



[2012] JMSC Civ. 169

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 5735

BETWEEN	BLUE POWER GROUP LIMITED	CLAIMANT
AND	HYACINTH MCDONALD	1 st DEFENDANT
AND	TRUSTEE IN BANKRUPTCY	2 nd DEFENDANT

Ms. Symone Mayhew & Ms. Jeroma Crossbourne instructed by Scott, Bhoorasingh & Bonnick for the Claimant.

Mr. Hugh Wildman for the Defendants.

Heard: 9th and 10th May 2012 and 23rd November 2012

Contract – Agent – Goods credited by employee and used to refurbish employer's premises – Vendor unpaid – Employer in liquidation – Whether employee contacted in her own name or in the capacity as agent – Whether employee personally liable or liquidator liable.

Brown G. J

[1] The Claimant (formerly known as Lumber Depot Ltd.) is a duly registered company under the laws of Jamaica carrying on business as a supplier of hardware supplies. The 1st Defendant is an Interior Decorator who was an employee of Cash Plus Development Limited. The 2nd Defendant is the Liquidator of the Cash Plus group of companies and was joined as a party by Court Order dated 11th day of November 2010.

- [2]** The Claimant allege that by an oral agreement, hardware material and supplies were sold and delivered to the 1st Defendant between November 2007 and December 2007 and has an outstanding balance of One Million Eighty Three Thousand Five Hundred and Four Dollars and Fifty-eight Cents (\$1,083,504.58).
- [3]** The Defendants have not denied the claim and contend that the proper party to the proceedings is the 2nd Defendant, as Cash Plus Limited is in liquidation and not the 1st Defendant. Thus, the Claimant should await the outcome of the liquidation process as the 1st Defendant was at all material times acting as an agent with the Claimant's knowledge.
- [4]** The issue in this case is whether the 1st Defendant had contracted with the claimant as an agent of Cash Plus Limited or in her own name and without qualification between November 2007 and December 2007.
- [5]** The Defendants are not disputing that the 1st Defendant had obtained credit from the Claimant and that there is an outstanding balance on the account. The Claimant made demands on the 1st Defendant to settle the debt and on June 11, 2008 the Claimant's manager wrote to the Defendant. This letter reads:

Dear Mrs. McDonald,

We have provided you with the very best service in order to enable you to serve your clients. We extended short-term credit to you so that you could deal with your jobs expeditiously.

In return we have ended up with a receivable from you of \$1,083,504.58. You have indicated that you are awaiting payments from your clients in order to settle the debt with us. Unfortunately, we are not in a position to wait for our funds any longer. We have submitted various invoices as requested by you to third parties but we must emphasise that the responsibility for settling the account is yours and yours alone. We have no direct relationship with any of your clients and we do not have any standing with them to establish our claim.

We hold you responsible for this amount and unless you make arrangements with us to settle this, we will have no alternative but to turn this matter over to our attorneys.

Yours sincerely

Maj. Noel Dawes (retd.)

- [6]** On the 19th August 2008 Ms. Casie Jean Graham, Attorney-at-Law, responded on her behalf. This letter reads:

RE: HYACINTH MCDONALD ACCOUNT WITH LUMBER DEPOT LIMITED.

We are instructed to act for and behalf of Hyacinth McDonald in the captioned matter.

Our instructions are that whilst our client had entered into a short term credit facility with your client, the goods acquired were for the benefit and use of a third party.

Every effort is being made to liquidate the sums outstanding through the commitments we have received from the said third party. In light of this fact and based on the good business relations which have persisted over the years between our respective clients, we are seeking a stay of thirty (30) days from the date hereof before legal proceedings are instituted. During which time it is hoped that our client will be in a position to satisfy the outstanding debt.

Notwithstanding the foregoing, grateful we be apprised of any legal action which is being contemplated or has been instituted against our client.

- [7]** It was the Claimant's case that the 1st Defendant had been a customer of the Claimant since 2002 conducting transactions as the one in question on similar terms and conditions in her personal capacity as an Interior Decorator. She would purchase materials on credit on behalf of her clients as she decorate and renovate their properties. During the period, the Claimant instituted a credit facility for the 1st Defendant who was allowed to credit supplies up to one million dollars for a period of thirty days. Whenever a payment was overdue, the Claimant sought payment from the 1st Defendant and not her clients. In this case,

the outstanding sum is for goods that were delivered between November 21, 2007 and January 7, 2008.

[8] The Defendants, on the other hand, claimed that the Claimant was seeking to circumvent the liquidation process and place themselves in a preferential position over all other unsecured creditors of Cash Plus. In 2006 the 1st Defendant was employed to Cash Plus Entertainment Limited and was responsible for refurbishing at least three projects for her employer, namely Pricilla's Night Club, Hillshire Hotel and Katz Club. Her employer authorised her to credit supplies on their behalf and later settled with their cheques. Various employees including the 1st Defendant would order the goods which were then collected by another employee. Whenever a payment is due the claimant's employees would telephone Cash Plus employees and sometimes collect the cheque from their office. This was denied by the Claimant's employee who stated that it was the 1st Defendant who gave her the number to call to speed up payments. The Claimant's witnesses also denied that they collected cheques from Cash Plus offices.

[9] The fulcrum of the Defendants' case was (a) that at all material times the 1st Defendant contracted with the Claimant in her capacity as an agent of the 2nd Defendant which subsequently went into liquidation and not in her personal capacity. (b) That the 1st Defendant had disclosed to the Claimant's employees that her principal was responsible to settle the debt. Thus, the Defendants argued that the 2nd Defendant and not the 1st Defendant is to be held liable for the debt. The 1st Defendant, in her witness statement, said as follows:

In order to facilitate the performance of my duties, I was authorised to enter into arrangements for the employment of services and the provision of the required material at and to the respective properties of CPE.

In and around early 2007 I returned to Kingston to attend to project there, particular, renovation works on Priscilla's Nightclub and Katz Club; I started doing business with the Depot again.

For and behalf of CPE, I entered into an oral agreement with the Depot for the supply of lumber, cement and other hardware material to effect repairs and renovation to some of the properties owned and/or controlled by Cash Plus or CPE.

- [10]** The Defendants called three witnesses, who were formerly employed to Cash Plus, to support their case that the 1st Defendant was also an employee and had at all material times contracted orally with the Claimant for the provision of goods on credit as an agent of the 2nd Defendant. They testified that on a number of occasions various employees would place orders in addition to the 1st Defendant. The cheques for payments were made from their office and at times the Claimant would send and collect it. Mr. Winston Darby was the financial controller, Ms. Lexia Taylor, receptionist and Mr. Lenford Cooper, the driver who would usually collect the supplies.
- [11]** Mrs. McDonald admitted that she had in the past credited material from the Claimant on behalf of her clients but had not purchased anything recently. In 2006 she advised their employees that she was now employed to Cash Plus. They encouraged her to give the business to the company and also sought her assistance to invest in Cash Plus. She then commenced crediting material but never applied for any credit arrangement for Cash Plus.
- [12]** It is a well-established principle of law that a principal is vicariously responsible for all acts committed or performed by its agent within the scope of the agency. An agent who enters into a contract, not on his own account, but professedly as agent for a disclosed principal, is not in general personally liable thereon to the other contracting party; and this is so, generally speaking, even where the contract is in writing, provided that the contract sufficiently expresses that he is contracting merely as an agent for another party. (*Miller, Gibbs & Co. v Smith, Tyrer & Co.*) (1917) 2 K.B. 141. On the other hand, an agent contracting in his own name, without qualification, is personally liable upon the contract, unless the circumstances may be such that it is obvious to the other party that the agent is contracting on behalf of a principal even where the principal's identity is

undisclosed. (*Teheran-European Co. Ltd. v S.T. Belton (Tractors) Ltd.*). In *Busholme and Bolton v SG Read & Co.* (1871 LR 6 CP 486) it was held that, the fact that a person is an agent and is known so to be doesn't of itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the principal; there is a presumption that he is incurring a personal liability unless a contrary intention appears; and similarly where he signs in his own name without qualification.

- [13]** Counsel for the Defendant submitted that in this instant case all the surrounding circumstances were such that it was obvious to the Claimant that the 1st Defendant was contracting as an agent of the 2nd Defendant. The circumstances referred to by defence counsel are that; (1) a cheque was drawn on a 2nd Defendant's account (2) that the names of 3rd parties appeared on the invoices along with the name of the 1st Defendant, invoices which were submitted by the Claimant (3) Cash Plus employees, including the 1st Defendant, ordered goods (4) that the goods were collected by the 2nd Defendant's driver and (5) the Claimant's employees would telephone Cash Plus employees for payments to settle the account.
- [14]** Counsel for the Claimant, on the other hand, argued that the invoices issued for the goods supplied to the 1st Defendant were never done in the name of Cash Plus Limited but in the 1st Defendant and/or the entity she was renovating. This, the Claimant said, was consistent with her previous dealings. The evidence show that on a number of occasions prior to the 1st Defendant being employed by the 2nd Defendant, the 1st Defendant received invoices reflecting her name along with that of her clients. This, the Claimant asserted, was done at the 1st Defendant's request, so as to make it easier for her to determine which invoice belonged to her different clients and never intended to make the third party liable or responsible as principal.
- [15]** The Defendants also submitted that the Claimant knew that Cash Plus Limited was the principal as all payments were made by them and not the 1st Defendant.
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The Claimant disagreed with the Defendants assertion as it was not unusual for her to make payments with cheques drawn on a third party account or with her personal cheques. Copies of the cheques were exhibited which show that these were drawn on the accounts of Peaches McDonald, Hillcrest Entertainment Limited and Hyacinth McDonald. There was no cheque that was drawn on her employer Cash Plus Entertainment Limited account. The 1st Defendant had also stated that she had opened an account in her name to facilitate payments and had paid the Claimant from it. The driver was also employed to the 1st Defendant prior to 2007 in a similar capacity, collecting the goods on her behalf. Therefore, the existence of these circumstances, without more, is insufficient to draw the conclusion that the 1st Defendant was, at the material time of the contract, acting as an agent of the 2nd Defendant.

[16] It was also contended that the 1st Defendant had disclosed to the Claimant's employees that she was now employed to Cash Plus and that they were responsible for payment. The Claimant's witnesses denied this and maintained that the credit arrangement between them was always with her and not her clients. She never applied to them for credit on behalf of Cash Plus and the goods were credited to her based on their previous agreement i.e. in her personal capacity (by contracting in her own name). They also asserted that the cheques were always delivered to the Claimant's office by the 1st Defendant or Lenford Cooper, as evidenced by the Defendant's cheque collection book.

[17] The oral and written evidence adduced by the Defendants clearly support their case that the 1st Defendant was an employee of Cash Plus at the time and the materials credited were used on the latter's properties. Notwithstanding this, the 1st Defendant may be held liable for the outstanding debt. In the case of *Abdul Karim Basma v Weekes*¹, it was held that "an agent, who contracted in his own name, did not cease to be contractually bound because it is proved that the other

¹ 1950 2 ER 146

party knew, when the contract was made, that he was contracting as an agent, and the agreement which was made in his name did not cease...”

[18] The Claimant is denying that the 1st Defendant had in fact communicated this to them and maintained that even if she had made such disclosure, it would not have changed the situation. As far as the Claimant was concerned, the 1st Defendant had contracted in her own name and in her personal capacity and ought not to be allowed to escape liability. She had contracted in such a form as to make herself personally responsible. Much reliance was placed on the decision of *Jones v Little Dale* 1837 li2 ER 186, where it was, the Defendant ought not to be allowed afterwards, whether or not her agent was known at the time of the contract, to relieve herself from that responsibility. In *Calder v Dobell* 1871 LR 6 CP 486, the Defendant had contracted in his own name on behalf of his principal who was known to the Plaintiff at the time, Counsel for the defence submitted that there was a distinction between when a Plaintiff was aware at the time of the contract that the Defendant was acting as an agent as oppose to the Plaintiff having no notice of the agency arrangement. It was however held that there was no distinction between whether a Plaintiff was or wasn't aware that the Defendant was contracting as an agent at the time of the contract, where the agent contracts in his own name, he will be held personally liable, and the Plaintiff had a right to sue either agent or principal at his or her election.

[19] The 1st Defendant in this case was asserting that she did not contract in her name and that they knew that Cash Plus was responsible to settle the debt. Consequently she sought to discredit the letter from Ms. Casie Jean Graham, her attorney-at-law, to the Claimant as it was not disputing her responsibility to satisfy the debt. The letter admitted that she entered into a short term contract but made no mention of Cash Plus as her principal. She referred to an unnamed third party from whom a commitment was received to liquidate the debt. The 1st Defendant said that Ms. Graham was, at the time, the attorney for Cash Plus who she had asked to assist her in the matter. She had not retained her and

disagreed with the contents of the letter as written. She claims that it was contrary to her instructions as it made no mention of Cash Plus as the principal and that it was liable to settle the debt. Instead, the letter confirmed her short term credit facility with the Claimant and the good business relations that had persisted over the years.

[20] This letter clearly corroborated the Claimant's case and effectively destroyed the 1st Defendant's credibility. The documentary evidence show that she was an employee of Cash Plus and that the goods were used for their benefit. However she did not apply for a credit facility for her employer and instead credited the goods on the short term arrangement she had with the Claimant. The Claimant's employees were always aware that the goods supplied were for the benefit of a third party as indicated on the invoices. I therefore reject the 1st Defendant's evidence that she had advised the Claimant's employees that she was acting as an agent for Cash Plus which was the entity responsible to settle the debt and not her. I find that the 1st Defendant had contracted in her own name utilising her credit facility. It is my opinion that she is personally liable and the Claimant was entitled to sue her.

[21] The Claimant, in this instant case, did not sue the 2nd Defendant as the principal and denied that this was done to circumvent the liquidation process. It was the 2nd Defendant who had successfully applied to the court to be joined as a Defendant. It was clear from the evidence adduced by the Defendants that the 1st Defendant was an employee of Cash Plus Limited and was authorised to credit goods on their behalf. This confirmed the relationship of principal and agent between them. In *Teheran-European Co. Ltd.*, Lord Denning said: "It is well established rule of English Law that an undisclosed principal can sue and be sued upon a contract, even though his name and even his existence is undisclosed, save in those cases when the terms of the contract expressly or impliedly confine it to the parties to it". The failure by the Claimant to sue the liquidator initially was not detrimental to their case since it was for the Claimant to elect between suing the agent or the principal. It has not affected the 2nd

Defendant whom has accepted liability on behalf of Cash Plus and thereby seeking to relieve the 1st Defendant from the debt.

[22] It was evidently clear that throughout their business relations, the 1st Defendant dealt with the Claimant in her personal capacity and was given a credit facility from which she would purchase material to be used on her various projects as an interior decorator. She had contracted in her own name and not as an agent and by virtue of that the 1st Defendant is liable. The 2nd Defendant has accepted liability as the principal and cannot be allowed to escape since it is he who had his name added to the action. The Claimant is entitled to recover the debt from either of them.

Judgment is entered for the Claimant in the sum of \$1,083,504.58 against the 1st Defendant with interest at 12% from December 3, 2008. Costs against both Defendants to be agreed or taxed.