In The Supreme Court of Bermuda

CIVIL JURISDICTION

Commercial Court

2014: No. 115

BETWEEN:

BERMUDA TAXI RADIO CABS LTD

Plaintiff

-v-

(1) HEWVONIE BROWN
(2) TAFARI OUTERBRIDGE

(together trading as Island Taxi Services)

Defendants

JUDGMENT

(in Court)[1]

Date of trial: March 16-18, 2015
Date of Judgment: March 31, 2015

Ms. Jennifer Haworth and Ms. Jessica Faiella, MJM Limited, for the Plaintiff
Ms. Simone Smith-Bean, Charter Chambers Ltd., for the Defendant

[1] This Judgment was circulated to the parties without a hearing.

Introductory

1. It was common ground that the Plaintiff transferred certain assets including its goodwill to the Defendants on or about July 1, 2010 without any binding agreement on the price to be paid being consummated. Whether or not the Plaintiff is entitled to recover $99, 875 or some other sum either for breach of subsequent contract or on the grounds of unjust enrichment from the 2nd Defendant (D2) was in controversy at trial.

2. The Plaintiff issued its Specially Endorsed Writ on March 21, 2014. The Plaintiff obtained judgment in default of defence against the 1st Defendant ("D1") in the amount of $99, 875 ($85,000 plus interest), on May 1, 2014 and against D2 in the same aount on May 8, 2014. On May 16, 2014, by consent, the Default Judgment against D2 was set aside and a Defence was filed on his part. The Plaintiff's judgment against D1 was never challenged.

3. The Statement of Claim alleged that the Plaintiff had transferred various assets to the Defendants to enable them to continue to operate the taxi dispatching business previously carried on by the Plaintiff. An oral agreement was entered into on July 1, 2010 to the effect that the Defendants would pay the price which was subsequently agreed. This construction of the pleading is largely informed by the way the case was advanced at trial. On its face, the pleading can be read as averring an unjust enrichment claim based on an unconsummated oral agreement to purchase assets at an agreed price of $85,000. A September 11, 2012 letter before action from previous attorneys instructed by the Plaintiff asserted solely an unjust enrichment claim.

4. The main thrust of the Defence was that the Defendants had accepted an offer of assistance extended by the Plaintiff's Principal Mr. Edward Darrell to allow them to use the Plaintiff's assets. No agreement was entered into to purchase the said assets; moreover no negotiations had even taken place. Any moveable assets received from the Plaintiff had been confiscated by him and were no longer in D2's possession.

Legal findings

5. Whether or not the parties entered into a binding oral contract for the purchase of the Plaintiff's business for an agreed price as the Plaintiff primarily claimed essentially turns on the facts. This is illustrated by one of the authorities relied upon by the Plaintiff's counsel, *Marshall-v-Sousa* [1988] Bda LR 75, where a binding contract was found to have been concluded in relation to the sale of a fishing boat and equipment without reference to a single legal authority.

6. However, that case did make legal findings on the measure of damages for the purchaser's failure to complete the agreed sale in circumstances where the relevant asset is retained by the vendor, namely "*the contract price less the market price*" (at

page 5). This measure would clearly not apply in the present case where the Plaintiff primarily seeks compensation for nothing more complicated than the failure to pay an agreed price. In *Marshall-v-Sousa*, L.A. Ward J (as he then was) also approved the wider principle for assessing damages formulated in paragraph 26 of '*McGregor on Damages*', 14th edition, namely that "'*…the object to keep constantly in mind in contract cases is that the plaintiff is to be put in the position he would have been in had the contract been performed*".

7. D2's counsel, apparently assuming that the Plaintiff was not advancing a contractual claim, primarily placed authorities on unjust enrichment before the Court. She centrally submitted that the doctrine could not assist the Plaintiff in the present case because it had assumed the risk that it might not be paid by transferring the assets without a concluded contract. Counsel relied upon a narrow extract from the following passage in the judgment of Nicholas Strauss QC in *Countrywide Communications Ltd-v- ICL Pathway Limited and Another* [1999] EWHC 293 (QB) (at page 28), which it is helpful to reproduce in full:

> "*Beyond that, I do not think that it is possible to go further than to say that, in deciding whether to impose an obligation and if so its extent, the court will take into account and give appropriate weight to a number of considerations which can be identified in the authorities. The first is whether the services were of a kind which would normally be given free of charge. Secondly, the terms in which the request to perform the services was made may be important in establishing the extent of the risk (if any) which the plaintiffs may fairly be said to have taken that such services would in the end be unrecompensed. What may be important here is whether the parties are simply negotiating, expressly or impliedly 'subject to contract', or whether one party has given some kind of assurance or indication that he will not withdraw, or that he will not withdraw except in certain circumstances. Thirdly, the nature of the benefit which has resulted to the defendants is important, and in particular whether such benefit is real (either 'realised' or 'realisable') or a fiction, in the sense of Traynor C.J's dictum. Plainly, a court will at least be more inclined to impose an obligation to pay for a real benefit, since otherwise the abortive negotiations will leave the defendant with a windfall and the plaintiff out of pocket. However, the judgment of Denning L.J. in the Brewer Street case suggests that the performance of services requested may of itself suffice amount to a benefit or enrichment. Fourthly, what may often be decisive are the circumstances in which the anticipated contract does not materialise and in particular whether they can be said to involve "fault" on the part of the defendant, or (perhaps of more relevance) to be outside the scope of the risk undertaken by the plaintiff at the outset. I agree with the view of Rattee J. that the law should be flexible in this area, and the weight to be given to each of these factors may vary from case to case."*

8. It was, I think, not controversial that, as the Defendant's counsel submitted, unjust enrichment could only be assessed by reference to "*monetary value*": Goff & Jones, '*The Law of Unjust Enrichment*', paragraph 4-3. Nor indeed that, as regards goods, "*the claimant cannot recover both the exchange value and the use value because this would comprise double recovery*" (Goff & Jones, paragraph 4-07).

Factual findings

Overview

9. The trial was initially fixed for a one day hearing with Witness Statements filed for only three witnesses, two for the Plaintiff and one for D2 (himself). At the commencement of the trial D2 sought permission to adduce evidence from two subpoena witnesses; leave was granted to avoid adjourning the trial with the Plaintiff's consent. This doubled the length of the trial, although the additional witnesses did not advance D2's case to any material extent and largely confirmed the evidence of the Plaintiff's witnesses.

10. The Plaintiff's witnesses Mr. Edward Darrell and lawyer Johann Oosthuizen gave their evidence in a straightforward manner and I found them to be credible and generally reliable witnesses. D2 was in general terms a credible witness, but certain aspects of his evidence seemed obviously inconsistent with uncontroversial documented facts. He sometimes appeared to find it difficult to distinguish his duty as a witness to give truthful evidence from his natural desire as a litigant to argue his own case. D2 also called D1, who I found to be generally credible and straightforward in his testimony. Mr. Stanton Lewis, who seemed entirely independent, was more credible still.

Was there a binding contract?

11. Although the Plaintiff's pleaded case appeared to be that a binding oral contract was concluded on or about July 1, 2010, the case presented at trial was that an oral agreement was entered to on October 7, 2010 after the relevant assets had been transferred. I accept the evidence of Mr. Darrell, which is confirmed by all other witnesses except D2, that prior to July 1, 2010 the Plaintiff was in negotiations about the sale of its business which was facing certain regulatory challenges flowing from new GPS requirements. I do not accept D2's suggestion that he believed at this late stage that the assets were being transferred for no consideration.

12. While Mr. Darrell himself appeared to me to admit in his oral evidence initially telling the D2 he would "give him" the business, I do not accept that this was intended to convey the idea of an outright gift. I take judicial notice of the fact that businessmen of a certain generation (Mr. Darrell appeared to be easily old enough to

be D2's father) typically open business negotiations using indirect language that does not refer to money or a price. Early discussions are often based on establishing a general rapport and spirit of goodwill, especially when what is being sold is business to which the vendor is personally attached. D2 may well have unrealistically and mistakenly believed at the outset (by his account before Mr. Darrell began negotiating with others) that he was being offered a gift, but he had no reasonable basis for this belief by the time the assets were transferred. I base this conclusion in large part on the following additional findings:

(1) D1 had no doubt that a purchase was intended and did not defend the present proceedings (partly to establish his stake in the new business after the Defendants had a falling out). The business was transferred to both Defendants, not D2 alone;

(2) Before he withdrew from the venture, Mr. Lewis hosted a meeting attended by D2 from which the latter ought to have realised that a sale was intended;

(3) D2 accepted that Mr. Darrell had adult children in the taxi business. It seems inherently improbable that he would give the business to a stranger rather than his own children if he wished to give it away;

(4) D2 accepted that he received a June 17, 2010 letter of intent requesting confirmation of their "*undertaking to purchase the assets*" from the then four prospective purchasers including himself. This contradicts D2's evidence that Mr. Darrell negotiated a sale which fell through with third parties without his knowledge, having previously promised to gift the business to D2;

(5) D2 accepted that he was involved in negotiations with the Plaintiff's attorney for the purchase of the assets in October and ended up renting the equipment in November. It makes no sense that D2 would have done this without at least attempting to rely upon Mr. Darrell's supposed promise of a gift.

13. I find that there was an implied or tacit agreement in principle reached on or before July 1, 2010 that the Defendants would be transferred the assets by the Plaintiff and that a formal agreement would be signed later. This was because the Plaintiff was not permitted to continue the operation beyond the end of June but did not want there to be any interruption to the business to the prejudice of subscribing taxi drivers and the wider public.

14. The Plaintiff did not at trial rely upon the pleaded notion of an oral agreement consummated as at this date, doubtless because no price had yet been agreed and any agreement would have been incomplete. Instead, the Plaintiff relied on an oral agreement said to have been reached three months' later at meeting between its lawyer Mr. Oosthuizen and the Defendants at the conclusion of which the Defendants were admittedly invited to seek independent legal advice before signing a formal contract.

15. It is difficult to see how this evidence can properly be used as the basis for a finding that a binding agreement to purchase the assets of the Plaintiff for $85,000 was consummated as at July 1, 2010. I accept Johann Oosthuizen's evidence that the Defendants verbally agreed to $85,000, but he admits that (1) a formal written agreement was contemplated, and (2) that when he circulated it to the Defendants he advised them to obtain legal advice before signing it. This suggestion must have been made either orally at the October 7, 2010 meeting or by telephone later, because it does not appear in the October 11, 2010 email under cover of which the "*revised agreement and Bill of Sale*" was transmitted. Moreover, after being notified by email dated October 10, 2010 by D2 that that "*we need additional time to go over the whole deal with our lawyer*", Mr. Oosthuizen merely replied:

> "*Kindly let me have your concerns and/or your lawyer's comments on the agreements so that we can discuss these.*
>
> *Otherwise, please call me as soon as possible to arrange a time to sign the agreement.*"

16. The lawyer's evidence given over four years later to the effect that he suggested the Defendants obtain legal advice merely "*to ensure the written terms matched the oral terms*" (Witness Statement, paragraph 12) is accordingly not reliable proof of precisely what form of words were expressed at the time. Even if an attempt to limit the scope of advice obtained by the Defendants had been expressed, it is difficult to see what legal effect such an 'injunction' could possibly be given. Where parties reach an oral agreement in circumstances where a written agreement is contemplated and the legally represented party invites the unrepresented parties to seek legal advice before signing the formal contract, this creates a strong inference that the oral agreement is an agreement in principle for the following reasons of general principle.

17. Freedom to contract is an important incident of fundamental property rights, and its incidents include the right to enter into bargains which are not unduly impacted by unequal bargaining power. For legal policy reasons therefore, exceptional circumstances would be required to justify a finding in such circumstances that the legally represented party had the right to limit the scope of legal advice that the

unrepresented party obtained in connection with entering into a significant commercial transaction.

18. I accept entirely that the Plaintiff's lawyer actually considered at the time that the price had been finally agreed, because he protested in a November 5, 2010 email to Mr. Kyle Masters when the Defendants' lawyer sought to reopen negotiations on the price. However, there is no clear evidence that the Defendants, in orally agreeing a price of $85,000 in circumstances where a written agreement was to be drawn up by the Plaintiff's lawyer and upon which they were to be able to seek their own legal advice, intended at that point to enter into a legally binding agreement on price. The Plaintiff's claim for breach of contract is dismissed.

Has D2 been unjustly enriched?

19. The following facts were not in serious dispute:

(a) the Defendants commenced their taxi dispatching business with effect from July 1, 2010 from premises formerly occupied by the Plaintiff, with Mr. Darrell providing free guidance on how the Plaintiff's business previously operated during the initial weeks;

(b) the Plaintiff's license to operate expired on or about June 30, 2010. Prior to that the Defendants (along with others) had been negotiating for the purchase of the Plaintiff's business without agreeing on a price;

(c) the Defendants received the Plaintiff's sixty year old telephone number, 295-4141 together with a list of corporate clients (the goodwill);

(d) the Plaintiff encouraged its subscribing drivers to sign up with the Defendants' business, although the Defendants themselves took steps of their own to facilitate new subscription agreements. D2 admitted that roughly 50% of the Plaintiff's former subscribers signed up with the Defendants;

(e) the Defendants used certain electronic equipment and furniture for some 4.63 months' free of charge (July 1 to November 20) when a rental agreement was signed as regards certain electronic equipment (the "Rental Agreement"). After that (with effect from December 1, 2010) the electronic equipment was leased on a monthly basis at the rate of $800 per month. The Plaintiff terminated the lease with at least one month's rental not paid in or about May, 2011;

(f) in or about May of 2011, Mr. Darrell recovered various pieces of electronic and other office equipment with no suggestion that the Defendants prevented him from collecting anything which was left behind;

(g) the Plaintiff had initially sought $150,000 for assets and goodwill in a January 20, 2010 "Fixed Assets List" given to prospective purchasers. This comprised $66,813 (assets) + $83,187 (goodwill);

(h) the parties at least provisionally agreed a purchase price for all assets and goodwill at $85,000 on October 7, 2010;

(i) the Defendants through their own lawyer offered to pay $50,000 for both assets and goodwill on November 12, 2010;

(j) after the Plaintiff obtained judgment in default, D1 agreed to pay half of the judgment debt ($49,937.50) through his attorneys by letter dated May 21, 2014.

20. I further find that the Plaintiff transferred the clearly valuable assets before signing a written agreement in good faith assuming the Defendants would pay for them at a price to be agreed. As Mr. Darrell testified, the transfer occurred:

(a) in order to enable the new business to commence operations without any interruption; and

(b) in circumstances where it was mutually understood that a price, yet to be agreed had to be paid for the assets the Defendants received.

21. I find that Mr. Darrell expected payment in due course and acted in a gentlemanly fashion in reliance on tacit assurances from the Defendants that they intended to consummate the bargain by allowing the Defendants to start operating the new business with minimal interruption, rather than pressurizing them to pay first. D1 not only accepted that he at all material times knew that payment was due. He did not ultimately oppose the Plaintiff's claim when proceedings were issued.

22. The failure to agree a price in the autumn of 2010 appears to me to be primarily the fault of the Defendants. Because they tentatively agreed a price of $85,000 on October 7, 2010, and rather than simply using the Plaintiff's suggestion of obtaining legal advice as a basis for withdrawing from the purchase agreement altogether on newly identified legal grounds, they decided to take advantage of Mr. Darrell's desire to help them by:

(1) reopening negotiations on price altogether;

(2) exploiting the fact that by the time the autumn negotiations were in train it was legally impossible for the Plaintiff to retrieve the valuable telephone number (as the Plaintiff discovered on November 16, 2010 having attempted to assert continuing ownership on the number two months previously). It was also practically impossible for the Plaintiff to prevent the Defendants from utilising the client list which the Plaintiff had no continuing commercial interest in;

(3) repudiating the original agreement in principle to purchase both assets and goodwill, entering into the Rental Agreement, and finally making arrangements to purchase fresh equipment of their own.

23. In these circumstances it would be unconscionable for D2 to be able to retain the goodwill of the Plaintiff's former business. I set out below my somewhat different findings as to the use of its equipment free of charge.

Has the Plaintiff proved any quantifiable loss?

24. The Plaintiff has clearly proved the market value of the use of the equipment because the Defendants agreed to pay $800 per month and I am satisfied that they used the equipment without paying for at least 5.63 months (4.63 months to November 20, 2010 plus one month unpaid thereafter). The Plaintiff is potentially entitled to be awarded $4504 for this head of loss. I make no award for the use of any equipment left behind. It appears to me that the Plaintiff recovered all physical assets considered to be of value in the summer of 2011 and at this point it is far too unclear what value can fairly be assigned to whatever was left behind.

25. The Rental Agreement was not only inconsistent with the notion that a binding purchase agreement had been consummated on October 7, 2010 (as contended at trial) or on July 1, 2010 (as alleged in the Specially Endorsed Writ). It is also inconsistent with the proposition that the Plaintiff expected to be paid for the mere use of the equipment during the July 1, 2010 to November 20, 2010 period. After all, the Rental Agreement made no reference to the prior period and even waived the requirement for the Defendants to pay rent between November 20 and November 30. As far as this particular category of loss is concerned, I find that the Plaintiff entered into the Rental Agreement assuming the risk that he might not be able to obtain recompense for the prior usage of the equipment through concluding a contract for the purchase of the equipment and the goodwill. Mr. Darrell, who was at all material times the directing mind of the Plaintiff, clearly knew by November 20, 2010 that a sale agreement might not ever be consummated.

26. In these circumstances I am bound to find that it would not be unconscionable for D2 to retain the benefit of the free use of the equipment for the July 1, 2010 to November 20, 2010 period. Any charge for such period was implicitly waived by the terms of the Rental Agreement. The Plaintiff is however awarded $800 owing pursuant to the latter contract.

27. It remains to consider whether the Plaintiff has proved to the requisite extent the market value of the goodwill (i.e. the telephone number and the corporate client list). I accept that the values in question are too low to expect the Plaintiff to have adduced expert valuation evidence. The best available evidence is the course of negotiations between the parties. I find that:

    (a) the Plaintiff's own Fixed Assets List prepared in January 2010 by the company's accountant valued the business at $150,000 overall, with equipment valued at $66,813 and goodwill at $83,187, or 55%;

    (b) the $85,000 provisionally agreed on October 7, 2010 (albeit before the Defendants obtained legal advice) was a global figure which did not assign any specific value to goodwill. However, assuming the same equipment/goodwill split assigned by the Plaintiff before, the goodwill element would have been worth $46,750;

    (c) the Defendants through their lawyer made an open offer to pay $50,000 for the assets and goodwill. Applying the Plaintiff's own apportionment formula, the goodwill element of this offer was 55% of $50,000 or $27,500;

    (d) I consider this apportionment formula to be a fair one because there is no suggestion that it was controversial prior to July 1, 2010 when the asset transfer occurred. Despite D2's attempt at trial to minimize the value of these assets, the importance of the telephone number as a convenient tool for the new dispatcher to be contacted by the wider public is too self-evident to require any further elaboration. I reject the suggestion that the value of the corporate client list was in any way diminished by the fact that the Defendants may not have chosen to exploit it;

    (e) it is not reasonably open to the Plaintiff to contend that the goodwill is worth more than the notional amount of $46,750 that it was implicitly willing to accept in October 2010, applying its own apportionment formula. It is not reasonably open to D2 to contend that the goodwill is worth less than the notional amount of $27,500 that his lawyer implicitly offered to pay in November 2010.

(f) bearing in mind that the Defendants' $50,000 offer for assets and goodwill was not expressed to be a final offer, I infer that the Defendants would likely have been willing to pay more for the goodwill alone had the parties negotiated with respect to goodwill alone and had the Plaintiff responded with a counter-offer closer to their own. In fact the Plaintiff responded to the Defendants' global offer of $50,000 with a counter-offer of $50,000 for the goodwill alone. This was, assuming the goodwill element of the global $85,000 figure represented only $46,750, simply not responsive to the Defendants' offer at all;

(g) on any sensible view of the negotiating history, the fair market value of the goodwill lies somewhere within the range of the Plaintiff's last notional offer price of $46,750 and the Defendants' notional counter-offer of $27,500.

28. The best indicator of the overall fairness of the global $85,000 valuation of which $46,750 may be attributed to goodwill is the fact that the Defendants verbally agreed to it on October 7, 2010. It is true that they were negotiating as lay persons with the Plaintiff's lawyer who himself had reservations about the propriety of proceeding to close the deal unless they obtained legal advice. It is possible that it was only after they obtained legal advice that the strength of their bargaining position was fully appreciated. However, they raised no principled objections to the Plaintiff's already reduced offer and simply engaged in what amounted to aggressive horse-trading which exploited the Plaintiff's by then weaker negotiating position. Moreover, when the Plaintiff issued proceedings, D1 was willing to accept the Plaintiff's original $85,000, even though this included items which had been retrieved. All of this suggests to me that the fair market value should be located at the top rather than the lower range of the negotiating scale.

29. Although his motives were somewhat mixed for making this concession, the fact that D1(D2's partner) felt that it was fair for him to be required to pay just under $50,000 for what was essentially the goodwill alone is not simply striking evidence of an insider's assessment of what the goodwill was actually worth. The commercial interests of D1 and D2 as business partners and joint Defendants were also substantially the same. While D1's failure to contest liability might not ordinarily be admissible against D2 in and of itself, D2 called D1 as a witness and he testified that he considered that this was a fair result.

30. Doing my best on the basis of the available evidence, I find that the goodwill should be assessed at $45,000.

Summary

31. The Plaintiff is entitled the recover from D2 $45,000 for the goodwill transferred on July 1, 2010 in circumstances where (a) a formal contract was intended to be concluded but was never consummated, and (b) it would be unjust for D2 to retain the benefit of the transfer which occurred. In addition the Plaintiff is awarded $800 under the Rental Agreement. Subject to hearing counsel if necessary, the Plaintiff would appear to be entitled to costs to be taxed if not agreed and interest at the statutory rate on the judgment debt. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, the Plaintiff shall be granted such costs and interests awards.

32. The Plaintiff claimed pre-judgment interest at the rate of 5% from July 1, 2010 on the original global figure of $85,000. D2 through his counsel did not positively dispute this claim, although Ms. Smith-Bean placed a leading case on interest in restitutionary claims, *Sempra Metals Ltd.-v-IRC* [2007] UKHL 34 before the Court. That case, albeit directly addressing interest recoverable in relation to money had and received, suggests that the Court has a flexible common law jurisdiction to award interest when granting relief in respect of restitutionary claims. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, the Plaintiff shall be granted interest at the rate of 5% on the sum of $45,000 from July 1, 2010 until judgment, with no pre-judgment interest being awarded on the $800 contractual rental arrears amount.

Dated this 31st day of March, 2015 _____

IAN R.C. KAWALEY CJ