BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2009/0083

IN THE MATTER OF THE ESTATE OF RAPHAEL WILLIAMS, Deceased

CLIFF WILLIAMS

First Claimant

AGGIE WILLIAMS

Second Claimant

-and-

THE MOORINGS LIMITED

Defendant

Appearances:

Mrs. Marie- Lou D. Creque of SCA Creque for the Claimants
Mr. Terrance B. Neale of McW.Todman & Co. for the Defendant

2010: November 05
2010: December 16

Law of contract – binding contract or agreement in principle – unilateral variation

The claimants, in their capacity as administrators for the estate of the deceased, instituted these proceedings against the defendant claiming damages in the amount of $420,693.95 for works done by the deceased at the defendant's facility. Subsequently, the parties met and reached an agreement on a sum to be paid in full and final settlement of debts due to the estate.

A week after the meeting, the claimants refused to accept the cheque of the agreed amount stating that the sum agreed upon was greater than initially thought. They sought a further meeting to review additional documents and receipts which had come to their attention. The defendant refused to enter into further negotiations, contending that an agreement had already been reached and that the claimants cannot unilaterally vary the binding agreement.

HELD:

1. On the facts of the case, a binding agreement was reached by the parties when they met. This was not an agreement in principle only.

2. The claimants cannot unilaterally vary it without the agreement of the defendant.

RULING

Introduction

[1] HARIPRASHAD-CHARLES J: On 6 March 2009, the claimants, in their capacity as administrators of the estate of Raphael Williams, deceased ("the deceased") initiated this action for breach of contract for certain construction works done by the deceased prior to his death pursuant to an agreement with the defendant. The claimants seek damages in the amount $420,693.95 together with interest and costs.

[2] On 9 November 2010, the parties appeared before me and it was agreed that Judgment be entered for the claimants against the defendant in the sum of $132,174.30. However, the remainder of the claim remains disputed. At that hearing, the court ordered that the parties will provide written submissions on whether the claimants can unilaterally vary the agreement reached between the parties on 19 March 2008. The following represents my ruling on this preliminary point.

[3] In a nutshell, the defendant asserts that it had reached an agreement with the claimants to pay the sum of $132,174.30 in full and final settlement of all claims due to the estate of the deceased and therefore, the claimants are estopped from bringing this claim. In other words, there was a binding contract between the parties which could not be varied unilaterally by one party.

[4] The gist of the claimants' argument is that there was no unilateral variation of the agreement but rather continued negotiations to settle the exact sum that was outstanding to them. The claimants further say that whilst there was an agreement, it was never finalized.

Some background facts

[5] In or around March 2007, the defendant entered into an oral agreement with the deceased to carry out certain construction works to its facility at Wickham's Cay II, Tortola. Sadly, the deceased died on 1 January 2008 when the construction works were about 70% complete.

The claimants applied for and were granted letters of administration to the estate of the deceased on 21 February 2008.

[6] Upon the death of the deceased, the claimants sought to collect funds which were allegedly due and outstanding to the deceased. The claimants initially made a claim for $291,915.77 which the defendant rejected.

[7] In or around March 2008, the parties met to discuss the matter. Based on their discussions, the claimants agreed to the sum of $132,174.30 in full and final settlement of all outstanding claims in respect of work carried out on the defendant's project. The claimants also agreed that in exchange, they will provide the defendant with the appropriate release.

[8] The defendant, through its legal advisers, advised the claimants' solicitors that in keeping with the Agreement between the parties that a cheque in the sum of $132, 174.30 later adjusted to $132,636.30, was ready for collection upon presentation of the Release. However, the claimants refused to accept the cheque stating that "*searches for all documents pertaining to the matter were continually on-going and as telephone calls and invoices were still being received from persons alleging they were owed funds, which had to be looked into, the claimants had to vary the agreement when it became clear that the sum was greater than initially thought*."[1]

[9] The defendant's response was that discussions and joint review of documentation had already been held and that the claimant could not unilaterally vary the agreement. They refused to enter into further negotiations on the amount.

The issues

[10] The issues which arise for determination are (1) whether the oral agreement reached by the parties on 19 March 2008 constitutes a binding contract or whether it was an agreement in principle only; and (2) if it was a binding contract, whether the claimants can unilaterally vary it?

[1] See paragraph (3) of the Reply filed on 19 June 2009.

[11] Learned Counsel for the defendant, Mr. Neale argues that there was an agreement between the parties for the defendant to pay the sum of $132,636.30 in full and final settlement of all claims against the defendant and the claimants cannot unilaterally vary the terms of that agreement. On the other hand, learned Counsel for the claimants, Mrs. Creque argues that the agreement was an agreement in principle only, and not binding until executed by the claimants in a formal document. She asserts that the process of negotiation was ongoing and inconclusive.

Applicable legal principles

[12] For convenience, I will start with some general principles of contract law. In the ordinary case, the law does not require a contract to be made in any particular form, nor according to any particular formalities. It is sufficient that there be a simple contract. Such a contract may be validly made either orally or in writing, or partly orally and partly in writing.

[13] To constitute a binding contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.[2] This requirement may be expressed by way of a general rule that for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately.[3]

[14] According to the learned authors of Chitty on Contracts[4]

> The question whether the parties have reached a complete agreement frequently arises where there has been an agreement in general terms but the parties have stipulated for the execution of some further formal document. The problem then is whether the agreement is too general to be valid in itself and is dependent on the making of a formal contract, or whether the parties have in fact completed their agreement so that the execution of a further formal contract is intended only as a solemn record of the already completed agreement. This is a question of construction for the court. In the words of Parker J in Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch 284, 288-89:

[2] May and Butcher Ltd v R (1929) [1934] 2 KB 17n at 21, HL, per Viscount Dunedin.
[3] Hussey v Horne-Payne (1879) 4 App Cas 311, HL.
[4] 25th ed., para 104.

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Court analysis

[15] In the present case, it is common ground that the parties met (without their lawyers) and reached an agreement on 19 March 2008. The agreement was that the defendant will pay to the claimants the sum of $132,636.30 in full and final settlement of all claims. This was to be followed by the issuance of a cheque to the claimants and the claimants undertaking to sign the release.

[16] In order to decide whether or not the agreement reached on 19 March 2008 was complete, it is necessary that I look beyond the simple offer and acceptance to the whole of the negotiations between the parties. After the meeting on 19 March 2008, a series of correspondence ensued between Counsel for the claimants, Mrs. Creque and Counsel for the defendant, Mr. Neale.

[17] On 20 March 2008, that is, the day after the meeting, Mrs. Creque wrote to Mr. Neale stating:[5]

> "I am instructed that our clients met directly this afternoon and have agreed terms which are as stated in your last email, save and except the difference on the Caribbean Transport invoice which is for $485.00 as faxed to you and not $65.00 as claimed in your clients note. Kindly amend the release to reflect this. My clients will attend your offices with the duly executed release and thereafter collect the cheque."

[18] The last email from Mr. Neale dated 19 March 2008 stated:

> "Further to our receipt of correspondence on the above matter my client has advised me that the actual sum due and owing to the Estate is actually

[5] Claimant's trial submissions, filed 19th November 2010, TAB 2.

> $132,174.30 and not $291,453.77 previously stated in your Release as the sum of $159,279.47 had previously been advanced to Mr. Raphael Williams as set out in the attached spread sheet of summary and expenses.
>
> In the circumstances, we have amended the draft Release to reflect the true state of affairs and the actual payments to be made to the Estate …"

[19] Following Mrs. Creque's correspondence on 20 March 2008, Mr. Neale wrote to his client the very day. In the email, he said:

> Tanya,
>
> Ms. Creque, the lawyer for the administrators advised that they met with you during the course of the day and as a result of this meeting have accepted that the sum due and owing to the Estate is indeed $132,174.30 as stated by you and not the sum previously claimed by them.
>
> The only discrepancy I am advised is the Caribbean Transport invoice where the sum of $65 was erroneously stated by you in your calculations when this in fact should actually be the sum of $485 as stated on the actual invoice.
>
> Ms Creque has advised that the Administrators are now willing to sign and deliver the Release in exchange for the Moorings cheque in the above sum subject to the qualification in the second paragraph above.

[20] On 25 March 2008, the defendant duly forwarded a cheque in the sum of $132,636.30 to Mc W. Todman & Co together with the release to be signed by the claimants.

[21] Then on 28 March 2008, Mrs. Creque wrote to Mr. Neale in the following words:

> "I am instructed that there is still a significant difference between our clients in respect of the figures. As such, may I propose a meeting whereby our clients may present their actual invoices in verification of the payments made and what I understand is alleged to have been an over-payment to the late Mr. Williams."

[22] On 1 April 2008, Mr. Neale responded to Mrs. Creque's letter of 28 March 2008 in this way. He stated:

> "With respect to paragraph 1 of your letter, our clients are taken by surprise at the position now expressed by your client since same is contrary to what had been previously represented by you on your clients'. You would no doubt recall that our

> clients met with your clients and reviewed the various invoices and receipts in the matter before arriving at an agreed position. We therefore do not think that your clients, in the absence of a change of circumstances would unilaterally be able to go back on what had been previously agreed. In this respect we advised that our client in anticipation of the completion of this matter had in fact forwarded their settlement cheque to us on the understanding that same would be exchanged for the executed Release.
>
> In the circumstances we are instructed to inform you that before our clients can agree to a meeting to discuss the matter further they require your clients to provide them with the reasons why they have now adopted this new position together with any supporting documentation which they may have so that our clients can review same with a view to deciding whether a further meeting with your clients would serve any useful purpose.
>
> In the meantime our clients reserve all their rights in the matter."

[23] The issue of whether or not there was a binding agreement between the parties is a question of construction for the court. I am satisfied that on the facts and the applicable legal principles, a binding contract was reached between the parties on 19 March 2008. This was an agreement reached by the parties which settles everything. It was to be followed up with the payment of a cheque in the agreed amount and the claimants signing the release. These were ancillary to the fact that the parties have finished reaching an agreement. This was not an agreement in principle only. It was the duty of the claimants to carry out all due diligence before reaching an agreement.

[24] In my opinion, the execution of the written release cannot be equated to an agreement in principle where the only proper inference to be drawn is that the parties have not yet finished agreement. For instance, where they make their agreement conditional, or subject to contract, or where so many important matters are left uncertain that their agreement is incomplete. This is a clear case of where the parties reached a binding agreement and subsequently, the claimants may have found more invoices and now seeks to vary that agreement unilaterally. This cannot the done. The law is that the parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement. A

mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of the contract.[6]

[25] In the premises, I will hold that a binding contract was reached between the parties on 19 March 2008 and the claimants cannot unilaterally vary it because they have now found new invoices. They should have never entered into that agreement or should have agreed in principle only.

[26] There will however be a slight variation to the order that I made on 9 November 2010 to reflect that Judgment be entered for the claimants against the defendant in the sum of $132,636.30 and not $132,174.30. This is admitted by the defendant's commercial director and sole witness, Tanya Whistler.

[27] There will be no order as to costs.

Indra Hariprashad-Charles
High Court Judge

[6] Cowey v Liberian Operations Ltd [1966] 2 Lloyd's Rep. 45.