FTCC 001/2017 T. No 7

# IN THE HIGH COURT OF SIERRA LEONE

Commercial and Admiralty Division

## FAST TRACK COMMERCIAL COURT

**ISATU THORLU-BANGURA** **- PLAINTIFF/APPLICANT**
**ADELE NATALIE THORLU-BANGURA**
(as Administratrix of the Estate of FARMA THORLU-BANGURA)
SCARCIES HOTEL & MANAGEMENT

**V.**

**FAYSAL DEBEIS** **- DEFENDANT**

PRESIDING;

**THE HON MR. JUSTICE REGINALD SYDNEY FYNN JA**

**Counsel;**

*YH Williams with him Abdul Karim Koroma for the Plaintiff*
*L Jenkins –Johnston for the Defendant*

# Ruling dated 6th May 2017

***Reginald Sydney Fynn JA***

1. In this application the Plaintiffs seek summary judgment pursuant to Order 16 of the High Court Rules 2007. The plaintiffs had filed a writ of summons dated 24th January 2017 and the defendant had entered appearance on 8th February 2017. The plaintiff's application is by Judge's Summons dated 16th February 2017 and is supported by the affidavit of Isatu Thorlu-Bangura of even date. On 9th March 2017 the defendant filed a defence and later filed an affidavit in opposition dated 9th March 2017. Several exhibits are attached to the affidavits and I shall refer to them as may be necessary.

2. The defendant had raised a preliminary objection but the court had directed that full arguments be proceeded with and the preliminary objection will come up first for consideration in my ruling.
3. The defendant's objection is that a party who files a case in the FTCC elects to use a process which compels the holding of a pre-trial conference before anything else. The defendant in support of this objection submits that Rules 4 & 5 of the FTCC rules which he submits are mandatory, leave no room for a court's discretion. Counsel submits that when rules 4 & 5 are read and juxtaposed, their joint effect is that the pre-trial conference is a must and should come before any application for summary judgment.
4. It cannot be denied that the pre-trial settlement conference is a compulsory requirement under the rules of the FTCC. The rules of this court provide that after pleadings have been settled, and specifically after a reply has been filed a case will then be put before a Judge for the parties to have a pre-trial settlement conference. The pre-trial settlement conference gives the parties the opportunity to meet, and with a judge guiding the process, attempt to settle the dispute without a full blown trial. Among the objectives of the pre-trial conference is that it can be viewed as a case management tool. It ensures that the limited time available to the court for the trial of cases is dedicated to those cases that truly need to be tried. The pre-trial settlement conference will filter and settle cases that can be resolved without a trial. Such cases will be resolved at the pre-trial settlement conference leaving time for the knottier disputes to proceed to a full blown trial.
5. Rule 5 sets out clearly what the conditions necessary for a pre trail conference are. They involve more than the mere filing of a writ in this court. The rule provides that ; *"After a reply has been filed or the time limited for the filing of a reply has elapsed ....."* On 16th February 2017 when the present application was filed, a defense had not been filed and certainly a reply could not have been filed nor had the time for the filing of a reply expired. Without more the case was not ripe for a pre-settlement conference under this rule.
6. The rule 4 does not refer at all to an application for Summary Judgment. An application for summary judgment pursuant to Ord. 16 of the High Court Rules of 2007 should not be confused with Judgment on Admission which is provided for in Ord. 34. Whilst R4 (2) of the FTCC Rules provides very clearly for and precludes taking out Judgment in Admission or on a Compromise the rule does not mention an application for summary judgment at all. It will therefore be quite a jump for me to read a prohibition of an application for summary judgment into that rule.
7. R4 (1) provides specifically that the High Court Rules 2007 apply to all cases before the FTCC except where those rules provide otherwise. The FTCC rules do not specifically exclude an application for Summary Judgment under O16 and its consequences it

follows therefore and I will conclude that Order 16 applies in full to cases before this court.

8. It will be noted that Order 16 of the High Court Rules 2007 also provides a process whereby a full blown trial can be dispensed with and judgment entered in a fitting case thereby avoiding the expense of time and cost associated with a full blown trial. The rule makes it possible that where a defendant has no defense or raises a defense which is a sham the matter can be dispensed with by entering judgment summarily without a full blown trial.
9. The defendant has raised a defense it is Exhibit FD8. His defense turns on a contract. Does this mean that automatically he should be given leave to defend? The parties have fully argued the contract and its implications on either side. The court is therefore in a position to decide the dispitued issues arising from the contract as to whether in fact they raise a defense such as needs to be taken to a full trial. In **Coastal (Bermuda) Ltd Esso Petroleum Ltd 1984 1 Lloyds Rep 11)** it was held that in an application for summary judgment where the case turns on the construction of contractual documents the court may proceed to decide that point provided that it is strait forward.
10. On the applicants side he urges that the contract which was temporary was made without full and frank disclosures on the part of the defendant. Non-disclosures of significant matters which go to the ability of the defendant to enter into a contract for leasehold property of that nature. The applicant argues that the leasehold property which the defendant was contracting to sell was co-owned with a thirdparty and that they held the lease on condition not to sublet without consent. He argues that the temporary agreement fails to disclose such co-ownership nor does it allude to any relevant consent. The applicant argues that as soon as he consulted with Solicitors, after the agreement was entered into he received advice of the defendant's defective standing and so he immediately rescinded the contract and demanded his money back.
11. The applicant has argued further that the respondent's omission to bring the need to get consent from his wife on the one hand and the government on the other was deliberate. He argues that the omission was mala fides and with the objective to deceive. The applicant relies heavily on Ex FD2 which is a letter from Solicitors of the co-owner in which they make enquires relating to another prospective buyer of the same property. The exhibit shows that that other prospective buyer was told about the co-owner's interest in the property.
12. On his part the defendant denies any mala fides arguing that eventually he would have made the necessary disclosures. This temporary agreement was simply that , until a final agreement would have been reached and at which stage all would have been revealed. The defendant further argues that if anybody is indebted to the other it is the plaintiff who has failed to perform fully his side of the bargain. The defendant argues that no

communication of the rescission of the contract has been received even till present time. He insists that the plaintiff's husband after paying the advance of $10,000 did not return to complete the contract. He argues that this failure caused him (ie the defendant) loss as he closed his business expecting that he was selling it. He also alleges that the applicant is being oppressive in that as soon as the business has restarted he has come with the present summons and application.

13. It appears to me that two straightforward questions in contract need to be answered in this case. Firstly, whether the plaintiff was entitled to rescind this contract and secondly whether in fact the plaintiff did effectively rescind the contract? Alternatively the court may have to consider whether in fact it is the Plaintiff who is in breach of the temporary agreement?
14. The parties are agreed that they have a contract.....though "temporary..." a contract nonetheless. They are also agreed that the contract was not performed but they give different reasons for the non-performance of the contract. The applicants argue that they rescinded the contract after making the necessary advance payment, due to fundamental defects which they subsequently discovered in the contract. The defendant denies not just the rescission but also the existence of any defects. The defendants claim that the contract is in its present unexecuted state due to the plaintiff's breach.
15. The defects which the plaintiffs allege arise from two non-disclosures which the applicant has submitted erodes the defendant's ability to contract at all in respect of the subject matter.
16. The agreement exhibit B is dated 28th January 2011 and the parties are on the one part Mr Faysal Debeis and on the other Mrs Isatu Thorlu Bangura and Mr. Farma Thorlu Bangura. Even though only one of the Thorlu Bangura's signed the agreement it is clear on the face of the agreement that both are intended to be contractually bound. One cannot help but think that the same could have been done for Henrietta Price Langley the co-owner who was a necessary party if this lease hold was to be sold effectively.
17. The general rule is that silence will not constitute a misrepresentation except in three situations *".....firstly where the silence distorts positive representation; secondly, where the contract requires umberrima fides; thirdly, where a fiduciary relation exists between the contracting parties".* (see **Cheshire & Fifoot** 13th Ed. Page 279).The first of these exceptions proceeds along the path of reasoning that nothing but the whole truth will do. A completely silent party will not attract liability for allowing the other party to proceed along with an erroneous belief. Not so the party who says something which is not wholly the truth or which is true but leaves unsaid some more of the truth which is necessary to convey a wholesome picture... he will not escape liability.

18. I am unable to find that the defendant's silence regarding his lack of full capacity to contract for the sale of this leasehold was fraudulent and mala fides. He argues that he did give the plaintiffs the title deeds to the property which on their face in the hands of the trained mind with little effort exposes the omission and points at the defendant's lack of capacity. This is not to say though that the omission is insignificant. It is important that the temporal agreement was drafted by solicitors - the defendant's solicitors, whilst the applicant's husband (a layman) signed the temporal agreement intending to consult solicitors latter. Surely he (the layman ie) was not in the position to spot the defect immediately and he should be entitled to a rethink after his solicitor's advice.
19. The failure to disclose that the property was jointly owned at this stage appears a significant omission and so is the failure to inform the plaintiff of the need for consent from the government to assign the lease. These non-disclosures are significant enough to amount to a *holding out* by the defendant that he had capacity to sell the property on his own and that there was no need for consent from government. It is true that the plaintiff could have found these things out later but he certainly was entitled to know them even before he entered into the temporary agreement considering that at the time they contracted it was he who parted with value.
20. I have found the defendant's claim that the applicant is in breach conflicting within itself. On the one hand he claims that he was informed by the deceased Mr. Thorlu Bangura that his wife was so entangled in debt that they are now unable to perform the contract. The defendant in the same affidavit also suggests that the illness and sad passing of Mr. Thorlu Bangura left the plaintiff broke and unable to carry-out the contract. Unfortunately Mr. Thorlu Bangura cannot deny the former account but the latter is denied by the plaintiffs who proffer quite a compelling alternative version and reason for refusing to follow the contact through for the defendant's defective capacity.
21. I have not been convinced by the defendant's submissions that his financial difficulties were caused by the plaintiff. Two matters that I have found helpful on this issue are i) the defendant's exhibits FD3, FD5 & FD6 which are letters to banks and the National Revenue Authority and ii) the defendants exhibit FD2 which is a letter from the co-owners solicitor regarding negotiations for the sale of this same property to a party who is not before us.
22. Exhibits FD3, FD5 and FD6 show that the defendant was in a financial debacle long before the plaintiffs appear on the scene. In fact the evidence suggests that it was the fact that he was in financial difficulties that may have caused the defendant to seek a buyer for the leasehold. In each of these letters he mentions the prospective sale of the property expressing the hope that his indebtedness to the particular creditor would be resolved along with the sale. Clearly a lot was riding on this sale and clearly the

defendant's financial woes were already in place and could not be attributed to any prospective buyer.

23. Even if the defendant were to argue that his financial troubles were worsened by a prospective buyer (which isn't what has been argued) I would still be at a loss as to which prospective buyer gets to be blamed? Exhibit FD2, does illustrate that the defendant was shopping for a buyer of the leasehold. He was not putting all his eggs in one basket. The evidence shows that he was looking at, at least two prospective buyers. I do not fault him for doing this. In fact the other buyer was offering more; $190,000 compared to the plaintiff's $180,000. We do not know what happened to that other deal and there is no evidence for me to conclude that it was abandoned for the possibility with the plaintiff.
24. On the whole it is my opinion that there is insufficient evidence in the circumstances for a conclusion that the applicants caused the defendant any loss at all (unless of course the applicants were not entitled to rescind the contract).
25. Where there has been a misrepresentation of any kind the *representee* is entitled to rescind the agreement. This is the case as long as the misrepresentation goes to a fundamental term of the contract. A person who contracts holds out that he has full capacity to do so. No misrepresentation can be more fundamental than the discovery that a contractual party lacks the capacity to contract. This is what we have here. When Mr. Thorlu Bangura signed the temporary agreement I hold that he relied on the agreement as it is and without more. The agreement does not mention a co-owner nor does it mention that there was a need to obtain consent from the government of Sierra Leone before the agreement could be complete. This is fundamental.
26. Would Mr.Thorlu Bangura had signed this agreement or parted with the $10,000 advance payment had he known about these issues? We will never know the answer to that. It is my opinion however that even if this were not a temporary agreement the defects complained about gave Mr. Thorlu Bangura the opportunity to rescind the agreement upon his discovering the true position. This being a temporary agreement he surely was entitled to avoid making it final because of the information he now had. The misrepresentation as to the respondent's capacity to contract even if innocent is too fundamental a term to hold a now unwilling other party to.
27. The applicant has deposed that immediately they discovered the defects they rescinded the contract and demand a refund from the defendant who had been promising to make the refund. The request for the refund has come from the deponent and from mutual friends. The defendant has contended that this rescission is not in writing nor is it documented. However the affidavit in opposition and the defence both corroborate that at least sometime in 2015 the plaintiff demanded emphatically that the deposit be

returned. I do not think such an emphatic demand would have been made if the plaintiffs considered themselves in breach at all.

28. I must note that there is no evidence on the defendant's side that any demand or complaint was raised in respect of a breach on the part of the plaintiff. There is none.
29. Even if I had not found the acts of rescission as I have found I take the view that the time which has elapsed without the contract being executed would have amounted to mutual rescission. This contract was made on 28th January 2011 when part payment was made; a further payment was due on 31st March 2011 to be followed by "a final document". None of the subsequent events happened and but for the plaintiffs demands the defendant did not complain. *"Unreasonable delay in the performance of a contract may justify an inference that the parties have abandoned the contract and thereby rescind it."* ***(Chitty's on Contract 21st Edition***). Non-performance since 2011 seems unreasonable delay in 2017. However, I am satisfied that this contract was rescinded by the plaintiff.

I am satisfied that the plaintiff has made his case and that the defence though well-articulated has no merit.

I therefore order as follows:

1. That the preliminary objection is overruled.
2. That the respondent is granted leave to defend this action on condition that he pays the sum of $10,000 which is the amount due and owing into court no later than 30th May 2017 failing which the plaintiff shall be at liberty to enter final judgment as claimed in the writ of summons herein.
3. Costs to the plaintiff to be taxed if not agreed.

**Reginald Sydney Fynn JA**.....