

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO: 9/2006

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	C.B. MACHINES SERVICE CO. LIMITED	1 ST APPELLANT
	COURTNEY BLAKE	2 ND APPELLANT
AND	KEITH FRANCIS	RESPONDENT

Mrs. Angela Cousins-Robinson, and **Miss Michelle Shand** instructed by **Robinson and Clarke** for the appellants.

Anthony Pearson, instructed by **Carl Dowding of Knight Pickersgill and Dowding** for the respondent.

July 6, 2006 and September 28, 2007

PANTON, P.

1. The appellants have challenged the judgment of Her Honour Miss Jennes Anderson, Resident Magistrate for the Corporate Area, wherein she ordered them to provide the respondent with either a new Uniwell cash register or the sum of seventy-two thousand dollars (\$72,000.00), being the cost of the register at the time of the filing of the action. The respondent was also awarded costs of ten thousand dollars (\$10,000.00), a sum that was agreed on by the parties.

2. The respondent, a businessman and restaurateur, filed suit against the appellants in respect of a cash register which he claimed was due to him by virtue of a contract between him and the appellants. According to the particulars of claim, as well as the evidence that the respondent gave before the Resident Magistrate, the appellants agreed to provide him with a new Uniwell 6600 cash register in exchange for a Sanyo ERC 240 cash register and twenty-six thousand dollars (\$26,000.00). However, it transpired that the appellants did not have the Uniwell in stock. As a result, in order not to lose the sale, the appellants offered to supply a Cassio TX 6000 cash register instead which they would program to suit the business needs of the respondent until a Uniwell was in stock. The respondent agreed, and gave the appellants his Sanyo cash register and twenty-six thousand dollars (\$26,000.00). The Cassio was provided by the appellants but it failed to meet the needs of the respondent and had to be returned by him.

3. The appellants did not give evidence in the Court below, although they had filed "particulars of defence and counterclaim" in which they denied the existence of any oral agreement as alleged by the respondent. They admitted that there was a transaction, but said it was limited to the trading in of the Sanyo and the purchase of the Cassio by the respondent. There was no condition attached to this sale as regards

the supply of a Uniwell 6600. There was a counterclaim for \$7,500.00 in respect of the programming of the Cassio.

4. The appellants made a no case submission which was rejected by the learned Resident Magistrate. In the circumstances, judgment was entered in favour of the respondent. In arriving at her decision, the learned Resident Magistrate stated the issues thus:

- “Whether the parties had an oral contract and if so
- What were the terms of the contract and;
- What was the consideration for such a contract
- Whether a case for the defendant to answer, had been established.”

She found that there was a contract between the parties. “The offer”, she said:

“was stated in terms of the plaintiff receiving a Casio cash register in exchange for his Sanyo machine and \$26,000.00 AND the promise that if the Casio performed unsatisfactorily then it would be replaced by a programmed UNIWELL as soon as the defendant had those machine(sic) in stock.”

According to the learned Resident Magistrate, the respondent accepted the offer on those terms, and the consideration was the Sanyo cash register and the sum of twenty-six thousand dollars(\$26,000.00).

5. The failure of the appellants to give evidence was frowned on by the Resident Magistrate who found that the respondent was an honest individual. It was also noted that the Sanyo cash register was relatively

new, having been purchased by the respondent on February 23, 2003, in New York, whereas the transaction between the parties took place on or about the 1st April, 2003. The Resident Magistrate found that, on a balance of probabilities, the respondent had proven his case. She found also that the legal requirements for the appellants to have made a no case submission had not been met. Consequently, the order stated in paragraph 1 herein was made.

6. The grounds of appeal are as follows:

"(1) That the learned judge was wrong in law in holding that there was a contract as the subject matter of the said contract was not in existence at the time and the Plaintiff provided no consideration for this alleged contract.

(2) That the learned judge erred on the facts where she found that the Plaintiff provided consideration in the sum of \$41,000.00, this sum was the purchase price for a different machine and constituted a separate contract.

(3) That the learned judge misdirected herself in that since she found that there was a contract, her order should be that of specific performance of that contract which would mean that the Defendant would supply to the Plaintiff the subject machine for which the Plaintiff would pay to the Defendant he (sic) purchase price of the said machine.

(4) That the Learned Judge's findings that there was a contract was wrong in law and against the weight of the evidence."

7. As foreshadowed by the grounds, the appellants' main argument was to the effect that the only contract between the parties was in

respect of a Cassio cash register as there was no specific identifiable Uniwell cash register in existence at the time of the transaction. So, it was submitted, there was no contract to supply a Uniwell cash register. In support of this reasoning, Mrs. Cousins-Robinson prayed in aid section 5 of the Sale of Goods Act which reads thus:

"5.-(1) A contract for the sale of any goods of the value of twenty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

8. Mr. Anthony Pearson, for the respondent, submitted that section 5 of the Sale of Goods Act has no bearing on the case. He submitted that the learned Resident Magistrate was correct in holding that there was a contract for the sale and purchase of a Cassio cash register upon certain

expressed conditions, namely that in the event that the Cassio malfunctioned, it would be replaced by a Uniwell free of cost. He said that section 12 (1)(c) of the Sale of Goods Act applied so far as conditions are concerned, and that the respondent was merely seeking to enforce the condition of the contract by the supplying of a Uniwell machine or the value thereof. Section 12 reads thus:

"12. -(1) (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Where a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

The response of the appellants to that submission was that the claim should have been for a breach of contract, seeing that the contract was a conditional one.

9. The response of the appellants is not readily appreciated given the fact that the respondent's claim clearly suggests the existence of an oral agreement amounting to an enforceable contract. The transaction as found by the learned Resident Magistrate is indeed in the nature of a contract. She had only one account of the transaction, in view of the failure of the appellants to offer any evidence. She found the evidence of the respondent credible, hence her judgment was inescapable. Section 5 of the Sale of Goods Act is inapplicable as it is geared for transactions in which goods are being sold in portions or stages.

10. This is not a case in which the terms agreed on by the parties, as found by the Resident Magistrate, presented any difficulty. The Court therefore had a duty to give effect to what it found the parties to have agreed to. In the House of Lords case **Scammell v Ouston** (1941) 1 All E.R. 14, at 25G to 26C, Lord Wright said:

"The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of

intention, however, is to be found in the words used. If these words, considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found....There are many cases in the books of what are called illusory contracts - that is, where the parties may have thought they were making a contract, but failed to arrive at a definite bargain.

It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."

In the instant case the respondent had recently bought a Sanyo cash register. It turned out to be inadequate for his needs. He wished a Uniwell instead. There was none in stock. He entered into a transaction with the appellants, at the latter's suggestion, to purchase a Cassio which the appellants would replace with a programmed Uniwell if the Cassio malfunctioned. The respondent's part of the bargain was the giving of his relatively new Sanyo cash register along with the appreciable sum of \$26,000.00 to the appellants. The Cassio malfunctioned, as found by the learned Resident Magistrate. There was no acceptable evidence to show otherwise, as the appellants provided none. In the circumstances, the respondent was entitled to an order for the delivery to him, by the

appellants, of a programmed Uniwell, or the cost thereof. That is what the learned Resident Magistrate ordered. Her judgment is unassailable.

11. Under ground four, the appellants challenged the Resident Magistrate's acceptance of the respondent's witness statement as his examination-in-chief. There is no doubt that there is no provision in the Resident Magistrates Court Rules for the use of the witness statement in this manner. However, it is obvious that the appellants consented to the proceedings being conducted in this way. In any event, it cannot be said that the appellants have suffered any injustice by this procedure, considering that they cross-examined the respondent on the basis of the contents of the said statement.

12. In the circumstances, there is no merit in any of the four grounds of appeal, and the appeal ought to be dismissed with costs \$15,000.00 awarded to the respondent.

SMITH, J.A.:

I agree.

McCALLA, J.A.:

I agree.

ORDER

PANTON, P.:

The appeal is dismissed. The order of the Resident Magistrate is affirmed. Costs \$15,000.00 to the respondent.