IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2004: No. 206

B E T W E E N:

BRUCE SIMONS

and

MARGO SIMONS

Plaintiffs

AND

MAGNOLIA PROPERTIES LIMITED

Defendant

Marshall Diel & Myers for the Plaintiffs
Cox Hallett & Wilkinson for the Defendant

JUDGMENT

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1. The Plaintiffs, Bruce Simons and Margo Simons, instituted proceedings against the Defendant, Magnolia Properties Limited, alleging misrepresentation – by the Defendant through its advertisement placed by its servant or agent Mr. Barry De Couto of De Couto and Dunstan Limited – that the second floor of 86 Reid Street (the Property) was suitable for use as a restaurant when it was not. The Plaintiffs further allege that by such representation it induced them to enter into a lease agreement with the Defendant in reliance upon the Defendant's advertisement and its agent's representation as to the suitability of the premises for use as a restaurant. The representations were false in that the premises are not suitable for a restaurant, as there is nowhere on the premises to store gas cylinders necessary for commercial kitchens.

2. The Plaintiffs further allege that the existing sprinkler system was not in compliance with the Building Code and needed to be extended to the entire restaurant. The Plaintiffs terminated the lease agreement and allege that they have suffered loss and damage arising from the Defendant's misrepresentation. The Plaintiffs claim loss and damages, interest pursuant to statute and costs.

3. The Defendant does not admit that the advertisement represented that the space was suitable for a "restaurant office or retail". The Defendant accepts that the Defendant's agent told the Plaintiffs that the space had been previously used as a restaurant – Rosa's Cantina.

The Defendant further maintained that:

(i) if it represented that the premises were suitable for a restaurant, the said representation was simply an expression of an opinion and was not a representation that the premises complied with all design and construction requirements legal and otherwise for use as a restaurant.

(ii) prior to entering into the contract the Plaintiffs carried out their own enquiries with due diligence whereby they inspected the premises and formed their own judgement as to the suitability of the premises as a restaurant. The Plaintiffs consulted with a number of professionals including an architect, an electrician, a fire department representative and a gas company representative.

(iii) if the sprinkler system was not in compliance with the Building Code and needed to be extended to the entire restaurant as alleged, that was something the Plaintiffs assumed the risk of having to do in order to operate a restaurant. This does not render the representation (if any, which is not admitted) incorrect.

The Defendant denied that the Plaintiffs terminated the lease as a result of any misrepresentation and also denied that they were entitled to terminate the lease.

The Defendant alleges that, prior to the repudiation; the Plaintiffs breached the terms of the lease by failing to pay rent. Further, as a result of the Plaintiffs' repudiation of the lease in breach of contract, which repudiation was accepted by them without prejudice to its claims for damages for breaches of contract occurring before the repudiation, the Defendant counterclaims that as a result of the repudiation it has suffered

loss of rent from the date of the acceptance of the repudiation until the premises were let to another tenant with effect from 1st May 2004.

The Factual Background

4. The evidence in chief is taken from the statements and affidavits of the parties and their witnesses.

5. The Plaintiffs had for some time been interested in the restaurant business and were looking for property to rent for such purposes.

6. The Defendant was the owner of premises at 86 Reid Street Hamilton. In March 2003, the Plaintiffs saw an advertisement that is exhibited which stated: "For Rent: 2300 Sq Ft. of Space in the City of Hamilton $5750.00 suitable for a Restaurant, Office or Retail call De Couto & Dunstan Real Estate Limited." Mr. Simons said that they arranged a meeting with Mr. Barry De Couto and they made it clear to him that they wished to use the premises for a restaurant.

7. At the end of the meeting a visit was arranged and took place. The Plaintiffs and Mr. De Couto were present. At the meeting, Mr. Simons said that Barry spoke to them about the history of the building and that it used to be Rosa's Cantina restaurant and that they should do well as Rosa's Cantina had done well.

8. The Plaintiffs asked why Rosa's had moved and were told by Barry that it was because they had moved to a better location. They explained to Barry that the concept they had in mind was a stir-fry restaurant, which required the use of a gas stove. They ultimately wanted to use gas cylinders. He thought the same people who owned the venue he was renting owned the alleyway. Mr. Simons said that at no time were they ever told that there was no place to put the gas cylinders necessary for a restaurant kitchen.

9. There is a dispute whether the Defendant made a representation that the property was suitable for a restaurant, namely one selling hot and cold food (Rosa's Cantina type), which required gas. On the other hand, Mr. De Couto denies that there was ever any question of a representation that he would provide adequate storage for propane gas. In his evidence, Mr. De Couto states that he rented them an empty space to use as they wished.

10. During subsequent visits and when rent negotiations were taking place a number of problems had to be dealt with, including bad flooring, poor exterior painting, rotten rafter feet in the front of the building and water leaking into the windows.

11. After the lease was signed the Plaintiffs began designing the kitchen area, part of which was the area where the gas cylinders were to be located. They approached Barry and asked where the gas cylinders could be situated and they mentioned putting the cylinders where the neighbour Chopsticks restaurant had placed their cylinders. Barry said that he would check with the architects to see if he owned the alleyway where they wanted to put the cylinders.

12. A few weeks passed and Barry told them that his architect was in the hospital. After another week or so he returned and said that he did not own the alleyway. It was trust property leased to Chopsticks. They approached Chopsticks to enquire if they could use the Alleyway but they turned them down. Their architect went to Wheels Cycles with a plan to put gas cylinders on their property. They too turned them down.

13. The Defendant went back to Barry who suggested that they needed to create an area by taking walls out of the existing building. They discussed it with the Fire Department but it was too expensive (approximately $40,000.) The Plaintiffs said that they went back to Barry and provided him with an estimated cost to make the property suitable for a restaurant, but, Barry was of the view that he should not cover the cost of the renovations.

14. On or about the 12th August 2003, the Plaintiffs spoke to Barry during which time he stated that his company would not be responsible for construction costs. A few days later, following a further meeting, it was agreed that no rent was to be paid until the gas cylinder problem was resolved. Mr. Simons said that they did not pay any rent for September to December without complaint from the Landlord.

15. In cross-examination Mr. Simons, was ‘inter alia’, referred to the advertisement and he said that he felt that the property would be suited for each of the types advertised (i.e. suitable for a restaurant, retail or office). He felt it would require some renovation depending on one’s concept. He agreed that it would require money outlaid by him.

In his mind he said he intended to create a hot food restaurant. A cold food restaurant in his view is a deli. He vaguely recalls Rosa's Cantina was there. He knew Rosa's was a success and this was one of the reasons, but not the key reason, why he wanted to rent the property. He and Mrs. Simons needed 2300 square footage. Mr. Simons said he believes Mr. Fox visited the property twice, but he, did not inspect the property beyond just looking around. Mr. Fox undertakes architectural work and lay out of premises.

Mr. and Mrs. Simons felt comfortable knowing that a restaurant was there previously. If Mr. De Couto said anything beyond Rosa's he cannot remember.

Q. Did you ask Mr. De Couto about the gas supply?

A. Yes, I did.

Q. This was before the lease was entered into?

A. No, I assumed the gas was always there.

16. He said that Mr. De Couto never responded to the memo dated 4th April 2003, which sought 'inter alia' for him to provide the key combination to the gas bottle alley area.

The sprinkler system is still an issue. It needed an extension.

As regards the request to extend the lease period with a five (5) year option he said that they thought it would be a good idea as they intended to invest a little less than one million dollars. He agreed that the architects identified an area for propane storage if the construction was done.

17. Mrs. Margo Simons confirmed the statement of evidence filed with the court and signed by her husband. She has worked in a number of restaurants including Japan where she developed the concept of Mongolian barbeque, which is a show grill, displayed in a large area where the chef puts on his show. She wanted to demonstrate this concept at a Bermudian restaurant.

18. She denied that Mr. De Couto told them on one of their visits to the property that the alleyway outside, where all the gas cylinders were located, belonged to the Chopsticks restaurant next door.

In cross-examination, this witness said that she does catering at private parties. She was aware of the space Rosa's Cantina before she saw the

advertisement. It is possible that she visited the premises 2 or 3 times before signing the lease.

19. Bryan Burch supports the Plaintiffs' evidence with regard to the fact that there is no storage space for gas cylinders available to the premises. Mr. Burch states that he was the President and Managing Director of Brunswick, a real estate and property management company. He was involved in the sale or possible sale of the property where Rosa's Cantina used to be. Rosa's Cantina was located in the Brunswick building and shared the same area in the alleyway with Chopsticks for purpose of storing their gas cylinders. The alleyway was owned or leased to the Company that shared Chopsticks.

20. After Rosa's Cantina relocated he attempted to rent the space to a Mrs. Kerr to be used as a restaurant and upon doing the checks he was told by Chopsticks that they would not allow a competitor to use the alleyway for their gas cylinders. The Brunswick property did not offer any space or facilities in the building itself.

21. After this incident occurred Mr. De Couto wished to purchase the premises the part formerly occupied by Rosa's Cantina. He said that he distinctly recalled that he told Mr. De Couto that it was not possible that a kitchen could exist on the premises for restaurant purposes as there was no facility for gas stoves cylinders. He said that he was sure that he said this to Mr. De Couto Jr., at least once during the period (2001-2002).

22. Mr. De Couto on the other hand denies that there was ever any such discussion. He said Mr. Burch was the janitor who came in and took out the trash; Mr. Burch tried to rent the property and failed. He did not even question what happened with Mrs. Kerr. He knows that he did not have that conversation.

23. Mr. John Roach the owner of Bermuda Restaurants Limited said that he has been in the restaurant business for over 25 years. In 1995, he moved Rosa's Cantina to its current location at 121 Front Street. At some time during the summer of 2003, Mr. Simons approached him and said that he had leased 88 Reid Street for use as a restaurant. Mr. Simons then told him that he should give up some of his space in the alleyway so that he, Mr. Simons, could accommodate his gas cylinders. Mr. Roach informed Mr. Simons that he needed all the cylinders that he could fit into the alleyway. He explained that his business was entirely dependent upon the constant supply of gas for his appliances and hence required an adequate

number of gas cylinders. He said that he made it clear to Mr. Simons that he would not compromise his business by allowing him storage space for his use.

Defendant's Case

24. Mr. De Couto says:

"I have been in the restaurant business for 22 years. In February 2003, I advertised a commercial space for rent in the Brunswick Building on Reid Street. My father's company, Magnolia Properties Limited ("Magnolia"), is the freehold owner of the Brunswick Building. This was purchased by Magnolia in 2002.

25. At the time of its purchase by Magnolia, the Property was occupied by the business known as the "Regal Art Gallery". This business vacated the Property in 2002 and at the start of 2003; I began the search for new tenants.

26. I listed the Property as "suitable for Restaurant, Office or Retail" at a price of $5750, which is approximately $30 per square foot. The two other properties I advertised on that day were listed as "suitable for Office or Retail" and were listed at approximately $42 per square foot.

27. I added that the Property was "suitable for restaurant" because I knew that there had been a restaurant – Rosa's Cantina – at the Property for many years as recently as the 1990s. I believed that as the Property had proved suitable for restaurant use for many years in the recent past, it was an area that could be used successfully as a restaurant. Obviously, as the last tenant had used it for the very different business of an art gallery, redevelopment would have to take place to make it ready for immediate use as restaurant, but the space was to my mind generally suitable for a restaurant given its past history.

28. I had discussions with a number of people interested in renting the Property, including Mr. & Mrs. Simons. Most, if not all, were aware of the history of the Property and the fact that it used to be Rosa's Cantina. I cannot recall specifically whether Mr. & Mrs. Simons informed me that they were also already aware that the Property was previously Rosa's Cantina. As I understand that they had been away from Bermuda for many years they may not have been. Mrs. Simons said she knew it as Rosa's Cantina. However, I recall saying to them that I knew the Property

had been used as a restaurant before and that this restaurant was Rosa's Cantina.

29. I also recall that on one of their visits of the Property, Mr. & Mrs. Simons asked about the gas supply. I told them that the alleyway outside, where all the gas cylinders were located, belonged to the Chopsticks restaurant next door.

30. In about the first half of March 2003, Mr. & Mrs. Simons as well as Mr. Simons' brother attended my offices. I recall that at this time they described to me their general plans for a restaurant. There was no in-depth discussion as to type of restaurant, nor was any mention made by them of any definite requirements (such as gas supply) for the Property. My only concern at this meeting was that Mr. & Mrs. Simons could demonstrate to me that they were able to pay the rent for the space and this they assured me they could do. Whether they ultimately were to use the space for restaurant, office or retail was their decision.

31. As Mr. & Mrs. Simons were keen to secure the Property, we verbally agreed that they could lease the Property starting from 1st April 2003 but that this would be at half-rent for the first two months. Full rent would be payable from the third month onwards (June 2003). I confirmed this to Mr. Simons in my letter to him dated 18th March 2003 (see trial bundle page 5).

32. During this meeting, I made no additional comments about the suitability of the Property for a restaurant.

33. In advertising a Property for the three very different categories of retail, office and restaurant, I do not believe that any prospective tenant could have thought that the planning, design, legal and construction aspects were satisfied for all three of these uses already. Coming to such a conclusion does not make any sense from the very general nature of the advertisement. The statement, "suitable for restaurant" was meant by me to be one describing the area's potential use based on my knowledge of its past use.

34. Mr. & Mrs. Simons clearly did not believe that I had made such a representation at this time either. They knew that the Property would require substantial redevelopment by them. That is why we agreed to half-rent for a period to enable them to carry this redevelopment out so

that the Property was made ready for restaurant (or any other) use they wanted.

35. Shortly, after this meeting, I received a "Letter of Intent" from Mr. Simons dated 14th March 2003 (see trial bundle page 6). This informed me in very general terms that he and his wife would like to lease the Property for "the purpose of a first rate Restaurant", that "the venue will be renovated for this purpose" and that they had hired "Ed Fox of Vanguard Services to provide [them] with a complete layout as well as business consulting. Once accomplished we will be sure to be impressive (sic) with our new start up business. (sic)"

36. Further on in this brief letter, Mr. Simons refers to contacting Butterfield and Vallis and their overseas restaurant equipment personnel. Again no mention is made to me that the equipment required a gas supply.

38. By a memo dated "4/3/03" (I believe this is dated 4th April and not 3rd March), Mr. Simons requested the combination to the gas bottle alley area amongst other items (see trial bundle page 11). I recall telling him again in response to this query that it was not part of the Property so I did not have the combination.

39. In or about June 2003, I recall that Mr. Simons contacted me to discuss the placement of gas cylinders. I did not expect that there would prove any difficulty to find somewhere on the premises to store the gas cylinders. I am not sure if it was on this occasion, but I suggested that he consider placing the gas cylinders on the roof of the Property by building a platform if there was no room elsewhere.

39. I did not consider that the ability to provide adequate storage facilities for propane gas cylinders was necessary for the Property to function as a restaurant. I also did not believe that I had any obligation to assist Mr. & Mrs. Simons to redevelop the Property so that it was ready to be used. I had rented the space to them. The space was suitable for a restaurant. It was up to them to make it ready for the specific type of restaurant they were planning. Nonetheless, despite these being my thoughts at the time, on receipt of this letter, I was still willing to assist if I could.

40. At around this same time, on 15th of July, Mr. Simons requested an extension of his lease option. He wished to increase the Agreement from a three-year period with a three-year option to a three-year lease with a five-year option. Three months later on the 18th July 2003, Mrs. Hayward

sent confirmation of my agreement to this to him (see trial bundle page 55). By seeking this extension of the option, I was given the impression by Mr. Simons at this time that he imagined that this would be a long term business and the issues raised of the gas supply and the sprinkler system were not likely to be a great problem for him in the short term.

41. In cross-examination, Mr. De Couto accepted that in June 2003 he received the following letter from the architects -- "I have been instructed by my clients, Bruce and Margo Simons, to contact you over concerns regarding your leased site at 86 Reid Street, and it's (sic) ability to function as the restaurant advertised.

The concern was raised during the restaurant's design process. It appears, upon initial site survey, that there are inadequate storage facilities for propane gas cylinders. City Ordinance, as well as local Health and Safety Laws, require that all commercial gas facilities are stored and utilized on the building's exterior, and may not be situated within the enclosed site itself. Furthermore, law requires this area to be self-contained, with adequate natural ventilation, and yet deny public access. After discussions with my clients, I understand that the necessary information for cylinder storage had been requested of you on several occasions, and yet this documentation and confirmation has yet to be supplied. Please find attached copies of your newspaper advertisement stating the suitability of this site as a restaurant, my clients' letter of intent to lease this property as a restaurant, your acknowledgment of this offer, and signed lease agreement. As we are taking every effort to reach an amicable and expedient solution, I am confident that this information will be forthcoming, and I await your urgent attention to this matter."

Mr. De Couto said that, upon receiving the letter, he went to the Landlord, the owner of the premises, who reviewed the letter. It was the Landlord's opinion that it was not up to us to provide that facility.

42. Mr. De Couto recalls receiving a letter from the Plaintiffs' Attorneys in August 2003 which in part reads: "As you also know, our clients have encountered a serious problem in that there is no available area on the property to place the gas cylinders necessary to operate a restaurant. In case there is any doubt, we would invite you to contact Mr. Jason Jones at OBM Limited who can confirm this".

43. During further cross-examination, Mr. De Couto was referred to his statement, which in part reads:

"I had rented them an empty space. They could decide to use it how they wished. Furthermore the need for a good business plan, prompt action and redevelopment is particularly true when new restaurants are started. More often than not, creating a new restaurant by its nature requires a significant redevelopment of any rented space"

A. Yes, gas storage is external it's up to them.

A. Yes, I knew they wanted to use gas.

A. Yes, I knew that there was no storage space for them to use gas.

Q. There is no dispute, they looked long and hard to find a place to put gas cylinder.

A. That's their opinion.

44. Mr. De Couto said that there is a building on Western side of the Wilkinson building called Kelly's restaurant and bar. He states, "Since, which I found out Docksides use that space, I am presently negotiating with them. I did not find this out until after the Simons' terminated their lease. This is not in my Witness Statement".

45. Mr. De Couto testified that on 4th August 2003, "I received a letter from Marshall Diel and Myers" written to the Defendant on behalf of Mr. & Mrs. Simons. This letter referred to Mr. & Mrs. Simons having, "encountered a serious problem in that there is no available area on the property to place the gas cylinders necessary to operate a restaurant." It also stated that Mr. & Mrs. Simons were "now going to be delayed (even if the matter can be resolved quickly) in opening but in any event they cannot continue paying rent indefinitely for premises they cannot use." The letter then went on to threaten that the lease would be rescinded if no solution were found by the end of August 2003.

46. Mr. De Couto said: I was surprised that Mr. & Mrs. Simons had resorted to using a lawyer over the gas cylinder issue. I felt that there must be a solution to this difficulty for them. I was also surprised at the threat of rescinding the lease over this issue and the fact that this had happened not long after Mr. Simons had asked for an extension to the lease term. Having since seen the business plan of Mr. Simons in which the start date (at the earliest) was not until October 2003, I also doubt that any real delay was being caused by this issue.

47. In a meeting in late August 2003 to discuss the content of Marshall Diel & Myers' letter, Mr. De Couto said I reluctantly agreed to Mr. & Mrs. Simons' request that they could continue to pay half-rent for another 4 months until

the end of 2003. This would be at the rate of $2,875.00 per month (inclusive of the service fee).

48. After our meeting, I was aware that Mr. Simons continued to search for alternatives on the Property to locate the gas cylinders. However, I am aware now from a note disclosed by his architects dated 20th August 2003 that the architect had a site meeting on 13 August. At this meeting, they had actually identified a suitable location on the northwestern corner of the building for gas cylinder storage.

49. Some 6 weeks later, I then received a letter from Mr. & Mrs. Simons dated 6th October 2003 confirming that a solution had been found to the gas cylinder storage problem (see trial bundle page 65). This was followed by a corrected copy of largely the same letter dated 9th October 2003 (see trial bundle page 66).

50. The original letter dated 6th October 2003 confirmed the agreement reached between us at our meeting in late August that they would continue to pay half-rent. However, Mr. & Mrs. Simons stated that half-rent was payable until the renovations had been completed. I would never have agreed to such an open-ended agreement. Half-rent had been agreed between us as payable until 31st December 2003. Despite confirming that they would pay half-rent in this letter, Mr. & Mrs. Simons had already failed to pay their rent installments by this time for September and October 2003.

51. Mr. & Mrs. Simons in their "corrected" letter dated 9th October 2003 then changed their position in an attempt to justify this non-payment of rent. In this letter, they stated I had agreed with them in our August meeting to pay no rent until the renovations had been completed. Despite stating that they had highlighted their changes to their original letter, this significant change was not highlighted – I would never have agreed to them not paying any rent for an undefined period.

52. Because in Mr. & Mrs. Simons' opinion, the work of providing gas storage and a sprinkler system was required for me to make the Property, "suitable for a restaurant", they suggested that I should permit them to lease the area without paying any rent for the 15 month period until 1st January 2005.

53. Throughout the term of the Agreement; Mr. Simons continually expressed his desire to rent the space above the Property as well. This was the

location of the old Club 40. Mr. Simons had a desire to connect the two properties to create a single combination nightclub/restaurant. As late as 28th November 2003, Mr. Simons met with me to discuss his continued interest in this adjoining area as well. I felt that Mr. Simons' interest in this space had a tendency to over-cloud his original plans.

54. By this letter, I also took the opportunity to point out to Mr. Simons that the situation whereby he was not paying any rent on the Property he was using, but not making any steps to renovate it at all, could not continue anymore. Mr. & Mrs. Simons had failed to pay any rent for the Property since the half-rented payment they made for August 2003. I explained to them that Magnolia expected to receive the half-rent (inclusive of service fee) for the months of September, October, November and December 2003 ($11,500 being 4 x $2,875) and payment for the full January rent of $5,750 making a total of $17,250 (this was actually slightly miscalculated as $17,200).

55. I see from the documents disclosed that Mr. Simons received a specification from Bermuda Gas in early December for gas tanks (see trial bundle pages 69 & 70). However, no further measures were taken by him to develop the Property.

Instead, by letter dated 29th December 2003, Mr. & Mrs. Simons informed me that they were making one final offer before they rescinded the lease (see trial bundle page 77). This, in effect, was the same proposal as before: that the costs of making the Property "suitable for a restaurant" in their opinion would be off-set against any rents they would owe. This was unacceptable to me.

56. By letter dated 9th January 2004, I then received a further letter from Marshall Diel & Myers (see trial bundle pages 80 & 81) stating that I had misrepresented the Property to Mr. & Mrs. Simons, that I was in breach of contract, the breach was accepted and the contract rescinded by them.

57. By letter dated 13th January 2004, Hollis & Co. responded on my behalf denying that there had been any misrepresentation by me. In an effort to resolve the matter, I offered to forego any claim I had for their breach of the Agreement by offering that Mr. & Mrs. Simons pay the unpaid half-rent due to me for the period from September to December 2003 plus the full rent for January 2004 as we had agreed in our meeting in August 2003.

58. Following the end of the Agreement, I was able to obtain a new tenant for the Property paying the full rental sum from 1st May 2004. This tenant actually runs a pottery business using an electric kiln. As is usual, she simply carried out the necessary renovations at her own cost in accordance with her business plan.

59. Mr. & Mrs. Simons made no renovation whatsoever to the Property during the 9-½ months it was in their possession. Instead, they got no further than obtaining a restaurant design and business plan before effectively giving up after a 4 month period of inactivity by them from September 2003.

60. The witness statement of Gianni Claudio Vigilante who has been in the restaurant business for 28 years states that he is the Chief Operating Officer of Associated Cuisine Limited (ACL), which was established in 1999 and owns and operates Frescos and Aqua in Bermuda. ACI employs approximately 60-70 people and serves approximately 50,000 diners annually.

61. The Silk restaurant serves about 1,000 diners per month and runs entirely on electric appliances, as they were unable to have gas canisters in the building. Electric has been a viable option for commercial kitchen in Bermuda for about 5 years. Silk has received a number of distinguished awards.

62. It is clear from this witness's evidence that a first class commercial restaurant does not have to rely on gas for cooking to make it successful.

63. The Plaintiffs' Contention

The Plaintiffs contended that the Defendant was aware of the nature of the restaurant the Plaintiffs wished to run, that it required gas and the Defendant knew gas was not available. Yet despite this maintained (and in fact continues to maintain) that the premises are suitable for a restaurant.

64. Clearly there was a misrepresentation. The Plaintiffs saw the advertisement that the premises were "suitable for [a] restaurant". In reliance of that they approached the Defendant, stated what type of restaurant they intended to open. The Defendant states that it was "suitable for a restaurant" in light of the fact that it had been operated as "Rosa's Cantina" in the past.

65. The Defendant maintained the fiction that the premises was suitable for a restaurant when it knew full well that the alleyway could not be used for gas cylinders and in the circumstances there was no place on the property to place them.

66. The parties knew precisely what was represented, namely that the premises were suitable to be used for a restaurant similar to Rosa's (i.e. Mongolian Barbecue).

67. The Plaintiffs relied on the fact that the premises satisfied the basic requirements for a restaurant, namely it had gas, power and water. The Plaintiffs' own inspection as stated in evidence was for interior design purposes.

68. The premises were the right size and were suitable for a restaurant as represented by the Defendant. But it was repeatedly stated that unless they had gas they could not run a restaurant!

69. It is quite obvious that Mr. De Couto never told the Plaintiffs about the alleyway. If he had then it would have been mentioned somewhere in the correspondence and pleadings before appearing for the first time in his statement.

70. At no time did the Defendant write back or assert this was not true. The Plaintiffs' evidence that they were never told is to be preferred.

71. Silk is the only known restaurant in Bermuda to use electricity and the Plaintiffs were clear they required gas to do so as every other restaurant does and further recall again that the Defendant stated that they represented the premises was suitable for a restaurant as it had housed Rosa's Cantina. Rosa's Cantina used (and uses) gas!

72. As for the sprinkler system the evidence is clear at Tab 2 page 16 — the memorandum stating the Fire Services' position.

> *"Melvin further confirmed that the existing sprinkler system must be extended throughout the remainder of the restaurant, in order to comply with current Code. He also indicated a preference to reopen the blocked fire escape on the south wall, adjacent to the existing toilet."*

And Tab 2 page 28

"An estimate value of $75,000.00 dollars will be incurred for the construction of plans, demolition for the construction, materials, labor and trucking of all materials for both the cylinder space construction and the extension of the sprinkler systems. In this case it is the owners' responsibility to either pay the total cost of construction or make a deduction in the rent so, we as the tenants will outlay the monies to make the facility Suitable for Restaurant Use at No. 86 Reid Street, the old Regal Art Venue."

73. Plaintiff had reasonable grounds to believe and did believe the representations were true?

The inescapable proof occurs at for example Tab 2 page 5 where the combination for the alleyway was requested (after the Lease was signed).

74. Again the Plaintiffs have no quarrel with the Defendant's statements of the law simply how they apply to the facts of this case given.

75. The Defendant knew that the representation was false when it was made. Thus, it was fraudulent or at the very least negligent.

76. The very simple fact was the Plaintiffs could not open a restaurant without a gas supply. There was no point in moving ahead with any other expenditure until this problem had been resolved. The proof of this is seen in the fact that when it could not be resolved the Plaintiffs terminated the agreement.

77. It was entirely the fault of the Defendant that matters did not move ahead. The Defendant was to do to the exterior but in fact did not do anything for the better part of a year.

78. The Defendant's Contention

On the other hand the Defendant submitted that from the Plaintiffs' pleadings it is clear that the type of misrepresentation pleaded is that of statutory negligent misrepresentation as set out in Section 3 of the Law Reform (Misrepresentation and Frustrated Contracts) Act 1977 ("the 1977 Act").

The Defendant claims that the Plaintiffs failed to pay the agreed rent during the period from 1st September 2003 until the Plaintiff's wrongful repudiation of the Lease on 9th January 2004.

79. There is no dispute on the law, which is taken from the submission of Counsel for the Defendant. A misrepresentation is a false statement of fact made pre-contractually which is intended to induce the representee into a contract and has that effect.

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;

The burden of proof is on the Plaintiff to show that these requirements are met.

80. If the Plaintiff can satisfy the court that the above requirements are met, then by Section 3 of the 1977 Act, the burden shifts to the Defendant to show "*that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true*." If he cannot show this, he will be liable for negligent misrepresentation. If he can show it, an innocent misrepresentation will have occurred.

81. It is contended by the Defendants that the statement made by him as agent of Magnolia was limited to that contained in the advertisement in February 2003: *"2300Sq.Ft. of Space $5750.00 suitable for Restaurant, Office or Retail*." Following the advertisement, Mr. De Couto merely informed the Plaintiffs of the history of the Property and that the restaurant "Rosa's Cantina" used to be there.

From his statement (page 2), Mr. Simons' complaint is also that although he explained to Mr. De Couto that the concept was a stir-fry restaurant requiring gas stoves, Mr. De Couto never told Mr. & Mrs. Simons that there was (allegedly) no place to put the cylinders. Mr. Simons therefore appears to be alleging that by Mr. De Couto's alleged non-disclosure or conduct, he misrepresented the true situation.

82. Even if the Court is willing to consider this and Mr. Simons' version of events is accepted, the general rule is in any event that mere non-disclosure does not constitute misrepresentation. There is, in general, no duty on parties to a contract to disclose material facts to each other; however dishonest such non-disclosure may be in particular circumstances.[1] In other words in our particular context, caveat emptor. There are exceptions to this rule: namely that tacit acquiescence in

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[1] Chitty on Contracts (29th Edition), p.436

another's self-deception can amount to a misrepresentation if the self-deception has been caused by an earlier positive misrepresentation.

He submitted that the statement made by the Defendant's agent was limited to the advertisement.

83. The Defendant contends that the advertisement was not a statement of fact but an expression of opinion honestly held by Mr. De Couto on the facts known to him. This is because the statement is too vague and ambiguous to constitute a statement of fact.

84. The fact that all these 3 different uses are included in the advertisement would indicate to the reader that the space is an empty one and that the advertising statement is a puff indicating that it is open to be used for a variety of general uses.

The Defendant contends that the Plaintiffs were not influenced by Mr. De Couto's representation on three grounds:

(a) that they relied upon their own due diligence when they inspected the premises;

(b) that Mr. & Mrs. Simons entered the contract because of the square footage and the fact that it had been Rosa's Cantina;

(c) that the relevant facts were equally known to both parties; where an estate agent's particulars misrepresented the size of a garage, and the buyer had examined the whole property thoroughly on two separate occasions, it was held that the misrepresentation had had no effect.[2]

85. As such, it is submitted that the Plaintiffs cannot be held to have relied upon the statement of the Defendants. This area was not part of the Property (see paragraph 29). In his cross-examination, he indicated that his response to the memo was that he also sought clarification of this for Mr. & Mrs. Simons by contacting the Defendant's architect and attorney. Mr. De Couto maintained that he knew however that it did not belong to the Defendant and made this clear to Mr. & Mrs. Simons at the time.

86. The representation by the Defendant went no further in scope or detail than the terms of the advertisement. As restaurants can include small outlets, cold food outlets or restaurants, which do not require gas, the representation made by Mr. De Couto was not false.

87. The Statement of Claim at paragraph 7 alleges that it was an impossibility to store gas cylinders on the Property and that this is why the Property is

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[2] Hartlelid v Sawyer & McClockin Real Estate Ltd [1977] 5 WWR 481 (referred to in Chitty at p.447)

alleged to be unsuitable for restaurant use. This is plainly wrong on the Plaintiffs' own evidence and the documentation provided as a solution was found by their architects (and Mr. Simons even states in his evidence that it was actually Mr. De Couto's idea) in August 2003 to create an area by removing part of the northwest exterior wall.

88. The Plaintiffs' real concern appears to be that the cost of carrying out the changes to effect their chosen solution in the northwest exterior wall amount to allegedly $40,000 (no proof is provided of this amount at all being based on a verbal estimate to Mr. Simons by OBM). However, the fact that this particular remedy has a potential cost does not affect the truth of the statement that the Property is suitable for restaurant use in the meaning understood between the parties: namely that the representation did not mean that all design construction and legal requirements were met but that renovations and development would be required by the Plaintiffs to make it ready for the type of restaurant they desired.

89. Most importantly, as was clearly demonstrated by Mr. Vigilante's evidence, in stating that a space is suitable for a restaurant, this does not necessarily imply that a gas supply has to be available. There are restaurants, "Silk" being one of them, which do not rely upon gas supply at all for their commercial kitchens.

On the basis of Mr. Vigilante's evidence, it is therefore strongly submitted that it is clear that the representation, "suitable for restaurant", is not made false even if the pleaded allegation at paragraph 7 of the Statement of Claim that there was nowhere on the Property to store gas cylinders was true.

Representation not false by reason that existing sprinkler not allegedly in compliance with the building code and needed to be extended to the entire restaurant.

It is not clear that this is pleaded by the Plaintiffs as also making the representation "suitable for restaurant" false. Furthermore this issue is not pursued by Mr. Simons in his statement at all. The representation is not made false by this allegation regarding the sprinklers. The representation did not mean that all construction and legal requirements were met for the Property, but that renovations and development would be required by the Plaintiffs to make it ready for the type and, in particular, design of restaurant they desired.

90. If the Court finds that the Defendant made a misrepresentation, the Defendant had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

The question of honest belief by the Defendant is insufficient by itself. The Defendant must positively establish reasonable grounds for his belief.[3]

91. Mr. Rothchild maintained that the Defendant satisfies this test as Mr. De Couto:

(a) held an honest belief that the Property was suitable for restaurant use up until the time of contract (and, in fact, beyond this until today);

(b) that honest belief is based on the reasonable ground that:

(i) The Property had been a restaurant not long before the Property was leased to the Plaintiffs;

(ii) That if the tenant wished to use gas for a restaurant, space could be located to provide this;

(iii) That a gas supply was not necessary for a successful restaurant.

(iv) Mr. De Couto knew that the alleyway was not part of the Property and he told Mr. Simons this before they entered the Lease Agreement.

(v) This fact that the alleyway was not part of the Property did not affect Mr. De Couto'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. De Couto 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. De Couto believed had not been adequately explored.

92. Mr. De Couto also referred in his cross-examination to using a bulk gas cylinder at a location some distance from the Property as another alternative. It is accepted by both parties that a solution to storing the gas cylinders was found by OBM.

It is therefore submitted that no amount should be awarded to the Plaintiffs with respect to the loss of profits claimed.

The Defendant's counterclaim is for the Plaintiffs' breaches of the Lease Agreement. The first breach was the Plaintiffs' failure to pay the agreed rent for the period from September 2003 to January 2004. The second breach was their wrongful repudiation of the Lease Agreement on 9th January 2004, as by their own correspondence dated 6th October 2003 (which they later corrected), they state that the agreement was to pay half-

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3 Howard Marine and Dredging Co. Ltd v A Ogden & Sons (Excavations) Ltd [1978] QB 574

rent until the renovations were completed. This slip by them reveals the truth of the agreement struck in August 2003. The fact that the Plaintiffs were prepared to pay the full rent of $5,750 within 3 months indicates the likelihood of this.

93. However, Mr. De Couto was clear in his dealings with Mr. & Mrs. Simons throughout the tenancy that resolving the gas supply issue was not the responsibility of the Defendant albeit they would do all they could to assist. It is submitted that this reason put forward by the Plaintiffs for the alleged agreement not to pay rent for the period of September to December 2003 is also inherently unlikely and contradictory to the consistent position adopted by the Defendants throughout.

94. Counsel for the Defendant maintains:
If the Plaintiffs can satisfy the court that the above requirements are met, then by Section 3 of the 1977 Act, the burden shifts to the Defendant to show "*that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true*." If he cannot show this, he will be liable for negligent misrepresentation. If he can show it, an innocent misrepresentation will then have occurred.

95. Conclusion

The Law
The Law Reform (Misrepresentation and Frustrated Contracts) Act 1977 states:

(3) (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the representation would be liable to damages in respect thereof had the misrepresentation been made frequently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court may declare the contract subsisting and award damages in lieu of rescission, if of opinion

that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

96. There is no dispute on the law, which has been set out succinctly by the Defendant:

> A misrepresentation is a false statement of fact made pre-contractually which is intended to induce the representee into a contract and has that effect.

97. 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.

98. The burden of proof is on the Plaintiffs to show that these requirements are met.

99. The allegation of misrepresentation is that the advertisement together with the statements of Mr. De Couto amounted to misrepresentation.
Additionally the property had no sprinkler system.

100. The first question is whether the advertisement which states: " 2300 Sq Ft. of Space in the City of Hamilton $5,750.00 suitable for Restaurant, Office or Retail" was a misrepresentation. The next question did the Plaintiffs enter the lease agreement based on that representation.

102. The Court is satisfied that there was no misrepresentation that induced the Plaintiffs to sign the lease agreement. I accept the evidence of Mr. De Couto, which was not shaken in cross-examination. Indeed whenever the Plaintiffs and Mr. De Couto's evidence are in conflict I prefer the evidence of Mr. De Couto.

103. The terms of the advertisement represented that it could be used for any one of the three (3) purposes – restaurant, office, or retail. Also, Mr. De Couto accepted that that the Plaintiffs referred to the restaurant using gas before the lease was signed. However, I am satisfied and find as a fact that Mr. De Couto made no positive representation that storage for gas cylinders was available. On the evidence I find as a fact that the Plaintiffs examined the property two or three times before signing the lease. On at least one of these occasions Mr. Fox, an expert, was present. In my judgment they formed their own view as to the suitability of the premises for use as a restaurant.

104. 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. Indeed in June 2003 by the time they asked for an extension of the lease from 3 to 5 years the true position was crystal clear and the relevant facts – that they could not have gas cylinder storage in the alleyway – known to all parties. This alleged inducement, if inducement there was, could not have operated to affect the Plaintiffs' much later decision to continue the relationship to the extent that they extended the lease agreement term from 3 years with a 5-year option. It is noted that some 9 1/2 months after contract the renovations had gone no further than the design phase.

105. To sustain their claim the Plaintiffs must prove that there is a material misrepresentation and they entered into the lease agreement on the basis of that misrepresentation. The loss or damage being claimed must result from that conduct.

106. Was there a representation of specific fact and did the Plaintiffs rely upon it? Were the Plaintiffs entitled to refuse to perform the contract into which they entered and which later they extended? For the representation to be actionable it must be the causative factor. It must be the factor that led the Plaintiffs to enter into the lease agreement.

107. I am satisfied that there is no misrepresentation or other conduct which entitled the Plaintiffs to refuse to honour the terms of the lease agreement and to refuse to pay rent for the premises.

108. In any event on the Plaintiffs' own evidence the gas and sprinkler difficulty could have been resolved at a cost of $70,000.

109. For the above reasons the Plaintiffs' claim fails. The Defendant succeeds on their counterclaim. I accept the Defendant's evidence that there was no agreement for non-payment of rent for any period. The actual loss suffered by the Defendant is the non-payment of rent until the Defendant rented the property. From the commencement of the lease the Plaintiffs paid 5 months of rent at one half the monthly rental; and although the Defendant agreed to an extension of half the monthly rental until the end of the year and full rent thereafter the Plaintiffs paid no further rent from August 2003.

110. The actual loss is calculated as follows: $2,875 per month from September to December 2003 (4 x $2,875) plus the unpaid full rent from January to May 2004 until a new tenant was obtained for the Property (4 x $5750). This is a total loss amount of $34,500.

111. The Defendant will have judgment for the sum of $34,500; and their costs of these proceedings.

Dated the 27th day of February, 2007.

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The Hon. Justice Norma Wade-Miller
PUISNE JUDGE