

30/3/01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.S. 249/95

BETWEEN	SPEEDWAYS JAMICA LTD.	PLAINTIFF
A N D	THE SHELL CO. (W.I.) LIMITED.	1 ST DEFENDANT
A N D	GUY MORRIS	2 ND DEFENDANT

Mr. L. Cowan for the plaintiff, instructed by Cowan, Dunkley and Cowan.

Mr. Andre A.K. Earle for the 1st defendant instructed by Rattray, Patterson, Rattray.

.....,for the 2nd defendant, instructed by Myers, Fletcher & Gordon.

HEARD: 23rd March, 2001

THEOBALDS, J.

By a Writ of Summons dated the 27th day of June, 1995 the Plaintiff herein claimed against the Defendants:-

1. Damages for breach of Lease Agreement between the Plaintiff and 2nd Defendant dated 20th April, 1991 for the premises known as 138 Old hope Road, Kingston 6.

2. Damages for breach of Covenant for quiet Enjoyment of and trespass to the said premises and demolition of the Plaintiff's building situated thereat.
3. Damages for breach of Written Letter of Undertaking dated November 5, 1993 by 2nd Defendant and Oral Promise dated September 28, 1993 by the 1st Defendant.
4. Interest at 25% or in alternative in accordance with the Law Reform (Miscellaneous Provisions) Act.
5. Costs.
6. Further and other relief.

The 1st Defendant the Shell Company of (Jamaica) Ltd. was the only one of the 2 Defendants who appeared at the trial. Substantially their defence was that the Plaintiff had embarked on repairing, modifying and improving the premises at 138 Old hope Road. This was done without the knowledge, consent or acquiescence of the 1st Defendant.

The 1st defendant also disclaimed any knowledge of or consent to or acquiescence in the Lease Agreement between the Defendant and the Plaintiff. This second lease agreement was in March of the lease agreement between the 1st and 2nd Defendants.

Issue was joined by the 1st Defendant with the Plaintiff's allegation that Shell Company Ltd. had promised the Plaintiff that if they vacated the premises and allowed the 1st Defendant to demolish the new building and extension, they would provide the Plaintiff with suitable alternative accommodation.

As regards the Letter of Undertaking dated the 5th November, 1993 given by the 2nd Defendant to the Plaintiff, the 1st Defendant emphasizes that this document was given to Ramesh Sujamani the Managing Director of the Plaintiff company and not to the Plaintiff. The significance of this escapes me. In fact all meetings, discussions and proposals were held between the parties with Sujamani representing the Plaintiff company at all times. It appears that reliance is place on the Letter of Undertaking at one instance when it comes to seeking compensation from the 2nd Defendant while another aspect of the same defence rejects the claim that the 2nd Defendant was ever acting as the servant or agent of the 1st Defendant.

The 1st Defendant vacillates in it's acceptance or rejection of the 2nd defendant as it's servant or agent. It is my finding of fact, based on the evidence adduced and documents tendered, that the 2nd Defendant was at all material times in his dealings with the Plaintiff

holding himself out to be in control of the premises in issue, jointly with and with the full knowledge and control of the 1st Defendant. The 1st Defendant's case that they had no dealings with the Plaintiff can only be upheld to a very limited extent. This is because they did deal with plaintiff through their agent, the 2nd Defendant. From the veritable plethora of authorities and judicial opinions tendered the most relevant is the **Law relating to Encouragement and estoppel by Representation** by George Spence Bowen Butterworths 1977 Chapter XII. A perfect example quoted therein and which is partially applicable to this case reads as follows:

“Where A has a right or title which B is in fact impinging under a mistaken belief that his acts are not acts of infringement, and A is aware ofB's invasion of that title or right, and of his erroneous belief that he is not encroaching thereon, but is lawfully exercising rights of his own, and yet, with that knowledge, A so conducts himself, or so abstains from objection, protest, warning, or action as to foster and maintain the delusion under which he knows that B is labouring, and induces B to act to his prejudice

on the faith of the acknowledgement to be implied from such conduct or inaction, A is not permitted to assert his own rights against B or contest B's rights against himself."

The underlinings are mine and are intended to emphasize the applicability of the above principle to this case in point. The important difference is that on the documentary evidence (see letter of 21st November and 24th December, Shell Company to Morris) and on my findings of fact from Hamilton's evidence there was never any acquiescence in inducement by Shell Company in the acts of the plaintiff. The plaintiff it was who ignored Shell and proceeded with modification and construction of the building. Indeed paragraphs 6 to 8 of the Statement of Claim dated 27th day of June 1995 makes this abundantly clear:

6. the Plaintiff embarked on the work of repairing, modifying and improving the premises with the knowledge, consent and/or acquiescence of the First and/or Second Defendant.
7. Representative, servants and/or agents of the First and Second Defendant discussed the said work with the Plaintiff, its servants and/or agents and proposed that it should be carried out as far as practicable to fit

in with the general motif of the First Defendant and the Plaintiff accepted these proposals implementing them at additional costs to itself.

8. Relying on the encouragement and acquiescence of the Defendants and their consent to the said work, the Plaintiff Expended the sum of \$2,144,000.00 in carrying out and Completing the said work.

Learned Counsel for the 1st Defendant submitted that the “central issue in the instant case, which falls for the determination of this Honourable Court is what caused Speedways to voluntarily vacate the said premises” – Counsel purported to supply the answer by submitting that “based on Speedways” own admission, it vacated the said premises in reliance on the undertaking from Morris of November 5, 1993. I have no hesitation in classifying this vacating of the premises as a relatively minor issue. This has to be so if the Court is of the view that, as stated above, the law relating to encouragement and estoppel by representation is applicable. Issues such as:-

- a. Had 1st Defendant Shell given permission to the Plaintiff Speedways for the modification, alteration or construction of the said building.
- b. That the said building was illegal in that prior approval

to it's construction had not been obtained from the planning authorities including the Kingston and St. Andrew Corporation.

c. That the said building was significantly reducing the Old Hope Road entrance to the station at No. 138.

(d) That the said building would eventually have to be demolished.

are all subsidiary issues which the Court would be obliged to consider in assessing the credibility of the parties on either side. In relation to (b), (c), and (d) above ask oneself, the question as to who would have particular knowledge of these considerations, the Managing Director of the Plaintiff company or the Managing Director of the Defendant company and his lessee Mr. Guy Morris.

One finds it difficult to comprehend how the Managing Director of the Plaintiff company, a man with no lack of experience in business and investment matters abroad could come to Jamaica for the specific purpose of extending his company's business in the sale of motor vehicle accessories without first seeking legal advice on the relevant rules and regulations applicable to altering, modifying or constructing buildings. To act on the mere say so of Mr. Guy Morris that approval of the Kingston and St. Andrew Cooperation would not be necessary as the modification proposed did not entail the construction of an additional building ought at the very

least, to have alerted the Plaintiff's Managing Director to the existence of such an organization as the K.S.A.C. Mr. Sujana confirmed under cross-examination that he had no building approval from the K.S.A.C. with respect to the illegal building put up on the Plaintiff's behalf. Mr. Sujana failed to exercise the prudence expected of any ordinary businessman. Having been alerted to the existence of the K.S.A.C. he should have made it his business to seek confirmation as to the correctness of Morris' statement. Bearing in mind that Morris' interest was to have the service station modified and improved at no expense to himself common sense would dictate that his statements should be rectified before embarking on any construction work. Although "ignorantia legis non excusat" Section 10 (2) of the K.S.A.C. Building Act is quite clear.

"Every person who shall erect, or begin to erect or re-erect, or extend or cause or procure the erection, re-erection or extension of any such building - or any part thereof, without previously obtaining the written approval of the Building Authority And every builder or other person who shall in the erection, re-erection or extension of any such building, or any part thereof deviate from the plan approved by th

.....

Building Authority. shall be guilty of an
 Offence against this Act, and liable to a penalty not
 Exceeding Fifty Thousand Dollars, besides being
Ordered by the court to take down the said building Or part
thereof" (emphasis supplied)

In a recent case of First Energy (U.K.) Ltd. Hengarian International Bank Ltd. (1993) 2 Lloyds Reports 194 the court of Appeal stated as a general principle that " a court should seek to uphold the reasonable business expectations of honest men" not of men who break the law whether through ignorance or as a result of having been deliberately misled. I agree with the submission of Counsel for the 1st Defendant that the Courts ought not to lend their aid to a litigant so as to enable him under any circumstances to obtain a benefit from his own crime or compensation for the consequences of his own culpable criminal act. The authority of the old case of Langton vs. Hughes (1813) M. and G 593 is still good law. There Lord Ellenborough C.J. stated that "what is done in contravention of the provisions of an act of parliament, cannot be made the subject – matter of an action."

The premises in issue in this case is the Shell Service Station situate at the corner of Old Hope road and Mona Road, in the Liqueane area in the

parish of St. Andrew. The 2nd Defendant, Guy Morris had leased from the 1st Defendant Shell Company (W.I.) Ltd. The premises in question and was conducting business there. There is evidence from the 1st Defendant that Guy Morris was classified as an excellent service station dealer and was doing well in his business. Be that as it may it appears that Morris wished to do even better. He formed a plan to extend the facilities and overall appearance of the building by allowing the Plaintiff thru Mr. Sujanani to sublet a portion of the premises for use as a motor vehicle, accessories" outlet. This was done without prior approval from the Shell Company (W.I.) Ltd. and was a clear breach of the Lease Agreement between Morris and the Shell Company. It involve modification and reconstruction of the original building. Shell's verbal objections to this modification and construction went unheeded until in November, 1991 Shell's objections were put in writing. Shell no doubt were aware that when demolition time came should they elect to demolish they would be on safe ground for no stranger can conceivably enter upon the land of another without that other's consent and proceed to modify and reconstruct any building thereon. It matters not whether that stranger is a sub lessee of Morris (the original lessee) or not. Mr. Ramesh Sujanani on the 29th April, 1991 signed as a Director of the plaintiff an instrument of lease from Guy Morris of 138 Old Hope Road

without first ascertaining whether the lease under which Morris held from the Shell Company empowered him to lease or part with possession of any part of these premises without the permission in writing of the company. By neglecting so to do he failed in his duty to his principal. Halsbury's Laws of England, 4th Edition Volume 27 (1) makes this position abundantly clear.

..... it is the undertenant's duty to inform himself of the covenants which are contained in the lease under which the underlandlord holds, and he is bound, in equity to observe such of those covenants as are of a negative character, on the ground he takes with notice

The above is the 2nd instance in which the Plaintiff company has found itself in an untenable position because of the ineptitude of its managing director or chief executive officer Mr. Sujanani. Shell simply cannot be liable to the Plaintiff because it is clear that the Shell lease to Morris contained express covenants against parting with possession and made any grant of an underlease a ground for termination of the lease between Shell or Morris. There is not a thread of evidence of any contractual arrangement between Shell and Speedways. Instead there is

abundance of evidence that Morris at an early stage represented to Shell that it was his construction and remodeling at 138 Old Hope Road and as far back as November, 21st of 1991 Shell put its objection in writing to Morris. Again on 24th December, 1991 Shell again put its objections in writing to Morris and repeated its request to halt construction. I find on a balance of probability that the evidence of Mr. Sujanani that Shell held out Morris as their agent is a total fabrication. It is nothing more than a misguided attempt to have the by no means limited financial resources of a multi-national corporation available in the event that substantial damages are awarded to the Plaintiff company. There must therefore be a judgment for the 1st Defendant against the Plaintiff with costs to be taxed or agreed.

The situation with regard to the 2nd Defendant is quite different. It is the 2nd Defendant who, acting contrary to his lease from the 1st Defendant, entered into a sub-lease with the Plaintiff, collected rent from him, authorized the modification of the promises, gave a letter of undertaking dated 5th November, 1993 to compensate the Plaintiff for the loss sustained by reason of the demolition of the building, acted in breach of an implied covenant for quiet possession and failed to appear at the trial to answer the allegation made against him in the Statement of Claim. He went no further than to file his defence and has adduced no evidence on which the court

could be invited to draw any influence in his favour. There will therefore be a judgment for the Plaintiff against the 2nd Defendant with costs to be taxed or agreed. The claim is for special damages and the onus remains throughout on the plaintiff to quantify and prove strictly the amount of his loss. He cannot simply throw figures at the court and ask for an assessment or estimate where the claim is for special damages. The further and Better Particulars supplied totaling the \$2,144000.00 as set out in the statement of claim have not been proven. The receipts actually put in evidence as Exhibits 17, 18, 20, 27, 23, 25,26, and 27 total a mere \$188,941.76 and judgment is accordingly entered against the 2nd Defendant for this amount . The claim for loss of income cannot be allowed as due to inadequacies of records the accountants' figures given in evidence can only be classified as unreliable. To the figure of \$188,941.76 above I would add the amount of the costs payable by the Plaintiff to the 1st Defendant after same have been taxed or agreed. The 2nd Defendant would then be liable on my judgment to the total of these amounts with costs to be taxed. Interest at 12% per annum from the 27th June, 1995 to the date do this judgment viz 22nd March 2001.

Finally I wish to apologize to the parties concerned for the delay in handing down this judgment. A total of 18 authorities cited with few indications of the relevant quotations and a further 51 Exhibits while

indicative of commendable industry on Counsels' behalf can only be time consuming for the judge to peruse in addition to his other duties. There are also problems in relation to typing of these hand written drafts.
