JAMAICA

IN THE COURT OF APPEAL

R.M. COURTS CIVIL APPEAL No. 30/65

BEFORE: The Hon. Mr. Justice Lewis, Ag. President
The Hon. Mr. Justice Waddington
The Hon. Mr. Justice Shelley (Acting)

BETWEEN AIRCOOL AWNING Co. LTD - PLAINTIFF/APPELLANTS

AND WALTER SILVERA - DEFENDANT/RESPONDENT

Mr. R.N.A. Henriques for plaintiff/appellants

Mr. J. Cools-Lartigue for defendant/respondent.

29th, 30th June, 1966.

LEWIS, P.(Ag.),

This case concerns an agreement for the supply of awnings by the plaintiff/appellant company to the defendant/respondent. The plaintiffs sued for £82. 6. 5d alleged by them to be due for hireage of awnings, particulars of which were supplied to the defendant; and the defendant counter-claimed for the sum of £25, being a deposit paid by him to the plaintiffs in respect of the hireage of awnings.

The defence pleaded at the commencement of the trial, was that it was agreed between the plaintiffs and the defendant that the plaintiffs should supply awnings to cover carport and verandah, but the plaintiffs in fact supplied awnings to cover the verandah only, and the defendant said that it was a unilateral mistake.

The defence on the counter-claim was that the

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plaintiffs had completely performed the contract and/or substantially performed it and that the defendant was not entitled to the return of the deposit.

The plaintiffs called only one witness, their supervisor of installations, Rudolph Cardozo, and he put in evidence an order, exhibit 1, dated the 28th of February, 1963, and a hire purchase agreement, exhibit 2, dated the 13th of March, 1963, both of which related to the supply of two awnings. The measurements stated in the order were 180 inches with a coverage of 54 inches, and 174 inches with a similar coverage. The hire purchase agreement made no reference to measurements, but was in respect of two new Flexi-Palm Beach aluminium awnings; and it was agreed at the trial that both the order and the hire purchase agreement related to the same transaction. Both documents were signed by the defendant and the plaintiffs' salesman, R. Domville, and gave the price of these awnings as £100. The hire purchase contract showed that charges of £9. 7/- were added and credit given for an instalment of £25 leaving a balance of £84. 7/- to be paid by monthly instalments of £7. 0. 6d each, first instalment being payable on the 13th April, 1963. It was agreed that no instalment had been paid.

Mr. Cardozo said in evidence that he was not present when the agreement was made, but that on one occasion, which he suggested was sometime previous to the actual making of the agreement, he had gone with Domville to the appellants' home to discuss the question of the supply of these awnings, that together they had measured the area of the verandah and the carport and calculated the cost, and that he had told the defendant that it would not be possible to supply three awnings for £100, but three awnings would cost £140 to £150.

There was a conflict of evidence as to whether this

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visit took place, as Cardozo suggested, before the order was given, or whether it had taken place after the awnings had been brought to the defendant's home and rejected by him.

The order form bore on it, in the place allocated for "Diagram and other Instructions," a sketch which, again it was agreed, had been made by Domville the salesman at the time he took the order. That sketch showed a section divided into two parts and on it the defendant had inserted what purported to be four columns and the words 'column, columns, columns,' and the words 'car port' showing where the carport was; and the real dispute between the parties at the trial was whether this sketch indicated that there had been an agreement between Domville and the defendant that the awnings that were to be delivered were to cover both carport and verandah.

It appears from the evidence that the carport and verandah formed one continuous front. Under the same heading of 'Diagram and other Instructions' were written the words 'Install on Beam on Verandah,' and it was the contention of the plaintiffs that that indicated that the awnings would be installed only on the verandah and not on the carport. In answer to a question from this Court, counsel at the Bar agreed that there was only one beam common to the verandah and the carport.

Domville, the salesman, who admittedly had been responsible for this transaction on behalf of the plaintiffs, was not called as a witness.

The defendant's evidence was that early in 1963 he had been approached by Domville and asked whether he was interested in awnings, that after some discussion he had agreed to purchase two awnings to cover the verandah and the carport

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for £100. He had written, on the 26th of February, a letter to the plaintiff company (Exhibit 4) which reads as follows:-

"If you will complete my front as arranged with your Mr. Robert Domville for £100 I will pay £25 enclosed and bal. within 1 year, i.e. 352" x 46", 200" x 46". I want it in a pascal green to be approved of by my wife before."

As I have mentioned, the order form is dated the 28th of February, that is two days later, and the defendant said that when this order form was produced for his signature he did not observe that there was a difference between the measurements as set out on the form and those that he had written in his letter; but that he inserted upon the sketch which Domville had drawn those words 'car port' and 'columns' and drew in the columns in order that it might be quite clear that the awnings he was ordering were intended to cover both carport and columns, and he said that Domville specifically told him that this order covered both carport and columns. Subsequently, the hire purchase agreement was signed. It is not clear, although it bears date the 13th of March, whether it was signed on the 13th of March or whether it was signed on the 20th of March or about the 20th of March when it was alleged that the awnings were brought for delivery. I say that because the agreement contains a delivery receipt which also bears the date the 13th of March, but the evidence is that the awnings were not delivered until about the 20th March. However that may be, what is perfectly clear is that when the workmen went to the defendant's home to install the awnings he discovered that they were made only to fit the verandah and not the carport, and he immediately rejected them and wrote a letter dated the 20th March to the Company

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in which he stated -

"I would like to make myself clear that you have agreed to install awnings the entire length of my verandah and car porte (sic) 54" wide for the sum of £100. £25 down payment.

You agreed for 58" but I note you changed to 54".

I am awaiting the erection of same this week, if not return my £25 and forget the whole thing."

That letter was not acknowledged by the plaintiff Company and on the 23rd of March the defendant again wrote. However, in the meantime, Domville had gone to the defendant's home, but it is not clear whether on this occasion he was accompanied by Cardozo. The defendant said that Domville agreed that a mistake had been made and said that the Company would make good the additional awning for the carport. Now, one must be careful here because it is not the case for the defendant that he had ordered three awnings, his case is that he had ordered two awnings, but that those two awnings were to cover the verandah and the carport, and apparently, the question of a third awning only arose after he had rejected the two that had been supplied and Domville offered to supply an additional awning in order to make good the contract. The defendant accepted this offer, the two awnings were later installed, but the third awning was never delivered. The defendant make no further payment and the awnings were subsequently removed by the plaintiffs.

I should mention here, that in the course of his cross-examination, certain questions were put to him which bore upon a letter that he wrote on the 9th of August after the plaintiffs had begun to press him for payment of the balance of the price of the awnings. The plaintiffs had

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written on the 16th of May saying that he was now making various excuses for not paying the balance and that they regarded this as nothing more than delaying tactics. To this he had replied drawing their attention to his letters of the 26th of February, the 20th of March and the 23rd of March and in August he wrote this letter, in which he again referred to the whole transaction and said that he had signed the contract without reading it because at the time he did not have his reading glasses. Questions were put to him in cross-examination to which he replied that had he been aware that the specifications in the order only related to awnings sufficient to cover the verandah only, he would not have signed it. The significance of these questions and answers is that they have been used as a basis for the submission which was put forward by learned Counsel for the plaintiffs both in the Court below and in this Court.

The learned Magistrate accepted the defendant's evidence and he rejected Cardozo's statement that he had gone to the defendant's home with Domville before the contract was agreed upon. He took the view that he must have gone there after the dispute arose about the awning. He held that the insertion of the words "columns", "car porte" and the drawing in of the columns on the diagram indicated that the defendant had made it perfectly clear to Domville that he wanted the carport covered, and he said that he believed that Domville in order to get the awnings put up had promised that the plaintiff would supply a third for the carport. The final paragraph of his reasons for judgment is:-

> "I found that there was a unilateral mistake of which Domville was well aware, and as his knowledge was Plaintiff's, the Plaintiff had not completely or substantially performed the contract."

/He....

He therefore entered judgment for the defendant both on the claim and on the counter-claim.

Both in the Court below and here learned Counsel for the plaintiff has founded himself upon the hire purchase agreement as setting out the terms of the contract and has submitted that once the defendant signed that hire purchase agreement knowing that it was a hire purchase agreement relating to the awnings which he was ordering, even if there was a mistake the defendant was bound and could not have the contract avoided on the basis of that mistake. That submission he founded upon the cases relating to the defence of non est factum. He referred to Cheshire and Fifoot on Contracts (5th Edition) p. 205, where the learned authors deal with that defence, and cited the case of Muskham Finance Limited v. Howard (1963) 2 W.L.R. 87 where the law relating to that defence is discussed. In answer to a question from the Bench he submitted that this was so even if the plaintiffs admitted that a mistake had been made and that the defendant was not aware at the time of signing the agreement that the written document contained a mistake.

Learned Counsel for the respondent, on the other hand, has submitted that this is not a case of non est factum, that this is a case where the facts reveal that no contract was formed at all, because at the time when the documents which evidenced the contract were signed, the plaintiffs' salesman, Domville, knew that the defendant believed that the specifications set out in the documents were large enough to cover the carport, and he Domville knew that that was not so: so that this was a case of a unilateral mistake. It seems to me that this is the view of the facts which the learned Resident Magistrate has accepted. He said, "Initially he (that is, the defendant) wrote Exhibit 4 and took care to write below the diagram in the order Exhibit 1 the words, "columns car port" etc. in Domville's

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presence to indicate clearly that he also wanted the carport covered." The learned Resident Magistrate can only mean that Domville understood that that was the intention and that the defendant believed that those specifications, 180" and 174" would jointly cover the carport as well as the verandah. The fact that Domville, as the Magistrate accepted, after the awnings had been rejected by the defendant, promised to make good the remainder of the awnings, that is, to supply sufficient to cover the carport indicates also that he knew that the defendant was ordering from him awnings to cover both verandah and carport although he also knew that the specifications as set out in the two documents would not cover the carport.

Where that is the situation then in law no contract is in fact formed if the mistake is a fundamental one, and even though a document has been signed it is open to the party who has signed the document under such a mistake to avoid the purported contract. The reference to this aspect of the law is contained in Cheshire and Fifoot on Contracts (5th Edition) at pages 193 and 204. Where no contract has been formed the plaintiffs, it is conceded by learned Counsel, cannot sue upon it, cannot recover anything under it and would be bound to return the deposit. In my view the mistake here was of a fundamental nature. Awnings to fit the verandah alone are not the same or substantially the same as awnings to fit the verandah and the carport. The mistake being fundamental there was no contract and the plaintiffs, therefore, cannot recover.

For these reasons I am of the opinion that the learned Resident Magistrate's judgment was right and this appeal should be dismissed with costs.

WADDINGTON, J.A.,

I am also of the view that on the evidence there was

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clearly a fundamental mistake in the Order which was signed by the defendant, and that that mistake was known to the plaintiffs' representative. That was a fundamental mistake which vitiated the contract, and I agree that the appeal should be dismissed with costs.

SHELLEY, J.A.,

I agree and I would only like to make the observation that from one of Mr. Henriques' submissions it would appear that he was saying that once there is something in writing a defendant is bound by it and can only avoid it on the ground of the doctrine of non est factum; thereby ruling out the question of mistake in any other form. That, in my view, is not correct because the general doctrine of mistake clearly applies where the alleged contract is in writing as well as where it is not. I too agree that the appeal should be dismissed with costs.

LEWIS, P.(Ag.),

Costs £12.