

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2019/0439

BETWEEN:

**HERON'S FLIGHT INC.
(Trading as "Spice Isle Coffee")**

Claimant

and

THE AIRPORTS AUTHORITY

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. James Bristol K.C. with him Ms. Melissa Modeste Singh for the Claimant
Ms. Shireen Wilkinson for the Defendant

2023: June 27

2024: February 27

JUDGMENT

- [1] **ACTIE, J.:** The claimant claims damages for misrepresentation and breach of warranty, special damages for a refund of maintenance fee in the sum of \$5,760.00 together with costs.

The claimant's claim

- [2] The claimant, trading as Spice Isle Coffee, operates a coffee shop at the Maurice Bishop International Airport. The claimant avers that on 4th May 2016 it entered a memorandum of understanding (1st MOU) with the defendant for the operation of a food and beverage concession, Spice Isle Coffee, located on the second floor of the Airport.

- [3] The claimant contends that it was induced into making the 1st MOU upon the defendant's warranty and representation that food and beverages would only be sold on the second floor of the airport and that the main food and beverage vendor currently on the ground floor would be relocated to the second floor.
- [4] The claimant avers that it prepared and presented its business plan to the defendant for approval with forecasted earnings entirely premised on representations that food and beverages would not be sold on the ground floor.
- [5] The claimant states that on 2nd August 2017, the parties amended the 1st MOU and signed a 2nd MOU that lengthened the term of the proposed lease from 3 to 5 years and decreased the rental fee, since the rental unit procured was smaller than originally intended. By the terms of the MOUs, the parties were to enter into a formal lease agreement to govern their relationship.
- [6] The claimant commenced operations on 23rd October 2017 before the lease was executed. The claimant states that it noticed that the gift and duty-free shops on the ground floor were selling food, namely snacks and beverages. It was also noticed that the defendant placed a cold drink vending machine on the ground floor resulting in a reduction of foot traffic to the second floor in breach of the warranty.
- [7] The claimant states that the defendant in a meeting held on 12th March 2019 admitted to representing that no food and beverages would be sold on the ground floor. However, the defendant asserts that its definition of "food" and "beverages" differed from that of the claimant, in that it did not consider snacks and soft drinks to be food and beverages.
- [8] The claimant states that by reason of the representation and/or breach of warranty, it suffered loss and damage as sales on the second floor were severely reduced due to the availability of food and beverages on the ground floor resulting in its projected income also being severely reduced.

- [9] The claimant contends that it was agreed that the claimant would pay a monthly sum of \$240.00 for air conditioning maintenance if a unit was provided by the defendant, however the defendant has not provided such service yet has billed the claimant said monthly sum from November 2016 to October 2019.

Defendant's case

- [10] The defendant contends that there was no inducement on its part and that all interactions between the parties were fairly negotiated.
- [11] The defendant contends that Clause 10 of the 1st MOU identified the types of food the claimant wished to sell, and the 2nd MOU did not revise the items, however the claimant has proceeded to sell the other items without seeking the leave of the defendant.
- [12] The defendant states that it removed the exclusivity on the sale of food and beverage with its long-standing tenant, Goddard's Catering Grenada, and varied the contract with Goddard's and other tenants to exclude snacks and soft beverages including drinks such as water. The defendant avers that snacks and soft beverages have always been sold by the tenants on the ground floor notwithstanding Goddard's exclusivity arrangement relative to the sale of food and beverages.
- [13] The defendant states that it never undertook to vary its tenancy agreements with the other tenants to prevent the sale of soft beverages and snacks, as such variation in order to facilitate the claimant would be too onerous, especially in light of this request never being specifically made and not forming part of the MOUs.
- [14] The defendant states that it was only at the meeting held on the 12th March 2019, nearly three years after the 1st MOU was signed, that the claimant raised the issue of the interpretation of "food and beverage". The defendant states that the claimant had a duty to clearly identify its requirements to the defendant.
- [15] The defendant states that the claimant's projections were made on the claimant's erroneous interpretation. The defendant further avers that the claimant is not the

only vendor of food and beverage on the second floor, and that none of the other tenants have raised an issue of the sale of snacks and soft beverages on the ground floor or on any floor affecting their bottom line.

- [16] The defendant states that the vending machine complained was not placed in breach of warranty, but was placed in the interest of customer service on the ground floor as all food and beverage outlets closed by 9:00pm. There being times where the last scheduled airline departure is delayed creating a necessity for the availability of snacks and drinks as part of international airport standards. The defendant states that in any event, the vending machine was eventually moved to the second floor to placate the claimant and as a good will gesture.
- [17] The defendant avers that clause 16 of the MOU requires the parties to enter into a lease agreement and to date the claimant has failed to respond to the fulsome comments on the lease agreement sent to the claimant's attorney on 2nd April 2019.
- [18] The defendant states that the claimant agreed to contribute towards the payment of air-conditioning in both MOUs and while there may not be an actual vent in the claimant's unit, it benefits from centralised air conditioning.

The Evidence

Zofia Malisiewicz

- [19] Zofia Malisiewicz, Director of the claimant's company, in her witness statement states that she approached the representative of the defendant in 2014 to discuss her interest in opening a coffee shop to sell snacks, coffee and other beverages, however there were no units available for rent at the time. She states that the departure lounge was located solely on the ground floor with a few shops such as Goddard's Catering Group, Snack Bar and other shops selling snacks, beverages and ice creams. She said that in 2016, she explicitly sought and was given the assurance that no food and beverages would be sold on the ground floor so as to drive passenger traffic to the second floor. Thereafter she formulated the coffee

shop business plan that included the coffee shop's forecasted earnings, which was a mandatory part of the approval based on the representation.

[20] She states that Goddard's Catering "Snack Bar" was relocated to the second level and renamed Island Deli but the rest of the establishments selling food and beverages were left downstairs where they have the greatest possible exposure to passenger traffic. She states that access to the second floor was not exposed to passenger traffic and proved difficult as the escalator which was convenient for passengers carrying baggage was frequently out of service. She contends that the claimant's coffee shop suffered loss and was unable to meet its forecasted earnings.

[21] On 26th March 2018, the claimant wrote to the defendant requesting an expansion of the product range offered by the coffee shop in effort to boost sales and meet the forecasted earnings. By letter dated 4th May 2018, the defendant approved her request for the sale of additional products save the request for the sale of alcohol. By email dated 7th June 2018, permission was given to sell bottled beers.

[22] An email dated 14th October 2018 from the claimant to the defendant highlighted a myriad of issues and requested that the rent be adjusted to 6% of the claimant's gross earnings and a credit be issued for the excess paid, together with suggested lease amendments. On 9th November 2018, she emailed the defendant notifying of the payment of the 6% of the claimant's gross sales to which the defendant responded by email dated 12th November 2018 informing that no approval had been given for the reduced amount.

[23] By email dated 19th November 2018, the defendant informed that should the claimant continue the breach of the MOU by making the adjusted payments, a replacement tenant would be found for the coffee shop.

Mr. Lenworth Gordon

[24] Mr. Lenworth Gordon, Marketing and Property Manager of the defendant, in his witness statement said that he was told by the former general manager that a

meeting was held on 7th October 2014 with Gearld Rothaus on behalf of the claimant, with a proposal to only sell coffee. The parties signed the 1st MOU with the agreed items listed at clause 10. The 2nd MOU did not revise any of the items that the claimant wished to sell, however, the claimant proceeded to sell other items. The terms of both MOU's required the parties to enter into a formal lease agreement to govern their landlord/tenant relationship.

- [25] Mr. Gordon said he was advised by the former general manager that the exclusivity was removed on the sale of food and beverage held by their long-standing client, Goddard's catering. He states that snacks and soft beverages have always been sold by the tenants on the ground floor notwithstanding Goddard's exclusivity arrangement relative to the sale of food and other beverages including alcoholic drinks.
- [26] With respect to the vending machine, he states that the claimant complained, and the defendant responded that there was nothing wrong in the placement of the vending machine as all food and beverage outlets including the claimant's coffee shop closed before or by 9.00 pm. The vending machine was in the interest of customer service in keeping with international standards as there are times that the last scheduled airline departure is delayed. Nonetheless, the vending machine was eventually removed to the second floor to placate the claimant as a good will gesture.
- [27] Further, he states that a lease agreement was prepared and sent to the claimant and the claimant in email dated 14th October 2018, listed 21 amendments of the draft lease agreement including a reduced rental. Thereafter, the claimant unilaterally reduced the monthly agreed rental and instead of paying the fixed monthly sum of \$3,500.00 which was the minimum guaranteed payment together with electricity and a monthly service charge, paid 6% of the gross sales together with water and electricity, but did pay the agreed monthly service charge. The claimant in response to queries stated that the payment was being made because it adhered to the requested corrections in the lease agreement.

[28] Mr. Gordon surmised that the claimant was never induced into signing any agreement and acted on its own free will. Further, the refusal to sign the lease agreement and the claimant still negotiating the terms signals that the parties are not ad idem on the terms of the said lease as to date. Furthermore, the claimant has failed to respond to the fulsome comments on the lease agreement made by the defendant.

Legal Analysis

Whether the defendant misrepresented to the claimant that food and beverage was only being sold on the second floor

[29] The claimant's claim is predicated on the Memoranda of Understanding (hereafter referred to as "the MOUs") signed by the parties and representations made prior to the signing of the MOUs. A Memorandum of Understanding (MOU) is an agreement between parties outlining the terms and understanding before entering into a formal document.

[30] In the case of **Gearing Up Limited v Fdl Consult Inc**¹ Justice Cadie St. Rose-Albertini at paragraphs 53 and 54 said:

"53. A memorandum of understanding is a form of agreement which may or may not create binding contractual obligations between parties. It is typically referred to as a preliminary agreement, letters of intent; pre-contract protocol or term sheet.² In that context it provides a broad outline of the mutually accepted expectations of the parties, based on mutual respect. It may also signal that the parties intend to enter into a binding contract, in relation to a particular transaction, at some future date.

54. The case of **Walford and others v Miles and another**³ establishes that the law does not recognize a contract to enter into a contract, when there are fundamental terms yet to be agreed, for the simple reason that it is too uncertain to have any binding force. Thus, whenever fundamental terms are left undecided, and are to be the subject of subsequent negotiations, there is no binding contract."

¹ SLUHCM2020/0056

² Lexis PSL Commercial Practice Notes

³ [1992] 1 All ER 453

- [31] The starting point is that a lease for a term of years must be either by deed or evidence in writing and must contain the material terms of the contract. Accordingly, the MOUs govern the terms of the arrangement between the parties, subject to the parties entering into a mutually acceptable lease agreement setting forth the terms and conditions contained in the MOUs.
- [32] The claimant alleges that she was induced in signing the 1st MOU based on the defendant having warranted and represented that food and beverages would only be sold on the second floor and based its forecasted earnings on that premise.
- [33] One of the main factors to be taken into consideration when deciding the enforceability of a MOU is the intention of the parties to be interpreted from the terms and the conduct of the parties post the execution of the MOU. The onus rests on the claimant to prove that it entered the MOUs as a result of the alleged representation.
- [34] What constitutes an inducement was in issue in **Esso Petroleum Co. Ltd v Mardon**⁴, where reference was made to **Hedley Byrne & Co. Ltd v Heller & Partners Ltd**⁵ in the following terms:
- “It seems to me that Hedley Byrne & Co. Ltd. v Heller & Partners Ltd., properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be it advice, information or opinion - with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.”
- [35] The defendant denied the purported representations and contends that the claimant’s forecasted earnings were all made of its own freewill. The editors of **Halsbury’s Laws of England**⁶ define a misrepresentation as:

⁴ 1 QB 801 820

⁵ [1964] AC 465

⁶ (5th edn., 2021) vol. 76, para 701

“a positive statement of fact or law, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor') makes a misrepresentation to another ('the representee') which has the object and result of inducing the representee to enter into a contract or other binding transaction with him, the representee may generally elect to regard the contract as rescinded.”

[36] In **East Pine Management Ltd v Tawney Assets Ltd & Ors**⁷ it was stated that:

“For a misrepresentation to vitiate a claimant’s consent to a transaction there must be a causal link between the representation and the representee’s conduct. The representee must enter into the transaction in reliance on the misrepresentation; conversely, the transaction must be induced by the misrepresentation. Although a distinction is drawn between reliance and inducement, they are closely related concepts that are both concerned with causation. Reliance signifies the required causal link between the representee’s conduct and the representation, viewed from the representee’s perspective. Inducement signifies that causal link, but from the representor’s point of view. It is not possible for there to be inducement without reliance. ... What is relevant here is what the claimant would have done had no representation at all been made. In particular, if the making of the representation in fact influenced the claimant, it is not open to the defendant to argue that the latter might have acted in the same way had the representation been true.”

[37] Clause 10 of the 1st MOU describes the use of the premises exclusively for the development and operation of a coffee shop facility to provide: Espresso coffee drinks/Brewed Coffee, fresh roasted coffee beans, teas, pastries, sandwiches, yogurts, non-alcoholic beverages, salads and small snacks.

[38] The claimant’s business plan which it alleges had to be approved before the 1st MOU lists a start-up inventory of coffee beans, coffee filters, baked goods, salads, sandwiches, teas, beverages etc. The equipment listed were espresso machine, frozen beverage dispenser, blender, refrigerator, iced tea brewer, ice maker etc. The product description states that the menu will be built around espresso-based coffee drinks such as lattes, mochas, cappuccinos etc. The plan was to provide a quality drink demand of high coffee and extra ordinary fresh quality cups of coffee

⁷ BVIHCVAP2012/0035

to guests using the best coffee preparation techniques. The focus of the claimant's business plan and MOU was based on providing premium coffee drinks.

[39] The defendant states that what was represented to the claimant was the removal of the exclusivity arrangement it had with its previous tenant, Goddard's Catering, for the sale of food and beverage as the sole concessionaire at the airport. The defendant states further that it always understood "food" and "beverage" to exclude snacks and soft beverages.

[40] The defendant contends that the claimant never requested a variation of its arrangements with the tenants on the ground floor to reflect the alleged misrepresentation, and also the items identified in the claimant's business plan were not items that were in competition with the snacks and soft beverages sold by the other tenants on the ground floor.

[41] The court accepts the defendant's evidence as it is noted that the only reference to possible competition in the claimant's business plan was in relation to the Snack Bar operated by the Goddard's where it is stated:

"Competition – Spice Isle Coffee recognizes Snack Bar (next door) as a potential competition because of its strong financial position and established operational practices. However, despite of the Snack Bar [sic] established market position, many customers favor smaller bars that offer different atmosphere and excellent coffee together with friendly and profession [sic] service".

[42] The claimant presents no evidence other than her assertions of what she perceived as the misrepresentations made by the defendant. The claimant argues that it was reasonably entitled to believe that the words "food" and "beverages" carried its ordinary meaning and not as excluding snacks and soft drinks which were being sold on the ground floor of the airport. The claimant relies on the **Oxford Dictionary's** definition of food, as: "things that people or animals eat" and beverage, which is: "any type of drink except water".

[43] There are no other witnesses, nor documents in support of the claimant's position. It is also worth noting that there is no reference to any representation in the

claimant's business plan, under the headings "Keys to Success" and "Competition", that there will be no snacks and soft beverage of any kind being sold on the ground floor.

- [44] In the circumstances therefore, the claimant has not provided any evidence to prove that as a matter of fact the said alleged representation was made. The defendant's conduct in removing the exclusivity clause held by Goddard's accords with the defendant's posture that no further undertaking was given in relation to the other shops on the first floor. The absence of such expressed consensus for exclusivity cannot be inferred except with the conduct in relation to Goddard's catering which was recognized in the claimant's business plan.

Whether there was a breach of warranty by the defendant by placing a vending machine on the ground floor

- [45] **Chitty on Contracts**⁸ describes a warranty as follows:

"The use of the word 'warrant' in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract, the breach of which by one party does not entitle the other to treat his obligations as discharged."

- [46] The claimant argues that the defendant placed a cold drink vending machine on the ground floor of the airport in breach of its warranty.
- [47] The defendant on the other hand states that the vending machine was placed in the interest of Customer Service. The defendant further states that it is an international airport, and that edible items and beverages cannot be confined to one area, but must be available at various locations at all times throughout the airport.
- [48] Though the defendant asserts the above position, it is the evidence that it moved the vending machine to the second floor after the claimant's complaint.

⁸ 32nd edn., Sweet & Maxwell, 13-031

[49] This gives perspective to the extent of the agreement between the claimant and the defendant, since if the placement of a vending machine was not contemplated by the discussions of the parties, why else would the defendant move same to the first floor where the claimant's business was located, when its rationale for placing the vending machine on the ground floor was to have edible items throughout the airport.

[50] In any event, the court having considered the evidence accepts the defendant's evidence that the removal of the vending machine was to placate the claimant but did not by itself suggest that it was in breach of any warranty to entitle the claimant to treat its obligations under the MOUs as discharged. The court also accepts that food and beverages are to be made available on both floors in keeping with international airport standards.

Whether the claimant is entitled to the relief sought given that it never executed a lease agreement with the defendant

[51] The defendant argues that in the absence of an executed lease, the claimant's claim ought to fail as there is no landlord-tenant relationship existent.

[52] The emails to the defendant seeking to enlarge the items described in the MOUs suggest that the terms are not conclusive of the agreement between the parties. The agreement before the court, that is the MOUs and the complaints of the claimant, stem not from the unexecuted lease, but from discussions alleged to have been had between the parties prior to the execution of the MOUs and continuing post the signing of the MOUs. It is obvious that the parties are not *ad idem* on the final terms of the lease.

[53] The court notes that the claimant is unilaterally seeking to enforce terms not expressed in the MOUs. The court also accepts the defendant's evidence that it would be unreasonable to restrict sales of food, snacks and beverages only on the top floor as the claimant suggests. It is the claimant's own evidence of the difficulty to reach the second floor when the lift is dysfunctional or where persons have heavy luggage. The court accepts the defendant's evidence that a restriction

not to sell food and beverages on the ground floor would not be in keeping with international airport standards. The MOUs, which form the basis of the contract are silent on the purported exclusivity which the claimant asserts.

- [54] The court having heard the evidence and applying the law to the facts finds that the claimant has failed on a balance of probabilities to establish its case for breach of warranty or misrepresentation. It is an expressed term in the MOU that the parties are to enter into a mutually acceptable lease agreement setting forth the term and conditions to govern their landlord and tenant relationship. This will be in keeping with statutory requirements in relation to a lease for the term of years agreed by the parties.

Whether the defendant wrongfully charged the claimant for the provision of air conditioning maintenance

- [55] The final issue is whether the defendant wrongfully charged the claimant for the provision of air conditioning maintenance. It is a clear term in the 1st MOU that payment for air condition maintenance be billed separately at the monthly rate of “\$240.00 (If unit is provided by the GAA).”
- [56] The claimant argues that the defendant provided no air conditioning unit in its rental space but has been billing the claimant for the monthly sum totalling \$5,760.00 and continuing. The claimant seeks a reimbursement.
- [57] The defendant in its pleadings averred that the claimant benefits from centralised air-conditioning but did not assert that a separate unit was provided as expressed in the MOU. However, the defendant has failed to discharge that burden of proof and accordingly the court finds in favour of the claimant for the reimbursement of the sums paid under this head.

Order

- [58] For the forgoing reasons, It is ordered and directed that:

(1) The claimant’s claim for damages and breach of warranty is dismissed.

- (2) The claimant's claim for the payment of \$5,760.00 for air conditioning maintenance and continuing at the monthly sum of \$240.00 is granted with interest at the rate of 3% per annum from the date of filing the claim until judgment and at rate of 6% per annum from the date of judgment until payment in full.
- (3) The parties agreed on costs in the sum of \$5,000.00 on the claim. However, the claimant having had partial success on the special damages is accordingly awarded prescribed costs on the total sum to be reimbursed by the defendant pursuant to Part 65.5 Appendix c.

Agnes Actie
High Court Judge

By the Court

Registrar