IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. H-176 OF 1996

BETWEEN	HORIZON RESORTS SERVICES LTD.	1ST PLAINTIFF
A N D	NORMA LEE-HAYE	2ND PLAINTIFF
A N D	JACKSON C. WILMOT	3RD PLAINTIFF
A N D	RALPH TAYLOR	DEFENDANT

Andre Earl and Jeffrey Daley for Plaintiffs.

Maurice Manning for Defendant with him Miss Camille Wignall as of 30th October, 2000.

HEARD: 30th November, 1st and 2nd December, 1999, 11th 12th, 13th, 14th, April, 30th and 31st October , 1st,2nd and 3rd November, 2000 and 8th January, 2001

F.A. SMITH, J.

The first plaintiff is and was at all material times a limited liability company engaged in villa rental and management and other hospitality related services with registered office at Bodmint, Rock P.O. Box 158, Falmouth in the parish of Trelawny.

The second plaintiff Mrs. Lee-Haye was the managing director of the first plaintiff.

The third plaintiff (Mr. Wilmot) was a director of the first plaintiff.

The defendant, a marine engineer, is and was at all material times the owner of a villa Resort known as Bodmint situated in Falmouth, Trelawny.

The plaintiffs' claim is for damages for fraudulent misrepresentations and/or breach of contract.

The plaintiffs are contending that in October 1993 the defendant made certain representations to the second plaintiff, Mrs. Norma Lee-Haye thereby inducing the plaintiffs to enter into a lease of the defendant's property known as Bodmint Resort. The plaintiffs further claim that these representations were, to the knowledge of the defendant false and were intended by the defendant to be acted on by the plaintiffs. The plaintiffs acted on them and thereby suffered damage.

Alternatively the plaintiffs claim that it was an implied term of the agreement that the conditions as represented by the defendant "were in existence and would continue to exist during the tenure of the lease as held by the plaintiffs. In breach of the said agreement the defendant has failed to provide the plaintiffs with evidence of the existence of the conditions."

The defendant denies the plaintiffs' claims and counterclaims for damages in respect of loss of rental income and the costs of demolition of structures erected by the plaintiffs and repairs to premises.

The Plaintiff's Evidence In Outline

Paragraph 5 of the Statement of Claim as amended reads:

> 5. In order to induce the plaintiffs to acquire a lease of the aforementioned Resort the Defendant in

or around October and November 1993 made the following representations and statements to them.

(1) That the Defendant had and operated a home based reservation system in New Jersey for and in relation to The Bodmint Resorts (hereinafter referred to as "the Resort".

(2) That the Resort was being advertised in Magazines.

(3) That the Resort was doing well overseas.

(4) That the Defendant's market in relation to the Resort was mainly overseas visitors.

(5) That the Resort was a well marketed product With the ability to meet its obligations.

(6) That the Resort was experiencing a good occupancy level.

(7) That the income from the Resort was satisfactory.

The evidence of the Plaintiffs comes from Mrs. Norma Lee-Haye the second plaintiff. In 1993 Mrs. Lee-Haye, the Managing Director of the first plaintiff, was responsible for identifying suitable investment opportunities and the management of the first plaintiff's investments. She then had seventeen years experience in hospitality services.

On the 30th October, 1993, Mrs. Lee-Haye telephoned the defendant and told him that two friends had informed her that he was leasing his property at

Bodmint. She made an appointment to meet with him the following day. She spoke with the third plaintiff, Mr. Wilmot, who agreed to accompany her to meet the Defendant. Mrs. Lee-Haye testified that at the meeting Mr. Taylor was "excited" and he "bragged about the property." He told them how well he was doing financially with the property, that it was advertised overseas in magazines; that most of his income was from overseas generated business and that he had a home based reservation system set up in New Jersey. He gave her a brochure with the overseas telephone number used for reservation (Exhibit 1), an excerpt from the Visitor Newspaper with a front page article on the Bodmint Resort and a copy document setting out the history of Bodmint.

Mrs. Lee-Haye also testified that Mr. Taylor shared with her a reservation he then had from the J.P.S. Co. Ltd. for an extended period for its crew working in the area. He also told her of reservations for some quantity surveyors as well as one he had for two weeks for a family coming out of the U.S.A.

It is her contention that Mr. Taylor told them that his income from the property "was satisfactory and he was satisfied that it would continue to be that way because the property was well established both locally and overseas."

She was impressed by the article in the Visitor Newspaper which extolled the Bodmint Resort. She was taken on a tour of the property by Mr. Taylor and what she saw aroused her interest. She said "Based on the representations made by Mr. Taylor, the article in "The Voice", which had to be approved by Jamaica Tourist Board, and having seen the property, I was satisfied that what Mr. Taylor said was correct."

Mrs. Lee-Haye told the court that she requested of Mr. Taylor his balance sheet for the previous year. Mr. Taylor, she said, told her he did not have one and that he never kept such records because he was running the Resort as a hobby. He also told her that he was not "into hotel" and did not have hotel management experience. Mr. Taylor did not want the Resort to be operated under the name 'Bodmint Resort' and hence the first plaintiff, Horizon Resorts Services Ltd., was incorporated to operate the resort.

After negotiations between their respective attorneys, the lease agreement between the first plaintiff and the defendant was signed on the 29th November, 1993 – Mrs. Lee-Haye and Mr. Wilmot (2nd and 3rd plaintiffs) signing on behalf of the plaintiff. The second and third plaintiffs also signed as guarantors of the obligations of the first plaintiff, Horizon Resorts.

Mrs. Lee-Haye testified that on assuming management of the resort she found out that the income was not as good as Mr. Taylor had indicated and that the property was not well advertised overseas. She stated that the reservation system that Mr. Taylor spoke of was not in place.

On the 19th May, 1994 the second and third plaintiffs met with the defendant. They informed him that the Resort had suffered major losses for the first five months of its operation. Among other things they requested a moratorium or a meaningful reduction of rental and, a financial report on the operation for the year 1992/1993.

In a letter dated 20th May, 1994 the plaintiffs wrote the defendant "demanding that a re-negotiation of the arrangements take place, failing this, you

may contemplate a termination of the contract." The demand did not find favour with the defendant.

By letter dated September 19, 1994, the plaintiffs' attorneys wrote the defendant purporting to terminate the lease 'with immediate effect."

Defence in Outline

Mr. Taylor the Defendant said that before he met Mrs. Lee-Haye he got a deposit from one Mr. Brown who was interested in buying the property at Bodmint. He was introduced to Mrs. Lee-Haye by a friend of his. Mrs. Lee-Haye met with him at his home at Villa No. 2 Bodmint. She came alone at first. According to Mr. Taylor, she told him that she would do a better job than Mr. Brown. He said she actually persuaded him to lease the property to her.

He told her that Bodmint was on a J.B.C. Programme, "Walk and Talk" in 1989. He also told her that there was an article on Bodmint in the "Jamaica Handbook" and that it was featured in the "Rough Guide". He informed her that he was a member of JAVA and as a member his property was listed overseas. He had a relationship with Vacation Accommodation Directory located in Florida. They promoted and advertised his property on his paying them a commission. He showed her the brochure of the property.

He took her on a tour of the property. At the end of the tour Mrs. Lee-Haye told him that she loved the place and wanted it.

A few days after this first meeting with Mrs. Lee-Haye, he next met with Mr. Wilmot and herself. He knew Mr. Wilmot before. She told him that Mr. Wilmot would guarantee the lease, hence his presence.

He ultimately received a deposit from Mrs. Lee-Haye and returned Mr. Brown's deposit. Both parties had lawyers who negotiated the terms of the lease.

It is the defendant's evidence that the said lease contains the entire contract between the parties pursuant to the negotiation conducted by their lawyers.

The defendant said he had no agreement with the second plaintiff that he would take reservation on her behalf at his overseas number. He claimed that he did not represent to the plaintiff that Bodmint was experiencing a good occupancy level. He denied that he made any false representations to her or that she was tricked into entering the lease agreement.

On the 2nd of September, 1994 the defendant sent the plaintiff a notice terminating the lease. On the 9th September, 1994 the defendant filed a Writ in the Supreme Court claiming U.S.$24,000 for arrears of rental. Judgment in default of Defence was entered on behalf of the defendant.

Submissions

Mr. Manning for the defendant submitted that the claims of the plaintiffs are misconceived. He contended that the evidence of the plaintiffs only witness Mrs. Lee-Haye, does not on a balance of probabilities establish that the representations alleged were false or that they were made by Mr. Taylor.

He referred to paragraph 5 of the Statement of Claim (supra) and submitted that:

(i) The evidence is that the defendant did operate a homebased reservation system. In this regard he stressed that the plaintiffs were not acquiring a business from the defendant. They were leasing

his property to run villas. They were not assigned to run villas.

(ii) There were advertisements of the Resort in at least three publications.

(iii) The evidence shows that the defendant did not and could not have told Mrs. Lee-Haye that the Resort was doing well overseas. This is the logical conclusion because she admitted that the defendant told her that he did not have a current J.T.B. licence and she knew that a licence was necessary to market the property overseas.

(iv) The plaintiff knew the state of the property. She was taken on a tour. She was told by Mr. Taylor that the property was used by him as a hobby.

(v) The statement by Mr. Taylor that the income from the Resort was satisfactory is not a misrepresentation of fact.

Mr. Earle for the plaintiffs submitted that there are three questions for the court.

(1) Were the representations made? If yes,

(2) Were they false and made fraudulently? If they were,

(3) Were the plaintiffs induced by the representations?

Counsel for the plaintiffs contended that the evidence shows quite clearly that representations were made by the defendant to the plaintiffs upon which the plaintiffs relied. Those very same representations, he argued, induced the plaintiffs to enter into a lease with the defendant and thereby to alter their position to their detriment occasioning loss as a consequence thereof. It is also his contention that the second plaintiff's projections were adversely affected

because the information from the defendant, upon which the projections were based, was totally false.

Fraudulent Misrepresentation or Deceit

From as far back as 1789 (in Pasley v. Freeman) it has been the rule that A is liable in tort to B if he knowingly or recklessly makes a statement to B with intent that it shall be acted upon by B, who does act upon it and thereby suffers damage.

To succeed in such an action the plaintiff must establish:

1. A representation of fact made by words or conduct.

2. That the representation was made with the intention that it should be acted upon by the plaintiff or by a class of persons which include the plaintiff in a manner which resulted in damage to the plaintiff.

3. That the plaintiff has acted upon the false representation.

4. That the plaintiff suffered damage by so doing.

5. That the representation was made with knowledge that it it is or maybe false – Winfield & Jolowicz on Tort 15th Edition.

It has been said, and rightly so, that this tort should not be advanced lightly and a court will require clear evidence of it – see **Hornal v. Neuberger Products Ltd.** (1957) 1 Q.B. 247.

In light of the above I will now proceed to analyze the pleadings, evidence and law and of course the submissions made in relation thereto.

The defendant in his amended defence denies paragraph 5 of the plaintiff's Statement of Claim. In his evidence the defendant also denied that he had a home based reservation system in New Jersey. However the defendant testified that he had an address in New Jersey as indicated on the brochure (Exhibit 1). He told the court that when he was in the U.S.A., people in the U.S.A. would call him at his New Jersey home number and make reservation. He denied that he agreed to continue to take reservation on behalf of the second plaintiff.

It seems to me that there was some confusion as to what the plaintiff meant by the "operation of a home based reservation system". However during the trial it emerged that the defendant was not denying that the purpose of putting his telephone number on the brochure (Exhibit 1) was to facilitate prospective guests contacting him. Thus, in fact, the defendant is not denying the first representation.

The second representation is also not denied by the defendant who in evidence maintained that the Resort was advertised in at least three publications.

The third and fourth alleged statements are denied by the defendant. Mr. Earle for the plaintiff asked the court to hold that the defendant's insistence on getting U.S. dollars is consistent with the second plaintiff's claim that the defendant told her that the Resort was well marketed overseas and that the customers consisted mainly of overseas visitors.

Mr. Manning for the defendant submitted that the second plaintiff, Mrs. Lee-Haye agreed that not having a Jamaica Tourist Board (J.T.B.) licence meant

that it was not permissible to solicit visitors from overseas. She also knew, he argued, that the defendant at the time had no such licence.

It seems to me that in light of the undisputed evidence that the defendant had no licence at the time and that both the second plaintiff and the defendant knew that in order for the Resort to be marketed properly overseas a J.T.B. licence was necessary, it would be unreasonable to accept the second plaintiff's claim that the defendant told her that the Resort was doing well with overseas visitors.

As to the reason for Mr. Taylor's insistence on getting U.S. currency, the plaintiffs stated in a letter to the Chairman of the Fair Competition Commissions that "Mr. Taylor would not accept Jamaican currency, he claimed he needed hard currency as he had brought some to Jamaica to invest in Bodmint."

I therefore hold that on a balance of probabilities the third and fourth representations were not made.

As regards the fifth alleged representation that the Resort "was a well marketed product and had the ability to meet its obligation" the defendant denied telling the plaintiffs that the Resort was a well marketed product, but admitted telling them that it was able to meet its obligations. The defendant clarified this by saying that what he meant by 'obligations' was the "operating and administrative costs."

It is not in dispute that the Bodmint Resort was a small operation carried on by one man who treated it as a "sideline" or "hobby", who kept no proper

records, who had no experience in the operation of such a venture, and who at the time had no J.T.B. licence.

Would the defendant in these circumstances represent to Mrs. Lee-Haye, a person with 17 years experience in the Resort business, that the Resort as it then was, was a well marketed product? On the balance of probabilities, I cannot bring myself to finding that he did.

The plaintiff also contend that the defendant represented that the Resort was experiencing a good occupancy level. The defendant denied saying this. He testified that he would not have described the occupancy level as good. In cross-examination he said by "good occupancy" he meant 25-50% occupancy because that was enough to pay his bills. It seems to me that on the basis of Mr. Taylor's evidence in this regard, it is reasonable to conclude that he probably told Mrs. Lee-Haye that the Resort's occupancy level was good.

Lastly the plaintiffs' claim that the defendant represented to them that the income from the Resort was satisfactory. This is not denied by the defendant who maintained that what he meant was that he could meet his operational costs. He stated that if he was making "a bag of money" from the Bodmint Resort, he would not have leased the property.

Were the Representations False and made Fraudulently?

The defendant has admitted making, or the court has found that he probably made, the following representations or statements:

1. That he operated a home based reservation system in New Jersey – as explained by the Defendant.

2. That the Resort was being a advertised in Magazines and/or publications.

3. That the Resort had the ability to meet its obligation.

4. That the Resort was experiencing a good occupancy level.

5. That the income from the Resort was satisfactory.

The representation at (I) is clearly not false. The unchallenged evidence of Mr. Taylor is that prospective guests would contact him by telephone at his home in New Jersey.

The representation at (2) is in dispute. Mr. Taylor insisted that the Resort was being advertised in at least three publications – the Jamaica Handbooks, The Rough Guide and the Vacation Accommodation Directory. He produced in evidence the 1996 Jamaica Handbook and the 1997 Rough Guide. He could not remember the names of the magazines in which the Resort was advertised in 1993, but he stated that he did see the advertisements. He did not have in court any magazines or publications for 1993.

It is for the plaintiffs to establish that the representation is false. There is no clear evidence that this representation is false. Indeed, in the letter to the Fair Competition Commission (supra) the plaintiffs referred to copies of magazines in which he (the Defenant) advertised the Resort.

The 'representation' at (3) is in my view a statement of opinion. It has not been shown that the defendant had no reasonable ground for this opinion. This statement to my view is just "sales talk" and simplex commendatio non obligat.

The Statement at (4) is in my view another example of "seller's imprecise commendation of his wares." Mrs. Lee-Haye was on spot. She was taken on a tour of the property. She could see for herself and form her own opinion. This statement was certainly not made with the intention to deceive her.

The last statement (5) is also in my view a statement of opinion. In any event the plaintiffs have not shown that this statement was false. The defendant kept no proper records. He said that by that statement he meant that he could meet his administrative and operating costs.

He stated that what he was operating was a small scale or private scale business - see letter dated 20th May, 1994 (Exhibit 10).

I have carefully considered the oral and documentary evidence adduced in light of the submissions of both counsel and I am firmly of the view that the representations and/or statements in their entirety and in their bearing on one another were not made fraudulently.

Were the Plaintiffs induced by the Representation?

In **Smith v. Chadwick and Others** (1881-5) All E.R.240 Lord Blackburn at p.242 stated:

> "As to what is sufficient proof of damage, I do not think it is necessary that the plaintiff always should be called as a witness to swear that he acted on the inducement. If it is proved that the defendants, with a view to inducing the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of the fact that he was induced to do so by the statement. The weight of this evidence must greatly depend on the degree to which the action of the plaintiff was likely and in the absence

of all other grounds on which the plaintiff might act....."

Relying on this statement and based on the following, Mr. Earle urged the court to draw the inference that the Plaintiffs relied upon the defendant's verbal assurances and representations:

(i) The defendant having financial records for Bodmint Hotel but withholding same from the plaintiffs;

(ii) The defendant insisting on the rental being paid in United States dollars only (not the Jamaican equivalent);

(iii) The impression given by the defendant to the 2nd plaintiff that he was leasing Bodmint Resort because he was retiring and not due to its poor viability;

(iv) The plaintiffs being told that all the property required was proper management to be viable;

(v) The impression given by the defendant to the Plaintiff that if the defendant, with no experience, poor management and his absenteeism, could run Bodmint on a break – even basis, surely, the plaintiffs, with their vast experience, would do better.

I have given careful consideration to these persuasive and astute submissions. I cannot, however, in all the circumstances come to the conclusion that the second and third plaintiffs were "taken in" by the statements and representations of the defendant. These statements did not in my view induce them to enter into the lease agreement. They did not in my opinion have a real or substantial effect on the plaintiff's decision to lease the property.

The statements are not of such a nature as would be likely to induce Mrs. Lee-Haye and Mr. Jackson Wilmot (the 2nd and 3rd plaintiffs), persons of vast experience in the tourist industry, to enter into the lease agreement.

I accept Mr. Taylor's evidence that Mrs. Lee-Haye was excited when she toured the place, that she told him she loved the place and wanted it. The offer came from her. Mr. Taylor had to return Mr. Brown's deposit in order to accommodate her. Mrs. Lee-Haye said she could see the potentials of the property. She was in a real sense captivated by the property.

Mr. Taylor told her he had no proper financial record for the Resort to show her. She saw that there was need for maintenance. She observed that there was no proper management in place. She knew that it was not a first class accommodation. She was told by Mr. Taylor that there was no current J.T.B. licence and thus there were certain constraints on advertising overseas. She was told that the reason why the defendant had no license at the time was because the general poor condition of the business did not meet the J.T.B.'s required standard.

I am of view that in all the circumstances the conjoint effect of the whole complex representation was not to mislead or deceive or induce the plaintiffs to enter into the lease agreement. As was stated in a letter from the defendant's attorney to the plaintiffs suggesting that the plaintiffs were tricked, is to avoid the truth.

Implied Term

In the alternative the plaintiffs pleaded a breach of contract. Mr. Earle submitted that the representations made by the defendant, which induced the plaintiffs to enter into the lease, constitute a collateral undertaking or implied term forming a part of the lease, upon which the plaintiffs relied on entering into the said lease agreement. No useful purpose will be served by dealing with this contention in light of my findings above.

However, in this regard, I must state that in any event this claim could not be successful by reason of the second plaintiff's evidence that the lease contains the entire agreement between the parties. This claim must therefore also fail.

The Counterclaim

In his counterclaim the defendant claims damages for breach of contract. The defendant avers that:

> ".....in breach of the terms of the said lease the plaintiffs carried out works at the premises, which works, upon the surrender of the said lease on the 27th September, 1994, were improperly removed and the said premises were not returned to the defendant in the condition rented as fair wear and tear excepted."

The defendant's contentions are that:

(1) the plaintiffs leased the property with a kitchen. They converted the kitchen into a "honeymoon suite" and erected a temporary kitchen outside the main building. On vacating the premises, the plaintiffs removed the temporary kitchen except for the concrete base, and left the premises without any kitchen. The defendant had to have a new kitchen built where "the honeymoon suite" was;

(2) that the plaintiffs removed the mesh on outside buildings and replaced it with lattice. The defendant

did not like the lattice work and had to restore the mesh. The defendant claimed that he had to reconvert some of the modifications done by the plaintiffs;

(3) that the second plaintiff removed three or four wooden seats in the gazebo and replaced them with patio furniture. She took the patio furniture and did not replace the wooden seats. The defendant had to repair the main structure which was damaged when the plaintiffs removed the roof they had had constructed;

(4) that the toilets and showers were "gutted" and were an eyesore.

The defendant also claims loss of rental, stating that the property was not rentable because of the plaintiff's breach by causing damage to the property.

Mr. Manning for the defendant submitted that the evidence shows that the plaintiffs left the premises in such a state of disrepair that the defendant was obliged to carry out restoration work on the said premises for the period October 1994 to March 1995. Accordingly, he submitted, the defendant is entitled to compensation from the plaintiffs.

Mr. Earle on the other hand submitted that there is nothing in the lease agreement which authorizes the defendant\lessor to reconvert improvements made by the plaintiffs/lessees and to claim as damages the costs of such reconversion.

Mr. Earle also contended that the defendant visited the Resort on several occasions during the term of the lease and had seen works being carried out and made no objections. In particular the small kitchen was converted into a "honeymoon suite" with the defendant's knowledge.

It is not disputed that the plaintiffs effected major improvements to the property.

It is also not disputed that when the premises were vacated, the plaintiffs removed fixtures and fittings.

It is also not in dispute that by the terms of the agreement the plaintiffs were entitled to remove such fixtures and fittings – see Clause 5.06. Indeed Mr. Manning told the court that he was not challenging the plaintiffs' right to remove the wooden kitchen and dining room which they had erected. What the defendant is complaining about is the consequential damage done to the property, he stressed.

I am of the view that the defendant's counterclaim should fail for the following reasons:

1. The defendant returned the security deposit to the plaintiffs after they had vacated the premises. If the plaintiffs had left the premises in such a bad condition as he claimed why did he return the deposit?

   I agree with Mr. Earle that in the circumstances it is reasonable to conclude that on a balance of probabilities the premises were left in a reasonable tenantable state, fair wear and tear excepted.

2. No complaint was raised by the defendant when He took possession from the plaintiff in September 1994. I reject the defendant's evidence that because of the hostility of the second plaintiff he was afraid and so was unable to inspect the premises properly. It is difficult to believe that in the presence of two police officers and the bailiff he would be so terrified by Mrs. Lee-Haye 'singing hymns' as not to be able to carry out an inspection.

3. The defendant erected new buildings viz a garage made of concrete and a one bedroom cottage after the termination of the lease. Improvements done by the plaintiffs were reconverted by the defendant, for example, the lattice work was removed and the mesh restored. The" honeymoon suite" was demolished and the kitchen restored. The costs of these are not recoverable by the defendant. The evidence adduced by the defendant does not indicate which of the receipts or invoices relate to the restoration as distinct from the work done to repair the damage occasioned by the plaintiffs' removal of the lessees' fixtures and fittings.

4. Since, according to the defendant, no proper inspection was done at the time of handing over, the defendant should subsequently have served a written notice and carried out inspection of the premises in the presence of the plaintiffs or their attorneys as a pre-condition to making any claim for damage to the premises. It seems that the plaintiffs only knew that the defendant was making such a claim when the Counterclaim was filed and served in February of 1997, nearly 2½ years after the plaintiffs vacated the premises. It is obvious that this claim against the plaintiffs was an after thought.

5. The defendant contended that he could not rent the property because it was defaced after the plaintiffs vacated it yet he advertised it for sale or lease on October 14, 1994 two weeks after the plaintiffs left.

Conclusion

1. Judgment for the Defendant in respect of the claim.

2. Judgment for the Plaintiffs in respect of the Counterclaim.

Parties to stand their respective costs.