IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.466/99

BETWEEN	**COUTTES LIMITED**	**APPLICANT**
A N D	**BARCLAYS BANK plc.**	**RESPONDENT**

Dennis Morrison Q.C., for Applicant.

Michael Hylton Q.C., for Respondent

HEARD: 2nd, 3rd 5th May, 2000 and 7th October, 2002

G.G. JAMES, J.

By an amended Originating Summons dated November 8, 1999 the applicant sought the Declarations following, namely, that an Option Agreement ("the Agreement") dated October 11, 1995 made between the Applicant and the Respondent has been frustrated and that the applicant is consequently entitled to a refund of the sum of U.S.$150,000.00 paid to the Respondent pursuant to that Agreement.

The facts are not in dispute.

The Applicant and the Respondent signed an Option agreement dated October 11, 1995 by which the Applicant acquired an option to purchase all the shares of Saffery Limited ("Saffery"), a company which owned the shares in Barclays Finance Corporation of Jamaica Limited (Barfincorp).

Barfincorp then held a licence under the Financial Institutions Act 1992 ("the Act").

The option was exercisable within 45 days of the signing of the agreement and for this the Applicant paid the Respondent U.S.$3,000.00. The option was exercisable at a price of U.S.$147,000.00.

A term of the said option agreement was that within the period, after the said agreement was signed and before the option was exercised, the Applicant was required to apply to the Minister for approval of the purchase agreement, in accordance with Section 21(1) of the Act.

That section reads:

> 21(1) "Where any person enters into any arrangement in relation to any licensee by virtue of which, if the arrangement is carried out, obtain control of the licensee, the arrangement shall be subject to the approval of the Minister."

Consequently on November 3, 1995 the Applicant made its application under the Act to the Minister of Finance for approval of the said arrangement. By letter dated November 13, 1995 the Minister acknowledged receipt of the application, advising therein that he was considering the matter.

On November 27, 1995, three (3) days after the expiry of the "twenty-one days" stipulated for the minister to give his approval, the applicant exercised its option to acquire the shares in Saffery and paid to the Respondent the sum of U.S.$147,000.00, the balance of the option price.

Section 21(2) of the Act provides as follows:

> 21(2) "Where an application is made to the Minister for approval of an arrangement referred to in

subsection (1), the Minister shall, subject to subsection (3) give his decision within twenty-one days of the receipt by him of the application, so, however that –

(a) the Minister shall not give approval unless he is satisfied that –

(i) the applicant is a fit and proper person as described in subsection (3) of section 4; and

(ii) the interests of the licensee's depositors would not be prejudiced if the applicant obtained control of that licensee.

(b) the Minister may give approval subject to such terms and conditions as he considers necessary in the public interest but where the Minister refuses to give approval he shall notify the applicant and shall give him an opportunity to make written representations;

(c) if the Minister fails to respond within the twenty-one days as aforesaid he shall be deemed to have waived the requirement for approval."

Dennis Morgan in his affidavit dated November 8, 1999 on behalf of the Applicant, at paragraph 9 said:

"9. The period of 21 days as of the date on which the application was made to the Minister expired on the 24th November, 1995. Accordingly, acting under the terms of the Option Agreement and pursuant to Section 21 of the Act, twenty-one days having elapsed since the application was delivered to the office of the Minister of Finance and Planning, the Applicant proceeded to exercise the option..... and paid Myers, Fletcher and Gordon U.S.$147,000 on the 1st December, 1995....."

The applicant was clearly acting in reliance on the deeming provisions of Section 21(2)(c) of the Act.

The parties had expressly agreed in the Option Agreement at paragraph 11:

> "It shall be a condition to the exercise of the option that the Minister shall have approved or shall be deemed to have approved the application pursuant to the Act."

Nothing further was heard in respect of the said matter until the Deputy Governor of the Bank of Jamaica, by letter dated December 13, 1996 sought further information. Further, by letter dated February 7, 1997 the said Deputy Governor advised that the Minister was not yet satisfied.

By letter dated March 27, 1997 the Governor of the Bank of Jamaica advised that:

> ".....the Minister is not satisfied as required by Section 21(2)(a)"

In June, 1998, the Minister revoked the licence of Barfincorp under the Financial Institutions (Amendment) Act 1997.

Mr. Morrison for the applicant agreed that the option agreement dated October 11, 1995 between the Applicant and the Respondent was frustrated and that there was a total failure of consideration and as a consequence the Respondent has been unjustly enriched. The applicant is entitled to a refund of the sum of U.S.$150,000.00 paid to the Respondent under the said agreement.

In the modern law, as a general rule, where a contract between the two parties is brought to an end or the purpose cannot be fulfilled due to supervening unforeseen circumstances, not due to the act or neglect of either of the parties but to other external forces, the said contract is terminated and the parties discharged.

The principle is summarised in Chitty on Contracts, General Principles (27th edition), at paragraph 23-001, as follows:

> "A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."

This was the statement of the law in Davis Contractors ***Ltd. v. Fareham Urban District Council*** [1956] AC 696 (per Lord Radcliffe at page 729). However, if the parties have expressly addressed their minds to such eventualities and made provision in the contract for a supervening event, which in fact occurs, such an event cannot be labelled as unforeseen. Thus, Lord Simon in ***National Carriers Ltd. v. Panalpina (Northern) Ltd***. [1981] AC 675, at page 700 said:

> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the out-standing contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

In the instant case, I agree with the submissions of Mr. Hylton for the Respondent that there was no frustration of the contract.

The parties had agreed in the Option Agreement of October 11,1995 that before the Applicant entered into the purchase of the shares arrangements, it had an obligation to apply to the Minister for his approval of the contemplated purchase arrangement. The Applicant fulfilled that obligation. The parties were fully aware that the said Minister could approve or refuse to approve the said purchase arrangement. If he refused so to do, the applicant would in all probability, not have chosen to exercise the option to enter into the said arrangement. In that event both parties would then be free of any obligation, not having entered into such a contract.

The Option Agreement of October 11,1995 which in paragraph 11 reads:

> "It shall be a condition to the exercise of the option that the Minister shall have approved or shall be deemed to have approved the application pursuant to the Act."

Demonstrates that the parties did direct their minds to the facts that:

(i) the approval of the Minister was a condition precedent to the exercise of the option, that is, the purchase of the shares in Saffery arrangements;

(ii) they were content that the Minister could refuse to approve, could have specifically approved or be taken to have approve the arrangement; and

(iii) that the provisions of Section 21 of the Act governed their transaction.

At the expiration of 21 days from November 3, 1995, the Minister having failed to respond to the Applicant, the said Minister was:

> ".....deemed to have waived the requirement for approval" of the purchase arrangement.

The effect of the deeming provision of section 21(2) (c) of the Act was that thereafter, the requirement for approval of the arrangement was statutorily waived, it was no longer necessary, as a matter of law. In essence, the purchase of the shares arrangement, could validly be completed without more. There was no statutory impediment or obligation.

I agree with the submission of Mr. Hylton for the Respondent, in this respect, that the effect of the deeming provision in the statute is automatic and I agree with and adopt the words of Pearson L.J. in ***R. v. Brixton Prison (Governor)*** exparte Soblen [1962] 3 All E.R. 641 at page 669:

> "the words 'deems' normally means only 'is of the opinion' or 'considers' or at most 'decides,' and there is no implication of steps to be taken before the opinion is formed or the decision is taken."

Consequently on the proper interpretation of Section 21(2) of the Act, on November 24, 1995, the date of expiration of 21 days after the application of the Applicant, the Minister was, in Law, treated as having waived the requirement for approval. The Minister's silence and inaction was in law his "seal of approval." The way was now clear for the parties to enter into the contract of purchase of the shares in Saffery, in exercise of the Option Agreement of October 11, 1995. On November 27, 1995 the option was exercised and on December 1, 1995 the Applicant paid to Respondent the sum of U.S.$147,000.00, the balance under the purchase arrangement.

The contract between the parties was then completely performed. The applicant was then legally entitled to be registered as the owner of the shares in

Saffery, which held all the shares in Barfincorp. Barfincorp was the holder of a valid licence under the Act. The applicant was therefore the valid owner of the said licence.

Therefore, having been "treated as" or "deemed" as not requiring any approval from the Minister to enter the said purchase arrangement, the applicant was, in effect a licensee. There was no further obligation or duty on the Respondent to do anything further in pursuance of the contract. Neither was there any requirement that the Minister, ".....deem the requirement for approval of the arrangement.....", which he refused to do.

The obligations on both the Applicant and the Respondent were satisfied. The parties received all that they had bargained for, including the benefit of the deeming provision of Section 21(2) of the Act, in favour of the applicant.

I agree with the submission of Mr. Hylton for the Respondent in this respect.

The doctrine of frustration did not apply to the contract between the parties in the instant case.

Consideration is defined, simply, by the authors of Law of Contract by Cheshire, Fifefoot and Firmston, 11th edition, page 70, as:

> "...the price paid by the Plaintiff for the Defendant's promise....."

The doctrine of failure of consideration is defined, inter alia, by Chitty on Contracts (27th Edition) paragraph 29-034 in this way:

> "Where money has been paid under a transaction that is or becomes ineffective the payer may recover the money provided that the consideration for the payment has totally failed....."

In my view, there was no total failure or any failure of consideration at all. The Applicant contracted for and acquired all the share sin Saffery and as a consequence acquired also Barfincorp, then the holder of a valid licence under the Act. The licence was in force and in the possession of and effectively for the use of the Applicant from December, 1995 until June, 1998, when the Minister revoked the said licence of Barfincorp under the Financial Institutions Amendment Act, 1997. Full consideration was given. In addition, the Applicant still had the right to acquire under the deeming provision of Section 21(2).

Neither on the basis of the doctrine of frustration nor the failure of consideration is the Applicant entitled to a return of the money claimed.

On the basis of my views expressed above, the said contract of purchase was a valid contract. The money, that is, U.S.$150,000.00 was not paid on the basis of a contract subsequently found to be void. The alternative argument of counsel for the Applicant, relying on the recent statement of the law by the House of Lords in ***Kleinwort Benson Ltd. v. Lincoln City Council et al*** [1998] 4 All E.R. 512 fails. There has been no unjust enrichment. Restitution of the money paid is therefore not available to the applicant.

The statutory deeming provision of Section 21(2) of the Act operated in the Applicant's favour from November 24, 1995. From then the applicant was entitled to be regarded as a licensee by virtue of the purchase arrangement with Saffery. The Applicant could have validly called upon the Minister to perform his statutory duty under the Act and formally declare him a licensee under Section 21(2).

The Applicant omitted to do so for the period up to June, 1998 and significantly up to the time of filing of the Originating Summons herein against the Respondent in November, 1999.

For the above reasons the declarations sought in paragraphs 1(1) (2) (3) (4) and (5) of this Originating Summons (as amended) dated November 8, 1999 are refused.

With costs to the Respondent to be agreed or taxed.

I regret delay in producing this judgment. Unfortunately, the documents in this case have been mislaid or lost. I am grateful to the Attorneys and their clients for the extreme patience and co-operation they have displayed.