

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2007/025

BETWEEN:

VERNANTIUS JAMES

Appellant

and

FERGUSON JOHN
t/a Chambers of John & John (A Firm)

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins
The Hon. Mr. Davidson K. Baptiste
The Hon. Mr. Michael Gordon, QC

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Vernantius James in person
Ms. Eugenia Dickson holding papers for Mr. Ferguson John for the respondent

2009: October 20, 22.

ORAL JUDGMENT

- [1] **RAWLINS, C.J.:** This written judgment is intended to reproduce the essence of an oral judgment which this court delivered on 22nd October 2009. The purpose is to re-state the facts of the case, which were misstated in an aspect of the oral judgment. The misstatement was occasioned by an inadvertent mixing of the facts of this case with the facts of another case which was heard on 20th October 2010, the same day on which the present appeal was heard. The court subsequently apologized to the appellant, Mr. Vernantius James, in open court and undertook to effect the correction by way of a written version of the judgment.

- [2] This is an appeal against a judgment of Cottle J, in the High Court dated 25th May 2007. In that judgment, the judge considered the claim that was made by Mr. James, the claimant/appellant. The judge indicated that both parties gave evidence in the case, there were witness statements, there was cross-examination as the Record shows. At the end, the judge made findings in what is one of the few cases in this jurisdiction involving litigation between lawyers.

Background

- [3] By way of background, the appellant retained the respondent to institute legal proceedings against the appellant's former employers, the Saint Lucia Marketing Board for breach of contract of employment. The appellant decided, it would seem, that instead of staying around waiting for answers, he would go off to pursue a career learning the law. The wisdom of that decision is reflected in the fact that he sits here today as a qualified lawyer. However, while he was away he intended to pursue a case against his employers. Accordingly, he instructed Mr. John, as is common ground between the parties, to bring the case to court on his behalf. Mr. John filed the claim on behalf of Mr. James.
- [4] At a certain point in the proceedings, the judge, Pemberton J, seemed to have given certain indication as to what course of action she would have taken if the case was not proceeding. At that point there had been adjournments and it was not clear that the matter was proceeding. Mr. John complained that he was unable to contact his client, Mr. James, who at that time was pursuing his studies in England. He was not able to contact him to obtain instructions and the judge was threatening to take certain courses of action. Mr. John then decided to discontinue the case.
- [5] Mr. James complained that the case was discontinued without him being notified. Mr. John indicates that there was no way he could have notified him. He had no forwarding address for Mr. James in England. He had no contact information for

him in England. Mr. James' response was that Mr. John did not even have to get the contact information in England because Mr. John knew his wife, his family. He also knew where he lived and he had visited his home on at least four occasions. Mr. James indicated that he had told Mr. John that in the event he could not contact him, he should have contacted his wife who would then contact him, but Mr. John did not do this.

[6] Mr. John said that while it is true he did not contact Mr. James' wife, he was not given instructions to contact her and since Mr. James was his client, he tried to contact him but did not succeed in doing so. The judge in his judgment, at paragraphs 6 and 7, indicated that he did not agree with the evidence given by Mr. James. He accepted the evidence given by Mr. John and agreed with him that the instructions were that he would use any means to contact Mr. James in England, not to contact his wife at the home address or by telephone. The judge accepted that Mr. John agreed to try to initiate contact with him (Mr. James).

[7] In the final analysis, the judge thought that there was an absence of specific instructions, and, therefore, that Mr. John was not in a position to prosecute the claim. This is evident from paragraph 9 of the judgment. The judge stated that Mr. James was expected to be there to give his lawyer as much assistance as possible so that the lawyer could in turn assist the court and that was not done.

[8] At the case management conference, the parties should have been prepared to negotiate and that could not have been done without instructions and so Mr. John was in no position to participate fully and meaningfully in the case management conference which was coming up. It would appear that the judge adjourned the first hearing and that at the second hearing, Mr. John having had no instructions and with the real possibility of a substantial cost order being made against Mr. James, decided to discontinue the claim. The judge stated that he did not consider that by this action, Mr. John was in breach of his duty to Mr. James.

- [9] The judge made an order dismissing the claim by Mr. James against Mr. John and awarded costs to Mr. John on the basis of prescribed costs, which costs amounted to some \$17, 998.22. The claim for general damages and special damages was dismissed. It is against that order that Mr. James has appealed. The appeal was on five grounds.
- [10] During the course of the hearing of the appeal, this court dismissed for reasons which were given, grounds 1 and 4. Ground 3 should also have been dismissed. As stated in the Notice of Appeal, that would have been grounds (a), (b) and (d) in which Mr. James contends that the judgment was arrived at by the judge by giving weight to a defence that was fraudulent and deceptive. That contention arose mainly because there was a Certificate of Truth, which was appended to the defence. It was agreed by all of the parties that it was not signed in accordance with the requirement for a Certificate of Truth that is signed by counsel on behalf of his client. In fact, it was Mr. John's name that was signed. It was accepted, however, that it was not Mr. John who had actually signed his name but his counsel who signed Mr. John's name. That might sound deceptive and that is what Mr. James was alleging.
- [11] Mr. James' case, really, is that the judge was wrong to put any reliance on that defence, when, at the trial, counsel for Mr. John informed the court that he signed the certificate. When, on the other hand, Mr. John was questioned by the Court, he agreed that he would abide by the contents of that same defence as being true and as his defence which he signed. The judge decided to rely on it and this court is of the view that the judge had good legal grounds for relying on it once Mr. John adopted it as being his defence in the case. It is not just a question of signature, deceptive signature and fraud. It is a question of utility. The question is whether the party whose name was signed is resiling from that document as not being done on his behalf. That is the inquiry that the judge carried out. Once it was determined that the party agreed that it was his defence that is sufficient although it was not signing in the form and manner that the rules require. It was simply that

his lawyer signed it for him. Importantly, he adopted that defence as his. The result is that this ground of appeal was dismissed.

[12] The other grounds of appeal (grounds 2 and 5) raised, in effect, 2 interesting considerations. On reading them, especially ground 2 in relation to the judge's fact finding. That ground of appeal is that the judge arrived at his decision on fact finding in a manner which was contrary to the **Benmax** principle.

[13] The **Benmax** principle is trite law. It states that when there is a matter of fact finding and you are questioning the judge's fact finding the inquiry is not at large. The error complained of must fit into those grounds of illegality, that is, illegal or erroneous fact finding by the judge.

[14] This court found when we deliberated on this matter that there was one area which perhaps was in favour of Mr. James. We found that there were in fact a few instances in which the trial judge made critical findings, agreeing for example, with the evidence that was given on behalf of Mr. John and not accepting the evidence that was given on behalf of Mr. James, simply on the ground that he did not agree with the evidence given, or that he accepted the evidence of one witness over the other with no indication of any reason whatsoever for this. In this case in which the evidence is given mainly by the 2 contending parties, that fact finding was tainted under the **Benmax** principle.

[15] The second area of concern was raised by the 5th ground of appeal. In this ground Mr. James states that the judge erred in finding that Mr. John had not acted incorrectly when he discontinued the claim without asserting that he (Mr. James) contacted him (Mr. John).

[16] This court itself considered the evidence, as is required when fact-finding is impeached under the **Benmax** principle. We were not of the view that Mr. John took all the steps that he could have taken to contact Mr. James before taking

such a serious step as discontinuing a claim, particularly given that the discontinuation of that claim meant that it could not have been brought to court again. It was then statute barred. In those circumstances, this court was of the view that client/lawyer relationship and the duty of the lawyer to his client means more than Mr. John did in this case. He should have taken more careful steps to contact Mr. James in order to apprise him of the court's intention and to seek Mr. James' so that he could have informed the court of Mr. James' position on the return to court for the continuation of the case management conference. The trial judge should have so found. With that information, the judge may have given a short adjournment. Had Mr. John taken those steps and his request for an adjournment was unsuccessful, one could not have blamed either him or the judge for falling into error by discontinuing or striking out the claim. We therefore decided to allow the appeal on ground 5 as well.

[17] Where did the foregoing decision leave the matter? The court was left to determine the question of damages. We found that Mr. James pleaded damages as the **Civil Procedure Rules** require. However, he did little or nothing at all to prove damages, particularly to prove special damages, notwithstanding that he claimed some \$69,000.00. Pleading is one thing but proving is quite another. The pleading is contained in the original statement of claim which is at page 164 of the Record. What is pleaded, however, seems to be contradicted by specific terms of the Contract of Employment. Mr. James basically took what was pleaded and attached it to the witness statement. It was therefore a repetition of the pleading and not evidence in proof. When it is looked at against the contract, it seems to contradict the specific terms of the contract on which the claim is based.

[18] The Contract of Employment was dated 4th December 1997. It is at page 186 of the Record. There is a claim for gratuity but there is no reference to gratuity in contract. There is a claim for salary balance on a 2 year contract and that term of contract is un-supported when one examines the contract. There is a claim for entitlement to salary increase but this is not reflected in the contract and the

appellant was paid for accrued vacation. This is evidenced at page 189 of the Record.

[19] The result is that special damages, although pleaded, has not been proved. Therefore the court could grant no special damages. In terms of general damages, general damages was claimed in relation to inconvenience, embarrassment and those terms which flow from cases such as these. However, it was only what is in the witness statement, at page 158 of the Record, that there is reference to general damages. It was very difficult to quantify general damages.

[20] The most the court was able to do in terms of general damages was to look at the statement of claim and what was pleaded therein and arrive at a figure of \$2,000.00 general damages or nominal damages. We then reduced that figure by fifty (50%) percent because we were of the view that it was not only the duty of Mr. John to keep in touch with Mr. James, but also that Mr. James should have assisted and to have paid more interest in his case which was going through the court. There is therefore a dual duty: a duty on the solicitor and a duty on the client, as well, to have kept contact with his lawyer. For not having done that in a manner that was more helpful, the court decided that Mr. James was partly responsible. Accordingly, we reduced damages to \$1,000.00.

[21] In terms of costs, we made no order as to costs, particularly because the amount awarded as damages was one that really turned to be within the jurisdiction of the Magistrate's Court, rather than this court's. This is also because Mr. James put us beyond being able to determine properly what his damages would have been and because Mr. John succeeded on some of the grounds of appeal, and the appellant, Mr. James succeeded on other grounds.

Summary of order

[22] In the final analysis, the order is as follows: The appeal is allowed. There is no award of special damages because it was not proved. \$1,000.00 is awarded as general/nominal damages. The parties are to bear their own costs in these proceedings.

Hugh A. Rawlins
Chief Justice

I concur.

Davidson K. Baptiste
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]