

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2011/CLE/GEN/FP/00270
BETWEEN

BWA (FREEPORT) LIMITED

Plaintiff

AND

DELORES LOCKHART
(Trading as Carib Market & Seafood)

First Defendant

AND

ELKENNY LOCKHART
(Trading as Carib Market & Seafood)

Second Defendant

BEFORE The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mrs A. Kenra Parris-Whittaker for the plaintiff
Mr Alonzo Lopez for the defendants

HEARING DATES: 2014: 27 May and 24 July

JUDGMENT

Gray Evans, J.

1. The statement of claim filed 12 October 2011 shows that the plaintiff is a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on the business of a wholesaler in the City of Freeport in the Island of Grand Bahama, who at all material times provided goods to the defendants.

2. The plaintiff alleges, but the defendants deny, that the first defendant is and was at all material times carrying on the business of a supermarket on the island of Grand Bahama trading as "Carib Market & Seafood"; and that the second defendant is and was at all material times a partner of the first defendant in the business venture trading as "Carib Market & Seafood". Further or alternatively, the second defendant was an agent and/or an employee of the first defendant.

3. The plaintiff's claim against the defendants is for payment of \$7,512.29 being moneys due and owing to the plaintiff by the defendants in respect of products sold and delivered by the plaintiff to the defendants pursuant to a credit agreement between the plaintiff and the defendants; alternatively, for damages for breach of the said agreement; interest and costs.

4. In their defence filed 10 November 2011, the defendants deny the plaintiff's claim and say that if any sums are owed to the plaintiff, they are owed by someone other than the defendants. The defendants do not plead who that "someone" else may be.

5. The issues that arise for consideration are as follows:

- a. Whether the sum of \$7,512.29, or any sum, is owed to the plaintiff for products sold to the business known as Carib Market & Seafood during the period May 2008 to September 2011? If so,
- b. Whether or not the plaintiff had an agreement with the defendants to pay the same?

6. Evidence at the trial was given by Mr Wayne Russell, General Manager and Ms Arnette Carey, Accounts Manager, respectively, of the plaintiff company and by the second defendant, Mr Elkenny Lockhart. All of the witnesses provided witness statements which they adopted as their evidence-in-chief, and each of them was subjected to cross-examination.

7. The plaintiff's evidence is that the defendants received goods valued at \$7,512.29 from the plaintiff between May 2008 and 30 September 2011 pursuant to an agreement between the parties made on or around August 2003; that the second defendant signed for and received most of the goods provided by the plaintiff to the defendants' business, at their store located on Kennedy Drive, Freeport, Grand Bahama. Mr Russell said that the plaintiff approached the first defendant requesting that the defendants sign a credit agreement form, which the first defendant did on 8 September 2011, and listed herself as the owner and manager of the business trading as Carib Market & Seafood. According to Mr Russell, the terms and conditions of that credit agreement were the same terms already agreed to previously between the parties, which provided that the defendants would pay all of the charges due for goods received to the plaintiff immediately upon receipt of a monthly statement.

8. According to Mr Russell, despite the plaintiff submitting monthly statements to the defendants for the products received by the defendants, the defendants have in breach of the credit agreement failed to pay the plaintiff; that the plaintiff, on 8 September 2011 sent a final

demand letter to the defendants requesting payment of the aforesaid sum of \$7,512.29 pursuant to the terms of the credit agreement, but the defendants have failed and/or refused to pay the same.

9. Included amongst the plaintiff's documentary evidence is a statement showing the aforesaid amount outstanding as at 8 April 2011.

10. According to Mr Russell, as a result of the defendants' failure to pay the aforesaid outstanding invoices, the plaintiff refused the defendants any further credit and thereafter required the defendants to pay cash for their purchases.

11. Under cross examination Mr Russell said he had been General Manager of the plaintiff since 2009, although he had been with the defendant company since 2002, having served as office manager prior to his appointment as general manager.

12. Mr Russell reiterated that the defendants would have received the goods for which they, trading as Carib Market & Seafood, were billed; that the invoices there for were all made out to Carib Market & Seafood, and signed for by different persons over the course of the period for which they were sent, as any employee or representative of Carib Market & Seafood would have received goods and would have signed for them; that none of the invoices were signed by the first defendant, although there were some that contained the second defendant's signature acknowledging receipt of the goods.

13. Mr Russell admitted that when the plaintiff invoiced the billings, it was not invoicing Elkenny Lockhart or Delores Cabral Lockhart personally but rather Carib Market & Seafood.

14. As for whether he knew who was trading as Carib Market & Seafood, Mr Russell said that it was the plaintiff's understanding that the defendants owned the business together and that they both conducted business on its behalf.

15. Mr Russell disagreed with counsel for the defendants' suggestion that neither of the defendants traded as Carib Market & Seafood and says that for years they have conducted business under that name with the plaintiff; that Mr Lockhart ordered the products, picked them up and signed for them and Mrs Lockhart dealt with the business' account with the plaintiff. That whenever there was an accounting issue, the plaintiff would call and discuss it with Mrs Lockhart and she was the one who attempted to settle the issue; that the defendants were the only two people whom the plaintiff knew traded as the business of Carib Market & Seafood and with whom the plaintiff dealt in relation to that business over the years.

16. In response to counsel for the defendant's suggestion that it was GAC Holdings Ltd who was trading as Carib Market & Seafood, Mr Russell said that the first time he had heard of GAC Holdings Ltd was after the commencement of this action. His evidence is that at no time during the relevant period, even after the demand for payment was made on the defendants, did either of them indicate to him that it was GAC Holdings Ltd and not them with whom the plaintiff should have been dealing.

17. Ms Carey's evidence is that when she joined the plaintiff company the defendants had an outstanding balance on their credit facility in the amount of \$7,512.29; that she has seen the invoices exhibited to the witness statement of Mr Wayne Russell and can confirm that those invoices remain outstanding to date. She said that as the Accounts Manager she could confirm that the plaintiff company did not receive any cheques from the defendants or GAC Holdings Limited in January 2013 and that no payments have been made on the defendant's credit facility since 2010.

18. The second defendant's evidence is that he was an employee of Carib Market & Seafood during the period 30 May 2008 to 30 September 2011 and is, therefore, able to speak to the plaintiff's claim. He said that any items that Carib Market & Seafood received from its suppliers, including the plaintiff, were signed for by himself or one of the principals of GAC Holdings Limited, the company trading as Carib Market & Seafood; that his wife Delores Cabral Lockhart, the first defendant, is part owner or operator of GAC Holdings Limited along with Marvin Cabral.

19. According to the second defendant, the plaintiff's case is ill-founded as it has incorrectly billed Carib Market & Seafood for items which it did not deliver and for which the plaintiff owed "the defendant" credits. Further, that the claim by the plaintiff that the defendants owe the plaintiff over \$7,000 dollars was incorrect as the plaintiff's bill included items for which the plaintiff had already received funds from Carib Market & Seafood. In any event, Mr Lockhart said, the plaintiff's bill is not payable even in part by the defendants or either of them because they are not the persons trading as Carib Market & Seafood; that he is merely an employee and has no business license to do business in Freeport.

20. Under cross examination Mr Lockhart said that the defendant's case is that the amount being claimed by the plaintiff is incorrect because some of the invoices had been paid and some of the items were incorrectly billed.

21. In response to whether it was true that Carib Market & Seafood owed the plaintiff any money but that he was unsure of the amount that was owed, Mr Lockhart said that he did not know if Carib Market & Seafood owed the plaintiff money. His position, he said, was that Carib Market & Seafood was invoiced for items that were damaged or for goods that were not received.

22. The second defendant said that Mr Russell's evidence that there was a previous credit application on file was incorrect. According to him, he and the plaintiff's previous manager were personal friends and when the business of Carib Market & Seafood was starting that manager extended credit to Carib Market & Seafood based on their friendship. However, there was nothing in writing to that effect. He said that none of the terms in the credit application form were discussed with him by the previous manager, who simply allowed "Carib Market & Seafood to buy goods and then pay for it by cheque."

23. Mr Lockhart admitted to having received goods from the plaintiff between 2003 and 2011, on credit, and that when the account went into arrears the credit facility was stopped.

24. Is the amount claimed by the plaintiff owed to the plaintiff?

25. The plaintiff alleges that it delivered products to the business known as Carib Market & Seafood during the aforesaid period pursuant to a credit agreement under which the defendants had agreed to pay when statements were delivered. In support of that allegation, Mr Russell produced copies of invoices for goods delivered to and received by or on behalf of the business of Carib Market & Seafood, along with a statement for the period 30 May 2008 through 8 April 2011, showing the said invoices as well as payments and credits to the account, leaving the aforesaid balance of \$7,512.29.

26. Although Mr Lockhart in his 13 May 2014 witness statement as well as under cross examination said, as I understood his evidence, that the invoices for which the plaintiff was now claiming payment related either to goods which had been damaged prior to delivery or which had not been delivered at all, or included invoices which had already been paid, he produced

Terms and Conditions

1. Customer shall pay all charges to Bahamas Wholesale Agencies Ltd at the address specified in the monthly statement immediately upon receipt thereof.
2. Bahamas Wholesale Agencies Ltd reserves the right to add a service charge, from time to time, to the amount outstanding on overdue accounts. Furthermore, if overdue accounts are referred to collection, then the collection costs and any legal expenses incurred shall be charged to the customer and shall be payable by him on demand.
3. Cash refunds will not be made on purchase orders.
4. Credit may be revoked by Bahamas Wholesale Agencies Ltd at any time without giving any reason for so doing.

I/We have read and agree to all the terms and conditions outlined above and warrant and confirm that the above information is true and correct.

Name (Block Letters): DELORES LOCKHART

Signature: (Sgd) D. Cabral Lockhart

Position: Manager/Owner

Signatures of Partners: _____

Date: 8 September 2011 _____"

32. It is noted that that document was signed by the first defendant, Delores Lockhart, as manager/owner, who, by her signature, confirmed that she had read and agreed to all the terms and conditions set out in the document and warranted and confirmed that the information was true and correct. As can be seen, the document also indicates that the first defendant is the "Customer" and the "trading name" of the business is "Carib Market & Seafood Limited". Under cross examination, Mr Russell said that that document was a reproduction of a previous credit application, as the plaintiff had lost a number of its documents, including the defendants' first application, during a hurricane, hence the need to have the defendants sign another form. He said he had seen the previous form.

33. According to Mr Russell, the plaintiff's policy is that customers wanting to establish a credit account with the plaintiff had to complete the credit application form, without which no credit facility would be extended. Further, that once the plaintiff agreed to extend credit to a customer, an account was set up in that customer's name and the customer notified verbally that the application had been approved.

34. It is not disputed that the copy credit agreement/credit application is dated 8 September 2011, the date that the plaintiff sent its final demand letter to the defendants requesting payment of the aforesaid sum. It is also not disputed that the said form was signed almost two years after the date of the last invoice for which the plaintiff is now seeking payment.

35. Consequently, I agree with counsel for the defendants that the plaintiff cannot rely on that document to prove that it had a credit agreement with the defendants or, for that matter, with Carib Market & Seafood, during the period covered by the aforesaid outstanding invoices, May 2008 October 2009.

36. However, as indicated, the evidence is that each of the invoices issued to Carib Market & Seafood, in the area of the "received by" signature, included the term that the invoices were to be paid within 30 days. In my judgment, by signing the said invoice, the signer, in some instances the second defendant, not only acknowledged receipt of the goods but also

acknowledged and agreed to, on behalf of Carib Market & Seafood, to whom the invoices were addressed, the terms for payment indicated thereon.

37. Moreover, although the second defendant denied the existence of a written credit agreement, his evidence under cross examination is that he and the plaintiff's previous manager were personal friends and when "the business", meaning Carib Market & Seafood, "was starting", that manager extended credit or "he allowed Carib Market & Seafood to buy goods and then pay for them by cheque", based on the personal friendship between him and the second defendant.

38. Further, although Mr Lockhart said that none of the terms set out in the credit application form were discussed with him by the previous manager, he admitted to having received goods on credit on behalf of Carib Market & Seafood between 2003 and 2011, paying for them when statements were rendered and that when the account went into arrears the credit facility was stopped. He also agreed with counsel for the plaintiff, that those were the same terms and conditions set out in the credit application form and which the plaintiff was alleging were the terms and conditions of its written credit agreement with the defendants.

39. Consequently, in my view, the operators of the business of Carib Market & Seafood by accepting the goods for which the aforesaid outstanding invoices were tendered, as evidenced by the signatures of their agents and or employees, including the second defendant, agreed to pay the plaintiff the invoiced amounts on the terms stipulated on each of the said invoices.

40. The defendants, however, deny that they are the operators of the business of Carib Market & Seafood. The second defendant's evidence is that it is in fact GAC Holdings Limited, a company beneficially owned by the first defendant and Marvin Cabral, that traded as Carib Market & Seafood, which no longer exists.

41. The plaintiff commenced this action in October 2011 and although the defendants in their defence filed in November 2011 deny that they were trading as Carib Market & Seafood, nowhere in such defence do the defendants state that GAC Holdings Limited was the entity trading as Carib Market & Seafood.

42. Moreover, the defendants filed their list of documents on 14 September 2012 and nowhere in that list do they mention GAC Holdings Limited or provide any documentation showing any relationship between that company and the business of Carib Market & Seafood. It appears that it was not until his witness statement filed on 27 May 2013 that the second defendant said that GAC Holdings Limited was the company trading as Carib Market & Seafood. In that regard, he stated at paragraphs 4 and 5 of his statement:

"That any items that Carib Market received from its suppliers including the plaintiff were signed for by myself or one of the principals of GAC Holdings Limited, the company trading by the name Carib Market & Seafood.

That my wife Delores Cabral Lockhart [the first defendant] is in fact part owner or operator of the said company GAC Holdings Limited along with Marvin Cabral."

43. However, nowhere on the invoices is there any indication that the products were received by or on behalf of GAC Holdings Limited trading as Carib Market & Seafood.

44. Additionally, although included in the bundle of documents are copies of bank statements for an account at First Caribbean International Bank in the name of "GAC Holdings Limited dba Carib Market & Seafood", that information is not reflected on the copy of the cheque

dated 3 December 2008, which appears to have been drawn on that account and signed by the first defendant. The name on the cheque is simply "Carib Market & Seafood".

45. The defendants had the option of disclosing to the plaintiff at the time the writ was served on them that they were not the proper parties; they had the opportunity in their defence to plead that they were not the proper parties; they had another opportunity when they filed their list of documents to disclose to the plaintiff that GAC Holdings Ltd was the entity trading as Carib Market & Seafood.

46. They did not take advantage of any of the aforesaid opportunities to bring the information to the plaintiff's attention.

47. Furthermore, Mr Russell's evidence, which I accept, is that he had never even heard of GAC Holdings Limited until this trial and that prior to the commencement of this action, he always dealt with the defendants in relation to Carib Market & Seafood. That evidence has not been disputed by the defendants.

48. According to Mr Russell, the second defendant was the person with whom he dealt in relation to the goods delivered to and received by or on behalf of Carib Market & Seafood, and the first defendant was the one with whom he dealt in relation to the account for the business; that when the credit facility fell into arrears he spoke to both defendants, multiple times, and at no time did either of them indicate to him that it was GAC Holdings Ltd with whom he should have been dealing. Indeed, Mr Russell's evidence is that when he spoke to the defendants about the arrears on the credit facility and the funds owing, they discussed and agreed a payment plan; that the defendants made one or two payments and then stopped paying. That evidence was not challenged.

49. While I agree with counsel for the defendants that the credit application form signed by the first defendant in 2011 is not evidence of a credit agreement between the parties on which the plaintiff may rely to support its claim for payment of the said sum of \$7,512.29, representing a debt incurred prior to September 2011, in my judgment, that document is evidence at least against the first defendant, that in September 2011 she held herself out to the plaintiff to be the customer and manager/owner of the business trading as Carib Market & Seafood.

50. That document, coupled with the other evidence, leads me to believe that the plaintiff was also led to believe that at least the first defendant was the person trading as Carib Market & Seafood.

51. Furthermore, notwithstanding the second defendant's evidence and counsel for the defendants' submission to the contrary, the plaintiff's evidence that the aforesaid credit application form is a replacement form was not challenged by the first defendant. Nor does she deny that she signed the document produced in evidence or that she held herself out to the plaintiff as the person trading as Carib Market & Seafood. In fact, curiously, the first defendant did not give any evidence in this matter, although it is her signature on the document indicating that she was the customer and manager/owner of the business trading as Carib Market & Seafood. Clearly she must have known in 2011 that, as the defendants now allege, GAC Holdings Limited was the entity trading as Carib Market & Seafood, unless, of course, as counsel for the plaintiff suggests, the first defendant's intention in representing herself as trading as Carib Market & Seafood was to mislead the plaintiff.

52. Furthermore, by the second defendant's own admission the extending of credit to Carib Market & Seafood was done on the basis of his personal friendship with the plaintiff's then

general manager. I am persuaded that such arrangement would have been made on the basis that the second defendant was, or held himself out to be, trading as, or one of the principals of the business known as, Carib Market & Seafood.

53. In the circumstances, I accept Mr Russell's evidence that the plaintiff during the relevant period only dealt with the defendants in relation to the business of Carib Market & Seafood and consequently, I find that on a balance of probabilities, the defendants by their conduct during the relevant period, held themselves out to the plaintiff to be the owners and or operators of, or persons trading as, the business known as Carib Market & Seafood and, in my judgment, are, therefore, the persons to whom the plaintiff is entitled to look for payment of the aforesaid invoices.

54. It is, in my judgment, disingenuous of the defendants at this stage to deny that.

55. In any event, I accept counsel for the plaintiff's submission that the defendants not having pleaded in their defence that GAC Holdings Ltd was responsible for the debt incurred on behalf of Carib Market & Seafood, the second defendant's evidence and counsel's arguments in that regard ought to be disregarded.

56. Similarly with regard to counsel for the defendants' arguments in relation to the Statute of Frauds. The Statute must be specifically pleaded if the defendants desire to rely on it. See RSC Order 18 rule 8 and note 18/12/18 English Supreme Court Practice 1999.

57. As observed by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775:

"Pleadings are still required to mark out parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties."

58. In any event, I agree with counsel for the plaintiff that the sections on which counsel for defendants sought to rely appear to be inapplicable to the facts of this case.

59. In the circumstances, I give judgment for the plaintiff for the sum of \$7,512.29 together with interest and costs to be paid by the defendants, such costs to be taxed if not agreed.

DELIVERED this 3rd day of November A.D. 2014

Estelle G. Gray Evans
Justice