[2013] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 134/2007

BEFORE: THE HON MR JUSTICE PANTON P
THE HONMRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JAMAICAN TREAT LIMITED**	**APPELLANT**
AND	**BARIKI INTERNATIONAL LIMITED**	**1ST RESPONDENT**
AND	**BALTEANO DUFFUS**	**2ND RESPONDENT**
AND	**JABICO INVESTMENTS LIMITED**	**3RD RESPONDENT**

Christopher Kelman instructed by Myers Fletcher and Gordon for the appellant

David Henry instructed by Mrs Winsome Marsh for the respondents

6 March and 14 November 2013

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing whatsoever to add.

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusions.

BROOKS JA

[3] On 2 January 2002, Jamaican Treat Limited (Jamaican Treat), an agri-processor, entered into two contracts with Bariki International Limited (Bariki). The contracts respectively required Bariki to secure loan financing (the short form contract) and to provide consulting services to Jamaican Treat (the long form contract). In return for its services for the short form contract, Bariki was to have been paid a sum representing a percentage of the amount of the financing secured. In respect of the long form contract it was to have been paid a monthly fee.

[4] By October 2003, relations between the parties had soured. Bariki tendered invoices for its services and its principal, Mr Balteano Duffus, wrote to Jamaican Treat demanding the immediate repayment of loans said to have been made to Jamaican Treat. Those loans, he said, were made either by him personally or by Jabico Investments Limited (Jabico), for which he is also the principal. Jamaican Treat did not satisfy the demands and on 15 March 2004 Bariki, Mr Duffus and Jabico (together called hereafter "the respondents") filed a joint claim in the Supreme Court to recover various sums in United States dollars as well as in Jamaican currency.

[5] Jamaican Treat defended the claim, contending that Bariki had failed to provide the services efficiently or at all, and had, as a result, caused Jamaican Treat loss. It not

only counterclaimed for damages for the claimed loss, but said that it had overpaid Bariki and, therefore, any sums due for loans by the respondents should be set off against the amount overpaid. The claim came on for trial before P Williams J on 26 September 2007.

[6] On 15 November 2007, Williams J gave judgment for the respondents totalling US$7,360.00 and in excess of J$1,650,000.00 respectively, together with interest on each sum. Jamaican Treat has appealed against the decision, asserting that the learned trial judge erred both in law and in fact. It asserts that she failed to consider documentary evidence, misconstrued the evidence that she did consider and failed to appreciate the separate effects of the contracts.

[7] In assessing this appeal, the contracts will be dealt with separately as different issues arise in respect of each.

The short form contract

[8] The short form contract consists of one typewritten page. It is mainly in respect of this contract that Jamaican Treat asserts that the learned trial judge erred on an issue of law. The essence of the issue is whether the sum due to Bariki should be calculated as a percentage of the sum committed by the financial institution providing the loan, or as a percentage of the amount actually disbursed. The total loan commitment to Jamaican Treat, and accepted by it, was $21,800,000.00 but the amount actually disbursed was $7,000,000.00. Jamaican Treat was unable to meet the requirements to

access the remaining funds, it defaulted on the loans actually disbursed and the commitment was later withdrawn.

[9] The learned trial judge found that the parties had agreed in the short form contract to Bariki's fee being calculated on the amount committed. She, therefore, awarded Bariki judgment based on that calculation.

[10] Mr Kelman, on behalf of Jamaican Treat, submitted that financial practicality demanded an interpretation that the calculation be done on loans and not loan commitments.Learned counsel argued that were it to be otherwise, the result would be that the borrower would have had an obligation to pay the fee on the full commitment amount, while not, as occurred in this case, having had the benefit of the full disbursement of the loan.

[11] At paragraph 20 of his written submissions Mr Kelman submitted that the learned trial judge was too strict in her interpretation of the contract. He said, in part:

> "…The trial judge failed to place either contract in their context and look at them as a whole. She isolated them both from their matrices of facts opting, at least in respect of the short form one, for purely internal linguistic considerations and an illiberal approach. She proceeded as if the contracts were made in a vacuum without the slightest reference to their setting, background, surrounding circumstances, the genesis of the transaction and the market in which the parties were operating at the time of the formation…."

[12] He relied, in support of these submissions, on the cases of **Prenn v Simmonds** [1971] 3 All ER 237, **Reardon Smith Line Ltd v Hansen-Tangen Hansen-Tangen v**

Sanko Steamship Co [1976] 3 All ER 570 and **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98.

[13] Mr Henry, for the respondents, supported the learned trial judge's approach. Learned counsel argued that the court is obliged to enforce the bargain that the parties, who are not of unequal strength, have made at arm's length. The bargain, he submitted, is clear and unambiguous in respect of this point and there is no basis for importing any additional terms in order to ascertain its meaning. He pointed out that the learned trial judge was consistent in applying this principle when she addressed an aspect of Bariki's claim. As a part of its claim Bariki sought a fee in respect of certain funds that it had secured for Jamaican Treat. The learned trial judge denied that aspect of the claim on the basis that those funds were by way of grant funding and were not pursuant to a loan. She did so, Mr Henry pointed out, on the basis that the contract referred to loans and did not include grants.

[14] The logical starting point for assessing this aspect of the appeal, is to set out the relevant part of the short form contract. It states:

> "In consideration for services rendered, CLIENT [Jamaican Treat] agrees to pay CONSULTANT [Bariki] a service fee of 3% of the **gross loan**. Under the terms of such an arrangement, CLIENT will pay CONSULTANT twenty-five percent (25%) of the total fee in advance of the commencement of the consulting services. The remaining seventy-five percent (75%) of the fees shall be deemed earned and payable **at the time and delivery and acceptance of the loan commitment**." (Emphasis supplied)

[15] It is difficult to agree with Mr Kelman on this point. The highlighted portion of the quotation from the agreement admits of no ambiguity. If, as the agreement states, the fee is "deemed earned and payable at the time and delivery and acceptance of the loan commitment", then Mr Kelman's submission, that one should wait to see how much of the loan is actually disbursed in order to be able to calculate the fee, is untenable.

[16] There is little dispute as far as the documentary evidence is concerned. The total amount of commitment accepted by 27 February 2003 was $21,800,000.00. The record reveals that Jamaica Exporters Association (JEA) disbursed, in furtherance of an earlier commitment to Jamaican Treat, the sum of $2,000,000.00, while National Export Import Bank of Jamaica Ltd (ExIm Bank) issued, and Jamaican Treat accepted, a commitment to lend Jamaican Treat $19,800,000.00. Prior to issuing its letter of commitment dated 7 October 2002, ExIm Bank had disbursed $5,000,000.00 to Jamaican Treat. In the October letter, ExIm Bank stated that the $5,000,000.00 was to be considered as a part of the $19,800,000.00. Jamaican Treat did not immediately accept the commitment and by letter dated 25 February 2003, ExIm Bank threatened to withdraw the commitment if, among other things, Jamaican Treat did not accept the October commitment by 28 February 2003. The October commitment letter was signed by Mr Carlton Allen, on behalf of Jamaican Treat and dated 27 February 2003. The year 2002 is what actually appears on the document (it having been prepared in that year), but Mr Allen, in cross-examination accepted that it was in fact signed on 27 February 2003.

[17] Based on that evidence, the fee was deemed earned and payable on 27 February 2003. The fact that Jamaican Treat did not subsequently meet the security requirements, which would have allowed the disbursement of the remaining sums, would not have affected its liability to Bariki. It was argued on behalf of Jamaican Treat, that Bariki would have known that Jamaican Treat could not have met the security requirements and should not, therefore, be allowed to claim the fee. Not only is that element not contemplated by the agreement, but the security requirements were clearly set out in ExIm Bank's commitment letter. They included the requirement of personal input by Mr Allen. As stated above, it is he who signed the acceptance and there is no evidence that Bariki would have known that Mr Allen could not have met the security requirements.

[18] The cases cited by Mr Kelman are not of assistance on this point. They are concerned with cases where the factual development did not fit exactly into the terms of the agreement between the parties. In those circumstances, the court in each case, contemplated the context of the agreement at the time of its execution, in order to determine the then aim of the parties and to give practical effect to their respective agreements. That is unnecessary in the instant case where the factual development, that is, the production and acceptance of the letter of commitment, giving rise to the fee being deemed earned and payable, is precisely what occurred. This complaint fails.

The long form contract

[19] Despite the name given to it in the litigation, this contract consists of only two typewritten pages. Unlike the short form contract, there was a time limit to the agreement under the long form contract. It was stipulated to commence on 2 January 2002 and end on 31 December 2002.

[20] The main complaint in respect of the learned trial judge's approach and findings in respect of this contract is that she, despite indicators that Mr Duffus was not credible, accepted his evidence in preference to that of Mr Allen. Had the learned trial judge properly weighed the evidence, the argument runs, she would have found that Mr Duffus was "an unreliable and mendacious witness" and that Bariki did not act competently.

[21] Mr Kelman submitted that although an appellate court is unwilling to disturb findings of fact by a trial judge, who had the benefit of seeing and hearing the witnesses, it will disturb a judgment based on those findings if it is of the view that the learned trial judge did not make use of the opportunity which he or she had or that the judgment is unsound. He argued, at paragraph 6 of his written submissions, that the decision in the instant case justifies interference by this court as "it bears several of the flaws which [**Watt (or Thomas) v Thomas** [1947] 1 All ER 582] authoritatively declared entitles this" court to do.

[22] In addition to **Watt**, Mr Kelman relied on **Price Waterhouse (A Firm) v Caribbean Steel Company Limited** [2011] JMCA Civ 29 and **Alcan Jamaica Company v Carl March** SCCA No 96/2002 (delivered 1 February 2005), in support of his submissions.

[23] In addressing the long form contract, the learned trial judge accurately stated that the defence, as pleaded, was that Jamaican Treat denied that Bariki had provided it with any consulting services. The learned trial judge, after sifting the evidence, found, quite reasonably on the evidence, that Bariki, through Mr Duffus, did in fact provide services to Jamaican Treat. The learned trial judge found, at page 8 of her judgment, that:

> "Mr Allen's evidence under cross-examination is replete with references to instructions he got from his financial advisor Mr. Duffus. He attested to the fact that he did not write cheques himself as they were written by Mr. Duffus who explained their purpose and asked for his signature. Indeed Mr. Duffus in his evidence said he would have to approve all expenditures [sic]….
>
> Mr Allen cannot say he did not receive any service from Mr Duffus – it is the quality he is taking issue with. His displeasure and dissatisfaction seems to stem from the fact that the factory was not up and running over the time BARIKI worked for him."

[24] After identifying that it was the quality of the service that was the subject of Mr Allen's complaint, as stated in his evidence, the learned trial judge observed that no evidence had been provided, which established an objective standard by which the service, actually provided, was to have been judged. She stated at page 9 of her

judgment that "the fact that [Jamaican Treat's] business did not take off in the way [Mr Allen] wished cannot, without more, be conclusive proof of Mr. Duffus's [sic] professional incompetence".

[25] It is true that during the time Mr Duffus was involved with Jamaican Treat, there was no production. Jamaican Treat did not, however, provide any objective evidence to show that Mr Duffus' performance was substandard. The absence of production, cannot by itself be evidence of incompetence. Indeed, Mr Allen himself explained to ExIm Bank in a letter dated 18 March 2003, that other factors intervened. He said that "very heavy rains in May 2002 destroyed large crops of callaloo. No ackee was available at the time" (page 156 of the record).

[26] The learned trial judge also found that Mr Allen's evidence, in respect of the monies paid to Bariki, was not clear. She found Mr Duffus' evidence in that regard "far more cogent" and supported by the documentary evidence.

[27] The fact that Mr Duffus' evidence, that the loan from JEA was not for production and operations but rather for equipment purchase, was contradicted by the relevant commitment letter which stated that the loan was "to finance working capital", was stressed by Mr Kelman as support for his stance that Mr Duffus' evidence was unworthy of credit. It must be noted, however, that the tribunal of fact is entitled to reject one part of a witness' evidence while accepting the rest. In any event, the evidence reveals that that particular loan was, in fact, used to purchase equipment, for which the vendors had given Jamaican Treat a dead-line to purchase.

[28] Based on the above assessment, there is no reason to disturb the learned trial judge's findings of fact. There is evidence to support those findings and Jamaican Treat's complaint in this regard is, therefore, without merit.

Loans

[29] The cross-examination of Mr Allen made it clear that he accepted that monies had been advanced to Jamaican Treat. The learned trial judge found that, not only did Mr Allen know that the monies had been advanced, but that he knew who had advanced the various sums. There is no basis for disturbing her findings in this regard.

Conclusion

[30] The complaints by Jamaican Treat cannot be supported. In respect of the short form contract the learned trial judge gave effect to the clear and unambiguous terms of the document. There was no need to venture outside of the terms of this contract in order to interpret the intention of the parties at the time of execution. Jamaican Treat's submission that the contract implied something other than what it stated is without merit.

[31] In respect of the long form contract, the issue was whether Bariki had provided the services contemplated by the contract. The evidence demonstrated that Bariki's representative, Mr Duffus, was actively involved in Jamaican Treat's day to day operations. There was evidence to support the learned trial judge's findings that a service was provided and this court should not disturb those findings.

[32] Similarly, there was evidence to support the learned trial judge's findings that the loans were made as stated by the respondents. Her judgment should, therefore, not be disturbed.

PANTON P

ORDER

1. The appeal is dismissed.

2. The decision and judgment of P Williams J is affirmed.

3. Costs of the appeal to the respondents to be taxed if not agreed.