

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA
CIVIL JURISDICTION
COMMERCIAL DIVISION

2018-HC-DEM-CIV-SOC-321

BETWEEN:

INSIGHT INC., a limited liability company duly incorporated under the laws of Guyana with registered offices at lot 62 Area Q, Turkeyen, East Coast Demerara, Guyana.

Claimant

-and-

TORAL KOWLESSAR

Defendant

BEFORE THE HON. JUSTICE NARESHWAR HARNANAN

APPEARANCES:

Mr. Mohabir Anil Nandlall - Claimant
Mr. Hari Narayan Ramkarran SC - Defendant

DECISION:

Introduction:

1. In January 2018 the parties to these proceedings met and over a short period of time discussed and negotiated the sale and purchase of commercial printing equipment and related materials to be used for the business of printing.
2. At that time, the defendant had been in that business for over 30 years and had taken a personal decision to retire and sell his equipment and stock. It appears he found a ready buyer in the claimant company, whose principals he knew personally.
3. About 3 months or so after that initial meeting in January 2018, a written agreement was signed by the parties on the 26th March 2018 capturing the business transaction between the parties for the sale by the defendant to the

claimant of stated equipment and related stock. The total selling price by this Agreement was \$58,000,000.00.

4. Prior to the agreement being signed, a sum of \$21,000,000.00 was paid to the defendant on the 16th March 2018 and another \$21,000,000.00 was paid to him on the 27th April 2018, leaving a balance on the purchase price of \$16,000,000.00.
5. The fact that significant sums of money passed between the parties even before a written agreement was executed shows that the parties displayed some level of trust and confidence in each other, which underlined their sale and purchase agreement.
6. They clearly did not anticipate that their good relationship would be soured by this business transaction. Issues arose between them pertaining to, but not exclusively, the serviceability and non-functioning of key pieces of equipment, delivery and installation of equipment and related materials to the claimant's premises and outstanding payments under the agreement.
7. These issues arose during the period January to June 2018 when the claimant company was utilizing the defendant's premises and staff, with his expressed approval, to test the functioning of the equipment by performing commercial printing contracts. Some of those contracts were even referred to the claimant company by the defendant.
8. It is apparent that these issues, more especially that of functioning and delivery of the purchased equipment, reached a climax in June 2018, when it appeared the claimant company felt the agreement could no longer be performed. It sought a rescission of the agreement through a letter by their attorney-at-law to the defendant on the 27th June 2018 and asked for their money back.
9. There being no resolution to their demand, these proceedings were filed in August 2018 seeking orders declaring the agreement be rescinded and a refund of moneys paid to the defendant, as well as general and special damages for breach of contract.
10. They complained that the defendant misrepresented the quality and fitness of the machines to be in a working condition and some key and very expensive ones were not.

11. It is unfortunate that an agreement born out of conviviality and trust ended up in this way. The defendant is adamant that there were no circumstances which justified the demand for rescission by the claimant since they had already taken delivery of a significant number of pieces of equipment and related stock which is valued even more than the total contract sum as he gave them a lot of other items not assessed to be within the agreement of sale.
12. He conceded that there were some minor issues to a few machines, but they were resolved. He argued that the claimant company had difficulties in making payments, even at one time applying for a bank loan which did not materialize.
13. His position is that the claimant should not be allowed to rescind the agreement. He also wants the Court to order that the claimant keep the equipment and materials it has already taken delivery for the \$42,000,000.00 paid by them and that he be discharged from any further obligations under the agreement.

Issues:

14. The question for the Court is whether the defendant breached the contract with the claimant. If the answer is in the affirmative, the consideration will be what remedy is available to the claimant.
15. The Court must also contemplate whether the defendant is entitled to retain the payments made by the claimant, with no other obligation to them under the contract, if there is a finding by this Court that the claimant is not entitled to the orders it seeks.

The law and analysis:

Breach of contract:

16. A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty¹.

¹ Section 1 *American Law Institute's Second Restatement of the Law of Contracts* – Cited in *Commonwealth Caribbean Contract Law* [2014] by Gilbert and Maria Kodilinye at page 1.

17. **Gilbert and Maria Kodilinye**, writing very practically in ***Commonwealth Caribbean Contract Law*** [2014] had this to say in their introduction at page 1 of the text:

...a party which enters into a valid contract can be assured that it will be able to recover compensation from the other party in the event of the latter's repudiation of the agreement or the failure to perform its obligations, and the 'measure' (i.e. the amount) of damages recoverable in contract law is intended to compensate the innocent party not only for any material or financial damage sustained on account of the other party's breach, but also for any loss of profits or other benefits which it would have received if the contract had been performed by that other party.

Rescission:

18. Parties to a contract are also entitled to a host of remedies depending on who defaults on their obligations in the contract. One such remedy is rescission of the contract. In addition to damages, this is a remedy which the claimant seeks in this action.
19. In the case ***Guarantee Co. of North America v. Gordon Capital Corp.*** [1999] 3 SCR 423, *Iacobucci and Bastarache JJ* delivered the judgment of the Supreme Court of Canada, and said at paragraph 39 of the report that:

Rescission is a remedy available to the representee, *inter alia*, when the other party has made a false or *misleading representation*. A useful definition of rescission comes from *Lord Atkinson* in ***Abram Steamship Co. v. Westville Shipping Co.***, [1923] A.C. 773 (H.L.), at p. 781:

Where one party to a contract expresses by word or *act in an unequivocal manner* that by reason of fraud or *essential error of a material kind inducing him to enter into the contract he has resolved to rescind it*, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante* and *restores things, as between them, to the position in which they stood before the contract was entered into.* [emphasis supplied]

20. The effect of rescission was explained by *John Cartwright* in his text ***Misrepresentation, Mistake and Non-Disclosure***, 4th edition, at page 76, where he writes:

Where the requirements of the remedy of rescission are satisfied, the contract is not void *ab initio*; it is voidable at the instance of the representee. The contract was therefore, from its creation and until the moment of its rescission, effective to create the rights and obligations which its terms provided. But at the moment of rescission the contract is made a nullity from the beginning: it is retrospectively avoided, and any performance already made under the terms of the contract is reversed, so that the parties are placed in the position in which they would have been had there been no contract.

21. Professor *Jack Beatson*, writing in ***Anson's Law of Contract***, 28th edition [2002] states at page 253:

Rescission is, in principle, available for all classes of operative misrepresentation. When a person has been *induced to enter into a contract by a misrepresentation of any description*, the effect on the contract is not to make it void, but to give the party misled an option, either to avoid it, or, alternatively, to affirm it. [emphasis supplied]

22. In the recent Privy Council decision of ***East Asia Company Ltd (Respondent) v PT Satria Tirtatama Energindo (Appellant) (Bermuda)*** [2019] UKPC 30, *Lord Kitchin*, at paragraph 88 of the judgment noted that:

It is also true that in the field of misrepresentation, it is *no defence to an action for rescission* to say that the representee might have discovered the falsity of the representation by the exercise of reasonable care. If an unequivocal statement is made by one party to another of a particular fact, it is no answer for the person who made the statement to say that if the person to whom he made it had reflected and thought about it he would have come to see that it could not be true. The very person who makes a statement of that sort has put the other party off making further inquiry: ***Bloomenthal v Ford*** [1897] AC 156, 161-162, 168, per *Lord Halsbury LC* and *Lord Herschell*, respectively. [emphasis supplied]

Material and substantial:

23. Professor Stephen Waddams, in his text, **The Law of Contracts**, 4th edition [1999], states at paragraph 427 that:

If the [misrepresentation] is a term of the contract . . . the mistaken party is entitled to damages as for breach of contract. Whether the party is further entitled to set aside the transaction and demand restitution of the contractual benefits transferred will *depend* upon . . . **whether the breach is “substantial” or “goes to the root of” the contract.** [emphasis supplied]

24. The author of **The Law of Contract in Canada**, 3rd edition, [1994], *Gerald Henry Louis Fridman*, is of the view at page 293 of his book that:

A *misrepresentation* is a misstatement of some fact which is *material to the making or inducement* of a contract. [emphasis supplied]

25. Therefore, the question before the Court in this case is whether it can be discerned from the evidence, facts which substantiate that there were misrepresentations of any description, made by the defendant, *which are so substantial and material*, that it goes to the root of the parties' agreement.

Condition in contract:

26. *Gilbert and Maria Kodilinye*, cited above, writes at page 67 of their text that:

A *condition* is a term of a contract which the parties regarded as *essential*, in respect of which one party either promises to perform and obligation or promises the accuracy of a statement. In the event of a *breach of a condition*, the innocent party is entitled to *rescind* the contract, treating himself as discharged from further performance. This is so, even if the innocent party has not suffered any loss because of the right to rescind or affirm the contract if he so chooses. In addition to the right to rescind or affirm the agreement, the innocent party may in either case claim damages for any losses suffered. [emphasis supplied]

27. The agreement between the parties here concerns the sale and purchase of commercial printing equipment and related supplies. There is no question surrounding the existence of a valid and subsisting contract between them,

even though the defendant contended he signed the agreement to assist the claimant in obtaining financing from a commercial bank.

28. Notwithstanding this contention, there is no evidence before the Court to suggest that this agreement was not intended to govern the sale and purchase of the equipment and related materials, or that the defendant was the subject of undue influence, coercion or pressure to sign the agreement.

29. The defendant himself was forthright with the Court when he admitted that he read the agreement and signed it voluntarily, and that he had easy access to many Attorneys-at-Law if he wanted to consult with any of them.

30. He also admitted that at no time did he take any legal action or objections during the period of 5 months (January to June 2018). It is also evident from the evidence that the defendant took no legal step or similar proceedings up to the claimant filing this action in August 2018. This Court is of the view that his belated objections to the contract during his testimony were self-serving and no weight was attributed to his contentions.

31. Coming back to the agreement, a list of the equipment was annexed, and it was expressly provided that:

All equipment is to be delivered in working condition...

32. It was also expressly provided that:

All equipment is sold with one year's warranty implied or given...

33. It is therefore easily discerned from the agreement that it was material and/or essential that the equipment, the subject of sale, was in a working condition. But it also went further. The defendant expressly guaranteed the working condition of the equipment for an entire year.

34. The agreement reveals that the claimant, took on the responsibility of subsequent repairs and maintenance in the contract's terms and conditions, after the assurance by the defendant that the equipment was in working condition, guaranteed for an entire year.

35. This Court is therefore of the view that the proper functioning of the equipment, was an essential term of contract between the parties.

36. The ***Sale of Goods Act, Cap. 90:10*** of the laws of Guyana, is also instructive. ***Section 15*** provides:

Subject to this Act and any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, **except** as follows:

- (a) where the buyer, expressly or by implication, makes known to the seller ***the particular purpose for which the goods are required***, so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), *there is an implied condition that the goods shall be reasonably fit for that purpose*, provided, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
- (b) where goods are bought by description from a seller *who deals in goods of that description* (whether he be the manufacturer or not), there is an *implied condition that the goods shall be of merchantable quality*. [emphasis supplied]

37. The question therefore is whether there is any transactional evidence underlying the sale and purchase of the equipment. Both parties gave evidence of their discussions prior to contract. The defendant orally advertised his printing business and equipment for sale after taking a decision to retire and when the claimant's principal, Mr. Yog Mahadeo, expressed an interest in purchasing, the defendant expressly stated he was pleased at the possibility that his business would go to someone he knew well over 20 years.

38. It is therefore clear that the defendant was aware that the claimant was purchasing the equipment to carry on the business of commercial printing. It is further evident from the claimant's uncontradicted evidence that the defendant's business Pavnik Press was a well-known and established commercial printing establishment, and its principal's skill and/or aptitude in this regard was a fact relied upon by them.

39. The parties even included a clause in their agreement that the defendant was prohibited from competing in any printing business from the time the agreement was signed on the 26th March 2018.
40. There is sufficient evidence before the Court to suggest strongly that the claimant would have relied upon the defendant's skill and judgment in taking a decision to purchase the equipment and related materials at the defendant's invitation and being cognizant that the defendant was dealing with this type of equipment in his own business operations for many years.
41. In so concluding, in addition to guaranteeing the equipment being in a working condition in the contract, this Court is further of the view that there was an implied condition in the contract that the equipment was reasonably fit and of a merchantable quality for a commercial printing business.
42. '*Merchantable*' simply means that the article being sold is of a high enough quality to be fit for sale, and to be '*merchantable*', an article for sale must be usable for the purpose it is made².

Delivery:

43. The ***Sale of Goods Act, Cap. 90:10*** of the laws of Guyana provides at Section 28 that:

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

44. ***Atiyah's Sale of Goods***, 12th Edition, 2010 interprets this provision to mean at page 118 of the text:

...there may be a duty to deliver to the buyer goods in which the ***property has already passed***...[emphasis supplied]

45. And at page 119:

It should next be noted that the legal meaning of 'delivery' is very different from the popular meaning. In law, delivery means the '*voluntary transfer of possession*', which is a different thing from the dispatch of the goods...[emphasis supplied]

46. ***Section 30*** of ***Cap. 90:10*** is further instructive:

² <https://www.law.cornell.edu/wex/merchantable>

(1) Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from the contract, express or implied, the *place of delivery is the seller's place of business, if he has one, and if not, his residence...*[emphasis supplied]

47. **Atiyah**, cited above, at page 119, opines that **section 30** does two things: First, it creates a *presumption* that in a sale of specific goods the *place of delivery is the place where the goods are known to be at the time of the contract*. Secondly, it lays down that in all other cases, in the absence of any special agreement, the *place of delivery is the seller's place of business* and, failing that, his residence...[emphasis supplied]
48. Delivery seems to be an issue in these proceedings as the defendant is contending that the agreement mandates that the equipment must be in working condition at the time of delivery, and he has not breached this condition of the contract which the claimant is relying on to rescind the contract of sale and purchase.
49. The evidence before the Court reveals that the parties had initially orally contracted with each other in respect of the sale of the equipment and related materials. They later expressed their agreement in writing by entering into a contract to govern the sale. In the contract, it was provided that the equipment is to be delivered in working condition.
50. It was further agreed that the defendant would oversee the removal of the equipment from his premises and install them at the claimant's premises, among other things. There was also to be a complete removal within 90 days of the full payment.
51. This Court is of the view that there is no question as to when delivery of the equipment and related materials was to occur. On entering the agreement, the property *in* the equipment passed from the seller to the buyer.
52. The place of delivery was the place of the seller's business. Delivery was already concluded. The issue between the parties arose on the ***dispatch*** of the equipment and related materials, when at that stage the claimant complains that vital machinery was not in a working condition prior to

dispatch. There is no special agreement in the contract which qualifies place of delivery, other than at the defendant's premises.

53. It has already been concluded by this Court that the working condition of the equipment is a material condition of the agreement between the parties. It is also concluded by this Court that delivery pursuant to the **Sale of Goods Act**, and as provided for in the contract, took effect when the parties entered into the agreement.

54. The question to be determined now is whether the evidence before the Court proves that the material condition that the equipment was in working condition was breached by the defendant, and if so, what remedy accrues to the claimant.

Breach of material condition of contract:

55. The evidence before the court is clear in respect of the non-functioning of a key printing press referred to as the Komori BPL machine. All the witnesses, both for the claimant and the defendant testified to this fact. The defendant himself admitted that the Komori is the largest and most expensive machine out of the lot that was sold. He gave his idea of its worth to be about \$10,000,000.00 by itself. This is confirmed by the valuation which was annexed to the agreement.

56. He further admitted that the Komori is only now functional as of 2 days prior to him giving evidence in Court on the 20th August 2019. This is about 1 year, 4 months after the contract was signed between the parties.

57. There were other pieces of equipment which were also problematic. The defendant accepted that a 'CTP' which is an accessory to the Komori, was also not functional for a short period of time. There were other components which were not operational at the time, like a 'red runner' which had to be replaced by the defendant.

58. The evidence from the defendant's witness, Mr. Thomside also confirmed that a printing job which was being done by the claimant had to be outsourced to the Stabroek News' printery. Further, he confirmed that at no time was the Komori machine ever functioning when the claimant operated from the defendant's premises.

59. The equipment on the conclusion of the agreement between the parties, had to be in a working condition. This was a material condition of the agreement, which, if operated to the contrary, would go to the root of the contract.
60. It is not disputed that \$42,000,000.00 out of the contract price of \$58,000,000.00 was already paid to the defendant. This represents about 73% of the total sum. Up to two days before this action was listed for hearing, one key printing press was not functioning. This printing press alone had an approximate value of 18% of the total contract cost. As noted above, this is about 1 year, 4 months after the written contract.
61. This Court is of the view that this represents a material breach of the condition that the equipment is in working order, so much so that the claimant is justified in claiming the remedy of rescission.
62. The claimant would have purchased functioning equipment, on the assurance by the defendant, for the purpose of running a commercial printing business, which, at the very least, was clearly hampered by the non-functioning of a key machine. This is so even if all the other pieces of equipment were operational at the time the agreement was finalized between the parties.

Remedies:

- 63. The Court having found that the defendant would have breached the contract, declares the contract to be rescinded. The claimant is therefore entitled to a refund of monies paid under the contract, that is, \$42,000,000.00 which the defendant is ordered to pay on or before the 31st March 2020.**
- 64. It is further ordered that the claimant company do return to the defendant all equipment and related materials dispatched to them pursuant to the agreement on or before the 31st March 2020.**
65. The next question is whether the claimant has proved it has suffered loss and damage as a result of the breach of the contract by the defendant.

Special damages:

66. The claimant has pleaded and testified to printing contracts they completed at the defendant's premises during the period they operated the equipment there. The evidence suggests that there were two contracts, one for the Guyana Revenue Authority, and another for the United Nations.
67. There is no documentary evidence tendered by the claimant in respect of invoices or payment vouchers to establish the quantum of the value of these contracts. Notwithstanding, the defendant himself admitted in evidence that he has received payments on these contracts, and others, which the claimant company has performed, and for which the defendant received payments.
- 68. It is therefore ordered that the defendant do produce an account to the claimant of the sums of money received from customers of Pavnik Press for the period January to June 2018, whose jobs/orders were performed and/or fulfilled by the claimant company, together with an account of any expense incurred by Pavnik Press that was not paid for by the claimant, on or before the 9th March 2020.**
- 69. It is further ordered that the defendant do pay to the claimants all sums due to them for printing contracts they fulfilled on behalf of Pavnik Press between January and June 2018, on or before the 31st March 2020, representing special damages for breach of contract.**
70. The other sums pleaded as loss and damage suffered, inclusive of labour, logistics, employment, electrical installation and transportation cost were not proved on a balance of probabilities. It is discerned from the documentary evidence that a significant proportion of the expenses incurred were at the instance of Inspire Inc. and not the claimant company, Insight Inc. Inspire Inc. is not a party to these proceedings. Further, 6 cheques paid out by claimant company totaling \$410,524.00 were dated subsequent to the date the claimant claimed rescission of the agreement.

General damages:

- 71. It is further ordered that the defendant do pay to the claimant the sum of \$1,000,000.00 representing general damages for breach of contract, to be paid on or before the 31st March 2020.**

72. For completion, the counterclaim filed by the defendant is dismissed on the ground that it is completely without merit.

73. **The defendant is ordered to pay costs to the claimant in the sum of \$500,000.00.**

A handwritten signature in black ink, appearing to read "Nareshwar Harnanan", written over a dotted line.

Nareshwar Harnanan
Puisne Judge
February 3, 2020