

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**ST. CHRISTOPHER & NEVIS
NEVIS CIRCUIT**

CLAIM NO. NEVHCV2015/0020

BETWEEN:

[1] **HASTINGS R DANIEL**
[2] **HAMERON SERVICES LTD**

Claimants

and

[1] **DEON DANIEL**
[2] **DEON & ASSOCIATES**

Defendants

Before:

The Hon. Mde. Justice Lorraine Williams

High Court Judge

Appearances:

Mrs Angela Cozier & Mrs Emily Prentice Blachett for the Claimants
Mr Terrence Byron & Ms Talibah Byron for the Defendants

2018: October, 10th
2019: November, 29th

JUDGMENT

[1] **WILLIAMS, J.:** This matter is before the Court by a further Amended Claim form dated 6th April 2016.

- [2] According to that claim form, the claim against the first Defendant Deon Daniel is for the sum of EC\$1,377,961.88 which represents the cost of services provided by the Claimants for and on behalf of the Defendants between April 2011 to March 2013 for which the Defendants' promised to pay and have refused to do so.
- [3] The Claimants have therefore claimed:
- (1) Payment of the sum of EC\$1,377,961.98
 - (2) Interest on the said sum from the 30th June, 2014 to date of payment
 - (3) Costs
 - (4) General damages
 - (5) Such further or other relief as the Court deems fair
- [4] The first Defendant is a property developer and is the Managing Director and owner of the second Defendant.
- [5] The second Defendant is a Property Management and Development company which requested the following services from the Claimants as follows:
- (1) A valuation of 24.3675 acres of land situated at Pinney's Estate, Nevis on the 11th April, 2011 at the cost of EC\$100,000.00 of which the Defendants paid EC\$50,048.15 on the 12th May, 2012 and EC\$15,900.00 on the 10th January, 2013, leaving an outstanding balance of EC\$48,984.84, which sum remains unpaid despite the claimants written demand for the same.
 - (2) A valuation of 20.3675 acres of land located at Pinney's Estate, Nevis on the 11th June, 2012 at the cost of EC\$231,959.51. According to the Claimants despite numerous written requests for payment to the Defendants the sum remains outstanding.
 - (3) A Business plan for Nevis Belmont Holdings Ltd at the cost of EC\$702,070.44 and dated the 14th February, 2013. According to the Claimants, despite numerous written requests to the defendants for payment of that amount, the sum remains outstanding.

(4) A second valuation of 20.3675 acres of land located at Pinney's Estate, Nevis which was done on the 11th March, 2013 at a cost of EC\$394,947.20. Despite numerous written requests for payment of the said amount, the sum remains outstanding.

[6] On the 11th September, 2013, the first Claimant stated that he agreed with the first Defendant for full settlement of the outstanding balance as follows:

- (1) Payment of invoice #13092 in the amount of EC\$40,056.98 and
- (2) Payment of invoice #13084 in the amount of US\$126,041.89

[7] On the 30th October, 2013, the first Claimant wrote to the first Defendant with reference to the settlement agreement and requested payment. The Defendants have refused to honor the agreement and the Claimants are requesting payment of the agreed sum.

The Defendants' case and submissions

[8] The Defendants deny that they requested the services from the Claimants as alleged, in particular, a valuation of land located at Pinney's Beach Resort at a cost of EC\$48,984.84.

[9] The Defendants assert that the Claimants agreed with Pinney's Beach Resort Limited, the previous registered proprietors of the land. The Defendants claim that a valuation of the said area by the second claimant acknowledges that Pinney's Beach Resort is the owner of the property. The Defendants further state that although they did not make a request for a valuation, they indicated to the Claimants that they would pay the sum of EC\$40,056.98, after they received the proceeds of sale.

[10] The Defendants state that the Claimants signed an agreement dated the 11th September, 2013 agreeing that the proceeds of the property sale would be paid to the claimants.

[11] However the Defendants deny that they requested services of the Claimants with regard to the valuation of the land at Pinney's Estate, Nevis at a cost of EC\$231,959.51, but agree that they would pay the Claimants the sum of US\$126,041.89 upon receipt of investments funds and sale proceeds.

[12] The Defendants therefore assert that the conditions of payment to the Claimants have not been met and therefore these monies have not become due and owing to the Claimants.

The Issues

[13] The issues to be determined by the Court are:

- (1) Whether the Defendants are liable to pay for the services rendered as detailed in invoice #13093 for a cost of EC\$231,959.51.
- (2) Whether the Claimants have adduced evidence to prove their claim in Invoices #13092 and #13084.
- (3) Whether there is a binding and enforceable contract between the parties.

The Law

[14] The elements to a legally binding contract according to **Chitty on Contracts** Volume I, is that there must be an:

- (1) **Offer** which is defined as an expression of willingness to contract made with the intention that it is to become binding on the person making it, as soon as it is accepted by the person to whom it is addressed.
- (2) **Acceptance** which is defined as a final and unqualified expression of assent to the terms of the offer.

When parties carry on lengthy negotiations it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they have ever agreed at all. The Court must then look at the whole correspondence, and decide whether on its true construction, the parties had agreed to the same

terms. If so there is a contract even though both parties or one of them had reservations, not expressed in the correspondence, the court will be particularly anxious to hold that continuing negotiations have resulted in a contract, where the performance which was the subject matter of the negotiations, has actually been rendered.

(3) An offer may be accepted by conduct. But conduct will only amount to acceptance if it is clear that the offeree did the act with the intention of accepting the offer.

(4) A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer.

However statements which are not intended to vary the terms of the offer or to add new terms do not vitiate the acceptance, even where they do not precisely match the words of the offer¹. If the new term merely expresses what would otherwise be implied, it does not destroy the effectiveness of the acceptance². Nor will it have this effect if it is merely a declaration by the acceptor that he is prepared to grant some indulgence to the Offeror. The test in each case is whether the Offeror reasonably regarded the purported acceptance as “introducing a new term” into the bargain and not as a clear acceptance of the offer³.

[15] The general rule is that an acceptance must be communicated to the Offeror⁴. The main reason for the rule is that it could cause hardship to the offeror to be bound without knowing that his offer had been accepted. So long as the Offeror knows of the acceptance, there can be a contract even though the acceptance was not brought to his notice by the Offeree⁵.

[16] After the offer is made and accepted there must be consideration. Consideration concentrates on the requirement that “something of value” in the eyes of the law must be given. In the case of **Carlill vs Carbolic Smoke Ball Co** Bowen L.J defined consideration as:

¹ See: *Clive vs Beaumont* [1847] 1 DeGSM 397
Simpson vs Hughes [1897] 66 L J ch 334

² See: *Lark vs Outhwaite* [1991] 2 Lloyds Rep 132,139

³ See: *Global Tankers Inc. vs Amercoat Europa* [1975] 1Lloyds Ref 666

⁴ See: *Allied Marine Transport vs The Leonidas* [1985] 1 W L R 925

⁵ See: *Levita's case* [1897] L R 3 ch App 36

“Any act of the plaintiff from which the defendant derives a benefit or advantage or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff with the consent either expressed or implied of the defendant.”

He said further in the dicta that:

“Inconvenience sustained by one party at the request of the other is enough to create a consideration.”

[17] In **R vs Civil Service Board of Appeal**⁶ it was held that an agreement, though supported by consideration was not binding as a contract, because it was made without any intention of creating legal relations⁷.

In deciding cases of contractual intention, the Courts normally apply an objective test which merely prevents a party from relying on his uncommunicated belief as to the binding force of the agreement. “Where such a belief is expressed in the documents, it must be a question of construction of the documents as a whole what effect is to be given to such a statement.”

Analysis

[18] The Claimants contend that the parties had a binding contract in relation to the valuation of 24.3675 acres of land located at Pinney’s Estate, Nevis, because the parties intended for the Claimants to prepare and the Defendants to use to their benefit the said valuation in consideration of the sum to be paid. The Claimants further contend that they prepared and delivered to the defendants who used the said valuation to their benefit. The Claimants also contend that they prepared a **Reminder Invoice** #3092 dated 30th June, 2014⁸ in the sum of \$48,984.84.

[19] On the 10th September, 2013, Hastings Daniel the Claimant, wrote to Deon Daniel the Defendant, with regard to payment of Invoice #13092 in the sum of EC\$100,000.00 and acknowledged that Deon Daniel paid three installments beginning on 26th August,

⁶ Ex parte Bruce [1988] 3 All E R 686

⁷ See: Zakhem International Construction vs Nippon Kohan [1987] 2 Lloyds Rep.596

⁸ See: Index of Authorities

2011 and ending on 13th January, 2013. In the said letter Hastings Daniel stated that there was a remaining balance of EC\$40,056.98 as at 31st August, 2013. The Defendants did not appear to respond to this letter, or to renegotiate or contest the invoice amount.

[20] Notwithstanding this, the Claimants sent a **Reminder Invoice** to the Defendants dated 30th June, 2014 claiming a total sum of EC\$48,984.84.

[21] On the 11th September, 2013, both parties signed an agreement varying the original contract. In particular, the Claimant Hastings Daniel agreed that the Invoice #13092 in the sum of EC\$40,056.98 will be fully paid “once we have received sale proceeds”.

[22] Mr Hastings Daniel admitted in examination in chief that he had signed the agreement without a date for compliance, but that he had written a letter on the 30th October, 2013 in which inter alia, he urged payment of the agreed sum on Invoice #13092 and 13084 no later than 15th December, 2013.

[23] In my considered opinion, the payment by the Defendants to the Claimants in the sum of EC\$40,056.98 for the valuation of land at Pinney’s Estate, Nevis was conditional upon sale proceeds of that land. The claimant signed an agreement and then proceeded to unilaterally vary the terms of that agreement by his letter dated 30th October, 2013.

[24] There is no evidence that the proceeds of sale for the Pinney’s land has been obtained and is available to the Defendant. Therefore there is uncertainty in the contract, brought about by the Claimant’s own negligence in signing a contract without a definite date for compliance by the Defendants, and based on a futuristic eventuality. The claim is therefore not grounded in Law, and consequently unenforceable⁹.

⁹ See: *May and Butcher vs The King* [1934] 2KB 17

- [25] The second claim by the Claimants is for the sum of EC\$231,959.51 as stated in Invoice #13093 for a valuation of 20.3675 acres of land located at Pinney's Estate, Nevis.
- [26] The Claimants contend that the parties had a binding contract in relation to this claim. The Claimants prepared the valuation which the Defendants used to their benefit. The Claimants further contend that the defendants did not deny that they owed this money to the Claimants.
- [27] In the Defendants witness statement dated 4th January, 2015 at paragraphs 10, 11 and 12. The Defendants deny any agreement with the Claimants to conduct a valuation of land on the 12th June, 2012 located at Pinney's Beach Resort.
- [28] Further, the Claimant agreed by letter dated 11th September, 2013 that the Defendants will issue payment for personal services rendered in the valuation of land at Pinney's Estate, Nevis "once they have received Investment funds on the Development".
- [29] The first defendant Deon Daniel in his evidence in chief on the 10th October, 2018 said that the Claimant was accustomed of doing that type of transaction and at once the properties were sold, the funds could be paid.
- [30] The Defendants contend that the agreement to pay the monies was conditional, so that those monies would only become due upon the satisfaction of those conditions, namely:
- (1) receipt of sale proceeds and
 - (2) the receipt of Investment funds
- [31] In the case of **Mamidoil-Jetoil Greek Petroleum Co. SA vs Okta Crude Oil Refinery Ad**¹⁰. It was held that it is a "well recognized principle of contract law that an

¹⁰ [2001] EWCA CW 406 per: Lord Rix

agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all”.

[32] Lord Rix also went on to reference the case of **Hillas and Co Ltd vs Arcos Ltd**¹¹ and said further that such a finding that it is **not** a contract should not be hastily made and though it may be the proper conclusion, it is necessary to exclude as impossible all reasonable meanings which would give certainty to the words.

[33] In the case at Bar, the settlement Agreement dated 11th September, 2013 leaves the time for payment by the Defendants as uncertain. I do not accept the premise of the Claimants that the court must look at all reasonable meanings which would give certainty to the words. The wording of the agreement dated 11th September, 2013, in my considered opinion is plain and unambiguous and the letter of the 30th October, 2013 does not appear to have the approval or consent of the Defendants to bring certainty to the agreement. The date for payment of the agreed sum according to that letter was to be no later than the 15th December, 2013.

[34] This unilateral variation of the Agreement or forbearance at Common Law by the Claimant while not contractually binding may have certain limited legal effects. The Law is clear that the question whether a subsequent agreement amounted to a contractual variation or to forbearance depends on the intention of the parties¹². However, Equity has developed a more satisfactory approach to the problem by concentrating, not on the intention of the party granting the variation, but on the conduct of that party and on its effect on the position of the other party¹³.

[35] Lord Cairns said in that case that if one party leads the other “to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will **not** be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties”.

¹¹ [1932] 147 LT 503

¹² See: *Stead vs Dawber* [1839] 10AEE 57

¹³ See: *Hughes vs Metropolitan Railway* [1877] a App Cas 439

[36] In applying this doctrine to the case at Bar, I am of the view that it is inequitable for the Claimants to go back on their agreement with the Defendants and to unilaterally insert a date for compliance with the debt payment. Consequently I will uphold the agreement dated 11th September, 2013 whereby both parties agreed for:

- (1) Payment on Invoice #13092 for the valuation of land at Pinney's Beach Resort in the sum of EC\$40,056.98 to be fully paid, once sale proceeds have been received.
- (2) Payment of Invoice #13084 in the sum of US\$126,041.89 for personal services rendered in the valuation of land at Pinney's Estate, Nevis to be fully paid once Investment funds on the Development have been received.

[37] The first Defendant stated in his evidence in chief at the trial, that no monies have been received by him and that the agreement was that when the properties are sold, the funds would be paid to the claimants.

[38] The Claimants have not adduced any evidence that those funds have been received by the Defendants and have become due and owing to them, or that the intention of the parties was for the monies to be paid within a reasonable time.

[39] I therefore hold that the Claimants have no enforceable claim in law against the Defendants in relation to the payment of Invoice #13092 in the amount of EC\$40,056.98 and payment of Invoice #13084 in the amount of USD\$126,041.89.

[40] In relation to the Claimants claim at paragraph (4) (a) for a second valuation of 20.3675 acres of land located at Pinney's Estate, Nevis done on the 11th March, 2013 at the cost of EC\$394,947.20 or USD\$146,276.74 and:

- (1) A valuation of 20.3675 acres located at Pinney's Estate, Nevis on the 11th June, 2012 at a cost of EC\$231,959.51

The Defendants deny that they requested the services of the Claimants and further that the only invoices that were agreed on were Invoice #13092 and Invoice #13084.

[41] Further, the first Defendant in his evidence stated that from the inception, he told the first Claimant he had to seek funding and never represented to the Claimant that he would receive funding in a timely fashion because that was a lot of money for a

valuation.

- [42] The Agreement to pay monies to the Claimant surfaces again in relation to these said Invoices. There is no evidence of an agreement oral or written by the Claimants and the Defendants in relation to the Invoice #13084 and Invoice #13094. I have difficulty in accepting the Claimants' contention that the Defendants should be obligated to pay the full amount of the Invoices and not only the amounts stated in the settlement agreement. The Agreement to pay the Invoices #13092 and #13084 is clearly conditional and there is no evidence of an agreement to pay Invoice #13084 and Invoice #13094.
- [43] In relation to the Business Plan for Nevis Belmont Holidays Limited, the Claimants claim the cost of EC\$702,070.44 or US\$260,026.09.
- [44] The first Defendant in his evidence stated that he was a 100% shareholder of Nevis Belmont Holdings Ltd. He also stated that he was referring to Nevis Belmont Holdings in paragraph 8 of his witness statement and that the first Claimant Hastings Daniel knows that the company was the holder of the property.
- [45] The Claimants' Invoice #13094 is addressed to Nevis Belmont Holdings Ltd C/O Deon & Associates. I am of the opinion that the above named are two separate and distinct entities and the Claimants cannot pursue a claim against Nevis Belmont Holdings cloaked in a claim against Deon & Associates. This is a separate claim and should be pursued in that way.

Conclusion

- [46] Therefore on the totality of the evidence, the claim at paragraph 7:
- (1) Of the claimants' Amended Claim is hereby dismissed.
 - (2) The claim for Interest on the sum claimed is also dismissed.
 - (3) The claim for costs is dismissed.
 - (4) The claim for general damages for Breach of contract is dismissed.

- [47] Prescribed costs to the Defendants to be agreed upon in accordance with Civil Procedure Rules 65.5.
- [48] I would strongly recommend that the parties pursue a negotiated settlement of this matter through mediation as originally recommended by this Court.
- [49] I apologise for the delay in the delivery of this Judgment.

Lorraine Williams
High Court Judge

By the Court

Registrar