IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. D.090/1980

BETWEEN	WILFED DUNN	PLAINTIFF
AND	EVEROY CHIN	DEFENDANT

W.B. Frankson, Q.C. and Mrs. Margaret Forte for Plaintiff
R. Carl Rattray, Q.C. and Earl Witter for Defendant.

23rd March, 1990

CHESTER ORR J:

JUDGMENT

The delay in delivering this judgment, for which I apologise was due to a combination of factors, some of which were beyond my control.

This is a Claim and Counter Claim in respect of a transaction between the parties concerning a sawmill and a low-boy trailer.

PLAINTIFF'S CASE

On the 2nd April, 1976, the Plaintiff trading as Freddie's Tools imported a log saw-mill with engine portable on a trailer pursuant to an Import Licence granted therefor.

Jamaica Citizens Bank had an interest in the shipment.

The Plaintiff collected the necessary documents from the bank and made efforts to clear the goods from the wharf. He did not have the funds to do so. He was introduced by a Mr. Victor Barnes to the defendant, a customs broker. The plaintiff and defendant had a discussion which resulted in an Agreement, Exhibit 4. This Agreement was prepared by the Defendant and signed by the plaintiff and duly witnessed.

The Agreement reads as follows:

"1st February, 1977.

M/S. Freddie's Tool
108 Pembroke Hall Drive
Boulevard P.A.

In respect of One (1) used Saw-mill complete and one (1) used Low Boy Trailer both old and rusty, which arrived EX. KIRK EXPRESS Rep. 2/1/71 Bill of Lading No. M-2. This shipment is consigned to FREDDIE'S TOOLS and owned by FRED DUNN.

I, FRED DUNN of 108 Pembroke Hall Drive do hereby agree to hand over complete shipment of Saw-mill and Trailer to Mr. EVEROY CHIN who will be investing the sum of Eight Thousand Six Hundred Dollars ($8,600.00) on Saw-mill and Trailor, the said shipments will be taken to Mr. EVEROY CHIN place of keeping where as these machinery will be tested and the said Mr. EVEROY CHIN has the rights to choose any one of both items without any additional cost to him or to sell both in order to recover the above amount that have been mentioned.

He will also have first option to purchase which ever one may or will be for sale by me at the going market value.

Signed by me .....
FRED DUNN

February ...1st..... 1977

Witnessed ..V. Hugh Phang.....

February ...1st..... 1977"

The Plaintiff signed a Provisional Entry, a declaration under the Customs Law, Exhibit 5, in blank. This document shows the description and value of the goods.

The defendant cleared the goods from the wharf and both gentlemen travelled in the defendant's car to the defendant's property at Mango Grove in St. Catherine where the goods were deposited.

The plaintiff made efforts to obtain money to repay the defendant but was unsucessful. He made enquiries and discovered that duty had not been paid on the trailer. Exhibit 6 which was prepared by the defendant indicates the saw mill only as liable to duty. He made a report to the Collector General.

He wrote the defendant Exhibit 7, indicating that the defendant had not invested the amount of $8,600.00 as stipulated in the agreement but only $3,166.68 and asked him to remit the balance to Jamaica Citizens Bank.

The Defendant's Attorneys replied by letter dated 15th September, 1977, Exhibit 8. They stated that the defendant had invested a sum in excess of $9,000.00 and proposed to sell either or both of the items to recover the amount of $8,600.00.

There was further correspondence between the Attorneys for both parties with regard to the amount the defendant claimed he had expended under the Agreement. On the 17th July, 1978, the defendant's Attorneys intimated by letter Exhibit 17 that the defendant proposed to dispose of the goods to re-imburse himself for the sum of $10,871.36 which was itemised on Exhibit 17A, unless the plaintiff paid this sum within ten (10) days.

The plaintiff was not advised by the defendant but received information that the saw-mill had been sold.

Sometime in 1979 or early 1980 the plaintiff and Mr. Harry Johnson went with a wrecker to remove the trailer from the property at Mango Grove. They were unable to do so. The trailer had been removed to a location on the property to which access was gained by a steep descent. Wheels and parts were missing from the trailer.

Mr. Johnson was of the view that the trailer could be removed with some difficulty if the wheels and missing parts were replaced. A tractor head would be required to remove the trailer but he doubted the ability of the tractor head to reach the location of the trailer. The plaintiff asserted that a road would have to be built to provide access for the tractor head.

The plaintiff visited the property in May or June 1980 and the trailer then had four wheels and four tyres. One tyre was cut and all tyres were smooth.

In the meanwhile the plaintiff had pursued his investigation with the non-payment of customs duty on the trailer. This resulted in the detention of the trailer under the Customs Act which did not involve removal from the property. The plaintiff eventually paid additional duty of $495.00 on 17th December, 1979. See Exhibit 21.

By letter dated the 27th September, 1981, Exhibit 25, the Defendant's Attorneys advised the Plaintiff's Attorneys that the property at Mango Grove had been sold and indicated that the defendant could not take responsibility for the condition of the trailer should the plaintiff refuse to take delivery thereof. As a result the plaintiff went to the property but the trailer was still at the same location and wheels were missing.

In 1984 the plaintiff visited the property. The trailer was still in the same place and then had only four wheels and the tyre of one wheel had been cut. Photographs were taken of the trailer and tendered in evidence - Exhibit 26.

DEFENCE

The plaintiff was introduced to the defendant by Mr. Victor Hugh who told the defendant in the plaintiff's presence that the plaintiff had a portable saw-mill on the wharf which was for sale by auction.

The defendant took the plaintiff to Mr. Barnes for assistance but Mr. Barnes was unable to help so the defendant decided to assist. The plaintiff wrote the Agreement - Exhibit 4, which was typed by the defendant's Secretary.

The defendant cleared the goods from the wharf. The duty was assessed by the Customs Officers. Exhibit 6, Entry for goods liable to Duty was prepared in his office. He took the goods to Mango Grove accompanied by the plaintiff. The plaintiff never repaid the amount due under the Agreement.

On the advise of his Attorneys he took the saw-mill which he sold for $10,000.00.

He sold the property at Mango Grove in April or June 1981. The trailer was then on the property with all eight (8) tyres. He saw the trailer up to 1984 and it had on eight tyres and was not parked at the end of a descent as alleged by the plaintiff.

He incurred expenses in excess of the amount of $8,600.00 stated in the Agreement.

THE PLEADINGS

The plaintiff claimed that the defendant had breached the Agreement by failing to invest the sum of $8,600.00 and by illegally removing the trailer from the wharf without payment of duty.

He claimed:

(1) The return of:

(a) the saw-mill and engine

(b) the low-boy trailer or their value and damages for their detention.

(2) Alternatively, damages for conversion.

(3) Damages for trespass to the low-boy

(4) Alternatively or further an account together with all enquires and directions and orders.

Particulars of Special Damage were given by an amendment.

The defence alleged that the plaintiff had invoiced the saw-mill as portable in order to avoid payment of customs duty. That the defendant had exercised his option to select the saw-mill in accordance with the Agreement and that he invested the sum of $11,651.36.

The counter claim was for storage of the low-boy from 1st August, 1978 to 30th June, 1981 and watchman's wages in respect of the low-boy during the said period.

Mr. Rattray submitted that the defendant acted by virtue of his rights under the Agreement. There was no obligation on him to establish that he spent $8,600.00. If he spent less, the plaintiff's obligation to him was for $8,600.00 and the defendant would be entitled to his rights under the Agreement.

In any event the defendant had expended a sum in excess of $8,600.00 namely $10,671.36.

He had maintained storage of the trailer and when he sold the farm had advised the plaintiff to remove his goods. The plaintiff failed to do so.

The defendant was entitled to the cost of storage and watchman's fees from the date of his election in 1978 to the date of the sale of the farm in 1981.

Mr. Frankson submitted that the Agreement was conditional. The obligations of the defendant were:

(1) To rescue the goods, and

(2) To invest the sum of $8,000.00 in the goods.

The failure of the defendant to disclose the Trailer as goods imported and liable to duty was a breach of a fundamental term of the Agreement which conferred on the plaintiff the right to repudiate which he did by letter, Exhibit 7. The fact that he gave the wrong reason for repudiation was irrelevant. He cited authorities in support of his submissions.

FINDINGS

I find that the defendant was the author of the Agreement, Exhibit 4.

In construing the Agreement both parties submitted that the word "investing" should not be given its usual meaning.

The Oxford English Dictionary gives one definition of invest as -

> "To employ (money) in the purchase of anything from which interest or profit is expected; now especially in the purchase of property, stocks, shares, etc. in order to hold these for the sale of the interest, dividends or profits accruing from them."

In Chitty on Contracts 25th edition at 769 the learned authors state:

> "Words are to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense, they are incapable of being carried into effect."

I accept this as a correct statement of the law.

Accordingly, in the circumstances of this case, I hold that the word "invest" in the Agreement was not used in the ordinary meaning of the word. I hold that "invest" should be given the meaning of "expend".

I find that the object of the Agreement was to secure the release of the goods from the wharf. I find that the non-payment of duty on the trailer was the fault of the defendant.

Does this failure to pay duty amount to a breach of a fundamental term of the Agreement?

In Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1966] 2 All E.R. 61 cited by Mr. Frankson, at 68, Viscount Dilhome said:

> "In Smeaton Hanscomb & Co. Ltd. v. Sassoon I, Setty, Son & Co. (No. 1) (22), Delvin J. said that he thought a fundamental term was -
>
> > "something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates."

In this case the goods were removed from the wharf and the non-payment was discovered by the plaintiff some months later. Having regard to the factual background to the Agreement I hold that the non-payment of the duty was not a breach of a fundamental term of the contract.

I hold that under the Agreement the obligation of the defendant was to expend the sum of $8,600.00. He could only exercise the option when he had expended this sum.

Did the defendant expend this sum? The expenditure is listed in Exhibit 17A.

The disputed items were cash advanced to Freddy Dunn, storage, watchman's wages, travelling expenses for plaintiff and customer, to unload equipment and interest charges.

It is clear that cash advanced cannot be appropriated to the Agreement.

Travelling Expenses

I accept the plaintiff's evidence that he travelled in the defendant's car on a friendly basis and disallow this item.

Travelling expenses for prospective customer was not contemplated by the Agreement; this item is disallowed.

The Agreement is silent as to storage and watchman's wages.

In Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 2 All E.R. 260 at 268, Lord Pearson said:

> "an unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves."

The Agreement Exhibit 4 states:

> "the said shipments will be taken to Mr. Everoy Chin place of keeping...."

Applying the test indicated by Lord Pearson, I am unable to imply a term for storage charges.

On the other hand if the goods are to be kept safely at Mr. Chin's premises it would be necessary to provide some form of security.

I imply such a term and allow the expenses for watchman's wages.

There was no evidence to support the charge for unloading the engine and Interest charges were clearly not within the contemplation of the parties.

The total expenditure allowed is $6,645.45. This is less than $8,600.00.

As the defendant was not entitled to exercise the option he is liable for conversion of the saw-mill.

What is the value of the saw-mill at the date of conversion, July 1978?

There are conflicting estimates. I prefer the evidence of Mr. Joseph Thompson and value same at $10,000.00.

Re: the Trailer

I accept the evidence of the plaintiff and his witnesses particularly Mr. Harry Johnson as to the location and condition of the trailer. I find that it was removed to a location at the end of a descent to which access was difficult and removal doubtful.

The learned authors of Winfield and Jolowiez on Tort ninth edition state at p.418:

> "A bailee is not obliged to return the chattel to the bailor; he must merely allow the bailor to collect it."

I hold that the defendant by relocating the trailer as stated above has frustrated the removal thereof and has not allowed the plaintiff to remove same. He is therefore liable in detinue.

What is the present value of the trailer? Mr. Causwell a witness for the plaintiff, was the only witness who gave evidence of its value. He gave various estimates but finally settled on a value of $50,000.00 in 1984 which I accept.

In Earle Stephens v. The Attorney General C.L.S. 110 of 1976 February 4, 1988 (unreported), Zacca C.J. held that 40% should be added for inflation since 1984. Since 1988 there has been further inflation. In all the circumstances I assess the present value at $90,000.00.

In addition the plaintiff is entitled to special damages of $830.00 being expenses incurred in an attempt to remove the trailer.

There will therefore be judgment for the plaintiff on the claim for the sum of $100,830.00 and Judgment on the counter claim with costs to be agreed or taxed.