ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2006/0557

BETWEEN

GENE B. SAMUEL

Claimant

AND

SHERON WHINFIELD

Defendant

Appearances:

Mr. John Fuller for the Claimant
Mr. Alex Fearon for the Defendant

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2009: January 26
February 10
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JUDGMENT

[1] Blenman J: Mr. Gene Samuel seeks from Ms. Sheron Whinfield the sum of $72,000.00 on the basis that she owes him that sum, based on their agreement.

[2] Background

Mr. Samuel was the part owner of a business place by the name of the Rayon House of Fashion. The Rayon House of Fashion was a business of general merchandising. The business was previously owned, in partnership, by Mr. Samuel and Mr. Prince Wills. It was agreed that Mr. Samuel's share in the partnership was worth US$20,000.00. Subsequently, that partnership was

dissolved and another was created between Mr. Samuel and Ms. Whinfield (who is Mr. Wills' niece). It appears as though the parties arbitrarily valued the partnership at US$100,000.00 and Mr. Samuel, who had previously invested US$5,000.00 into the partnership, was credited with US$25,000.00, which was to represent his share in the partnership. Ms. Whinfield was accepted as having a "share capital" in the partnership of US$75,000.00.

[3] In the original contract, the parties agreed that a bank account would be created in the name of the partnership and payments in excess of EC $250.00 shall be drawn by cheques. Further, the parties agreed that 75% of the stocks, implements and trade materials of the partnership shall belong to Ms. Whinfield and 25% percent shall belong to Mr. Samuel.

[4] Subsequently, the parties entered into another agreement which did not have the benefit of a lawyer's input. The parties agreed that Mr. Samuel would "relinquish his 25% investment in Rayon House of Fashion, totaling US$25,000.00 to Ms. Whinfield, and that all other agreements bearing the name of Mr. Samuel, including rentals, lease, bills and taxes, will now be the sole responsibility of Ms. Whinfield." The parties also agreed that Ms. Whinfield shall pay Mr. Samuel the sum of $12,000.00 yearly for a period of six years commencing on 15th December, 2005 and concluding 15th December, 2011.

[5] There was a strange turn of events when the entire business enterprise, the Rayon House of Fashion, was destroyed by fire in August 2005. Ms. Whinfield has not paid Mr. Samuel any money. He has therefore filed a claim and seeks to recover the sum of $72,000.00, which he alleges is owed to him. He maintains that it was not a term of the agreement that he was to be paid for his share only if the business, the Rayon House of Fashion, continued to exist. The agreement had nothing to do with the Rayon House of Fashion continuing to be a going concern.

[6] Ms. Whinfield strongly resists his claim. She says that she agreed to purchase Mr. Samuel's share in the partnership and this referred to the business as a going concern. She further asserts that at the time of signing the agreement, Mr. Samuel knew that she was to utilise monies/profits realised from the business the Rayon House of Fashion to pay the annual installments. She contends that

she has no obligation to pay Mr. Samuel the sum claimed, in so far as the subject matter of the contract has been destroyed by fire.

[7] Issues

The parties have raised several issues including whether Ms. Whinfield owes Mr. Samuel the monies, and whether the payment of the monies was dependent upon the business continuing to exist. However, I have sought to crystallise them, with no respect intending to learned Counsel, as follows:

(a) To what did the parties agree?

(b) Was the contract frustrated as a result of the destruction of the business by the fire?

[8] Evidence

Mr. Samuel gave evidence on his own behalf and Ms. Whinfield testified on her own behalf. They were both cross examined. I have paid significant regard to their evidence, together with the documentary evidence presented to the parties, particularly the agreement dated 1st November, 2004.

[9] Submissions

At the conclusion of the trial, in keeping with Part 39.3(2) of the CPR 2000, based on the joint request of both learned Counsel, the Court ordered that closing arguments be filed and exchanged together with authorities in 10 days. To date, I have not received any submissions.

[10] Court's analysis and conclusions

I have given deliberate consideration to the evidence and the following represents my findings of facts: Mr. Samuel agreed to sell his 25% investment in the Rayon House of Fashion to Ms. Whinfield for the sum of US$25,000.00. The contract was drafted by Mr. Samuel with Ms. Whinfield's approval. The parties agreed that she would pay six equal consecutive annual installments of $12,000.00 each; the first installment was to have been paid on the 15th December, 2005. Tragedy struck the business premises of the Rayon House of Fashion and it was destroyed by fire in August 2005. All of the merchandise owned by the partnership was destroyed. Ms. Whinfield has failed to pay any of the installments. Even though Mr. Samuel had agreed to

relinquish his interest in the business, after the signing of the agreement he remained a signatory to the partnership's bank account. In addition, he retained the keys to Rayon House of Fashion's business premises.

[11] I come now to address the issues identified.

[12] Issue No.1: To what did the parties agree?

There is no doubt that there is a dispute as to the meaning of the agreement. In seeking to ascertain the meaning of the agreement, the Court has to examine the entire document and determine the meaning. Usually, the written agreement is regarded as containing all of the terms of the agreement. However, there are circumstances in which a written contract does not expressly state the terms, or does so inelegantly. Where this occurs, the Court's has to seek to determine what the parties intended. In so doing, there are well established legal principles that guide that Court. There are no doubt two competing interpretations being argued for, in the case at bar.

[13] In interpreting the contract the Court has to ascertain the intention of the parties. As a general rule the Court is limited in the search for the intention to the consideration of the document itself. In Lovell & Christmas Ltd v Wall (1911) 104 LT 85 Cozens-Hardy MR said:

> "If there is one principle more clearly established than another in English law it is surely this: It is for the Court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood".

The rule may be regarded as a branch of, or closely related to, the parol evidence rule. The reason for not allowing recourse to the negotiations to establish intention was explained in Prenn v Simmonds [1971] 3All ER 237. Lord Wilberforce said that "'such evidence is unhelpful' because only when the contract is finally made is there a consensus, and until that time the parties' respective intentions may change, or be refined. There can be no guarantee, therefore, that an intention appearing during negotiations has remained constant until the time of contracting. In those circumstances, it is thought safer to rely on the words of the document alone".

However, the law has moved on.

[14] Where the contract is in writing and signed, the party signing it is usually regarded as bounded by it. Although the primary obligations are contained in express terms, it is quite unusual for the

parties to express all of the primary obligations, or to provide for every contingency. The Court, in these circumstances usually implies terms to fill out the gaps in the contract, based on the circumstances of the contractual relationship. See Hughes v Greenwich London Borough Council [1993] 4 All ER 577. The terms will be implied where there is a compelling reason, or put another way, when it is essential.

[15] The test to be implied was stated by McKinnon LJ in Shirlaw v Southern Foundries [1926] 2 KB 206:

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily supply him with a common "Oh, of course"".

[16] What did the parties intend by Mr. Samuel's 25% investment in Rayon House of Fashion? Mr. Samuel is of the view that this means his interest in the partnership as distinct from the business enterprise, the Rayon House of Fashion. Ms. Whinfield argues for the contrary position. She says that it means 25% interest in the business enterprise which includes the shares and capital. The Court must seek to ascertain the meaning of that term. Could the term 25% investment in Rayon House of Fashion be restricted to interest or is it wide enough when read in the context of the entire contract to include stocks, interest, capital, money and good will? Where as is the case at bar, it falls to the Court to determine to what did the parties agree, the Court, in seeking to determine the meaning, has to ascertain what a reasonable person would conclude was the intention of the parties.

[17] In doing so, I find the pronouncements of Lord Bingham of Cornhill in Bank of Credit and Commerce International S.A. (in liq.) v Ali (No.1) [2001] UKHL 8; [2001 2 WLR 735 very helpful. He stated that:

> "In construing any contractual provision, the object of the Court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts

surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the Court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified".

[18] In Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570 p 574 c-h Lord Wilberforce stated:

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating. When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties'.

[19] Following on from Lord Wilberforce's statement in Reardon Smith Line Ltd v Hansen-Tangen ibid, Lord Steyn in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352 at 369 c-e advanced three propositions:

> "Relying on the reasoning in Lord Wilberforce's speech in Reardon Smith, at 996D to 997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is admissible as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind.

[20] Accordingly, the words must be interpreted in light of the relevant factual matrix. Even in the case of a badly drafted contract it is imperative that in construing the terms of the contract that the relevant factual situation be determined. Lord Bridge of Harwich in giving the opinion of the Privy Council in Mitsui Construction Co Ltd v Attorney General of Hong Kong [1986] LRC (Comm) 245 at 253a stated:

> "a badly drafted contract affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used, interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any Court should be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis".

[21] The statement of Lord Steyn in Sirius International Insurance Co (Publ) v FAI General Insurance Ltd [2004] UKHL 54; [2004] 1 WLR 3251 captures the modern view of the Courts on this point:

> "There has been a shift from literal methods of interpretation towards a more commercial approach. In Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed:
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> > "If detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".
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> In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, I explained the rationale of this approach as follows:
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> > "In determining the meaning of the language of a commercial contract the law generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a

reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language".

[22] Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 at 114e-115d stated the principles of construction of commercial contractual documents that is now to be adopted:

> "I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. The principles may be summarized as follows:
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> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes the language of the document which would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant

background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. See (Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd. [1997] 2 WLR 945.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v Salen Rederierna A.B. [1985] A.C. 191, 201:

> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".

[23] Applying the above principles, and specifically paying regard to the reasonable person test, it is clear that the parties intended that Ms. Whinfield was to purchase Mr. Samuel's interest in the business the Rayon House of Fashion; this includes the stock, capital and interest. In consideration of Mr. Samuel transferring his share in the business, Ms. Whinfield agreed to pay him six equal yearly installments. By way of emphasis, a reasonable person will be fortified in that view, having reviewed all of the circumstances, the background and the context in which the agreement was reached, and having examined the agreement that the parties intended, by the agreement, for Mr. Samuel to sell his 25% investment in the Rayon House of Fashion was referable to the business, the Rayon House of Fashion.

[24] In passing, I state that I am not of the respectful view that there was any implied term of the agreement that should Ms. Whinfield fail to pay one installment, the entire purchase price would become due. There simply is no basis for reading that term into the contract.

[25] Further, applying the above legal principles to the case at bar, paying particular regard to the principles enunciated by Lord Hoffman, an objective assessment would lead the Court to conclude that the parties intended that Mr. Samuel would relinquish his 25% investment in the business the Rayon House of Fashion. This was to have occurred after Ms. Whinfield had completed the payments of the six annual installments commencing December 2005. In passing, I state that Mr. Samuel having retained his interest in the partnership at the time of signing the agreement did not divest himself of his interest since the time did not arrive for Ms. Whinfield to even pay the first installment, when disaster struck in August 2005. The entire subject matter of the agreement was destroyed in the fire.

[27] Issue No. 2: Was the contract frustrated as a result of the destruction of the business by the fire?

I come now to address the relevance, if any, of the destruction of the business, the Rayon House of Fashion, by fire in August 2005.

[28] In law, where the performance obligation in contract is struck, there is a guarantee to achieve a stipulated result, and any failure to achieve that result is a breach of the contract. However, in a contract where there is an intervening event whose effect makes the further performance of the contract impossible that contract is automatically brought to an end. It is the law that, generally, the physical destruction of something which is essential to the performance of the contract serves to frustrate the contract. In addition, where there are changes of circumstances after the formation of the contract which has rendered it commercially impossible to fulfill the contract or it has transformed performance into a radically different obligation from that undertaken in the contract, these serve to bring the contract to an end. See Chitty on Contract 25th Edition paragraph 1521 page 830. That principle was judicially recognised in Taylor v Caldwell (1863) 3 B & S 826. In that case, the defendants had agreed to allow the claimants to use their hall for four concerts for a fee of £100 for each day. After the contract was made, but before the day of the first concert, the hall

was destroyed by fire, causing the claimants a loss since they were unable to access an alternative venue for a concert, for which preparations were well advanced. The claimants sought to recover their loss from the defendants, who pleaded the accidental destruction of the hall as an excuse for their non-performance. The Court found for the defendants. Blackburn J said:

> "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless the time for fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such existence as the foundation of what was to be done; there, is in the absence of any express or implied warranty that the thing shall exist, the contract is not bound to be construed as a positive contract, but subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractors".

[29] Blackburn J based his finding that performance had been excused upon an implied term of the contract between the parties that the concert hall should continue in existence until the time for performance. However, the doctrine was revolutionized by the House of Lords in Davis Contractors Ltd v Farehan UDC [1956] AC 696. Lord Reid and Radcliffe stated that in many circumstances in which it was admitted that the frustration doctrine should apply the test for the implication of a term as fact would not be satisfied.

[30] The modern view of frustration is accepted to have been expressed by Lord Radcliffe when he said:

> "Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
>
> > It is not the hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".

[31] In effect, Lord Radcliffe was saying that it made no difference whether the legal basis is an implied term or the application of an objective of contract law independent of the parties' intention. The test to be applied is that which is known as "a radical change in the obligation test". Whether or not an event frustrates the contract is a question of law. Indeed, the question of law is whether the relevant facts make the performance demanded "radically different from that which was undertaken".

[32] As stated earlier, it has long been accepted that the legal effect of frustration is to bring the contract to an end automatically; this is so irrespective of the wishes of the parties. Applying the above principles to the case at bar, it is clear that the destruction of the physical business of the Rayon House of Fashion, by fire made performance of the contract "radically different" from that which was intended by the contract. In a word, the contract has been frustrated due to intervening destruction by fire.

[33] I come now to address whether Ms. Whinfield is liable to pay Mr. Samuel. Frustration causes all obligations to pay to terminate from the time of the frustrating event. In Appleby v Myers (1867) LR 2 CP 651, the plaintiffs contracted to install and maintained all machinery in the defendant's factory, payment to be made upon completion. Before the task of installation had been completed the factory and machinery were destroyed by fire. The contract was frustrated. Because the payment obligation was not due to be performed by the time of the frustrating event the plaintiff was not entitled to any payment for the work done.

[34] Applying the above principles to the case at bar, it is clear that Ms. Whinfield has no obligation to pay Mr. Samuel the sum of $72,000.00 for his "25% investment in the Rayon House of Fashion". Indeed, she is discharged from fulfilling the obligation to pay.

[35] Conclusion

In view of the foregoing, Mr. Samuel has failed to prove his claim against Ms. Whinfield.

[36] Accordingly, it is hereby ordered that Mr. Gene Samuel's claim against Ms. Sheron Whinfield is dismissed.

[37] Ms Whinfield is to have prescribed costs, unless otherwise agreed.

Louise Esther Blenman
High Court Judge