IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.H. 74/87

BETWEEN	ANITA HYLTON	PLAINTIFF
A N D	TRANS CARIBBEAN (JAMAICA LTD.)	DEFENDANT

Dennis Goffe for the Plaintiff.

Enos Grant for the Defendant.

HEARD: May 1, 3, 4, 5, and July 31, 1989.

PANTON, J.

In July, 1971, the plaintiff, a travel agent who then lived (and who still lives) in Brooklyn, New York, U.S.A., entered into a contract with a company known as Trans Caribbean Estates Limited to purchase lot no. 1487 Ironshore subdivision designated Area 2c Phase 2, in the parish of St. James. The company then had a sales office at 34 Fort St., Montego Bay, with its head office at the International Credit Bank Building, Freeport, Bahamas.

By that agreement, the plaintiff paid U.S.$3,675.19 as a deposit, with the balance being due in 59 monthly instalments at the rate of U.S. $144.45 per month with the exception of the final instalment which should have been U.S.$145.59. The first payment was due on the 15th September 1971 and each subsequent payment should have been on the 15th day of each month until the balance was paid. The deferred payment price was U.S.$12,343.14.

The agreement provided that on or prior to 36 months after the date of the agreement the vendor was to cause to be built access roads contiguous to the property, and water pipes or mains were to be installed along the roads of the subdivision.

If the terms of the agreement were carried out, then by July, 1974, roads and water would have been provided; and by July, 1976, all amounts due to the vendor would have been paid.

That situation, however, did not materialize as neither road nor water has been provided; and the plaintiff has not completed payments, she having paid a total of U.S.$7,477.65 up to September 30, 1976.

The documents that have been presented to the Court indicate that during 1975 Trans Caribbean Estates Ltd. disappeared from the scene, and the plaintiff and the defendant commenced dealings with each other in relation to the same lot and the same account number. It is clear also that the plaintiff has continually dealt with the same set of employees who were previously employed to Trans Caribbean Estates Ltd.

The plaintiff, as purchasers now seek from the defendant a refund of the amounts that she has paid together with interest and, in addition, she claims damages for breach of contract.

The defendant contends that it had no agreement with the plaintiff and that its dealings with the plaintiff were in its (the defendant's) capacity as agent, and that that was known, or ought to have been known by the plaintiff. The defendant further contends that if there is a contract between it and the plaintiff, the claim is statute-barred; and also, that there is no "memorandum of any agreement" between the parties to satisfy the Statute of Frauds.

At the trial of the action, the plaintiff testiifed on her own behalf and, surprisingly, called the managing director of the defendant company as her witness. Having called this witness, the plaintiff's attorney-at-law proceeded to object to any cross-examination of the witness by the attorney-at-law for the defence. He relied on the case Tedeschi v. Singh and Others (1948) 1Ch. 319 for this stance. I stated then that I did not think that the ruling of Roxburgh, J., represented the law and practice of Jamaica. There was, in my view, no reason to depart from the normal rules of practice and procedure.

The attorney-at-law for the defendant agreed with the position that Mr. Goffe adopted, but sought permission to cross examine the witness in relation to a letter written by him. I granted the permission sought.

The defendant called no witness.

The contention that if there is a contract the claim is statute-barred overlooks the fact that time would only have begun to run at the moment that the plaintiff communicated to the defendant that she was treating the defendant's attitude as a breach of contract. This was on the 22nd September 1986, when the plaintiff's attorney-at-law wrote thus to the defendant:

> "May we point out that under the rider to the Agreement between our client and yourselves you agreed to build suitable access roads, water pipes and mains within thirty six (36) months from the date of the Agreement. To date you have not done so and in view of this breach, our instructions are to advise you that our client treats the contract as at an end and demands the immediate return of the moneys which she paid plus interest."

As regards the contention that there is no "memorandum" to satisfy the Statute of Frauds, I should have thought that the agreement itself and the several letters from the defendant to the plaintiff would have made such a contention impossible.

The real point for determination, in my judgment, is whether the defendant is liable on a contract, the original document of which it did not sign. In determining this, consideration has to be given to all the documents to see what they mean. Was the defendant dealing with the plaintiff as if the defendant was a party to the contract? Or, was it acting in the capacity of an agent?

It seems to me that the answers to these questions may clearly be found in the documents that have been put before the Court. I intend to refer to five letters that were written by the defendant (four of them to the plaintiff, and one to the Financial Secretary).

On September 30, 1986, the defendant wrote thus to the plaintiff -

> "Re - Lot 1487, Area 2C Ironshore Estates
> Account #10061
>
> Dear Mrs. Hylton,
>
> We write once more to inform you that your above-mentioned account is seriously in arrears and to afford you the opportunity to make good your agreement before we are forced to implement clause 5a of the Agreement of Sale and Purchase, copy of which we enclose herewith for your perusal.
>
> There is a total amount of U.S$3,322.35 owing to us and to complete payment. We are in possession of the Certificate of Title and on receipt of your cheque, in full, the necessary Registrable Transfer will be requested and forwarded to you for execution.
>
> Kindly let us hear from you within 14 days of today's date failing which we will have no alternative but to take the necessary steps to rescind the Contract and forfeit all funds made to us on account.
>
> Yours very truly,
>
> TRANS CARIBBEAN (JAMAICA) LIMITED,
>
> per: Williams"

It is to be observed that in this letter, the defendant is threatening the plaintiff to "implement" a clause of the agreement. In the second paragraph, the defendant is stating that the arrears are owed to the defendant.

On the 5th December, 1983, the plaintiff's attorneys-at-law wrote to the defendant after the defendant had suggested that the plaintiff should accept a lot in an already developed area of Ironshore in exchange for the lot which is the subject of the contract. In this letter the attorneys-at-law responded that the plaintiff was willing to consider the suggestion if there was no increase in the price she had contracted to pay and if the new lot meets with her approval.

In response to that letter, the defendant wrote thus on December 20, 1983 -

> "Re: Lot 1487, Ironshore
> Sale to Anita Hylton
>
> We thank you for your letter of December 5th.
>
> We must advise that we cannot consider an exchange without Mrs. Hylton paying the difference and would like her to know that on receipt of the balance of purchase money, we will proceed to prepare the Transfer document for her execution with the clear understanding that the infrastructure will not be completed until another eighteen (18) months.
>
> We would be glad to hear from you as early as possible.
>
> Yours faithfully,
> TRANS CARIBBEAN JAMAICA LIMITED
>
> Angella Dear
> Per: S. B. J. Whitter
> PRESIDENT"

By September, 1984, a dispute had developed between the parties as to the price of the new lot.

On December 18, 1984, the defendant through its managing director/president wrote to the plaintiff's attorneys-at-law as follows -

> "Re: Lot 1487, Area 2C, Ironshore
> Sale to Anita Hylton.
>
> We acknowledge receipt of your letter dated September 20.
>
> We would like you to know that the Five Thousand Jamaican Dollars ($J5,000) was agreed to have been paid some eighteen (18) months ago. We did not hear anything from you nor your client until July last, when we should have gone and shown her the lot.
>
> However, we did not get to see Mrs. Hylton and therefore, we had to make arrangements with Mrs. Stephens on behalf of Mrs. Hylton. We told her, that we could exchange a lot with Mrs. Hylton if she was prepared to pay Five Thousand United States Currency (US$5,000), because from the time we first spoke about the price for the lot to now, the lot has increased in value and therefore, we could not exchange the lot for anything less than Five Thousand United States Currency (US$5,000). As a matter of fact, if this runs on for any longer, she may have to pay more.
>
> Cont'd.

If she is prepared to pay this, we would be happy to make the exchange, but if not, we may have to continue on the existing Contract.

We await your response.

Yours faithfully,
TRANS CARIBBEAN JAMAICA LIMITED

S. B. J. Whitter "

The fourth letter which I wish to quote was written by the defendant company's President on June 6, 1986. It reads thus -

" Re: Lot # 1487 Area 2C Ironshore
Sale to Anita Hylton.

We have your letter of April 25th, 1986.

Firstly, the infrastructure in Area 2C is still not completed. We are prepared to trade Lot # 447A Torada Heights for lot 1487 with Mrs. Hylton under the following conditions:

(1) Mrs. Hylton will pay the balance due on lot 1487 under her Contract which is the sum of $US3,315.70.

(2) She will pay an additional $US3,000.00 on the purchase of lot 447A Torada Heights.

If an exchange cannot be effected under these conditions then we will only have to ask that Mrs. Hylton pay the balance due under the Contract on lot 1487 after which we will transfer the Title to her.

We hope to hear from you soon.

Yours faithfully,
TRANS CARIBBEAN JAMAICA LIMITED

S. B. J. WHITTER
PRESIDENT "

The fifth letter which is earlier in time than the last three letters quoted above was written to the Financial Secretary, Kingston.

It reads thus -

> " Re: Mrs. Anita Hylton, Lot 1487, Phase 2C.
>
> We acknowledge receipt of your letter of the 6th instant referring to the abovementioned property and client.
>
> Mrs. Hylton entered into contract with Trans Caribbean Estate Limited whose operation have been in the hands of Trans Caribbean Jamaica Limited since 1975. At the time of her contract that company undertook to complete all infrastructure. This, however, was not done.
>
> On taking over the office of Trans Caribbean Estate I inherited this liability. As you may recall, the real estate market had become stagnant during the last seven years. As a result, my company was unable to fulfill its obligation to complete infrastructure.
>
> Given the new economic climate I have now embarked on a new five year development programme for Ironshore. In this programme provision is made for the completion of infrastructure work in Phase 2C.
>
> A transfer of the Certificate of Title will be prepared in the name of Mrs. Anita Hylton on receipt of the outstanding balance plus interest, compound at 8% per annum.
>
> Please note that in order for my office to complete this transaction, Mrs. Hylton should provide proof of monthly payments made.
>
> We will be happy to correspond with Mrs. Hylton in connection with this transaction and we are very sorry that the matter had to be brought to the attention of your office before it could be finalised.
>
> Yours truly,
> TRANS CARIBBEAN JAMAICA LIMITED
>
> S. B. WHITTER
> PRESIDENT "

In none of these letters has any mention been made of the defendant's company acting as an agent. It cannot be without significance that each (with exception of the one first quoted) was signed by or for the person who styles himself alternately as president and managing director. Surely, such a highly placed person would have been at pains to emphasize the agency - if it were so. As said earlier, the managing director gave evidence on behalf of the plaintiff, and he was cross-examined by Mr. Grant.

During the cross-examination, which was restricted to the letter of the 21st July, 1983, he was asked:

> " Am I correct that this letter is dealing with the completion of the infrastructure in Phase 2C? "

He answered:

> " Yes, I only act as agent for the folks who ... "

At this point, he was at a loss as to who those folks were so he left his answer in mid-air as recorded above.

Mr. Grant was not satisfied. It was then that the witness proceeded to say:

> " All I wish to say is that we act as agent for the Trans Caribbean Estates Ltd. "

In re-examination, he said, in explaining the words "I inherited this liability" which are in the letter of the 21st July, 1983 -

> " When I said, 'I inherited this liability' it did not mean that Trans Caribbean Jamaica Limited had inherited the liability to complete all infrastructure. The liability I was referring to was monies owed to various people by various people. Money that was just owed. "

This answer caused me to form the impression that the witness had been so intent on discrediting the contents of the letter and setting up an agency that he ended up outsmarting himself with the last two sentences. It was clear that he had got himself into a tangle from which there was no escape. The agency that he now seeks to advance is an after-thought. It is not in keeping with the words in the documents.

The letter of September 30, 1976, indicates that the defendant had undertaken all the responsibilities set out in the agreement for sale and was expecting the benefit of the terms thereof. The defendant not only requested the sending of money under the agreement to them but threatened to implement a particular clause thereof, and warned that if it did not hear from the plaintiff within a specified period of time it would take the necessary steps to rescind the contract and

forfeit "all funds made to us on account." These last words are a clear acknowledgement that the defendant was the beneficiary of payments already made under the contract. Furthermore, how can one rescind a contract to which it is not a party?

The letter to the Financial Secretary presents a picture of the defendant having taken over the operations of the company that signed the agreement. In taking over the operations, the defendant regarded itself as having undertaken the responsibility of completing the infrastructure.

In the circumstances, I hold that the plaintiff has established the existence of a contract between herself and the defendant - the terms of this contract are the same as in the agreement dated July 1971, which the defendant had threatened to rescind.

It is observed that the plaintiff, in addition to the return of her payments plus interest, is seeking an additional award as damages for the breach.

I do not think that she is entitled, in the circumstances, to anything other than the return of her money plus interest. Even if she is so entitled in law, there is no evidential base to permit it.

In the circumstances judgment is entered in her favour as follows -

(i) US$3,675.19 (J$20,787.05) plus interest at 10% from 6.7.'71 to 31.7.'89.

(ii) US$3,802.65 (J$20,990.63) plus interest at 10% from 30.9.'76 to 31.7.'89.

The plaintiff is also to have the costs of the proceedings, such costs to be agreed or taxed.