JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 118/2007

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	ISA TECHNOLOGIES INC.	APPELLANT
AND	LASCELLES LIMITED	RESPONDENT

Mr. Nigel Jones instructed by **Nigel Jones & Company**, for the Appellant.
Mr. Conrod George and Miss Noelle-Nicole Walker instructed by **Hart, Muirhead, Fatta for the Respondent.**

5 and 6 June, 2008

ORAL JUDGMENT

MORRISON, J.A.:

This is an appeal from a judgment of Mrs. Justice Norma McIntosh which was handed down on the 18th of October 2007, by which she granted an application by the respondent for summary judgment against the appellant in the sum of US$712,924.00, with interest at 3% from September 1, 2006. As a consequence of that order, the learned trial judge struck out the appellant's defence and also declined to make orders on the application which had been made by the appellant to

strike out items of the Particulars of Claim. The amount involved in the matter is not insubstantial, but the facts can be stated fairly briefly.

The appellant company is in the business of manufacturing equipment and they are based in Canada. In 2003, the respondent purchased from the appellant company a manufacturing system for the purpose of manufacturing styro-foam lunch boxes, styro-foam egg boxes and styro-foam plates. The system consisted of equipment which included machinery and accessories such as trays and other facilities.

The respondent contended at a very early stage after delivery of the equipment that it was not suitable and could not be brought up to the specifications that had been promised. It is clear that over a period of time there were efforts involving both the appellant and respondent with a view to getting the equipment to perform according to specifications. These efforts finally failed and as a result the parties entered into an agreement on the 29th of July, 2005 which was reduced to writing.

The respondent agreed in effect to resell the equipment to the appellant for the sum of US$712,924.00, and fairly detailed terms are set out in the letter of agreement which calls for the payment of the cost of transportation of the equipment from Jamaica back to Canada by the appellant and also provides that the respondent gives no warranty as to merchantability and fitness for the purpose.

Appendix I to the agreement sets out the payment terms and Appendix II sets out the payment schedule. The total amount due to the respondent was stated to be US$712, 924.00, payable in full upon sale of equipment to a third party by the appellant. The transaction was to be completed within six (6) months of the delivery of equipment to the appellant or to their freight forwarders.

The equipment was duly shipped back to the appellants, but the amount of US$712,924.00 was not paid within the six (6) months period. The appellant contended that it had not been able to achieve a resale of the equipment and therefore was unable to pay and as a result this action was brought by the respondent against the appellant claiming the amount of US$712,924.00.

The defence was essentially that the agreement of the 29th July, 2005, did not, firstly, intend to create legal relations and secondly, that there was no consideration for the agreement to pay US$712,924.00. It was purely a gratuitous offer by the appellant to, in effect, resolve what had become a difficult situation. The defence also contended that the appellant produced its best efforts to resell the equipment and, not having resold the equipment, therefore, they were under no liability to pay this sum to the respondent.

The agreement, it was said at paragraph 9 of the defence, generally lacked the vital elements of the contract. The appellant's

action was solely a form of professional and business courtesy as the respondent had previously purchased two lines of equipment from it and was considering a second project worth approximately US$750,000.00. The arrangement was for the appellant upon conclusion of a resale, to reimburse the respondent the sale price.

Based on that state of the pleadings, an application was made by the respondent for summary judgment. In support of that application, an affidavit was filed by the Managing Director of the respondent company, Mr. Bruce Terrier. Mr. Terrier's affidavit sets out the history of the matter and says at para. 8:

> "The system supplied by the defendant was not of merchantable quality nor was it fit for the purpose of manufacturing styrofoam containers and as such the defendant breached the contract for sale."

and in para 9 it says:

> "In or about February 2005, the claimant accepted the defendant's repudiatory breach of the implied condition of the contract for sale and notified the defendant of its rejection of the goods."

Mr. Terrier referred to the letter of agreement of the 29th of July 2005, to refer to its terms and to say that the claim was therefore for damages for breach of the contract.

At para. 17 Mr. Terrier says:

> "The claimant submits that the consideration offered and accepted by the defendant was

> that the claimant would not sue the defendant for the breach of the implied condition of the contract for sale."

Mr. Terrier stated that it was an agreement which involved the elements of a contract on both sides which would therefore involve consideration as well.

An affidavit in response was filed by Mr. Al August who held a similar position in the appellant company. In that affidavit Mr. August summarizes the history of the matter, in terms not substantially at variance with what Mr. Terrier had said. He was concerned to demonstrate that there was nothing wrong with the equipment and that with proper training of the respondent's personnel, the equipment would work. Specifically in respect of the claim based on the July 29 agreement, he said at paras. 11 and 12:

> "Whilst we admit to having promised to take the equipment back in an attempt to resell it, such a promise was given gratuitously and the PCL gave no consideration therefor. We are advised by Attorneys-at-law, both in Canada and in Jamaica that the Agreement generally lacked the vital elements of a contract. Our action was solely a form of professional and business courtesy since Plastic Containers Limited had purchased two (2) lines of equipment and was considering a second project worth approximately US$750,000. The arrangement was for the Defendant, upon conclusion of the resale to reimburse Plastic Containers Limited the sale price of US$712,924. The defendant also agreed to ship the equipment back to Canada at its own expense of

> approximately US$14,000. There were never any understanding or communication between the parties which suggested that my company would benefit from the second 'Agreement'."

Mr. August went on to say:

> "Even if the letter dated July 25, 2005 represents a contract, which is strictly denied, we would not have breached such a contract."

Then he deals with the payment terms and emphasizes the statement at Appendix 2, that the price was payable in full upon sale of the equipment to a third party.

He further went on to say that at all relevant times he exerted considerable effort in trying to find purchasers for the equipment and currently there are still interested purchasers. Plastic Containers Limited has not been paid because the condition subsequent that payment is due in full upon sale of the equipment has not materialized through no fault of the parties.

On this evidence, the respondent contended that the goods had been rejected and a copy of e-mail correspondence from Mr. August to Mr. Terrier on the 1st March 2005 stated as follows:

> "Good morning Bruce, with regret I am writing to confirm our understanding of change of plans: which you discussed with me by phone yesterday Feb. 28.

> We have stopped our shipment of components and cancelled our flight reservation for our visit to PCL.
>
> We will be in touch to discuss an orderly programme to accommodate your wishes to end our relationship."

And then the answer to this from Mr. Terrier is:

> "Dear Al,
>
> I am also saddened by the result of our joint efforts to get the foam plant up and running. This has led to the ultimate conclusion that the equipment that we have will never deliver the finished product efficiently, which was the main criterion that we required in order to operate in a highly competitive environment.
>
> We are most anxious to close this chapter thus allowing us to move on so we are eagerly awaiting your instructions as to the shipment of the equipment that we have and details of our compensation."

Norma McIntosh, J found on this evidence that there was in fact a compromise agreement. She held that the July 29, agreement was signed at an important point. It sets out the terms of the agreement between the parties and it also stated the terms on which it should be governed, that, is by Jamaican law at different sections and at various headings setting out how payment should be made.

In my opinion it represents a binding agreement. McIntosh J referred to Mr. Terrier's affidavit and the issue of forbearance to sue and further stated that this was a compromise agreement, also that the

behaviour of the appellant was such that it was not denying responsibility, it was paying for the shipping to take back the equipment. The learned judge found that the July 29 agreement was legally binding with consideration and so the defendant's application to strike out could not succeed.

She went on to say that the appellant's defence had no reasonable prospect of success and as a result of that she struck out the defence and made the order referred to at the outset of this judgment.

Mr. Nigel Jones who appeared for the appellant below and in this Court challenged both the findings of the learned trial judge; that there was sufficient evidence in the claimant's affidavit to establish consideration, and defining the July 29, letter as a compromise agreement. He challenged that on the basis that the judge's exercise of her discretion was unreasonable in the light of the evidence and he asked that the judgment be set aside and reversed.

In his argument before this court, Mr. Jones concentrated on trying to demonstrate to the court that in fact there was no consideration. He did not pursue the contention that there was no intention to create legal relations. In light of the formal terms of the July 29 agreement, I do not think that is a position that could seriously have been maintained and it is to his credit that, Mr. Jones did not seek to do so. But he submitted strongly that there was no consideration. He also submitted with regard

to the respondent's position that the consideration was that no suit would be filed, there was no clear indication that in fact the respondent was going to file any suit and therefore it would not amount to a compromise agreement. He also contended that under the terms of appendix 2, payment did not become due until the equipment had been resold. The equipment had not been resold and therefore, there could be no liability for the payment.

Mr. George for the respondent contented himself with three submissions. He said that:

> "(1) on its face this was a sale and purchase agreement and is a contract with consideration;
>
> (2) this is a compromise agreement; and
>
> (3) in any event the prospect of future business which Mr. August spoke of as a motivation for entering into the agreement was in itself good and sufficient consideration."

With regard to Appendix 2 on the issue of payment, he submitted that the agreement must be construed in such a way as to make business sense, that the six month term mentioned in the appendix must be given some meaning and that the only sensible business meaning was that it provided an outside limit after which if the goods has not been resold, then the appellant would be liable for payment.

We have considered carefully, the submissions on both sides and we have come to the conclusion that this appeal cannot succeed. The

learned trial judge was in my view plainly correct in deciding on the state of this evidence that this was a compromise agreement. It is quite clear from the exchange of emails on March 3, 2005 that the respondent was plainly foreshadowing a claim. He did not say it in so many words, but he did say that he was awaiting information as to details of its compensation. He was awaiting a proposal from the appellant as to how he could be compensated for the equipment which he was now proposing, and which apparently had been agreed in telephone discussions between Mr. August and Mr. Terrier, should be returned to Canada. That is the relevant context and against that background , the July 29 agreement comes to the scene. In my view, on that ground alone the respondents were entitled to succeed.

Mr. George referred us in his skeleton arguments to a decision in the case of ***Callisher v Bischoffsheim*** [LR] 5 QB 449 in which Cockburn, C.J. said:

> "The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference... Every day a compromise is effected on the ground that the party making it has a chance to succeeding in it, and if he bona fide believes he has a fair chance of success he has a reasonable ground for suing and his forbearance to sue will constitute a good consideration..."

In my view that is the law and it makes good sense: on the appellant's side the motivation for entering into the agreement which is proferred is

(1) as a professional and business courtesy and (2) for the prospect of future business. It is also good commercial sense and that is one of the bases upon which compromise is often entered even if a party is not fully convinced of its own liability .

In my view the case for the compromise agreement is without doubt. I also think there is a lot to be said to Mr. George's first submission, which is that on the face of it, the contract is one for the sale and purchase of equipment. In order to undermine it in any way it would be necessary to put forward evidence as to the surrounding circumstances and the motivation of the parties which in my view might well amount to a breach of the prohibition against using extrinsic evidence to alter the terms of a written agreement.

For those reasons, the appeal must be dismissed on the basis that the learned trial judge was correct in her determination. It cannot be said that the learned trial judge erred in the exercise of her discretion in any way and there is no basis for this court to disturb it. As a result the appeal is dismissed and the respondent will have its costs to be taxed if not agreed.