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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N. 174 OF 1984

BETWEEN	RONALD NICHOLAS	PLAINTIFFS
A N D	TORSHIE NICHOLAS	
A N D	IKE OKWESA	DEFENDANT

Mr. R. L. Francis for the Plaintiffs.

Mr. D. Scharschmidt instructed by Ms. Sonia Jones for the Defendant

HEARD: June 12 & 13, 1986; July 7, 8, 9 & 10, 1986; October 10, 1986

SMITH J. (Ag.)

Mrs. Torshie Nicholas otherwise known as Honora Nicholas is a Ghanian national who in 1975, in London, England married the male plaintiff. By joint effort they acquired a dwelling house. In 1980 they decided to live permanently in Jamaica. They sold their dwelling house and with the proceeds of sale bought several motor vehicles including a 1975 model Volvo 224 DL motor car. They brought the vehicles to Jamaica. They went to live in Trinityville, St. Thomas. Whilst living in Trinityville they met the defendant, Mr. Okwesa, who lived in Kingston.

In 1983 they decided to sell the Volvo motor car. It was difficult to have prospective buyers inspect the car in St. Thomas. Mrs. Nicholas spoke with defendant about it. He volunteered to help and told them they could use his house as the locus for the viewing of the car by would-be buyers. It was advertised. On the 25.12.83 (Mr. & Mrs. Nicholas), the plaintiffs took the car to the defendant's house in Trafalgar Park. No one came to look at the car that day. They drove it back to Trinityville.

Mrs. Nicholas, in her evidence, claimed that the car was valued at $25,500 and that the asking price was $25,000. She had given different amounts as the value and asking price. She testified that she was "mixing up" the value with asking price and the amount the car was actually sold for. She asserted that the defendant was told not to sell the car for less than $25,000 and instructed to sell it as it was. The car was sold for $22,500.

By a Writ dated the 6th September, 1984, the plaintiffs claim damages for breach of contract, inter alia. Counsel for the defendant submitted that the plaintiff had not established that there was a contract in that there was no consideration.

He referred to paragraph 5 of the Statement of claim and argued that this paragraph clearly indicates that there was no consideration.

This paragraph reads:

> "It was also an express oral term of the said agreement that no commission was payable to the defendant by the plaintiffs from the proceeds of sale of the said motor car but <u>that the plaintiffs would reasonably compensate the defendant for his efforts in disposing of the said motor car</u>" (the underlining is mine)

He contended that the words underlined are "just the seed for possible dissension between the parties."

I am afraid I cannot accept this argument for reasons which I will give in a moment.

Mr. Francis for the plaintiffs submitted that a contract of agency differs in its formation and requirement from an ordinary contract. "Contracts of agency are in a special class by themselves", he contended. "The consent to undertake the obligations is sufficient to bind the parties", he argued. In his arguments he referred to <u>Gornac Grain Company Inc. v. Faure (H.M.F.) & Fairclough & Bunge Corp. (1968) A.C. 1130 at 1137B</u>. These submissions are in my view incorrect as I will endeavour to show.

Paragraph 5 of the statement of claim avers a promise to compensate the defendant. This is against the promise of the defendant to sell the car on the plaintiff's behalf. In Harrods Ltd. v. Geneen (1938) 4 All E.R. 493 it was said that such mutual promises constituted consideration. However, it is clearly deducible from subsequent authorities that an estate agent is normally under no obligation to do anything and therefore gives no "price for the promise" of the principal. Such a contract is therefore a unilateral contract. It is difficult to identify the consideration in such a contract. However, on the facts of this case we do not have this difficulty. We must look at the evidence, but before doing so it would be convenient to mention another aspect of counsel's submission.

It was the further contention of counsel for the defendant that even if the ingredients in paragraph 5 of the statement of claim amounted to consideration there is no evidence to support it, and thus it remains an allegation not proved. It would seem to me that the short answer to this is that paragraph 5 of the statement of claim was not traversed by the Defence and thus remains admitted. But what is the evidence in this regard ?

Mrs. Nicholas testified that there was no agreement to pay the defendant a commission, but that she intended to compensate him. That although she did not tell him of the amount, she intended to give him $1,000.

The defendant in his evidence (this was also pleaded in the Defence), stated that it was agreed between Mr. Nicholas (the male plaintiff) and himself that in view of the effort made and the amount of work required to effect the sale the defendant was to get a 10% commission. This was agreed after the car was delivered to the defendant and when Mr. Nicholas was in the United States of America. The car was in fact sold after this agreement to pay 10%. Hence there is no basis to argue that this is past consideration.

To my mind this subsequent promise by the male plaintiff to pay 10% commission evidences a positive bargain which fixes the amount of compensation on the faith of which the defendant had promised to undertake the selling of the car.

However, where an agent is engaged to buy or sell property on a commission basis, the mere establishment of such a relationship normally does not impose any binding obligation upon either party. The agent is not bound to do anything. Nor at the outset is the principal, for his only promise is to pay, if and when the agent has brought about the intended result - See Luxor (Eastbourne) Ltd. v. Cooper (1941) A.C. 108. But once the property is sold or bought, as the case may be, a contractual nexus arises between the parties. This is an example of a promise that ripens into a contract. Thus a request and performance will normally create a contract.

The general principles that govern a contract between principal and agent in such a case as the instant one, were stated by Lord Russell of Killowen in Luxor (Eastbourne) Ltd. v. Cooper (supra) at p. 124

> "(1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of these terms. And (3) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything".

In the instant case it is not disputed that there was a request from the plaintiffs for the defendant to sell their car. The plaintiffs promised to compensate the defendant for his efforts. The amount of compensation was subsequently fixed by the male plaintiff. It is not disputed that the car was in fact sold. I therefore have no difficulty in finding that there was a binding contract between the plaintiffs and

the defendant.

In particular I find that there is ample evidence of valid consideration.

The second point raised by Mr. Scharschmidt is that there was no intention to create legal relations. In this regard he referred to Mrs. Nicholas' evidence to the effect that the defendant was doing her a favour. He relied on the undisputed facts that the defendant was not a car dealer and that the plaintiffs and defendant were "friends".

Mr. Francis urged the Court to hold that the parties intended that their conduct should have legal consequences. One of the cases he referred to is Edwards v. Skyways Ltd. (1964) 1 W.L.R. 349. In this case, it was held that the use of the word 'ex gratia' did not negative the contractual intention.

Now, to create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when the parties enter into an agreement which in other respects conforms to the rules of law as to the formation of a contract. However as was said by Megaw, J. in Edwards v. Skyways Ltd. (supra) "where the subject matter of the agreement is not domestic or social but is related to business affairs, the parties may by using clear language, show that their intention is to make the transaction binding in honour only and not in law; and the Courts will give effect to the expressed intention".

Here there is no evidence of an expressed intention that the agreement should not give rise to legal relations. Neither is the agreement a social or domestic one as, for example, in Balfour v. Balfour (191) 2 K.B. 571. This is clearly a business agreement and it will be presumed that the parties intend to create legal relations and to make a contract. The burden of rebutting this presumption of legal relations lay upon the defendant and it is a heavy burden. I find that he had not discharged it.

Assuming there was no contract as pleaded, would that be the end of the matter? Mr. Scharschmidt submitted that even though the pleadings say "alternatively" and "further or alternatively" the only cause of action mentioned is breach of contract. Therefore, he argued, if the Court finds that there was no contract that would be the end of the matter - the plaintiffs would have failed on all limbs. On the other hand Mr. Francis submitted that the plaintiffs claim is not confined to a contractual situation.

He contended that alternatively to the claim for damages for breach of contract the plaintiffs claim that the defendant received money on their behalf for which he had not accounted and also claim damages for breach of instructions (i.e. instructions of principal to agent) I should mention that Mr. Scharschmidt is not arguing that a principal - agent relationship can only be created by contract. Agency, of course depends on agreement but not necessarily on contract. It may arise out of an agreement which does not amount to a contract because there is no consideration.

The important question therefore is, do the pleadings disclose alternative causes of actions?

Paragraph 11 of the statement of claim as amended reads:

"11. Further or alternatively the plaintiffs claim against the defendant

(i) The loss of $2,500.00 occasioned by the defendant selling the said motor car for a price less than the price at which the plaintiffs instructed him to sell.

(ii) The payment of the sum of $2,250.00 wrongfully retained by the defendant as ten percent (10%) Commission from the proceeds of sale of the said motor car.

(iii) The payment of the amount of $600.00 allegedly spent on repairs before the car was sold.

(iv) The payment of the sum of $6028 being the amount unpaid to the plaintiffs from the proceeds of sale of the car.

(v) Alternatively an order that the defendant accounts to the plaintiffs for the sum of $8878.00 from the proceeds of sale of the said motor car".

In my view the plaintiffs' claim at (ii) (iii) and (iv) above, though not framed specifically in such terms, are in essence claims for moneys had and received based on an implied promise to pay over.

The claim at (i) is in essence a claim for breach of instructions. On the assumption that there was no contract of agency, then such a gratuitous agent cannot be liable in contract but may be liable in fort for misfeasance in performing it - see Coggs v. Bernard (1703) 2 L.D. Raym 909.

For these reasons I find that the pleadings disclose alternative causes of action. It would follow therefore that even if I had found that there was no contract, I would be obliged to consider the case on its merits. I will now do so.

1. Firstly the plaintiffs claim $2,500 being the difference between the price ($25,000) for which the defendant was instructed to sell and the price ($22,500) for which it was sold. On this point the evidence of the female plaintiff, Mrs. Nicholas, is somewhat confused. She mentioned these amounts as the asking price - $22,500, $25,500 and finally $25,000. The defendant testified that the plaintiffs, on Christmas Day 1983, suggested $30,000 or the nearest offer. That the final figure arrived at was $22,500 based on affirm offer. That this offer was communicated to the male plaintiff, Mr. Nicholas/who was then in the United States of America, and that he discussed the sale with the female plaintiff. He denied being given any instructions not to sell for less than $25,000. The female plaintiff also stated in her evidence that after the sale of the car she made several trips to the defendant for payments and in fact received part of the proceeds of sale. It would seem that the defendant got instructions from both plaintiffs. The female plaintiff cannot deny that the final figure agreed at was $22,500. The plaintiffs have not satisfied me on a balance of probabilities that the instruction alleged was in

fact given. The plaintiffs must fail in this regard.

Secondly the plaintiffs claim the amount of $2,250 as being wrongfully retained by the defendant as 10% commission from the proceeds of sale. The female plaintiff stated that she intended to give the defendant $1,000 - this amount was not mentioned to the defendant although she told him that she intended to compensate him. She denied that there was any agreement to pay the defendant a commission of 10%.

The defendant testified that he had discussions with the male plaintiff on the phone, whilst he was in the United States of America. That it was agreed that he should receive a 10% commission. He said he mentioned this discussion to the female plaintiff but he could not recall if he actually told her that it was agreed that he should get 10% commission. The female plaintiff was not in a position to challenge this agreement. I accept Mr. Scharchmidt's submission that if the Court accepts the defendant's evidence as to his conversation with the male plaintiff then such evidence affects not only the male plaintiff but the female plaintiff as well. I have not been satisfied on a balance of probabilities that there was no such agreement between the defendant and the male plaintiff. Here also the plaintiffs' claim fails.

Thirdly the plaintiffs claim the amount of $600 which they alleged was wrongfully retained by the defendant as expenditure on repairs to the said motor car.

Mrs. Nicholas gave evidence to the effect that the defendant was instructed to sell the car as was. That there was no question of the defendant effecting any repairs to the car.

The defendant's evidence is that he made deductions for parts pursuant to the instructions of Mrs. Nicholas. He stated that he did not actually buy the parts, but he gave the purchaser a discount

after getting the approval of Mrs. Nicholas the female plaintiff. This the latter vehemently denied. It is important to note that in his defence at paragraph 6, the defendant averred that he had necessary repairs done. This is inconsistent with his evidence. I accept, the evidence of the plaintiff that the defendant was instructed to sell the car as was. If therefore, he gave the purchaser a discount in respect of parts that had to be replaced, he did so without authority and in breach of the instructions given. The plaintiffs are entitled to recover the amount claimed.

Finally the plaintiffs claim $6028 being the balance of the proceeds of sale which remains unpaid and unaccounted for.

Mr. Nicholas testified that in March 1984, the defendant lent her $1000. Said she intended to treat this as an advanced payment and thus a payment on account. The car was sold sometime in April or May. It was her evidence that the defendant told her that the car was sold for $22,500. Sometimes in May 1984, defendant gave the female plaintiff a cheque for $8000. This cheque was not honoured, to use a colloquialism, it bounced. She took it back to him and he gave her $5000 cash. This was on the 9.6.84. She received another cheque for $2000 around the 3rd July, 1984. Later said month she received $1000 in cash. About the 11th July, 1984, she received yet another cheque - this one was for $5,622. She was frustrated again - this cheque was also dishonoured. She returned it to him. "There was a lot of quarrel and arguments about this cheque", she lamented. She sought the assistance of Mr. B. McCaulay, Q.C. After "much negotiations", she received a cheque issued by Mr. McCaulay for $5622 in August 1984. Thus on her evidence, she received $14,622 altogether.

Under cross-examination she admitted she made a mistake when she said she received $1000 in cash. She agreed that payment of this amount was by cheque dated 3.7.84 - Exhibit 2.

She denied that on the 19.6.84, the defendant took her to the bank and gave her a cash cheque (Exhibit 3) for $7000. It is important to note that the female plaintiff's signature does not appear on the back of Exhibit 3, neither is any means of identifying her noted thereon. I must mention here that the other cheques - Exhibit 1 for $2000 and Exhibit 2 for $1000 - have the signature of the female plaintiff on the reverse sides.

To a suggestion that around the end of March 1984, defendant gave her $3000 in cash, she responded, "I don't remember that". The circumstances surrounding this alleged payment were put to her. She denied that any of these took place and in particular she was certain that she did not go to the bank with the defendant and receive this amount.

The defendant in his evidence asserted that payments to the female plaintiff were made in about 5 parts. He claimed that he made the following payments:

(1) $1000 in cash which was an advance.

(ii) $3000 in cash also an advance

(iii) $7000 by way of a cash cheque - Exhibit 3

(iv) $1000 by cheque - Exhibit 2

(v) $2000 by cheque - Exhibit 1

(vi) $5622 by cheque drawn by Mr. McCaulay.

According to his evidence he made payment totalling $19,622.

A statement of account with a schedule of deductions attached thereto was admitted in evidence as Exhibit 7. The complainant denied getting this statement from the defendant or anyone.

Having examined the pleadings, the evidence and the exhibits carefully I am satisfied that on a balance of probabilities the plaintiffs received altogether $14,622 as Mrs. Nicholas testified and not $19,622 as the defendant claims.

Finally the defendant testified as to amounts paid for courier service in sending certain documents to the male plaintiff for his signature, as also to amounts paid for advertisements in the Gleaner. The female plaintiff asserted that there was no agreement for the defendant to deduct any such sum from the sale price.

The defendant's evidence as to such a term of the agreement is nebulous. The thrust of his evidence in this regard is that there was an agreement with the male plaintiff for him to get 10% commission for his efforts and time. He gave no evidence in support of any agreement for him to make deductions for courier service and advertisements. This was not pleaded in the defence. In the circumstances of this case the Court may not imply such a term in the contract.

The plaintiffs are therefore entitled to recover the difference between the selling price of the car ($22,500) and the sum total of the amounts received by the plaintiffs and $2250 being 10% commission.

The Computation is as follows:

Selling Price of car		$ 22,500
Less (i) amounts received	$14,622	
(ii) 10% commission	2,250	16,872
Balance due		$ 5,628

The award therefore is:

Judgment for the plaintiffs against the defendant for $5,628 with interest at 3% from the 6th September, 1984, to the date of judgment.

The plaintiffs must have their costs as agreed or taxed.