SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1987

BETWEEN:

ANDRE BEAUFRAND - Appellant

and

SIMON HUGHES DE POINTES - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: H. DeB. Forde, Q.C., A. Shephard, A. Cummings and A.Saunders instructed by Messrs. Hughes and Cummings for the Appellant.

O. Sylvester, Q.C., and M. Williams, instructed by Sylvester and Williams for the Respondent.

1988; July 19, 20,
Dec. 12.

JUDGMENT

MOE, J.A.

This appeal is against an award of $143,433.89 Special Damages and $10,000 General Damages to the respondent on his Counterclaim for loss and damage which he claimed he suffered as a consequence of several breaches of a tenancy agreement between himself and the appellant relating to premises called the Hotel Anchorage Yacht Club.

The appellant sued the respondent for inter alia arrears of rent and/or use and occupation and/or mesne profits for the premises for the months of December 1981 to April 1982 inclusive. The respondent in his Defence and Counterclaim pleaded so far as is relevant to this appeal as follows:-

1. The defendant denies that he is indebted to the plaintiff in the sum of $105,000.00 or any other sum. The defendant says further that by virtue of a tenancy agreement made partly orally and partly in writing on May 1, 1981, the plaintiff agreed to let and he agreed to accept an annual tenancy of the Anchorage Yacht Club at an annual rental of 360,000 French Francs, or E.C. $167,400.00, and further agreed to pay the same in 12 equal monthly instalments of 30,000 French Francs or E.C. $13,950.00.

3. At the time of the agreement, the plaintiff represented to the defendant that it was necessary to operate all of the facilities

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of the Anchorage Yacht Club in order to generate enough revenue to meet the monthly rent as the hotel itself was too small to be operated as a profitable unit, so that it was necessary to earn income from the agency fees for Air Martinique; rent for the office on the Anchorage compound accommodating Air Marginique; charter fees from the daily charter of the Charagate; profits from the operation of the dry dock; income from the operation of the hotel, the hotel bar and the dining-room; and from the paying passengers who frequented the transit lounge of Air Martinique. In reliance on the plaintiff's representations that the annual tenancy would include the Anchorage and its allied facilities, the defendant agreed to accept the annual tenancy at the stated rent on the express understanding with the plaintiff that the aggregate income therefrom would accrue to the defendant.

4. It was an express term of the said agreement that at the defendant's initial cost he would renovate and repair the resort, its furniture, fittings and other allied facilities in return for a security of tenure to recover his initial outlay on the said resort; and alternatively, if for any reason the tenancy determined before the defendant had recovered the same that the plaintiff would reimburse him for the following expenses:

(1) $75,525.63 which represents an overdraft incurred by the previous tenant of the Anchorage Yacht Club, Laurent Moriniere. This debt had become the personal liability of the plaintiff and he would have been personally liable to discharge it in order to restore bank credit facilities to the resort. Those facilities had been terminated and were not restored until the defendant had discharged the said overdraft;

(2) $27,592.84. This sum, like that referred to above, was an aggregate of debts incurred by the said Laurent Moriniere during his operation of the resort. They consisted of the following:-

a.	rent owed for an house that was occupied by Laurent Moriniere - cheque 769	$1,800.00
b.	telephone fees for March 1981 - cheque 048763	4,465.50
c.	telephone fees for April 1981 - cheque 044203	3,835.44
d.	St. Vincent Electricity Services Limited	9,653.62
e.	H.M.S. Customs - cheque 764	1,440.50
f.	National Provident Fund - cheque 767	513.78
g.	Income tax - cheque 768	254.78
h.	Broadway Supermarket - cheque 771	1,824.50
i.	Commissions on US$ cheques	445.50
J.	Employees holiday pay	3,359.52
		27,592/84

/The above-.....

The above-mentioned sums represented actual cash which the defendant had to spend on the facilities at the Anchorage before he could commence business in order to put the resort into a state of repair suitable for business. It was done in the presence and with the knowledge of the plaintiff, who, at all material times lived at the resort and never once objected to anything that was being done. In fact, he openly praised the defendant for the good work he was doing to restore it to its former lustre, for he was aware of the appalling state of disrepair of the facilities at the resort. That disrepair related to the following:-

(a) a malfunctioning ice-machine
(b) an uncleaned, malfunctioning water-tank
(c) a defective generator
(d) a collapsing dry dock
(e) a defective desalination plant
(f) inadequate kitchen facilities.

After the defendant had expended his money, approximately $103,118.47 on the resort, his annual tenancy was abruptly terminated by the plaintiff without warning; and in consequence, the defendant lost the opportunity to recover his investment as had been agreed.

8. That the plaintiff took over an area of the demised premises and constructed an office thereon and took chairs and other office equipment from the demised premises together with electricity and water therefrom and used same as an office for Air Martinique. The defendant says that five hundred dollars ($500.00) per month is a reasonable rent for the aforesaid facility.

9. In further breach of the agreement the plaintiff assumed control of the Air Martinique travel agency and collected commission fees therefrom for 5 months, taking $700.00 monthly, thereby making a total of $3,500.00.

AMENDED COUNTERCLAIM

13. The defendant repeats paragraphs 2,3,4,5,6,7,8,9,10 and 11 of the Amended Statement of Defence and says further that by virtue of the plaintiff's several acts of interference by himself, his servants and/or agents, the plaintiff so disturbed the defendant's right of quiet possession that he caused him to lose considerable revenue; in consequence whereof the defendant has suffered loss and damage.

Particulars of Special Damage

1.	Under paragraph 4 hereof, loss of investment	$117,068.47
2.	Under paragraph 7 hereof, loss of 4 months charter service at the rate of $2,836.50 per month for use of the yacht Charagate	11,346.00
3.	Under paragraph 8 hereof, loss of Air Martinique office for 5 months at the rate of $500.00 per month	2,500.00
4.	Under paragraph 9 hereof, loss of commission fees for travel agency, 5 months at the rate of $700.00 per month	3,500.00
5.	Under paragraph 10 hereof, loss of landing fees for the use of the Union Island airfield	35,722.00
6.	Under paragraph 11 hereof, loss of profits from boutique	21,262.50
7.	Under paragraph 11 hereof, loss of dry dock facilities	6,227.55
		$197,6[illegible]6.52

And in the General prayer he claimed Damages for breach of contract and/or warranty of quiet possession.

The appellant in a reply denied that the agreement was for an annual tenancy or a lease as contended for by the respondent. He averred that he made it clear to the respondent that before he could consider the grant of such a lease he would require from the respondent, who was an alien to the State, his work permit and residency permission, police record, bank statements and/or references. The respondent promised to produce them and upon that promise the appellant permitted the respondent to operate the club subject to the production of the documents and do pay the appellant $13,950 monthly. The appellant further pleaded that the respondent having failed to produce the documents the monthly tenancy was terminated and he gave the respondent notice to quit dated 8th December, 1981 expiring on 31st January, 1982.

It was clear therefore that issues which arose for the learned Judge's determination was whether the tenancy held by the respondent was monthly as claimed by the appellant or annual as asserted by the respondent for $167,400 payable monthly and also whether there was an express term in the agreement between the parties that the respondent would repair and renovate the premises and if he did not have his annual tenancy he would be entitled to recoup the sums of money he had paid out.

The learned Judge found that the terms of the agreement between the parties to be a yearly tenancy renewable at the end of each year to extend to five years with the annual rental being $167.400 payable at the rate of $13,950 E.C. or 30,000 francs per month. That the respondent would be given the option to purchase the premises and whenever that option was taken the agreed purchase price of $800,000 U.S. would be paid off by the end of five years. He found it was expressly agreed that the respondent would renovate and repair the premises and put them in good working condition at his own expense on the understanding that he would enjoy them from year to year at least for five years if he did not exercise the option to purchase or as his own, if the option were exercised.

The learned Judge further found that the respondent paid $30,595.84 to clear debts which Mr. Moriniere incurred while he held a tenancy of the premises. He went on to find that the debts, being debts incurred by the Anchorage Yacht Club of which the appellant is owner, became the appellant's own personally, moreso, having regard to the very wide powers given to Moriniere to manage the appellant's affairs by a Power of Attorney under which the appellant agreed to ratify and confirm whatsoever Moriniere "shall do or purport to do by virtue of such power". He accepted that the respondent spent $100,000 towards the improvements on the premises. Finally he found that as a result of harassment of the respondent by the appellant, the respondent was forced to give up an agency for Air Martinique; that having taken away the agency for Air Martinique from

the respondent, the appellant constructed an office on part of the demised premises without the permission of the respondent and paid no rent. He made an award to the respondent for use and occupation of the area concerned.

The learned Judge gave judgment on the Counterclaim as follows:-

Special Damages	
Anchorage Debts	$30,595.84
Improvements	100,000.00
Chris Muller's expenses	10,000.85
Rent for the Air Martinique office	2,000.00
Total	$143,439.89
Damages for breach of quiet enjoyment	10,000.00
Total	$153,439.89

He ordered the appellant to pay the respondent full costs on the Counterclaim with interest on those costs from the date of its quantification.

The burden of the appellant's complaint is that the learned Judge made findings on the respondent's Counterclaim based on issues not raised on the pleadings. Counsel contended essentially that as a result of the learned Judge making such findings he failed to fairly and adequately (a) direct himself on the issues raised and (b) assess the evidence with the consequence that he awarded damages which were not pleaded and in one case formed no part of any cause of action raised on the pleadings.

Counsel submitted firstly that cases must be determined on the issues on record as disclosed on the pleadings and it is no function of the Court to enter upon an enquiry in a case before it other than to adjudicate upon the specific matters in dispute raised by the parties on their pleadings. Secondly that where a matter is not pleaded it is wrong to draw inferences adverse to the other party which might well have been answered if pleaded. We were given a long list of authorities in support of the submissions. But as was expected there was no challenge to these elementary principles.

Of greater significance was the third submission that the learned Judge's findings on issues not pleaded and his drawing of consequences adverse to the appellant constituted a radical and substantial departure from the case as pleaded so as to disentitle the respondent from succeeding. Counsel referred to:- Wagham v George Wimpey (1970) 1 All E.R. 474; Lloyd v West Midland Gas Board (1971) 2 All E.R. 1240; Esso Petroleum v South Port Corporation (1956) A.C. 218; Bullen, Leak and Jacobs 12th Ed. pages 6 to 9.

/The main....

The main plank in this submission was that the finding that there was an agreement for an annual tenancy with an option to renew for a fixed term and an option to purchase for $800,000 U.S. amounted to finding an agreement ultra vires the Aliens (Landholding Regulations) Ordinance Cap. 96. The respondent is an alien and under sections 2 and 3 of the Aliens (Landholding Regulations) such a person is prohibited without a licence from holding land. Counsel submitted that a tenancy coupled with an option to renew beyond a year and/or coupled with an option to purchase would constitute an interest in land. Reference was made to London & South Western Railway Co. v Gomm (1881) 1 All E.R. 59; In Re Button's Lease, Inman et al v Button (1964) 1 Ch. 263; Muller v Trafford (1901) 1 Ch. 54.

A contract as found by the learned Judge, Counsel submitted, being on its face (Ex facie) contrary to Statute Law the Court should decline to enforce it even if there was no reference to the point in the pleadings. He referred to:-

North Western Salt Co. Ltd v Electrolytic Alkali Co. Ltd. (1914) A.C. 461

Walcott v Trents Ltd., 30 W.I.R. 17

Independent Automatic Sales Ltd. v Knowles & Foster (1962) 3 All E.R. 27

On this head the respondent stated that it could not be gainsaid that the whole course of pleadings etc. were quite unsatisfactory; that difficulty arose because different Counsel were involved in the case at different stages and the principal parties faced difficulty with the English language. Be that as it may, he submitted firstly that the option to purchase was not part of the yearly tenancy - it was collateral to it; so that although it was contrary to the Aliens (Landholding Regulations) Ordinance it did not affect the yearly tenancy. Secondly even if the option was part of the yearly tenancy it was severable from the yearly tenancy.

The pleadings of the respondent set out above as is relevant to this aspect of the case do not set up terms of the tenancy such as the learned Judge found. There was however evidence given on which there could be a finding that such were the terms. But variations between the case pleaded and that proved and the extent thereof are all matters which affect the acceptability of a party's case. Pleadings act as a measure for comparing the evidence of a party with the case which he has pleaded. I think it most peculiar to draw consequences or arrive at conclusions adverse to a party which are reached by ignoring the deficiency in the other party's case. The importance of pleadings is too often discounted today. The authorities quoted by Mr. Forde are good reminders of their importance. The point is well made in the following passage taken from an article by I.H. Jacobs on the present

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importance of pleadings in Current Legal Problems (1960) at pages 176 to 177 and reiterated in Bullen and Leak and Jacobs, Precedents and Pleadings (12th Ed.) at pages 17 and 18. "The very nature and character of pleadings demonstrates their significant and overwhelming importance; for the attention of the parties as well as the Court is naturally focussed on and rivetted to the pleadings as being the nucleus around which the whole case revolves throughout all its stages. The respective cases of the parties can only be considered in the light of and on the basis of the pleadings which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters so as to put forward the real questions in controversy between the parties. Each party may thus be assumed to have put forward the best case he has in the best way he can in his pleading and in this sense the pleadings manifest the true substantive merits of the case".

The response of the respondent concentrated on the submission relating to the finding on the option to purchase which was but a part of the attack and indeed only an alternative method of attack on the Judge's finding as to the nature and terms of the agreement. However I do not think it necessary for the purposes of this judgment to deal with the matter from this point of view. In addition to that aspect being an alternative attack, the record shows that the respondent himself stated he was not pursuing reliefs on the basis of the option to purchase.

The respondent's submission ignored the first part of the appellant's attack which was that a tenancy coupled with an option to renew beyond a year would constitute an interest in land. Mr. Forde gave us authorities in support of this proposition and I think the position is most clearly set out in Weg Motors Ltd. v Hales (1961) Ch. 49 where at pages 71 and 72 Lord Evershed M.R. having reviewed Muller v Trafford (1901) 1 Ch. 55 showed that covenants for renewal of a lease - like other covenants running with the land - are annexed to the land and form "part of it ab initio".

Section 3 of the Aliens (Landholding Regulations) Ordinance Cap. 96 provides:-

> "Subject to the provisions of this Ordinance, neither land in the ~~Colony~~ State, nor a mortgage on land in the ~~Colony~~ State, shall, after the commencement of this Ordinance, be held by an unlicensed alien, and any land or mortgage so held shall be forfeithed to ~~His~~ Her Majesty:
>
> Provided that, -
>
> (a) Land may be acquired and held by an unlicensed alien on an annual tenancy, or for any less interest for the purposes of his residence,

/trade,.....

trade, or business,but an unlicensed alien shall not so hold more than five acres of land in all.

(b) Land acquired by an unlicensed alien under a will or an intestacy shall not be forfeited if, within one year from the death of the testator or intestate, or within such extended time (if any) as the Governor may decide to be reasonable, the land is sold or the alien obtains a licence to hold the land.

(c) A mortgage acquired by an unlicensed alien under a will or on an intestacy shall not be forfeited, but the alien shall not, unless he obtains a licence to hold the mortgage, be entitled to foreclose or enter into possession of the mortgaged land.

(d) Nothing in this Ordinance shall affect the interest of a judgment creditor in the land of his judgment debtor, but the debtor's land shall not be acquired by an unlicensed alien.

(e) Nothing in this Ordinance shall affect the estate or interest of an alien in any land or mortgage held by him at the commencement of this ordinance."

By section 2 of the Ordinance "Land" includes tenements and hereditaments, both corporeal and incorporeal and every interest therein but does not include money charged on land.

The learned Judge therefore had found that the respondent concluded a contract under which he held an interest in land. In effect in the circumstances he found that the respondent entered into a contract which neither party had put up for determination, which contract turned out to be an illegal contract and consequently from which he ought not to have awarded the respondent any benefits. It is contrary to public policy to allow a man to claim benefits resulting from his own illegality.

For the proposition that no person can recover on a transaction which is illegal there is a wealth of authority dating back to Holman v Johnson (1775) 1 Cowp. 341 and reiterated recently in Shelley v Paddock (1980) 1 Q.B. 348.

A fourth submission under this head was that the learned Judge having erred in his determination of the true contract concluded by the parties was influenced by that error in his assessment of the credibility of the various witnesses and in his evaluation of the evidence.

The learned Judge did say in his judgment that he found it inconceivable that the respondent would have undertaken the tremendous project on improvements as he found that he did if the terms of the tenancy agreement were in fact on a month to month basis as alleged by the appellant. But again I find it unnecessary to go into the matter

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of the relation of the finding of a certain type of contract (i.e. with certain terms making it an illegal one) to the assessment of the credibility of appellant's evidence and case.

For apart from the question whether the respondent was entitled to an award which in effect would be enforcing an illegal contract other basic considerations arose in relation to various heads of the award to which I now turn.

Anchorage Debts

Appellant's submission was that while the evidence showed that the debts were incurred by Mr. Moriniere while he was a tenant of the appellant and had permission to use a bank account of Beaufrand and Co. Ltd., there was no evidence that the appellant adopted the debts. Respondent, referring to Clause 3 of the Power of Attorney which Mr. Moriniere had from the appellant and to the Agreement of Settlement between them when Moriniere gave up the premises, contended that it was not an unreasonable inference to draw that the Anchorage Debts such as respondent had to pay were taken over by the appellant.

It is true that the Power of Attorney shows a power granted by the appellant to Moriniere to use money from the appellant's bank account in or about the appellant's business or to invest it as he thinks fit but as I understand the evidence, the debts concerned were debts incurred during Moriniere's tenancy in respect of Moriniere's own busi[redacted]. There is no evidence whatever that when the respondent paid Mo[redacted]ere's debts he paid them in circumstances in which the law would regard the appellant as liable to pay the respondent the amount concerned. Moreover it was not for the Judge's determination whether an inference may be drawn that the appellant was liable to pay the sums concerned, for the respondent's pleading was that it was expressly agreed that the appellant would pay the sums. The respondent clearly did not establish his case for an award under this head.

Improvements

The appellant's contention simply was that a party cannot and will not be allowed to recover in respect of special damages unless it is specifically pleaded and specifically proved. This was not done he argued in respect of the $100,000 awarded for improvements. Reference was made to:-

> Perestrello E. Companhia Limiteda v United Paint Co. Ltd. (1969) 3 All E.R. 479
>
> Hayward & Another v Pullinger & Partners Ltd (1950) 1 All E.R. 581
>
> Ilkiw v Samuels & Others (1963) 2 All E.R. 879
>
> Anglo-Cyprian Trade Agencies, Ltd. v Paphos Wind Industries, Ltd. (1951) 1 All E.R. 873

/The respondent....

The respondent could urge little on this. The inelegant pleading at paragraph 4 set out above shows the merit of the appellant's point with regard to the pleading and the evidence as to how the amount was arrived at was remarkably absent.

Chris Muller's Expenses

Even less needs be said about this. The respondent conceded that the learned Judge ought not to have awarded the amount as special damages. Counsel sought to impress upon us that the relevant expenses were incurred as a consequence of the arrangement between the appellant and the respondent. That the respondent's inability to recover these expenses was a natural consequence of the breach of the agreement by the appellant. The amount may be awarded as general damages for consequential loss. Unfortunately Counsel was unable to show that the appellant had anything to do with the payment of the expenses.

Air Martinique Office

The appellant's complaint was two-fold. Firstly that the respondent's pleading did not show a claim based on a tenancy so as to ground an award of rent; the respondent appeared to have alleged a trespass. It was not open to the Judge to award damages for rent as special damages. Secondly that the findings of fact that the respondent gave up the Air Martinique agency because of the appellant's harrassment of him is not supported by the evidence. The respondent submitted that the use of the term "rent" was unfortunate. However it was sufficient for the respondent to state the material facts. It was not necessary for him to state the correct legal result. The appellant in reply conceded the learned Judge could have given damages for trespass as general damages if he found trespass.

A review of the evidence reveals that the respondent's evidence is that Air Martinique itself made various requests of him in relation to his Air Martinique office. He did not accede. After the hard time they gave him, he gave up the Air Martinique agency and Miss Beaufrand took over. She operated from an office under the control tower adjacent to a botique and he continued to have the use of the same office space after 7.12.81. The area used as office under the tower was part of the demised premises and the learned Judge found $500 per month as reasonable for use and occupation of the area.

The award of damages for breach of quiet enjoyment based on the Judge's finding that the appellant harassed the respondent to the point where he had to give up the Air Martinique agency could not be supported.

/One other.....

One other issue raised in this appeal is the question whether the learned Judge had power to award interest on the costs allowed. The appellant submitted that there is no statutory provision in St. Vincent for the award of interest on costs. Reference is made to the Interest Ordinance Cap. 10 and section 26(a) of the West Indies Associated States Supreme Court (St. Vincent) Act 1970. The respondent seemed to have agreed with the point made as there was no submission from him on it.

Section 26(a) of the W.I.A.S. Supreme Court (St. Vincent) Act 1970 provides:-

> "26(a). In any proceedings for the recovery of any debt or damages in the High Court or Court of Appeal, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, but nothing in this section -
>
> (a) shall authorise the giving of interest upon interest; or
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> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
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> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

The Interest Ordinance delimits the rate of interest which may be added to those sums on which interest may be added. These statutory provisions do not provide authority for awarding interest on costs and none giving such authority has come to our attention. The basis for the award would have to be grounded at Common Law but there interest was not awarded on costs.

In the result from all that has been said above I would allow the appeal set aside the order of the learned Judge on the Counterclaim of the respondent and order that the Counterclaim do stand dismissed. The appellant is to have his costs thereon in the Court below to be taxed certified fit for two Counsel if not agreed. The appellant will also have his costs of the appeal to be similarly certified.

G.C.R. MOE,
Justice of Appeal

I agree

L.L. ROBOTHAM,
Chief Justice

I agree

E.H.A. BISHOP,
Justice of Appeal