[2013] JMSC Civ. 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIRCUIT COURT

CLAIM NO. 2010/HCV03934

BETWEEN	**VIOLA MILLER**	**1ST CLAIMANT**
AND	**PAUL MILLER**	**2ND CLAIMANT**
AND	**MARILYN STEWART**	**DEFENDANT**

Ms. Catherine Minto instructed by Nunes Scholefield DeLeon and Co. for Applicant.
Mr. Anthony Pearson instructed by Pearson and Co. for Respondent

HEARD ON: 20th December 2012 and 3rd October, 2013

Civil Procedure - Application for Court Orders – Striking out – Summary Judgment – Stamp Duty Act – Promissory Note

CORAM: MORRISON, J

[1] The cause of the suit at bar is as a result of an agreement in writing, so called, dated 8th April 2005, by which the defendant promised to pay to the claimants the sum of five hundred thousand dollars on or before the 31st December, 2005.

[2] As critically observed by the Defendant, the claim form does not set out the basis for the promise. The what, why and wherefore of the promise has not been supplied: "just what has or would the Defendant obtain in return for her promise to pay five

hundred thousand dollars ($500,000)", asks the Defendant. Again, as observed by the Defendant, the so-called Agreement was not attached to the Claim Form as Part 8 of the Civil Procedure Rules demand. In further vitiation of the agreement, criticises the Defendant, the said agreement has not been exhibited to any reply or response to the affidavit in support of the application to strike out, nor has any counter affidavit been filed by the claimant.

[3] The Defendant's Notice of Application for Court Orders, as adverted to, dated October 6, 2010, seeks to strike out the claim or, in the alternative, asks for summary judgment on the grounds that first, the claim discloses no reasonable cause of action and second, that the claim is otherwise an abuse of the process of the Court and a waste of the Court's time and resources.

APPLICANT'S SUBMISSIONS

[4] First, there is no mutual consideration for the promise to pay. Accordingly, it is not a legally binding agreement and cannot be enforced in a court of law. Second, the transaction runs afoul of the Statute of Frauds as the claimants say that the $500,000.00 is to be paid in relation to the sale of land, part of Waterloo Avenue, St. Andrew, lastly the Applicant suggests that were the court to give countenance to the claim it would be lending itself to the approval of illegality.

[5] The Applicant placed emphatic reliance on the Stamp Duty Act; **Barrington Price v. Kavanagh Investments Ltd. E042 of 1993**; **Allan Toppin v. Raymond Lee et al, Suit No. E321 OF 2000**, **Forbes v. Millen's Liquor Store (Dist.) Ltd**, **Suit No. E478 of 2001**; **Swain v. Hillman [2001] 1 ALL E.R. 91**, and other cases.

RESPONDENT'S SUBMISSIONS

[6] The Respondent was content to repose on the submission that the Stamp Duty Act provides cover for the claim for $500,000.00which is grounded in the promissory note of April 8, 2005. As such the Respondent recruited the authorities of **Birchall and Others v. Bullock (1896) 1QB 325**; **R v. Peter Blake, 16 J.L.R. 61** and **Stanley Lalor v. Ainswort Campbell, Suit No. E 24 OF 1976**.

The Facts

[7] The Claimants are relying on a promissory note or an agreement of April 8, 2005 between themselves and the Defendant in respect of the sale of property, part of Waterloo in the parish of Saint Andrew.

[8] It appears that there was a subsequent agreement for sale dated April 26, 2005 between the said parties in relation to the said property. In respect of the subsequent agreement the relevant taxes were paid and the property duly transferred to the defendant as is borne out by the Certificate of Title.

[9] As to the second agreement it is to be noted that it makes no mention of the first agreement, as such, it must be assumed that the second agreement superseded the first agreement.

[10] A statement of Account was issued by the former attorney-at-law of the Claimants under cover of letter dated June 21, 2005, addressed to the Defendant. It showed that the Defendant owed the sum of $119,945.00: What then, of the additional sum of $500,00.00 that was to be paid on the sale price pursuant to the agreement for Sale of April 26, 2005 in the context of the payment of stamp duty and transfer tax on the amount of $3,500,00.00?

The Issues

[11] The issues that are generated resolve into asking and answering, first, whether there was mutual consideration for the promise made by the defendant to pay to the claimants the sum of $500,000.00. Second, is the promissory note of April 8, 2005, purportedly embodying the promise to pay the sum of 500,000.00, in relation to the sale of the said property, offensive to the Statue of Frauds? Third, is the claim for the payment of the $500,000.00 tainted with illegality?

Resolution

[12] In engaging the issue of the promissory note I accept that in order for legal liability to accrue there has to be in contractual terms, an offer followed by an acceptance of that offer and, finally there must be consideration. All three elements must inhere, As to the latter, both parties must receive something in return.

[13] Accordingly, where there is no mutual consideration for the promise it cannot become legally binding.

[14] Applied to the instant case, the pleadings, on its face, do not disclose what benefit, if any, accrued to the Defendant as a result of entering into the promise. The following case exemplifies the principle.

[15] In **Tweddle v. Atkinson [1861] 121 ER 762**, the fathers of a young couple who intended to marry agreed that each would settle a sum of money on the couple. The father of the prospective bride died before settling the sum as promised thus precipitating the would-be groom to sue the executors of the estate of the deceased when they refused to pay over the money. Though the Plantiff was named in the agreement the suit failed as he had not given any consideration for the said agreement.

[16] I now move to deliberate on the applicability of the Statue of Frauds to the claim. If, which has not been deflected, the Claimants answer to the Defendant is that the payment of the additional $500,000.00 is in relation to the sale of land, part of Waterloo in the parish of Saint Andrew, then, such a transaction must not offend the Statue of Frauds.

[17] It is trite law that the disposition of land must be evidenced in writing. Since the Claimants say that the additional sum of $500,000.00 is in relation to the sale of the said land, it follows that it must be evidenced in writing. However, the promissory note was not annexed to the Claim Form nor was it exhibited to any reply or response to the affidavit in support of the Application to Strike Out. In point of fact, what has been

annexed is the Agreement for Sale dated April 26, 2005. Even so, the agreement for sale omits any mention of the so-called agreement that is embodied in the promissory note of April 8, 2005. It follows that the promissory note was not incorporated into the agreement for sale. Had it been, the Stamp Duty and Transfer Tax that was in fact paid on the agreement for sale of April 26, 2005, reflected that fact only without the liability for taxes on the promissory note sum. Accordingly, the transaction not only violates the Statue of Fraud but it also signalizes illegality.

[18] I shall now enlarge on the above. In doing so I go to the Stamp Duty Act for its applicability to the questioned transaction. According to Section 33 of the Act, the expression “bill of exchange” includes draft, order, cheque, and letter of credit and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression “bill of exchange payable in demand” includes:-

(a) bills of exchange payable at sight or on presentment.

(b) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen.

[19] From the extract above it is clear that The Stamp Duty Act identifies a promissory note as one the instruments on which stamp duty is payable.

[20] Further, says Section 36 of the said Act, “no instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof”. These are plain words yet are the subject of disagreement between the parties.

[21] In **Birchall and Others v. Bullough**, **supra**, the judgment of the court, taken from the headnote, is, that in an action for money lent, an insufficiently stamped promissory note, purporting to be signed by the defendant and expressed to be given for money lent, was put into the Defendants hands by the Plaintiff's counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan. It was held that the Plaintiffs were entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act 1891, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever". It will suffice to give a brief rendering of the facts.

[22] The Plaintiffs, as executors of the estate of a deceased, sued for money lent by the deceased to the Defendant. The Defendant, prior to the trial of the suit, had refused to answer an interrogatory whether he did not sign a promissory note whereby he had promised to pay to the deceased a certain sum of money by a certain date. He had objected to do so on the basis that the promissory note was inadmissible in evidence it being insufficiently stamped. However, at the trial, the very objection was raised again by the defendant. The Defendant's counsel was overruled.

[23] Upon the note being placed in the Defendant's hands, he admitted that the signature to it was his. The trial judge gave judgment for the Plaintiff. On appeal the Defendant's counsel submitted that the note being insufficiently stamped ought not to have been used at all, and the Defendant ought not to have been required to look at it as the Stamp Act, 1891, provides that an instrument insufficiently stamped, as this was, "shall not … be given in evidence or be available for any purpose whatever".

[24] Wright, JA and Bruce JA, rejected that argument: "All that was done with the note in this case", according to Wright, JA, "was to put it into the Defendant's hands for the purpose of challenging his recollection, and that was, in my judgment, a purpose for which the Plaintiff's counsel was quite entitled to use it. The judge does not appear to have admitted the note as evidence."

[25] It will be seen at once that both the first instance judge and the judges of appeal did not give the expression, 'for any purpose whatever' in the prohibition of the Stamp Act, 'shall not … be given in evidence or be available for any purpose whatever', a restricted meaning.

[26] It seems to me that the above decision does not pertain to the domain of substantive law but to the law of evidence. The latter determines how facts may be proved in a court of law, and what facts may not be proved thereby. Further, it also facilitates how a witnesses credibility on an issue may be challenged.

[27] In **Stanley Lalor v. Ainsworth Campbell**, **supra**, the Plaintiff brought an action against the Defendant, that if proved, could have led to the forfeiture of the Defendant's standing at the Bar who up to 1969 had served the private bar for (18) years. In the course of trial the Defendant's counsel one of three documents which the plaintiff admitted signing. It was a conveyance which was admitted in evidence as an Exhibit over objection by counsel for the Plaintiff arguing as he did that since the document was not stamped it breached Section 36 of the Stamp Duty Act. Wright, J (as he then was) said the document was not being advanced to secure its enforcement but for the sole purpose of impugning and discrediting the witness and was clearly admissible for that purpose. This case re-affirms the evidentiary purpose for which such a confrontation can be used: for impugning and discrediting a witness.

[28] In **Regina v. Peter Blake, supra**, the Appellant was convicted after a trial by judge without jury. The sole eye-witness for the prosecution, in cross-examination, gave evidence consistent with the defence but inconsistent with his evidence in chief as to where he had found the Appellant with a gun after he had run away from the police who went in chase of him. Defence counsel, in endeavoring to impeach the credibility of the witness, placed a newspaper clipping in the hands of the witness and began asking him questions which the judge forbade, holding as he did that the relevance of the document in issue must first be established before he would permit any question to be asked.

[29] It was held on appeal that counsel was entitled in cross-examination to confront a witness with a document regardless of its admissibility and without disclosing its contents, to elicit a response from the witness which might be favourable to the facts which the cross-examiner is seeking to establish or damaging to the credit of the witness being cross-examined as a result of questions which may subsequently be asked. During the course of his judgment Watkins, JA delivered himself in this fashion: "…both the learned trial judge and counsel for the crown were mistakenly of the view that counsel for the Appellant was seeking to put to the witness a previous statement that he had given which was contrary to whatever degree to the testimony he had given in court, and pursuant to this view were enjoining Defence counsel to lay the proper evidential basis for such questions. In fact Defence counsel was seeking to invoke another rule of evidence at common law some antiquity and far less commonly met in practice than the one referred to above".

[30] It is evident that even if the promissory note is of evidential value all that it would accomplish is proof that there was a promise by the Defendant to the claimant to pay a certain sum by a certain date to the latter. But the promissory note, being rank, offends the Statute of Frauds. Significantly, it also marks another offence it being vitiated by illegality. As such no court will aid an illegality by allowing a party to rely on or benefit from that persons illegal transaction. Whether the illegality is pleaded or not such a person will have to prove the claim without recourse to the illegal transaction.

[31] The legal maxim of *ex turpi causa non oritur* action summarizes the doctrine. It comes to this. No court ought to be called upon to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him.

[32] Notwithstanding, the presumption of law is in favour of the legality of a contract therefore if it be reasonably susceptible of two meanings or two modes of performance,

one legal and the other not, that interpretation is to be put upon the contract which will support it and give it operation. It lies upon the party seeking to set aside a contract for illegality to prove it: see **Hire Purchase Co., v. Richens [1887] 20 QBD 387**. However, if the contract on the face of it shows an illegal intention, the onus lies upon the party supporting the contract to show the legality of the intention.

[33] In **Re Mahmoud and Ispahani [1921] 2. KB 716** the Plaintiff agreed to sell and the defendant to buy 150 tons of linseed oil. By a statutory order then in force it was illegal to buy or sell or otherwise deal in linseed oil unless both parties had a licence. The Defendant did not have a licence. The contract was illegal and unenforceable irrespective of the parties' state of knowledge about the existence of licences.

[34] The legislative basis of the illegality is twofold: The Transfer Tax Act and the Stamp Duty Act.

> Under the Transfer Tax Act, Section 3(1), it provides that "subject to and in conformity with the provisions of this Act, tax shall be charges at the rate of seven and one-half per centum of the amount or values of such money or money's worth as is, or may be treated under this Act as being the consideration for each transfer … of any property; and tax charge in respect of such transfer shall be borne by the transferor". There are provisions in this Act where the transferee who has an obligation to pay the tax can recover it from the transferor: See Section 8(1) also, where documents are not stamped in obedience of the Act, such documents, according to Section 19, are deemed not stamped for the purposes of the Stamp Duty Act.
>
> Under Section 2 of the Stamp Duty Act, stamp duty is payable on transfers of real property: "there shall be raised, for the use of the government of this island, upon the several instruments mentioned in the Schedule, the several duties therein respectively specified…" Allied to the above is Section 37 of the Act which makes every instrument null and void where with intent to evade the Act a

consideration or sum of money that is expressed to be paid is less than the consideration actually paid or agreed to be paid.

[35] In the Belizean case of **Azucena v. De Molina, [1995] 50 WLR 85**, reading from the head note, it was held that, "where both the vendor and the purchaser of land were aware that a false figure had been inserted into a deed of transfer as consideration in order to reduce the amount payable as stamp duty on the transaction, the contract and the transfer were tainted with illegality by reason of fraud on the revenue". Public policy prevented the court from giving effect to the contract or the transfer. Further, where the vendor who invokes the aid of the court to enforce his rights under such contract had been involved in the illegality, the court will not give effect to the contract even if the purchaser has not pleaded the illegality.

[36] I need not enlarge upon the judgment of Meerabux, J as it has the blessing of an impressive and binding array of authorities: any agreement which tends to be injurious to the public or against the public good is invalidated on the grounds of public policy. There are five groups of public policy where contracts may be invalidated: objects which are illegal by common law, or by legislation; objects injurious to good government either in the field of domestic or foreign affairs; objects which interfere with the proper working of the machinery of justice; objects injurious to family life; and, objects economically against the public interest.

[37] In **Chettiar v. Chettiar, [1962] PC 295**, a father transferred 40 acres of his 139 acres of land with rubber cultivation to his son for a purported consideration which was not in fact paid. The father had intended to defeat the relevant regulation the transfer was duly registered and a certificate of title issued to the son. Subsequently, the father asked his son to execute a power of attorney so as to enable him to transfer the land to a third party to whom he had agreed to sell the land. The son declined to do so and the father brought proceedings in which he claimed that the son was a trustee of the 40 acres which he held on trust for him. It was held by the House of Lords and Privy Council that the father was not entitled to a retransfer of the land from the son.

[38] Significantly, said this august tribunal, “he had of necessity to disclose in the proceedings that he had practiced a deceit on the public administration … and he could not use the process of the courts to get the best of both worlds – to achieve his fraudulent purpose and also to get his money back”.

[39] In summary I hold that, the Claimant’s claim as constituted, on the facts and the law must of necessity, appears destined to fail. Notwithstanding, there is a threshold test to overcome.

[40] In Part 15 of the Civil Procedure Rules, 2002 and as amended, Rule 15.2 states that “the court may give summary judgment on the claim or on a particular issue if it considers that:

(a) the Claimant has no real prospect of succeeding on the claim or the issue, or

(b) “…

Also, according Rule 26.3 of the said rules, “in addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

a) …

b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim; or

d) …”

[41] An application for summary judgment is decided by applying the test of whether the respondent has a case with a real prospect of success. In **Swain v. Hillman [2001] 1 All ER 91,** Lord Woolf said that, the words ‘no real prospect of succeeding’ directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. However, this must be done bearing in mind the overriding

objectives of the Rules. Where the Respondents evidence, taken at its highest, does not raise a possibility of a defence, but is in the realm of a mere possibility, it is right to enter summary judgment: (**Akinleye v. East Sussex Hospitals NHS Trust, [2008] EWHC 68 (QB), [2008] LS Medical 216**). Conversely, where there is some prospect of success, summary judgment should be refused, and the court should not conduct a mini-trial into disputed questions of fact: **Cotton v. Rickard Metals Inc. [2008] EWHC 824 (QB)**.

[42] On the evidence and, on the law, I make bold to say that the Claimant's case taken at its highest does not even raise the possibility of a defence for reasons I have heretofore given. Accordingly, the Application For Court Order succeeds. Summary judgment is hereby granted. Costs are to go to the successful party which is to be agreed, if not, then it is to be taxed.