract but for an astronomical sum of EC$336,025.00 for designing and establishing "Two Gardens at Horizon."

THE CLAIM

9. It is accepted that the contract came to an end on the 1st day of December 2000. The principal issue which falls to be determined is: was there a breach of the contract by either party?

10. Learned Queen's Counsel for the Defendant contended that there was no time for completion of the contract as the Claimant repudiated the contract and the Defendant was entitled to treat such repudiation as a termination of the contract. Counsel submitted that the correspondence between the parties of the 1st, 4th and 6th December 2000 showed that the Claimant has repudiated the contract. Learned Queen's Counsel next submitted that at the time that the Solicitor for the Claimant wrote to the Defendant on the 1st day of February 2001, the contract was already repudiated. At para. 548 Vol. 9 of Halsbury's Laws of England, Fourth Edition, the Learned Authors said:

> "Repudiation may be an express renunciation of contractual obligations. However, it is more commonly implied from the failure to render due performance or, in cases of anticipatory repudiation, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable man to believe that he will be unable to perform or will be unable to perform at the stipulated time."

11. At para. 556, the Learned Authors continued:

> "The question whether or not a party has elected to rescind is one of fact. An election to rescind must involve an unequivocal assertion by the innocent party that he regards himself as no longer bound by the contract as a result of the breach…
>
> Where the defaulting party is the plaintiff in an action and the innocent party is merely relying upon the breach as justification for his non-performance, the innocent party need show no positive acceptance of the breach as terminating the contract, though he will not be able to rely upon that breach as discharging him if his inaction is such as otherwise to constitute affirmation."

12. Mrs. Kimberley Roheman for the Claimant submitted that the Claimant was frustrated with the repeated demands for performance and that there was a total failure of proven performance. She next submitted that the Defendant had no intention of completing the

contract within the express contractual period of three months, or within a reasonable time or at all.

13. The general rule of contract is that a party must perform exactly what he undertook and contracted to do. A breach of contract entitles the innocent party to treat a contract as discharged:
    (i) Where the party in default has repudiated the contract before it has been fully performed i.e. where by words or conduct he has intimated that he does not intend to honour his obligations.
    (ii) Where the party in default has committed a fundamental breach.

14. In the instant case, it was an express term of the contract that the garden will be installed in three months. It was an agreed express term that completion would be three months of the date on which the premises were ready for installation of the garden. Up to the 1st day of December 2000, the garden had not been installed. It is clear from the Claimant's evidence that he specifically demanded completion of the contract and that time was of the essence. On the other hand, the Defendant was least concerned about time. He deposed that he is moved to create when he is inspired to do so. In my opinion, although time was of the essence of the contract, it was immaterial to the Defendant since if he is not inspired, he will not create. He does not like to be hurried into doing these inspirational works. So, it is my firm view that the Claimant was 'at the mercy 'of the Defendant.

15. On the evidence as presented, I am also of the view that the Defendant by his failure to commence the installation of the garden committed a breach of the contract entitling the Claimant to treat the contract as discharged. In this regard, the Claimant is entitled to the return of the deposit of EC$70,000.00 less $ 2,399.00 representing professional work undertaken.

COUNTERCLAIM

16. The Defendant counterclaimed for the following:

(i) EC$64,410.00 being the balance due on the contract.

(ii) EC$336,025.00 for designing and establishing two gardens at Horizon.

(iii) Interest on the balance of EC$64,410.00 from 1st day of December 2002 until the date of payment at the rate of 6% per annum.

(iv) Interest from 1st June 2001 at 6% per annum until the date of payment and

(v) Costs.

17. Given my judgment on the claim, the issue of the balance of EC$64,410.00 is now not an issue.. In respect of the Counterclaim, the Defendant alleges that in accordance with an oral agreement, he designed and installed two artistic gardens at the Claimant's house named Horizon using semi precious stones. The Defendant next alleges that although the Claimant was billed for the two gardens at Horizon for a sum of EC$336,025.00, he has failed to pay.

18. In his Reply and Defence to Counterclaim, the Claimant alleges that there was no oral contract or otherwise for the design and installation of two artistic gardens at Horizon. He asserted that he had purchased paintings from the Defendant and that in December 1996 at his wife's 50th birthday party the Defendant offered to design the aforesaid two gardens at Horizon as a gift to the Claimant's wife.

19. I believe the Claimant that the two gardens of which they took an active role in gathering rocks and semi-precious stones from a beach at Cap Estate were a birthday gift and that the Defendant assisted him in gathering stones and in the design and installment of the gradens. They were good friends.

20. The Claimant first learnt that he had to pay for the two gardens at Horizon when he received an invoice on or about December 2000 which contained the following annotation: "You have not been billed for the two gardens at Horizon."

21. Finally, by invoice 01-2001 dated 26th day of February 2002, the Claimant was billed for US$125,000.00 being the cost of designing two gardens at Horizon. It is rather strange that it took the Defendant five years to forward an invoice for the two gardens.

22. On the facts adduced, I find that the counterclaim must fail. There was no contract for the two gardens at Horizon. There was no answered design, no contract price, nothing. It is trite law that if an offer is not definite and certain, the acceptance creates nothing that can be enforced by the law.

CONCLUSION

Accordingly, I order as follows:

(1) That there be judgment for the Claimant in the sum of $EC67,601.00.
(2) That the counterclaim filed on the 19th day of June 2001 is hereby dismissed.
(3) Interest at the rate of 6% per annum from the date of judgment to the date of payment.
(4) Costs agreed at $10,000.00 to the Claimant.

INDRA HARIPRASHAD-CHARLES
High Court Judge