JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 110/98

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**EXOTIC FRUITS AND FLOWERS LIMITED**	**PLAINTIFF/ APPELLANT**
AND	**AGRICULTURAL DEVELOPMENT CORPORATION**	**DEFENDANT/ RESPONDENT**

R. Manderson-Jones for the Appellant

Lennox Campbell, Senior Assistant Attorney General instructed by Director of State Proceedings for the Respondents

4th, 5th October & 20th December 1999

FORTE, P:

In its Statement of Claim the appellant claimed as follows in paragraphs 4 and 5:

> "4. By an agreement made in or about the 7th May, 1991, the Defendant agreed to sell to the Plaintiff the existing mango crop in the mango orchard on the (said) Spring Plain lands and to give the

> Plaintiff exclusive possession of the property for the purpose of reaping the crop from 7th May, 1991 to 30th August, 1991 (inclusive) for a consideration of $525,000.00 to be paid by the Plaintiff to the Defendant at the end of the crop or on 30th September, 1991 whichever is the earlier.
>
> 5. It was also a term of the said agreement that during the period of possession by the Plaintiff the Defendant would in good faith formalize and conclude a lease of the 978 acres to the Plaintiff for a term of 49 years at an annual rental of $489,000.00 for the land, $97,000.00 for infrastructure and a total figure of $2,100.000.00 for the mango orchard."

It was also pleaded that on the 7th May 1991, the respondent by letter of the same date placed the appellant in possession of the land, the appellant thereby taking possession. Then the appellant alleged that in breach of the agreement, the respondent by letter of the 11th July, 1991 unilaterally broke off the formalization and conclusion of the lease. After exchange of letters, the respondent on or about the 9th August, 1991 wrongfully entered the said lands, "driving the plaintiff's servants off and has thereby trespassed and is still trespassing thereon" unlawfully reaping and selling the plaintiff's mangoes. The appellant thereafter pleaded:

> "As a consequence of the Defendants said breaches of contract, trespass and conversion the Plaintiff has suffered loss and damage and has been put to great expense."

and set out the particulars of damage amounting to $403,072.00.

In his determination of the issues the learned judge made the following order:

> "1. Judgment for the Plaintiff on the Claim for $250,314.85 and on the Counterclaim with costs to be agreed if not taxed.
>
> 2. Order that the amount lodged by the Defendant in current account 131011814 at the National Commercial Bank being the proceeds of the sale of the mangoes be paid to the Plaintiff."

Before us, the appellant makes no complaint in respect of the order made, but challenges the learned judge's refusal to make the following declaration asked for in the Statement of Claim:

> "A declaration that the Plaintiff is and remains entitled to possession of the said property 978 acres at Spring Plain under the terms of a lease for 49 years granted by the Defendant."

The respondent in its pleadings maintained that there was no agreement for lease of the property but alleged that it allowed the appellant to take possession of the property for a period of 90 days on condition that a lease be agreed between the parties. The lease agreement having failed to materialize, the appellant's right to possession expired by "effluxion of time."

The issue, as it was refined in the arguments before us, was concerned with whether there was in fact an agreement for the lease of the property, between the parties as was alleged by the appellant.

In coming to his conclusion on this issue the learned judge made the following findings:

> "There was an oral agreement for a lease. Under the Statute of Frauds the agreement is unenforceable by action unless some memorandum or note thereof is in writing and signed by the party to be charged. The memorandum is to be found in the Memorandum of Understanding, Exhibit 1. This document does not state all the material terms of the Lease. The duration of the lease is not stated and there is a misdescription of the plaintiff. In addition it indicated that the terms of the Lease should be settled by the Attorneys, it is subject to certain conditions and creates no legal obligations between the parties. I find that agreement had not been reached between the parties."

In summary, Mr. Manderson-Jones challenged these findings of the learned judge in four aspects:

(i) The defendant's express admission in its pleadings – in its responses to Further and Better Particulars – that there was an oral agreement for a lease which provided full particulars .

(ii) That the learned judge having found that there was an oral agreement for a lease, erred in finding "that agreement had not been reached between the parties."

(iii) That the learned judge erred in not accepting the respondent's statement in paragraph 4 (iii) of the Further and Better Particulars that "the oral

agreement was reflected in the Memorandum of Understanding dated 7th May, 1991" and

(iv) That the learned judge erred in finding that the Memorandum of Understanding by itself as well as in conjunction with other documents constituted an insufficient memorandum for the purpose of the Statute of Frauds.

This appeal can be disposed of, by a simple interpretation of certain provisions of the Memorandum of Understanding signed by Exotic Fruits and Flowers Limited, ("the Company") on the one hand, and Agricultural Development Corporation ("ADC") and the National Investment Bank of Jamaica, ("NIBJ") on the other. In the document the Agricultural Development Corporation agrees inter alia to:

> (a) "lease or procure to be leased to the Company approximately 918 acres of land part of St. Jago/Spring Plains as identified in the diagram contained in Schedule 1 hereto."

And thereafter, both parties (ADC & the Company.) mutually agree that the lease should be settled between the Attorneys for ADC and the Company.

Of greater significance however is the precise terms of "Conditions" stipulated at the end of the memorandum which reads as follows:

> "Condition" The parties understand, that this Memorandum represents an understanding with respect to the matters upon which agreement must be reached, creates no legal obligations amongst the parties and is subject to the obtaining of such governmental consents which may be necessary."

The latter paragraph speaks in clear terms, that the Memorandum of Understanding was not in fact the agreed terms of the proposed lease, but would form the basis for negotiations between the parties and their Attorneys who would settle the lease. Significantly, the ADC agreed to "lease or procure to be leased" the said property, thus indicating that it might be necessary for a step to be taken before the land could be leased; that step being the governmental consent necessary which is stated as a condition at the end of the memorandum.

The respondent's case, inter alia, rested on the contention that the Memorandum of Understanding was nothing more than the title described, and was indeed not a contract.

Mr. Asgar Ally was then president of N.I.B.J. one of whose functions was the divestment of government assets, including Spring Plain Farms. As such, he was one of the signatories of the Memorandum. He testified as to the status of that document. He maintained that it would "come into being" when the negotiations were completed. "It forms part of the submission to Cabinet and is always subject to the decision of Cabinet which can reject, add, alter or delete any of its terms." He recalled that there would have had to be an agreement which would set out the terms and conditions incorporating the terms of the

Memorandum. However, he could not recall whether approval had been given by the Cabinet, as Mr. Peter Bunting, the President of the N.I.B.J. had handled the matter "after a while."

Mr. Bunting deponed that the negotiations with the appellant ended in the Memorandum of Understanding. He stated that it was so called because "it sets out the common understanding of the parties at that point" but was still conditional on a "whole number" of things happening subsequently before they could reach the point of a contract.

The above extracts from the evidence as outlined in the judgment of the learned judge, support his finding that agreement had not been reached by the parties, as the terms of the lease were to be settled by the Attorneys, and that the Memorandum was subject to conditions, and created no legal obligations on the parties. The respondent would therefore be well within its right not to enter into contract if the conditions were realized e.g. the non-approval of the Government.

The learned judge was correct in his conclusions, given the clear and unambiguous language of the Memorandum in this regard, which leaves no doubt that the parties did not consider themselves as entering into a contract at the time of its signing. That the appellant was of that view is also demonstrated in the letter dated 8th July, 1991 from the appellant to N.I.B.J. stating, inter alia,

> "In the meantime the Attorneys for Exotic will conclude the lease arrangements ..."

and in addition, letter dated 9th July, 1991 from the appellant to the Hon. Minister of Agriculture in which he states:

> "At present the lease document with Exotic ... is in an advanced stage of negotiation with the Attorney General's Office"

confirms that even subsequent to signing, the appellant regarded the terms of the lease as still uncertain.

That conclusion, clearly disposes of the appeal.

Mr. Manderson-Jones, however, made a valiant attempt to convince the Court that the Memorandum is evidence in writing of an agreement entered into between the parties, as it contained all the ingredients of a contract. On this complaint the learned judge also came to the right conclusion when he found that it did not, as quite apart from the reasons given heretofore, it did not state the duration of the lease. Lord Denning, M.R. in ***Harvey v. Pratt*** [1965] 2 All E.R. 786 referring to the certainty of the terms of a lease, said at page 787:

> "It has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. ... 'There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract must, in order to satisfy the Statute of Frauds, contain this reference'."

Mr. Manderson-Jones attempted to fill that deficiency by reference to an advertisement in the newspaper for the divestment of the property which stated the duration of time for which the lease of the property was proposed. That

submission has no merit as clearly an advertisement inviting applications, could not be used to determine what was contained in any subsequent agreement between the parties.

The appellant also relied on answers to interrogatories given by the respondent, on which it maintained that the respondent conceded that there was an agreement between the parties for the lease of the property. These answers however, indicate that the Memorandum of Understanding was based on the agreement between Spur Tree Farms, the Jamaican partner, and Quest Farms Inc, the foreign partner and itself (the respondent) that Quest Farms would have the majority shares in the appellant company as a condition to finalization of the agreement. The clear understanding was that more shares would be issued in the appellant company to Quest Farms Inc., to accomplish this, but this was never done. In the interrogatories, the respondent also answered that none of the terms of the lease could be agreed as at no time did Quest Farms Inc hold majority shares in the appellant company. The respondent however states in the interrogatories that there was an agreement between the appellant and itself which was oral but was reflected in the Memorandum of Understanding dated the 7th May, 1991.

The latter answer, on which the appellant relies to establish the agreement, in fact refers to the Memorandum of Understanding which, as I have concluded for reasons already given was not a contract, but merely the basis for settling of the lease by attorneys, assuming that the conditions did not prevent it. The answers also reveal another express condition set out in the

Memorandum i.e. the acquisition of the majority shares in the appellant company by Quest Farms Inc, which did not materialize, and so would justify the respondent's refusal to enter into contract with the appellant. The continuing involvement of Quest Farms Inc., was apparently vital to the conclusion of the lease. Exotic having been described in the Memorandum of Understanding as, "a subsidiary of Quest Farms Inc..." and in the recital as among the top producers of flowers in the U.S.A. Furthermore, the absence of Quest Farms Inc., would make one of the parties to the proposed lease fundamentally different from that envisaged by the Memorandum of Understanding. This contention is also without merit.

For the above reasons, I would dismiss the appeal, and affirm the order of the Court below. The respondent must have the costs of the appeal to be taxed, if not agreed.

HARRISON, J.A.

I agree.

PANTON, J.A.

I agree.