IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COLONY OF MONTSERRAT
(CIVIL)
A.D 2013

CLAIM NO. MNIHCV2009/0025

BETWEEN:

NELSON PIERRE	**Claimant**
and	
MILLENIUM HOLDINGS Ltd. MHL	**1st Defendant**
FREDERICK SAHADEO	**2nd Defendant**

APPEARANCES:

Mr. David Brandt for the Claimant

Mr. Kharl Markham for the Defendant

2013: September 20
2013: November 05

JUDGMENT

[1] **REDHEAD J. (ag):** The Claimant, Nelson Pierre, a resident and National of the Commonwealth of Dominica, claims against the defendants damages for **breach of contract** entered into between him and the defendants between the 13th January 2009 and 24th April 2009.

[2] By his particulars, the Claimant alleges that the said agreement between the parties was made partly orally, partly by conduct and partly in writing. He also said in his particulars that " in so far as it was oral the said agreement was made at meetings and interviews between the 13th of January 2009 and 17th of February 2009. In so far as it was in writing the said agreement was contained in a document dated April 27th 2009."

[3] In his pleadings the Claimant also alleges that the 2nd Defendant on the 13th day of January 2009 informed him that he, the second defendant, was the cooperate manager of the 1st Defendant with sole responsibility for management of the Little Bay Infrastructure Development project and that the 1st Defendant needed a new project manager and it was his decision regarding who would be selected.

[4] The Claimant expressed his interest in the post of Project Manager with the 2nd Defendant, but he could not start any full time engagement until after the 31st of March 2009 because of prior commitments with the Government of Montserrat. The Claimant had delivered a copy of his curriculum vitae to the 2nd Defendant. The Claimant alleges that the 2nd Defendant on behalf of the 1st Defendant engaged him to provide professional engineering and management support services until the 31sr March 2009.

[5] The Claimant alleges that on the 17th of February 2009 at Tropical Mansion suites at the invitation of the 2nd Defendant and further discussion there was an agreement for the Claimant to be project manager for the Little Bay Infrastructural Development Project. The above, the Claimant says, are the

meetings between him and the 2nd Defendant that constitute the oral agreement.

[6] The following represent the conduct of the 2nd Defendant from which the Claimant says can be inferred a contractual agreement between him and the 1st Defendant.

[7] E-mail sent from Mr. Rhyad Khan of the Defendant's company to the Claimant on behalf of the 2nd Defendant. The Claimant alleges that in accordance with the 2nd Defendant telephone instructions, he prepared a letter dated the 23rd of February 2009. The letter was addressed to David Lashley of DLN Consultants and was issued by him to the 2nd Defendant (via Mr. Khan) for the 2nd Defendant's review and signature under cover of an e-mail dated the 23rd February 2009.

[8] The Claimant alleges that at the invitation by the 2nd Defendant, the Claimant attended a meeting with the 2nd Defendant at Tropical Mansion to discuss several issues, to include staffing and the Claimant's continued role in the development of the Little Bay Infrastructure Development Project.

[9] The Claimant in his Claim Form alleges that the 2nd Defendant telephoned the Claimant on the 21st of April, 2009 and requested the Claimant to join him in Antigua for a meeting with DLN Consultants. The Defendant provided the ticket and accommodation in Antigua. The Claimant paid for ground transportation cost in Dominica and embarkation taxes throughout the trip. The Claimant cancelled all his meetings personal and business appointments in order to attend the meeting.

[10] The Claimant also alleges that on the 24th of April 2009 the 2nd Defendant on behalf of the 1st Defendant signed a professional service contract dated the 22nd of April 2009. The Claimant says that pursuant to the said contract the Defendants agreed inter alia (a) to pay the Claimant a lump sum fee determined and based on $25,000.00 per month multiplied by the total number of months duration of the entire contract period and until and up to the delivery date of the completed project to the Government of Montserrat. The monthly portion of the fee shall be payable by electronic funds transfer to the Claimant's bank account in Dominica at the end of each month (and other terms). The Claimant alleges that by the 18th day of May 2009 the Defendants failed or refused to comply with any of the terms of the agreement despite the fact that the Claimant urged it to do so. The Claimant states that he informed the Defendants that at all material times he was willing and able to perform his part of the agreement.

[11] "The Defendants having failed or refused to perform his (sic) part of the agreement." The Claimant's solicitor wrote a letter to the Defendant pointing out several braches of the agreement requesting the defendant to remedy the same and requesting a reply by noon on the 25th May 2009 but the Defendant has failed or refused to reply to the said letter.

[12] The Claimant alleges that "he has lost the full benefits of the agreement and revenue they (sic) would otherwise have received there under and have suffered loss and damage.

The Claimant Claims the:

(i) The Sums of $280,000.00 and

(ii) $25,000.00 in damages

(iii) alternatively damages

(iv) Cost

(v) Interest.

[13] The First and Second Defendants put in separate defenses but in my view there is no material difference between both Defences. The Second Defendant denies that he informed the Claimant that he was the Cooperate Manager of the First Defendant but told him that he was a director of the 1st Defendant.

[14] The Second Defendant denies that he told the Claimant that he had sole responsibility for project management of the Little Bay Infrastructure Development Project and that the First Defendant needed a new Project Manager. The Second Defendant states that while residing at Tropical Mansions suites, the proprietor Isabelle Meade introduced the Claimant as an engineer and in response to the Claimant's solicitation for work he, the seond defendant, informed him that at the time there were no vacancies at the Little Bay Project. The Second Defendant says that he and the Claimant interacted

socially at Tropical Mansions suites over a period of time and at some stage during the interactions the Claimant presented him with his curriculum vitae.

[15] The Second Defendant says that about the month of April 2009, Mr. Michael Browner, the Project Manager on the Little Bay Project left Montserrat for Northern Ireland to attend to urgent family matters, and it was understood that Mr. Browner would be temporarily absent from work.

[16] The Second Defendant says that he informed the Claimant that there was a short term opening for a Project Manager at the Little Bay Project given the absence of Michael Browner from the island. He denies telling the Claimant that the decisions regarding the employment of a Project Manager rested with him.

[17] The Second Defendant admits that the Claimant discussed his previous employment with the Public Works Department in the Government of Montserrat and repeatedly informed the Second Defendant that he was on good terms with the Government.

[18] The Defendants deny engaging the Claimant to do any other professional or engineering and management support services. The Second Defendant says that there was a period when he was without his personal computer and the Claimant volunteered to prepare a number of e-mails and letters for him. The Defendants admit that the Claimant sent an e-mail to Rhyad Khan, the data base personnel based in Trinidad, on behalf of the Defendants and also typed a letter to Mr. David Ashley of DLN consultants during the period, that the Second Defendant was without his personal computer, but states that the

e-mails and letters were prepared and vetted by the Second named defendant and were not typed by the Claimant in the capacity of an employee of the First or Second Defendant.

[19] The Second Defendant denies inviting the Claimant to the Tropical Mansion Suites for a meeting to discuss staffing and his continued role in the Little Bay Infrastructure Development and states that at all material times the Claimant was the fiancé of the proprietor of Tropical Mansions Suite and he was often present at the said hotel.

[20] The Second Defendant states that during the month of May 2009 the First Defendant and the Claimant reached a provisional agreement that the Claimant would serve as project manager of Little Bay, but that while the First Defendant was prepared to retain his services as Project Manager for the period that Michael Browner was away, such retention would be subject to an interview by DLN Consultants and/or the Government of Montserrat, with the view to obtaining final approval for the Claimant's employment. The Claimant agreed.

[21] The Second Defendant admits sending an airline ticket to the Claimant in Dominica with a view to having the Claimant meet (with) the Second Defendant in Antigua. They also provided the Claimant with an airline ticket to Montserrat to facilitate the Claimant's interview with DLN, and at all material times, the Claimant was aware that his employment with the First Defendant was subject to the approval of the Government of Montserrat.

[22] The Second Defendant says that he repeatedly informed the Claimant of the need to submit himself to an interview with the Public Works Department and the Claimant eluded the issue and that at one stage the Claimant informed the Second defendant that an interview with the Public Works Department would only "stir up trouble."

[23] The Second Defendant alleges that during or about the month of April 2009 shortly before leaving Montserrat, the Claimant presented him with a document which the Claimant indicated was an employment contract, and asked him, the second defendant, to sign it in order to provide him with a degree of comfort while he was away from the island. The Second Defendant puts forward, I would say, this startling defense, that he was surprised that the Claimant had prepared a contract without informing him, but given the friendship, coupled with the fact that the Claimant and the defendant had discussed the salient terms which would embody a service contract, to include but not limited to actual employment being subject to approval by the Government of Montserrat, the defendant subsequently signed the agreement without reading it. I do not accept this, I shall return to this later in this judgment.

[24] The Defendants by their defense say that it was an implied term of the agreement reached between the Claimant and the First Defendant that the Claimant's proposed services to the First Defendant were subject to approval by the Government of Montserrat. The Claimant represented to the defendant that approval would not be a problem since there were no

outstanding issues with the Government of Montserrat which would have prevented his approval.

[25] The Defendants state that after signing the agreement prepared by the Claimant and while the Claimant was away from the island, the defendant's awareness that the Claimant was avoiding an interview with the Public Works Department heightened, and as a result of queries carried out by the 2nd defendant revealed that the Claimant's previous employment with Public Works Department was thwart with problems which would prevent the Claimant from serving as the interim Project Manager at Little Bay. The Second Defendant states that based on discussions held with and representations made by the Claimant as the proposed interim Project Manager but the Claimant misrepresented facts which were critical to the agreement, thereby inducing the First Defendant into contracting with him.

[26] The Defendants state that as a result of relying on the representations made and by extension agreeing to employ the Claimant, the first defendant has suffered loss and damage. The First Defendant alleges that the Claimant's failure to attend an interview with the Public Works Department and or DLN Consultants thereby ascertaining whether he could be employed by the first Defendant caused the contract works to be postponed for a period of twenty (20) days and the particulars of loss include:

i. Wages loss to survey crew $50,000.00.

ii. Loss for quality assurance,

iii. Quality control, $30,000.00

iv. Amount Loss for mobilization $40,000.00

v. Company managers and overhead loss $55,000.00,

vi. Total $175.000.00

[27] Finally the Defendants allege that the First Defendant was forced to source an interim Project Manager from Trinidad for a period that the appointed Project Manager was away from the island.

[28] I, first of all, look at the written contract dated the 22nd day of April 2009 entered between the parties. First of all, I reject out of hand the Second Defendant's assertion that he signed the agreement without reading it because he knew it was an employment contract, as he said so, He is a director of the First Defendant. Why would a director of a company sign an employment contract which would bind his company without reading the contract? This, to my mind, makes absolutely no sense and therefore cannot be accepted. However by so stating the plea **non est factum** cannot avail him, because I do not accept this. Even if I did, in the circumstances of this case, It would not avail him.

[29] I cannot accept either that the Second Defendant signed the contract in order to 'provide the Claimant with a degree of comfort' while he was away as the Second Defendant pleaded. Intelligent business professionals simply do not behave this way.

[30] Clause 16 of the Contract provides as follows:

" This agreement constitutes the entire agreement and understanding between the parties hereto in consideration with the subject matter here of, and supersedes and cancels all previous representations, negotiations and agreements (whether oral or written)."

This agreement was entered into on the 2nd May 2009. In his pleadings the Claimant claims damages for breach of contract entered into between the Claimant and the defendants on the 13th day of January 2009 and the 24th day of April 2009. In my opinion, the pleadings are inconsistent with clause 16 of the contract. I make the observation, which is an elementary point, that one is bound by one's pleadings.

[31] Mr. Markham, learned counsel for the defendants in his Skeleton Arguments contends that there is a material variance between the pleadings and the evidence. Learned Counsel for the Claimant in cross examination seemed to have proceeded on the basis that strict reliance was placed on the written agreement and no consideration was being given to oral discussions and other matters pleaded and not forming part of the executed agreement dated the 22nd of April 2009. He argues that... **"extrinsic evidence may be introduced to cure some uncertainty and is always admissible to show inter alia, that the parties purported to reduce a prior oral agreement to written agreement but that the written agreement does not correspond with the oral agreement."** [1]

[32] Mr. Markham argues that there were terms agreed by the parties prior to the signing of the agreement prepared by the Claimant which were not

[1] See Halsbury Law of England 4th Edition Vol. 9 paragraph 287

incorporated into the agreement. He contends that at the material time the defendants intended to employ the Claimant as the project manager but subject to certain conditions. It was agreed by the parites that the Claimant would (a) submit to an interview with DLN Consultants (Government's representative on the project) and or the Government of Montserrat and (b) seek the approval of the Government of Montserrat for him to be employed and work as the First Defendant's Project Manager. These terms were not incorporated into the written agreement, but are no less enforceable. I agree **(see Halsburys)** [2]

THE EVIDENCE

[33] The Claimant said in cross-examination: " I heard about DLN Consultants from different sources but never from Mr. Sahadeo." Yet later on in his cross-examination he said: " While I was in Dominica Mr. Sahadeo gave me a ticket and told me that he would like me to attend a meeting with DLN Consultants in Antigua."

[34] The Claimant denies that the Second Defendant told him of the need to meet with government consultants and or the government for an interview and that his employment was subject to government's approval. The Claimant also denied that he told the Second named defendant that there would be no problem with the government so far as his employment with the First named Defendant was concerned. I do not accept any of this.

[2] Vol 9 paragraph 351

[35] I find that the Claimant was less than forthright and truthful in his testimony before the court. Where there is a conflict between the testimony of Claimant and that of the second named Defendant, I prefer the latter.

[36] I find the following facts, the Claimant was employed with the Government of Montserrat as an engineer. This employment came to an end on the 31st day of March 2009.

[37] The Claimant during his employment with government stayed at the Tropical Mansion Suites, Montserrat, or in any event, he was a regular visitor there, so did the Second named Defendant.

[38] The Claimant and the Second named Defendant developed a friendship. During this period. The Second Defendant was a director of the First named Defendant which was undertaking the development of the Little Bay Project. Michael Browner was the approved Project Manager for the Little Bay Project. However, in April, Michael Browner had to leave Montserrat and return to Northern Ireland, his home land, on urgent personal business.

[39] I accept the Second Defendant's testimony and find as a fact that prior to that date the Claimant was enquiring of him whether there was a vacancy for a Project Manager at the Little Bay Project. It must be remembered that his employment with government was coming to an end by the 31st day of March 2009. In this regard, I reject the Claimant's assertion that he carried out work for the 1st named defendant before 31st March 2009. The Claimant's enquiry yielded no success at that time, however with the temporary absence of Michael Browner from Montserrat and away from the Little Bay Project, Mr.

Sahadeo informed his friend, the Claimant, of the temporary vacancy. The Claimant applied for the post of Project Manager. The defendant having accepted the assurance given him by the Claimant that there would be no problem with his being employed with the Little Bay Project or obtaining a work permit from the Government of Montserrat because he had left his employment on good terms. This turned out not to be true, as I shall explain later.

THE WORK PERMIT ISSUE

[40] It is quite obvious to me that the work permit which the Claimant needed to perform the duty of Project Manager at the Little Bay Project was not forthcoming or to put it bluntly the government of Montserrat refused to issue him with one. The Claimant knew this. His Lawyer Mr. David Brandt on the 20th May 2009 wrote to the Chief Minister in the following terms:

"Dear Sir,

I act for Mr. Nelson T. Pierre... a Dominican National who was recently employed by the Government of Montserrat at the Ministry of Communication and works. My Client entered into a written contract for provision of services with Millennium Holdings Ltd. at Little Bay Montserrat and he has received the enclosed letter stating that your Government is not prepared to agree to his employment by Millennium Holdings Ltd. Could you

inform me whether or not your government has taken such a decision against an OECS citizen? May I hear from you at your earliest.

Yours Very Truly,

David S. Brandt

cc. Nelson Pierre."

[41] In response to the letter of the 20th May 2009 from learned counsel, the Hon. Chief Minister said that he was forwarding the matter to the Labour minister requesting him to advise Mr. Nelson T. Pierre of his rights.

[42] Learned counsel, Mr. David Brandt on the 1st of April 2010, on behalf of his client, wrote again to then Hon. Chief Minister, inquiring, inter alia, of him.

"My client received the enclosed letter from the company stating that your then Government was not prepared to agree to his employment on the project. Could you inform me whether or not your Government had taken such a decision?...."

[43] On the 12th of April, 2010 Dr. Lewis replied to Mr. Brandt in, what I would call, "political diplomatic" language as follows:-

"Dear Sir,

In response to your letter of the 1st of April 2010, I wish to infrom you that I have no recollection of my government being asked to make a decision, or making a decision to prevent Mr. Nelson Pierre from being employed by the company Millennium Holdings. I am not also aware of any conditions which existed which would legitimately bar Mr. Nelson Pierre who is a

CARICOM professional, who had previously worked and lived in Montserrat from working in Montserrat.

Yours Truly,

Lowell Lewis"

[44] On or about 11th May 2009, Mr. Sahadeo, the 2nd Defendant wrote to the Claimant as follows.

" Thanks for your emails of May 6th and 7th we now need to reach a consensus on the way forward. As indicated, the Government of Montserrat is not prepared to agree to your employment by Millennium Holdings Limited. This is regrettable since I had not anticipated this turn of events **given your assurances of not foreseeing any problems from the Public Works Department.**

I am certain you will agree that I had done everything in my power to expedite your employment by Millennium Holdings. I have made representations to have the authorities change their position on the issue of your employment. To date, I have been unsuccessful, and as a matter of urgency it would help if you are able to use your influence to bring about a change.

Please let me hear from you as soon as possible.

Yours faithfully,

Frederick Sahadeo."

[45] I make the observation that I find it passing strange that the Claimant does not recall receiving this letter. He said in cross examination:-

"I do not recall whether I received this letter. It sounds familiar"

[46] This correspondence from Mr. Sahadeo to Mr. Pierre, to my mind, speaks volumes. From this letter I come to irresistible conclusion that the Government of Montserrat did not agree to the Claimant's employment with Millennium Holdings on the Little Bay Project and consequently refused to issue him with a work permit.

[47] The Claimant had given the defendant the assurances of not foreseeing any problems from the Public Works Department about his employment with Millennium Holdings. If it were not so why would Mr. Sahadeo put these things in a correspondence to him?

[48] Finally, I conclude that the Claimant had represented to the 2nd named defendant that he left his employment with the Government of Montserrat on good terms. This turned out not to be so, because if it were true, the Government of Montserrat would not have refused to give him a work permit or object to his working on the Millennium Project for the Little Bay Development.

[49] The Second named defendant says :-

"The Claimant represented to me that approval from the Government would not be a problem since there were no outstanding issues with the government which would prevent his approval, I believed him."

[50] I accept that the Claimant had this discussion with the Second named Defendant. If he did, then it must mean that, in my view, the Second named

Defendant told the Claimant that his proposed employment was subject to the approval of the Government of Montserrat.

[51] Mr. Markham in his Skeleton Submissions argues:-

"... the enforceability of the agreement with the Claimant was always subject to the oral agreement that the Claimant would obtain the approval of the Government and or DLN Consultants as outlined in the examination in chief. Additionally, the promises, or representations by the Claimant that there was no problem with obtaining the government's approval to serve as the Project Manager were fundamental and amounted to overriding oral promises." I agree.

[52] Mr. Brandt, learned counsel for the Claimant, in his Skeleton submissions argues that the Claim by the Defendant that the Claimant's employment with the Public Works Department was thwart with problems and would prevent the Claimant from serving as a interim Project Manager at Little Bay is without foundation. I do not agree, having regard to the reasons I gave above.

[53] In support of his argument that the Claimant's employment with the Public Works Department was thwart with problems was without foundation, Learned Counsel Mr. Brandt contends, to the contrary, and in doing so, he referenced Dr. Lewis' letter of the 12th of April 2010 (referred to above) in that letter Dr. Lewis said that he had no recollection of his Government being asked to make a decision, or making a decision to prevent Mr. Nelson Pierre from being employed by Millennium Holdings. He also said in that letter that

he was not aware of any conditions which existed which would legitimately bar Mr. Nelson, who is a CARICOM National from working in Montserrat.

[54] It must be noted that on one occasion Dr. Lewis said **that he had no recollection**. On the other occasion he said **he was not aware.** He did not say that his government did not make a decision to prevent Mr. Pierre from being employed by Millennium Holdings, neither did he say there was no condition which existed which would legitimately bar Mr. Nelson, a CARICOM professional from working in Montserrat. Even if he had said the latter, he would, in my view, have been incorrect as I would show later.

[55] In my opinion the letter from Dr. Lewis does not support the conclusion of Mr. Brandt.

[56] Mr. Brandt, on behalf of the Claimant argues that he had written on several occasions to the Defendants pointing out several breaches of the agreement, to date the defendants have failed or refused to remedy them.

[57] He argues, that as a consequence the defendants have repudiated the agreement and by a letter dated the 4th of September 2009, the Claimant informed the Defendants that he had accepted their repudiation.

[58] Mr. Brandt submits that the focus of the repudiation doctrine is objective. If a reasonable person in the position of the promisee would conclude that the promisor has repudiated the contract, that will be a repudiation. Even though there is no express refusal to perform and no actual intention to repudiate.

[59] He refers to **Swiss Atlantique Societe D'Armemant Maritime SA V N.V Rotterdamsche Kolen Centrale[3] and Freeth and Am Burr[4]**

In **Freeth** Lord Coleridge C.J at page 213 opines:

"…. The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non delivery on the other, may amount to such an act, or may be evidence for a jury of an intention whereby to abandon the contract and set the other free."

[60] The Claimant said in cross-examination. That he is a CARICOM National and he is allowed as a professional to work in Montserrat. I shall return to this aspect later in the judgment. The Claimant also said that he was not aware that he needed a work permit to work in Montserrat. **Ignoaratum lex non escuset.** He insisted that if a work permit was required it was the responsibility of the employer.

[61] Section 21 of the Immigration Act Mandates

"21 (1) No person not belonging to Montserrat within the meaning of paragraph (b) of subsection 2 of this Act shall (a) engage in any profession in Montserrat for profit or reward.

(b) be employed in Montserrat for wage salary or other remuneration…

(c)_"

[62] Mr. Markham in his written submissions argues that " against this background, it is clear that the requirement of a work permit prohibited the

[3] 1967 1AC 361
[4] 1874 LR9 C.P 208 to 213

Claimant from working as Project Manager [without one] despite the agreement arrived at with the First Defendant. Additionally, the First Defendant was not permitted to allow the Claimant to work as its Project Manager on the Little Bay Project without the requisite work permit, and in effect enforcement of such an agreement is tantamount to enforcing an illegal contract."

[63] Indeed a breach of the relevant provision of the **Immigration Act 2009**[5], constitutes a criminal offence. (See 21[2]). Learned counsel contends that in addition to this being a matter of law to be imported into the agreement, it goes to the business efficacy of the agreement.

[64] In **Halsburys Laws**[6] the Learned authors instruct us, inter alia; as follows:-

"... what the law desires to effect by the implication is to give such business efficacy to the contract as must have been intended by both parties as businessmen, that is not to impose on one side all the perils of transactions, or to emancipate one side form all the chances of failure but to make each party promise in law as much at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." **(See Hamlyn & CO V Wood & Co)**[7]

[65] In my judgment it must have been in the contemplation of both sides in the case at bar that the Claimant would obtain a work permit in order for him to perform his service in Montserrat for Millennium Holdings Ltd, whether this

[5] CAP 13.01
[6] Vol. 9 paragraph 355
[7] [1891] 2 q.B 488

was expressed/discussed by the parties or either of them or made a term of the contract.

[66] The granting of a work permit to the Claimant to perform his services in Montserrat is so vital for the performance of the contract that without it there can be no contract as it turned out.

[67] Learned counsel for the Defendants contends- " that the claimant being a CARICOM professional, two things should be noted. As at the date of trial (not at the date of the trial but at the date of the contract) Montserrat was not a signatory to any document/treaty allowing CARICOM nationals to work freely in Montserrat without a work permit. The more important point, however, is that the law which exempted CARICOM Nationals with a skilled CARICOM Certificate to work without a work permit came into force in 2012, years after the Little Bay Project was completed. This is in the form of the Labour Code 2012 passed on the 26th of December 2012. Sections 125-127 repealed sections 21-23 of the Immigration Act.

[68] Mr. Markham takes the position that the agreement between the parties cannot be enforced without the Claimant obtaining a work permit and therefore that disentitles the Claimant to contractual relief. Moreover, enforcement of the contract would be clearly against public policy and would be illegal.

[69] In addition Mr. Markham argues that the agreement was entered into because it was induced by misrepresentation. The misrepresentation the Defendants are relying on, is that the Claimant represented to the Defendants

that approval from the Government of his contract to work on the Little Bay Project would not meet with any problems since there was no outstanding issues with the Government which would prevent his approval. The Second named defendant said that he believed the Claimant. This turned out to be untrue. As I understand the Defendants' case on this point, is that, the Claimant made the representation to them which he knew was untrue and had it not been for that representation, they would not have entered into the contract with him.

[70] I accept that the Claimant did make this representation to Mr. Sahadeo, the second named defendant. I conclude that the Claimant must have know that this representation was false. When he was pressed to have the interview with the Public Works Department so that he could have the "blessing" of the government for the job, he told Mr. Sahadeo to have an interview with the Public Works Department would only "stir up trouble. "

[71] I find that there was misrepresentation by the Claimant which induced the defendants to enter into the contract with the Claimant. The contract is therefore voidable at the instance of the defendants. The defendants are therefore entitled to rescind the contract.

[72] Finally, Learned Counsel in his written submissions argues the issue of frustration. It was not pleaded and Mr. Brandt did not have the opportunity to argue this matter. However as **".... The question is treated as one at least involving a question of law or, a question of mixed law and fact."**[8]

[8] (1981) AC 675

[73] If Frustration involves a question of law, then there is no requirement that it should have been pleaded. **Lord Hailsham in National Carriers v Panalpina Ltd.** [9] referring to the judgment in **Leighton's Investment Trust Ltd v. Cricklewood Property and Investment Trust Ltd** [10] referenced the Judgment of Lord Wright in that case where Lord Wright opined:-

"... the doctrine of frustration is modern and flexible and is not subject to being constricted by any arbitrary formula."

[74] Mr. Markham refers **to Chitty on contracts**[11], the learned authors tell us

" a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfill the contract or transforms the obligation from that undertaken at the moment of the entry into the contract."

[75] The case at bar, in my opinion, falls squarely within the first limb of that definition. After the contract agreement was signed by the parties, the authorities refused to permit the Claimant to work on the Millenium project or to grant the Claimant a work permit which made it impossible for the Claimant to carry out his duties in Montserrat. The granting of the work permit or refusal to do so was beyond the control of the parties.

[76] In **National Carriers(supra)** Lord Hailsham quoting from the judgment of Lord Radcliffe in **Davis Contracts v Fareham Urban District Council**[12], Lord Radcliffe said:

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[9] (1942) 2 ALL ER 580
[10] Per Lord Hailsham National Carriers v Panalpina Ltd (1981) AC 675 to 688
[11] 29th Edition at paragraph
[12] [1956] A.C. 696 to 729

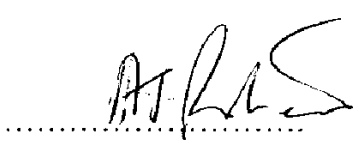
[77] "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable or (sic) [of] being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract **Non hace foedera veni.** It was not this I promised to do."

[78] I would with respect add or because performance becomes impossible.

[79] In light of the foregoing, in my judgment the contract entered into between the Claimant and defendants was voidable and could have been voided by the Defendants, as they did. The contract was unenforceable because to enforce the contract would be illegal. In the alternative the refusal of the Government to allow the Claimant to work on its project at Little Bay or to grant a work permit to the Claimant frustrated the contract.

[80] The Claim of the Claimant is hereby dismissed. The counter claim by the defendants is also dismissed.

[81] Cost to the defendants to be agreed, if not agreed to be assessed on the basis of Prescribed Costs.



Albert Redhead

High Court Judge