[2010] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 45/2006

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE COOKE J A
THE HON. MR JUSTICE MORRISON J A

BETWEEN **TELEFONAKTIEBOLAGET LM ERICSSON (T/A ERICSSON)** **APPELLANT**

AND **JIHEJE LIMITED** **RESPONDENT**

Gavin Goffe instructed by Myers Fletcher & Gordon for the appellant

Miss Sherry-Ann McGregor and Miss Anna Harry instructed by Nunes, Scholefield, DeLeon & Co. for the respondent

21, 22 September; 9 October 2009; and 24 November 2010

PANTON, P.

[1] On 9 October 2009, we made the following order:

> "The appeal allowed.
> The counter-notice of appeal is dismissed.
> The order of Reid J is set aside.
> Judgment entered in favour of the appellant with costs in the court below and of the appeal awarded to the appellant to be agreed or taxed.

Our order was in respect of a judgment awarded in favour of Jiheje Limited against Ericsson in the sum of US$36,000.00 together with interest at 8% per annum from 1 May 2002 to 2 June 2006. We promised to put our reasons in writing. This we now do.

The Pleadings

[2] Jiheje is a company that acts as agent for Auburn Court Limited, which is the owner of 12 two-bedroom apartments at 15 South Avenue, Saint Andrew. Jiheje filed a claim against Ericsson for breaching an agreement to rent these apartments from Jiheje for a period of six months for the sum of US$243,000.00.

[3] The particulars of claim state that by letter dated 22 March 2002, Ericsson confirmed an oral agreement to enter into a lease agreement in respect of the apartments at a cost of US$100.00 per day for each apartment. The lease was due to commence by the end of the first week of April 2002, or at the end of renovations based on Ericsson's requirements for work to be done to the bathrooms before occupation. The renovations were done and this fact was communicated to Ericsson but, according to Jiheje, Ericsson advised that it no longer needed the apartments.

[4] The defence was that there was no oral agreement, and no contract had been formed as the intention was to enter into a formal written lease

agreement. There was also a denial that the renovations had been completed and that that fact had been communicated to Ericsson.

The Evidence

[5] The evidence presented to Reid, J in the Supreme Court consisted in the main of three witness statements and four letters. As provided for by the Civil Procedure Rules 2002, the makers of the witness statements were cross-examined. It was agreed that on 22 March 2002, the parties were introduced at the site of the apartments by Miss Leila Johnson, a real estate agent attached to Diplomat Accommodation Bureau. At that meeting there was an inspection of the property followed by a discussion as regards the leasing of the apartments. The discussion involved the price, date of commencement, period of rental and renovations required prior to occupation. On that very date, the first of the letters referred to above was written by Ericsson advising of its intention to enter into a lease agreement as soon as the bathrooms had been renovated. Occupation was expected to commence in April 2002.

[6] On 23 March 2002, Mr Ake Ohnback, the appellant's managing director, inspected the apartments. He would have been the individual to sign any lease that Ericsson was proposing to sign. However, there is no evidence that he visited the premises at anytime thereafter or that he had any further dealings with the matter. According to Mr Delbert Perrier, managing director of Jiheje, Miss Johnson was advised that the work had been completed but nothing was

heard from Ericsson. There is a letter dated 27 March 2002, that was written by Miss Johnson to Ericsson. The importance of this letter will be dealt with later. On 6 May 2002, Mr Perrier wrote to Ericsson to formally confirm that the work had been completed, and inquired when they would be taking possession. In that letter, Mr Perrier indicated also that Jiheje had turned down two other opportunities to rent the apartments. Ericsson refused to take possession, and by letter dated 3 May 2002, (which apparently crossed Jiheje's letter of 6 May) advised Jiheje that there had been a change in Ericsson's plan to rent the apartments.

[7] Under cross-examination, Mr Perrier said that he was expecting a lease agreement to be prepared, but none was done, and there was no discussion as to who should have prepared this agreement. Page 62 of the record of appeal shows the following exchange during the cross-examination of Mr Perrier:

> "Q. Why didn't you prepare the lease agreement or had it prepared?
>
> A. We were expecting Ericsson to come back to satisfy themselves based on this letter about the things they said they asked/demanded to be done and the occupancy they expected was to commence on April 8, 2002.
>
> Q. It is only if they were satisfied that the agreement would be done?
>
> A. Yes."

The letter being referred to in this exchange is the letter of 22 March 2002. So far as the question of a lease agreement is concerned, Ms Ray Baugh, secretary of Jiheje, agreed that the parties had had discussions that a lease agreement was to have been prepared, and she confirmed in evidence that no such agreement was prepared.

[8] Mrs Veronica Clarke-Brown, Ericsson's financial controller, testified that Mr Perrier had called her on the telephone and asked her to make him an offer based on Ericsson's budget, and to state the minimum requirement he needed to put in place by 8 April 2002. It was after that conversation that she wrote the letter of 22 March 2002.

The judgment below

[9] The learned trial judge, in our view, correctly identified the issue in the case. He said:

> "The single issue is whether letters between the parties together with other events created a binding agreement for a lease in order to sustain the Claimant's claim for damages for breach of contract."

He reasoned that although the terms that would have been in a carefully drawn up lease were missing from the arrangements between the instant parties, that did not mean that a valid and enforceable agreement had not been reached. He said that the commencement of the occupancy had been deferred to accommodate the modification of the bathrooms as requested by

Ericsson. There was no refuting the assertion that Mr Ohnback had approved the apartments; there was no suggestion of inordinate delay in the process of preparation for occupancy; nor had there been any inspection or protest in this regard on the part of Ericsson. Clearly, the learned trial judge concluded, a binding agreement had come into being. The consideration on Jiheje's part, he said, was the execution of the renovation of the bathrooms as requested. Jiheje had a duty to mitigate but Mr Perrier had failed to take advantage of two offers for occupancy. In the circumstances, the learned trial judge felt a proper award for breach of contract was 30 days' occupancy – hence, the award of US$36,000.00.

The grounds of appeal

[10] The grounds of appeal relied on were as follows:

> "(a) The finding that a contract existed is not supported by the evidence.
>
> (b) The learned Trial Judge erred in failing to recognize that at all material times the correspondence between the parties was subject to contract and therefore not binding until a written contract was executed.
>
> (c) The learned Trial Judge failed to recognize that the agreement to lease was not enforceable because several material factors of the proposed lease agreement were still uncertain. The factors included:
>
> i. the parties to the lease agreement;

ii. the effective commencement date of the lease;

iii. the term of the proposed lease, and

iv. terms related to the treatment of the proposed security deposit

(d) The learned Trial Judge erred in holding that the renovations undertaken by the Claimant was good consideration for the agreement to lease.

(e) The learned Trial Judge failed to make appropriate deductions from the award of damages to take account of the fact that the agreed rental was inclusive of all expenses related to the tenancy, including electricity, water, and repairs and those expenses would not be incurred by the Claimant if the tenancy never began."

[11] Mr Gavin Goffe, for the appellant, submitted that the main issue for determination was whether there was an enforceable agreement. The letter of 22 March 2002, he said, was only an indication of an intention to enter into a contract, and that all discussions between the parties were subject to the execution of a written lease. He pointed to the uncertainty as to the date for the commencement of the contract as an indication of the absence of a contract. It was essential, he said, for the parties to a contract to be known to each other. In the instant case, Ericsson was not aware that it would have been contracting with Auburn Court, instead of Jiheje. Finally, he said, even if there was a lease in existence, the learned trial judge had erred in his computation of

the damages. It would have been necessary for there to be an assessment of the damages as there was no evidence to support the amount awarded. The rental sum discussed was an all-inclusive sum, and there was no evidence to indicate that there had been debts incurred through the usage of the utilities.

Mr Goffe summarized the position of the appellant thus:

> (i) At all material times, the agreement was subject to contract;
>
> (ii) there were outstanding, incomplete negotiations, for example, the date of commencement and the proposed security deposit;
>
> (iii) there were no acts of part performance to suggest the existence of a contract;
>
> (iv) the names of the contracting parties are unknown (or not revealed) at least in the case of the appellant;
>
> (v) there was no consideration; and
>
> (vi) even if there was a lease, the learned judge erred in computing the damages.

[12] Miss Sherry-Ann McGregor, for the respondent, submitted that there was an agreement for a lease and that that was as good as a lease. That being so, she said, the learned trial judge was correct in finding that a lease agreement existed. She said that the premises were known, the term of the lease had been decided on and the rental amount had been fixed. As regards knowledge of who the contracting parties were, she submitted that the landlord need not be the owner of the property, in this case, Auburn Court. The respondent, as agent

of Auburn Court and the entity that carried out the renovations, was perfectly capable, she said, of signing the lease in its own name. In any event, the authority of the respondent was never in issue and prior to the hearing there had been no challenge on that score.

[13] As far as Miss McGregor was concerned, "the only grey area in terms of the essentials of a lease is the commencement date". She submitted that an ascertainable commencement date was what was required, and there was no necessity for there to be a specific date. The requirements, she said, were to be met by the end of April; however, it was intended to commence on 1 April 2002. When the court inquired of her whether there was uncertainty as to the terms of the lease given the letter of 27 March 2002, Miss McGregor said that the deal had been sealed on 22 March 2002. Miss McGregor cited and relied on ***Singer Sewing Machine Co. v Montego Bay Co-operative Credit Union Ltd*** (SCCA No. 22/1996 delivered 19 May 1997), and ***Amalgamated Investment v Texas Commerce*** [1981] 3 All ER 577. She submitted that there was a valid agreement for a lease entitling the respondent to damages, and that six months' rent should be the amount of damages awarded.

[14] The case ***Amalgamated Investment v Texas Commerce*** was in respect of the construction of a guarantee and is, with respect, wholly irrelevant as far as the present proceedings are concerned. The ***Singer Sewing Machine*** case which, incidentally, had also been tried by Reid, J is clearly distinguishable.

There, the parties had agreed on the area for rental, the rental amount with provision for annual increase, the tenure and the repairs to be done. Singer as tenant had undertaken to do some repairs to suit its own circumstances and had given its customers and the general public notice of its new location. There was the request from the credit union for a security deposit, which was paid, and the date for possession was clearly stated. One month's rental was forwarded to the credit union by Singer "as a token of good faith". Singer received the comfort of a letter from the credit union saying that formal approval for the transaction had been received from the credit union's regional office and that the letter from the credit union was to be regarded as a "binding commitment to lease the premises subject to the conclusion of a mutually satisfactory lease agreement". Singer responded that they had "to all intent and purpose" already taken possession of the property. In the circumstances, the Court of Appeal, in reversing Reid J's decision held that the parties had come to a concluded agreement and had expressed the desire to put that agreement into a formal document by their lawyers.

The letters

[15] On 22 March 2002, the financial controller of the appellant wrote to the respondent advising it of the intention to enter into a lease agreement as of April 2002. She indicated the appellant's recognition that the bathrooms had to be renovated and that as soon as that had been done the appellant would

be ready to sign the contract. The letter specified that the renovations were to be done and the apartments ready for occupancy in order to facilitate the signing of the contract by the end of the first week of April. On 27 March 2002, Miss Leila Johnson, who had introduced the parties, wrote to the appellant's financial controller confirming that the respondent's managing director had received the letter of 22 March. Miss Johnson informed the appellant that the repairs were being done and that the respondent would "have the draft lease and inventory available on April 8th in line with Mr Ohnback's return". It will be recalled that Mr Ohnback was the appellant's managing director. Miss Johnson also acknowledged in her letter to the appellant's financial controller that she understood that the appellant may not need all the apartments "due to the number of engineers at hand". However, she added, the respondent "would prefer to lease the entire complex to one company".

Conclusion

[16] The letter of 22 March 2002 made certain specifications as to work to be done, the time for occupancy to commence and the signing of a contract. It is clear that there was no indication to the appellant of the completion of the renovations by the stated time. One would have thought that there would have been such notification by the respondent in order for the appellant to assure itself that the premises were indeed fit for occupation. There is nothing to indicate that Mr Ohnback was ever contacted on his return. It is also clear that no contract was prepared and offered to the appellant, and there has

been no explanation offered for this failure. The letter of 27 March 2002, merely confirms the uncertain state of affairs between the parties, thereby negating the idea of the existence of a contract. In the circumstances, the learned trial judge was in error in concluding that there was a binding contract.