

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2009

CLAIM NO. AXAHCV 1995/0021

BETWEEN:

RAFAEL VEGAS

Claimant

and

1. GRAZINA ADAMCZYK
(As personal representative of the Estate of
George Adamczyk (deceased))

2. PALOMA LIMITED

Defendants

Appearances:

Mr. Gerhard Wallbank and Miss Tameka Davis for the Claimant
Ms. Eustella Fontaine and Mrs. Cara Connor for the Defendants

2009: April 6,
June 5

JUDGMENT

- [1] **MICHEL, J. (Ag.):** By Writ of Summons filed on 6th March 1995 the Claimant, Rafael Vegas, instituted proceedings in the High Court of Justice in Anguilla against George Adamczyk and Paloma Limited.
- [2] An appearance was entered for the Defendants on 6th April 1995.
- [3] On 18th March 1996 the Claimant filed a Statement of Claim setting out his case against the Defendants and seeking the following relief –
1. A declaration that the Claimant is entitled to 121 of the 424 shares of the 2nd Named Defendant.

2. An order that the corporate registers of the 2nd Named Defendant be completed to reflect the Claimant's shareholding in the company.
3. An order that the 2nd Named Defendant issue the Claimant a share certificate for his 121 shares.
4. A declaration that the Claimant is entitled to an accounting from the Board of Directors of the 2nd Named Defendant and/or the 1st Named Defendant.
5. An order that the Board of Directors of the 2nd Named Defendant and/or the 1st Named Defendant produce an accounting to the Claimant.
6. Damages.
7. Such further or other relief as the Court deems just.
8. Costs.

[4] On 5th July 1996 a Defence and Counterclaim was filed on behalf of the 1st Named Defendant only, with a Reply and Defence to Counterclaim being filed by the Claimant on 15th January 2007.

[5] By Summons filed on 20th September 1996, the Claimant sought judgment against the Defendants upon the claims set out in his Statement of Claim.

[6] By Order of the Court dated the 26th day of April 1998 and entered on the 7th day of May 1998, the Claimant was granted the relief claimed in the paragraphs numbered 1, 2 and 3 above and the determination of all other claims was stayed pending the outcome of Suit 460 of 1995 instituted by the Claimant against the 1st Named Defendant in Sint Maarten, The Netherlands Antilles.

[7] Judgment in the Sint Maarten suit was handed down on 5th May 1998 in favour of the Claimant, with the 1st Named Defendant being ordered to pay the Claimant for the value of his shares in the 2nd Named Defendant.

- [8] By Order of this Court dated 21st May 2008 and entered on 23rd May 2008, it was ordered that if the 1st Named Defendant does not file and serve witness statements and/or witness summaries of fact which he intends to rely on by 6th June 2008 then the 1st Named Defendant will be debarred from seeking to produce the evidence at trial and the counterclaim shall stand dismissed.
- [9] No witness statements and/or witness summaries having been filed or served by the 1st Named Defendant by 6th June 2008, or at all, the counterclaim accordingly stood dismissed and the Defendant, with no application made by him for relief from sanctions, was not therefore allowed to present any evidence at the trial of the matter.
- [10] The trial therefore proceeded with evidence by the Claimant only, a witness summary having been filed on his behalf on 9th November 2007.
- [11] At the trial, an objection taken by Learned Counsel for the Defendants to the form of the aforesaid witness summary was overruled by the Court on the basis that the witness summary complied with the requirements of Part 29.6 of the Civil Procedure Rules.
- [12] The Court having disposed of certain of the claims prior to the matter coming to trial and certain of the claims having been dealt with by the court in Sint Maarten in Suit 460 of 1995, the issues to be determined at the trial appear to be the following -
1. Whether the Claimant is entitled to a declaration and to an order that the Board of Directors of the 2nd Named Defendant and/or the 1st Named Defendant produce an accounting to the Claimant.
 2. Whether damages in the form of unpaid rent is due and owing to the Claimant by the 1st Named Defendant.
 3. Whether the Claimant is entitled to damages from the Defendants other than for unpaid rent.

- [13] Although the Agreed List Of Issues dated and filed on 12th December 2006 did not mention the issue of damages other than for unpaid rent, there was a definitive averment in paragraph 24 of the Statement of Claim of loss and damage occasioned to the Claimant by acts or defaults of the Defendant and a claim for damages consequential thereto and a joinder of issue by the 1st Named Defendant on this averment and claim. There was also evidence given by the Claimant in support of this averment and claim and so a determination must be made by the Court on this issue.
- [14] The other issues contained in the Agreed List Of Issues dated and filed on 12th December 2006 no longer arise because the Claimant has denied the claims made by the Defendants giving rise to these issues and the Defendants are unable to present any evidence to support them and so they cannot be proceeded with.
- [15] In terms of the date from which damages in the form of unpaid rent is being claimed, Learned Counsel for the Claimant submits that the date of 1st February 1999 stated in the Agreed List Of Issues is an error and that the correct date – as can be deduced from the pleadings – is 1st February 1996, in addition to the quantified and specifically claimed unpaid rent for the period up to 31st January 1996, which latter claim is admitted by the 1st Named Defendant in his defence. This submission was not disputed by Learned Counsel for the Defendants and does appear to be borne out by the pleadings wherein arrears of rent up to 31st January 1996 is quantified and specifically claimed, with unpaid rent beyond that date not being quantified and specifically claimed and thus being left to be determined by the Court as to whether it is due and owing to the Claimant by the 1st Named Defendant.
- [16] In terms of the first of the issues to be determined, this Court considers that the Claimant is clearly entitled to a declaration and an order that the Board of Directors of the 2nd Named Defendant produces an accounting to him. The Claimant did seek a declaration and an order to this effect in his Statement of

Claim, the 2nd Named Defendant did not contest his entitlement thereto, the evidence in the case supports his entitlement to the declaration and order and the Court therefore declares that the Claimant is entitled to have accounts produced to him by the Board of Directors of the 2nd Named Defendant and hereby orders that the Board of Directors of the 2nd Named Defendant produces to the Claimant an account of the affairs of the 2nd Named Defendant up to 5th May 1998, after which date the Claimant is entitled not to shares in the company but to the value of his shareholding in the company.

[17] The Court does not, however, consider that the Claimant is entitled to a declaration and order that the 1st Named Defendant produces an accounting to him. The Claimant did seek a declaration and order to this effect in his Statement of Claim, the 1st Named Defendant, however, put in a defence contesting the Claimant's entitlement to the claims made by him in the Statement of Claim and no evidence was presented by the Claimant to support his entitlement to a declaration and order that the 1st Named Defendant produces an accounting to the Claimant.

[18] In terms of the second issue to be determined by this Court, I have little difficulty in accepting the submission by Learned Counsel for the Claimant to the effect that the date stated in the Agreed List Of Issues was intended to be 1st February 1996 and not 1st February 1999, since the first date logically arises from the pleadings whereas the second date is referable neither to the pleadings nor to any document or averment in this case.

[19] Although Learned Counsel for the Defendants is right when she criticizes the Claimant for the lack of specificity in his Statement of Claim in not specifically pleading his entitlement to rent for the period from 1st February 1996 and the non payment thereof and in not specifically claiming the unpaid rent as damages, the fact is that in one of the Claimant's pleadings, namely the Reply filed on his behalf, the Claimant does aver that the 1st Named Defendant's obligation to pay rent continued after 31st January 1996 in light of the continued exclusive occupation of the property by the 1st Named Defendant. It is also a fact that the agreement

dated 14th March 1992 to which the Claimant and the 1st Named Defendant were parties, and which is one of the documents in evidence in this case, does give the 1st Named Defendant the right to exclusive occupation of the property and the obligation to pay rent to the Claimant for the property in accordance with a formula contained in the agreement.

[20] The same agreement also gives the 1st Named Defendant the obligation to purchase the shares of the Claimant in the 2nd Named Defendant which owns the property and determines the time by which and the price at which he will purchase the shares. When the 1st Named Defendant had failed to purchase the Claimant's shares at the agreed time, the Claimant instituted proceedings against the 1st Named Defendant in Sint Maarten, whereupon the court in Sint Maarten, on 5th May 1998, ordered the 1st Named Defendant to pay the Claimant the amount due to him for the price of the shares as determined in the agreement.

[21] Consequent on the order of the court in Sint Maarten, which order is filed in this case, the 1st Named Defendant's obligation to pay rent to the Claimant for his share of the property arising from his shares in the 2nd Named Defendant would accordingly be extinguished after 5th May 1998.

[22] In the circumstances, the Claimant would be entitled to damages in the form of unpaid rent from 1st February 1996 to 5th May 1998 at the rate of FF6,369.44 per month, yielding a total of FF254,777.60 or US\$50,955.52, bearing in mind the provision in the agreement that "[e]ach initiated month has to be paid for," meaning that May 1998 will have to be paid in full even though only five days had elapsed in the month.

[23] In terms of damages claimed other than from unpaid rent, it needs first to be stated that the court in Sint Maarten awarded damages to the Claimant for the value of his shares which, by virtue of the 14th March 1992 agreement between the parties, the 1st Named Defendant was to have purchased from the Claimant in accordance with an agreed formula. This was the full extent of the damages awarded by the court in Sint Maarten to the Claimant.

- [24] The issue of damages in the form of unpaid rent and damages for loss to the Claimant occasioned by the wrongful organization of the shareholding and management of the 2nd Named Defendant by the 1st Named Defendant was not addressed by the court in Sint Maarten.
- [25] The Claimant having pleaded his loss and damage resulting from the wrongful organization of the shareholding and management of the 2nd Named Defendant by the 1st Named Defendant and having given evidence of that loss and quantified it as being between US\$24,500 and US\$29,500, and no evidence having been given to contradict it, the Claimant is entitled to an award of damages against the 1st Named Defendant arising from the alleged loss and damage.
- [26] The submission by Learned Counsel for the Defendant to the effect that compensation to the Claimant in respect of this loss should be by way of legal cost and not damages does not find favour with this Court and an award of damages is hereby made to the Claimant against the 1st Named Defendant in the sum of US\$24,500.
- [27] The total amount of damages awarded to the Claimant in this matter is therefore \$243,466.91, being the EC equivalent of US\$90,172.93, made up of unpaid rent up to 31st January 1996 of US\$14,717.41, unpaid rent from 1st February 1996 to 5th May 1998 of US\$50,955.52 and damages for loss occasioned to the Claimant from the 1st Named Defendant's wrongful organization of the shareholding and management of the 2nd Named Defendant in the sum of US\$24,500.00.
- [28] As agreed between Counsel for the parties, costs in this matter will follow the event and will be prescribed costs based on the amount of any award of damages to the Claimant in the event that judgment is rendered in favour of the Claimant. Costs are therefore awarded to the Claimant in the sum of EC\$45,520.00.
- [29] For the sake of completeness, it should be noted that in the course of the proceedings the Claimant, who started life in this suit as Plaintiff, was rechristened as Claimant and Grazina Adamczyk as personal representative of the estate of

George Adamczyk (deceased) was substituted for her deceased husband, George Adamczyk, as 1st Named Defendant.

[30] By way of summary, the following orders are hereby made:

1. This Court declares that the Claimant is entitled to have accounts produced to him by the Board of Directors of the 2nd Named Defendant and hereby orders that the Board of Directors of the 2nd Named Defendant produces to the Claimant an account of the affairs of the 2nd Named Defendant up to 5th May 1998.
2. The 1st Named Defendant is to pay damages to the Claimant in the following amounts -
 - (a) the sum of \$39,737.01, being the EC equivalent of US\$14,717.41, for unpaid rent up to 31st January 1996;
 - (b) the sum of \$137,579.90, being the EC equivalent of US\$50,955.52, for unpaid rent from 1st February 1996 to 5th May 1998;
 - (c) the sum of \$66,150.00, being the EC equivalent of US\$ 24,500.00, for loss and damage occasioned to the Claimant by the 1st Named Defendant other than for unpaid rent.
3. Costs to the Claimant in the sum of \$45,520.00.

Mario Michel
High Court Judge (Ag.)