IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV05771

BETWEEN	**COMMUNTEL BROADBAND LIMITED**	**FIRST CLAIMANT**
AND	**STARCOM CABLEVISION LIMITED**	**SECOND CLAIMANT**
AND	**ALFRED McKAY**	**DEFENDANT**

Mr. Anthony Pearson instructed by Pearson & company for the claimants.

Mr. Sylvester Morris instructed by Lelieth D. Lambie-Thomas & company for the defendant.

Heard: April 11, 13 and 14, 2011 and February 3, 2012

SIMMONS, J.

[1] On the 28th February 2003 the first claimant and the defendant (the parties) entered into a written agreement for the lease of premises at 20 Hellshire Drive, Braeton in the parish of St. Catherine for one year commencing the 1st March 2003. The monthly rental was sixty thousand dollars ($60,000.00). The second claimant also operates its business at the said premises but is not a party to the agreement.

[2] It is alleged that during that year period the parties verbally agreed that the first claimant would with the permission of the defendant carry out improvements to the premises and that the defendant would in turn, extend the lease to ten years and reduce the rental sum. These improvements were undertaken between May 2003 and February 2004.

[3] On the 1st March 2004 the parties entered into another written agreement this time for a period of four years. The monthly rental was United States one thousand five hundred dollars (US$1,500.00) which the parties agree amounted to an increase of approximately 50%. The first claimant ceased paying rent in July 2007 and was served with a notice to quit the premises on or before the 31st

March 2008. The defendant also brought an action for recovery of possession in the Resident Magistrates' Court for the parish of St. Catherine.

[4] The claimants subsequently commenced this action in which they have claimed:

i. Specific performance of the oral agreement made between the Claimants and the Defendant in or about early 2003 whereby the Defendant agreed to lease the premises at Hellshire Drive, Braeton, St. Catherine for a period of ten years from the 1st March 2004;

ii. An injunction to restrain the Defendant by himself or through his servants and or agents from evicting or taking further steps to evict the Claimants from the said premises or to interfere with the Claimants' quiet possession of the said premises;

iii. A mandatory injunction ordering the Defendant to take steps to have electricity supply to be restored to the said premises;

iv. Damages for breach of contract;

v. Interest;

vi. Costs

[5] The defendant has alleged that there was no oral agreement between the parties and that the construction undertaken by the claimants were done without his consent or approval. With respect to the electricity the defendant alleges that the supply was disconnected as a result of the first claimant's failure to pay its bills when they were presented. He has also counterclaimed for the sum of United States nineteen thousand seven hundred dollars (US$19,700.00) in rent and continuing, recovery of possession, payment of the outstanding electricity bills and the replacement cost of the perimeter wall and gates.

[6] The claimants filed a Defence to the counterclaim in which they maintain that in light of the terms of the oral agreement they are entitled to remain in the premises. They also maintain that they are entitled to set off the amount of rental owed against the value of the construction undertaken by them. With respect to the electricity, the first claimant has alleged that the defendant failed to provide a letter authorizing the transfer of the meter into its name and that he also failed to deliver the bills in a timely manner. This it is alleged caused the electricity supply to be disconnected on several occasions and resulted in damage to the claimants.

[7] There is no dispute that the first claimant has failed to pay its rent from the 1st July 2007. The total sum outstanding to date is United States eighty four thousand dollars (US $84,000.00) which represents four years and eight months. It is also clear that the account for the supply of electricity to the premises was in

the name of the defendant up until some time in 2008 when the meter was removed. The claimants subsequently entered into a contract with the Jamaica Public Service Company for the supply of electricity to the premises.

[8] The issues are:

i. Whether an order for specific performance can be made in respect of the "oral agreement" between the parties;

ii. Whether extrinsic evidence may be adduced to vary the terms of the contract dated the 1st March 2004;

iii. Whether the first claimant is entitled to an order to compel the defendant to take steps to restore electricity to the said premises; and

iv. Whether the defendant can claim for the sums outstanding in relation to electricity bills for the premises.

Whether an order for specific performance can be made in respect of the "oral agreement" between the parties

[9] The claimants' case is based on the existence of an oral contract between the parties. The evidence in relation to this issue was given by Mr. Wesley Anderson on behalf of the claimants and the defendant Mr. Alfred McKay and his witness Mr. Easton Dorman.

[10] Mr. Anderson states that in 2003 during the currency of the one year lease, the parties agreed that the first claimant could with the defendant's approval carry out certain improvements to the property and that in return a lease for ten years would be granted at a reduced rental. No evidence was provided as to the mechanism by which the rent was to be determined. It is this "agreement" for which the claimant seeks specific performance. It is clear that the defendant knew of the construction and he has stated in evidence that he had knowledge of it even before he was so informed by Mr. Charles Ellis. However, there is no evidence that the construction plans were discussed with the defendant prior to the commencement of the work. Whilst it is clear from the evidence that the defendant knew that the construction was taking place and took no active steps to stop the claimant from proceeding, the question still remains as to whether this "agreement" amounted to a legally binding contract.

[11] The parties made written submissions in this matter ending with those of the defendant which were received in July 2011. Counsel for the clamant has submitted that specific performance of the oral agreement should be ordered on the basis that there has been part performance of the said contract by the first claimant. In support of this proposition Mr. Pearson referred to ***Kingswood Estate Co. Ltd. v. Anderson*** (1963) 2 QB 169 in which UpJohn J cited the following passage from Fry's Specific Performance, 6th edition:

> *"The true principle of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one, that they prove the existence of some contract and are consistent with the contract alleged."*

[12] Mr. Pearson argued that the acts of the first claimant in undertaking the construction must be referable to some contract between the parties. He underscored the point that the value of the building is quite considerable and it would not be logical for the first claimant to spend such a large sum in the absence of an agreement between the parties. He also stated that the court should consider the fact that the defendant has offered no explanation why the claimants constructed the building and why he did not stop them.

[13] Mr. Morris submitted that there was no oral agreement between the parties and that in any event, the said agreement as pleaded was incomplete and as such specific performance could not be ordered by the court. He pointed out that even on the facts of the claimants' case, the rental sum was not stated and no mechanism was prescribed to ascertain how much rent should be paid by the first claimant. Reference was made to the case of ***Scammell v. Ouston*** [1941] A C 251 in which the court found that there was no enforceable contract between the parties on the ground that a clause in an agreement was so vague that a precise meaning could not be attached to it. Counsel also referred to the case of ***Waring and Gillow (Limited) v. Thompson*** (1913) 29 T.L.R. 154 in which Buckley, L.J. stated:

> *"A contract which is void for uncertainty is not rendered certain by part performance…"*

Counsel also submitted that there was no proper consideration as the first claimant had failed to obtain the necessary approvals before erecting the building. That he said made the building an illegal one. He argued that the burden of proving that there is a concluded contract is on the first claimant and it had failed to discharge that burden.

[14] Mr. Morris proceeded to make the point that where is a written agreement between the parties oral evidence cannot be adduced to vary its terms. He also indicated that the first claimant did not challenge the March 1st agreement until approximately five years after it was concluded. Mr. Morris further submitted that as a result of this illegality, the first claimant was not entitled to be compensated in damages arising from its construction.

[15] The fact that the construction was undertaken without the necessary approvals was also raised in respect of the claim for compensation. It was argued that in those circumstances the first claimant was not entitled to receive compensation.

[16] With respect to the electricity it was pointed out that the lease agreement placed the responsibility for the payment of those charges on the first claimant.

Mr. Morris referred to the bill which was admitted in evidence as exhibit 5 which clearly shows an outstanding balance of one hundred and forty-eight thousand three hundred and eighty-eight dollars and seventy-three cents ($148,388.73) as at the 20th March 2008. Reference was also made to the evidence of Mr. Dorman in which it was stated that a letter addressed to the Jamaica Public Service Company Limited authorizing the transfer of the account to the first claimant was given to Miss Patricia Fields who worked in the claimants' office. He argued that the first claimant is not entitled to have the electricity restored based on the equitable maxim that *he who comes to equity must come with clean hands.*

[17] Counsel asked the court to rule in the defendant's favour on the claim as well as the counterclaim.

[18] It is settled, that in order for a contract to be legally binding there must be an offer, acceptance of that offer and consideration. The defendant has denied having any discussion with Mr. Anderson pertaining to the *"oral agreement".* Having assessed the evidence and observed their demeanour I find Mr. Anderson to be a fairly credible witness in respect of this issue. The defendant's credibility in my view was undermined in cross examination when he was asked about his knowledge of the construction especially as it related to the location of the pit. In one breath he stated that he didn't know why Mr. Anderson wanted to know its location but later stated that he did not want the construction to interfere with it. He also said that he watched what was taking place. His statement that he and Mr. Anderson had no discussion about continuing the lease after the first year is also incredible. I also make particular mention of his statement that "since the building go up I told him he had no written proof that he was to stay for ten years" which to my mind, speaks volumes. In the circumstances I find that there was some discussion between the parties concerning the undertaking of improvements to the property by the first claimant in return for a lease for ten years at a reduced rental.

[19] There is however, no dispute that the amount of rental to be charged was never settled and from the evidence it is clear that no method was prescribed for its settlement. I therefore accept the submissions of counsel for the defendant that "the oral agreement" was incomplete and that no order for specific performance could be made in those circumstances.

Whether extrinsic evidence may be adduced to vary the terms of the contract dated the 1st March 2004

[20] With respect to whether evidence may be adduced pertaining to the discussions between parties prior to the conclusion of a written agreement, the general rule is that extrinsic evidence may not be given to contradict or vary its effect. Such evidence may only be used to show that the written agreement did not represent the whole bargain and may be admitted to show that the written agreement does not correspond with the prior oral agreement between the parties. This was confirmed by Lawrence J in ***Jacobs v. Batavia and General Plantations Trust*** [1924] 1 Ch 287 at 295. The learned Judge said: *"…parol*

evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties". This rule shows that the court is concerned with the manifested intention of the parties as evidenced by their written agreement. There are however exceptions to this rule and such evidence may be admitted in the following circumstances:-

i. To show whether there is a valid contract;

ii. To show the true nature of the contract. However the written agreement will not be rectified to correspond with an oral one if that would amount to a variation of the former;

iii. To show that the contract is invalid due to duress, fraud, mistake, frustration, illegality or misrepresentation.

[21] The parties have not challenged the validity of the contract dated the 1st March 2004. The first claimant appears to be asking the court to vary the written agreement to correspond with aspects of the *"oral agreement"* between the parties. This according to the case of ***Angell v. Duke*** (1875) 32 L T 320 is not permissible. In that case the defendant agreed in writing to let premises to the claimant with the furniture therein. The claimant sought to lead evidence that the defendant had agreed to provide additional furniture. The court held that that evidence was inadmissible as parties having not included those terms in the written agreement were bound by it.

[22] In this matter it is significant that the first claimant made no effort to enforce this *"oral agreement"* until after proceedings were brought to recover possession of the premises. This five years delay is in my view quite considerable in circumstances where having expended a very large sum of money, the first claimant is alleging that it was given a shorter term than that which it had bargained for and at an increased rental. The Valuation Report which was admitted in evidence as exhibit 1 indicates that the improvements are valued between three million five hundred thousand dollars ($3,500,000.00) and three million seven hundred thousand dollars ($3,700,000.00). In any event, the first claimant appears to be asking the court to vary the period of the written lease to increase it to ten years based on prior discussions. The law is clear on this point. I therefore accept the submissions of Counsel for the defendant and find that extrinsic evidence cannot be used to vary the terms of a subsequent written contract. The parties are bound by the terms of the agreement dated the 1st March 2004 and the claim for specific performance is refused.

[23] The terms of the lease clearly stipulate that it was for a period of four years. It states:

> *"This tenancy is fixed for a period of four years commencing on the first day of March 2004 to the first day of March 2008."*

It is also gives the tenant one month after the expiration of the term to vacate the premises. In light of my ruling that the parties are bound by its terms, the claim for an injunction to restrain the defendant from taking any further steps to recover possession of the premises is refused.

[24] In accordance with the terms of the lease agreement of the 1st March 2003, it is my ruling that the defendant is entitled to possession of the premises as at April 1, 2008. The said agreement also stipulates that the first claimant is also liable to pay rent until it vacates the premises and returns the keys to the defendant. The first claimant having remained in the premises is therefore liable for the outstanding rental for the period July 1, 2007 to today.

Whether the first claimant is entitled to an order to compel the defendant to take steps to restore electricity to the said premises.

[25] The claimants' evidence is that the first claimant was unable to pay the electricity bills for the premises as a result of the defendant's failure to deliver the said bills to them. It is also their evidence that the electricity supply has been disconnected on previous occasions due to the non- payment or late payment of bills. They also allege that this is due to the defendant's failure to deliver the bills to them in a timely manner. Mr. Anderson's evidence is that due to the nature of the claimants' business the supply of electricity is vital. Yet no evidence has been given as to whether the claimants made any effort as the only occupant of the premises, to ascertain the balance due in respect of the electricity bills. Having received bills from the defendant on previous occasions, they were in my view, in a position to ascertain the status of the account in respect of the premises. In any event, in light of the fact that first claimant has made arrangements for the receipt of electricity and has provided no evidence that it has settled the outstanding balance of one hundred and forty eight thousand three hundred and eighty eight dollars and seventy-three cents ($148,388.73) the claim for a mandatory injunction is refused.

Whether the defendant can claim for the sums outstanding in relation to electricity bills for the premises

[26] With respect to the counterclaim for the outstanding electricity bill it is my ruling that in the absence of evidence that the defendant has paid these sums they cannot be claimed by him. As such no award is made in respect of those sums.

[27] The defendant has also claimed for the cost of replacing the perimeter wall and gates, however no evidence has been led as to the current state of the premises and the cost to remedy the situation if that is in fact necessary.

[28] Judgment is awarded to the defendant against the claimants on claim and against the 1st claimant on the counterclaim as follows:-

i. Damages in the sum of United States eighty four thousand dollars (US $84,000.00) plus interest at the rate of 3% per annum from the 19th December, 2008 to today;

ii. Recovery of possession of premises known as 20 Hellshire Drive, Braeton in the parish of St. Catherine on or before the 1st March 2012 ;

iii. Costs to the defendant against the claimants to be taxed if not agreed.