

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CIVIL

CLAIM NO: ANUHCV 2006/0048

BETWEEN:

CLINTON SOFTLEIGH

Claimant

And

JASMINE JONES

Defendant

Appearances:

Mr. Cosbert Cumberbatch for the Claimant

Mr. Dexter Wason for the Defendant

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2007: May 29 August 09  
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*Contract for sale of goods – Pharmacy Act – Meaning of ‘drugs’ – Practice of Pharmacy without licence – Prohibitions regarding practice of pharmacy and operation of pharmacy on unlicensed premises – Whether contract enforceable – Severance of contract.*

JUDGMENT

[1] **Thomas J:** By fixed date claim, filed on 25<sup>th</sup> January 2006, the Claimant, Clinton Softleigh, instituted proceedings against the Defendant, Jasmine Jones.

[2] In these proceedings the Claimant contends that the Defendant is in breach of contract with respect to goods sold to the Defendant but for which the Claimant was never paid.

STATEMENT OF CLAIM

[3] In his statement of claim the Claimant aver that during February 2005 the Defendant requested that the Claimant order a quantity of goods for re-sale. The goods were duly

ordered and supplied to the Defendant to a value of \$14,095.00. And by oral agreement it was understood that the Defendant would pay the Claimant the value of the goods supplied within thirty days.

[4] It is further pleaded that upon the failure of the Defendant to pay the sum as agreed a further period of thirty days was allowed for payment. Further still, that even after the thirty day period and several demands both, written and oral, the Defendant has refused or neglected to pay.

[5] In the premises the Claimant claims the sum of \$14,095.00, interest pursuant to statute and costs.

#### DEFENCE

[6] In her defence the Defendant admits that she ordered the goods from the Claimant but it was made clear then that the items would be retained by her over several months. It is further admitted that the goods were received in or about March 2005 but it is pleaded that when the goods were opened it was noticed that many of the goods were close to their expiry date, - a fact which was communicated orally to the Claimant.

[7] The demands for payment are admitted but the Defendant avers that her attorney by letter dated 30<sup>th</sup> June 2003 informed the Defendant that nine thousand three hundred and eighty dollars worth of the goods supplied were close to their expiry date and as a result " ... were not reasonably fit for the purpose for which they were acquired ...."

[8] In the circumstances the Defendant pleads that the Claimant is in breach of the implied terms relating to quality and fitness prescribed by section 16 of the SALE OF GOODS ACT, Cap. 393. The said terms as to quality and fitness for the purpose were implied from certain circumstances, as pleaded:

"(a) That the Defendant informed the Claimant prior to accepting delivery of the goods that she would be retailing them at a store which she proposed to open on 1<sup>st</sup> April 2005 and that as it was a new venture she was uncertain as to how quickly they would sell.

(b) That the goods were of a type which by their nature is in breach of the Pharmacy Act."

[9] It is the Defendant's contention that the goods supplied by the Claimant were not of satisfactory quality nor reasonably fit for the said purpose. In the circumstances the Defendant denies that she is indebted to the Claimant except for the sum of \$4,713.00.

[10] Finally, at paragraph 9 of her defence the following is pleaded:

"Further or in the alternative the alleged contract was illegal and therefore void as the Claimant supplied the said pharmaceuticals to the possession of a valid licence to sell pharmaceuticals as required by section 13 of the Antigua and Barbuda Pharmacy Act, No. 11 of 1995 ....

The Defendant repeats paragraphs 1-8 of the Defence herein and states that she has suffered loss and damage as a result of sales lost by reason of her being unable to sell the said goods.

Particulars of Loss & Damage

Loss of 50% profit on the sale of \$9,382.00 worth of goods \$4,691.00.

Setoff

As to \$14,095.00 the sum of money claimed by the Claimant in this action the Defendant is entitled to set off against the same sum of \$4,691.00 or such as may be found due to the Claimant from the Defendant under the Counter Claim found herein."

REPLY AND DEFENCE TO COUNTERCLAIM

[11] In his Reply and Defence to counterclaim the Claimant denies that:

1. any goods supplied were close to expiry date or any oral conversation that the Defendant would not pay for any goods with near expiry dates or that customers were offering to return any goods;
2. the Defendant offered to return any goods as alleged in paragraph 3 of the Defence Counterclaim and Set off;
3. the goods supplied were not reasonably fit for the purpose for which they were supplied or were not of a satisfactory quality and further denies that he is in breach of section 16 of the SALE OF GOODS ACT, Cap. 393;
4. there was any intimation of what the Defendant proposed to use the goods except to resell them and further denies any intimation otherwise.
5. there was any breach of the Pharmacy Act and says that the contract between himself and the Defendant was valid and subsisting.

## ISSUES

- [12] The issues for determination are:
1. Whether the Claimant is estopped from recovering the balance of the purchase price as claimed because the contract between the Claimant and the Defendant was in breach of section 13 of the Antigua and Barbuda Pharmacy Act No. 11 of 1995 and therefore illegal and void.
  2. Whether the products sold by the Claimant to the Defendant -
    - (a) were not of merchantable quality under section 16 (1) (a) of the Sale of Goods Act; or
    - (b) were not reasonably fit for the purpose for which they were supplied under section 16 (1) (b) of the Sale of Goods Act.
  3. Whether assuming that the Claimant was in breach of the provisions of section 16 of the Sale of Goods Act, the Defendant is entitled to damages.

### ISSUE NO. 1

**WHETHER THE CLAIMANT IS ESTOPPED FROM RECOVERING THE BALANCE OF THE PURCHASE PRICE AS CLAIMED BECAUSE THE CONTRACT BETWEEN THE CLAIMANT AND THE DEFENDANT WAS IN BREACH OF SECTION 13 OF THE ANTIGUA AND BARBUDA PHARMACY ACT NO.11 OF 1995 AND THEREFORE ILLEGAL AND VOID**

- [13] It is common ground that at sometime during the month of February 2005 the Defendant requested the Claimant to supply a certain class of goods to a value of \$14,095.00. It is also common ground that the goods were supplied to the Defendant, as agreed, on 2<sup>nd</sup> March 2005.
- [14] Given the nature of the goods, the question is whether the supply of such goods in any way contravened the **PHARMACY ACT NO. 11 1995** ("the Act"). For this purpose a number of the provisions of the Act must be examined.
- [15] The long title to the Act is in these terms: "An Act to establish a Council to control and regulate the practice of pharmacy, the sale of drugs and poisons and to make provision for

the registration and control of persons admitted to practice as pharmacists and engaged in the business of pharmacy.”

[16] The following definitions in the Act are relevant:

“ ‘drugs’ means –

- (a) any substance or mixture of substances or any article manufactured, sold or represented for use in –
  - (i) the diagnosis, cure, treatment, mitigation or prevention of any disease, disorder, abnormal physical or mental state, or the symptoms thereof in human, animal or fowl;
  - (ii) the restoring, correcting or modifying of organic functions in human, animal or fowl;
  - (iii) the disinfection of premises where food is manufactured, prepared or stored, or
  - (iv) the preparation of cosmetics for producing a drug action as mentioned in paragraphs (i), (ii) and (iii), and
- (b) any substance whether natural or synthetic with therapeutic or medical properties and chiefly used as medicines or ingredients in medicines;
- (c) any article other than food intended to affect the structure of any function of the body of man or animal;

‘pharmacy’ means any place or premises registered as a pharmacy under section 13, and where prescriptions, drugs medicines, chemicals and poisons are compounded, dispensed or sold or distributed by retail;

‘pharmacist’ means a person who is registered in accordance with section 9 and whose name appears in the Register of Pharmacists kept and maintained under section 6 ....”

[17] Sections 7 to 11 of the Act address the questions of registration of pharmacists and the practice of pharmacy. In particular section 11 makes it an offence to engage in the practice of pharmacy without being registered as a pharmacist. Also section 12 prohibits the use of premises as a pharmacy unless the premises are approved by the Minister responsible for health and licensed as suitable for operating a pharmacy. But licensing of the premises is not the end of the matter as the premises must also be licensed under section 13 of the Act. Even further, section 14 prohibits the operation of a pharmacy on any premises unless there is in force in relation to such premises a valid licence issued by the Minister in accordance with section 13.

[18] Having examined the definition of "drugs" it is important to have some idea as to the goods involved. In the statement of claim the particulars of the goods pleaded are as follows:

25	Sexforte tabs 50's @ \$45.00 each	\$1,125.00
3	Preventor Condoms 48's @ \$3.20 each	\$ 460.00
2	Preventor Condoms 48's @ \$3.00 each	\$ 288.00
1	Rough Rider Condom 48's @ \$3.00 each	\$ 144.00
1	Stamina Pro 24's @ \$168.00 each	\$ 504.00
1	All Nite Long 18's @ \$ 6.00 each	\$ 108.00
2	Horney Goat Weed 24's @ \$168.00 each	\$ 336.00
17	Vigor Forte Caps 60's @ \$50.00 each	\$ 850.00
100	Cialis Tabs 20 mg @ \$54.00 each	\$5,400.00
60	Viagra Tabs 100mg @ \$430.00 each	\$ 900.00
24	Lubri Gel 113g @ \$ 8.00 each	\$ 192.00
104	Wingora Tabs 50mg @ \$7.00 each	\$ 726.00
60	Kamagra Tabs 50mg @ \$9.00 each	\$ 540.00
60	Kamagra Tabs 100mg @ \$17.00 each	\$1,020.00
60	Viagra tabs 50mg @ \$425.00 each	\$1,500.00

#### THE EVIDENCE

[19] In his witness statement, filed on 20<sup>th</sup> June 2006, the Claimant, says this:

"... I live at Paynters Court, St. Peter's, Antigua. I am a pharmacist by profession. I qualified as a pharmacist in Guyana in 1989 and I hold a diploma in Pharmacy. I practiced pharmacy in Guyana for two (2) years from 1989 to 1991 and I have been practicing in Antigua and Barbuda from 1991. I am a registered pharmacist in Antigua and Barbuda under the Pharmacy Act 1995 and I am licensed to conduct the business of a pharmacist."

[20] With respect to the goods supplied by the Claimant, under cross-examination he testified that he understood the Defendant to be saying that she intended to retail the products. He testified further that at the time he did not enquire whether she had a licence as he assumed that she had one and that, in any event, it was his view that he did not have a duty to enquire.

[21] The Defendant, Jasmine Jones, in her witness statement, filed on 20<sup>th</sup> June 2006, says the following at paragraphs 1 to 4:

"1. I am the owner of an adult store known as "Teddiez and Thingz" situated on All Saints Road, in St. John in Antigua. In this store I sell adult toys and lingerie along with several stimulants and similar products for use by both men and women. In late February 2005 I approached Mr. Softleigh about obtaining a line of credit for certain items such as condoms and certain supplements and stimulants which I wished to carry in my adult store, which I proposed to open in March 2006 although I am not a registered Pharmacist. He informed

me that he would be willing to do so as he was finding it difficult to sell some of this stock due to the fact that he was employed full time as a Pharmacist.

2. At the time of our mutual discussion I was at Mr. Softleigh's place of residence at Paynters, he then went into his house and returned with several items, which he showed to me as samples. Due to the fact that he had stored in his garage 98% of the items I wanted I decided to purchase everything I needed from him, and I placed an order for certain items at that time. He did not have to order everything for me.
3. In March 2005 Mr. Softleigh invited me to his house where he showed me the following items which he had placed in several packages:-

25 SexForte Tabs 50's @ \$45.00 each	\$ 1,125.00
3 Preventor Condoms 48's @ \$3.20 each	\$ 460.00
2 Preventor Condoms 48's @ \$3.00 each	\$ 288.00
1 Rough Rider Condom 48's @ \$3.00 each	\$ 144.00
3 Stamina Pro 24's @ \$168.00 each	\$ 504.00
1 All Nite Long 18's @ \$6.00 each	\$ 108.00
2 Horny Goat Weed 24's @ \$168.00 each	\$ 336.00
17 VigorForte Caps 60's @ \$50.00 each	\$ 850.00
100 Cialis Tabs 20mg 2 \$54.00 each	\$ 5,400.00
60 Viagra Tabs 100's @ \$430.00 each	\$ 900.00
24 Lubri Gel 113g @ \$8.00 each	\$ 192.00
104 Wingora Tabs 50mg @ \$7.00 each	\$ 728.00
60 Kamagra Tabs 50mg @ \$9.00 each	\$ 540.00
60 Kamagra Tabs 100mg @ \$17.00 each	\$ 1,020.00
60 Viagra tabs 50mg @ \$425.00 each	<u>\$ 1,500.00</u>
Total	<u>\$14,095.00</u>

These items were also listed on an invoice dated the 2<sup>nd</sup> of March 2005 which Mr. Softleigh presented to me at the same time I took delivery of these items."

[22] In cross-examination the Defendant testified that on the opening night of her adult store, being 1<sup>st</sup> April 2005, she tried to sell the goods received from the Claimant.

#### THE CONTRACT

[23] It is beyond question that a contract was concluded between the parties. But the contract must now be considered having regard to the prohibitions and requirements of the Act.

[24] It is clear that the Act contains a legislative regime for, inter alia, the sale of drugs, the strict regulation of the pharmacists and the practice of pharmacy. In this regard it will also be recalled that the Act addresses the question of qualifications for persons to be registered as pharmacists, prohibits the practice of pharmacy without a licence, requires premises to be used as a pharmacy to be registered and prohibits the operation of a

pharmacy in unregistered premise. And quite importantly there are criminal offences prescribed in this regard.

[25] The definition 'drugs' is of enormous width and within it there exists the all-embracing or sweep-up sub-clause - 'any article other than food intended to affect the structure of any function of the body of man or animal'. Also included is the sub-clause which speaks to 'the restoring, correcting or modifying of organic functions in human, animal or fowl.' In any event, the Defendant did testify that she was operating an adult shop. Even further, the Claimant, under cross-examination did say that he was aware that a prescription was required with respect to the cialis and viagra. Therefore, by definition these two items are drugs but so are items such as sexforte, stamina pro, all nite long, horny goat weed, vigor forte, wingora tabs, and kamagra tabs which must relate to restoring, correcting or modifying of organic functions of the human body. Put plainly they are concerned with modifying the sexual function in humans.

[26] In LAW OF CONTRACT (7<sup>th</sup> ed.) by Cheshire and Fifoot at page 297 it is stated that: "A contract that is expressly or impliedly prohibited by statute is illegal. In this context, 'statute' includes orders, rules and regulations that ministers of the Crown and other persons are so frequently authorized by Parliament to issue."

[27] The learned authors go on to consider the rules of evidence that govern the proof of illegality, whether the contract is illegal by statute or at common law:

"First, where the contract is *ex facie* illegal, the court takes judicial notice of the fact refuses to enforce the contract, even though its illegality has not been pleaded.  
Secondly, where the contract is *ex facie* lawful, evidence of external circumstances showing that it is illegal will not be admitted, unless those circumstances have been pleaded.  
Thirdly, when the contract is *ex facie* lawful but facts come to light in the course of the trial tending to show that it has an illegal purpose, the court takes judicial notice of the illegality notwithstanding that these facts have not been pleaded."

[28] Further still, the same authors make the point, at page 314, that: "There is no need to stress the obvious fact that an agreement is illegal and void if its object, direct or indirect is the commission of a crime or a tort."

[29] In Vol. 1 of CHITTY ON CONTRACTS (28<sup>th</sup> ed.) at paragraph 17-007 the learning is that: "Illegality may affect a contract in a number of ways but it is traditional to distinguish between (1) illegality as to formation and (2) illegality as to performance. Broadly speaking the first refers to the situation where the contract itself is illegal at the time it is formed, whereas the latter involves a contract which on its face is legal but which is performed in a manner which is illegal."

[30] In terms of contracts which involve illegality as to formation, CHITTY ON CONTRACTS gives this explanation at paragraph 17-008:

"Contracts may be illegal when entered into because they cannot be performed in accordance with their terms without the commission of an illegal act. Thus the contract may involve a breach of the criminal law, statutory or otherwise, or alternatively it may be a statutory requirement that the parties to the transaction possess a licence and where they do not the contract will be illegal as formed. An example of a contract which was illegal as formed is provided by *Levy v. Yates*, a case concerned with the former statutory rule that no play could be lawfully acted within 20 miles of London without a royal licence, which might be given only in certain circumstances. In that case the contract, between a theatre-owner and an impresario, was itself for the performance of a theatrical production prohibited by the statute. The contract was unenforceable since "the agreement could not be carried into effect without a contravention of the law": the parties had contracted to do the very thing forbidden by the statute and the contract was therefore unenforceable."

[31] In the case at bar the Claimant and the Defendant entered into a contract involving the sale of drugs, as defined by the Act, and by extension the practice of pharmacy where neither the Claimant nor the Defendant operated such a business. The Claimant knew the purpose for which the drugs were required as the Defendant made it plain that she operated an adult shop and further that on the night of the opening she tried to sell the drugs to her customers.

[32] The Claimant, although he is a pharmacist sold, the drugs from his home at Paynters and there is no evidence to suggest that his home satisfies the requirements under section 14 (1) of the Act. To do otherwise is to commit an offence under section 14(3) of the said Act. At another time the Claimant did say in evidence that the sale of viagra and cialis would require a prescription.

- [33] The Defendant on the other hand is not a pharmacist and does not operate a pharmacy within the meaning of the Act. It is an offence to practice pharmacy without a licence (section 11(2)) and it is also an offence to operate a pharmacy on unlicensed premises (section 14(3)).
- [34] The Claimant sought to extricate himself, in cross-examination, by saying that he was under no obligation to enquire whether the Defendant was a licensed pharmacist. But there are two issues against him. First, the maxim - ignorance of the law is no excuse applies with full vigour in these circumstances. Secondly, the Claimant said in cross-examination that at one time he was a member of the Pharmacy Board and also a member of the Pharmacy Association. In either case, the pharmacy legislation must have been a matter of primary concern. On top of all that, the Claimant told the Court that he was a pharmacist for more than eighteen years.
- [35] It is therefore the determination of the Court that the contract for the sale of drugs as pleaded is illegal and unenforceable. This determination is subject to what is said below with respect to severance.

#### SEVERANCE

- [36] There is learning which suggests that if only part of a contract is illegal, the whole contract will not be void if the illegal part can be severed from the rest of the contract<sup>1</sup>. "If, however, the whole purpose of the contract is an illegal one, the court will not make a new contract for the parties by attempting to cut out those portions which are illegal and enforce the rest.
- [37] In this regard the case of **NAPIER v NATIONAL BUSINESS AGENCY LTD** [1951] 2 All ER 264 is instructive. The facts are as follows. The defendants engaged the plaintiff to act as their secretary and accountant at a salary of £13 a week together with £6 a week for expenses. Both parties were aware that the plaintiff's expenses could never amount to £6 per week, and, in fact they did not exceed £1 per week. Each week the defendants deducted from

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<sup>1</sup> Charlesworth's Business Law (16<sup>th</sup> ed.) by Paul Dobson at page 150-152

the salary of £13 a week the amount of income tax appropriate to that sum, and the payment of £6 a week was represented as a re-imbusement of expenses on the returns made to the Inland Revenue Commissioners. The plaintiff was summarily dismissed and claimed payment from the Defendants, in lieu of notice, of £13 a week for a certain period.

[38] In the Court of Appeal it was held that although the plaintiff sought only to enforce the provisions of the agreement relating to salary, those provisions were not severable from the rest of the agreement and were equally unenforceable. Sir Raymond Evershed, MR reasoned thus at page 266:

“The contract is, to my mind, not severable. It cannot properly be treated as consisting of two separate and distinct bargains, and, therefore, although it is true fact that the plaintiff sues only in respect of £13 a week, he is really seeking to enforce a contract which is tainted to the extent I have mentioned. It being so tainted, I think the Court will not enforce it at his suit. I think that this appeal fails and should be dismissed.”

[39] By parity of reasoning although the various types of condoms and the lubri gel ordered and delivered may not be drugs within the meaning of the Act, the entire contract is tainted by several infringements of the criminal law by both parties. In other words, the parties intended, *ab initio*, to violate the criminal law of the land. Accordingly, there can be no severance. The determination that the contract is illegal and unenforceable in its entirety remains.

[40] In the circumstances the other issues do not arise for determination.

## **ORDER**

[41] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The contract between the Claimant and the Defendant respecting the supply of certain goods which are drugs within the meaning of the Pharmacy Act 1995 is illegal and unenforceable.
2. The matter of severance does not arise in the circumstances of the said contract.
3. There is no order as to costs.

Errol L. Thomas  
**Judge**