IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SUIT NO. 462 of 1982

BEFORE HON KIPLING DOUBLAS ACTING CHIEF JUSTICE 20-06-84

BETWEEN	JAMES D. McCALLISTER	PLAINTIFF
AND	SANTA CRUZ INVESTMENTS CO. LTD. (T/A TORTUGA CLUB)	DEFENDANT

Mr. Adams for plaintiff
Mr. Shae for defendant

JUDGMENT

In this case the plaintiff, Mr. James McCallister, is bringing an action against the defendant company, Santa Cruz Investment Co. Ltd., and the writ is endorsed for damages for wrongful dismissal and breach of contract.

The evidence is that as a result of a telephone conversation which took place some time in May 1981 between the plaintiff and Mr. Marion Barich, a shareholder of the defendant company, the plaintiff drew up a document incorporating the arrangement for his salary and other considerations, to wit: commissions, housing, meals and other expenses. This document dated 28th May 1981 was agreed to and signed by Mr. Barich. Thereafter the plaintiff journeyed to Grand Cayman and started his employment as Watersports Director at the Defendants, Tortuga Club.

Upon the evidence I have heard, I am satisfied that the only expressed terms of the contract were those embodied in the document dated 28th May 1981.

Mr. Shea, counsel for Mr. McCallister, in support of paragraph 9a of the amended defence and counterclaim, which is in short, that section 4 of the Statute of Frauds has not been complied with, has submitted that the agreement alleged by the plaintiff is one not to be performed within the year, and is therefore an agreement which cannot be sued upon, in that there is no memorandum in writing.

In considering the relevant evidence I find that there is nothing to support this submission of learned counsel for the defence. On the contrary, although there is no memorandum in writing, the evidence clearly takes this contract of employment outside the ambit of section 4 of the Statute of Frauds.

My finding is based on three facts.

Firstly, the hiring was what is termed a general hiring. As such the presumption is that it is from year to year, unless rebutted. There is no such rebuttal in this case.

Secondly, this was intended to be a contract of employment within one year of its making. This is supported by the fact that both parties subsequently agreed that on 28th May 1982 it had run a year.

Thirdly, this contract was not binding on either party for any definite period of time. It was in fact based upon a contingency, i.e. the implied condition that it could only last so long as the plaintiff was granted and continued to hold a gainful occupation licence. A contract to serve for an indefinite period, subject to termination at any time upon reasonable notice, is not within the statute, though the service may extend beyond the year. The subsequent application by the defendant for a gainful occupation licence for a two year duration, does not affect in any way the nature of the contract. In the case cited of Adams v Union Cinema Ltd. reported at 1939 1 All E. R. p 169 where the plaintiff was offered a position by the defendant company at an annual salary of £2,000. In answer to his enquiries as to the length of the new service, he was told that he could make arrangements for two years, but this was qualified by the statement "you will see how you get on with the work." It was held that it was a temporary arrangement of indefinite duration, pending a written agreement and in these circumstances the Statute of Frauds section 4 does not apply. Mr. Shea has also submitted that in view of paragraph 2 (ii) of the amended defence, the agreement became frustrated by the Protection Board's refusal to grant the plaintiff a gainful occupation licence.

Here I must briefly review the relevant evidence.

The plaintiff assumed duties at the defendant's, Tortuga Club, and was granted a temporary Gainful Occupation Licence valid until 8th July 1981. By letter dated 17th September 1981 this licence was renewed to 23rd September 1981, and perhaps as indicated by a handwritten footnote, "good until 23rd October 1981." On the 6th October 1981 Mr. Frank Connolly, the General Manager of Tortuga Club, applied for a Gainful Occupation Licence for the plaintiff. However, on the 6th November 1981, just a month after this application, the said Mr. Connolly wrote to the Cayman Protection Board revoking the application and alleging that the plaintiff was bringing disturbance at the club with the staff that had been there for many years, and that it was his humble opinion that the plaintiff should leave the Island as soon as possible. In response to this the Chief Immigration Officer at the Department of Immigration wrote acknowledging the letter of 6 October and stating that in the circumstances, Mr. Connolly should advise the plaintiff to call at the Immigration Office to regularize his position in the Cayman Islands as he no longer had authority to remain in accordance with the terms of his gainful occupation licence which was now no longer in force.

There are two points of significance in this letter. Firstly, that the plaintiff's gainful occupation licence was no longer valid, making it impossible for him to lawfully continue in his employment, and secondly, that he no longer had authority to remain on the Island.

There can be little doubt that this letter frustrating the contract was in response to that of Mr. Connolly, acting for and on behalf of the defendant. In fact the frustration was induced by the defendant company. It has been established that where the performance of a contract is rendered impossible by the act of the party chargeable thereon, such impossibility affords no answer to an action on the contract. He is therefore estopped from claiming any benefit therefrom. It was submitted that it was impossible to tell the reason why the Board continued to refuse a Permit subsequent to this letter. With this submission I agree. But even had the board subsequently granted a licence to the plaintiff the contract would still have, on receipt of the above letter, become impossible to perform at that time and therefore renunciable by the plaintiff.

In this case before us, although the contract became impossible to perform and the plaintiff was therefore entitled to treat himself as being discharged, he took no such step but continued to enjoy the benefits without being able to perform the obligations attached thereto. The defendants had clearly indicated that they no longer intended to perform the contract and they no longer wished to have the plaintiff in their employment. The letter to the Board revoking the application attests to this. The fact that there may have been conflicting views in this regard within the defendant company is of no relevance here. The plaintiff is not obliged to look beyond the act of the company to see if there is unanimity or conflict. The act of the managing director is that of the company.

The plaintiff claims that the breach and repudiation took place on 28th May 1982 and contends that he was entitled to reasonable notice. However in order to establish the plaintiff's right to receive damages, it is first necessary to examine closely the agreement, the breach of which the defendant wrongfully induced or procured.

I have already held that the contract was one intended for an indefinite period, but actually renounced within a year of its making, and now I have to consider the question of what term if any is to be implied in it as to notice. I think that it is to be implied in the contract that it would be determined by reasonable notice on either side. Mr. Barich testified that he gave the plaintiff notice at least a month in advance of the final date. The plaintiff said he received 17 days notice. This court holds that the plaintiff knew of the renunciation of the contract from as far back as November when the contract became impossible to perform and he ceased working and left the club.

In answer to learned counsel for the defence, the plaintiff told the court that, here I quote:"When my work permit was turned down it appeared to me that my prospect of employment in the Cayman Islands had come to an end." And added: "By early months of 1982 my prospect of employment had come to an end." How can it therefore be said that his contract was terminated some months later without notice? I hold that the defendant's

renouncement of the contract was sufficient notice to the plaintiff, that his employment had ended. I find the amounts which he was paid after the renouncement clearly exceed any damages to which he may have been entitled.

The plaintiff also claims for the cost of alternative accommodation and meals during his sojourn at Breakers. I find as a fact that the plaintiff moved out of residence at the club on his own volition. The evidence is that he was about to be married. His fiance had living with her a teen age daughter and it was evident that the accommodation provided for him at the club would be most unsuitable. He himself admitted that it was small.

Marion Barich testified that the plaintiff told him that living at the club was becoming very straining, and he felt that in some instances the safety of his family was at stake. After an extensive discussion he told the plaintiff that he must do for his family what he feels is right. He described the apartment occupied by the plaintiff at Tortuga Club as small. The agreement had provided for housing and all meals for the Water Sports Director and one guest. I hold that it must have been an implied condition that the housing and meals would only be provided by the club, at the club. The parties could never have intended the provision of the plaintiff with housing and meals at any place of his choice.

It follows, therefore, that the plaintiff's move to Breakers was in breach of that implied condition though not going to the root of the contract. The claim for meals and accommodation is without merit and must also fail.

Section 1(e) of the particulars of special damages lists a claim for cost of repatriation. Section 2 of the agreement dated 28th May 1981 states: "The Tortuga Club is responsible for transfer of personal effects and personal automobile to Grand Cayman." Section 2(e) reads: "The Tortuga Club is responsible for the return of the said automobile to the United States upon termination of contract by either party."

The defendant has testified that the cost of shipping his car back to Florida was over US$1000.00. His particulars of special damages show an amount of US$1076.53 which this court is willing to accept. There was some contention as to whether it was his own personal car as that of his wife. This seems to be a question of splitting hairs and I accept as a fact that the car shipped was the plaintiff's personal property. There will therefore be judgement for the plaintiff on this aspect of the claim.

In its amended defence and counterclaim the defendant has made two claims. By paragraph 10 it is claimed that the plaintiff owed a balance of US$679.66 being outstanding balance of amount to be repaid on amount advanced by the defendant for duty on the plaintiff's car. It has been denied by the plaintiff who contends that by virtue of paragraph 2 (a) of the agreement the defendant company was responsible for all expenses pertaining to the transfer of his automobile to Grand Cayman.

I have examined the evidence before me leading up to this contention, and having heard the witnesses and observed their demeanour, I am satisfied that Mr. Barich's version of what transpired is true and correct.

I am also satisfied that the agreement contained no express or implied condition that the defendant would be responsible for the payment of duty. I accept that the imposition of the duty came as a surprise to the plaintiff, in Barich's words, he (plaintiff) was amazed.

Connolly testified that the plaintiff came to him for a loan or an advance of his payroll to pay the import duty and freight. He further stated that the plaintiff had given him $240.00 and that $50.00 per week was to be deducted from his pay. I accept this as being a true version of what transpired and find that the plaintiff was responsible for the payment of duty on the car.

The evidence reveals that out of the total debt of US$1479.66 the plaintiff repaid US$1000.00 leaving a balance of $479.66 and not US$679.66 as counterclaimed.

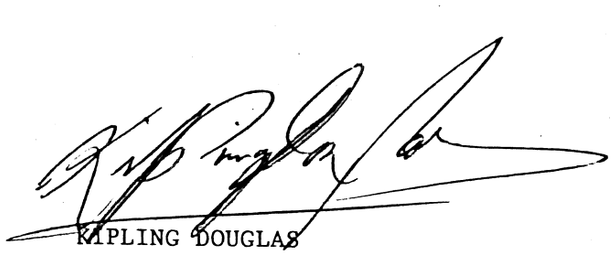
However paragraph 11 of the amended defence and counterclaim avers that the plaintiff unlawfully retained certain items of furniture belonging to the defendant and as a result the defendant has suffered loss and damage to the amount of $2,222.45.

It is clear that the plaintiff was never happy about having to pay the duty on his motor car and on his departure to Breakers, Barich once more displayed another gesture of unbounding generosity towards him by telling him he could take the items of furniture in lieu of the $50.00 being deducted from his salary. The fact that at this point the payroll deductions ceased, supports the plaintiff's story. Added to this is Connolly's testimony, here I quote: "I stopped making deductions when Mr. McCallister left for Breakers. Mr. Marion told me to give him $700.00 a fortnight." (End of quote). This was his full salary. All that Mr. Barich himself testified about this is that he didn't know why the $50.00 per week deduction was stopped before the duty was paid off.

In view of this evidence I find as a fact that the items of furniture were a gift to the plaintiff repudiating the agreement for the plaintiff to repay the duty on his car, and foregoing the balance of $479.66 still owed.

There will therefore be judgment for the plaintiff on the claim for US$1,076.53 and costs with interest thereon of 7% per annum as from 1 July 1982.

On the counterclaim there will be judgment for the plaintiff.



KIPLING DOUGLAS

20th June 1984.