

10/1/09

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. HCV 01223 OF 2004**

<b>BETWEEN</b>	<b>MERNA BENAIN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MERCELLA ROBINSON</b>	<b>FIRST DEFENDANT</b>

**Consolidated with**

**CLAIM NO. C.L.B. 111 of 2002**

<b>BETWEEN</b>	<b>MERNA BENAIN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>KEITH MORGAN</b>	<b>FIRST DEFENDANT</b>
<b>AND</b>	<b>MERCELLA ROBINSON</b>	<b>SECOND DEFENDANT</b>

**Ms. Nesta-Claire Smith and Ms. Marsha L. Smith for the Claimant instructed by Ernest A. Smith & Company Attorneys at Law.**

**Mr. Ravil Golding for the First and Second Defendants instructed by Lyn – Cook Golding & Company Attorneys at Law.**

**Breach of contract – Oral Agreement – Credibility of Claimant**

**HEARD ON: 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> of June 2009 and 27<sup>th</sup> of July 2009**

**BROWN J. (Ag):**

The claimant brought an action against the defendants to recover the sum of Three Million Five Hundred Thousand Dollars (\$3,500,000.00) that was given to the first defendant to construct a dwelling house on land owned by him.

The claimant operated a supermarket with her common law partner at Alexandria, St. Ann. The first defendant is a businessman and a former employee of a commercial bank in Brown's Town, St. Ann. The second defendant is the mother of the first defendant and the owner of premises situated at 74 Marley Acres, Old Harbour, St. Catherine. She is 87 years old.

The claimant alleged that on 3<sup>rd</sup> August 1995 she entered into an oral agreement with the first defendant that he would construct a dwelling house on lands belonging to him at Old Harbour, St. Catherine for Three Million Five Hundred Thousand Dollars (\$3,500,000.00) and he would eventually sell her said land. The parties did not negotiate a purchase price for the land.

The claimant testified that she met the first defendant while he was employed at the bank. He would assist her with her bank transactions. Shortly thereafter a relationship of trust developed. She confided to him that the relationship between her common law partner and herself was rocky and she was seeking a home to relocate with her children.

She had gone to Mandeville to view a property but did not find it suitable. He then offered to sell her a lot he owned and to construct a house for her on it. The construction cost was agreed at Three Million Five Hundred Thousand Dollars (\$3,500,000.00). She did not view or inspect the land and relied on his statements. He showed her a building plan and also a video tape of the land. She then gave him an initial deposit of One Million dollars (\$1,000,000.00) on 3<sup>rd</sup> August 1995.

Sometime thereafter he requested a further Five Hundred Thousand Dollars (\$500,000.00). She gave his friend Fred the money as directed. She also made a second payment of Five Hundred Thousand dollars (\$500,000.00) to Fred.

In 1996 she made the final payment of One Million Five Hundred Thousand dollars (\$1,500,000.00) to him at the supermarket. She reminded him that he had not given her a receipt for the sums paid to him and requested one. He did not have a receipt. She then took a sheet of paper and wrote an agreement between them. She dated it 3<sup>rd</sup> August 1995 and they both signed it.

The first defendant shortly thereafter advised her that the house was completed. She had the house furnished. She then visited the new house and was disappointed that it was not in a nice residential area as was advised. She requested the first defendant to have the property transferred into her name. This was not done.

One morning, while at the house she met the second defendant who advised her that the house belonged to her and not her son. She planned to leave it for him in her will.

The claimant told her that she had given the first defendant Three Million Five Hundred Thousand Dollars (\$3,500,000.00) to build the house and he had refused to transfer it to her. She threatened to report the matter to the police. The second defendant told her that the first defendant had said it was a rich white lady who helped him to build the house. She showed her the duplicate certificate of title and agreed to sell the house and repay her.

After repeated requests the defendants have not fulfilled their promise.

The claimant exhibited:

- (a) The agreement signed by the first defendant and herself
- (b) A receipt for the kitchen cupboard
- (c) Valuation report

The defendants denied the claimant's allegation that her money was used to construct a dwelling house on the land and that it was agreed that the property would be sold and the Three Million Five Hundred Thousand Dollars (\$3,500,000.00) repaid to her.

The first defendant alleged that the claimant and he had an intimate and sexual relationship from 1995 until she ended it on 12<sup>th</sup> September 2001. They met while he was working at the bank in Brown's Town. She was fearful that her common law spouse would find out if they met in the area. She would visit him at his home at 74 Marley Acres, Old Harbour.

He was renovating the house and she offered to assist him. She gave him approximately Three Hundred and Fifty Thousand dollars (\$350,000.00) and he added on a garage and a verandah. This was a gift to him out of her love and affection.

He denied signing any agreement with the claimant to construct a house for Three Million Five Hundred Thousand Dollars (\$3,500,000.00). He claimed that she gave him a blank sheet of paper to sign while they were in bed at his home. He claimed that the document was not a genuine agreement.

The claimant on the other hand sought to explain the inconsistency between the written agreement and her testimony. The agreement dated 3<sup>rd</sup> August 1995 clearly showed the claimant made only one payment to the defendant. She now claimed that she wrote it in 1996 and not 3<sup>rd</sup> August 1995. She paid only One Million dollars (\$1,000,000.00) on that date. She could not however recall the dates she made the other three (3) payments. The money was paid in cash and the first defendant did not give her any receipt.

By signing the agreement he would in fact acknowledge that he did in fact receive Three Million Five Hundred Thousand Dollars (\$3,500,000.00) to construct the dwelling house.

It was submitted on the claimant's behalf that the money was used to construct the house on 74 Marley Acres. The valuator's report done on February 6, 2002 described the house as new and in very good condition. The land was valued at Five Hundred Thousand Dollars (\$500,000.00) and the building at Three Million Five Hundred and Sixty Thousand dollars (\$3,560,000.00). This strengthened the claimant's case.

Counsel for the defendants' challenged the veracity and credibility of the claimant's case. He described the claimant as an older woman who was sexually attracted to younger men and was using the opportunity to establish a love nest outside of St. Ann.

She denied that the relationship she described as "one of trust" was in fact "one of love and intimacy." She said she could not have had a sexual relationship with him as he was nearly as old as one of her sons. She admitted sending him a letter dated 12<sup>th</sup> September 2001 ending their relationship. This letter reads:

*Hello Keith,*

*Good day, I have ment to write you this letter for a while now, Let me just come straight to the point the Relationship between us is over I havent any feelings for you anymore and so I am ending it. I will still see you as a very good friend, but nothing more than that please do not sit there and wait on me as a lover. As that will not happen "Keith" I think our relationship has died years ago as I haven't got any feelings for you where certain things are concerned. Please get your self someone that you can share your feelings with and be happy as I just cannot do that I don't have that feelings for you. I would have told you on the phone but I preferred to do it in writing your attitude over the years have just gotton to me and I am truly fed up of nothing. Please dont expect any thing from me when I come there more than what a friend would have offered. Hope you can understand from my point of view. Respectfully,*

*Merna*

It made no mention of any dispute between them as it relates to their ownership of the house or to his occupation. He lived there by himself. The claimant visited him about two (2) times per year. He was now being told not to wait on her but to find someone else who can share his love. Was this necessary to end a relationship of trust?

The first defendant would not have known that the claimant had found a new and younger lover. He was surprised and hurt when he found a letter dated 20<sup>th</sup> September 2001 written by the claimant only some eight (8) days after receiving his.

This letter was addressed to "Cris" who had stayed at the house. He was about twenty (20) years younger than the complainant. She however denied that she had an intimate relationship with Cris at the time she wrote the letter.

This letter reads:

*Hi Cris,*

*Good morning, kiss, kiss, kiss, kiss, kisses. Honey first of all let me say you were really looking cool and sexy this morning I really wanted to just kiss you all over but then I would be creating problems for both of us at an inapporate place. Honey I love you so very much I just wanted the very best for you and to just know that you are very happy. Ill be missing you like crazy "hon" But Ill just think of all Romantic times we have shared together and I am shure that will keeps me until I am in those warm and sexy arms of yours Again Honey you ment Every thing to me I truly truly loves you with all my heart. I just wanted you to know that now one else ment anything to me you are all I Need and will always love. So honey please be good until we talk again with all my all*

*Love Always*

*Merna*

*Enclose are the*

*Keys for the house*

*Please enjoy your stay.*

The burden was on the claimant to prove that:

- (a) There was an agreement with the first defendant to sell her a lot and to construct a dwelling house thereon.
- (b) That she paid to the first defendant cash in four (4) parts.
- (c) That the first defendant used the money to construct the house.

The claimant was a discredited witness. She denied that she had an intimate relationship with the first defendant and later Cris. These were two younger men that the evidence from the letters she wrote clearly showed that she was involved intimately with them.

The claimant had no independent witness to corroborate her account. Her agreement with the first defendant was to be a secret. She secretly took money from the business that she operated with her common law partner and gave to her lover. She gave him cash at all times and had no receipt. As a result, she drafted a document and had him sign to it. This document was not stamped and was not admissible as a receipt or an agreement.

This document was however inconsistent with her testimony. She now asserts that the date on it represented the first payment she made to him. She further asserted that she made four payments to him. This document she claimed was written when she made the final payment. However, this inconsistency goes to credit and cannot be treated as evidence of the truth of its content. The claimant had no written proof of any agreement.

The claimant maintained that the dwelling house on the land was constructed by the first defendant from the money she had given to him. She had not inspected or viewed the property

and therefore cannot say what building if any was there in 1995. She relied on a valuation report commissioned by her from Rogers' Real Estate Limited of Discovery Bay St. Ann.

In the report the valuator described the building as new. However, on the claimant's case it would have been constructed some six years before the valuation. In the circumstance it would be difficult to agree with the valuator's opinion. Interestingly, he valued the building for Three Million Five Hundred and Sixty Thousand dollars (\$3,560,000.00) almost exactly the same amount she had purportedly given to the first defendant.

The claimant was asking the court to treat this report as expert evidence. The maker of the document failed to indicate his qualification and experience neither did he state on what basis he came to his conclusion. It must be shown that the expert acted impartially on matters relevant to his expertise. In this instance the report was not an independent one as it was commissioned by the claimant.

She did not seek an order pursuant to Part 32 of the Civil Procedure Rules 2002 which would have been beneficial to the court. This valuation report must be viewed with great suspicion in light of the description of the building and the valuation.

The claimant sought to have the second defendant transfer the title into her name without negotiating a price for the land. She took away the second defendant's registered title for the land. She had to lodge a caveat to protect her interest. It was clear that the claimant was seeking to have the land transferred to her although she knew that there was no negotiation or agreement to sell.

The claimant's case lacked credibility. She claimed that she was in a rocky relationship and wanted to relocate with her children. Old Harbour is some distance from Runaway Bay. She did not know the area but was willing to relocate without first checking its suitability and convenience. She said she never visited the site throughout the construction and only did so when she was told it was completed. This is not the action of a prudent person.

The second defendant on the other hand maintained that she had bought a house from the Ministry of Housing. She had refurbished and extended it to a four (4) bedroom house. On her

return from England she observed that there had been additions to it. That is, a garage and a second verandah. The first defendant told her that his girlfriend had assisted him.

The second defendant was an elderly lady. She was 87 years old. Her age must affect her memory and clearly have some difficulties remembering some things. She was however adamant that the house that claimant says was recently constructed was not true. I accept her as a truthful witness.

The burden of proof lies with the claimant that she entrusted the sum of Three Million Five Hundred Thousand Dollars (\$3,500,000.00) to the first defendant that was used to construct a house on the second defendant's land.

She had no documentary proof that she paid him that sum. She evidenced a document dated 3<sup>rd</sup> August 1995 which could not have been executed on that day. The positioning of the signatures gave the impression that they were affixed on a blank paper and words were inserted later.

The credibility of the claimant was destroyed as it was shown that she was involved in romantic relationships with the young men. Her claim appeared to be contrived as the documents she relied on raised a great deal of suspicion.

This raised the inference that she gave the first defendant about Three Hundred and Fifty Thousand dollars (\$350,000.00) to assist him as he refurbished his mother's house.

The conduct of the claimant demonstrated that she was not seeking any house to relocate her family but to find a place where she could meet with her lover. It could be said she was assisting her young lover, that is, the first defendant to renovate and furnish his house where they could comfortably meet away from Brown's Town to prevent being discovered by her common law spouse and business partner.

In the circumstances the claimant's claim is dismissed.

Judgment to be entered for the defendants with costs to be agreed or taxed.