EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2010/0033

BETWEEN:

BROWN'S BAY RESORT LTD

Appellant

and

LUCA POZZONI

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal [Ag.]
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett, Ph.D. for the Appellant
Mr. Lenworth Johnson for the Respondent

2014: July 8;
September 16.

Civil appeal – Lease – Repudiation of contract – Whether learned trial judge erred in awarding liquidated damages – Remoteness of damages - Whether learned trial judge erred in not deducting taxes from the award of damages

The respondent leased commercial premises from the appellant for a period of two years, beginning 1st November 2006, for the purpose of operating a restaurant and beach bar business ("the Lease"). The respondent also operated a day charter and fishing tours business from the premises. Clause 19 of the Lease made provision for a penalty fee of US$4000.00 in the event of an interruption of the contract.

In or about September 2007, the appellant's representative told the respondent that the appellant was selling the property and that the Lease would not be continued. In December 2007, the locks to the property were changed and the premises were padlocked. The respondent accepted the appellant's repudiation of the Lease and cancelled the contract he had with a new chef and hostess/manager that he had engaged for the second year of the term. He also had to pay the chef and hostess/manager compensation.

The respondent brought a claim against the appellant for loss of profits, losses caused by the forced termination of the contract with the chef and hostess/manager and for damages for unlawful termination of the Lease. The learned trial judge granted judgment for the respondent and ordered the appellant to pay to the respondent general damages of $123,347.02 which represented inter alia loss of revenue from the appellant's breach of the Lease and costs of the aborted contract of service with the chef and manager.

The appellant appealed on the grounds that the learned trial judge erred in (1) failing to construe clause 19 of the Lease as a liquidated damages clause; (2) accepting the damages claimed by the respondent in the absence of sufficient or adequate proof; (3) awarding damages for loss from a fishing and charter business; and (4) failing to apply the principle that damages are to compensate a claimant only in respect of what he has lost.

Held: allowing the appeal and varying the order of the trial judge, that:

1. Generally, words in a contract should be given their plain and ordinary meaning unless this leads to an absurdity. A court is not to extend the meaning of ordinary words to re-write parties' contract. Applying those principles to this case, it clear that clause 19 was a provision for financial consequences of an interruption or break in the Lease followed by a resumption. It did not apply where one party has conducted himself in such a way where the conduct resulted in a repudiation and termination of the contract. Further, the sum stipulated in clause 19 of the Lease is not a genuine pre-estimate of the damages likely to accrue from a breach of the agreement so as to be characterized as liquidated damages.

   Kenneth Krys et al v New World Value Fund Limited et al Territory of the British Virgin Islands High Court Civil Appeal BVIHCMAP2013/0017 (delivered 26th May 2014, unreported) followed.

2. It is not an absolute rule that special damages must be strictly pleaded and proved. Although there were no supporting documents for the respondent's claim for lost revenue, the trial judge accepted the respondent's written and oral evidence in relation to this and there is basis on which the Court should interfere with that finding.

   The Attorney General for Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al, Antigua and Barbuda High Court Civil Appeal ANUHCVAP2004/0022 (delivered 6th February 2006, unreported) followed.

3. In the context of a situation where the Lease did not make reference to a charter and fishing business, the alleged losses from that business are too remote and could not have been within the reasonable contemplation of the parties when the Lease was made.

4. Damages are meant to compensate a claimant for actual losses suffered. As such, the award of damages should be reduced by the amount of taxes that the

respondent would have paid had he received the amount as profits from the restaurant business and not as damages.

British Transport Commission v Gourley [1956] AC 185 applied; **Waite v Caribbean International Airways Limited** (1988) 39 WIR 61 applied; **Dominica Agricultural and Industrial Development Bank v Mavis Willams** Dominica High Court Civil Appeal DOMHCVAP2005/0020 (delivered 29th January 2007, unreported) followed.

JUDGMENT

[1] **WEBSTER JA [AG.]**: On 13th November 2006 the respondent leased commercial premises at Brown's Bay, St. Phillip, Antigua known as the Tamarind Bar and Restaurant from the appellant for a term of two years from 1st November 2006 for the purpose of operating a restaurant and beach bar business ("the Lease"). The annual rent of $20,000.00 was payable on the 1st day of the months of November to August in each year of the term. The months of September and October were reserved for repairs and maintenance of the premises. The leased premises comprised a restaurant, bar, swimming pool, solarium, tennis court, beach and beach facilities and "…space to moor a 12' – 40' boat at the dock".[1]

[2] In addition to the uses listed above the respondent operated a day charter and fishing tours business from the premises.

[3] In or about September 2007 the appellant's representative, Mr. Sergio Poli, told the respondent that the appellant was selling the property, and that the new owners had other plans for the restaurant and the Lease would not be continued. The respondent said that he wanted to continue the Lease whether or not it was sold and Mr. Poli told him that "agreement or no agreement, Tamarind will be closed next season". In mid-October the appellant allowed third parties to enter the premises without the knowledge or consent of the respondent to take inventories of the equipment in the restaurant. In December 2007, Mr. Poli changed the locks and padlocked the premises. The respondent had no alternative but to accept the appellant's repudiation of the Lease. He also had to

[1] Clause 2 of the Lease.

cancel the contract he had with a new chef and hostess/manager that he had engaged for the second year of the term. He had to pay the chef and hostess/manager compensation of US$14,184.00.

[4] On 17th March 2008 the respondent brought a claim against the appellant for:

(1) Loss of profits for the season 2007 – 2008.

(2) Losses caused by the forced termination of the respondent's service contract with the new chef and hostess/manager.

(3) Damages for unlawful termination of the Lease.

(4) Interest and costs.

[5] The appellant counterclaimed for loss of rent, mesne profits and damages on account of the respondent's breach of the Lease.

[6] The claim was heard by Michel J in December 2009. The learned judge ordered that judgment be entered for the respondent as follows:

(1) The appellant shall pay to the respondent general damages of $123,347.02 representing $83,700.00 (US$31,000.00) for loss of revenue resulting from the appellant's breach of the Lease; $38,297.02 (US$14,184.00) for the costs of the aborted contract of service with the new chef and manager resulting from the appellant's breach of the Lease; and $1,350.00 (US$500.00) by way of reimbursement for expenses incurred in putting up garden lights for the second season of the Lease.

(2) The appellant shall pay to the respondent interest on the sum of $123,347.02 at the rate of 5% per annum from 17th March 2008 to 7th June 2010.

(3) The appellant's counterclaim is dismissed.

(4) The appellant shall pay to the respondent prescribed costs on the damages and interest hereby ordered as per rule 65.5 of the **Civil Procedure Rules 2000** ("CPR").

[7] The appellant appealed against the learned judge's order. There are four grounds of appeal:

(1) The learned trial judge erred in his construction of clause 19 of the Lease when he held that it was not to be construed as a liquidated damages clause.

(2) The learned trial judge erred when he accepted the damages claimed by the respondent in the absence of sufficient or adequate proof, when it was the case that the appellant was insisting that there was no tax returns or other proof to satisfy the need for certainty of the quantum of the claim.

(3) The learned judge erred in awarding the respondent damages for losses from the fishing and charter business as the appellant could not reasonably be regarded as assuming responsibility for such losses.

(4) The learned trial judge erred when he failed to apply the principle that damages are to compensate a claimant only in respect of what he has lost, and in view of the incidence of personal income tax, he has in such a case lost only his net earnings.

I will deal with the grounds of appeal in the order set out in the notice of appeal.

Ground 1

[8] The first ground of appeal involves interpreting clause 19 of the Lease and applying it to the facts of this case. Clause 19 reads:

> "19. Interruption of Contract – Failure to respect every aspect of this contract could result in an interruption of the contract by either the owner or the tenant. If an interruption occurs then the party

> responsible will pay to the other party a penalty fee of US$4000.00. Any pending expenses of either the owner or the tenant are to be paid before the contract is terminated."

The main issue regarding clause 19 is whether it is an agreed liquidated damages clause limiting the respondent's claim for damages to the sum of US$4,000.00 upon the repudiation of the Lease by the appellant.

[9] The respondent submitted that clause 19 comes into play when the Lease is interrupted by a breach by either party. It does not apply when the Lease is terminated. The appellant's position is that clause 19 applies whenever there is a breach of the Lease, whether or not the breach results in the termination of the Lease, and it limits the innocent party to the penalty fee of $4,000.00 for the "interruption".

[10] In interpreting clause 19, the Court is guided by the basic rules of construction that words in a contract should be given their plain and ordinary meaning unless this leads to an absurdity, and the court is not to extend the meaning of ordinary words to re-write the parties' contract. These principles are illustrated by the recent decision of this Court in **Kenneth Krys et al v New World Value Fund Limited et al**.[2] The Court had to interpret the word "sale" in a commercial contract. The respondents submitted that the word "sale" should not be interpreted literally and in the context of the commercial contract in issue it should be given an extended meaning to include a "distribution *in specie*". The Commercial Court judge accepted this extended interpretation. The Court of Appeal unanimously reversed this finding. The Chief Justice, Dame Janice Pereira, writing for the Court found that there was no ambiguity in the use of the word "sale" in the contract and it should be given its ordinary meaning. The Chief Justice confirmed at paragraph 30 of the judgment, having previously found that the use of word "sale" was not ambiguous, that the Court's only concern is to find out what the document means

[2] Territory of the British Virgin Islands High Court Civil Appeal BVIHCMAP2013/0017 (delivered 26th May 2014, unreported).

and it cannot improve on the words used by the parties. Therefore, the word "sale" did not include a "distribution *in specie"*.

[11] Returning to the case at bar, clause 19 opens with the words "Interruption of Contract" and goes on to say what is an interruption of the contract. The clause then stipulates that where one party causes an interruption of the Lease he is responsible for paying a penalty fee of $4,000.00 to the other party. It is obvious that the parties were making provision for the financial consequences of an interruption or break in the Lease followed by a resumption. That is the obvious meaning of the word "interrupt" and the court should not extend or change that meaning to include a termination of the Lease. If the parties had intended that the penalty fee would be payable for a repudiation followed by termination it would have been the simplest thing to have used the word "termination" instead of "interruption".

[12] This is not a case of an interruption of the Lease. The learned judge made a very clear finding at paragraphs 40 – 41 of the judgment that the appellant, by its conduct, had repudiated the Lease and the repudiation was accepted by the respondent bringing the Lease to an end. The learned judge therefore found that-

> "The fact is that clause 19 of the lease agreement is not a clause which provides for a pre-estimate of damages likely to result from a breach of the agreement, but is a clause which stipulates an agreed penalty for any interruption of the contract by either party"[3]

[13] I would adopt and confirm the learned judge's finding. Clause 19 applies where one party has conducted himself or itself in such a way as to interrupt the contract, not to a case where the conduct results in a repudiation and termination of the contract.

[14] This finding by the learned judge is, in my view, sufficient to dispose of the issues relating to clause 19 and ground 1 of the notice of appeal. However, the learned judge went on in his judgment to deal with the alternative position of what would

[3] Para. 39 of the judgment.

happen if clause 19 applied to the facts of the case and whether it limited the respondent's claim for damages to the stipulated sum of $4,000.00. In other words, is clause 19 a true liquidated damages clause or a penalty. The learned judge analysed the relevant principles and authorities and concluded at paragraph 40 of the judgment –

> "In any event, the principles to be extracted from the case of Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited, which both sides accepted as the pre-eminent authority on the determination of whether an amount stipulated in a contract is a penalty or liquidated damages, lead in the Court's view to a conclusion that the sum of US$4,000 stipulated in clause 19 of the lease agreement is not a genuine pre-estimate of the damages likely to accrue from a breach of the agreement so as to be characterised as liquidated damages – the amount is stated in the agreement to be "a penalty fee" and not liquidated damages; it is single lump sum made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage; and the damages caused by a breach of the agreement (as in the present case) are quite capable of being ascertained by the normal measure of damages."

I agree with and would adopt the learned judge's conclusion that clause 19 is not a liquidated damages clause, and his reasons for so concluding. I do so with deference to the very careful and detailed submissions on the point by Dr. David Dorsett, counsel for the appellant. The respondent's claim for damages is not limited to the stipulated amount of $4,000.00. Damages are at large. I would dismiss ground 1 of this appeal.

Grounds 2 and 3

[15] The appellant relied on the well-known principle in cases such as **Ashcroft v Curtin**[4] that special damages must be strictly pleaded and proved. However, he agreed that this is not an absolute rule.[5]

[4] [1971] 1 WLR 1731.

[5] Per Barrow JA in The Attorney General for Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al, Antigua and Barbuda High Court Civil Appeal ANUHCVAP2004/0022 (delivered 6th February 2006, unreported) at paras. 23 and 24.

[16] The disputed item under this ground is the claim for ten months lost revenue for the 2007 – 2008 season at the rate of US$2,100.00 per month which the appellant submits was not properly proved. I accept that the evidence in support of this claim was scanty, consisting mainly, if not entirely, of the respondent's written and oral evidence. There were no supporting documents. However, the evidence is that the respondent did not have the relevant information because it was among his business records. He did not have access to the records because they were inside the premises and he did not have access to the premises after December 2007 when the locks were changed by the appellant. He does not know what happened to his records.[6] The learned judge accepted his evidence and there is no basis on which this Court should interfere with that finding.

[17] The award of US$31,000.00 for lost revenues included US$10,000.00 from the operation of the fishing and charter boat operation. The Lease provides that the leased premises includes a space to moor a 12' – 40' boat at the dock. However, it does not make reference to a fishing or charter boat business. The appellant pleaded that the fishing and charter business was not connected to the lease of the restaurant and any loss from that business was too remote. The respondent was therefore put on notice that he had to prove that the fishing and charter business was included in the Lease and that any losses from this business was in the reasonable contemplation of the parties when the Lease was made.

[18] The respondent did not set out any basis in his witness statement for the Court to infer that the appellant was aware of fishing and charter business and his oral evidence is limited to the following exchange between the respondent and his counsel:

> "Q. How was the defendant aware you were running the fishing charter boat business?
>
> A. The defendant knew me, my father, my mother and my business from a long time ago because it's from 2003 I live in the area of Brown's Bay."[7]

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[6] Para. 5 of his witness statement.

[7] See p. 47 of the appeal bundle or p. 17 of the Transcript of Trial Proceedings, lines 19-23.

[19] In the context of a situation where the Lease does not make reference to a charter and fishing business this falls far short of proving that at the time when the Lease was made the appellant's representatives were aware that the respondent intended to carry on such a business. In his oral submissions before this Court counsel for the respondent, Mr. Lenworth Johnson, agreed that on the evidence it would be difficult to show the required knowledge.

[20] In the circumstances I find that there was no evidentiary basis for the finding that is implicit in the judge's decision that the lost revenue from the fishing and charter business was within the reasonable contemplation of the parties when the Lease was made, or that the fishing and charter business was a part of the Lease. The losses from that business are too remote and should not to be allowed. I would therefore vary the award of US$31,000.00 by deducting the US$10,000.00 for the lost revenue from the fishing and charter business, leaving a balance of US$21,000.00 or EC$56,700.00.

[21] There is no appeal against the awards of $38,297.02 for the aborted contract for the new employees and $1,350.00 for reimbursement of expenses and I would confirm these awards.

Ground 4

[22] The final ground of appeal is that the learned judge erred in not deducting from the award for lost revenues, which is now varied to US$21,000.00, the amount of income tax that would have been payable on the award had it been received by the respondent in the normal course of business and not as damages. The basis of this submission is that damages are meant to compensate the respondent for actual losses and he would not have received the full US$21,000.00 had it been received as profits from the business. He would have had to pay taxes on the amount. The award should therefore be reduced by the amount of taxes that he would have paid. Support for this position is to be found in the well-known case of **British Transport Commission v Gourley**.[8] The plaintiff was injured by the

[8] [1956] AC 185.

defendant's negligence and received an award of damages that included lost earnings. It was not disputed that the receipt of the lost earnings as damages was not taxable, but it would have been taxed if it had been received by the plaintiff in the usual way. The trial judge and the Court of Appeal did not deduct taxes from the award. The House of Lords reversed the decision of the Court or Appeal and ordered that the plaintiff should receive only the net amount of the award after deducting the amount of tax payable on the lost earnings. The decision in **British Transport Commission v Gourley** was followed by the High Court in Barbados in **Waite v Caribbean International Airways Limited**[9] and by this Court in **Dominica Agricultural and Industrial Development Bank v Mavis Willams**.[10]

[23] There is no reason to depart from this well established principle and I would further vary the judge's order by deducting from the award of US$21,000.00 the amount of taxes that would have been paid by the respondent had he received the amount as profits from the restaurant business and not as damages. There were no written or oral submissions on the amount of taxes that should be deducted. Counsel for the parties have since provided the Court with joint written submissions on the amount of taxes that should be deducted from the award for lost earnings. Based on the joint submissions the amounts that should be deducted are $2,505.00 for personal income tax and an education levy of $1,255.00.

Conclusion

[24] I would dismiss grounds 1 and 2 of the notice of appeal and allow grounds 3 and 4 to the extent that the award $83,700.00 for lost revenues is reduced by $27,000.00 to $56,700.00, and then by $3,760.00 for taxes payable on the $56,700.00. This leaves a balance of $52,940.00. Both parties have enjoyed success on this appeal and I would accordingly order that they bear their own costs of the appeal.

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[9] (1988) 39 WIR 61 at 68.

[10] Dominica High Court Civil Appeal DOMHCVAP2005/0020 (delivered 29th January 2007, unreported) at para. 53.

Order

[25] I would propose the following order for disposing of this appeal:

The appeal is allowed and the learned judge's order dated 28th June 2010 is varied by deleting paragraphs 1 and 2 and replacing them with the following:

(1) The appellant will pay to the respondent damages of $52,940.00 for lost revenue from the restaurant business; $38,297.02 for the cost of the aborted contract with the new chef and manager; and $1,350.00 by way of reimbursement of the expenses of putting up the garden lights for the second year of the Lease.

(2) The appellant will pay to the respondent interest on the sum of $92,587.02 at the rate of 5% per annum from 17th March 2008 to 7th June 2010.

(3) The parties will bear their own costs of the appeal

Paul Webster, QC
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal [Ag].