

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2004

BETWEEN:

PORT SERVICES LIMITED

Appellant

and

EXECUTIVE AIRLINES INC.
Trading as American Eagle

Respondent

Before:

The Hon. Michael Gordon, QC
The Hon. Denys Barrow, SC
The Hon. Hugh Rawlins

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. John Fuller for the Appellant
Mr. Hugh Marshall for the Respondent

2006: March 6;

JUDGMENT

- [1] BARROW, J.A.: The appellant provided ground-handling services at the airport to the respondent under a contract that the appellant belatedly accepted permitted either party to terminate upon sixty days' notice. On 13th December 2001 the respondent sent a letter to the appellant notifying the appellant that the respondent would terminate the contract effective with the close of business on 13th January 2002. In response, the appellant communicated to the respondent on different dates its wish to continue with the contract and sought to get the respondent to reverse its decision.
- [2] By a second letter dated 9th January 2002 the respondent advised the appellant that the reference in the earlier notice to the termination date of 13th January was

in error and that the correct termination date, to accord with the contractual requirement of 60 days notice, should be with close of business on 11th February. The respondent asked the appellant to please correct the official termination date.

[3] On 11th January the appellant's Miami lawyers wrote the respondent and the stand that they took seems largely the cause of the present litigation. The Miami lawyers declared that by "the issuance of the December 13th, 2001 letter American Eagle has repudiated the Agreement, declared that it is in default of the Agreement and, perhaps worse, admitted that it has no cause for such termination. Port Services, Ltd. is entitled to all legal and proper damages ensuing from such breach." The Miami lawyers pronounced, "The sixty day termination clause only deals with the Main Agreement. Article 11.5 makes no reference to the Agreement let alone a right to terminate the Agreement." They stated that the appellant "relied upon the May 31, 2003 expiry date in the Agreement in developing an infrastructure to carry out its responsibilities under the Agreement. Such infrastructure cannot simply be abandoned without financial consequences. We are in the process of calculating the full extent of our client's damages." The respondent did not respond to that letter. At 6 p.m. on 13th January the appellant informed its staff of the loss of the contract and that they were to cease providing services as of that day. The respondent ceased performance under the contract on that day.

[4] By the time the appellant filed its statement of case it had accepted that the agreement was terminable upon 60 days' notice. However, in its statement of case the appellant persisted in a claim for damages for wrongful repudiation of the Agreement by the respondent based on loss of profit for 16.5 months amounting to US\$311,850.00 and in closing submissions before the trial judge its counsel maintained that claim. On the appeal counsel for the appellant, who did not appear in the court below, quite rightly conceded that the appellant could not be entitled to damages of more than the profit that the appellant would have earned during the 60 days' notice period. This accords with the well-known principle stated in

McGregor on Damages¹ that where a contract gives a party a right to terminate a contract upon giving notice and he terminates without giving notice the law will limit the damages awarded to the innocent party to what the guilty party would be liable for had he acted in the manner most advantageous to him for which the contract provides. It is at least probable that the present litigation would have been avoided had this position been appreciated by the appellant from the outset.

[5] The judge held that the first notice that the respondent sent, in giving 30 days instead of 60 days' notice, was defective and therefore void. He held that the attempt in the second notice to correct the error in the first and to extend the length of the first notice to 60 days was not capable of remedying the defect. The judge stated that the proper way for the respondent to have proceeded was to issue a correct notice for a new period of 60 days.

[6] The judge gave a clear summary of the law on anticipatory breach. He stated that if before the time arrives when a party is bound to perform an obligation he expresses his intention not to perform, this constitutes an anticipatory breach that entitles the innocent party to choose one of two courses. He may accept the renunciation, treat the contract as at an end and sue for damages or he may affirm the contract, keep it open for performance and if it is not performed when the time for performance comes he may sue for damages.

[7] However the judge distinguished that situation from what had occurred in the instant case. The judge found that the first notice from the respondent was not a proper notice of termination and, therefore, was no more than a notice that a breach would occur on 14th January. The judge stated²:

"The first letter from Executive Airlines was not proper notice. It was no more than notice that a breach would occur on 14 January 2002. The breach did not occur on receipt of the notice or some time thereafter, but on the failure of the party to perform. Receipt of that notice did not entitle [the appellant] to cease performing. That would be a breach on its part.

¹ XX edition, at paragraph XXX

² At paragraphs [20] and [21] of the judgment delivered 13 January 2004

[The appellant] was obligated to continue performing until [the respondent] actually broke the Agreement by failing to perform on its part. [The appellant] could have continued working the contract until 13 January, as it did, and accepted the breach on 14 January, if it had occurred, and then walked away from the broken contract. That would have been an acceptance of the breach.

“The second letter did not correct the first notice and make it proper notice. It was no more than notice that the breach had been postponed and would now occur on 14 February. But, this second letter did inform [the appellant] that [the respondent] had changed its mind about the intended breach of contract on 14 January. If [the appellant] had come out to work on that day, which it did not do, and [the respondent] had refused to perform, that would have entitled [the appellant] to sue on the breach. What [the appellant] was not entitled to do was to choose to break the Agreement itself when [the respondent] was still willing to perform. The result is that [the appellant] has failed to show that it had affirmed the contract and waited until the time for performance had arrived and that [the respondent] had failed to perform thus entitling it to sue for the breach.”

- [8] Counsel for the respondent in his written submissions was of the view that the respondent by delivering the first letter “did in fact breach the Agreement.” He submitted that this was what the judge decided. This is not at all my understanding of what the judge decided. The judge decided that the first letter from the respondent was a notice that a breach would occur on 14 January 2002. I am not clear whether the judge regarded this as an expression of intention to breach the contract. I see no reason why the judge should have done so. It is accepted that the respondent was at all times purporting to exercise its right under the contract to terminate upon giving notice. This was not expressed in the first letter but it was expressly stated in the second letter, which had as its sole purpose the correction of the first letter. So while it may be said that the period of notice given in the first letter was in breach of the contract, if breach is used to mean ‘not in accordance with’, I do not see how it can be said that the exercise of a right given by the contract was in breach of the contract, if breach is used in the sense of a renunciation of the obligations in the contract. It is clear that it is only if the respondent breached the contract by renouncing it that the right of the appellant could arise to accept that breach and be discharged from further performance.

This proposition is helpfully illustrated by the discussion of Devlin J (as he then was) in *Universal Cargo Carriers Corporation v Citati*.³

- [9] Devlin J stated that the right to rescind arises in three sets of circumstances which give rise to a discharge of contract: (1) renunciation by a party of his liabilities under it; (2) impossibility created by his own act; and (3) total or partial failure of performance. The third of these is the ordinary case of actual breach and the first two state the two modes of anticipatory breach. The learned judge then explained:⁴

“A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must “evinced an intention” not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.”

- [10] After further discussing what amounts to a renunciation the judge continued:⁵

“The two forms of anticipatory breach have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable; if a man puts it out of his power to perform, the breach will be inevitable in fact - ... So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would have actually occurred if he had waited.”

- [11] Renunciation, it is seen, is a matter of intention. The intention required is an intention no longer to be bound by the contract. Renunciation must be clearly made. Renunciation of a contract or liability under it is fundamentally different from termination of a contract pursuant to a provision in a contract that permits such termination. In this case the respondent expressed its intention to terminate the contract in accordance with the provision of the contract. The underlying element

³ [1957] 2 QB 491

⁴ at page 436

⁵ At page 438

in the respondent's action was the affirmation of the contract as opposed to a renunciation of the contract. The fact that the respondent mistakenly gave less than the contractually required period of notice cannot convert a termination by notice pursuant to the contract into a renunciation because renunciation is a matter of intention and the respondent did not intend to renounce.

[12] It is only a renunciation that could have permitted the "injured party" to anticipate a breach. It is only the acceptance of that breach that could have permitted the appellant to be discharged from the contract. Since there was no renunciation there was no breach to accept and no discharge of the contract.

[13] In arguing the appeal the appellant accepted that, in relation to the first letter, by seeking to get the respondent to reverse its decision to terminate the appellant had not accepted the alleged breach but had kept the contract open for both sides to perform. It was the renunciation contained in the second letter that the appellant accepted, its counsel argued, and it was that acceptance that discharged the contract. It seems to me that even if there could be any credible argument that by its first letter the respondent intended to renounce the contract, and I do not think there could be, it is unarguable that by its second letter the respondent was doing anything other than invoking the contractual provision for determining the contract by notice. There was no intention to renounce contained in or to be inferred from that letter.

[14] Accordingly, on the basis that the respondent never renounced the contract the judge's conclusion was a proper one; it was the appellant that itself was in breach of the contract. The reason for the appellant having so acted is not hard to find: the appellant believed at the time it acted that the contract gave the respondent no right to terminate and that the respondent's termination was a repudiation of a contract that still had some 16.5 months to run. That is the clear statement in the letter from the Miami lawyers. It was that supposed repudiation and anticipatory breach that the appellant accepted. This, I infer, was the reason why the appellant

did not say to the respondent, "now look here, the period of notice that you have given to me is less than that to which the contract entitles me and I insist that you give me proper notice otherwise I will sue you for a breach of that term of the contract". Instead, misinformed, the appellant terminated the contract when it had no right to do so. It did not thereafter help matters that the appellant felt entitled to claim more than US\$575,000.00 as flowing from the supposed breach by the respondent.

- [15] I would dismiss the appeal with costs to the respondent. I note that in the court below the judge awarded prescribed costs of \$14,000.00 from which I infer that he treated the claim as valued at \$50,000.00. The respondent filed no counter notice so there was no challenge to the award of costs below. In accordance with part 65.13 of the Civil Procedure Rules 2000 I would award costs in this court at the rate of 2/3 of the costs awarded below.

Denys Barrow, SC
Justice of Appeal