ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.14 OF 2003

BETWEEN:

TEXACO (WEST INDIES) LIMITED

Appellant

and

GEORGE BARNES

Respondent

Before:

The Hon. Adrian Saunders	Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal

Appearances:

Mr. Sydney Christian, Q.C for the Appellant
Mr. John Fuller for the Respondent

2004: May 25;
September 20.

JUDGMENT

[1] GORDON, J.A.: This appeal arises from a judgment delivered by Olivetti J on 28th April 2003 in which she found for the Claimant/Respondent and awarded damages against the Defendant/Appellant. The Defendant/Appellant has appealed that judgment.

[2] The Respondent was at the material times the owner and operator of a gas station known as Charlie's Service Station and the Appellant was a manufacturer and distributor of petroleum products and a supplier of service station equipment. By a contract dated 19th December 1995 and amended on 3rd July 1996 the Appellant agreed to loan certain equipment to the Respondent, specifically pumps for the

dispensing of gasoline, and to supply petroleum products to the Respondent for resale.

[3] As part of the agreement between the parties the Appellant charged the Respondent the sum of $0.03 per imperial gallon of gasoline supplied as a "contribution to defray the cost of maintaining said equipment". In fulfillment of that obligation to maintain the equipment, the Appellant caused one of its employees to attend at the Respondent's Service Station monthly and there carry out certain functions. It was the course of dealing between the parties that at the end of each visit of the maintenance mechanic he would present a form headed "Monthly Preventive maintenance on co-owned equipment" and consisting of some 5 pages for the Respondent or his agent to sign below a legend "I certify that the above work has been completed to Texaco's standards " on some of the forms or "I certify that the above work has been completed to my satisfaction" on others.

[4] It was the contention of the Respondent that from the time that the new pumps were installed in September 1996 the meters within the pumps which measured the amount of product delivered were defective in that they were not properly calibrated. Indeed, it is the case of the Respondent that the pump meters were not properly calibrated by the Appellant, whose duty it was to calibrate them, until 17th March 1998 at which time it was found that each of the dispensers (six in all) delivered more gasoline than was being metered. The Respondent based his claim for damages on the difference between the gallons of gasoline delivered versus the gallons shown by the pump meters to have been sold multiplied by the price at which he could have sold that difference, that is at $6.85 per gallon.

[5] The learned trial Judge found that from the time of the installation of the pumps until the end of March 1998, the Appellant had delivered some 692,410 gallons of gasoline to the Respondent's station and that the total gasoline dispensed according to the total running meters within the pumps was 632,861.7 gallons, a discrepancy of 59,548.3 gallons. The learned Judge found further that the

discrepancy of 59,548.3 gallons should be reduced by 4,540 gallons held in the tanks of the service station at the time of measuring and by crediting the opening readings on the pumps. The trial Judge found that the discrepancy should be further reduced by 17,500 gallons being the amount of gasoline delivered between the 18th March and end of March 1998 thus leaving a total discrepancy of 37,508.3 gallons. She further found that the discrepancy resulted from the faulty meters in the dispensing pumps.

[6] Judgment was given in favour of the Respondent in the sum of $256,931.85 being the number of gallons representing the discrepancy multiplied by the sum of $6.85 which was the price that the Respondent stated he was selling gas at. It is to be noted that in his Statement of Claim the Respondent claimed losses predicated on the price at which he purchased gas from the Appellant, being $6.50. I shall revert to this issue later on in this judgment.

[7] The Appellant raised six grounds of appeal in his Notice of Appeal, but consolidated them into four principal arguments, the first of which was that "the learned trial Judge misdirected herself in finding that no meter accuracy checks were carried out by the Appellant prior to March 1998 having regard to the evidence before her and the inferences that she drew therefrom".

Meter Accuracy Checks

[8] The trial Judge dealt with the issue of the meter accuracy checks both contextually and directly. Firstly she referred to the evidence of the Respondent that he had on numerous occasions requested that meter accuracy checks be done by the Appellant, but he was told that this could not have been done due to the absence of a measuring can. The learned trial Judge did not make a direct finding as to whether the Appellant had a measuring can or not, but I would have difficulty in believing that such a can was not available, it being merely a can calibrated to show one or more gallons. What is significant, however, is that the Judge found that the Respondent had on numerous occasions asked for the pumps to be

checked. This was confirmed by the evidence of Mr. Mark Layne, marketing coordinator of the Appellant, who stated in his evidence that he passed on these requests to Mr. Grenville Jacobs who at the relevant time was operations coordinator of the Appellant in Antigua. Mr. Jacobs said he had no recollection of these requests. The trial Judge inferred from this evidence that the requests for accuracy checks were ignored by the Appellant. I can find nothing wrong in reality or in principle with such an inference.

[9] The learned trial Judge dealt directly with the issue in these trenchant terms: "The Court finds it incredible that prior to March 1998 all the meters according to Mr. Francis had been tested monthly and were accurate and that suddenly and inexplicably in March all six meters gave wrong readings. The only proper conclusion the Court can come to on the evidence before it and bearing in mind the standard of proof in civil cases is that Texaco by its servant or agent, Mr. Francis, did not carry out any meter checks prior to March 1998". I can find no error in the logic and deduction of the learned Judge. This ground of appeal fails.

Estoppel

[10] The second ground of appeal argued on behalf of the Appellant was that "the learned trial Judge ought to have found that, having signed all the monthly maintenance reports, the respondent was estopped from questioning the accuracy of those reports". As I understand the argument of learned Queens Counsel on behalf of the Appellant, by signing each month at the end of the "Monthly preventive maintenance on co-owned equipment" form the Respondent represented that the checks were carried out by the Appellant's mechanic and that they were carried out to the satisfaction of the Respondent.

[11] In developing his argument Learned Queens' Counsel relied on the case of Saunders v Anglia building Society[1]. This was a case dealing with the defence

[1] [1970]3 All ER 961

of 'non est factum' and sought to restate the law touching on that somewhat complex issue. It was in the specific context of 'non est factum' that the House of Lords sought to deal with the issue of estoppel by negligence and distinguish it from the defence of 'non est factum'.

[12] What the Appellant seeks to rely on is estoppel in pais which is defined in Halsbury's Law of England[2] as follows:

> "Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.
>
> "The conduct relied upon as amounting to a representation may be by negligence. This, can give rise to an estoppel only where there is a duty to the person complaining to use due care; and it is further necessary that the neglect should be in the transaction itself which is in dispute, calculated to lead, and in fact leading, as its real cause to the belief created."

[13] It seems to me that the Appellant has a number of hurdles to cross. Suffice it to cite three. Firstly, nowhere in the Appellant's pleadings (Amended Defence) is negligence on the part of the Respondent alleged, nor that the Respondent owed any duty of care to the Appellant. Secondly, nowhere in the pleadings or in the evidence is there an allegation that the Appellant relied on the representation of the Respondent. Thirdly, as a matter of logic, the Appellant's representative, Mr. Francis, the mechanic who did the monthly inspection in each of the inspection reports represented that he had inspected the pumps and found them to be in order and it would be that representation on which the Respondent relied in giving his own representation. This ground also fails.

[2] 4th Edition, Vol 16 para 955

The Date of Installation

[14] The third ground argued by learned Queens' Counsel on behalf of the Appellant was that "the learned Judge, in the face of the evidence before the Court, ought not to have refused to consider the Appellant's submissions as to the true installation dates of the pumps because of the admission contained in the defence". As I understand this ground, the Appellant is arguing that the deliveries of gasoline commenced in October 1996 when one pump was installed and that a further two pumps were installed in December 1996. Between October 1996 and 13th December 1996, when it is alleged that the latter two pumps were installed, some 82,300 gallons of gasoline were delivered. If I understand the argument of learned Counsel correctly he is suggesting that either this figure, or two thirds of this figure should be deducted from the total of the discrepancy.

[15] Learned Counsel for the Respondent counters this argument by pointing out that there is no evidence that prior to the Equipment Loan Agreement, there was ANY relationship between the parties. Hence it is to be presumed that all gasoline supplied by the Appellant was dispensed through the pumps installed in October and December 1996. He argued that it mattered not which pump delivered what, it is totals that this case is concerned with. On the basis of the evidence, I find this argument compelling. This ground of appeal also fails.

Interest

[16] The fourth ground of appeal related to the interest awarded by the trial Judge who awarded interest on the judgment of $256,931.85 at 10% per annum from the 17th March 1998, the date on which the fault in the meters was discovered.

[17] The evidence of the Respondent is that he purchased gasoline from the Appellant at the whole sale price of $6.45 per gallon and resold that gasoline at the rate of $6.85 per gallon. The learned trial Judge awarded damages to the Respondent in

the sum of $256,931.85 which represents the discrepancy of 37,508.3 gallons multiplied by $6

[18] .85. In other words, the trial Judge awarded the Respondent not only the cost he paid for the gasoline, but also the profit he might have made had there not been the problem with the faulty meters. In the circumstances I am of the view that the award of interest should date from the date of judgment rather than from 17th March 1998 and I so order.

[19] Learned Senior Counsel correctly advanced that the principle by which a Court should be guided in awarding interest as set forth in Jefford v Gee[3] is that the rate of interest should be that available on a short term investment account. Learned Counsel did not, however, posit what such a rate might be. However, pursuant to the Judgments Act of Antigua which mandates 5% this is perhaps not relevant.

[20] In summary, the appeal is dismissed and the order of the learned trial Judge is confirmed save to the extent that the award of interest is varied to read "interest is awarded to the Respondent at the rate of 5 percent per annum on the sum of $256,931.85 from the date of judgment, April 28, 2003.

[21] Prescribed costs are awarded to the Respondent in the sum of $ 31,462.00.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

[3] [1970]1 All ER 1202