**[2011] JMCA Civ 16**

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CIVIL APPEAL NO. 12/2010**

**BEFORE: THE HON. MRS JUSTICE HARRIS JA**
**THE HON. MR JUSTICE MORRISON JA**
**THE HON. MR JUSTICE HIBBERT JA (Ag)**

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| **BETWEEN** | **KEITH GARVEY** | **APPELLANT** |
| **AND** | **RICARDO RICHARDS** | **RESPONDENT** |

**Miss Jacqueline Cummings instructed by Archer Cummings & Company for the appellant**

**Leymon Strachan instructed by Strachan, Strachan & Company for the respondent**

**12 April and 27 May 2011**

**HARRIS JA**

[1] This is an appeal challenging the judgment of Her Honour Mrs Jennes Anderson, delivered in favour of the respondent. On 12 April, 2011 we allowed the appeal and ordered that the judgment of the Resident Magistrate be set aside and awarded costs of $15,000.00 to the appellant. We now put our reasons in writing.

[2] On 19 December, 2008 the respondent instituted proceedings against the appellant and a Mr Donald Salmon claiming damages of $250,000.00 for breach of contract. His claim was particularized in the following terms:

> "We went into an agreement to coach players for national team assist tournaments, umpiring and maintenance training and preparation for team trials and National Club League matches Plaintiff and defendant agreed (sic) $30,000 per month. However defendants have failed to pay plaintiff up until now."

[3] He stated that he was the manager of the Table Tennis Club. He asserted that he had conversations with the appellant, on the telephone and at the Young Men's Christian Association (YMCA), about conducting the training of junior and senior table tennis players, on behalf of the Jamaica Table Tennis Association (JTTA). The appellant, he said, told him that four separate tables and four evenings per week would be required for the coaching of the players. He further said that the appellant was responsible for payment for training purposes and that the appellant informed him that he would pay him monthly, or at the end of each training programme. After each training programme, he declared, the sponsors would give money to the appellant who would in turn give him money from it.

[4] He went on to say that he informed the appellant that his fees would be in excess of $20,000.00 monthly and that the appellant told him that he would be paid as soon as he received the money. The appellant did not communicate with him thereafter and although he trained the participants for two and a half years, he was never compensated.

[5] The learned Resident Magistrate heard the evidence adduced by the respondent. The appellant's attorney-at-law made a no case submission. The learned Resident Magistrate then proceeded to make the following orders:

> "Judgment for $250,000.00 against (sic) first Defendant. No case submission against (sic) second Defendant upheld. Costs to Plaintiff to be halved and to be agreed or taxed."

[6] The following grounds of appeal were filed:

> "1. The Learned Magistrate erred in finding that a prima facie case had been established against the Appellant/1st Defendant by the Respondent/Plaintiff.
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> 2. The Respondent/Plaintiff failed to provide evidence that any contract or agreement existed between himself and the Appellant/1st Defendant in his personal capacity.
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> 3. <u>The Learned Magistrate failed to put the Appellant/1st Defendant to an election to call evidence of (sic) stand on</u>

his submissions before deciding the no case submission."

[7] The issues arising are:

(a) whether there was a concluded agreement between the appellant and the respondent upon which the learned Resident Magistrate could have entered judgment in favour of the respondent.

(b) whether the learned Resident Magistrate ought to have put the appellant to his election to stand on his no case submission or call evidence.

[8] Miss Cummings submitted that the learned Resident Magistrate acknowledged that there was an agreement in the making between the appellant and the respondent, yet concluded that there was a binding agreement between them. She contended that no binding agreement had been made between the parties. She argued that all essential terms must be present in a concluded agreement and the evidence of the respondent did not disclose that any terms were agreed upon by them.

[9] Mr Strachan quite properly conceded that the learned magistrate had erred.

[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a

contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.

[11] Ordinarily, in determining whether a contract exists, the question is whether the parties had agreed on all the essential terms. In so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship. In **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG UK (Production)** 2010 3 All ER 1 Lord Clarke, at paragraph 45, describes the applicable test to be as follows:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a

> precondition to a concluded and legally binding agreement."

[12] The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.

[13] The learned Resident Magistrate, in giving her reasons for judgment, dealt with it in this manner:

> "There appeared to have been an oral agreement with the 1st defendant with the terms not fully 'fleshed out' but that may be the nature of oral agreements. The evidence disclosed no denial that the plaintiff managed a club, The Table Tennis Club, at the YMCA and that the 1st defendant requested the use of the facilities of that club. The club was used. The plaintiff worked in the actual organizing of (sic) and for tournaments. There is no denial that based on discussions between the plaintiff and the 1st defendant, The Table Tennis Club provided tables, time and coaching to members of the JTTA. The plaintiff had no arrangements with the JTTA; he had it with the 1st defendant. His evidence is that during his discussions with the 1st defendant the 2nd defendant and his duties with the JTTA were mentioned. Contrary to what the defendants' attorney-at-law said in his submission, there was no evidence given by the

> plaintiff of any actual discussion between himself and the 2nd defendant.
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> It was pointed out that there was no contradiction in the plaintiff's evidence as regards the fact that he worked for the defendants for two and a half years and that the programme was never ending. As far as the plaintiff was concerned he worked and was involved in it for a set period which he can state, but as far as he is aware the programme continues (without him).
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> The plaintiff said he told the defendants that he worked for 'not less than $20,000.00 monthly' so we have a stated amount to work with. We also have a definite time frame, June 2006 to January 2009.
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> What was not given in evidence was the frequency of the training programme and tournaments.
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> However based on a calculation of the minimum monthly salary discussed and a time frame of 30 months then he seems to have earned about $600,000.
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> The suit is for $250,000.00, the jurisdictional limit of this court, so judgment is for $250,000.00 against the 1st defendant and the No Case Submission is upheld against the 2nd defendant."

[14] In the case under review, the performance of an obligation is at the heart of the dispute between the parties. Even if there was an arrangement between the parties for the respondent to undertake the training of persons to participate in the table tennis tournaments, the

terms of such arrangement are vague. This, the learned Resident Magistrate failed to appreciate. The respondent stated that he performed the services upon which the parties agreed but there is nothing to show that the parties had agreed upon a specific period during which the respondent should carry out the services which he said he had done over a two year period.

[15] Further, there is no evidence that a fixed amount was agreed upon as to the respondent's remuneration. He merely stated that the payments were to be on a monthly basis, the appellant informed him that he would be paid monthly or following each training programme and that the appellant would offer him money received from sponsorship. Significantly, his claim was for $30,000.00 monthly which is, obviously, a specific sum. However, his evidence is that he told the appellant that he worked for a sum in excess of $20,000.00 monthly and that the appellant advised him that on his, the appellant's, receipt of the money he would communicate with him. In these circumstances, it cannot be said that there was evidence that any remuneration had been agreed upon.

[16] Further, there is no evidence that there was any arrangement with the respondent for the use of the JTTA's facilities. Any arrangement in this regard would have had to be made with Mr Salmon, who, the respondent

said, was the person in charge of the functions of the JTTA. Mr Salmon was never involved in any discussions with the respondent.

[17] The learned Resident Magistrate's statement that "there appeared to have been an oral agreement" and her further statement that the terms of an agreement had not been fully "fleshed out", are clearly an acknowledgment by her that there was no concluded agreement in place, yet she proceeded to find that a valid contract was in existence.

[18] It is also necessary to state that the respondent related that the appellant performed certain functions at the JTTA. Even if this is so, we agree with Miss Cummings that whatever arrangements were made between the parties regarding the provision of certain facilities by the JTTA, this would go to show that they were made with the appellant, as representative of the JTTA and not with the appellant in his personal capacity.

[19] Even if there had been negotiations or discussions between the parties, the evidence does not reveal that these led to a binding and enforceable contract between the parties. No definitive terms had been negotiated which would have had a contractual effect. It cannot be said that, as legally required, all essential terms had been agreed on. There being no agreed terms, there is nothing to show that the parties intended to create legal relations. Any discussions between them cannot be taken

higher than pre-contractual negotiations contemplated by them to enter into a binding agreement. The evidentiary material before the learned Resident Magistrate clearly shows that no concrete agreement was formed either expressly or by implication. Therefore there is no basis upon which she could have concluded that there was a binding contract between the parties.

[20] It was also Miss Cummings' submission that the learned magistrate erred in failing to put the appellant to his election to stand by his submissions or call evidence in support of his case. She cited the case of ***James Douglas v St Jago Cement Block Factory Limited and Esso Standard Oil S.A. Ltd*** (1991) 28 JLR 51 in support of this submission.

[21] In that case, it was held, among other things, that as a matter of law, a judge is required to put counsel who prefers to make a no case submission to his election and to refuse to rule unless counsel elects to call no evidence. At page 5 Wright JA said:

> "I would have thought that the governing principle is now so well established as not to be now the subject of debate: See ***Yuill v Yuill*** (1945) 1 ALL ER 183, where Lord Greene, M.R, in dealing with the very question, said at page 185:
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> > "The practice which has been laid down amounts to no more that (sic) a direction to the judge to put counsel who desires to make a submission of a no case to his

> election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misinterpretation as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission."

[22] At the close of the respondent's case, the appellant's attorney at law made submissions that the appellant and Mr Salmon ought not to be called upon to answer. The submissions were upheld in favour of Mr Salmon but were rejected in respect of the appellant. The learned Resident Magistrate, in dealing with the submissions said:

> "It was pointed out that a No Case Submission meant that the defendant failed to answer any of the plaintiff's allegations and therefore the plaintiff's case as presented stands alone. If the defendants said in their Statement of Defence that there is no contract between the plaintiff and the defendants (sic). That they were not sued in their proper capacity; and that if there was anyone to be sued at all it was the Jamaica Table Tennis Association (JTTA); the rule of evidence is that they should at least attempt to prove their defence. This (sic) to be done on a balance of probabilities in a civil suit such as this. The defendant pointed out in his submission that when a plaintiff alleges an oral contract his evidence may state the terms of the contract to suit him. In such a case then the defendants

being present and represented had an obligation to come forward with their version of the contract or alternatively, show that none existed."

She then went on to say:

> "When the judgment was being delivered the defendants (sic) attorney-at-law attempted to interrupt the judgment when he realized the direction in which the judgment was headed. He said he should have again been asked if he stood by his submission before a judgment was given. He was told that he had already made his application and had been allowed to address the court on it and based on his Application and the submission he made when asked if he was certain he wanted to make the Application; the judgment was being given. He was at that time, further told that a party cannot use another party to do work; to not pay for the work done and then come to court and say they have no case to answer. On a balance of probabilities the defendants lost the case because they did not take the stand to disprove the plaintiff's evidence. That evidence by the plaintiff was found to be sufficient to discharge his burden of proof.
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> It is to be noted that the defendant's attorney was only asked if he was certain that he wanted to make a No Case Application. He was never actually asked if he 'Stood by his Application."

[23] After hearing the submissions, having ruled against the appellant, the learned Resident Magistrate was duty bound to have called upon him to elect as to whether he stood by his submissions, or he proposed to give

evidence and call witnesses. It was her view that a case was made out against the appellant. She said that the defendants had an obligation to give their version of the contract or show that none existed, yet she did not give them an opportunity so to do. It was incumbent on her to have permitted the appellant to have called evidence, if he opted so to do. She had clearly erred. She ought not to have proceeded to make a ruling unless, upon enquiry, she was satisfied that the appellant had decided to stand on his submissions.