Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2004 HCV 827

BETWEEN	TREVOR BLAIR	1st CLAIMANT
AND	DAVID GAREL	2ND CLAIMANT
AND	WALTECH CONSTRUCTION CO. LTD.	3RD CLAIMANT
AND	KEITH EDWARDS	1ST DEFENDANT
AND	FREE FORM FACTORY LTD.	2ND DEFENDANT

Mr. John Graham and Miss Lesley Cargill instructed by John Graham & Company for the Claimants
Mr. Garth McBean instructed by Garth McBean and Company for the Defendants

Business Contract – Fundamental Term – Breach of Contract - Credibility of Witnesses

Heard on 14th, 15th and 16th May 2008; 1st July, 2008; Oral Judgment delivered on 12th February, 2009

CORAM: MORRISON, J (Ag.)

By way of an Amended Claim Form dated March 2, 2005 the Claimants Trevor Blair, David Garel and Waltech Construction Limited, through Mr. Gentle Wallace, claimed from the Defendants the sum of US$37,500.00 being monies paid over to the Defendants pursuant to an agreement which was breached by the Defendants and which the 1st Defendant agreed would be paid back to the Claimants.

The 1st Defendant was at all material times a majority shareholder and a director of the 2nd Defendant. The 2nd Defendant is a limited liability company incorporated under the Laws of Jamaica.

The parties at bar fashioned an agreement roundabout May 2003. The agreement was for the parties to form a company named M2 Jamaica Limited (M2J) which company was to be incorporated and whose purpose was to engage in the manufacturing of business panels made of polystyrene foam wrapped in steel wire.

Further, it was agreed that some of the machinery essential to their undertaking would be sourced from a company in Italy called M2Emmedue Limited (Emmmedue). It was their common understanding that the 2nd Defendant, a client/customer of Emmedue would use its prior course of dealing with Emmedue as leverage in the purchase of the equipment adverted to above. The equipment so obtained was to become the property of M2J. The Claimants propound that it was a fundamental term that each party to the agreement would be an equal partner in the formation of M2J as well as the business venture. Specifically, that it was understood and agreed that M2J would be owned equally through shares issued to each party. As the purchase price of the machinery was US$50,000.00 each party was to contribute the sum of JA$5,000,000.00 with the balance of the purchase price to be funded by the parties' joint effort. Faithful to the agreement each Claimant paid over to the 1st Defendant on or about June 12, 2003 the sum of US$12,500.00 towards the purchase of the machinery from Emmedue. The 2nd Claimant came to the aid of the 1st Defendant by paying on behalf of the latter the obligatory sum due on the initial deposit as to constitute the 1st Defendant an equal shareholder in M2J. The cheques in this regard were made payable to Emmedue with the explicit understanding that the 1st Defendant would deliver the said cheques to Emmedue.

Ensuing therefrom, the said cheques were encashed and the respective accounts of the Claimants debited accordingly.

Paragraph 9 of the Claimant's Particular of Claim contains the gravamen of the complaint. It is repeated in extenso.

"In or around August 2003, the 1st Defendant sought to alter the agreement so as to confer upon himself a majority shareholding in the proposed company, M2 Jamaica Limited. Further, the Claimants state that it was never discussed and/or agreed that the 1st Defendant's shares in the 2nd Defendant would be his contribution to the shares in the proposed company M2 Jamaica Limited. This would result in the 1st Defendant assuming majority shareholding in the proposed venture and this was not the agreement of the parties as evidenced by the meeting held on or about June 12, 2003:" See Exhibits of minutes of meeting.

In the end, the Claimants withdrew from the agreement owing to the 1st Defendant's unilateral breach. This information was communicated to the 1st Defendant by the 2nd Claimant, who acted on behalf of all Claimants, on or around August 22, 2003. Thus informed, the 1st Defendant indicated that he would proceed in the venture on his own and he also undertook to repay the Claimants by September 2003. The 1st Defendant failed so to do upon the several requests made of him by the Claimants.

The Defendants joined issue with some of the above averments.

Firstly, that it was always understood that the title to the machinery was to be in the name of M2J when in fact, they say, that title to the machinery would be placed in the name of the 2nd Defendant. The Defendants also denied the issue of equal shareholding by the parties; that, though it was discussed it was contingent on the parties establishing that they had the capital

base and resources; that the precise sum of JA$5,000,000.00 that each party was to pay was, "not in fact paid by any of the parties ..."

The 1st Defendant in his reference to paragraph (9) of the Claimants particulars of Claim gave a qualified admission. It bears worthwhile repetition and is quoted *ipsissima verba*: "Paragraph 9 of the Particulars of Claim is admitted and the 1st Defendant avers and says that the decision to assume majority shareholding in the proposed company arose out of the fact that the Claimants at a meeting in or around August 2003 advised the 1st Defendant that the initial capital that they had intended to invest in the proposed company was not forthcoming.

The 1st Defendant further avers and says that the estimated value of the assets of the 2nd Defendant which the 1st Defendant brought to the table at the material time was $70,000,000.00. The assets of the 2nd Defendant included inter alia machines ... The 1st Defendant further avers and says that the Claimants before entering the business agreement were fully aware of the extensive capital that the 1st and 2nd Defendants possessed and what was required of them to create an equal shareholding of the company."

The 1st Defendant denied that he was consulted by the 2nd Claimant who advised that the varied agreement was unacceptable to the Claimants and that the 1st Defendant undertook to repay all sums paid by the Claimants pursuant to the agreement. Instead, his rebuttal is that the Claimants having informed him that they did not have the funds required to create the equal shareholding in the company, he the 1st Defendant made the decision to assume majority shareholding.

To this end, the 1st Defendant, "decided to try to complete the purchase of the equipment," from Emmedue on his own through private financing and that contingent to his

getting the loan he would "consider refunding the sums(which had been) forwarded by the Claimants" to Emmedue.

Not without significance, the 1st Defendant avouches that it was a condition of the agreement as between the parties that in respect of the Emmedue contract that there was an August 2003 deadline for the completion of the transaction, which if, not met, would result in the forfeiture of the deposit. Notwithstanding, he managed to get an extension of time to October 2003, in spite of which the collective failure of the Claimants to pay their balance resulted in the deposit being forfeited.

Finally, the 1st Defendant avers that the deposits as paid by the Claimants were in fact paid to Emmedue and that it did not represent a loan to him. As such, he asserts, that the Claimants stratagem to have him sign a promissory note saying that the said money was a loan to him did not eventuate as he did not fall for that ruse.

It will be seen from the above that there are factual contentions on either side. The minutes of order of the meeting between the parties on 12th June 2003 assumes particular importance. So too are the documents contained in the bundle filed on May 16, 2008. In this bundle are –

(1) Letter dated June 11, 2003 from Emmedue to the 2nd Defendant

(2) Proforma invoice dated June 11, 2003

(3) Additional sale conditions from Emmedue

(4) Proposal for the establishment of company to carry on business of manufacturing panels and other Styrofoam related products

(5) The minutes of order of the meeting referred to above

(6) Unsigned promissory note.

(7) RBTT bank cheque stub for cheque #011678.

(8) Invoice #81/03 dated June 27, 2003.

The letter at item #1 above is from Emmedue to the 2nd Defendant. In this letter Emmedue pointedly refers the 2nd Defendant to a specific condition as is contained in an annexed proforma invoice.

The proforma invoice describes the machines as an electronic system cutting machine, an automatic welding and assembling plant, an electronic spot welder. Other sub-heads include inter alia, terms of payment. Significantly, under sub-head, "Additional Sale Conditions," is included the following: "If Free Form Factory delay its payments due, Emmedue can suspend the execution of its obligations ... until the payment due has been made ... If after 30 days from the date of expiry of the payment from Free Form Factory is in default, then Emmedue has the right, previous written communication sent to Free Form Factory and without request of favourable judgment by the Judicial aAuthorities, to back out of the contract, withdraw the machines and retain the sums previously paid by Free Form Factory under any title, as refund of the damages ..."

It is to be noted that according to the Proforma Invoice dated June 11, 2003, US$300,000.00 was to be paid in advance within (15) days from the present date; the balance of US$189,500.00 by monthly instalments of US$24,350.00 each.

Further on, under its "Validity" clause, it says that this proforma invoice is valid for (15) days from the present date.

Significantly, on June 12, 2003 at a meeting between the parties at the Terra Nova Hotel the following emerges. It is reproduced in full as it is in my view incorporated into the agreement;

Notes Of Meeting Held At
Terra Nova Hotel On Thursday June 12, 2003, 7.40pm – 9.45pm

ATTENDEES WERE:

Keith Edwards	*- Businessman of 2A Ashenheim Road, Kingston 11*
Davvid Garel	*-Company Executive of 85 Hope Road, Kingston 6*
Trevor Blair	*-Businessman of 1 Scotland Avenue, Kingston 6*
Gentle Wallace & Daniel Barnett	*-Businessmen of 12 Roosevelt Avenue, Kingston 6 (representing WALTECH Construction Limited)*
Everton Hanson	*-Businessman of the Jamaica Mortgage Bank*
Arnaldo Peralto	*-Technical Assistant at Free Form Factory*

THE FOLLOWING DECISIONS WERE TAKEN:

1. That partners four (4) at present, with a possible fifth (5th) to be added, would purchase panel plant through a company – M2 JAMAICA LIMITED, which is to be incorporated to effect purchase.

   M2 JAMAICA LIMITED will be owned equally through shares to partners. Mrs. Henry, Attorney at law, has been requested to commence documentation for the formation of M2 JAMAICA LIMITED. It was also agreed that the lawyer should be instructed to draft a Memorandum of Understanding for the purchase of the panel plant.

2. That a sown payment of US$50,000 is to be made to M2 LTD IN ITALY, as part payment of a purchase price of $485,000. The down payment and the balance are to be shared equally by each partner contributing approximately J$5M towards the purchase of the panel plant, and jointly seeking funding for the balance. EXIM Bank, Jamaica Mortgage Bank and NIBJ were suggested as possible funding agencies.

3. That shares in Styrofoam manufacturing company (Free Form Factory) currently located at 2A Ashenheim Road, and owned and operated by Mr. Keith Edwards are to be offered to other partners. Due diligence exercise to determine value of the company is to be completed within two (2) weeks of meeting date. Initial proposal is that upon agreement of the value of the business, partners would be offered equal shareholding (or alternative distribution to be determined) in the entity.

4. That consideration be given to the partners purchasing shares of WALTECH Construction Limited. The value of WALTECH and subsequent shareholding distribution are to be determined. Further discussions are to be held to determine guidelines for managing and maintaining the quality of the finished product and also conditionalities for the involvement of other construction entities in the future.

5. It was decided that new space to locate both styrofoam manufacturing and panel production plants should be either purchases or leased. Location on Ashenheim Road currently housing the Tropical Battery plant was identified as possible site, and decision was taken that partners would visit the location and make decision regarding acquisition or lease arrangements.

6. Next meeting was planned for THURSDAY, JUNE 19 @ TERRA NOVA POOLSIDE.

SIGNATURES:

Keith Edwards..... Everton Hanson .....

Trevor Blair ..... Arnoldo Peralto .....

Analysis of Evidence

Where the factual contention arises as to which party repudiated and or breached the contract the evidence of the Claimants is preferred to that of the 1st Defendant. Generally, the unvarying evidence of each Claimant supports their particulars in the Claim as well as conforms to their witness statements. The individual testimonies of the Claimants were delivered with forthrightness and are irreproachable. Contrarily, the evidence of the 1st Defendant was punctuated with different slides of focus and a shifting of the plane of reference so that the essential unreality of his account was made to comment upon the claim. The 1st Defendant testimony lacked the inspiration and hallmarks of credibility so as to render it unbelievable. The essential unreality to his evidence and its presentation is borne out in the minutes of the meeting of June 12, 2003, the "Proposal for establishment of Company to carry on Business of Manufacturing of M2 Panels and other Styrofoam Related Products, "The Proposal" and its annexed inventory of machines for production of styrofoam. In point of fact, no documentary evidence was presented by the 1st Defendant to the Claimants and, indeed, the Court, of and concerning the, "previous written communication sent to Free Form Factory" by Emmedue. Neither was any documentary proof tendered in respect of the application by the 1st Defendant to Emmedue for an extension of time or, for that matter, in relation to the 1st Defendant's pronouncement that the deposit had been forfeited. All of this is against the background that the 1st Defendant was constituted by the Claimants as their De Jure agent, circumscribed and limited though, to his sphere of operation in interfacing with Emmedue on the basis of the 2nd

Defendant's course of previous dealings with Emmedue. Nor was this Court persuaded to countenance the 1st Defendant in his assertion that his promise to repay the Claimants was predicated upon his being able to obtain a loan from the commercial entity of Royal Bank of Trinidad and Tobago, which incidentally, did not materialize, thus resulting in forfeiture of the deposit by Emmedue. I was unimpressed with his evidence of inaction as while he sought to obtain the said loan Emmedue's payment and forfeiture clauses were within imminent approach of activation. On that view, he was obliged to forestall such an outcome.

It is to be observed that the Proposal comprised a radical departure from the "Meeting" in respect of the shareholdings of each party. As such it needed to have been ratified by the Claimants before it could be deemed to have found its way into the agreement. I do not accept the 1st Defendant's submission on this point. In any event a cursory look at the "Minutes" reveal that the parties who were at the Terra Nova meeting, included the self-same parties at bar, along with others. All the parties affixed their signatures to the "Minutes" thereby acknowledging and adopting its contents as constituting the agreement between them. Conversely, the same adoption cannot be involved in respect of the "Proposal" which remained unsigned so as to render it inutile. The "Proposal" was in my view an afterthought through which devise the 1st Defendant unilaterally altered the agreement in an attempt to give to himself a larger shareholding in the proposed venture.

I do not find, on a preponderance of possibility that the Claimants were at fault in this imbroglio. I find that the 1st Defendant was the party, as between them, at whose instance the fundamental contractual term as to shareholding by the parties, was breached by the Proposal. In consequence, the Claimants were entitled to treat the contract as at an end. The 1st Defendant was so apprised by the 2nd Claimant on the joint behalf of the other Claimant and himself.

Thus, with full knowledge of the termination of the contract by the Claimants and with full cognizance of the impending forfeiture of the deposit by Emmedue, the 1st Defendant ought to have been astute in averting the said forfeiture.

The 1st Defendant's averment that it was the Claimants collective failure to pay the balance purchase money due to Emmedue is negated as an opportune inexactitude.

Finally, in relation to the "Promissory Note" I was asked to say at whose hands it was crafted. This too is reproduced.

PROMISSORY NOTE

DATE.....

DUE DATE: September 15, 2003

FOR VALUE RECEIVED KEITH EDWARDS, businessman of 2A Ashenheim Road, Kingston 11 in the Parish of Saint Andrew, (hereinafter called "the Borrower') UNCONDITIONALLY PROMISES to pay to the order of TREVOR BLAIR businessman of 1 Scotland Drive, Kingston 6, in the parish of St. Andrew, DAVID GAREL, Company Executive of 3 East Widcombe Heights, Kingston 6 in the Parish of Saint Andrew and WALTECH CONSTRUCTION LIMITED, A Coompany registered under the Companies Act with registered office at 12 Roosevelt Avenue, Kingston 5 (hereinafter together called "the Lenders") the principal sum of THIRTY-SEVEN THOUSAND FIVE HUNDRED UNITED STATES DOLLARS (US$37,500.00) without interest on the 15th day of September 2003.

WHEREAS

1. The Lenders and the Borrower pursuant to an agreement to purchase a Panel Fabricaation Plant (hereinafter called "the plant") from EMADUE S.R.L. of Italy (hereinafter called "the company") disbursed amounts of TWELVE THJOUSAND FIVE HUNDRED UNITED STATES DOLLARS (US$12,500.00) each towards the purchase of the said plant.
2. The total sum of THIRTY-SEVEN THOUSAND FIVE HUNDRED UNITED STATES DOLLARS UNITED STATES DOLLARS (US $37,500) was disbursed by the Lenders to the Company in pursuance of the said purchase on the day of 2003.

3. The Borrower and the Lenders have agreed that the Lenders will no longer cooperate in the agreement to purchase the plant jointly but that the Lenders will lend to the Borrower the sums disbursed to the Company in order that the Borrower may pursue the business involving the Panel Fabrication Plant solely.

Payments shall be made to each of the Lenders at their respective addresses herein or at any place as the Lenders may designate and notify the Borrower.

IN WITNESS whereof the Borrower has executed this document the day and year first hereinbefore written.

EXECUTED BY KEITH EDWARDS

While it is true as Mr. McBean submits that "nowhere in their witness statement did the Claimants mention that the 1st Defendant requested promissory note," the Claimants at paragraph 11 of their Amended Particulars of Claim dated March 2, 2005 averred thus: On or around August 22, the 2nd Claimant contacted the 1st Defendant on behalf of all the Claimants and indicated to the 1st Defendant that this agreement as varied by the Defendant was unacceptable to the Claimants whereupon the 1st Defendant indicated that he would proceed in the venture on his own and he undertook to repay by September 2003 any and all sums forwarded by the Claimants in furtherance of the original agreement (emphasis mine)

In the 1st Defendant's traverse and in particular at paragraph 12 thereof, it is clear that his mind was adverted to the issue of the promissory note.

The promissory whether generated by the Claimants or the 1st Defendant is rendered otiose in respect of my finding that the 1st Defendant agreed to repay to the Claimants the sum in contention. A look at the Amended Claim form and the Amended Particulars of Claim of the Claimants exttriates the 1st Defendant's contention that the evidence of the Claimants on the score of "whether the monies paid by the Claimants (to the 1st Defendant) would be treated as a

loan", should be rejected on the basis of their deficit of credibility. That contention is therefore propugned.

The Submisions

For the Claimants there is only one sweeping omnibus consideration: What was Keith Edwards' responsibility to the Claimants when it was recognized by all parties involved that no part of the venture was going to be implemented? From the posed question, they argue, that the 1st Defendant was appointed their agent. This they say is a matter of law.

They threw their weight behind that submission by relying on **Garnac Grain Co., Inc. v. HMF Faure and Fairclough Ltd.** [1968] A.C. 1130; Bowstead and Reynolds on Agency, 16th edition page 1; **Armstrong v. Jackson** [1917] 2 K.B. 822 at 826; An Outline of The Law of Agency, 2nd edition by Markensimis and Munday at page 77; **Parker v. McKenna and Others** (1874 – 1880) All. E.R. Reprint, 443 at 455; **Phipps v. Borrdman** (1965) Ch. 992 at 1013-1019; **Foley v. Hill** (1843-1860) All. E.R. Reprint 16 at 19.

Mr. Garth McBean's contention on behalf of the Defendants is reproduced in their entirety:

Whether the agreement was repudiated or breached by the Claimants as a result of their indication of an inability to pay the balance of the purchase price for the machinery to be purchased from Emmedue.

Secondly, whether it was the first Defendant who repudiated or breached the agreement by unilaterally varying the contract by assuming proposing majority shareholding in the proposed company.

Thirdly, whether the parties agreed that the contract be varied whereby the sum of $US 37,500.00 paid by the Claimants towards a deposit on the purchase price for machinery to be purchased from Emmedue was to be treated as a loan to the Defendants.

Finally, whether the total sum of US$37,500.00 paid by the Claimant towards the deposit on the purchase price of the machinery was forfeited by Emmedue pursuant to the agreement for failure to pay the balance of the purchase price.

The Defendants were content to rely on the legal conveyance of a breach of a contractual term. In support they relied on Law of Contract 11th edition pages 843-844.

As I see it the factual concerns framed as they are by Mr. McBean are essential to an unveiling of this plemic.

The Law

The question as to when the relationship of principal and agent was created is one of law. In **Garnac Grain Company, Inc. v. HMF Faure and Fairclough Ltd**. [1968] A.C. 1130, Lord Pearson espouses that the relationship of principal and agent can only be established by the consent of principal and agent.

I adopt the Claimants counsel submission as to the definition of agency. It is that an agency is the fiduciary relationship which exists between two persons one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents to act, or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent: See Bowstead and Reynolds on Agency, 16th edition, page 1.

The incidents of agency are comprised of the duty not to put himself in a situation where his duties as agent conflict with his own interests; not to take advantage of his position so as to

gain benefits for himself, and, to hand over the principal's money which he holds to his use, and account to the principal.: See Markensinis and Munday's in an article Outline Of the Law Of Agency 2nd edition, page 77. All the cases supplied by the Claimants buttress these points seriatim: **Parker v. McKenna & Others** (1874-1880) All E.R. Reprint, 443 at 455; **Phillips v. Boardman** [1965] Ch. 992 at 1013-1019; Foley v. Hill [1843-1860] All E.R., Reprint, 16 at 19. Applied to the case at bar, on the evidence, the 1st Defendant acted as the agent of the Claimants.

Where there is a breach of a condition the innocent party may either terminate the contract or affirm it: See Law of Contract by Trietel, 11th edition, pages 843-844.

In the instant case, from my findings, the 1st Defendant repudiated the contract by varying the equal shareholdings term of the agreement. The Claimants acted with the utmost propriety in terminating the contract with that knowledge in mind.

In the final analysis on a balance of probability judgment is awarded to the Claimants in the sum of US$37,500.00 attracting an interest payment rate at 12% compounded from September 1, 2003 to the date of payment.

The Claimants costs are to be agreed or, if not agreed, then the costs are to be taxed.