

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 183 OF 2005



BETWEEN:

HEATHER GRANT

Claimant

AND

AUGUSTUS KING MITCHELL

Defendant

Appearances:

Mr. Duane Daniel for the Claimant

Mr. Sylvester Raymond-Cadette and Mr. Emery Robertson Senior for the Defendant

2005: January 24

2007: March 1

JUDGMENT

[1] **BRUCE-LYLE, J -:** The Claimant and the Defendant both reside in Union Island, in the State of Saint Vincent and the Grenadines. On the 29th June 2004 both parties agreed that the Defendant would transfer 35% of his interest in a property called the Sunny Grenadines Hotel situate in Union Island, in return for the expertise and managerial skills of the Claimant in managing the said hotel. The hotel at the time was valued at \$2.3 million. It was to be transferred to a company incorporated by the parties with the terms of the agreement to be agreed by both parties before the formation of the company.

[2] This company would then have been the vehicle through which the project was to be facilitated. The Claimant as per the contract agreement would give her time, skill and expertise in management and marketing for a 7-year period effective from the 29th June 2004.

- [3] Matters did not go as planned, leading to this suit which is based on a breach of the said agreement or contract dated the 29th June 2004 and made between the parties to this suit.
- [4] The Claimant in her evidence contends that the Defendant at all material times maintained that he held the property absolutely either in his personal capacity or in a body corporate over which he had complete, exclusive and unfettered control.
- [5] She further contended that the Defendant did not effect transfer of title to the company as per the contract and told the Claimant that she was no longer part of the project. The Claimant sent the Defendant a notice of breach and asked the Defendant to remedy the breach within 14 days.
- [6] According to the Claimant, the Defendant did not remedy and reiterated that the Claimant was no longer a part of the project and questioned her status in relation to the agreement and further pleaded frustration on the basis that there were additional shareholders; previously undisclosed who did not agree to the transfer of the property.
- [7] The Claimant therefore claimed as pleaded in her statement of claim: -
- (a) A declaration that the Claimant has a beneficial interest in the property situate at Union Island and known or described as Sunny Grenadines Hotel.
 - (b) Compensation for services:
 - (i) Creation of plans and drawings
 - (ii) Interior decorating
 - (iii) Project Management.
 - (c) Special Damages in the sum of EC\$198, 821.79.
 - (d) Damages for breach of contract equivalent to 35% of the property known or described as Sunny Grenadines Hotel.
 - (e) Loss of Profits.
 - (f) Interest.
 - (g) Costs.

(h) Further or other relief.

[8] I need to state at this stage of the judgment that the Claimant, which is undisputed, was to use her expertise in design, interior decorating, architectural drawing etc. to manage the refurbishment, as well as contribute to the refurbishment in the ratio of 35% to her and 65% to the Defendant.

[9] The Defendant's case was that the Claimant is in breach of contract by incorporating the contract in a manner inconsistent with the terms of the contract; and secondly that the contract has been frustrated by virtue of the fact that the hotel which forms the subject matter of the agreement is owned by a domestic company, Mitchell's Hardware Ltd and no privity of contract exists between the Claimant and Mitchell's Hardware Ltd., and thirdly, that the incorporating of the company by the Claimant was repugnant to the provisions of the Aliens (Landholding Regulations) Act,

[10] I prefer to deal with this third area of the Defendant's defence first. It is my view from the evidence and having analyzed both arguments for the Claimant and the Defendant on this issue that there is no evidence to support any view that what the Claimant did by way of incorporating the company mentioned in evidence was repugnant to the provisions of the said Alien (Landholding Regulations) Act. If the Defendant maintains that the transfer of the hotel to the company cannot take place by virtue of the fact that the existing shareholders of Mitchells' Hardware Ltd will not transfer, of what purpose or effect is any licence? The position would have been different if the Defendant was in a position to transfer and did cause the transfer of the hotel to the company so incorporated, or did not transfer the hotel to the company at all for fear of some illegality. If the above scenario had taken place and the Claimant had sent the Defendant a letter informing or complaining of such breach, the Defendant would have been in a fine position to make illegality and/or any attendant licence an issue.

[11] The Defendant has made much about this issue pertaining to the Alien (Landholding Regulation) Act. In my view this is a non-issue and that ground of defence is hereby dismissed.

[12] I now turn to the alleged breach of the Claimant. This contract was exhibited as Ex. H.G. 2 by the Claimant. Section 4(a)(i) and (ii) of the contract provides as follows:

- “(i) The parties shall incorporate a company (hereinafter referred to as the Company) which shall be the vehicle through which the project is to be facilitated.
- (ii) The name of the company is to be chosen by the Manager.”

In paragraph 20 of her claim, the Claimant states:

- “(20) The Claimant in pursuance of all her obligations per contract incorporated a domestic company in the State of Saint Vincent and the Grenadines, date of incorporation 29th October 2004, company No. 106 of 2004 ...”

and by paragraph 27 of her witness statement:

- “(27) In pursuance of all my obligations per contract I incorporated a domestic company...”

From this it is clear that the Claimant readily admits that it was she who incorporated the Company in late October 2004. It is evident from the evidence adduced by the Claimant under cross-examination that the Claimant explained that she had desperately contacted the Defendant to assist with the incorporation, as it was through the company that funds were to be channeled instead of the joint account which was still in use in October 2004 and up to the time the claim was filed. This joint account was an interim measure to manage the pre-incorporation money.

[13] The contract was signed on the 29th June 2004. Four months later after asking the Defendant several times to incorporate with her and having received no positive response, the Claimant incorporated the company and furnished the Defendant with copies of all the documents. At this stage the Defendant made no allegation or complaint that there was any breach of the agreement. The Claimant further stated under cross-examination that if

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the Defendant took serious issue with the company as incorporated, she would have been only too happy and willing to incorporate another company to satisfy the Defendant.

[14] I therefore ask myself – Where is the breach of contract as alleged by the Defendant? The simple answer is that the Claimant is not in breach as alleged or at all, and that she acted prudently in the circumstances when it is clear that it was the Defendant who was not conforming to the terms of the contract, and I so hold. This ground of defence fails miserably, and it is also dismissed.

[15] This leaves me with the last ground of defence as posited by the Defendant – frustration of contract. It was advanced by the Defendant that the company has a separate legal personality and is not bound by the contract as it is not a signatory to the contract. At no time does the Claimant seek to challenge the fact that Mitchell's Hardware Ltd has separate legal personality. The Claimant's case rather is that the Defendant is personally liable. It is also her case that the Defendant contracted with her the Claimant and represented to her that he owned the hotel, either in his personal capacity or that he exclusively owned a company over which he had complete ownership and control. She further alleged that the Defendant induced the Claimant to sign, by promising in return, under contract, a 35% (per cent) share in the hotel, which the Defendant maintained that he owned. The hotel, before restoration and refurbishment was valued at \$2,304,220.

[16] The Claimant's case therefore is that the Defendant is personally liable to the Claimant for her loss and that the Defendant should not be allowed to rely on the principle of frustration to avoid damages to be paid to the Claimant for breach of contract. The Claimant relies on the fact that the Defendant must have known as he was the Managing Director of Mitchell's Hardware Ltd, the company which owns the hotel, that he would require the permission and consent of the other shareholders to affect the transfer as per contract. It is interesting to note that the Defendant by the very contractual terms represented that he owned the hotel absolutely.

[17] The Defendant on the other hand states that the Claimant was aware that Mitchell's Hardware Ltd owned the hotel as this was discovered by counsel for the Claimant "before the contract was drafted and signed." For avoidance of doubt I reproduce paragraph 2 of the Defendant's defence filed on the 23rd May 2005 –

"(2) Paragraph 3 of the Claim is denied. The SUNNY GRENADINES HOTEL (the Hotel) is owned by the MITCHELL HARDWARE COMPANY LIMITED a company incorporated under the Laws of Saint Vincent and the Grenadines. This was knowledgeable to the Claimant through her attorney who discovered this fact after a title search before the contract was drafted and signed. He related this to the Defendant in the presence of the Claimant and the Defendant's Attorney."

I again reproduce paragraph 5 of the Defendant's witness statement filed on the 25th November 2005 –

"We had meetings with Mr. Daniel at his chambers and reviewed the agreement. During our meetings Mr. Daniel told my lawyer in my presence that he discovered that the Sunny Grenadines Hotel was owned by Mitchell's Hardware Limited. I was not in agreement as I thought that although the company was formed I was in complete ownership of the Hotel. I am a layman and had no knowledge of company law."

[18] The Defendant throughout the trial gave me the distinct impression that he had no legal representation throughout the transaction in issue, but here we have both the defence and witness statement of the Defendant supporting the contention that the Defendant had legal counsel throughout the negotiations as they state that his counsel was present "before the contract was drafted and signed." In another vein he says "we had meetings ... and reviewed the agreement. During our meetings Mr. Daniel told my lawyer..."

[19] This puts the credibility of the Defendant into serious question. I found him to be evasive and cunning. He did not succeed in fooling this Court though. Short of calling him a liar because of his advanced age, I cannot help but view him as someone who is a clear stranger to the truth. On the other hand the Claimant's witness statement at paragraphs 16, 17, 18 and 19 clearly indicates that she did enquire as to the ownership of the hotel and the misleading response given to her by the Defendant.

[20] I also refer to Section Two of the Contract Ex. H.G. 2 which the parties signed –

"2(a) AND WHEREAS under and by virtue of a singular or various titles recorded in the Registry of the State of Saint Vincent and the Grenadines the hereditaments and premises as a more particularly set out and described therein became seised by King Mitchell (and or a body or bodies corporate of which he has full ownership and control) ...

(b) AND WHEREAS KING MITCHELL has given the MANAGER to understand that the aforementioned hereditaments comprise of property better and more commonly known as the Sunny Grenadines Hotel in his exclusive possession or in the possession of a body corporate of which he has ownership and control ..."

And by Section 3 (a) (i) –

"3(a)(i) King Mitchell is the owner/proprietor of the Hotel."

This clearly supports the Claimant in her witness statement as to how the Defendant misled her into believing that he was the sole and exclusive owner of the said Hotel.

[21] It is easy to discern that the contract was drafted with no mention of Mitchell's Hardware Ltd. Further, the terms of the contract rather strongly favours the Claimant's version that she did not know the name of the company, or have knowledge of its name before the contract was signed. She was led to believe that the Defendant exclusively owned the Hotel as so informed by him and his attorney. The Claimant therefore contracted on the basis that the ownership and control of the Hotel on information received from the Defendant. That I am totally convinced about having regard to the contract and the evidence of the Claimant as juxtaposed to that of the Defendant which I find to have credibility problems.

[22] Again it is pellucidly clear that the ownership of the Hotel was known to the Defendant, but then he never indicated that there were shareholders or any encumbrance affecting his ownership or control of any company which may own the Hotel. The Claimant was innocent to the name of the company at the signing of the contract, and to the existence of shareholders as she was told there was only one shareholder – the Defendant – see the case of Walton Harvey Ltd v Walker and Homfray's Ltd [1931] 1 Ch 274.

[23] This case is on all fours with this instant case. In this instant case, the Claimant and the Defendant entered into a contract; the Defendant did not disclose to the Claimant that there were shareholders in the company whose prior approval would have to be obtained in order to transfer the Hotel. The Claimant was led to believe by the Defendant that the Hotel was not subject to any third party who may have rights and interfere with the Defendant's ability to transfer. The Defendant must have known of the shareholders and knowledge should be imputed to him.

[24] The Defendant's witness Adella James whose evidence could at best be described as jittery and to my mind attempting to conceal the truth, admitted however that the Hotel belonged to Mitchell's Hardware Ltd.; that her father, the Defendant was the Managing Director, and that meetings were held from time to time, even though sporadically, and also an oral list as to who some of the shareholders were.

[25] It is my view therefore that if the Defendant seeks to rely on the fact that the contract is frustrated by virtue of the shareholders not agreeing to ratify his intention to transfer and that this supervening circumstance, if absent would have led to the performance of the contract, that defence would not avail him having regard to all the circumstances of this case and the evidence before me. The rights that Mitchell's Hardware Ltd had over the Hotel are the same as the rights the local authority had by virtue of the Statute in the **Walton Harvey Ltd v Walker and Homfray Limited** case as referred to earlier in this judgment. In that case Lord Hansworth at page 280 had this to say -

"But we still have to deal with the question whether or not this is one of those cases in which one can apply the principle which is laid down in **Baily v De Crespigny** L.R. 4 QB 180, that is to say, that where some higher authority has supervened and has prevented the completion of the terms of an agreement, such failure to perform the agreement is not to be imputed to one of the parties, but is due to what has subsequently made performance impossible, with the result that the defaulting party is not to be responsible in damages to the other party."

[26] At page 282 Lord Hansworth goes further to say –

"How is it possible to apply that principle to the present case? As I have said, and the learned Judge has found, it would appear that the Defendants were aware of the fact that their premises might be taken under the statutory powers in the Act of 1920, S. 11. The plaintiffs had no such knowledge, nor can knowledge be imputed

to them ... The Defendants must have known that while they had a sure and certain continuance of their rights until October 31, 1925 ... there was some risk after that date. They could have provided against that risk, but they did not. The Court is not ready to imply subsidiary parties and in the absence of such implication, the law as stated in Paradine v Jane still applies. The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement. If they do not do so, but have entered into a contract in terms which are absolute, those terms must be carried out unless in the somewhat rare cases where it can be found that there was implied understanding on both sides that the basis the contract was the contained existence of an essential matter to the contract. Having regard to the knowledge on the part of the defendants, the terms of the contract and the fact that the defendants were sure of their possessory rights for a certain time only, it does not seem to the court possible to apply the principles illustrated in Baily v De Crespigny and the subsequent cases which have been referred to which arose during the war."

[27] At page 285 Romer L.J. agreeing with Lord Hansworth M.R. as well as Bennett, J in the Court below had this to say –

"Now the circumstances of the present case are that the impossibility of further performance by the defendants of their contract arose from the exercise by the Corporation of Compulsory powers of purchasing the hotel. Those powers, however, had been conferred by an Act of 1920, four years before the date on which the plaintiffs and defendants entered into the contract or contracts in question. I agree with Bennett, J and the Master of the Rolls that the defendants must have known of the existence of the Act and therefore, of those compulsory powers. In those circumstances I find myself quite unable to come to the conclusion that the exercise of those compulsory powers cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. It seems to me rather that the exercise of those compulsory powers was an event which might have been anticipated and guarded against in the contract."

[28] I am therefore inclined to believe that this case hinged squarely on the fact that the supervening event, thought well acknowledged as being beyond the control of the parties, was one which the Defendant had prior knowledge of to the exclusion of the plaintiffs and did not guard against. Juxtaposed to this instant case it can safely be said that the supervening event was that of Mitchell's Hardware Ltd's refusal to transfer the asset, being the Sunny Grenadines Hotel. The Defendant must have known and in fact did know, that he was not the only shareholder, and that there was a risk that the company will not accede to his request to transfer the Hotel. I am inclined to believe that the Defendant never even made the request for transfer from the shareholders based on his tattered

credibility in this matter. He then signed a contract on June 29, 2004 stating therein that he had full ownership and control.

[29] The Claimant in reliance on that could not then have anticipated any issue with the transfer of the Hotel to the company, because no other shareholders or interests were made known to her. The Claimant was therefore unaware of the supervening event, being the existence of shareholders who had the power to refuse to transfer. The Defendant did not include terms in the contract to guard against failure of the other shareholders to transfer. The Defendant cannot therefore be entitled to rely on the supervening event since he knew of the inherent risk. The contract cannot therefore be considered as being frustrated. The Defendant is rather in breach of the contract which he signed to. And I so hold.

[30] The Defendant was the Managing Director of Mitchell's Hardware Ltd. He had day to day control of same, and had been the Manager from its inception. He presided over shareholders' meetings and was a shareholder himself. He must have known then, that he was not the only shareholder. Most importantly he must have known that he did not have full ownership and control. He must also have known that at some point the shareholders would have to consent, and could also well refuse to do so. He therefore clearly should be estopped from relying on frustration.

[31] Having regard to all the circumstances of this case and the evidence, and on a balance of probabilities, I hold that the contract dated 29th June 2004 is a binding contract. The consensus of meeting dated 18th May 2004 superceded by the contract, gave a clear indication of the terms that the parties intended to contract on. It evidences their intention to create legal relations. The defendant in his evidence admitted that he had read the terms of the consensus, understood them, and signed the document on May 18, 2004.

[32] Looking at Ex. H.G. 2 in its entirety, it is clear that it was always in the contemplation of the parties as suggested by the Defendant, King Mitchell, that the Claimant was to receive her 35 per cent equity. The Defendant is a man with over 60 years experience in business transactions. He is a man of demonstrable mental acuity and is literate. There is no way

that this court could conclude that he was unduly influenced in signing the document. I find no such evidence. The Defendant himself said in his evidence under cross-examination that he read the terms of the contract and having understood them that he took them all in good faith. He is therefore bound by its terms even if he did not read the document – L'Estrange v F. Graucob Ltd [1934] 2K.B. 394.

[33] On the issue of the Special Damages claimed by the Claimant, this remains unchallenged. None of the witness statements filed by the Defendant Augustus King Mitchell nor his witness Adella James address the issues or refute the claims which are documented in the exhibits and made available to the Defendant by way of disclosure, inspection and list of documents in accordance with CPR 2000. No evidence was given by the Defendant at trial to refute this claim.

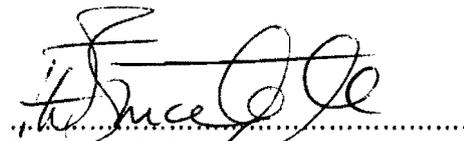
[34] On the converse the Defendant counterclaims for an amount which totals some \$379,055.07. There were also allegations of damage and loss to the Defendant's property which he claims the Claimant occasioned. This claim (counter) has been made without proof documentary or otherwise or a witness to adduce evidence to support same. No receipts or evidence of transactions or bank statements has been produced either by way of disclosure, list of documents, as Exhibits, to lend credence to the Defendant's counterclaim.

ORDER:

[35] I therefore order as follows:

- (1) A declaration that the Claimant has a beneficial interest in the property situate at Union Island and known or described as Sunny Grenadines Hotel.
- (2) Special Damages in the sum of EC\$198,821.79.

- (3) Damages for breach of contract equivalent to 35 per cent of the property known or described as Sunny Grenadines Hotel in the sum of \$800,000.00.
- (4) Interest to accrue from the date of filing of this claim at 5% until judgment.
- (5) The Defendant's defence and counterclaim is hereby dismissed.
- (6) Costs to be paid by the Defendant to the Claimant in the sum of \$40,000.00.



Frederick V. Bruce-Lyle
HIGH COURT JUDGE