IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. E-087/96

BETWEEN	ECITON HAULAGE AUTO SALES CO. LTD.	PLAINTIFF
A N D	TROPICAL JALOUSIES LTD.	DEFENDANT

Mrs. Patricia Roberts Brown and Miss Suzette Wolfe, Attorneys-at-law for the plaintiff instructed by Crafton Miller and Company.

Miss Haydee Gordon, Attorney-at-law, for the defendant, instructed by Myers, Fletcher and Gordon.

HEARD: MAY 15 AND 16, 2000
JUNE 26, 29, AND 30, 2000
JANUARY 22, 2001

RECKORD J,

This is an action for breach of a contract in writing dated May 28, 1991 between these parties.

The defendant company is in the business as dealers in glass doors and steel shutters.

In May, 1991, the plaintiff needed glass doors and steel shutters for the premises at 59 Molynes Road, St. Andrew. Mr. Winston Notice of the

plaintiff's company, contacted the defendant's who sent Mr. Carlton Guy their sales representative, to do measurements. He did so on the 28th of May, 1991, when he was told the price and both then signed the agreement which contained specifications for three items (Exhibit I).

The plaintiff made payments in terms of the written contract totalling $47,000 over the period September 1991 and September 1993. In September, 1995, Mr. Notice requested delivery of the goods. He never got them. He spoke to Mr. Oscar Kerr, the Sales Manager of the defendant's company, who told him that the goods "were sold at a yard sale for less than what I paid for it and he was not willing to refund me any money." He called Mr. Guy at his home who said he can't understand how something like that could take place. As a result he contacted his Attorney-at-law.

In January, 1996 Mr. Notice met with Mr. Mel Alley, the general manager of the defendant company. Others present were Mr. Patrick Grant, Mr. Cornwall, Major Carter and Mr. Carlton Guy. Mr. Guy told Mr. Alley that he would ask Mr. Kerr to rebuild the goods so as to maintain a good customer relationship – Mr. Kerr refused. Mr. Alley asked Mr. Guy to return and re-measure. Mr. Guy did. Mr. Alley said the price for the goods would now be $200,000. Mr. Notice never accepted this proposal as he had already paid for the goods which were built according to specifications.

In the agreement with the defendant they were to deliver the goods and to install them when they were ready. He had never received any letter or telephone call neither had Mr. Guy informed him that the goods were ready.

Mr. Notice instructed his Attorneys-at-law to return the $47,000.00 that the defendant had sent. He was never told that the price was increased, nor labour rates had increased or that the Jamaican dollar had been devalued or that the goods were going to be on a yard sale.

As a result of not getting the goods ordered the plaintiff had to construct walls inside his building to protect goods there. Had the defendant supplied the goods he would not have constructed the walls. He had put in 2 doors, grill and 2 windows. He paid a Mr. Barry $51,000.00. To construct wall he paid Mr. Nesbert Bennett $46,500.00. Document showing final payment admitted as Exhibit 4.

In May this year two shutters would costs $347,000 including installation. Glass door would now be $90,000.00. as a result of the defendant's breach of contract, the plaintiff was asking the court to order specific performance as he still needed the shutters and glass. In the alternative he was claiming damages and the return of the money he paid with interest.

Under cross-examination, the plaintiff agreed that if the Jamaican currency devalued, the price of goods would increase. He agreed he had to pay 100% of the purchased price before delivery. He did pay the full purchase price. The 2 shutters were for the storage area while the glass was for the shop. He did nothing to his building to alter the areas specified for the shutters.

The plaintiff stated that Mr. Bennett has been working for him for a number of years and he was satisfied with his work. He did not shop around for other persons to do the job.

(On application of the plaintiff's attorneys-at-law the statement of claim was amended to include under special damages the sum claimed for expenses incurred. Amended Statement of claim filed 2/6/2000 filed.

This was the plaintiff's case.

Mr. Michael Brooks, the Sales Manager of the defendant company, said his company was one of the largest manufacturer of building products and allied equipment including doors, shutters, and windows. Some they manufactured and others are imported for re-sale. He had joined the company since 1996 and as sales manager he had access to the records of the

company. He gave a long and detailed evidence of the system that takes place when an order was made for equipment.

Mr. Brooks only became aware of this issue when he received a document (probably the writ). He went to the company's archives and found the plaintiff's files and sent them to the defendant's legal advisers. He found a document relating to the final measurements. He tendered in evidence a digest from the back of Jamaica as to the exchange rates between the Jamaican currency and that of the U.S.A. during the period 1991 to 1996.

During his tenure, yard sales were conducted by the defendant company. He worked with the company for 3 ½ years. He knew Mr. Mel Alley, Mr. Patrick Grant, Mr. Cornwall and Mr. Oscar Kerr. They no longer work with the company. He found no records that goods were made up for the plaintiff's company. If no deposit was paid, no work would be done. The company Tropicair Jalousies Limited is no longer in existence. He was aware that money was sent back to the plaintiff. When he last looked at the plaintiff's files, it did not show that the plaintiff had paid 100% of price agreed. He found nothing in the records to suggest that goods made for the plaintiff were sold at a yard sale. If there were any increases in the prices the plaintiff would be advised in writing.

This was the end of the defendant's case.

Both attorneys-at-law tendered their closing arguments in wrting.

SUBMISSION

Counsel for the plaintiff submitted that the payments were made in accordance with the terms of the contract which included the sum of $600.93 which was credited to his account for goods he had returned to the defendant. When the plaintiff was ready for the goods the defendant would deliver and install it. At no time did the defendant inform the plaintiff of any increase on the agreed price as a result of material, labour rates increases, or devaluation of the Jamaican dollars.

In September, 1995, the defendant was requested by the plaintiff to deliver and install the goods, but to date the defendant has failed to made delivery. When he inquired for the reason for non-delivery the plaintiff was told that they were sold at a yard sale. Although the defendant was advised to rebuild the goods for the plaintiff so as to maintain good customer relationship, the then sales manager Mr. Kerr refused to do so.

Counsel further submitted that the plaintiff's evidence through Mr. Notice was very credible and he ought to be seen as an honest and reliable witness. He agreed that the contract contemplated that if there were changes in the currency it would lead to a change in the price of goods ordered. He

could not dispute that there were changes in the exchange rates between May 1991 and September, 1995.

The plaintiff had made 100% of the purchase price as agreed in the contract.

Mr. Guy, the Sales representative, had made it clear to the plaintiff that the goods were ready for delivery as soon as the plaintiff could receive same. Nothing had been done to the plaintiff's building to alter the areas for which the goods were required.

As far as the defence was concerned, the only witness called was Mr. Michael Brooks, a former sales manager of the defendant's company. His only knowledge of this issue was when the writ of summons was served and what he saw on the records. He had joined the company in April, 1996. He knew that the company conducted yard sales which could include broken items, damaged goods and these with incorrect specifications.

It was the practice of the company that when there were changes in the prices of goods the customer would be told "face to face" or by telephone but that this would be followed up in writing. However, he saw nothing on the records to show that the plaintiff was advised of any changes. Although there were records of the goods sold at yard sales by the company, he never checked to see if the plaintiff's goods were sold. He did not know

what the company under new name now make. He could not give any estimate of the costs of these items although he was still involved in that type of business.

The defendant had failed to call any witness from the company or former employees to give evidence concerning this issue and very little weight can be given to Mr. Brooks evidence.

RE DAMAGES

It was submitted that the plaintiff's witness had taken steps to mitigate its loss due to non-delivery of the items ordered. He had produced receipts to show expenditure of $97,500.00 for grill work, construct wall, fit door jams etc. in mitigating his loss which was not challenged. The statement of claim had been amended to include this item of special damages.

RE SPECIFIC PERFORMANCE

The just and reasonable expectations of the plaintiff would be defeated if specific performance was not granted.

The plaintiff must as for as money can do, to be restored to the position he would have been in, had that particular damage not occurred. From the evidence the costs to build and install 2 shutters is $347,000.00 and costs of glass door $90,000.00.

Re: Interest:- This being a commercial transaction, the plaintiff is entitled to interest at the rate of 35.18% which was the interest rate in 1997.

DEFENDANT'S CLOSING SUBMISSION

Counsel acknowledged that the plaintiff contracted with the defendant to provide it with 2 steel security shutters and a glass door .

It was the defendant's case that to date, the plaintiff has not completed payment of 100% of the purchase price and has only paid $47,000.00 on account of the goods that it had ordered. The defendant admits that the terms of the agreement for sale are clear and unambiguous.

Counsel submitted that the prices quoted were subject to: Devaluation of the Jamaican currency. Increase in the price if raw material increase in the J.I.C. labour rates.

There were no dispute between the parties that the sum of $47,378.00 was the price agreed upon. The plaintiff had agreed that this price was subject to escalation. The defendant admits that it would have to communicate the final price to the plaintiff, however the invoicing had not yet been done.

There was evidence that the Jamaican dollar devalued significantly, as also the J.I.C. labour rates during the period 1991 – 1996 . There was no accord and satisfaction between the parties. The defendant never accepted

the payment made on the 25th of August, 1995, as the finally payment under the contract. The plaintiff having paid in excess of the sum, has not admitted to paying the exact sum quoted in the agreement for sale. The plaintiff having not completed payment of the 100% of the purchase price, it was not in a position to request delivery. Payment was a condition precedent to delivery.

Counsel submitted that the court should determine whether the goods ordered by the plaintiff were in fact sold by the defendant at a yard sale. The plaintiff has failed to prove this. The plaintiff's evidence in support of the defendant's alleged breach of contract is uncorroborated, contradictory and inconsistent.

Finally counsel submitted that no final measurements were taken as the building was not ready. In the absence of final measurements the defendant could not produce the goods ordered.

On the question of damages counsel for the defence submitted that no damage should be awarded to the plaintiff for the cost of $30,000.00 for building a wall to keep out dust The shutters ordered were for security. The costs of the wall is not referable to the breach of contract.

Re: interest.

The defendant having tendered the sum of $47,000 to the plaintiff, no interest should be awarded on this sum after the 28th of January, 1997. The damages the plaintiff is entitled to is the cost for procuring alternative goods. The plaintiff became aware of the breach of contract from September, 1995, but did nothing to remedy it until the latter half of 1996.

FINIDNGS

The defence filed in this action revealed no defence to the plaintiff's claims. The sole witness called by the defendant's company did not deny the plaintiff's claim. It appeared to me that the defendant was putting the plaintiff's case to proof. This matter ought to have come to the court for assessment of damages if the parties had failed to arrive at an amicable settlement.

The plaintiff's case was straight forward. They had placed an order with the defendant to supply steel shutters and a glass door for its office and warehouse which the defendant agreed to do after taking all the necessary specifications The parties agreed at a price of $47,378.00 which included installation. Over a period between 1991 and 1993 the plaintiff paid the full amount to the defendant. He called upon the defendant to install the goods which he has failed to do.

All the defendant has said is to give a long and detailed account of the system employed by the company after an order has been placed. He admits that a contract was entered between the parties, he had no record that full payment had been made by defendant; his record did not disclose if the three items ordered were ever procured or that they were procured and later sold at a yard sale. He personally could give no information regarding these goods as he had joined the defendant company only in 1996 and that others who were with the company at the relevant period no longer worked there. He agreed that his company sent a cheque to the plaintiff refunding the amount which it had paid, and that it was returned.

As a result of the defendant's failure to supply the goods, the plaintiff incurred expenses by putting up walls to protect his property which would not have been necessary had the defendant fulfilled the contract.

Both attorneys in their final submission made several reference to the Sale of Goods Act, which I think were quite unnecessary. This is a simple breach of contract which can easily be dealt with under the common law.

I find that the plaintiff fully paid the price of the goods and that when called upon to produce and install same the defendant failed to do so. The defendant having failed to notify the plaintiff of any increase of the contract price, it was obliged to supply to goods when called upon. I find that the

final measurements had been taken from the inception and for reasons unknown to the plaintiff the defendant failed to deliver. Although the plaintiff's company was informed that the goods were sold at a yard sale, the plaintiff was under no obligation to prove this.

From the evidence it was not clear whether the defendant company, having changed its mind since the action commenced, still supplied the type items that the plaintiff company needed. In those circumstances the court ought not order specific performance and damages will suffice.

Accordingly, there shall be judgment for the plaintiff against the defendant with damages assessed as follows:-

Special damages in the sum of $97,000.00 with interest at the rate of 25% per annum from the 10thof May, 1996 to today.

General damages awarded in the sum of $347,000.00 with interest at the rate of 6% per annum on the sum of $300,000.00 ($347,000. minus $47,000) from the date of appearance on 16/1/97 to today.

Costs to the plaintiff to be agreed or taxed.