[2019] JMCC Comm 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. CD 00487 OF 2017

BETWEEN	**DENNIS LAWSON**	**1ST CLAIMANT**
AND	**LAWSON FARMS LIMITED**	**2ND CLAIMANT**
AND	**CHRISTOPHER WOOD**	**1ST DEFENDANT**
AND	**JAMECO DEVELOPMENT COMPANY LIMITED**	**2ND DEFENDANT**
AND	**ULTRA HOME CONTRACTORS LIMITED**	**3RD DEFENANT**

IN OPEN COURT

Mr Kent Gammon instructed by Kent Gammon & Associates, Attorneys-at-Law for the Claimants

Mr Kemar Robinson, Attorney at-Law of the Defendants

Heard: 3rd, 4th April and 10th May 2019

Contract - Promissory note – Defences to claim on promissory note – Whether defence of set-off possible on counterclaim

LAING J

[1] The Claimants claim against the Defendants is reflected in their Second Further Amended Particulars filed 8th May 2017 as follows:

"1. Liquidated damages for breach of a final settlement agreement agreed amongst the parties pursuant to the Dispute Resolution Foundation Mediation Settlement Agreement arrived at on the 01st December 2009.

2. Liquidated damages for breach of loan agreement effected on or about the 06th of January 2006, reduced to writing and corroborated by a Promissory Note dated 19th November 2009 in the sum of JMD$16,000,000.00 and further corroborated by a final settlement agreement agreed amongst the parties pursuant to the Dispute Resolution Foundation Mediation Settlement Agreement arrive at on the 01st December 2009.

3. Liquidated damages for breach of contract of Promissory Note dated 19th November 2009 in the sum of JMD$16,000,000.00.

4. Interest at a commercial rate 12.5% per annum on liquated damages at a such rate as this Honourable Court deems just

5. Costs

6. Such further or other relief as this Honourable court deems just. " (reproduced without underlining)

[2] The 1st Claimant, Dennis Lawson ("Mr Lawson") is a Contractor and Businessman. He was at all material times the principal shareholder in the 2nd Claimant, Lawson Farms Limited ("Lawson Farms"). Lawson Farms is a company duly incorporated under the laws of Jamaica and was at all material times the registered proprietor of approximately 455 acres of land registered at Volume 1181 Folio 520 of the Register Book of Titles (hereinafter called "The Property").

[3] The 1st Defendant, Christopher Wood ("Mr Wood") is a Businessman and Real Estate Developer and is the Managing Director and a shareholder in the 2nd Defendant Company, Jameco Development Company Limited ("JAMECO"), a company incorporated under the laws of Jamaica. Mr Wood was at all material times the registered owner of the land comprised in four Certificates of Title registered at Volume 1418 Folios 128, 129, 130 and 131 of the Register book of Titles, being lands at Swallowfield Estate in the parish of St. Andrew "the Swallowfield Land").

[4] The 3rd Defendant, Ultra Home Contractors Limited is a company incorporated under the laws of Jamaica ("Ultra") and was the developer of townhouses on the Swallowfield Land. Mr Wood was also the principal shareholder of Ultra.

The Claimants' Case

[5] In or about the year 2005, Mr Lawson and Mr Wood had discussions leading to an agreement for the sale and purchase of the Property. Mr Lawson's evidence was that the consideration for the sale was $30,000,000.00 in cash, in addition to four town houses on the land comprised in Certificates of Title registered at Volume 1418 Folios 128, 129, 130 and 131 of the Register Book of Titles ("the Townhouses") which were being developed by Ultra. Mr Lawson said that the agreed value of the Townhouses was fixed at $42,900,000.00 which meant that the total consideration for the purchase of the Property was $72,900,000.00. He stated that initially there was no discussion about the inclusion of a Catapillar 988 Front End Loader ("the Loader") as a part of the consideration, but at the time Mr Wood was making the cash payments he was short of cash and he suggested that Mr Lawson agree to accept the Loader as a part of the purchase price and Mr Lawson agreed. Mr Lawson's evidence is that he/ the Claimants received approximately $27,000,000.00 in cash and cheques in addition to the Loader. In proof of this fact he relied heavily on a schedule of payments in Mr Wood's handwriting, which indicated payments of $29,980,000.00 which included the Loader and a value ascribed to it of $3,050,000.00.

[6] Pursuant to the agreement between the Parties, the Property was transferred to JAMECO on 6th January 2006. The Transfer of Land document exhibited during the trial reflected a consideration of $15,000,000.00. Mr Lawson accepted that it is his signature which appears on that document but he insisted that the first page of the document that he signed had a figure of $30,000,000.00 inserted as being the consideration. He explained that sometime in 2016 or 2017 when he discovered that the Property had been sold to the National Housing Trust, he did investigations

and noticed the discrepancy in the consideration stated on the Transfer of Land. It was at this time he said he realised that "*something had gone wrong*".

[7] It is clear from the evidence that the insertion of $15,000,000.00 on the Transfer of Land document is evidence of improper or fraudulent conduct. Even on the Defence case, the Property was purchased for $30,000,000.00, therefore the insertion of $15,000,000.00 as being the purchase price appears to be an effort to deceive the tax authorities. If the agreed consideration was $72,900,000.00 as Mr Lawson said it was, then his execution of the transfer document which reflected it as being only $30,000,000.00 is also admitted evidence of his complicity in that scheme to mislead the authorities.

[8] Mr Lawson asserted that as a consequence of the Defendants' failure to fulfil the terms of the agreement for the sale and purchase of the Property, a claim was then filed on the 17th April 2009 by the Claimants against Defendants being Claim No. HCV 2022 of 2009.

[9] Mr Lawson had also entered into agreements for sale in respect of the Townhouses to third parties which he said was with the knowledge and consent of Mr Wood. He was unable to obtain the Certificates of Title in respect of the Townhouses because they were held by Capital & Credit Merchant Bank ("the Bank") as security for a loan. By letter to Mr Lawson dated 4th November 2009 Mr Wood indicted that:

> *… "In exchange for the sum of **SIXTEEN MILLION DOLLARS** ($16,000,000.00) being paid to Capital & Credit Merchant Bank Limited. I confirm my agreement to sign a Promissory Note for this amount. The Promissory Note would be secured by way of a new Caveat against the property at Sheckles, Clarendon and the existing Caveat be withdrawn. I await receipt of the Promissory Note confirming that Jameco promises to pay the sum of **SIXTEEN MILLION DOLLARS** ($16,000,000.00).*

[10] There was mediation of the aforementioned Claim No HCV 2022 of 2009 and an agreement was reached by the parties on 1st December 2009. The terms of the settlement included a provision that the "…*matter was settled on terms contained*

in Promissory Note dated 20th November 2009 and consent authority to lodge caveat dated the 20th November 2009."

[11] Mr Lawson paid $16,000,000.00 to the Bank. The Certificates of Title for the Townhouses were released and they were sold to third parties.

[12] Mr Lawson's evidence was that he agreed "*in principle*" to Mr Wood's proposal that he accepts Three (3) 1997 Volvo Dumper Trucks and a cement mixer (sometimes referred to herein as "the Heavy Equipment") to offset some of the money owed to him. The Heavy Equipment was received by Mr Lawson. Mr Lawson said that he and Mr Wood did not discuss a price for the Heavy Equipment, but agreed that they would obtain a valuation of them once the relevant documents were produced. However, Mr Wood did not produce the documents.

The Defence

[13] A Further Amended Defence was filed on behalf of the Defendants on 20th June 2017. It was the Defendants' position that the agreed purchase price of the Property was $30,000,000.00 and that the balance of the purchase price in the sum of $12,500,000.00 was forwarded to Mr Lawson under cover of letter dated 13th January 2006 from Jennifer Messado & Company. Mr Wood stated in cross examination that he had put a proposal to Mr Lawson that the Property would be purchased for $30,000,000.00 in addition to the Townhouses and Mr Lawson agreed. However, he stated that this was just a proposal not an agreement and he only proposed it because he had been led by Mr Lawson to believe that the subdivision and other approvals had already been received in respect of the Property.

[14] The Defendants denied that they were aware of a loan agreement between either of them whether jointly and/or severally and the Claimants or either of them. The Defendants asserted that neither of them had received a loan.

[15] As it relates to the Promissory Note, the Defendants asserted that a prior existing debt, if any, would not provide sufficient consideration for the issuing of the Promissory Note. It was also asserted that the Promissory Note was not stamped in keeping with the provisions of section 35 of the Stamp Duty Act and is therefore unenforceable. The Defendants did not admit or deny that a demand had been made pursuant to the Promissory Note and put the Claimants to proof that value was received by the Defendants in exchange for the Promissory Note.

The Counterclaim

[16] The Defendants asserted in their Counterclaim that in or around 2008 they jointly and/or severally leased the Loader to "*the Claimant*" (presumably the 1st Claimant Mr Lawson) and that in or around March 2010, the Defendants, Jointly and/or severally leased to the Claimants the three (3) 1997 Volvo Dumper Trucks and a cement mixer.

[17] The Defendants claim that the 1st Claimant has failed and or refused to pay the $24,000,000 being the sums due and owing in respect of the lease of the Heavy Equipment. The Defendants also asserted that Mr Lawson had sold and disposed of the Loader and had accordingly converted it to his own use.

[18] The Defendants therefore counterclaimed for damages for Conversion and for the sum of $24,000,000.00 being the amount owing in respect of the lease of the Heavy Equipment.

Analysis of the claim for breach of Promissory Note

[19] The evidence of Mr Lawson is that the agreed consideration for the Property was $30,000,000.00 plus the Townhouses. Mr Wood's evidence is that he had proposed $30,000,000.00 plus the Townhouses to Mr Lawson but that this was only a proposal based on Mr Lawson having led him to believe that that the requisite approvals for further development had been procured. However, they had not been procured and therefore there was no agreement in the terms he had

proposed. Having asserted this position, I find that it is rather curious that Mr Wood has offered no evidence as to any discussion between the parties which resulted in agreement on the consideration of $30,000,000.00 which he asserted was the final contractually agreed amount. The course of conduct between the parties have caused me to conclude on a balance of probabilities that the consideration agreed between the parties was $30,000,000.00, in addition to the Townhouses. On the evidence of Mr Wood this was his initial proposal to which Mr Lawson agreed. I find that there was no subsequent variation of that term of the agreement.

[20] I accept Mr Lawson's evidence that the value placed on the Townhouses by Mr Wood and to which he agreed was $42,900,000.00. This evidence as to value has not been challenged. I am fortified in my conclusion that the Townhouses were a part of the consideration by the fact that the granting of the Promissory Note is consistent with that having been the agreed position of the parties. If the Townhouses had not been a part of the consideration for the sale of the Property and was an independent transaction, then it is reasonable to conclude that the vendor would simply have accepted the $16,000,000.00 payment by Mr Lawson to the Bank as part payment towards the purchase price of the Townhouses. Mr Lawson has not given any evidence of having made any payment for the Townhouses as part of a separate transaction, nor have the Defendants so asserted.

[21] If Mr Lawson had made a payment or payments referable to the purchase of the Townhouses, then one would expect that there would be some documentation referencing such payment. If the $16,000,000.00 payment to the Bank represented a part payment in respect of the Townhouses, one would expect that there would be some documentation, whether in the form of an exchange of correspondence or otherwise, to reflect this. The evidence before the Court is capable of only one conclusion on a balance of probabilities and that is that the payment to the Bank was not a payment that Mr Lawson or Lawson Farms made in order to discharge any liability that was owed to any of the Defendants for the purchase of the Townhouses. The Townhouses were to be provided to the Claimants (or their

nominee) because the Townhouses formed a portion of the agreed consideration to which Lawson Farms was entitled as vendor, arising from the sale of the Property.

[22] The liability to the Bank which was discharged by the payment of the $16,000,000.00 was a liability of one or more of the Defendants (depending on who executed the loan and security agreements with the Bank, a fact which is not entirely clear from the evidence). It was not an existing debt of the Defendants (or either of them) to either of the Claimant. The payment to the Bank created a new liability which was a benefit to one or more of the Defendants because of the connection between the Defendants . Accordingly, the payment to the Bank was a liability for which they could have jointly issued the Promissory Note in the form that they did. I therefore find that there is no legal merit in the Further Amended Defence that a prior existing debt would not provide sufficient consideration for the issuing of the Promissory Note. The Defendants have all signed the Promissory Note and it is deemed to be their joint and several Promissory Note.

Defence to the claim on the Promissory Note

[23] The Defendants have argued that the Promissory Note has not been stamped in keeping with section 35 of the Stamp Duty Act. It was revealed during the trial that the Promissory Note had in fact been stamped and this is therefore a non-issue.

[24] It is important to note that the only defences to an action on a bill which is accepted as genuine are that it has been obtained by fraud or illegality or where there has been a total failure of consideration, see **Wayne Chen v Tiksi International Management Inc. [2015] JMCA App 14** which is referred to in greater detail below.

[25] Promissory notes in Jamaica are governed by the Bills of Exchange Act, section 83 of which defines a promissory note as:

> *"…an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or*

determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

[26] Section 89 of the Bills of Exchange Act provides as follows:

> *" 89 – (1) Subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.*
>
> *(2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.*
>
> *(3) The following provisions as to bills do not apply to notes, namely, provisions relating to-*
>
> *(a) presentment for acceptance;*
>
> *(b) acceptance;*
>
> *(c) acceptance supra protest;*
>
> *(d) bills in a set.*
>
> *(4) Where a foreign note is dishonoured, protest thereof is unnecessary."*

[27] In the case before this Court there has been no pleading by either of the Defendants that the Promissory Note has been procured by fraud, nor is there any pleading that there has been a failure of consideration. As a result, the Defendants have not deployed a viable defence to the claim for breach of the Promissory Note, accordingly and the Claim for breach of the Promissory note succeeds, for reasons which will be clearly apparent in the following paragraphs.

The Counterclaim

[28] What the Defendants have attempted to do is to claim a set-off of the sum they asserted is owing by the Claimants for the lease of the Heavy Equipment and conversion of the Loader. However, the authorities clearly demonstrate that such a counterclaim is bound to fail as a matter of law.

[29] In the House of Lords case of **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH** [1977] 2 All ER 463, Lord Russell of Killowen concluded at page 479 as follows:

> *"…It is in my opinion well established that a claim for unliquidated damages under a contract for sale is no defence to a claim under a bill of exchange accepted by the purchaser, nor is it available as a set-off or counterclaim. This is a deep-rooted concept of English commercial law. A vendor and purchaser who agree on payment by acceptance of bills of exchange do so not simply on the basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale. The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument; it is also to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded on some allegation of failure in some respect by the vendor under the underlying contract, unless it be total or quantified partial failure of consideration …"*

[30] In that same case Lord Salmon also noted at page 474 as follows:

> *"I agree that there is no defence to the bills, since the only possible defence could be that their acceptance had been procured by fraud, duress or for a consideration which had failed and because the damages claimed in the arbitration are unliquidated damages and such damages cannot be set of against a claim on the bills of exchange (**James Lamont & Co Ltd v Hyland Ltd** [1950] I AII ER 34I).*

[31] In **Wayne Chen v Tiksi International Management Inc,** Brooks JA in refusing leave to appeal against the Judge's decision to grant summary judgment in a claim on a promissory note, adopted the following statement of Lord Dilhorne at page 470 of **Nova (Jersey) Knit** (supra):

> *"…Bearing in mind the intrinsic nature of a bill of exchange, 'an unconditional order', which the appellants were entitled to regard as a deferred instalment of cash, and the fact that cross-claims, unless based on fraud, invalidity or failure of consideration are not allowed, it appears to me that seldom, if ever, can it be right while denying the right to bring a cross-claim, to allow a cross-claim to operate as a bar to execution and to prevent the holder of a bill of exchange receiving the deferred instalment of cash which the parties agreed he should get."*

[32] I therefore find that the Counterclaim of the Defendants by way of a set-off fails. However, even if the law relating to set-offs and promissory notes were otherwise, the Counterclaim would not have succeeded in any event. This is because on the

evidence I do not accept the assertion of the Defendants that there was any agreement or agreements between the parties pursuant to which the Defendants, jointly and/or severally, leased to Mr Lawson the Heavy Equipment and/or the Loader.

[33] I accept the evidence of Mr Lawson that the Loader which the Defendants assert was leased was the same Loader which was given in part payment for the Property. Accordingly, there is no basis on which the Loader could support the claim by the Defendants for conversion of property by the Claimants. I accept Mr Lawson's evidence that the three Volvo trucks and the cement mixer were offered as part payment by the Defendants to off set some of the outstanding balance on the purchase of the Property. I also accept Mr Lawson's evidence that the documents for the Heavy Equipment were not provided to him (a fact admitted by Mr Wood) and I accept that there was no agreement as to a price for the Heavy Equipment. On the other hand, I do not accept the evidence of the Defendants as to the existence of a lease agreement in respect of the Heavy Equipment. The absence of any credible evidence as to there having been agreement as to the terms and conditions of the alleged lease agreement, (especially on price), was of course quite influential in my deliberations. I have concluded that the assertion of the Defendants that there was a lease agreement is merely a device to attempt to escape their liability pursuant to the provisions of the Promissory Note, by trying to create a debt on the part of the Claimants in a similar sum to the debt being claimed by the Claimants against the Defendants.

Conclusion and Disposition

[34] Having found that the Defendants are liable on the Promissory Note it is not necessary for me to consider the other heads of claim which have been pleaded in the alternative. In the Court of Appeal decision of ***British Caribbean Insurance Company Limited v Delbert Perrier*** (unreported), Court of Appeal, Jamaica, SCCA No 114/1994, judgment delivered 20 May 1996SCCA No. 114/94 it was held that it is open to the Court to award interest to a successful claimant in matters

of commerce. Having regard to the nature of this claim being commercial in nature, and the 1st Claimant having for a significant time been kept out of the money he paid to the Bank, I find that the 1st Claimant is entitled to interest at the Bank of Jamaica's Base lending rate from the date for payment of 19th February 2010 as stated in the Promissory Note .

[35] For the reasons expressed herein the Court makes the following orders.

1. Judgment for the 1st Claimant against the Defendants on the Claim in the sum of $16,000,000.00 plus interest at the rate of 12.5% from 19th February 2010 until payment.

2. Judgment for the 1st and 2nd Claimants against the Defendants on the Counterclaim.

3. Costs of the Claim and Counterclaim are awarded to the 1st Claimant against the Defendants.