# IN THE COURT OF APPEAL FOR BERMUDA

## CIVIL APPEAL No. 11 of 2007

**Between:**

**BRUCE SIMONS**
**and**
**MARGO SIMONS**

**Appellants**

**-and-**

**MAGNOLIA PROPERTIES LIMITED**

**Respondent**

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Before: Nazareth, JA
Sir Anthony Evans, JA
Forte, JA

**Date of Hearing:** **22 November 2007**
**Date of Judgment:** **29 November 2007**

## Judgment

**Nazareth, JA**

**Introduction**

1. The Appellants are husband and wife who were interested in operating a restaurant. The Respondent is the owner of 84-86 Reid Street, Hamilton. The second floor of this building was advertised for rent by Mr. Barrymore DeCouto of DeCouto & Dunstan Real Estate Limited in February 2003. The Respondent is a company operated by Mr. DeCouto. The advertisement stated: "2300 sq. ft. of space in the City of Hamilton, $5750, suitable for Restaurant, Office, or Retail."

2. The rental space had previously been an art gallery and before that a restaurant known as “Rosa’s Cantina” during the 1990’s. The Appellants viewed the premises on at least two occasions in late February or early March and on one occasion this was with the architect and business consultant they had hired, a Mr. Fox. The appellants informed the respondent they wished to open a restaurant, and Mr. DeCouto mentioned to them the property’s former use as a restaurant known as “Rosa’s Cantina”. The appellants were already aware of that.

3. In between the property and the adjoining Chopsticks restaurant is a narrow alleyway where gas cylinders are located. Mr. DeCouto recalled that before the 20th March 2003, Mr. Simons asked him about a gas supply, to which Mr. DeCouto replied the alleyway with cylinders belonged to Chopsticks. Mr. Simons did not recall asking any question regarding the gas supply but he assumed it was available. No in depth discussion as to the type of restaurant or inquiries for the space was entered into between the appellants and Mr. DeCouto.

4. A lease agreement was entered into between the appellants and the respondent with the term commencing on 1st April 2003. Half rent was agreed to be paid for the first three months and full rent thereafter. This reduction in rent was said to be to enable the Appellants time to carry out any redevelopment of the space to make it ready for any use they wanted. The Appellants were clearly under the impression that a gas supply would be available.

5. By a Memorandum dated 4th April 2003, the Appellants requested the combination to the gas cylinder alley storage area. Mr. DeCouto informed the Appellants that the alleyway was not part of the property so he could not let them have the combination. He suggested an alternative location where the gas cylinders could be placed. About two months later on 25th June 2003, the new architects of the Appellants wrote to Mr. DeCouto regarding inadequate storage facilities for propane gas cylinders. Although not considering he had any obligation to assist the appellants to redevelop the property, Mr. DeCouto nonetheless sought to assist where he could by writing to the owner of the lot

on the western side of the property to see if cylinders could be placed there. This proved not to be possible.

6. On the 15th July 2003, the Appellants then requested their lease to be extended from a 3-year period with a 3-year option to a 3-year period with a 5-year option, which was agreed by the Respondent.

7. On the 4th August 2003 the Appellant's attorneys threatened on their client's behalf to rescind the lease just extended as there was no available area on the property to place gas cylinders.

8. On the 13th August 2003 the Appellant's architect located a suitable location for gas cylinder storage on the property. This was on the northwestern side of the building and required the removal of a section of the wall from the lower floor wall. At the end of August 2003 the Respondent agreed to the Appellant's request to extend their time of paying half-rent for a further four months until the end of 2003. By letters dated the 6th and 9th of October 2003 the Appellants confirmed to Mr. DeCouto that a solution had been found to the gas cylinder storage problem at a cost of $40,000. Extending the sprinkler system was estimated to cost another $30,000. The Appellants claimed that it had been agreed with Mr. DeCouto that no rent was payable until renovations were completed. The Appellants estimated these renovations would take 15 months until 1st January 2005. By letter dated 1st December 2003 the Respondent informed the Appellants that the situation whereby they were not paying any rent and not taking any steps to renovate, could not continue. The Respondent reminded the Appellants of the agreement to pay half rent as agreed from September onwards from full rent payable from January 2004.

9. In January 2004 the Appellants then rescinded the lease agreement claiming that Mr. DeCouto had misrepresented the property to them. The Appellants commenced proceedings claiming loss and damage amounting to $635,051.00, which later was to be almost doubled.

10. The material averments in the Statement of Claim were these:

> "3. The Plaintiffs first became interested in leasing the said premises following an advertisement place in the Royal Gazette

by the Defendant's servant or agent, DeCouto & Dunstan Real Estate limited, The advertisement represented that the Defendant's agent has 2,300 square feet of space available for rent which was "suitable for a restaurant."

4. The Plaintiffs contacted the Defendant's agent and confirmed with the Defendant's agent by way of letter dated 14th March, 2003 that they wished to use the premises for a restaurant. It was confirmed by the Defendant's agent that the premises was suitable for use as a restaurant.

5. In the circumstances, the Defendant's, its servants or agent made or caused to be made to the Plaintiffs, representations as to the suitability of the premises for use.

7. The representations were false in that the premises are not suitable for a restaurant in that there is nowhere on the premises to store gas cylinders necessary for commercial kitchens."

11. The action came before Wade-Miller J., who gave judgment for the defendant on the 27th February 2007; she recorded among others the following findings:

i. that she was satisfied there was no misrepresentation that induced the Plaintiffs to sign the lease agreement;

ii. that she accepted the evidence of Mr. DeCouto, which was not shaken in cross-examination, and that whenever the [Appellants'] and Mr. DeCouto's evidence were in conflict she preferred the evidence of Mr. DeCouto;

iii. that Mr. DeCouto made no positive representation that storage for gas cylinders was available;

iv. even if the advertisement constituted a representation that the premises were suitable for a restaurant and operated on the Plaintiffs' minds, this could not have affected their much later decision to enter into the lease agreement, for by then the true position should have been made clear by their own inspection with a professional architect; by the time they asked for an extension of the lease from three to five years, the

true position was crystal clear, and the fact that they could not have gas cylinder storage in the alleyway known to all parties.

12. From that decision the Appellants have appealed to this Court upon the following seven grounds of appeal:

(1) The Learned Judge erred in failing to hold that the Plaintiffs were induced to enter into a lease agreement with the Defendant by virtue of the Defendant's representations that the property was suitable for a restaurant.

(2) The Learned Judge erred in holding that the Defendant in any event believed the said representation to be true when the Defendant knew or ought to have known the premises did not have the ability to use gas for cooking

(3) The Learned Judge erred on that facts in holding at paragraph 91(v) that:-

> "This fact that the alleyway was not part of the Property did not affect Mr. DeCouto's honest belief that the Property could be used as a restaurant. He knew the alleyway was not part of the Property and informed Mr. Simons of this before he signed the lease agreement. Mr. DeCouto believed that it was possible to find an alternative location to the alleyway for gas cylinders and came up with the suggestion to place a platform on the roof, which Mr. DeCouto believed had not been adequately explored."

The Plaintiff believed that the alleyway was part of the property until some time after the lease had been signed.

(4) The Learned Judge having found at paragraph 92 that –

> "It is accepted by both parties that a solution to storing the gas cylinders was found by OBM."

erred in attaching any weight to this fact as the Defendant refused to pay for or give credit to the Plaintiff for the costs to implement the solution.

(5) The Learned Judge erred in paragraph 92 in holding:

> "The fact that the Plaintiffs were prepared to pay the full rent of $5,750 within 3 months indicates the likelihood of this."

(6) The Learned Judge erred on the facts in paragraph 103 in attaching any weight to the fact that as the Plaintiffs visited the property two to three times once with a Mr. Fox this indicated that the Plaintiffs had formed their own view as to the suitability of the premises as a restaurant. The Plaintiffs visited the property for the purposes of interior design only and continued to rely on the Defendant's (mis) representation as to the premises suitability.

(7) The Learned Judge erred in attaching any weight to the nine and a half month "delay" in the renovation work referred to at paragraph 104 of the Judgment as the Plaintiff's own uncontradicted evidence was that without gas they could not operate a restaurant and so delayed the renovation work until a solution could be found.

13. In addressing the grounds of appeal and the submissions, plainly the first step must be to identify the representation and then the questions whether it was made and is false. The first stop must thus be the Statement of Claim; for it is

there that the representations and their falsity must be pleaded. This is also apt to lead to the resolution of this appeal in short order. For if the representations and their falsity are not established, the Appellants' claim of misrepresentation must fail. This is because of the effect of the Law Reform (Misrepresentation and Frustration) Contracts Act 1977. The relevant provisions section 3(1), (2) and (3) are set out in the judgment of Wade-Miller J. there was no dispute on the law before her or this court, including critically that for a statement to constitute an actionable misrepresentation, the following requirements must be met:

(a) The statement must be one of fact not law, intention or opinion;

(b) The statement must have induced the representee to enter into the contract;

(c) The statement must be false.

Accordingly, if either of the two essential elements, the representation or falsity are not established, than the claim of misrepresentation must fail.

14. It has to be said that the Appellant's submissions in large measure, assume rather than demonstrate, that suitability for use as a restaurant imports the availability of a gas supply or storage space for gas cylinders. It was simply said that the representation made connotes that the property has inter alia water, electricity and a gas supply. It was also said that Mr. DeCouto, in presenting the premises as suitable, mentioned its former use as a restaurant known as Rosa's Cantina. It is now located on a different street in Hamilton but for a number of years was a well known restaurant. This, it is suggested, was in some way a representation that there would be a gas supply. Superficially more credible but hardly decisive was the assertion that almost all the restaurants in Hamilton use gas, although there appear to be a few exceptions. But it is not necessary to pursue those claims. That "suitable for restaurant" imports a gas supply has not been demonstrated; it has simply been assumed. When the Appellants architects found a solution to the gas

cylinder storage problem within the same building and the Appellants opted to renew the lease for a further three years, which demonstrates that although the premises did not have a gas supply, it was suitable.

15. Mr. Diel in his submissions to this court, no doubt recognizing the critical necessity of establishing the representation and its falsity, focused upon those and did not pursue the other grounds of appeal.

16. In conclusion, we add that at the appeal hearing, Mr. Diel made it clear that the appellants rely only on the written representation in the advertisement, that the premises were suitable for use as a restaurant. Broadly speaking, that was true. But that statement cannot bear the meaning that they are suitable for all kinds or for any particular kind of restaurant, nor that a gas supply, if one was needed, was available from outside the premises. The appellants do not allege that any specific representation was made during the conversations that followed. There was none.

Further, even if there was such a statement, the appellants clearly failed to prove that they signed the lease relying upon it. They took their own architect and they formed their own view with the benefit of his advice. If they failed to consider where the gas would come from, if gas was needed, that was not because they had been told that it was available. No such statement had been made.

17. For the reasons given we dismiss the appeal and order nisi that the Respondent is to have its costs of the appeal.

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**Nazareth, J A**

I Agree. _____

**Sir Anthony Evans, J A**

I Agree. _____

**Forte, J A**