In The Supreme Court of Bermuda

CIVIL JURISDITION
2007: No.7

BETWEEN:

NATALIE CHIRANJI

First Plaintiff

-and-

KEVIN GREGORY BEAN and THADDEUS ARTHUR HOLLIS III
(as trustees of the Jack Daniels Trust)

Second Plaintiff

-v-

JOHN ANDREW BENTO
(in his personal capacity and as trustee of the Alanton Trust)

First Defendant

-and-

ESTHER BUMATAY BENTO
(as trustee of the Alanton Trust)

Second Defendant

REASONS

Date of Judgment: October 14, 2008
Date of Reasons: November 17, 2008
Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates, for the Plaintiffs
The Defendants failed to appear

Introductory

1. On October 14, 2008 following a short trial at which the Defendants failed to appear, I gave judgment in favour of the Plaintiffs in respect of part of their total claim. The Defendants were ordered to pay to the Plaintiffs $103,458 plus interest at the rate of 3.5% from the date of the Writ until judgment, and thereafter interest at the statutory rate until the judgment has been satisfied. The Defendants were further ordered to pay interest at the statutory rate on the sums of $30,000 (for the period November 2, 2005 to March 9, 2006) and $17,262.50 (for the period March 9, 2006 to June 1, 2008).

2. In addition to this monetary relief, the Court granted two declarations. Firstly, it was declared that the 2nd Plaintiffs had rescinded the sale and purchase agreement dated January 26, 2006 in respect of the two unfinished units annexed to the No. 4 Cable Hill property. Secondly, it was declared that the purported deed of conveyance between the 2nd Plaintiffs and the Defendants which was signed in or about January 2006 was ineffective for a total failure of consideration.

3. I indicated that I would give short reasons to properly memorialise the basis of the decision made in relation to claims which were not simply claims for liquidated damages. The decision made just over a fortnight ago also entailed a decision to proceed with a trial in circumstances where the Defendants were believed to be abroad but had been represented by counsel who purported to cease acting without leave of the Court shortly before the trial was scheduled to commence. The Defendants had neither entered appearances nor filed any Defence.

Purported withdrawal of attorney of record

4. On January 18, 2007, the Plaintiffs obtained leave to serve the Defendants out of the jurisdiction from Bell J. An Affidavit of Service dated March 8, 2007 deposing to service on both Defendants on March 1, 2007 of the Notice of Writ was duly filed pursuant to the said Order. The original Statement of Claim dated April 19, 2007 was also personally served on each Defendant in the Philippines. It does not appear that a Defence was ever filed.

5. On January 21, 2008, Peniston & Associates filed a Notice of Change of Attorney in respect of the 1st Defendant. On January 31, 2008, the same firm filed a Notice of Appointment of Attorney in respect of both Defendants. On April 3, 2008, following a hearing at which the Defendants did not appear, Bell J granted the Plaintiffs leave to re-amend their Statement of Claim. However, the Defendants' counsel did appear before Bell J on May 15, 2008 when pre-trial directions were ordered, including directions providing for (a) discovery, (b) the exchange of witness statements and (c) setting down for trial. The Plaintiffs essentially complied with these directions while the Defendants did not. On September 3, 2008, the Plaintiff appeared before me at a hearing which the Defendants' counsel again failed to attend and obtained leave to re-amend their Statement of Claim. It

is clear from the Affidavit of Letasha DeGrilla dated October 1, 2008, that this application was at some point served on Peniston & Associates, because they returned the Summons and supporting Affidavit to Lynda Milligan-Whyte & Associates on September 29, 2008.

6. Meanwhile by letter dated August 28, 2008, Peniston & Associates advised Lynda Milligan-Whyte & Associates that because the Plaintiffs' counsel had refused to return telephone calls, correspondence from Mr. Harshaw personally would no longer be accepted. This astonishing demand was reiterated in a letter dated September 9, 2008. And the DeGrilla Affidavit indicates that Peniston & Associates refused to accept delivery of a September 29, 2008 letter (a) complaining that previous correspondence dated July 16, 2008 and August 11, 2008 reference trial dates had not been answered, and (b) warning that if no dates were provided within seven days, an application would be made to the Registrar to fix a trial date. The Plaintiffs' attorneys understandably saw no need to wait for seven days, and on October 3, 2008 a Notice of Hearing was sent out by the Registrar to the respective attorneys of record fixing the trial for October 14, 2008.

7. I was satisfied on a balance of probabilities that this Notice of Hearing was received by the Defendants' attorneys on or before October 6, 2008, because on the latter date at 11.35 am, they filed in the Registry a "*Notice of Discontinuance of Acting*", which Notice was back-dated to October 3, 2008, the same date as the Notice of Hearing. It is possible this backdating was merely coincidental as a similar "back-dating" occurred previously in circumstances where there was no reason for this to have been deliberately done; however it seems likely that the receipt of the Notice of Hearing on October 6, 2008 prompted the filing of the Notice on that same date. And in the absence of any positive assertion that the Notice of Hearing was not received, it seemed reasonable to conclude that in the ordinary course of the Court's business a Notice of Hearing dated October 3, 2008 which on its face appears to have been faxed to both law firms involved would have been received by the Defendants' attorneys on or about October 6, 2008, or, in any event, well in advance of the trial.

8. Mr. Harshaw fairly put before the Court at the commencement of the trial the issue of whether the Defendants not only had notice of the hearing through service of the Notice of Hearing on their attorney on or about October 3, 2008, but more significantly whether Peniston & Associates continued to be attorneys of record notwithstanding their purported withdrawal communicated to the Court on October 6, 2008. At first blush it would be astonishing if trials fixed for hearing could be effectively aborted by the attorney for one or more parties simply filing a notice a week or so before trial indicating his withdrawal from the record and compelling the Court to re-serve the withdrawing attorney's client personally with a notice of Hearing previously served on the attorney of record before the trial could proceed. This sort of abuse of process is not contemplated by the Rules.

9. Peniston & Associates were the first attorneys of record, and they came on the record by filing a Notice of Appointment of Attorney dated January 31, 2008 on February 7, 2008, almost a year after the action had been commenced, under Order 67 rule 3 which provides:

> **"67/3 Notice of appointment of attorney**
> *3 Where a party after having sued or defended in person, appoints an attorney to act in the cause or matter on his behalf, the change may be made without an order for that purpose and rule 1(2), (3) and (4) shall, with the necessary modifications, apply in relation to a notice of appointment of an attorney as they apply in relation to a notice of change of attorney.*"

10. Although the Defendants apparently took no active steps in the action, they were effectively defending in person, and this was the only available form which their attorneys could file to signify their entry onto the litigious stage in this matter. But while no order of the Court is required to start acting, leave of the Court is required to withdraw where neither (a) the client has filed a Notice of Intention to Act in Person, nor (b) a new attorney has filed a Notice of Change of Attorney. Order 67 rule 6 provides as follows:

> "***67/6 Withdrawal of attorney who has ceased to act for party***
> *6 (1) Where an attorney who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with rule 1, or notice of intention to act in person in accordance with rule 4,* **the attorney may apply to the Court for an order declaring that the attorney has ceased to be the attorney acting for the party in the cause or matter, and the Court may make an order accordingly, but unless and until the attorney**—
>
> *(a) serves on every party to the cause or matter (not being a party in default as to entry of appearance) a copy of the order, and*
>
> *(b) procures the order to be entered in the Registry, and*
>
> *(c) leaves at the Registry a copy of the order and a certificate signed by him that the order has been duly served as aforesaid,* **he shall, subject to the foregoing provisions of this Order, be considered the attorney of the party till the final conclusion of the cause or matter in the Court.**

> *(2) An application for an order under this rule must be made by summons and the summons must, unless the Court otherwise directs, be served on the party for whom the attorney acted.*
> *The application must be supported by an affidavit stating the grounds of the application.*
> *(3) An order made under this rule shall not affect the rights of the attorney and the party for whom he acted as between themselves.*" [emphasis added]

11. Accordingly, there was little doubt that Peniston & Associates as a matter of law remained attorneys for the Defendants in the absence of (a) a Notice of Change of Attorney being filed by another firm, (b) the Defendants themselves filing a Notice of Intention to Act in person and/or (c) an order pursuant to Order 67 rule 6(1) RSC 1985 granting the attorneys of record leave to withdraw. The "*Notice of Discontinuance of Acting*" filed on October 6, 2008 was not only a form not prescribed by the Rules; it had no legal effect because in the applicable circumstances an order of this Court was a mandatory statutory precondition to withdrawal on the attorneys' part. I accept Mr. Harshaw's submission that paragraph 67/1/5 of the 1997 White Book[1] accurately represents the Bermuda law position in this regard:

> "*So long as the solicitor to a party in an action remains on the record, serving that solicitor is good service…This applies even after judgment…A solicitor therefore can only be discharged from liability to receive service of proceedings by the substitution of another solicitor, or of the party in person…*"

12. The trial proceeded on the basis that the Defendants, who had declined to actively advance any defence throughout, had notice through their attorneys of the hearing and simply failed to appear.

Claim for damages for defective and /or incomplete work in respect of Unit#3

13. The first principal monetary claim was very carefully advanced by the Plaintiffs' counsel at trial. The Statement of Claim from the outset had clearly focused on Unit #4 the purchase of which the Plaintiffs evidently hoped to be able to complete. It was alleged that defective work was performed although no explicit breach of contract was alleged It was conceded that the misrepresentation relied upon at trial was not expressly alleged in the Re-Amended Statement of Claim which was further amended (in other respects) at trial. Although the Plaintiffs' Submissions referred to a contractual claim, this was not or not seriously pursued as an alternative claim.

[1] Paragraph 67 /1/9 of the 1999 White Book.

14. Mr. Harshaw in paragraph 16 of the Plaintiffs' Submissions drew the Court's attention to the fact that the written sale agreement included a standard clause in the following terms: "*The Purchaser accepts the Unit in the physical state it is in at the date of this Agreement*." The agreement is undated but the 1st Plaintiff believes it was signed in or about December 2005 or January 2006. The 1st Plaintiff stated in paragraph 7 of her Witness Statement however that before this Agreement was signed: "*John Bento took us around the property and showed us the various condominiums he was developing. None of the condominiums were then finished but John bento told us that they would be finished before they were sold.*" A Woodbourne Associates Ltd. Report dated December 8, 2006 concluded that completing the unit would costs $100,788. According to the Plaintiffs' pleaded case, the Defendants left Bermuda for the Philippines in August 2006, leaving the unit uncompleted.

15. Counsel referred to the Court of Appeal for Bermuda decision in *Burville & Burville-v- Jones Waddington Ltd. et al* [2000] Bda LR 4, which supports the proposition that false oral representations made prior to an agreement for the sale of land may constitute misrepresentation. In that case where misrepresentation was pleaded, it was held that evidence that the vendor had personally said during a site visit that the house had been recently re-wired, which the vendor (but not the agent) must have known was untrue constituted prima facie evidence of fraudulent misrepresentation. In that case the oral representations were confirmed in writing, but that fact does not appear to have been a necessary element of the decision. In the present case I was unwilling to go so far as to hold that the Plaintiff's case amounted to prima facie evidence of fraud, because fraud must be strictly pleaded and the requisite averments had not been made.

16. But having regard to the fact that the sale agreement in relation to unit #4 explicitly described those two apartments as "uncompleted", which was not the case in relation to Unit #3, the fact that the Defendants left the jurisdiction some three months after unit #3 was purchased and the fact that the Plaintiff's un-particularised claim for liquidated damages for the failure to complete the unit was unchallenged, I was satisfied that a *prima facie* case of negligent misrepresentation had been made out.

17. Counsel referred the Court to section 3(1) of the Law Reform (Misrepresentation and Frustrated Contracts) Act 1977, which provides that where a plaintiff has proved that he has suffered loss by virtue of entering into a contract pursuant to misrepresentation, the defendant shall be liable if (a) he would at common law be liable in the case of a fraudulent misrepresentation, even though fraud is not proved, **unless** (b) "*he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.*" All the Plaintiffs had to establish was that a misrepresentation was made of a character which, if fraud had been proved, would give rise to a claim in damages. It was then for the Defendants to show, at a minimum, that they were not in fact negligent.

Claim for damages for loss of rental income Unit #4

18. The Plaintiffs' initially pleaded case sought to enforce the sale agreement by compelling the Defendants to obtain the planning permission contemplated therein. The amended claim sought a declaration that the Plaintiffs had rescinded the agreement. The notion of seeking compensation for loss of profits was retained but seemed somewhat incongruous from the outset in light of the fact that the Plaintiffs' own case conceded that the sale contract had never been performed and should be regarded as at an end. The financing they required to complete was not obtained and this was a significant cause of the non-completion by the Plaintiffs' own account. Moreover, there was no clear evidence that if the sale had been consummated the additional apartment would have generated a net profit for the Plaintiffs of $626,000 or in any amount. Mr. Harshaw very fairly conceded that the difficulty with this claim was his clients' own evidence that it would not in fact have been possible for Planning permission to be obtained to enable the 1st Plaintiff to occupy the lower portion of Unit #4 and rent out the upper potion at a profit.

19. The loss complained of was wholly speculative and/or was not proven to any satisfactory extent. This claim was plainly unsustainable and accordingly was dismissed.

Declaratory Relief

20. The Plaintiffs sought declarations that the sale agreement and conveyance in respect of unit #4 should be regarded as having been rescinded and ineffective for a total failure of consideration respectively. The unchallenged evidence in support of the unchallenged pleaded case clearly showed that (a) the Plaintiffs were entitled to rescind the sale and purchase agreement if financing was not obtained by them, and (b) that although a deed of conveyance had been signed in anticipation of completion, no conveyance was ever consummated because financing to complete the purchase was never obtained. The declarations were granted accordingly.

Interest claims

21. The Plaintiffs claimed interest on a deposit which was paid reference unit #4 on November 2, 2005 and not applied to its eventual use (the purchase of unit #3) until March 9, 2006. In addition interest was sought on the sum of $17,262.50 for the period March 9, 2006 to June 1, 2008. This sum was paid by the Plaintiffs to the Defendants on March 9, 2006 in respect of the costs of preparing the aborted lease. This amount was very properly refunded by Lightbourne & Simmons on or about June 1, 2008. I could identify no objection to these claims which were accordingly each granted.

22. In addition, the Plaintiffs sought and were granted pre-judgment interest at the rate of 3.5% from the date the Writ was issued until judgment, and thereafter post-judgment interest at the statutory rate of 7% until payment in full. Mr. Harshaw initially sought pre-judgment interest at the statutory rate, but reduced this claim when I raised doubts as to the propriety of pre-judgment interest being awarded at all[2].

Costs

23. I saw no reason why costs at the standard rate, to be taxed if not agreed, should not be awarded to the Plaintiffs in accordance with the usual rule that costs follow the event and are awarded to the successful party.

Dated this 17th day of November, 2008

KAWALEY J

[2] My current view is, as a result of a judgment delivered shortly after the decision in the present case which considered conflicting authorities on section 10 of the Interest and Credit Charges (Regulation) Act 1975, as follows. The Court has a discretion to decline to grant any pre-judgment interest at all. If pre-judgment interest is awarded , the statutory rate must be applied; however, the Court is not bound to award interest for the full period of writ to judgment, so the amount of interest awarded can be adjusted on a discretionary basis.See: *Lisa SA-v-Leamington Insurance Company Ltd et al*, Commercial Court 1999: 108/2001:79, Judgment dated October 17, 2008.