

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 9/07

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag).**

BETWEEN NACO CARIBBEAN LIMITED APPELLANT/DEFENDANT

A N D RICHARD GAYLE RESPONDENT/CLAIMANT

Jermaine Spence instructed by **DunnCox** for the Appellant

Lowell Smith and Gregory Reid instructed by **Ziadie Reid & Company** for the Respondent.

23rd, 31st July, 2007 and March 14th, 2008

PANTON, P:

I have read in draft the reasons for judgment written by Dukharan, J.A. (Ag.). I am in substantial agreement with what he has written and have nothing to add.

HARRISON, J.A.:

I have read the draft judgment of my brother Dukharan, J.A. (Ag.) and I agree with his reasoning and conclusion.

DUKHARAN, J.A (Ag.):

This is an appeal from the decision of Morrison J. (Ag.) on the 18th of January, 2007 wherein he refused the appellant/defendant's application for an order for immediate possession of the Company's premises (a house) located at 2 Selvin Close, Kingston 8, St. Andrew. He also refused the appellant's application for mesne profits for the respondent/claimant's unlawful occupation of the house.

After hearing arguments, we allowed the appeal and promised to reduce our reasons to writing. We now keep that promise.

The appellant, NACO Caribbean Limited, is a Limited Liability Company registered in Jamaica. It is a wholly owned subsidiary of L.J. Williams Limited, a publicly listed company in Trinidad and Tobago, (the parent company).

The respondent Richard Gayle commenced working with the appellant in 1982 as an accountant and became a Director of the Company in 1990. In 1994 he was promoted to Managing Director. In 1996 he became a Director of the Parent Company.

The respondent alleges that an oral agreement was made between himself and one Ronald Williams, then Chairman of the appellant's company in March, 2000. The

Terms of the said oral agreement were as follows:

- (a) The appellant would provide the respondent with a company house in which to reside.
- (b) The house would be transferred to the respondent when his employment with the appellant's company was determined.
- (c) The respondent would pay rent for the property while residing there.

- (d) The aggregate of the rental so paid would be deemed the claimant's equity in the property and be deducted from the market/purchase value of the property at the time of the transfer.

Ronald Williams died in May, 2000. In July 2000, a deposit was made on the house in question by the respondent. The sale of the house was completed in July, 2001 with the transaction handled by the respondent. The house was transferred in the name of the appellant's company.

On the 31st of August, 2005 the respondent's employment with the appellant's company was terminated. He was given a written notice dated the 17th of November, 2005 to vacate the premises by the 30th of November, 2005.

It is against this background that the respondent commenced proceedings against the appellant in the court below. On the 14th of December, 2005 he was granted an ex parte interim injunction for 28 days restraining the appellant from taking any steps to evict him from the premises. On the 12th of January, 2006 the respondent filed a fixed date claim form, seeking declarations that he was entitled to possession of the premises at 2 Selvin Close, Kingston 8. The appellant filed a counter claim seeking an order for immediate possession of the said house and also for mesne profits for his unlawful occupation of the premises from the 1st of December, 2005 until the respondent vacates the premises. Other remedies were sought in the counter claim.

On the 16th January, 2006 McIntosh J. refused to extend the interim injunction granted on the 14th of December, 2005 on the basis that there were no serious issues to be tried.

On the 20th of November, 2006 Morrison, J. (Ag.) heard the matter and determined that:

- (1) there were issues for examination at a trial as to whether there was an agreement between the respondent/claimant and the appellant/defendant to sell the company's premises (the house) to the respondent; and
- (2) that there is a sufficient memorandum in writing of the agreement alleged by the respondent to satisfy the Statute of Frauds.

The appellant filed several grounds of appeal. They are as follows:

- "(a) That the Learned Judge erred in law and /or wrongly exercised his discretion in refusing the defendant/applicant's application for an order for immediate possession of the company's premises located at 2 Selvin Close, Kingston 8, in the parish of St. Andrew (the house).
- (b) That the Learned Judge erred in law and/or wrongly exercised his discretion in refusing the defendant's application for Mesne Profits for the claimant's unlawful occupation of the house from December 1, 2005 until the claimant vacates the premises.
- (c) That the Learned Judge erred in law and/or wrongly exercised his discretion in ordering Costs to the respondent/claimant to be agreed or taxed.
- (d) That the Learned Judge erred in law and/or wrongly exercised his discretion in failing to strike out the respondent/claimant's Statement of Case as disclosing no reasonable grounds for bringing a claim.
- (e) That the learned Judge failed to consider or to properly consider whether the fixed date procedure was appropriate given the nature of the claim and counterclaim.

- (f) That the Learned Judge erred in law and/or wrongly exercised his discretion in failing to treat the matter as being in substance a Claim Form and thereby determine the application based on the Claim Form procedure.
- (g) That alternatively and in any event the Learned Trial Judge failed to consider or to properly consider whether rule 27.2(8) of the Civil Procedure Rules, which allows the court to deal with a Fixed Date Claim in a summary manner, applied in light of the evidence and the submissions before the court.
- (h) That the Learned Judge erred in law and/or wrongly exercised his discretion in failing to deal with the Claim summarily in light of the evidence before the court and the admission by Counsel for the claimant/respondent that the agreement for the transfer/sale of the house was not in writing.
- (i) That alternatively and in any event the Learned Judge failed to take account or to take proper account of the overriding objective and the fact that the rules required that a Fixed Date Claim be dealt with expeditiously on affidavit evidence.
- (j) That the Learned judge failed to apply or to properly apply the Statute of Frauds to the evidence before him.
- (k) That the Learned Judge failed to take account or to take proper account of the fact the Supreme Court had earlier refused an injunction sought by the Respondent/Claimant against the Appellant/Defendant whereby it was sought to restrain the latter from taking any step to evict the Claimant from the house or to interrupt or interfere with the Claimant's enjoyment thereof, or from dealing with and

disposing of the house until the determination of the Claim.

- (l) That in light of the refusal of the injunction, the Learned Judge erred in law or wrongly exercised his discretion in failing to grant an order for recovery of possession of the house to the Appellant/Defendant.
- (m) That the Learned Judge failed to recognize that the Respondent/Claimant has no current legal claim to possession of the house, particularly in light of the earlier refusal of the injunction.
- (n) That the Learned Judge failed to take into account or into proper account that a valid Notice to Quit was served on the Claimant.
- (o) That the learned Judge failed to apply or to properly apply the law of contracts and particularly the contractual principles as to consideration, and also failed to apply the maxims of equity and in particular the maxim that 'equity does not aid a volunteer', in determining whether or not the Claimant had any real prospects of succeeding on the Claim, or in determining whether or not the Claimant had any reasonable grounds for bringing the claim.
- (p) That the Learned Judge erred in law in failing to find on the evidence before him that there was no consideration for any agreement alleged by the Claimant.
- (q) That the Learned Judge erred in law in failing to find that what the Claimant sought to enforce was merely an alleged promise unsupported by consideration and, as such, unenforceable in equity.
- (r) That the learned judge failed to apply or misapplied the test of 'real prospect of success'."

The orders sought by the appellant are:

- (i) That the respondent's case be struck out.
- (ii) Immediate possession of the Company's premises located at 2 Selvin Close, Kingston 8 in the parish of St. Andrew.
- (iii) Damages for loss of use of the premises, such damages to be assessed.
- (iv) Mesne profits
- (v) That the remaining Counter Claim be set for Case Management Conference.
- (vi) Costs both here and in the court below:

Grounds E-I raise points of procedure. This concerns whether or not the correct procedure was employed by the respondent in bringing the action. The respondent brought the action by way of Fixed Date Claim Form instead of Claim Form. However, the learned trial judge converted the matter to the Claim Form procedure with the concurrence of the Respondent's counsel. The question of the correct procedure has now therefore become academic.

The substantive issues are in grounds a-d and j-r.

Submissions

Mr. Spence for the appellant, submitted in grounds a-d and j that the respondent was prevented from bringing the action by virtue of the Statute of Frauds. He relied on Section 4 which states that "no action shall be brought against any person upon any agreement (for sale of or interest in land) that is not in writing and signed by the party against whom the action is being brought or his lawfully authorized agent." He contended that any document which the respondent intended to rely on as the basis of

any agreement, must contain a sufficient memorandum in writing of the agreement. He further submitted that the respondent admitted that there was no documentary evidence of the offer by Mr. Ronald Williams nor did the Minutes of the Board meetings reflect any agreement between the appellant and the respondent. He said that nowhere in the Minutes did the appellant agree to any of the terms of any agreement alleged or proposed by the respondent nor anything said about transfer of the property upon the termination of the respondent's employment. He said the appellant was therefore entitled to have the Claim struck out.

In relation to grounds p, q and r, it was submitted by Mr. Spence, that if this court was not in agreement with the arguments advanced in relation to the Statute of Frauds, then any agreement as alleged would be void for uncertainty and unenforceable. He further submitted that details in a number of matters in which the parties must agree were lacking. For example, the purchase price of the house was not agreed, or if agreed, it is unclear on the evidence. A number of other considerations required for executing the transactions are also not agreed. He submitted that there was a lack of consideration on the part of the respondent as he alleges that a promise was made to him. Without consideration the court cannot find that there was an agreement.

In grounds k-n, it was submitted by Counsel, for the appellant that the respondent occupied the house as a licensee and that this licence was determined at the same time as the respondent's employment. It was further submitted that the

appellant is the owner of the property and did not grant a lease or agree to the terms of the respondent's occupation of the house.

Counsel referred to the cases of ***Rye v Rye*** [1962] A.C. 496. ***Isaac v Hotel de Paris Limited*** [1959] 2 WIR 105 and ***Shell Max and B.P. Ltd. v. Manchester Garages Ltd.*** [1971] 1WLR 612.

Mr. Smith, for the respondent submitted in response to ground (j) that there was sufficient evidence in the memorandum to satisfy the Statute of Frauds as was found by the learned judge. He further submitted that the Minutes of the Board meetings and letters to the auditors when taken together would provide the essential terms to satisfy the Statute of Frauds. He relied on paragraphs 15 and 25 of the Minutes of the Board meeting of the appellant's Company. He contended that the agreement does not have to be in writing if there is a memorandum or note of it which contains all the material terms of the agreement. He referred to the case of ***Hawkins v Price*** [1947] Ch. 645. He said that the least that would be required in respect of the material terms are the parties, the property and the price. In sum, counsel submitted that the notes of the meetings of the appellant's parent company which have been exhibited in the affidavit of Paul Jay Williams (sworn on the 4th March, 2002) satisfy the requirements of the Statute of Frauds. The parties, the property and the price are sufficiently identified therein.

In grounds k to n, counsel for the respondent submitted that the respondent's legal right to possession of the house must depend on the entitlement he asserts in the house itself. If he succeeds in proving his case at trial, his right becomes clear and he

cannot be dispossessed. Counsel submitted in the alternative that the respondent had a legal right to possession of the house as a tenant, pursuant to the terms of his employment. The alleged Notice to Quit could do no more than terminate the contractual tenancy, leaving in place the statutory tenancy.

The Statute of Frauds

Counsel for the appellant in ground j, submitted that the learned trial judge failed to apply or to properly apply, the Statute of Frauds to the evidence before him. Section 4 of the Statute of Frauds is worth repeating. This section provides that:

“No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized.”

In **Gibsons Conveyancing 20th Edition** at page 50, the author sets out what the memorandum must contain:

“The written memorandum in order to satisfy the section must in the case of a sale, show (a) the names or descriptions of the vendor and purchaser, (b) the subject matter of the sale, (c) the consideration, (d) the terms on which the property is to be sold, if any special terms are agreed upon; and must be signed by the party to be charged or his agent (who may be appointed by word of mouth); it need not be signed by both parties.

In the case of a contract to grant a lease the memorandum must state in addition to the names of the parties, the description of the property, the rent and any special terms agreed, the length of the term and the date of its commencement.”

The question this court has to determine is whether or not there was any agreement between the parties as advanced by the respondent, and if there is any evidence to satisfy section 4 of the Statute of Frauds.

The respondent's claim to the house is based on the oral agreement between himself and Mr. Ronald Williams in March, 2000, then Chairman of the appellant company. Mr. Williams died in May, 2000. Mr. Paul Jay Williams stated in his affidavit that he has been the Chairman of the Board of the appellant's Company since 2002 and the Director of the parent company (LJ Williams Limited). He said that the respondent as Managing Director was provided with a housing allowance, but there was no agreement by the appellant's company to provide him with a company house as part of his compensation package at that time, or at any time in the future. He said that at no time did the Directors approve the purchase of the house at 2 Selvin Close for the respondent as part of his remuneration. He further added that there was in fact no written record of any such promise or agreement between the respondent and Ronald Williams, or between the appellant's company and the respondent. Ronald Williams died before the property was identified and purchased in the name of the Company and without the Company's approval. Mr. Paul Jay Williams further stated in his affidavit that the only Director of the Appellant Company at the time who knew of any discussions concerning the purchase of the house was Richard Williams. Mr. Richard Williams explains his level of awareness of the discussions between the respondent and Ronald Williams in a letter dated 8th of January, 2002. The letter is addressed to Paul Jay Williams, Managing Director and states:

"Paul,

Further to our conversation this a.m. I could confirm that I am aware of discussions which had taken place between Ronald Jay Williams, former chairman of NACO Caribbean Ltd. and Richard V. Gayle, Managing Director also of NACO Caribbean Ltd.

Basically, RJ had agreed in principle to the housing provision for RVG and I believe this was based on the arrangements which were extended to the former Managing Director.

What I can add was that I had urged both RJ and more so RVG to document this arrangement but RJ passed away before the final arrangements could be settled. (emphasis mine)

It is quite clear from this letter that there was no documentation of the discussions between the respondent and Ronald Williams.

From the extract of a Board Meeting of NACO Caribbean Limited in May, 2002, the respondent (in paragraph 12) was asked to report to the Board on his purchase of the house for his own use without the authority of the NACO Board or the knowledge of the Managing Director and other Board Members of L.J. Williams Ltd. In paragraph 18, the chairman asked the respondent whether there was any documentary evidence of Mr. Ronald Williams' offer and he said there was none. The Minutes also state that the Managing Director advised that the respondent wanted eventually to buy the property using the accumulated rental towards the purchase at retirement. However, no decision was taken at the meeting as to the respondent's desire.

A perusal of the Minutes of the Board Meeting only indicates the respondent's allegation of a promise to him by Mr. Ronald Williams. In my view, there is nothing in

the Minutes which reflect any agreement between the appellant and the respondent. There is nothing in the Minutes that indicates that the appellant agreed to any of the terms of any agreement alleged or proposed by the respondent. For example, nothing is said about the transfer of the property upon the termination of the respondent's employment, or about rent being deducted from the purchase or market value of the property or even the sale price.

In my view there are no terms of any agreement that can be found. The respondent has not satisfied the Statute of Frauds. The learned trial judge in my view erred when he found that there was a sufficient memorandum in writing of the agreement alleged by the respondent to satisfy the Statute of Frauds. The claim cannot stand and the appellant is therefore entitled to have the claim struck out. The appellant therefore succeeds on this ground. It therefore becomes unnecessary to go into the merits or to make any pronouncements on the other grounds.

Accordingly, as stated, the appeal is allowed. The respondent's statement of case is struck out. The appellant is granted immediate possession of the premises located at 2 Selvin Close, Kingston 8, St. Andrew. Mesne Profits and damages for loss of use of the said premises from December 1, 2005 to be assessed and awarded to the appellant. The remaining counterclaim is to be set for Case Management Conference.

Costs to the appellant both here and in the court below to be agreed or taxed.

PANTON, P.:

ORDER:

Appeal allowed. Respondent's statement of case struck out. Appellant granted immediate possession of the premises located at 2 Selvin Close, Kingston 8, St. Andrew. Mesne profits and damages for loss of use of said premises from December 1, 2005, to be assessed and awarded to the appellant. The remaining counterclaim is to be set for Case Management Conference. Costs to the appellant both here and in the court below to be agreed or taxed.