IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00470

BETWEEN	**VETERAN LAWN SERVICES LIMITED**	**CLAIMANT**
AND	**PLANTATION VILLAGE CITIZENS' BENEVOLENT SOCIETY**	**DEFENDANT**

Contract for services - Whether once signed a party is bound by its terms - Whether termination clause inserted after it was signed - Whether Non *est factum* applies- Whether contract lawfully terminated –Practice – Whether bundle of documents "not agreed" should be filed.

Tamiko Smith instructed by Ramsay Smith for the Claimant.

Denise Senior Smith and Dameta Gayle-Francis instructed by Oswest Senior Smith & Co. for the Defendant.

Heard: 12th ,13th April ,20th ,21st, 23rd September, 29th November 2021, and 14th January 2022.

In Open Court

COR: BATTS J.

[1] This trial occurred at the time of the popularly termed "Covid. 19" pandemic. As such, counsel were permitted to use the bench reserved for the inner bar so as to

facilitate the necessary social distancing. Also, some persons were permitted to attend via video link from a remote location. The evidence was however taken in person. The trial process was not, it seems, adversely affected.

[2] The Claimant's counsel filed a bundle of documents which contained both agreed and un-agreed documents. In this jurisdiction the hearsay rule still exists and as such it is not appropriate, in a civil case where there is no jury, to place documents not in evidence before the trial judge. On the first hearing date I therefore returned the bundle filed so it could be disaggregated. That was done. A Bundle of Agreed Documents was later tendered and admitted as Exhibit 1 (a) to (d).

[3] Notwithstanding the plethora of, video footage, "Whatsapp" conversations and, documents eventually put in evidence (there were 11 exhibits) and, the number of witnesses who gave evidence (three for Claimant and two for Defendant), the ultimate decision posed no difficulty. This is primarily because the Claimants' case was incredible, not entirely consistent with the documentary evidence and, in part unsupported by the statements of case filed on its behalf.

[4] The claim concerns a contract for services being maintenance of common areas within the Defendant's housing estate. The Claimant asserts that the said contract was wrongfully terminated as there was no justifiable reason to do so and because the contract was for a fixed term with no right to terminate by notice after a "probationary" period of 14 days had passed. It is alleged that the signed agreement had been tampered with to make it appear that the Claimant's representative had signed to terms with which it had not in fact agreed. Throughout the several days of trial much of the evidence was concerned to prove how well the Claimant performed the contract. This included video footage and photographs. There was extensive cross-examination of each witness. Evidence was lead that the agents of the Defendant had fraudulently substituted a page or inserted a term in the signed agreement. The Claimant denies agreeing to a term providing for termination by a 14-day notice and alleges that this was not a part of the agreement.

[5] The Defendant contends that the contract was lawfully terminated by a 14-day notice in accordance with its terms and that termination was due to complaints from residents about the Claimant's performance. The Defendant says further that there was, given the terms of the agreement, no need to have a reason.

[6] I do not find it necessary, in this judgment, to rehash all the evidence in this case. This is because the Claimant's case depends for its success on a finding that there was no termination clause, allowing for a 14-day notice, in the contract. If there is such a term it matters not how well or how poorly the contract was performed. Except in a case of fraud or misrepresentation a party, and in particular a commercial entity which enters into a signed written agreement, is bound by its terms whether or not that party was aware of the terms contained therein, see ***L'Estrange v F Graucob Ltd [1934] All ER Rep 16*.** In this case there is a signed contract. It is therefore that document, and the circumstances of its execution, which I will consider.

Exhibit 1 (a) is a copy of a written agreement signed by both parties. The contract exhibited has a term which reads,

> "*This agreement may be terminated by either party with fourteen (14) days' notice by either party."*

Importantly the contract is initialled on the page containing that term by the Claimant's principal Sindia Smith. She admits she initialled that page. The Defendant by letter dated 10th September 2019 terminated the contract with effect on the 30th September 2019, see Exhibit 1 (b) and paragraph 28 of the witness statement of Sindia Smith dated 27th January 2021. The letter gave 14 days' notice. The Claimant's witness asserts, in paragraph 28 of her witness statement, that such a termination clause was not a part of the contract she had signed and that the contract had been altered with *"ill-intent.'* In this regard it was her evidence, orally before me, that she had worked as a paralegal at a law firm in the United States and had had responsibility to compile commercial agreements. She said she was familiar with contracts.

[7] At the commencement of the evidence of Sydia Smith I upheld an objection, by the Defendant's counsel, and struck out that part of paragraph 28 which purported to give evidence of the content of a document not put in evidence before the court being the "*hard copy of the contract*". When permitted to amplify her witness statement the witness attempted to introduce a computer generated document which had not been disclosed in the discovery process. An objection was taken and the attempt to tender it was abandoned. The witness was however allowed to state the difference between the document she prepared (and signed) and the one she alleges has been tampered with and which was in evidence. In amplification of her witness statement she said:

> *"Q: Recall precise wording in relation to electronic copy*
>
> *A: To best of my recollection 1-year contract with 14-day termination notice by either party after its executed-day termination by either party. "*

In re-examination the witness clarified that the clause in the contract she had prepared and signed, but which had been later tampered with, permitted termination within 14 days of its execution:

> *"Q: Earlier you were asked at what stage you noticed contract altered and you started to say contract had many versions.*
>
> *A: The language in original agreed signed contract is for one year with 14 days' termination until after its executed. From first draft until last final copy dated 8th February the language was correct except that unilateral change to termination clause"*

[8] Mrs. Smith explains the differences between the document she prepared, and the one bearing her signature in court, on the basis that the Defendant's representative had tampered with it by changing the clause. In her witness statement she asserts that the change occurred, after she had signed the document and, when the

Defendant's representative took it to have it photocopied. Here is how she described it in her witness statement dated the 27th January 2021:

> *"I recalled seeing a strange look on Ms Miller's face and feeling a strange sense of unease as I waited for a copy of the executed Agreement that took what seemed to be an inordinate amount of time to return a signed copy to me. I now verily believe that the Defendant, in altering the termination clause did so with ill-intent. "*

[9] I cannot accept this evidence because Mrs Smith had initialled the relevant page. She, during cross examination, identified her initial on the page containing the termination clause. The question, still unexplained, is how could the Defendant replace either the page or the clause and replicate the initial? I note thatneither party was able to account for the absence of the original agreement but, this is of no moment as, a copy was admitted by consent as Exhibit 1 (a). It seems to me therefore that, on the evidence, a finding of fact that the contract was terminable by fourteen days' notice is inevitable.

[10] There is a further reason why the Claimant's case of tampering is questionable. This is because it seems so odd, as to be improbable, that a Claimant whose case is that it was relying heavily on a fixed term of one year would agree to termination within a 14-day probationary period. This would have been after the ride-on mower was purchased. A purchase the Defendant says was a great investment, so much so that, the loss on its resale is claimed as part of the damages. I find it also significant that there is no allegation of document tampering to be found in the Claim or the Particulars of Claim. No Reply was filed to the Defence notwithstanding its expressed reliance on the fourteen-day termination clause.

[11] Even if one were for some reason minded to accept the Claimant's account, and one or other of the versions alleged, there is a point of pleading which is insurmountable. In her closing submission counsel for the Defendant pointed to

the absence of any plea of fraud, fraudulent misrepresentation or any assertion of fact related to an alleged substitution of pages in the contract. As indicated earlier there was evidence lead to that effect and there was also cross examination on the evidence. There was however no application, even during the submissions after the point was taken, to amend the pleading. On the basis of the statements of case, and the issues joined therein, the court would be unable to find fraud, fraudulent misrepresentation or, give any remedy related to an alleged tampering with the contractual documents.

[12] The Claimant's counsel, in her submissions, relied upon the principle of *non est factum*. The submission was that as her client's representative had not read the document, and as she was deceived as to the content of the document, equity would not allow reliance on such a clause by the Defendant. The issue of pleading aside, the problem with this argument is that there is no evidence of the Defendant representing to the Claimant the content of the contract. In short there is no evidence of a misrepresentation of fact. The authorities establish that non est factum may be available to illiterate persons, persons who are blind or otherwise disabled from reading the content of that which they sign and, persons who without negligence sign an instrument which is fundamentally different from that which they intended to sign, see ***Saunders v Anglia Building Society [1971] AC 1004*** as applied by Anderson J in ***Mary Campbell v Consolidated Caribbean Investments Limited [2016] JMSC Civ 100*** **(unreported judgment delivered 17th June 2016).** The Claimant's representative, as stated earlier, was at pains to prove her experience in the preparation of contracts. I saw and heard her give evidence and, it does seem to me that, she has more than a passing acquaintance with the written and spoken word. Even therefore were I to accept, which I do not, that the agreement placed before her contained a term with which she had not agreed a plea of *non est factum* would not be available. Furthermore, the difference, between that which she signed and that which she says she thought she was signing, is not so fundamental as to motivate a court of equity to apply *non est factum* relief.

[13] In the result therefore, and for all the reasons stated above, the claim is dismissed. Costs will go to the Defendant to be taxed or agreed.

David Batts
Puisne Judge.