

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-02733

Between

KIM GILLEZEAU

LARRY LALCHAN

**(on their own behalf and on behalf of all
members of the PETROTRIN Point-a-Pierre Club)**

Claimants

AND

MONTRICHARD LIMITED

Defendant

Reasons

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. Karuna Ramsaran and Mr. Prakash Deonarine for the Claimants.
2. Mr. Kayode Saunders and Mr. Cedric Neptune for the Defendant.

Date of Oral Delivery: 12th November, 2014

REASONS

Nature of Proceedings

1. Before the Court for its determination, is the Claimants application for summary judgment filed on the 16th October, 2014 , wherein the Claimants sought an order that the Defendant had no real prospect of successfully defending the Claimants claim for damages for breach of contract in the sum of \$116,550.00 which was paid to the Defendant for the supply, delivery and installation of (9) nine pieces of gym equipment to its Petrotrin Point-a-Pierre Club.

Claimants Case

2. The Claimants by their statement of case filed on the 25th July, 2014 contend that by an oral agreement dated the 14th April, 2014, which was entered into by Mr. Larry Lalchan (the club secretary) with the Defendant, it was agreed that the Defendant would supply, install and deliver (9) nine pieces of gym equipment to the Claimants Petrotrin Point –a- Pierre Club for the sum of \$116,550.00., and that the delivery and installation would be made on the 1st May, 2014 by the employees of the Defendant.
3. On the 24th April, 2014 the Claimants through Mr. Lalchan issued to an agent of the Defendant the sum of \$116,550.00 as payment for the supply, delivery and installation of the pieces of gym equipment. In breach of the contract, the Defendant failed to deliver and install the said equipment on the 1st May, 2014 and the sum issued was not repaid.

Defendant's Case

4. The defendant did not dispute entering into an oral agreement with the Claimants, however it was contended that on the 1st May, 2014, the gym equipment was assembled and ready to be delivered , but while the equipment was being transported ,the truck caught afire and all the equipment on the tray of the truck were completely burnt.
5. The Defendant contended that its inability to complete the delivery and installation of the gym equipment was not its fault, but rather that the contract was frustrated.

6. The Defendant contended at paragraph 5 (i) of its defence, that upon payment of the purchase price on the 24th April, 2014, property and ownership of the gym equipment passed to the Claimants and that the Claimants were thus vested with the risk from the 24th April, 2014, however, the Defendant did not plead that it was an express term of the oral contract that the property passed to the Claimants on the 24th April, 2014
7. The defendant contended that it is not liable for the Claimants failure to insure the said equipment nor are they liable for the loss the Claimants suffered.

Test to be applied

8. An application for summary judgment is premised on Part 15. 2 of the CPR, which provides :

“The court may give summary judgment on the whole or part of a claim on a particular issue if it considers that-

(a) on an application by the Claimants , the defendant has no realistic prospect of success on his defence to the claim or part of the claim or issue; or

(b) on an application by the defendant, the Claimants has no realistic prospect on the claim, part of claim or issue.

9. In accordance with the established principles in **Swain .v. Hillman (2001) 1 All E.R. 91**

The test that the court has to consider, is whether there is a real prospect of success as opposed to a fanciful one.

10. In the case of **Three Rivers District Council .v. Bank of England (No.3) [2001] 2 All ER 513 Lord Hope at para 95 and 158 stated:**

The rule '... is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR 24 is not one of probability; it is the absence of reality'

The Law in Relation to the Defendant's Defence/ Does the Defendant have a Realistic Prospect of Success?

11. According to Gilbert Kodilinye and Maria Kodilinye in their text **Commonwealth Caribbean Contract Law (2014) at pg.99** : “If the goods perish before the risk passes to the buyer under the contract without any fault of either party, then the contract will be void. Generally the risk will pass to the buyer when the property is delivered to the buyer. This means that before the sale but after the agreement to sell, the risk remains with the seller. It should be noted that the parties are free to determine the time at which the property passes to the buyer and in the case of such determinations, the rule that the risk passes with the property will not apply.”

12. The Court considered the provisions of the Sale of Goods Act Chap 82:30 and noted in particular Sections 19,20 and 22 which provides as follows:
 19. (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
 - (2) For the purpose of ascertaining the intention of the parties, regard should be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer:

(a) where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed;

(b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done, and the buyer has notice thereof;

22. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. **However, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. Nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.**

13. As it relates to the issue of frustration, according to Gilbert Kodilinye and Maria Kodilinye in their text **Commonwealth Caribbean Contract Law (2014)** , at pg 251. "when a frustrating event occurs, the contract is brought to an end forthwith without more and automatically, so there can be no liability in damages for acts or omissions occurring after the date of frustration. A frustrated contract, is not void ab initio; it begins as a valid contract but ceases to have effect on the occurrence of the frustrating event; the legal consequence is that each party must fulfil his contractual obligations so far as they have fallen due before the frustrating event , but he is excused from performing those that fall due later".

14. The question therefore arises as to whether the monies paid prior to the frustrating event, can be recovered. In the House of Lords case of **Fibrosa Spolka Akcyjna .v. Fairburn Lawson Combe Barbour Limited [1942] 2 All ER122** it was held that money handed over in fulfillment of a contract which was subsequently frustrated could be recovered in quasi contract on the ground of total failure of consideration, notwithstanding that the the contract was not void ab initio.

Reasoning/ Conclusion

15. It is not the Claimants case that the property was passed to them on the 24th April, 2014 and the Defendant never pleaded that it was a term of the oral contract that property passed on the 24th April 2014. The Defendant's contention at paragraph 5 (i) of its Defence that the property passed to the Claimants on the 24th April 2014 when the total purchase price was paid and therefore that the Claimants took the risk from the said 24th April, 2014 was not premised upon any pleading to that effect. The Defendant never pleaded that it was expressly agreed or that it was the common intention that the property would so pass to the Claimants.

16. Based on the Defendants pleadings it could not be said that it was a term of the contract that the parties had the common intention that property passed to the Claimants on the 24th April, 2014. Consequently if the property never passed to the Claimants, then the Defendant is in breach of contract. Even if the Court is wrong on this issue and the property did pass to the Claimants on the 24th April, 2014, it was expressly agreed that the Defendant was to deliver the goods to the Claimants, and in fact, the Defendant was paid for such delivery. Pursuant to section 22 of the Sales of Goods Act, the goods were at the risk of the party in fault with respect to the delivery and that party is responsible for any loss which might not have occurred but for such fault.

17. It is evident on the defence that in the course of the Defendant discharging its contractual obligation to deliver the goods, that the same was lost as a result of the fire. Accordingly under Section 22 of the Sales of Goods Act, the Defendant is responsible for such loss.

18. In the circumstances the Court was of the view that the Defendant had no realistic prospect of successfully defending the claim and therefore granted to the Claimants the reliefs sought and ordered as follows;

1. That judgment be awarded to the Claimants in the sum of \$116,550.00 together with interest at the rate of three (3%) percent per annum from the 25th July, 2014 until judgment and thereafter at twelve percent (12%) per annum until payment.
2. The defendant do pay the Claimants prescribed costs of the claim in the sum of \$14,565.00;and
3. There shall be a stay of execution of 14 days.

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FRANK SEEPERSAD

JUDGE