BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

No. 1792 of 1998

BETWEEN

REGINA SCHULTE HULSE **PLAINTIFF**

AND

KNIGHTS LIMITED **DEFENDANT**

Before the Honourable Mr. Justice W. LeRoy Inniss, Judge of the High Court

2003: December 16-18

2004: January 19

Mr. Brian Weekes and Ms. Annette Linton for the Plaintiff.

Mrs Sherica Cumberbatch and Mr. Francis Depeiza of

Carrington and Sealy for the Defendant.

DECISION

[1] The Plaintiff Regina Schulte Hulse is a recording artist who resides in Germany.

[2] The Defendant Knights Limited is a company registered under the provisions of the Companies Act Cap. 308. of the Laws of Barbados.

THE FACTS

[3] On or about September 22nd, 1993 the plaintiff entered into a contract with Knights Ltd for a period of five years for the manufacture and distribution of her work throughout the West Indies. In pursuance of the agreement Ms. Hulse delivered to the defendant a catalogue of her work which included:

a. One Digital Audio Tape (DAT) a master recording of music;

b. One copy of a music video.

[4] Further, the plaintiff hired the defendant to produce an album which was done at the cost of $6,765.00. The defendant produced for her the following:

a. one cassette master;

b. 100 cassettes;

c. One metal stamper;

d. 150 vinyl records;

e. 300 record jackets; and

f. record labels.

[5] In January 1995 there was a fire at the defendant's premises. As a result, Ms. Hulse's DAT as well as the majority of the items produced for her by Knights Ltd. were destroyed. The cassette master was not destroyed as this was stored in another area of the defendant's premises not affected by the fire.

[6] The plaintiff commenced an action against Knights Ltd. for breach of contract alleging the following:

1. that the defendant breached clause 5 of the contract by failing to provide the plaintiff with quarterly royalty statements as contracted;

2. that the defendant breached clauses 2 and 8 of the contract by shipping the plaintiff's catalogue to a company called Ocean Entertainment in Florida, United States of America.

[7] Further Ms. Hulse alleges that the defendant never returned her property to her after she, through her Attorney-at-law wrote to the defendant demanding it.

She seeks inter alia the following relief:

a. an Order that the defendant provide her with quarterly royalty statements as required under the

contract;

b. an Order that the defendant return her catalogue to her; and

c. Damages.

[8] In response the defendant contends that:

a. as a result of the fire, the contract between the parities was frustrated;

b. it returned the plaintiff's property to her;

c. the plaintiff's music was never sold therefore, she would not be entitled to any royalties;

d. the plaintiff's DAT was destroyed in the fire but an offer was made to her by the defendant to re-produce a new master DAT from the cassette master which offer was refused by the plaintiff.

[9] On 26 November, 1999 the plaintiff issued a summons seeking summary judgment against the defendant pursuant to order 14 of the rules of the Supreme Court. The plaintiff filed an affidavit opposing the application for summary judgment. After extensive affidavits were filed by both sides the plaintiff withdrew the application for summary judgment and the matter was set down for trial.

THE ISSUES

[10] 1. Whether the contract between the plaintiff and the defendant was frustrated as a result of the fire.

2. Whether the defendant was a bailee of the plaintiff

3. Whether the plaintiff is entitled to damages for:

(a) breach of clause 5 of the contract; and

(b) loss of the plaintiff's work in the fire.

4. Whether the plaintiff failed to mitigate her loss by refusing the defendant's offer to reproduce the DAT locally.

[11] *Whether the contract between the plaintiff and the defendant was frustrated as a result of the fire of January 1995*

The defendant contends that the majority of the plaintiff's items produced as well as items handed over by the plaintiff to the defendant in pursuance of the contract were destroyed by a fire in January 1995. The items allegedly destroyed are the plaintiff's DAT, metal record stamper and record jackets. This is supported by the affidavit of Mr. Best a former manager of the defendant in which he states at paragraph 23 that he informed the plaintiff of the fire and the fact that her DAT had been destroyed. The plaintiff herself does not in any of her affidavits filed refute or admit this.

[12] "Frustration" has long been recognised as an exception to the strict

performance rule. In **Taylor v Caldwell (1863) 3 B&S 826,** Blackburn J stated the principle thus: "…The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, condition is implied that the impossibility of the performance arising from the perishing of the person or thing shall execute the performance". Lord Brandon in **Paal Wilson and Co. v Partenrederei Hannah Blumenthal, The Hannah Blumenthal [1983] 1 AC 854,** at 909 stated as follows:-

> "…there are two essential factors which must be present in order to frustrate a contract. The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without the fault or the default of either party to contract".

[13] The signing of the contract does not generally amount to promising the impossible. Consequently, if some supervening event outside the control of either party makes it impossible to perform a contract it would be futile to require the fulfilment of obligations incapable of being fulfilled and unjust to demand payment of damages for non-performance. The fire which occurred was not in the contemplation of either party to the contract. The contract between the plaintiff and the defendant was entered into for the following reasons.

(1) for the defendant to distribute the plaintiff's music throughout the West Indies; and

(2) for the defendant to produce an album for the plaintiff.

[14] The defendant contends that records and cassettes were produced in accordance with the contract but alleges that they were destroyed by the said fire which made the distribution of the plaintiff's album impossible.

[15] The defendant states that the cassette master was not destroyed and as a result the plaintiff's DAT can be reproduced from this. It further states that this offer was made to the plaintiff who refused it at once. In **Tsakiroglou & Co. Ltd v. Noblee Thorl GmbH [1962] AC 93** it was held that a contract to sell ground nuts in Hamburg was not frustrated by the blockage of the Suez Canal, even though the nuts were to be loaded at Port Sudan and would have normally been carried through the Canal. The seller could have performed the contract by shipping them via the Cape of Good Hope, even though that would have been more expensive and taken longer. Lord Reid pointed out that it was not a case where a longer voyage would have damaged the goods or

one where the buyers would suffer extraordinary losses as a result of the goods arriving later than anticipated.

[16] In applying **Tsakiroglou** I find that the plaintiff's album could have been reproduced and distributed since her DAT and consequently her album could have been reproduced from the master cassette which was not affected by the fire. The contract was therefore not frustrated as contended by the defendant. The Frustrated Contracts Act Cap. 202 is therefore not applicable to the circumstances of this case.

The issue of Bailment

[17] In pursuance of their contractual agreement the plaintiff delivered her DATS to the defendant. This created a bailment. There was an obligation on the part of the defendant/bailee for the safe-keeping of the plaintiff/bailor's goods.

[18] In **York Products Pty v Gilchrist Watt & Sanderson Pty [1970] 3 ALL ER 825** Lord Pearson in applying **Morris v. CW Martin & Sons [1966] 1 Q.B 716,** stated the following:-

> "The defendants by voluntarily taking possession of the plaintiffs' goods in the circumstances assumed an obligation to take due care of them, and are liable to the plaintiffs for their failure to do so. The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee."

[19] A bailee must exercise reasonable care for goods entrusted to him. Included in that duty of care is to see that the place in which the goods are kept is fit and proper for that purpose. But, the bailee is not an insurer and where there is no negligence on his part, he is not liable for loss or damage to the goods as a result of fire. **GARSIDE (1792) Term Rep 581.**

[20] However, where goods held under bailment have been subject to loss or damage, the burden remains on the bailee to show that such loss or damage was not due to any neglect, default or misconduct on his part. **Halbury's Laws of England (4th ed Reissue) Volume 2** states at paragraph 1843.

> "When a chattel entrusted to a custodian is lost, injured or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of any neglect on the part of himself, or on the part of servants acting within the course of their employment, to use such care and diligence as a prudent or careful man would exercise in relation to the property. If he succeeds in showing this he is not bound to show how or when the loss or damage occurred."

[21] This is supported by the dicta of Lord Salmon in **Port Sweetenham Authority v. T.W. Wu & Co. (M) Sdn Bhd [1979] AC 580** applying the case of **Hunt & Winterbotham (West of England) Ltd. v. B.R.S. (Parcels) Ltd. [1962] 1 Q.B 617** where it is stated:

> "in their Lordships' view the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safe keeping. Accordingly the onus of proving that the loss of the goods deposited with the

> defendants for safe custody was not caused by the negligence or misconduct of their servants in the course of their employment, without any doubt, lies on the defendants."

[22] In the present case the defendant has sought to shift the burden of proof on to the plaintiff to show that the defendant did not store the plaintiff's works in a place that was adequate at the time. However, the burden remains on the defendant. Apart from stating that there was a fire in its premises, the defendant has not in any of its pleadings shown that it exercised due care in storing the plaintiff's property.

[23] In light of this, the defendant has not discharged its burden of proving that it exercised due care in storing the plaintiff's property or that the fire of January 1995 was not due to its negligence.

[24] **Is the Plaintiff entitled to damages?**

The purpose of damages in contract law is to place the plaintiff in so far as money can do, in the position he/she would have been in had the contract been performed. **[Robinson v. Harman (1848) 1 Exch 850 at 855] Johnson v. Agnew [1979] 1 A11 ER 883 at 896 per Lord Wilberforce.**

[25] **Damages for breach of Clause 5 of the contract – failure to provide the plaintiff with Royalty Statement.**

It was an express term of the contract that the defendant issue the plaintiff with statements of royalties payable to her.

The defendant in its amended defence filed September 18th, 2001 contends as follows:-

i. the majority of the songs comprising the plaintiff's DAT were in the German language;

ii. that it indicated to the plaintiff that it was not interested in marketing or producing her album on account of the songs being in German and therefore had little marketing potential in the Caribbean;

iii. that there were no sales of the plaintiff's music so that no royalties are due to her.

[26] These contentions are supported by the affidavit of Elson Best filed October 16, 2000 where he states:

> (i) that the defendant sent the plaintiff's album to 16 radio stations throughout the Caribbean and there was no viable response to its contents by the public; and

(ii) that he cannot recall there being any sales of the plaintiff's album.

[27] In response the plaintiff in her affidavit filed January 24th, 2001 states the following:

i. her album received substantial press coverage in Barbados and

ii. she was not informed by the defendant that it had sent her album to 16 radio stations throughout the Caribbean.

[28] Whether or not any of the plaintiff's albums were sold is not the issue. The fact remains that it was a term of the agreement that the defendant would issue the plaintiff with royalty statements. There was no condition precedent that records had to be sold. What was conditional on the sale of records were in fact royalty **payments** because if no records were sold then no royalties would be payable. The plaintiff was entitled to the royalty statements whether or not they reflected that any of her records had been sold and royalties were payable. The provision of these statements would have made her aware of the financial success or failure of her album.

[29] In addition it is of no consequence that the plaintiff as the defendant contends, never made a demand for accounts prior to the expiration of the contract. It was the defendant's duty to provide Ms. Hulse with statements of royalties as it had undertaken to do. As such the defendant was in breach of Clause 5 of the contract by failing to provide the plaintiff with statements of royalties payable.

[30] The defendant contends that even if it is liable, the plaintiff is not entitled to any damages on account of the non-issue of royalty statements as the plaintiff has suffered no loss as a result thereof.

[31] In its pleadings the defendant states that there was no commercial viability of the plaintiff's album in the Caribbean given that it was recorded in German. Elson Best in his affidavit mentioned above states that he cannot recall there being any sales of Ms. Hulse's album. Added to the fact that the album was in German Ms Hulse was not a well known artiste in the Caribbean. I accept the evidence of Mr. Best that there were no sales of the album. Ms Hulse is entitled in these circumstances to nominal damages only for the failure of the defendant to provide the royalty statement.

GENERAL DAMAGES

[32] The plaintiff states:

> "the material which I handed over to the defendant company was contained on DATs the production of which cost me tens of thousands of dollars in American currency or DM 133,088.43."

[33] She also states that she left 200 cassettes and 100 records with the defendant for distribution. There is no evidence as to the value of these items. The only amounts which seem recoverable as damages by the plaintiff are in fact indicated by the defendant, that is, the cost of production of the plaintiff's album. This figure of $3,238.21 is stated in the Amended Defence of September 18th 2001. In his affidavit of October 16, 2001 Elson

Best states at paragraph 18 that it appears from a copy of a receipt issued (which is thereto annexed) that the plaintiff paid the sum of $3,238.21 to the defendant.

[34] Ms. Hulse has not, in any of her pleadings sought to quantify the amount of loss she has incurred. Besides the sums stated above, there are no actual figures provided to show the actual loss. As such she has not proven the amount of damages for the material allegedly loss.

[35] The plaintiff further claims that she is entitled to damages being the cost of replacement of her DATs. The defendant contends that the original DAT was lost in the fire but that it offered to replace the DAT but the offer was refused by the plaintiff.

Did the Plaintiff discharge her duty to mitigate her loss

[36] Both the plaintiff and the defendant brought expert evidence with respect to the difference in quality of a DAT produced from a cassette master and one produced from a digital master. In his affidavit Roger Moore the defendant's expert states that he is a mastering engineer of some 16 years experience. He supports the defendant's contention that the plaintiff's DATs could have been reproduced. This affidavit states inter alia:

i. that the DATs could be reproduced from the cassette master which was not lost in the fire;

ii. that any loss in sound quality as a result of this process would have been negligible; and

iii. any such loss of sound quality could be corrected using equalizing technology which was available at the time.

[37] In short Mr. Moore is saying that while there may be a loss in quality this would be insignificant. In any event, the loss of sound quality could have been corrected using equalizing technology which was available at the time.

[38] Gottfried Koch of Germany gave evidence on behalf of the plaintiff. In his affidavit he states that he is a sound engineer since 1985. He further deposes as follows:-

i. that it was possible to reproduce the plaintiff's DATs from an analogue tape but there would be substantial loss in sound quality;

ii. that he was informed by the plaintiff that her DATs were produced on a synclavier which produces a much higher sound quality;

iii. that it would be hard to produce this sound quality from an analogue tape.

[39] This affidavit further states that the synclavier has limited memory and as a result it would be unlikely that Ms. Hulse's original recordings were saved in the machine's memory.