[2015] JMCD CD.15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013CD00070

BETWEEN ISP FINANCE SERVICES LTD CLAIMANT

AND E.W. ABRAHAMS & SONS LTD DEFENDANT

Alexander Williams of Usim, Williams & Co instructed by Kemar Hewitt for the Claimant

Christopher Honeywell instructed by Christopher Honeywell & Co for the Defendant

Heard: 2nd March and 30th July 2015

Assignment of Debt – Whether there can be an assignment of the value of items to be sold pursuant to a consignment agreement where there is no sale - Whether acknowledgment and promise to pay on a Notice of Assignment constitutes an irrevocability liability.

K. LAING J

The Claim

[1] The Claimant, ISP Finance Services Limited, by claim form and particulars of claim filed on 8th March 2013 seeks the following relief:

1. The sum of $1,657,000.00

2. Interest at a commercial rate, pursuant to the provisions of the *Law Reform (Miscellaneous Provisions) Act*
3. Costs
4. Such further or other relief as the Court deems fit.

Background

[2] The Claimant operates a micro-finance company with its registered address at 17 Phoenix Avenue, Kingston 10. The Defendant is a distributing company that sells goods on behalf of suppliers or producers.

[3] The Defendant had a distribution agreement with a Sure Limited ("***Sure***") pursuant to which the Defendant would use its distribution network to sell goods supplied to it by Sure on consignment. The Defendant would endeavour to sell the goods supplied on consignment and the proceeds of any sale would be remitted to Sure minus the agreed commission which would be retained by the Defendant. By this agreement the Defendant only became liable to pay for the goods successfully sold and was at liberty to return any unsold items.

[4] Pursuant to this consignment agreement, on or about 6th May 2011, Sure supplied the Defendant with 1500 cases of Bullet Energy Drink ("***the Drink***") to be sold under invoice bearing number 020227 with an invoiced total sum of $3,600,153.00 inclusive of GCT ("***the Consignment Agreement***").

[5] On or about 6th May 2011 Mr. Nigel Bair ("***Mr. Bair***") on behalf of Sure visited the Claimant's office and procured a loan of $1,657,000.00. The loan was agreed to be repaid from the payment by the Defendant for the Drink supplied to the Defendant. Mr. Bair was advanced the loan on condition that there was a debt, due and owing by the Defendant to Sure, under invoice bearing numbers 020227, and that this debt was assigned to the Claimant.

[6] A notice of the assignment of the debt dated 30th May 2011 was signed by Mr. Bair as director of Sure and was sent to the Defendant ("***the Notice of Assignment***"). Mrs. Jean Fraser, a Director of the Defendant, signed the Notice of Assignment on behalf of the Defendant

[7] The full terms of the Notice of Assignment are as follows:

> *"May 30, 2011.*
>
> *E.W. Abrahams Limited*
> *35 Hagley Park Road*
> *Kingston 10*
>
> ***Re: NOTICE OF ASSIGNMENT***
>
> *Dear Mrs. Jean Fraser*
>
> *You are hereby notified that on May 6th 2011, we have assigned and transferred to ISP Finance Services Limited the following debt of One Million Six Hundred and Fifty Seven Thousand Dollars ($1,657,000.00), incurred on our invoice #020227 covering goods supplied to you.*
>
> *Please direct any further correspondence to Dennis Smith of ISP Finance Services at the following address:*
>
> *Dennis Smith*
> *17 Phoenix Avenue*
> *Kingston 10*
> *Tel 906-0132/0012 (office)*
> *469-1773 (mobile)*

Email dennissmith@ispfinanceservices.com

Thank you for your cooperation

Sincerely

Nigel Bair
Director
Sure Limited

Kindly indicate your acceptance and willingness to pay unconditionally the full amount stated when due and payable to ISP Finance Services Ltd. by signing below.

Mrs. Jean Fraser
Signature"

[8] In July 2011 the Defendant concluded that there was an issue as to the true owner of the Drink which had been supplied to it and formed the opinion that Rosh Marketing Ltd./Carden Trading was in fact the true legal owner of the Drink. On that basis, the Defendant purported to terminate the Consignment Agreement and delivered to Rosh/Carden Trading the unsold 1464 cases remaining of the 1500 cases of the Drink, which had been supplied to the Defendant by Sure as well as a cheque for $86,400.29 representing the payment for the 36 cases which the Defendant says was used largely for promotional purposes.

The Claimants Case

[9] The Claimant contends that there was a valid assignment of a debt owed by the Defendant to Sure in the sum of $1,657,000.00. It further contends that the signature of Mrs. Jean Fraser on behalf of the

Defendant constituted an absolute and unconditional obligation to pay that debt of $1,657,000.00 and the Defendant is liable to pay this sum notwithstanding any issues which may have arisen as to the ownership of the Drink or the underlying Consignment Agreement by which the Defendant became liable to Sure in the first place.

The Defendant's Case

[10] The Defendant position is that notwithstanding the terms of the Notice of Assignment and the "acceptance and willingness to pay unconditionally the full amount stated when due and payable..." its liability under the assignment could not exceed its liability to Sure and to the extent that it did not sell the Drink supplied pursuant to the Consignment Agreement (save for 36 cases), a debt or liability to Sure in the amount of $1,657,000.00 did not arise and could not therefore be the subject of a cause of action by the Claimant based on an assignment.

The Law relating to assignments of debt

[11] Treitel, The Law of Contract 12 Ed para 15-001 describes an assignment as follows:

> *"This is a transaction between the person entitled to the benefit of the contract (called the creditor or the assignor) and the third party (called the assignee) as a result of which the assignee becomes entitled to sue the person liable under the contract (called the debtor). The debtor is not a party to the transaction and his consent is not necessary for its validity."*

[12] A chose in action can also be assigned. A chose in action describes all personal rights of property which can only be claimed or

enforced by action and not by taking physical possession. According to Cheshire, Fifoot and Furmston's Law of Contract 15th Ed**.** at pg 643;

> *"It is a term that comprises a large number of proprietary rights, such as debts, shares, negotiable instruments, rights under a trust, legacies, policies of insurance, bills of lading, patents, copyrights and rights of action arising out of tort or breach of contract."*

[13] There is no prescribed formulation for an equitable assignment. Where there is a contract between the owner of a chose in action and another person which shows a clear intention that such person is to have the benefit of the chose, there is without more a sufficient equitable assignment.

[14] Section 49(f) of the **Judicature (Supreme Court) Act** provides for a statutory assignment as follows:

> *"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or thing in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor…"*

[15] In **New Falmouth Resorts Limited v International Hotels Jamaica Limited** SCCA No 32/2009 delivered April 20, 2011, the Court of Appeal in examining the law in relation to assignments in Jamaica stated as follows:

> *"[53] Section 49 (f) prescribes the procedure for the statutory assignment of choses in action. It reflects a provision which was first enacted in England in substantially similar terms in 1873 (Judicature Act, section 25(6) and is now to be found in section 136(1) of the law of Property Act, 1925. Before 1873, although there was no general right of assignment of contractual rights at common law, such rights were always assignable in equity, which took the view that "choses in action were property which ought, in the interest of commercial convenience, to be transferable" (Treitel, para. 15-006). In considering this question, it is important to bear in mind that the introduction of a statutory method of assignment did not affect the process of equitable assignment in any way, since, as Lord Macnaghten observed in* ***Brandt's Sons & Co v Dunlop Rubber Company*** *[1905] AC 454, 461, "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree".*

[16] To constitute a statutory assignment the assignment must be absolute. In **Durham Bros v Robertson** [1898] 1 QB 765, Chitty LJ stated that:

> *"The assignment before us complies with all the terms of the enactment save one, which is essential: it is not an absolute but a conditional assignment. The commonest and most familiar instance of a conditional assurance is an*

assurance until J. S. shall return from Rome. The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for revesting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form: it is one of substance, relating to the protection of the original debtor and placing him in an assured position."

Was there a debt capable of being assigned?

[17] The Claimant has not sought to draw a distinction between a statutory and an equitable assignment. Counsel for the Claimant submitted that not only does the Defendant have notice of the assignment but it actually signed the notice and made a written promise to pay unconditionally therefore the document takes effect as a binding assignment of the debt and obligation to pay. Counsel relied on the statement by Blackburn J, in **Griffin and other v Weatherby and Henshaw** [1868] LR3QB 753, at page 758 as follows:

*"Ever since the case of **Walker v. Roston** (1) it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person,*

and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the Transferee, founded on the promise, and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder"

[18] It is to be noted that there was no "fund" in existence or accruing in the hands of the Defendant on May 6, 2011 or May 30, 2011, nor was there any fund ever received for that matter and the principle stated in ***Griffin and other v Weatherby and Henshaw*** is of limited applicability to the facts under consideration.

[19] In the Court's view, for purposes of deciding the Claim, it matters not whether the purported assignment of the debt of $1,657,000.00 took effect as a statutory assignment or as a conditional or equitable assignment. The Claimant cannot succeed on its claim. The law is accurately stated by **Cheshire Fifoot and Furmston's Law of Contract 15th Ed pg 654,** as follows:

"An assignee, whether statutory or not, takes subject to all the equities that have matured at the time of notice to the debtor. This means that the debtor may plead against the assignee all defences that he could have pleaded against the assignor at the time when he received notice of the assignment."

[20] The learned authors also referred to ***Mangles v Dixon (1852) 3 HL Cas 702 at 735*** where Lord St. Leonards states:

> *"The Authorities upon this subject, as to liabilities, show that if a man does take an assignment of a chose in action he must take his chances as to the exact position in which the party giving it stands."*

[21] The Notice of Assignment indicates that on May 6, 2011, there was an assignment of the "debt" of One Million Six Hundred and Fifty Seven Thousand Dollars ($1,657,000.00), incurred on invoice #020227. The Court accepts that the Drink that was the subject of that invoice was supplied pursuant to the Contingency Agreement between the Defendant and Sure. The Court finds that there was not at any material time a debt in the sum of $1,657,000 that was then "presently due and payable" to Sure, nor was there at anytime a debt in this amount owed by the Defendant which could have been the subject of a valid assignment and the basis of the instant claim by the Claimant against the Defendant.

[22] Furthermore, the Defendant was entitled at the time of the Notice of Assignment to return the Drink to Sure without breaching the Consignment Agreement and without incurring any liability (save for any unreturned product). As it is entitled to do, the Defendant has raised a defence to the Claim which is a defence it would have had against Sure. This defence in essence is that Sure is not the Owner of the Drink, Rosh /Carden Trading is and on that basis the Consignment Agreement was terminated and the remainder of the Drink returned to Rosh/Carden Trading "*based on the instruction and full knowledge of Sure Limited on the 15th day of July, 2011*". It is entitled to deploy this defence in these proceedings. The Claimant has not adequately addressed this defence.

[23] The Claimant was not able to prove that the Drink was properly the property of Sure and that by not returning the remainder of the Drink, the Defendant incurred a liability to Sure under the Consignment Agreement which was assignable and which had been assigned. Sure was not joined as a party and the Court was not required to determine whether Sure might have a claim against the Defendant for breach of the Consignment Agreement by returning the Drink to Rosh/Carden Trading .

[24] In any event, for purposes of this judgment it is my opinion that such a finding is unnecessary. The Claimant has not established on a balance of probabilities that it has a valid claim against the Defendant which arose from the assignment of a liability or debt of $1,657,000.00 which became due and payable by the Defendant to Sure.

Did the Notice of Assignment once signed and acknowledged amount to an irrevocable and unconditional obligation on the part of the Defendant to pay the Claimant the sum of $1,657,000.00

[25] In the Court's opinion the Defendant's acceptance and willingness to pay as indicated on the Notice of Assignment must be construed as being subject to the Defendant, as a matter of fact and of law, having a debt to Sure. The Court has found that there was no such debt to Sure. The Claimant cannot by the terms of the acceptance endorsed on the Notice of Assignment obtain the benefit of a right to a debt which Sure did not have.

[26] The Claimant has not pleaded that the acceptance and willingness to pay as indicated on the Notice of Assignment constitutes an independent agreement as between itself and the Defendant which gives rise to a separate cause of action for breach of contract or

otherwise. It is therefore not necessary for the Court to consider any other possible bases of the Defendant's liability to the Claimant.

[27] For the reasons discussed above the Court finds that the Claim does not succeed and makes the following orders;

1. Judgment for the Defendant.

2. Costs of the Claim to the Defendant to be taxed if not agreed.