IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. Y008/1995

BETWEEN	CLIFTON YAP	PLAINTIFF
A N D	RAYMOND HUGH	1ST DEFENDANT
A N D	MIRAGE ENTERTAINMENT LTD.	2ND DEFENDANT

Ransford Braham & Miss D. Gentles instructed by Livingston, Alexander & Levy for Plaintiff.

Clark Cousins & Miss Wilson instructed by Rattray, Patterson and Rattray for the Defendants.

Heard: 22nd, 23rd & 30th June; 2nd July, 1998 and 10th December, 1999.

W. A. James, J.,

The Plaintiff is a registered Architect and the First Defendant the Managing Director of a manufacturing Company.

In or about October, 1990 the Plaintiff and First Defendant agreed that the Plaintiff would render professional services in relation to the construction of a disco club at Sovereign Centre and would be paid 13½% of the construction costs as fees by the First Defendant.

The club was incorporated on February 27, 1991 as Mirage Entertainment Limited and was opened on or about June 30, 1994. Mirage Entertainment Limited shall be referred to hereafter as the Club.

During the construction of the Club, the First Defendant had discussions with the Plaintiff concerning whether the Plaintiff would be interested in using his fees towards acquisition of shares in the Club. This discussion was either in 1991 according to the First Defendant or in 1992 as stated by the Plaintiff.

Following the discussions, the Plaintiff wrote the First Defendant on September 27, 1993, a letter tendered in evidence as Exhibit 3. The Plaintiff stated in paragraph 1 of the Exhibit as follows:

> "As previously discussed and agreed, it is my intention to use accrued fees on this project to purchase equity in the disco, however, I would like out of pocket expenses to be paid separately."

Up to that time neither of the parties could have known what the construction costs were likely to be. Hence, the fees to which the Plaintiff would be entitled would await the determination of such costs.

On October 10, 1994 the Plaintiff wrote a letter to the First Defendant, and this letter was admitted in evidence as Exhibit 4. In Exhibit 4, the Plaintiff expressed his desire to meet with the First Defendant "as soon as possible" to finalise the following ....

(1) Architectural/Interior Design fees

(2) Overall Project cost

(3) Share equity value of fees and time table for issueing of shares.

(4) Shareholders rights and access to financial information.

(5) Cash flow projections to estimate pay-back of investments etc.

The Plaintiff did not receive any response to Exhibit 4, and in December 14, 1994 again wrote the First Defendant a letter, admitted in evidence as Exhibit 5A.

The Plaintiff complained of several issues. They included not being responded to in respect of Exhibit 4, that his further involvement as a shareholder/director is non-existent as he had never been invited to any meetings, nor had he been asked his opinion about matters concerning the Club's operation.

He wrote in paragraph 5 as follows:-

> "I have therefore decided that it is in our mutual interest that I resign as a director of Mirage Entertainment Limited (assuming that I was formally appointed) and that, I be paid for my Architectual and Interior Design Services, as the matter of share equity has not been quantified or formalised."

In Exhibits 3 & 5A lie the essence of the case. It seems clear from the pleadings, and further from the evidence, that there was a fundamental disagreement/misunderstanding between the Plaintiff and First Defendant regarding the question of whether there was a binding agreement between them in relation to the Plaintiff's fees being used to acquire shares in the Club.

From the evidence I find that an agreement was made between Plaintiff and the First Defendant on or about October, 1990. There was no company named Mirage Entertainment Limited at that time.

At the time when Plaintiff and First defendant had discussions about fees being used to acquire shares in the Club, the Plaintiff knew that the Club had been incorporated in February 1991. The Club, according to the First Defendant, is a family business.

It did not however, conduct its business in accordance with the provisions of the Companies Act and its Articles of Association. The First Defendant himself gave evidence which showed the total disregard for the requirements of a company in that -

(a) there was never a formal board meeting

(b) had no share register

(c) no register of directors

(d) issued no share certificate

(e) never issued any notices for meetings.

Even if the First Defendant acted as agent for the Second Defendant in respect of the discussions regarding the Plaintiff's fees for shares, I find that there was no contract between either the Plaintiff and the First Defendant or the Second Defendant because the fundamental terms/conditions of a contract were never negotiated nor agreed.

I cannot accept submissions of Counsel for the First and Second Defendants that there were conditions subsequent to the discussions for shares in lieu of fees capable of fulfilment. His reliance in Halsbury Laws of England (4th Ed.) Vol.16 at para. 957 provides no solace for him.

What are the express terms of this contract? The answer must be none. For further proof that there was no agreement regarding fees for shares I turn to Exhibit 3 where in paragraph 1 the Plaintiff stated quite clearly that:

> "As previously discussed and agreed it is <u>my intention</u> to use acrued fees ..... to purchase equity in the disco." .....

The only fact known to the Plaintiff and the Defendant when Exhibit 3 was written was that the fees would be equivalent to 13½% of construction costs. There was no agreement as to the method to be used in determining the value of the shares in the Second Defendant, or the percentage such shares would bear in the Second Defendant's equity.

Counsel for the First and Second Defendants in expanding his submissions that there was an agreement "governed" by conditions subsequent, further submitted that to become a shareholder in law requires agreement and entry on the Company's register of shares. But the Second Defendant kept no such register, so he says the Plaintiff had a contractual right to become a shareholder. In Reigate v Union Manufacturing Company (Ramsbottom) [1918] 1 K.B. 592 Scrutton, L.J. said:-

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: What will happen in such and such a case? They would both have replied; Of course so and so will happen: we did not trouble to say that; it is too clear."

And in Shirlaw v Southern Foundries (1926) Limited 2 K.B. 206 Mackinnan, L.J. said:-

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying: so that if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily surpress him with a common, 'O, of course'."

The evidence in this case does not bear testimony of any of the above.

Counsel for the Plaintiff relied on May & Butler, Limited v. The King 1934 2 K.B. 17 Lord Buchmaster said:-

> "It has long been a well recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all."

In the same case Lord Dunedin said:-

> "To be a contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled between the parties."

Counsel also relied on Courtney & Fairbairn Ltd. v Tolaini etal 1975 1 ALL E.R. 716.

Having so concluded that the discussions between the Plaintiff and the First Defendant together with Exhibit 3 did not create a contract, it is not necessary for me to consider what effect it would have had on the contract of October 1990.

There is another matter which I may as well deal with, and that is the so called appointment of the Plaintiff by the First Defendant as a director of the Second Defendant. But for the provisions of Article 97 of the Articles of Association, the appointment of the Plaintiff as a director would have been invalid.

The First Defendant testified that he sought the permission of the Plaintiff to put his name as a director of the company on the Company's letter-head and business card. The appointment was not in accordance with the Companies Act and the First Defendant said he never treated the Plaintiff as a director. Even if the

Plaintiff had been properly appointed a director that would have no bearing on the question of whether there was a valid contract.

Counsel for the Plaintiff submitted that the Plaintiff having pleaded in his Statement of Claim for interest at the commercial rate, he should be awarded such interest at the rate of 30% per annum. In this regard, he submitted the Statistical Digest published by Bank of Jamaica in March, 1998 which was tendered in evidence as Exhibit 9.

He submitted that in December, 1994 where the Commercial Banks weighted loan Rates for personal credits was 53%, and further submitted that 30% per annum would be a fair rate of interest.

I do not agree with the submission that Plaintiff should have interest at the rate of 30% p.a. as such a rate is the Commercial Banks Deposit rates for deposits of $100,000.00 and over - (see page 51 of Statistical Digest) for period of six months and less than twelve months at December, 1994. There is no evidence from the Plaintiff that he would have placed his fees on deposit. I would award interest at the rate of 20% p.a - the average savings rate being 18.75% per annum.

I therefore give Judgment for the Plaintiff against the First Defendant for $4,230,191.93 with interest @ the rate of 20% per annum with effect from 14/12/94 to 10/12/99.

Costs to the Plaintiff to be agreed or taxed.

No evidence was given in relation to the claim against the Third Defendant. Such claim appears to have been abandoned.

Having regard to the nature of the evidence in this case I refrain from making any award of costs in favour of the Second Defendant against the First Defendant.

Application is granted for a six (6) weeks stay of execution of the judgment.

I regret the delay, but the reason has already been communicated to Counsel for the Plaintiff.