NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1998/P-021

BETWEEN	**PREMIUM FINANCE LTD**	**PLAINTIFF**
AND	**JOHN MORGAN**	**DEFENDANT**

A. J. Dabdoub and J. Dabdoub instructed by Clough, Long and Company for Plaintiff

Crafton Miller and Miss N. Anderson instructed by Crafton Miller and Company for Defendant

HEARD: **9th, 10th, 11th, 12th, 13, 18th November 1998 and 27th May 1999**

ELLIS J.

In an amended Statement of Claim the plaintiff company claims:-

(i) Specific Performance of Sale Agreements

(ii) Specific Performance of oral agreement referred to in a letter dated 30th July 1997

(iii) Such further or other relief as the court deems just.

(iv) Costs.

The statement of Claim alleges that on the 16th of May 1996 the plaintiff who is a creditor of a company called "C.J.'s" Rent-A-Car Ltd. hereinafter called "C.J.'s" a Winding Up Order against the said "C.J.'s." In consequence of the Winding Up Order the Trustee in Bankruptcy was appointed as provisional liquidator. It is alleged that the

defendant, John Morgan and his common law wife who were the shareholders in "C.J.'s", requested a meeting with the plaintiff's attorney-at-law, himself and his attorney-at-law and the Trustee in Bankruptcy.

It is alleged that the defendant requested the meeting towards the conclusion of an agreement to settle the debt owing to the plaintiff since the debtor "C.J.'s" was not able to discharge the debt.

The Trustee in Bankruptcy by letter dated August 5, 1997 informed the participants of the meeting of the agreement reached and according to the claim no one objected to the terms of the agreement. That letter is in evidence as Exhibit 2 and it is to be noted that it was not signed by the defendant.

The exhibit 2 speak to certain properties which are to be sold and the proceeds of sale should go towards the settlement of "C.J.'s" debt to the plaintiff.

The Trustee in Bankruptcy caused valuation of the properties to be made. Sale Agreement were approved by the defendant's then attorney-at-law but none was signed by the defendant.

In the light of those allegations the plaintiff says the defendant is in breach of an agreement between the parties and the Trustee in Bankruptcy. He therefore claims the reliefs already set out above.

The defendant in his defence admits that he negotiated with the Trustee in Bankruptcy on behalf of "C.J.s". He says he did not meet with the Trustee in Bankruptcy to broker any agreement, to personally pay "C.J.'s" debts.

He denies that he agreed to sell any property and to make the proceeds of any such sale available for the liquidation of "C.J.' s" debt. It is his admission however, that he did in March 1997 agree to sell certain properties towards the liquidation of "C.J.'s" debt to the plaintiff (Exhibit 13). In addition to the real property which he agreed to sell pursuant to the agreement of March 1997, he also submitted documents relating to a 1991 Mercedes Benz motor car with engine number 20398122070928.

Finally, he denies every alleged agreement save that of March 1997. He counterclaims and claims return of duplicate certificate of title registered at Vol. 1112 Folio 526, Volume 933 Folio 21, Volume 1060 Folio 905 and documents for the Mercedes Benz motor car.

The plaintiff in defence to the Counterclaim accepts draft agreement of March 1997 but says that that draft agreement contained excessive valuations of the reality. The black Mercedes Benz was falsely described as a 1991 model when in fact it was a 1988 model and it was returned to the defendant.

The certificate of title registered at Volume 1126 Folio 562 is being held by the plaintiff in pursuant to a new agreement between he parties (Exhibit 2). The certificate of title at Volume 933 Folio 21 is being held by the Trustee in Bankruptcy. No mention is made in respects of the certificate of title at Volume 1060 Folio 905 and the documents to the Mercedes Benz motor car.

The plaintiff evidenced its case by firstly calling Raymond Clough. Clough said that "C.J.'s" was indebted to the plaintiff and when that debt was not paid the plaintiff

applied for a Winding Up Order against "C.J'.s". That order was made by the Supreme Court on 16th May 1996 and was upheld by the Court of Appeal on 30th October 1996.

Subsequent to the order to wind up "C.J.'s", negotiations began with the defendant towards his paying the debt. These negotiations were designed to prevent the appointment of a liquidator.

The negotiations as I understand Clough's evidence resulted in two agreements. The first in March 1997 and the second in August 1997 (5/8/97). He said his evidence relates to the first agreement. Those agreements are exhibits 13 and 2 respectively. It is to be noted that the first agreement Exhibit 13 is undated but is signed by the defendant and bears the seal of "C.J's Ltd." which is owned by the defendant.

The agreement (exhibit 13) purportedly transferred certain parcels of land and a black Mercedes motor car tot he plaintiff.

The properties and motor car are particularly described and identified in the first schedule to exhibit 13. Clough's evidence is that the properties transferred were valued by the defendant's valuator. The valuations were inaccurate in that they overvalued the properties and were rejected by the plaintiff. There were subsequent valuations done by Carby and Associates which confirmed the overvaluations. At this point he said, the Trustee in Bankruptcy was appointed liquidation for "C.J.'s".

The defendant then substituted four other properties for those contained in the schedule to exhibit 13 and also requested the involvement of the Trustee in Bankruptcy. A meeting was held on the 30th July 199 , involving the defendant, the representative of the plaintiff, the Trustee in Bankruptcy and other persons. At that meeting, the Trustee in

Bankruptcy was the mediator and a new agreement (exhibit 2) was concluded. That new agreement incorporated some terms of the agreement (exhibit 13). In addition, at paragraphs -

> "1.5 Trustee in Bankruptcy during the "Sale period" will continue to conduct such investigations as he considers reasonable in the circumstances to enable the winding up of "the Company" to proceed should "the Company", its directors or other representative fail to carry out the terms of the settlement agreement.
>
> 1.6 During the "Sale Period" Premium Finance Limited will take no action to inforce any legal remedies to which it is or may become entitled against "the Company" or any of the parties involved or associated with it.
>
> 1.7 Mr. Morgan is to give to the Trustee in Bankruptcy a Power of Attorney to sell all the properties of which Mr. Morgan is the registered owner, which are to be included in the Settlement Agreement."

The defendant has not carried out the terms of the agreements. He as the representative of the plaintiff took steps to assist the defendant in so doing. Those steps are evidenced by exhibits 3A, 3B, 3C, 3D, 4A, 4B, 5A, 5B, 6A, 6B, 7A and 7B.

In answers to Miss Anderson in cross examination Mr. Clough said that while an appeal against the order for the winding up of "C.J.'s" was pending the defendant negotiated to pay the debt owing to the plaintiff.

He denied the absence of any agreement between he parties. He said that his client did acts in part performance of the agreements.

Mr. K.H. Cooper the Trustee in Bankruptcy said in his evidence that he embarked on the liquidation of "C.J.'s". The assets of the company were insufficient to satisfy the debt owing to the plaintiff.

As a consequence of Exhibit 2 he obtained valuations which were paid for by the defendant in respect of Lots 92, 93 and 317 at Ironshore and Lot 217 at Carib Ocho Rios.

He advertised the lots for sale. A purchaser was found for lot 93 and a sale agreement was drafted but the sale was not completed. He again advertised the properties and obtained offers to purchase lots 92 and 93. Those lots he said were authorised to be sold by the defendant. No sale of the properties was effected as the defendant refused to sign sale agreements.

In cross examination Mr. Cooper said that as liquidator he had an obligation to hold meetings with the creditor and the debtor. He said that the first agreement for sale of land to a Mr. Esme was consequent on the agreement in Exhibit 2. The defendant was joint owner of the lots which were offered for sale. That was the evidence for the plaintiff.

The defendant Morgan in his evidence said he was never indebted to the plaintiff personally. He admitted that he owned the lots 92 and 93 were owned by Pauline Smith and himself.

The entity "C.J.'s" reflected his ownership of one share. The company was wound up on the 16th May 1996. He did become aware of the company's indebtedness to the plaintiff but not the extend of the indebtedness. He however said the amount of the debt has always been disputed. It was his concern that "C.J's" should be kept in operation.

In early 1997 he entered into discussions and negotiations with the plaintiff and the liquidator who was the Trustee in Bankruptcy. These negotiations resulted in an agreement between the plaintiff, "C.J.'s" and himself. That agreement was his hope of effecting a full and final settlement of the debt to the plaintiff.

He said the agreement was abhorted. The documents in relation to the properties in the agreement have not been returned although he has requested their return.

He recalled a meeting on the 30th July 1997 and that a Mr. Ebanks, the Trustee in Bankruptcy and himself were present.

He denied any knowledge of the document Exhibit 2 and that he entered into an agreement as a consequence of that document. "C.J.'s" has not been in operation since 1996.

He said he owed the plaintiff no money and he made no agreement to liquidator the debt of anyone to the plaintiff.

In his cross examination by Mr. Dabdoub the defendant admitted that he is in fact Courtney Eric John Morgan. Also "C.J." in which he is a shareholder are the initials of his christian names. He admitted that he obtained valuations for a lot of land at Greenwood and elsewhere and that he did make those lots available to the liquidation to be sold. He identified documents as the valuations which he received in respect of the lots. See Exhibit 19.

He denied that on the 30th July 1997 he came to any agreement with the plaintiff. He did not act upon any agreement evidenced by Exhibit 2.

He admitted that "C.J.'s" owed money to the plaintiff.

From a consideration the evidence I find the following facts:-

(i) "C.J.'s" is indebted to the plaintiff;

(ii) the plaintiff did obtain an order from the Supreme Court for the winding up of "C.J.'s" ;

(iii) the defendant who was a shareholder in "C.J.'s" desired to have that entity preserved and be not wound up;

(iv) the defendant entered into discussions and negotiations with the Trustee in Bankruptcy to pay in full "C.J.'s" indebtedness to the plaintiff;

(v) those discussions resulted in an agreement as to how the indebtedness was to be liquidated (Exhibit 13);

(vi) the defendant took steps towards honouring the terms of the agreement (Exhibit 13);

(vii) those steps were not pursued to finality;

(viii) subsequent to the agreement (Exhibit 13) another document (Exhibit 2) was entered into by the parties;

(ix) the defendant did not honour (Exhibit 2) although he took steps to do so based on the terms of Exhibits 13 and 2

(x) the plaintiff expected the defendant to honour the agreement.

Is the defendant liable to satisfy the claims of the plaintiff?

The plaintiff claims an order for specific performance of certain sales agreement. It is only the parties to an agreement who can be made plaintiffs or defendants in an action for Specific Performance.

On a perusal of the relevant sales agreements the plaintiff in this case, was not a party to any of them.

In the light of that clear statement of law, the plaintiff cannot succeed in a claim for Specific Performance. That claim fails.

On the 17th November 1998 the plaintiff was granted leave to amend the statement of claim. That amendment allowed him to claim Specific Performance of the terms contained in Exhibits 13 and 2.

A determination of a claim under this head of necessity demands reference to the ***Statute of Frauds (29 Carolus 2 C. 3) S.4 1677 U.K.*** That statute, albeit an Imperial Statute runs in Jamaica on the principles stated in ***Jacquet v Edwards (1867) 1 Stevens Report (Ja.)***

Section 4 of the Statute of Frauds (the clauses applicable in this case) is as follows:-

> "No action shall be brought whereby to charge a defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

There is no doubt that on the viva voce evidence and Exhibits 13 and 2 that the defendant did promise the plaintiff to pay the debts owing to him by "C.J.'s". That circumstance places the transaction within the Statute of Frauds. The case of ***Eastwood v Keynon (1840) 11 Ad. and Ell 438; [1835-42] All E. Reports 133*** is authority on point. The quoted section requires that the promise should be in writing and signed by the party to be charged.

To my mind, that requirement has been satisfied in that the document Exhibit 13 has been signed by the defendant. It may be argued that exhibit 2 does not bear the defendant's signature. That is indeed so. However I do not hold that exhibits is anything but written evidence of attempts which were made to have the defendant honour the terms of Exhibit 13. I hold that exhibit 13 is the main document and it satisfies the Statute of Frauds as it is in writing and signed by the defendant.

I find support for holding as I have done in the case of ***Harburg India Rubber Comb Coy. v Martin [1902] 1 K.B. 778.*** In that case, the defendant was a director and shareholder in a company. The plaintiffs were judgment creditors of the company and had sought by a writ of Lieri facias to levy execution upon its property. The defendant promised the plaintiffs that he would indorse bills for the amount of the debt if they would withdraw the writ.

Lord Justice Vaughn Williams in the Court of Appeal, held that the promise was a promise to answer for the debt of another and was within section 4 of the Statute of Frauds. However as the promise was not in writing, the action could not be maintained.

In this case, the promise on which reliance is placed is written and signed. The plaintiff in this case sought the liquidation of "C.J.'s" in which the defendant was a shareholder. The defendant promised to liquidate "C.J.'s" indebtedness to prevent the liquidation of "C.J.'s"

On the evidence and on the authorities cited, the plaintiff's case is clearly justifiable and maintainable.

True enough the claim as the pleading shows, is for Specific Performance of oral agreement of 30th July 1997. That to my thinking is a mere technicality which is curable by amendment. In any event a court should not close the door to justice on a mere technicality.

The circumstances of this case demand that the plaintiff obtain remedy. Moreover, business men must realize that their words should be their bond particularly when those words have been reduced to writing.

The involvement of the Trustee in Bankruptcy in the negotiations caused me some concern since he is the liquidator.

However, the provision at section 224 (I) (f) of The Companies Act allows the liquidator:-

> "(f) to compromise all calls and liabilities capable of resulting in debts.....
> and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof."

The provision has dissipated any concern which I had and I am convinced that the Trustee in Bankruptcy had jurisdiction to act as he did.

In light of my findings and conclusions, the plaintiff is entitled to Specific Performance of the agreement Exhibits 13 and 2 subject to any amendment to the Statement of Claim. If specific performance is not achievable for any reason the plaintiff is to have damages in the amount of money stated in the Exhibit 13 as $12,250,000.

The counterclaim of the defendant is dismissed.

There is therefore judgment for the plaintiff on the claim and counterclaim with costs to be taxed if not agreed.