

DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 of 1990

BETWEEN: CASTAWAYS HOTEL LIMITED

Appellant

and

UNIVERSITY OF DOMINICA (SCHOOL OF MEDICINE
AND HEALTH SCIENCES) LIMITED NOW KNOWN AS
ROSS UNIVERSITY

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice Byron J.A.
The Honourable Mr. Justice Matthew J.A. (Ag.)

Appearances: Mr. D. Knight Q.C. and Mr. E. DeFreitas for the
Appellant
Mr. G. Harris and Mr. K. Williams for the Respondent

1992: March 11th, 12th,
September 14th.

JUDGMENT

FLOISSAC, C.J.

The appellant (qua lessor) and the respondent (qua lessee) entered into a contract of lease of the Castaways Hotel (the demised premises) for a term of two years commencing on the 15th October 1980 and ending on the 14th October 1982. The respondent took possession of the demised premises on the 6th November 1980 but prematurely vacated the same in May 1982.

On the 3rd June 1983, the appellant sued the respondent for arrears of rent and for damages for breach of contract by way of breach of an obligation in regard to the repair, maintenance and restoration of the demised premises. Whereupon the respondent counterclaimed for damages for alleged breaches of contract by the appellant and for alleged wrongful detention and/or conversion by the appellant of certain movables (including a 72 seater school bus).

On the 10th April 1990, Joseph J. gave judgment for the appellant in the sum of U.S\$50,000.00 for the arrears of rent but made no award for damages for the alleged breach of contract by the respondent. The learned judge also awarded to the respondent damages in the sum of EC\$65,000.00 for the appellant's wrongful detention of the school bus. The learned judge made no award as to costs in the High Court, but the parties have since negotiated and filed in this Court a compromise on those costs.

The appellant is dissatisfied with the judgment and has appealed against it. The appellant maintains that the learned judge should have awarded damages against the respondent for breach of contract and should not have awarded damages against the appellant. The issues in this appeal therefore are (1) whether the respondent owed to the appellant an obligation in regard to the repair, maintenance and restoration of the demised premises (2) whether the respondent was in breach of that obligation and the extent of the respondent's liability (if any) therefor and (3) whether the appellant wrongfully detained the school bus and the extent of the appellant's liability (if any) therefor.

(1) The obligation to repair etc.

The appellant originally sought to establish that there was an express obligation or covenant on the part of the respondent in regard to the repair, maintenance and restoration of the demised premises and that the express obligation or covenant was contained in a first agreement (which was executed in New York on the 19th September 1980 and was marked exhibit W.H.1) and/or a second agreement (which was executed in Dominica and was marked exhibit W.H.3). However, the admissibility of the two agreements was challenged on the ground that they were unstamped and unregistered and were thereby rendered inadmissible by section 20 of the Stamp Ordinance (Cap 277) and section 4 of the Deeds and Registration Act (Cap 220). Thus the learned judge found and concluded as follows:

"The documents W.H.1 and W.H.3 do not bear a registration number and from the submissions of counsel for both parties it is clear that the documents were not registered. The texts of the documents cannot therefore be considered by the Court.

Further, exhibit W.H.3 was not stamped in accordance with the Stamp Ordinance and counsel for the defendant conceded that the Court cannot consider its contents. In law, I am precluded from considering any claims which flow from exhibits W.H.1 and W.H.3."

The appellant was therefore prevented from establishing an express obligation by reference to the two agreements. The appellant was accordingly constrained to rely on the pleadings and in particular on paragraphs 4,5, & 6 of the appellant's Statement of Claim and paragraphs 4 and 5 of the respondent's Defence and Counterclaim. Thus:-

(1) Paragraph 4 of the Statement of Claim provides that:

"It was a term of the agreement that the defendant shall maintain throughout the period of the tenancy thereby created, and shall yield up at the termination of the tenancy, the interior portions of the premises including without limitation, all fittings, air conditioners, fixtures, furniture, linen, appliances, china, cutlery and any and all other personalty located thereon in as good condition as existed as of the date of commencement of the tenancy."

(2) Paragraph 4 of the Defence and Counterclaim provides that:

"As regards paragraph 4 of the plaintiff's Statement of Claim the defendant say that the obligation of the

defendant was to make good damage if any, to the premises necessary to restore the premises to the condition described in the report of the 7th of November 1980 of Webber Burnett Partnership."

(3) Paragraph 5 of the Statement of Claim (which was admitted in paragraph 5 of the Defence and Counterclaim) provides that:

"It was a term of the agreement that the Plaintiff shall have the option of having the firm of Burnett and Webber inspect the demised premises to determine the condition thereof and to report thereon."

(4) Paragraph 6 of the Statement of Claim (which was admitted in paragraph 5 of the Defence and Counterclaim) provides that:

"It was a further term of the agreement that in the event the inspection and report indicates damage to the premises the party obligated under the terms of the agreement to make the repairs or replacements necessary to restore the premises to the condition it was in at 6th November, 1980, shall promptly make such repairs or replacements."

The pleadings therefore establish that the respondent owed to the appellant a conditional contractual obligation to make the repairs and replacements necessary to restore the interior portions of the demised premises and personalty therein to the condition in which they were on the 6th November 1980. The preconditions of the contractual obligation were an invitation by Burnett and Webber (the Firm) to inspect the demised premises after the 7th November 1980 and a Report (after such inspection) by the Firm certifying that damage for which the respondent is contractually responsible (i.e. damage to the interior portions of the demised premises and personalty therein) had been done.

The pleadings also establish that the preconditions of the contractual obligation were in fact fulfilled. In paragraphs 7 & 8 of the Statement of Claim, the appellant alleged that on or about the 11th June 1982, the appellant requested the Firm "to inspect the demised premises and to prepare a Report thereof" and that the Report (which was admitted in evidence as exhibit M.G.2) was prepared and submitted to the respondent on or about the 18th August 1982. In paragraph 7 of the Defence and Counterclaim the respondent admitted receipt of the Report but alleged that the Report was not properly carried out and is "inaccurate, exaggerated and misleading" and that the Report has been disputed by the respondent .

The question therefore arises as to whether the respondent should be allowed to impugn the Firm's report on the ground that it is inaccurate, exaggerated or misleading and to do so in the face of the admitted paragraphs 5 & 6 of the Statement of Claim. To answer that question, I would refer to principles of promissory estoppel and estoppel by convention or mutual assurance. .

Promissory estoppel is described in Halsbury Laws of England (Fourth Edition) Vol: 16, paragraph 1514 as follows:-

"When one party has, by his word or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced. This doctrine, which is derived from a principle of equity enunciated in 1877, has been the subject of considerable recent development and is still expanding. It

differs from estoppel in pais in that the representation relied upon need not be one of present fact."

Estoppel by convention or mutual assurance is described in *Spencer Bower & Turner on estoppel by Representation* (3rd Ed, 1977, p157) as follows:-

"This form of estoppel is founded not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth from the statement of facts so assumed."

This passage was cited with approval by Eveleigh & Brandon LJJ in **Amalgamated Investment v Texas Commerce** (1981) 3 A E R 577 where Lord Denning M. R. said (at p 584):

"When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands."

These statements of the law of estoppel by convention or mutual assurance were recently adopted by Lord Donaldson M. R. and Mc Cowen L. J in **Hiscox v Outwaite** (No.1) (1991) 3 A E R 124. I would therefore regard this kind of estoppel to be now well established in law.

In my judgment, the appellant is entitled to invoke the doctrine of promissory estoppel and/or the doctrine of estoppel by convention or mutual assurance in this case. Here, the appellant and the Respondent evidently proceeded on the basis of an underlying assumption that the firm possessed the competence and integrity to prepare an impeccable report and would not submit a report which is inaccurate, exaggerated or misleading. The contractual terms expressed in paragraphs 5 & 6 of the Statement of Claim and admitted in paragraph 5 of the Defence constituted a vote of confidence in the Firm to present a proper Report. The contractual terms also constituted a clear and unequivocal representation, promise or assurance by the respondent that it would abide and be bound by the Firm's Report. The representation, promise or assurance was intended to be acted upon and was in fact acted upon by the appellant which thereby incurred the expense of the Report and altered its position to its prejudice.

In those circumstances, the appellant and the respondent (inter se) are estopped from impugning the Firm's Report on the ground that it is inaccurate, exaggerated or misleading. While any such imperfection may generate a right of action by the appellant or the respondent against the Firm, it would be unfair, unjust and unconscionable to allow the appellant or the respondent to use a defect in the Report as a ground for repudiation of the obligation or liability which the appellant and the respondent expressly agreed that the Report would create as between them.

(2) **Breach of the obligation to repair etc.**

The Firm's Report stated that: "From the inspection survey given in Sections 2.0 and 3.0 of this report, it is clear that the tenant of the Agreement of Lease has a liability for necessary expenses to be incurred in making good the premises, as required under the terms of the Agreement of Lease." The Report indicated the damage to the demised premises to be as follows:-

Building and fittings	-	\$176,067.00
Furniture and fittings	-	91,197.00
Miscellaneous	-	900.00
Inventory		16,305.00
Kitchen	-	<u>11,352.00</u>

TOTAL \$295,821.00

In view of the above extracts from the Report, I would have been content to confine myself to the facts that the Firm found that there was damage to the demised premises for which the respondent is liable and that the Firm assessed the damage at \$295,821.00. However, counsel for the appellant generously conceded that the sum of \$24,000.00 of the total amount of \$295,821.00 represents damage to the external part of the demised premises. That sum must therefore be deducted from the total amount. I would accordingly declare that the appellant is entitled to recover from the respondent the sum of \$271,821.00 for breach of contract in regard to the repair, maintenance and restoration of the demised premises.

(3) **The detention of the bus**

The learned judge found that on the 28th October 1982, the respondent demanded and the appellant refused delivery of the Respondent's school bus and that the appellant thereafter detained the bus until the 14th October 1984, when it was returned to the respondent. The learned judge also found that delivery was refused on the bald ground that the Respondent was indebted to the appellant. These findings therefore justify the conclusion that the refusal was unjustifiable and that the detention was wrongful.

The only serious issue in relation to the detention is the measure and quantum of damages recoverable therefor.

In **Brandeis Goldschmidt v Western Transport** (1982) 1 A E R 28 at 31, 32, Brandon L. J. said:-

"Looking at the matter from the point of view of principle first, I cannot see why there should be any universally applicable rule for assessing damages for wrongful detention of goods, whether it be the rule contended for by the plaintiff or any other rule. Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case.

It is for plaintiffs to prove what loss, if any, they have suffered by reason of a tort, and when, as here, the effect of the tort is potentially adverse interference with the course of their business operations, it is for them to establish by evidence that there was in fact such adverse interference, and that they suffered a properly quantifiable loss by reason of it. If that is indeed what the plaintiffs are in law required to do, it is manifest that they have wholly failed to do so in this case."

In this case, no special damage was alleged or proved to have been suffered by the respondent as a result of the wrongful detention of the bus. With regard to loss of use of the bus, the learned judge found that "Although loss of use for the three pieces of equipment is an alternative claim to the value of the items, no evidence was led relating to the amount payable for loss of use of the Equipment, so I cannot entertain the claim for loss of use." In those circumstances, the appropriate measure of damages recoverable

for the wrongful detention is the normal measure of damages recoverable in detinue. The normal measure in this case is the market value of the bus on the 28th October 1982 (when the wrongful detention began) less the market value on the 14th October 1984, (when the bus was returned to the respondent).

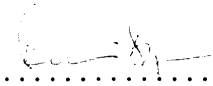
The Learned judge found that at the time of its wrongful detention, the bus was valued at \$70,000.00 and that at the time of its return to the respondent, it was valued at \$5,000.00. She accordingly awarded damages in the sum of \$65,000.00 for the wrongful detention. I see no good reason for interfering with that award.

I would allow the appeal and would order the respondent to pay to the appellant the sum of \$206,821.00 (representing the said sum of \$271,821.00 less the said sum of \$65,000.00) and the appellant's costs of this appeal.



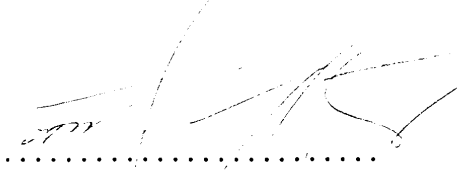
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SIR VINCENT FLOISSAC
Chief Justice

I concur



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C. M. D. BYRON
Justice of Appeal

I concur



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A. MATTHEW
Justice of Appeal (Ag.)