[2021] JMCC Comm 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00514

BETWEEN	**BHI THERAPEUTIC SCIENCES LIMITED**	**FIRST CLAIMANT**
	BLUE HORIZON INTERNATIONAL LLC	**SECOND CLAIMANT**
AND	**CARIBBEAN REGENERATIVE CENTRE LIMITED**	**DEFENDANT**

Contract – Whether wrongful repudiation/termination – Whether Quasi Contract relief possible- Damages- Whether wasted expenditure recoverable.

Trudy Ann Dixon-Frith and Danielle Reid instructed by Dunn Cox for Claimants

G. Peter Abrahams and Sharon Abrahams for the Defendant

Heard: 14th, 15th, 17th, 25th June and 17th September, 2021

In Open Court

Cor: Batts J

[1] This case concerns an intended collaboration that went awry. The Defendant operated a health spa. The Claimants were qualified to do stem cell treatments. It was contemplated that the Claimants would offer that treatment at the Defendant's facility. The Claimants contend that pursuant to an agreement with the Defendant they incurred expenses, however, the Defendant did not do that which had been promised and wrongly terminated the agreement. The Claimants

therefore seek compensation. The Defendant says there was never a contract and the Claimants are entitled to no compensation.

[2] On the first morning of trial the parties put in, by Consent, Exhibit 1 being a Bundle of Agreed Documents and, Exhibit 2 being a document entitled "Company details" dated the 1st June 2021. In this judgment I will briefly highlight portions of the evidence of each witness before stating my decision and the reasons therefor.

[3] The Claimant's first witness was Brian Mehling. He is a medical doctor, whose witness statement, dated 30th March 2021, stood as his evidence in chief. It was very detailed. Dr. Mehling described himself as a director of both Claimant companies. The 1st Claimant was registered in Jamaica and, at the time of registration, shared the same registered office as the Defendant being Villa Viento, Tower Isle St. Mary. The 2nd Claimant is incorporated in Delaware in the United States. Both Claimants provide health care services using advanced technologies, "*such as stem cell processing and treatments*."

[4] Dr. Mehling explained the circumstances in which he met Peter Mansfield, the principal and sole director of the Defendant Company, and said after discussions,

> "*we decided to proceed to set up a stem cell facility in Jamaica, which we would jointly establish and operate.*"

[5] He says they had a contract which was partly oral and partly in writing. Initially the cost of setting up the facility was to be bourne equally. This is reflected in a Memorandum of Understanding dated 4 May 2016 (the MOU), Exhibit 1 pages 1-6. He says it is only while instructing his lawyers for this claim that he realised that the Defendant had not signed the MOU. (Paragraph 13 of his witness statement.) He references emails by which the Defendant conveyed the impression he had signed the MOU (See Exhibit 1 page 9, email dated 7th June, 2016). Later, after it became clear the Defendant had no money to put into the project, the Claimants agreed to incur the full start-up costs. This was evidenced by a "Whatsapp"

discussion, see Exhibit 1 pages 60 – 61. (Paragraph 18 of his witness statement). The costs were to be recoverable by the Claimants from income earned by the stem cell facility.

[6] The 1st Claimant was incorporated in Jamaica for the purpose of implementing the agreement (Para 19 Brian Mehling's witness statement). A joint venture agreement was prepared by attorneys Dixon & Associates. It was signed by the 1st Claimant. The Defendant never signed it (Paragraph 22 of witness statement). This refusal to sign, the witness says, marked the commencement of the breakdown in their relationship.

[7] On the 19th February, 2018 the Defendant issued an email (Exhibit 1 page 166) which terminated their relationship. Dr. Mehling describes this as "*wrongfully done.*" Prior to this the Claimants had sent considerable funds to Mr. Peter Mansfield who, as the person on the ground, oversaw the construction and the application of these funds to the project generally. Mr. Peter Mansfield also assisted by applying for a medical certificate to allow Dr. Mehling to practice medicine in Jamaica (see paragraph 36-39 of the witness statement). Eventually, the Claimant had to itself secure Dr. Mehling's licence (Paragraphs 40 – 41 of witness statement). Dr. Mehling denies performing any medical procedures prior to obtaining his Jamaican licence.

[8] Dr. Mehling says the facility became "*functionally operational*" on or about the 10th July 2017 (Paragraphs 46 of witness statement and Exhibit 1 page 44). The entire facility was fully operational by December 2017 (Paragraph 49 of witness statement). A "clean room" was to be completed in phase 2 of the project. The special flooring for it was however installed. The wrongful termination of the contract prevented completion of the clean room which was intended for scientific research and other procedures. It was not necessary for the medical procedures (Paragraph 52 of witness statement).

[9] The witness says it was never their intention that he would perform the medical procedures and that other medical professionals had been engaged and were involved. He identified them in Paragraphs 53-54 of his witness statement. The witness outlines the start-up costs incurred by the Claimants in Paragraphs 59, 63, 64, 66 and, 68 of his witness statement. The total amount allegedly incurred is US$217,421.35.

[10] Dr. Mehling says that the amount of rent to be paid to the Defendant was never agreed. However, the Joint Venture Agreement provided, in Clause 7(ix), a minimal amount of J$3,000 per month (Paragraph 73 witness statement, Exhibit 1 page 119). He alleges that as the facility was only fully operational in December 2017 and the agreement terminated in February 2018, the rental is *de minimis*. In any event the renovations improved the premises and therefore there should be a set-off (Paragraph 75 of witness statement). I pause to observe that no evidence was provided as to the quantum, of any enhancement to the value of the Defendant's premises, consequent to the alleged improvements/construction.

[11] His evidence in cross-examination revealed that the stem cells were prepared by two highly trained technicians from China. They were brought to Jamaica at the Claimants' expense. An exchange with the cross examiner concerning his medical licence to practice in Jamaica is instructive:

> *"Q: On 31st July 2017 she asked Mr. Mansfield for a copy of medical licence by Watts App message. You knew on 31st July by that message that you had not received the contract.*
>
> *A: I was relying on statement on July 27th. So when she asked for a copy it mean he did not have it in place and I would be given the actual physical document. It supports the statement of July 27th."*

[12] In answer to the cross examiner the witness stated he did not recall if he performed any stem cell procedures in 2017. He was aware he should perform no procedures without a licence. There was another interesting exchange when it was suggested that some expenses for Jamaica Inn were unnecessary.

> *"Q: $2,923 at Jamaica Inn*
>
> *A: for me and I surmise the 4 passengers. I don't know*
>
> *Q: Mr. Mansfield at Villa Biento he has facilities there for guests.*
>
> *A: very substandard. No air conditioning not appropriate for guests we would be bringing.*
>
> *Q: On 31st January, 2017 meeting at Tuscani Hotel U$ dollars [page 46].*
>
> *A: yes. That restaurant is across street from Mr. Mansfield. He made the reservations and suggested place himself. He was in attendance.*
>
> *Q: these expenses were all related to the project*
>
> *A: Every one, every single one."*

It is noteworthy that when he gave evidence Mr. Mansfield did not challenge these statements of fact.

[13] On the question of the cause of the breakdown the following interesting exchange occurred:

> *"Q: Mansfield asked for changes*
>
> *A: I said … about it not really negotiable. I was saying I not sending more money until we have a signed Joint Venture Agreement.*

Q: *Would it be fair to say that yourself and Mr. Mansfield over the course of these messages were trying to sort out your relationship.*

A: *yes of course*

Q: *In the end it, just did not work*

A: *when one party is dishonest difficult to make it work. I did not realise the depth of dishonesty until the very end. I trusted him and now I am paying the price.*

Later in this exchange the witness stated that the Claimants moved and established the business elsewhere.

[14] The witness indicated that the patients treated did pay for the treatment. However, the payment was by way of a donation to a "a *foundation*." He had not, in his calculations of the amount owed, made allowances for these "donations."

[15] It is fair to say that cross-examination of Dr. Mehling did not result in any major change to his evidence-in-chief. The witness impressed me by his candour. His evidence was generally consistent internally as well as with the documentation. I found him to be a witness of truth.

[16] There were no other witnesses on behalf of the Claimants. The Defendant's witness was Mr. Peter Mansfield. His witness statement dated 18 May 2021 was allowed to stand as his evidence in chief. He was permitted to give further oral evidence in chief. This consisted of him saying he had seen Dr. Mehling treat between seven and nine patients in the beginning of December 2017. When cross-examined however it became apparent that he was not a particularly honest witness. His evidence was in parts inconsistent and generally appeared tailored to a result he wished to achieve rather than any accurate recollection of the events which occurred.

[17] In his witness statement Mr. Mansfield says he met Dr. Brian Mehling in 2015. He denies the existence of a contract (Para 5 of his witness statement). He says there were protracted negotiations some terms were agreed but not all. He agrees that a law firm Dixon & Associates was engaged to draft a joint venture agreement. He says he never signed that document because he had concerns (Paragraph 9 of his witness statement). In Paragraph 10 of his witness statement he says he had deep concerns about Dr. Mehling's beginning "*to practice medicine in Jamaica without the required licence to do so."* Also because of *his "indifference*" to the requirements of Jamaica's Income Tax laws. He says these were expressed in his email of 19th February 2018, (Exhibit 1 page 166). He says he had to forcefully remind Dr. Mehling and his staff that such conduct was unacceptable. He says also that Dr. Mehling's style was autocratic and he was not a person with whom he could do business (Para 12 of his witness statement).

[18] In cross-examination the following emerged. The Defendant did not own the property at Villa Biento. It was rented from a Dr. Ojo who is in Canada. Mr. Maynard asserted that he had told the Claimant this fact and that he never said he was the owner. He admitted agreeing to the renovations and said he had obtained the owner's permission. The witness admitted the renovations had been paid for by the Claimants. He admitted that he oversaw what was happening "*on the ground*." He admitted the money to do the reservations was wired to him. He admitted he collected stem cells. He admitted he made travel and accreditation arrangements for doctors and lab technicians and nurses. He said the lab technicians were from China but the doctors and nurses lived in Jamaica.

[19] As regards the terms of the arrangement the witness agreed that the later agreement was that the Claimants would fully cover start-up costs and it would be fully recouped from income from the facility. The following instructive exchange occurred:

> "*Q: Period agreed would be over 12-month period.*

A: No I wanted 36 months

Q: look at page 60 Exhibit 1. WhatsApp messages 11th June, 2017 6:25:10

A: I did say that

Q: So you were in agreement each month for 12 months.

A: I thought medical supplies I did not imagine travel expenses etc. he must be mad. This was followed up by telephone conversations as well.

Q: do you agree in this conversation no indication of things you will agree to.

A: not in this conversation."

[20] The witness admitted that there were other doctors there but insisted it was Dr. Mehling who did the procedures. He alleged that the other medical doctor did not know how to inject iv's. Although admitting patients were booked and came, and asserting it was Dr. Mehling who was treating them, the witness paradoxically stated that the clinic was not up and running. The following is to my mind indicative of the witness's lack of candour:

"Q: P. 75 Exhibit 1 – 1st February, 2018, 10:13:31 a.m. [read to witness]

A: I did tell him because he was driving me mad. Yes, I did tell him but I did not have any patients."

[21] There was also another exchange, relating to the signing of the MOU and whether he signed it or said he would, which denotes dishonesty:

"Q: Good to go. (p. 9)

Did you say you would print and sign and send it back?

A: obviously did, it's there

Q: I will print and resend you were saying you had signed

A: I have never sent it

Q: you did say you signed

A: I did

Q: in relation to Joint Venture you never signed it.

A: I did not."

The witness had no qualms about misrepresenting to Dr. Mehling that he had signed the agreement and that he would send it to him. He seems to believe that the fact he never sent it is somehow ameliorative of the position. Mr. Peter Mansfield, in this and other exchanges in cross-examination, struck me as a rather duplicitous person.

[22] The witness admitted that Dr. Mehling was not intended to be the only doctor to treat patients. In cross-examination he asserted that Dr. Mehling's application for a local licence was refused. In response to a question about a message at page 53 of Exhibit 1 at 2:22:54 (in which he had said that the doctor would be given his licence 'in person") the witness maintained he was saying that Dr. Mehling had to go back for an interview. The ability of this witness to otherwise construe the meaning of apparently clear words in a document did not suggest credibility.

[23] The witness was effectively challenged on the email of 19th February 2018 which terminated the relationship. He admitted that he had been purportedly assisting Dr. Mehling to get his licence to practice medicine two weeks before he stated as a ground for termination Dr Mehling's practicing without a licence. He admitted he did not know that nine days after his letter Dr. Mehling received a licence. He admitted that prior to issuing the letter of termination he never told Dr. Mehling he would terminate unless he got a medical licence. He was referred to an email of 23rd February 2018 (Exhibit 1 page 168) and admitted that nowhere in that letter did he express concern about Dr. Mehling not having a licence. Curiously he

explains this by saying if he leased it to an unqualified doctor practicing he would not get in trouble.

[24] The witness admitted that he still occupies the property and is earning “a little” from it. He said he could not earn from the clinic “because of the lawsuit.” He admitted that, after termination of the agreement, he offered the property to the Claimants for rent at $2,000 per day (Exhibit 1 page 168).

[25] After some effective cross-examination it became clear to me that it was neither the medical licence nor the completion of the clean room nor any other of the reasons advanced which led to termination of the relationship. This was the culmination of that exchange:

> *“Q: suggest delay in completing clean room did not cause you to terminate contract.*
>
> *A: not just that, his attitude to me treating me like a boy. He shouted at my wife. That’s why I did not sign Joint Venture his attitude to me.*
>
> *Q: the issue of clean room you made it up and put it in your Defence.*
>
> *A: Not true.*”

[26] The witness then admitted that he had not expressed concern to the Claimant about “*tax implications.”* Further that he was not qualified to say if there were tax implications. On the question of the use of other accommodation than his own, the witness admitted, he recommended and booked the alternate accommodation (Exhibit 1 p. 36). When asked to point out which of the bookings (on page 330 of Exhibit 1) was not legitimately for the business he pointed to only one. Then he admitted that that may have been for a videographer. The witness’ evidence in re-examination was unremarkable.

[27] The parties were allowed one day to prepare their closing submissions. These were delivered orally on the 17th June 2021. Claimant’s counsel submitted that the

evidence was sufficient to establish a contract. But if there was no contract the Claimants were entitled to recover on the basis of quasi-contract. The Defendant ought not to be unjustly enriched. This had not been pleaded although it was included in her written submissions filed prior to the start of the trial. Over the Defendant's objection I granted an amendment, to include a quasi-contractual claim, and adjourned the matter to the 25th June 2021 to allow Defendant's counsel an opportunity to consider. The amendment was granted as the issue clearly arises on the evidence and the Defendant was alerted to it by the written submissions earlier filed. The amendment was as follows:

> *"16(a) By reasons of the following the Defendant has been unjustly enriched by the expenditure of the Claimants and has not in any way accounted to the Claimants for the expenditure nor has the Defendant reimbursed the Claimants. The Claimants have therefore suffered detriment and loss.*
>
> *"and to paragraph 17 to insert the words "and or unjust enrichment" before the words "the Claimant."*

[28] At the resumed hearing the following agreed documents were tendered

> Exhibit 3(a)
>
> Tab H of Bundle of Claimant's Closing Submissions filed 17th June 2021 being Commercial Bank's Foreign Currency Loan Rates
>
> Exhibit 3 (b)
>
> Tab I, of the same bundle, being Commercial Bank's Domestic Currency Loan Rates

[29] The Claimant's counsel completed her submissions. Essentially it is alleged there was a contract partly oral and partly evidenced by the documentation. It was part

performed and it was expressly agreed that the Claimant was to be reimbursed 100%, of the start-up costs incurred, from the profits of the venture. The Defendant wrongfully terminated that contract and therefore must pay damages. This being the reimbursement of the Claimant's expenses. The contract must be inferred from conduct. They rely on ***Caribbean Cement Company Ltd. v Freight Management Limited [2016] JMCA Civ 2*** **(unreported judgment delivered 15th January 2016),** wasted expenditure due to wrongful termination awarded. ***RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) [2010] 1 WLR*** **753** was cited to establish that a signed agreement was not necessary to prove a contract and that the parties' conduct would suffice.

[30] On the question of damages it was submitted that these total less than the amounts pleaded being US$218,919.43 and J$142,528.13. The pleading was amended to reflect these figures. On the matter of the amounts paid for patients treated, and that this was paid to charity, Mrs. Dixon-Frith says that she was caught by surprise. She complained that the Defendant could have sought disclosure of this information prior to the trial. She suggested that a figure of US$30,000 for the treatment was appropriate. When asked how both Claimants could recover she admitted that the 1st Claimant was incorporated in the course of the contract and that the MOU was entered into with the 2nd Claimant. The receipts and invoices relied upon are drawn to the 2nd Claimant for the most part. Therefore, she submitted judgment can properly be entered for the 2nd Claimant.

[31] In his closing submissions Mr. Abrahams emphasized that no signed contract in writing had been put in evidence. In answer to my question, whether if there is no agreement what should happen to the money spent, counsel candidly admitted that reasonable expenses should be refunded. The court rose to allow him to consult his client on this issue. He, at the resumption, stated U$63,111.52 was paid directly by credit card from "Blue Horizon Charitable Foundation". He said if the foundation is to get the benefit they must send the credit. Counsel said US$37,486 was spent on the build out of the property and the Defendant should

be partly responsible for that. US$45,158.38 he submitted was spent on payroll. This should be divided equally as it was a joint venture. He also submitted that the payroll was not a start-up cost. He however admitted the employees were, some of them, there to train others. He relied on the authority of ***Consulate Ventures Inc. v. Amico Contracting and Engineering (1992) Inc. [2011] O.J. No. 2476 (Judgment 2 June 2011) Ontario Court of Appeal*** to demonstrate an approach to assessment when there was no contract**.** Counsel referred to the Joint Venture Agreement at para 119 (page 124, of Exhibit 1) which indicates that US$10,000 was the amount a patient would pay.

[32] Having considered all the evidence, and the submissions both written and oral, it is manifest that the parties had a binding contract and had commenced implementation of it. The Memorandum of Understanding (page 1 of Exhibit 1) states in clause (iii) that the parties "*acknowledge that no contractual relationship is created* ". However, the same document proceeds to reference itself as an agreement and, states in clause 4.1 that "All *rights and obligations of the Parties concerning the terms of this Agreement will continue in effect after its termination for a period of three (3) years*, *unless the Parties agree otherwise in writing*". If necessary, I find as a fact that the parties intended to and did create legal relations by this document which constituted a binding agreement.

[33] The Defendant represented to the 2nd Claimant that he had signed the said Memorandum of Understanding and his representation induced the Claimants to embark upon expenses pursuant to that agreement. The Defendant is therefore estopped and precluded from denying its existence. I find also that the termination of the agreement was wrongful. The reasons stated for termination were manufactured and provide no lawful basis. The Claimant's ought to have been allowed at least 3 years' operation at the premises if the agreement was to be terminated. The Defendant is therefore liable for breach of the agreement and/or for its wrongful repudiation.

[34] Even if I am wrong on this, and there was never a contract, the Defendant has stood by and encouraged the Claimants to expend money in the expectation of a contract. Indeed, it was the Defendant for the most part, through its agent Mr. Peter Mansfield, who collected and spent the money on the Claimants' behalf. A court of equity will grant quasi-contractual relief to the Claimants by way of restitution or damages.

[35] In the final analysis therefore the Defendant is liable to the Claimants. Damages for breach of contract will seek to put the Claimants in the position they would have been in had the contract been performed. In this regard it is the evidence, which I accept, that the Defendant agreed that the Claimants would be reimbursed for 100 percent of the start-up costs out of the earnings of the business. The wrongful termination meant there was no business out of which to get reimbursement. Therefore, the damages recoverable ought to be 100% reimbursement of the start-up costs incurred. If I am wrong on that there has been an unjust enrichment and compensation is by way of restitution. This will be of the start-up costs expended and not reimbursed. Whether breach of contract or quasi contract therefore the measure of damages, in this case, is the same

[36] The evidence discloses, and the Claimants admit, that some revenue was earned. This it is said was paid to a charity (the Claimants' Foundation) by the patients treated. That is of course irrelevant. The Claimants' received, or might have received, these payments. If they told the patient to pay it to a charity that cannot be to the Defendant's detriment. There is a dearth of evidence as to the number of patients treated. The Claimants' witness was not asked about this. The Defendant's evidence, which was not challenged, is that between seven and nine patients were treated (see his evidence in amplification of his witness statement). I will accept nine as the number treated. The payments by patients treated will therefore be applied to reduce the Defendant's liability. There is no evidence as to the amount paid by each patient but I accept that US$10,000 is the amount contemplated (see joint venture agreement page 124 of Exhibit 1). Similarly, any

amount due to the Defendant in the period for rental/use of the property will be deducted.

[37] I therefore assess the damages payable as follows:

Start-up costs incurred: US $218,919.43 and, J$142,528.13

Less amounts patients paid: (9 patients @US10,000 per patient) U$90,000

Less rent owed :(J$3,000 per month – December 2017 to February 2018) J$9,000.

The Claimants concede that the 2nd Claimant was the one who actually incurred the expenses and was also the primary contracting party (see MOU page 1 of Exhibit 1). This does not appear to be a matter of dispute. Furthermore, the 1st Claimant was incorporated in order to give effect to the Memorandum of Understanding. Judgment will therefore be given in favour of the 2nd Claimant only.

[38] On the matter of interest to be awarded I accept that this is an appropriate case for the award of interest at commercial rates. This was a commercial agreement. The Claimant, due to the Defendant's breach had to remove and re-establish operations elsewhere. It must reasonably have been in the parties' contemplation that any breach would likely result in an award of interest at commercial rates. The Court of Appeal of Jamaica has given recent guidance in that regard see ***Goblin Hill Hotels Limited v John Thompson et al SCCA No. 57/2007 (unreported judgment dated 5th June 2009)*** per Morrison JA at paragraph 22. When regard is had to Exhibit 3 (a) the average annual rate of interest on United States dollar loans, in the period 2018 to 2020, is 6.89%. Exhibit 3 (b) supports an average annual rate of interest on Jamaican dollar loans, for the same period, of 13.03%.

[39] My decision on the Claim means *ipso facto* that the Counterclaim by the Defendant is dismissed. There will therefore be judgment for the 2nd Claimant against the Defendant as follows:

(1) US$ 128,919.43 with interest thereon at a rate of 6.89% per annum from the 19th February 2018 to the date of payment and,

(2) J$ 133,528.13 with interest thereon at a rate of 13.03% per annum from the 19th February 2018 to the date of payment.

Costs to the 1st and 2nd Claimants to be taxed or agreed as it was not unreasonable to have joined the 1st Claimant as a party to the Claim.

David Batts
Puisne Judge