

1  
23rd February, 1988. 39.

IN THE ROYAL COURT OF JERSEY  
(INFERIOR NUMBER)

---

Before: Mr. V.A. Tomes, Deputy Bailiff

Jurat C.L. Gruchy

Jurat Mrs. M J. Le Ruez

---

John Glasson Plumbing and Heating  
Engineers Limited

-v-

Select Hotels (Jersey) Limited

---

Advocate R.G. Day for the Plaintiff  
Advocate R.J. Renouf for the Defendant

---

This is a Claim for £3,795.81 in respect of an account rendered. On the 3rd February, 1988, as one of the terms of an adjournment, granted on the application of the defendant, the Court required the sum of £2,500 to be paid forthwith to the plaintiff. Accordingly this judgment concerns only the balance of £1,295.81.

The plaintiff's claim relates to the supply of materials and labour in connection with the installation of a central heating system in the manager's and staff accommodation at the Ocean Hotel, Westmount, St. Helier.

The defence is under two heads:-

- 1) That the Ocean Hotel is owned and operated by Ocean Hotel Limited and not by the defendant and that the plaintiff was employed by Ocean Hotel Limited and, therefore, that the defendant is not liable at all to the plaintiff.
- 2) That the plaintiff quoted a verbal price or estimate of £2,500 for the works; that Ocean Hotel Limited accepted the verbal estimate of £2,500 and

offered, through the defendant, to pay to the plaintiff the amount of the verbal estimate (now paid as we have stated above); and that the amount that was due to the plaintiff, because there was a 'fixed-price' contract between the plaintiff and Ocean Hotel Limited, or between the plaintiff and the defendant, was limited to the sum paid of £2,500.

We deal firstly with the first head of defence, i.e. that the action is wrongly instituted against the defendant because it was Ocean Hotel Limited alone that contracted with the plaintiff. It is admitted that the initial negotiations were conducted between Mr. John Glasson, a director and the beneficial owner of the plaintiff, and Mr. Anthony Shelton, managing director and joint beneficial owner of the defendant and a director of Ocean Hotel Limited a wholly owned subsidiary of the defendant. We find, as findings of fact, that Mr. Shelton failed to make it clear to Mr. Glasson that the contract would be between the plaintiff and Ocean Hotel Limited and that in correspondence the defendant, albeit post contract, represented itself as the contracting party.

The question is, therefore, whether the defendant is now estopped from claiming that Ocean Hotel Limited and not itself should have been sued by the plaintiff.

The plaintiff relies on Turner's "Estoppel by Representation" 3rd edition, pages 4 and 5, from which we quote:

"It will be convenient to begin with a satisfactory definition of estoppel by representation. From a careful scrutiny and collation of the various judicial pronouncements on the subject, of which no single one is, or was perhaps intended to be, quite adequate, and many are incorrect, redundant, or slipshod in expression, the following general statement of the doctrine of estoppel by representation emerges: where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence

or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto. This passage was adopted as accurate by Sir Raymond Evershed M.R. in 1955 in *Hopgood v. Brown* (1955) 1 All E.R. 550 at p.559, C.A. Lord Birkenhead succinctly stated the essentials of the doctrine in *Maclaine v. Gatty* (1921) 1 A.C. 376 H.L. at p.386, as follows:

"Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time...."

"Again in *Greenwood v. Martins Bank Limited* (1933) A.C. 51 at p.57, H.L., Lord Tomlin defined the essential factors as (i) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (ii) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; (iii) detriment to such person as a consequence of the act or omission. In *Nippon Menkwa Kabushiki Kaisha v. Dawson's Bank Ltd* (1935), 51 Ll.L.Rep. 147, J.C., Lord Russell of Killowen defines estoppel at p.151 as being "a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or someone on his behalf (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement.""

Counsel for the defendant submitted long extracts from Halsbury's Laws of England 4th Edition Volume 16 Estoppel pages 1010 and 1011, and pages 1068-1091 inclusive. It will be appropriate for us to quote selected passages:-

"1505. Estoppel by matter in pais. Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

The conduct relied upon as amounting to a representation may be negligence. This, also, can only give rise to an estoppel where there is a duty to the person complaining to use due care; and it is further necessary that the neglect should be in the transaction itself which is in dispute, calculated to lead, and in fact leading, as its real cause to the belief created.

"1506. Other matters of estoppel in pais. The estoppel arising from conduct of the kinds here briefly referred to is one of the forms of estoppel by matter in pais, and is probably in modern times what is most usually meant by that expression. It is, however, properly, and was in old times more commonly, used to describe an estoppel arising from acts establishing certain relations of parties....".

"1591. Basis of principle in law and equity. The branch of estoppel most frequently invoked in modern times, and presenting itself in infinite variety, is that form of estoppel in pais which is generally known as estoppel by representation. This form of estoppel in pais is not distinguishable in principle from what was sometimes spoken of in courts of equity as equitable estoppel.

The principle is one equally of law and equity; the only distinctions seem to be that in equity it was apparently applied only to cases where a person had entered into a contract on the faith of the representations made, which might have been made either by a party to the contract or by a third person; and that whereas the common law phrase was that the person who made the representations was not allowed to deny their truth, the phrase of equity was that he must "make his representations good".

"1592. Necessary elements of representation. To form the basis of an estoppel a representation may be made either by statement or by conduct; and conduct includes negligence and silence. Certain general propositions are, however, applicable, in whatever manner the representation is made.

1593. Existing fact. In order to found an estoppel a representation must be of an existing fact, not of a mere intention, nor of a mere belief. In the case of something future there is no occasion to apply the rule as to estoppel, because the party to whom the representation is made has only to say "enter into a contract" and all difficulty is removed. It is true that the state of a man's mind is a fact, and in that sense a man who makes a statement as to his present intention makes a statement of existing fact; but estoppel is a rule of evidence, available, where there is a cause of action, to prevent a person from denying what he has once said, and is not a cause of action. The person who made the statement of intention is to be put in the same position as if it were true, but in no worse a position; and had the statement of intention been true, the maker would have been at liberty to change his mind. The representation of an existing state of things as being of a continuous nature is, however, more than a statement of intention, and a person who has made the representation cannot, after ridding himself of that state of things, take advantage of its removal to the prejudice of another who has acted on the representation.

"1595. Representation must be unambiguous. To found an estoppel a representation must be clear and unambiguous; not necessarily susceptible of only one interpretation, but such as will reasonably be understood by the person

to whom it is made in the sense contended for, and for this purpose the whole of the representation must be looked at. This is merely an application of the old maxim applicable to all estoppels, that they "must be certain to every intent". A statement, true as far as it goes, is not to be taken to mean more than it says....

"1599. Intention that representation should be acted upon. It is not necessary that the representation should be false to the knowledge of the party making it, though in the early cases this appears to have been the law, provided that (1) it is intended to be acted upon in the manner in which it was acted upon, or (2) the person who makes it so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it in that manner. It has been added that the doctrine of estoppel by representation ought not in most cases to be applied unless the representation is such as to amount to the contract or licence of the party making it....

"1600. Representation acted upon, as intended, by party to whom it was made. ....It is not sufficient that the party complaining acted in a manner consistent with the truth of the representation if it appears that he was not influenced by it. If, however, he really has relied upon its truth it is no answer to say that if he had thought about it he must have known that it was untrue; the representation itself was what put him off his guard. If the representation is clear and unequivocal, or at least one which could reasonably be understood to be clear and unequivocal, he is under no obligation to make investigation or inquiry to ascertain whether the representation is true....

It must have been acted on in the manner in which it was meant to be acted on, or in such manner as a reasonable man would suppose it was meant to be acted on....

"1603. Representation by agent. A representation made by an agent will be as effectual for the purpose of estoppel as if it had been made by his principal.

Thus a company may be estopped by representations made by its officer in the ordinary way of business....

"1609. What conduct will create estoppel. The question whether a course of conduct, negligent or otherwise, amounts to a representation, or is such as a reasonable man would take to be a representation meant to be acted on in a certain way, must vary with each particular case. With certain exceptions no general rules can be laid down for answering it....

....Parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up; and, a fortiori, on a somewhat different principle, such a party cannot take advantage of an error to which he has himself contributed....

"1618. Effect of silence or inactivity when duty to speak or act. In the absence of a duty to speak, mere silence or inaction is not such conduct as amounts to a representation....

A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it.

"1620. Duty to use due care. Before anyone can be estopped by a representation inferred from negligent conduct there must be a duty to use due care towards the party misled, or towards the general public of which he is a member....

....Accordingly, if in the course of business a man volunteers a statement upon which another businessman may probably act, it is his duty to take reasonable care that the statement is correct."

The Court is satisfied that estoppel by conduct forms part of the law of Jersey. It was applied by the Court in *Wightman v. Cathcart Properties Limited* (1970) J.J.1433 where the plaintiff, having signed an application to the Housing Committee for consent to occupy a flat, was held to be estopped from seeking to deny that it was his intention to occupy the flat. Estoppel by conduct was also considered in *The Trustees of La Rocque Methodist Chapel -v- States of Jersey Sewerage Board* (1974) J.J.71 and by the Licensing Assembly in *Re Golden Sands Hotel* (1976) J.J.429.

We are satisfied that Mr. Glasson believed that he was doing business with the hotel group owned and controlled by Messrs. Shelton through the defendant. The plaintiff's account was addressed merely to "The Ocean Hotel". Cheques for the work done at the Ocean Hotel had been received drawn on Lords Limited and Sarum Hotel, other members of the group, as well as Ocean Hotel Limited. The first intimation that the plaintiff's account was disputed was contained in a letter from Mr. Shelton, written on Select Hotels Jersey Limited notepaper (with the names of the several subsidiaries printed at the foot) and in which Mr. Shelton said that "...we have no intention of paying...." The plaintiff's reply was addressed "A. Shelton Esq., Select Hotels Jersey Limited". Subsequently, by a single letter the plaintiff sent to "Select Hotels (Jersey)" accounts in respect of the Ocean Hotel, the Sarum Hotel and the Lord's Discotheque. It is true that two cheques subsequently sent to the plaintiff were drawn on the account of Ocean Hotel Limited but the first of these was sent by covering letter again on Select Hotels Jersey Limited notepaper and signed by Mr. Shelton as a Director of that Company.

In our judgment Mr. Shelton by his written words and conduct justified Mr. Glasson in believing that the plaintiff was employed by the defendant. It must have become very clear to Mr. Shelton at an early stage of the correspondence that Mr. Glasson was acting on the erroneous assumption that the defendant had undertaken the liability for his claim. Thus Mr. Shelton was under a duty to speak and his continued silence or inaction and, indeed, continued conduct, amounted to a representation upon which the plaintiff acted



to its prejudice, i.e. incurred costs. Accordingly, the defendant is estopped, as against the plaintiff, from making, or attempting to establish by evidence, the averment that Ocean Hotel Limited is alone liable to the plaintiff. We reject the first head of the defendant's defence.

Mr. Day sought to persuade us that Rule 4/4(2) of the Royal Court Rules, 1982, enabled us to add Ocean Hotel Limited as a defendant and consequently to appoint the defendant to represent both.

Rule 4/4(2) is in the following terms:-

"(2) At any stage of proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants, or one or more of the persons who have the same interest in the proceedings as the defendants, to represent all, or all except one or more, of those persons in the proceedings; and where, in the exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order adding that person as a defendant."

Because we have decided in favour of the plaintiff on the issue of estoppel, it is unnecessary for us to decide this point. Nevertheless, we think it right to say that we reject this submission. Rule 4/4 applies only to representative proceedings. It is an essential condition of a representative action that the persons who are to be represented and the person or persons representing them should have the same interest in the same proceedings (see *Markt & Co. Ltd. -v- Knight S.S. Co. Ltd.* (1910) 2 K.B. 1021, C.A.). The defendant and Ocean Hotel Limited do not have the same interest in these proceedings since only one of them can be liable to the plaintiff. By no stretch of the imagination could the present action be regarded as or converted into representative proceedings.

In the alternative, Mr. Day invited us to apply Rule 6/12(1) in order to substitute Ocean Hotel Limited as defendant.

Rule 6/12(1) is in the following terms:-

"The Court may at any stage of the proceedings allow a plaintiff to amend his claim, or any party to amend his pleading, on such terms as to costs or otherwise as may be just."

Even if the Court has power under Rule 6/12(1) to amend by substituting a new party for a sole defendant, we have no hesitation in saying that, in the exercise of our discretion, we would not have allowed the plaintiff to amend its claim in order to substitute Ocean Hotel Limited for the defendant at such a late stage. Such an amendment should only be allowed if the Court is satisfied that there was a mistake which was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued. In this case there was not a genuine mistake but a deliberate choice of defendant. If we had not found in favour of the plaintiff on the issue of estoppel we would have ordered the action to be dismissed.

We come now to the second head of the defence, i.e. that there was a 'fixed-price' contract between the parties at £2500.

The evidence of Mr. Glasson for the plaintiff can be summarised briefly. The plaintiff had been employed by the Select Hotels Group from December, 1985. The first job, the major one, was at the Ocean Hotel. The plaintiff had been introduced to the work via Mr. Peter Green who was managing the work. The plaintiff had been asked to carry out the whole of the plumbing and heating work at the hotel and had been given a free hand. No estimate of cost was requested. Periodical accounts were submitted. The total cost was in the region of £18,000. Work was also carried out on a similar informal basis at the Marina and Sarum Hotels and at Lord's discotheque. So much for the background. On Saturday, the 5th April, 1986, Mr. Glasson was called out to

the Ocean Hotel because a fault had developed in the hotel's central heating system. He traced the fault to a leak under the car-park. An unusual system existed whereby the manager's and staff accommodation, which was a completely separate building, was served by the same system as the hotel. Mr. Glasson advised that a new and separate heating system be installed for the separate building. He telephoned Mr. Shelton and arranged to meet him at the hotel on the morning of Monday 7th April. At that meeting, in the car park, which lasted only about five minutes, he showed where the fault lay, gave explanations and advice. When asked what it would cost, he replied "Round about three grand" (£3,000). It was a rough idea only of cost and was not an estimate on which to base a contract. He was told to get on with the work. In the event, the plaintiff's bill amounted to £3,795.81; however this included a number of 'extras' including the electrician's account of £259.38, electrical control £54, a new cylinder £92.18 and three radiators for the manager's flat £244.40, so that the work envisaged originally exceeded the 'guesstimate' by only £215.85. Mr. Glasson had never mentioned a figure of £2,500 or any maximum; he had never been asked for a written quotation; he had never visited the staff building and there was no 'fixed-price' contract.

Mr. Shelton's evidence can also be summarised briefly. He had been told that the plaintiff was the most expensive plumber available. Therefore, when he met Mr. Glasson on Monday the 7th April, 1986, he had wanted a maximum price. He had been astounded by the size of the bills on the main hotel job and was not prepared to continue on a materials and labour basis. Mr. Glasson had told him that the work would not cost any more than £2500. It was on that basis that he told Mr. Glasson to go ahead. During the work there was no consultation whatever between them about 'extras' and he would not have consented to the plaintiff employing its own electrician, but the defendant was entitled to have the entire work done, including all alleged 'extras' for £2,500.

Mr. Carlo Allegra, the hotel manager, also gave evidence. He recalled the meeting on Monday, 7th April, 1986. He was standing on the car park, alongside Mr. Shelton, throughout the conversation. He heard Mr. Shelton ask

how much the work would cost and Mr. Glasson replied "Two and a half thousand pounds". Mr. Glasson did not mention the figure of £3,000. He remembered this part of the conversation because he went to tell his wife about the new work that was to be done and told her the price; he was pleased that the work was to be carried out.

It is necessary that we should refer to the burden of proof. In the course of his address Mr. Day submitted that the burden of proof to establish a fixed-price contract rested upon the defendant. When asked for authority to support his submission he said that he would not pursue it. Mr. Renouf submitted that the burden of proof rested on the plaintiff throughout, on the balance of probabilities.

In our view, Mr. Day's submission was the correct one. For ease of reference we turn to Halsbury's Laws of England 4th Edition, Volume 17: Evidence, at paragraph 13:-

".....The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this burden is usually clear from the pleadings, it usually being incumbent upon the plaintiff to prove what he contends. The evidential burden, however, may shift from one party to another as the trial progresses according to the balance of evidence given at any particular stage; this burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side".

And at paragraph 14:-

"The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a

particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues".

And at paragraph 15:-

"The evidential burden will rest initially upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence".

In our judgment, the burden on the plaintiff was to prove that which it contended, i.e. that it had been employed by the defendant to carry out work on a labour and materials basis, that it had done so, that its account for that work amounted to £3,795.81 and that the account was fair and reasonable for the work carried out. The plaintiff satisfied that burden. However, the defendant asserted that a 'fixed-price' contract had been entered into; accordingly the evidential burden shifted. In respect of that particular allegation, the burden lay upon the defendant because the substantiation of that particular allegation was an essential of the defendant's case.

The Court rejects the evidence of Mr. Allegra; there were glaring discrepancies between the evidence of Mr. Allegra and that of Mr. Shelton. It was striking that Mr. Allegra in reality remembered very little of the meeting except that one item that he claimed to recall with great clarity, i.e. the reference to price. The Court finds his evidence to be wholly unreliable.

The Court prefers the evidence of Mr. Glasson to that of Mr. Shelton and accepts his version of the meeting. Therefore, even if the burden of proof were on the plaintiff throughout, the Court would find in favour of the plaintiff, on the balance of probabilities. Even if there was some reference to £2,500 at the meeting, the Court is entirely satisfied that no 'fixed-price' contract was entered into between the parties. Having regard to our finding as

to the burden of proof, the defendant has failed to discharge that burden. There being no 'fixed-price' contract the plaintiff is entitled to be paid its reasonable account for the work carried out on a labour and materials basis, which account was not challenged.

Accordingly we give judgment to the plaintiff in the sum of £3,795.81, less the sum of £2,500 already paid. The defendant will pay the taxed costs of the plaintiff.

## Authorities

referred to at the hearing +  
referred to in the Judgment #

- # + Turner: Estoppel by Representation (3rd Ed'n) p.p. 4-5
- # + Royal Court Rules, 1982, Part 4; Rule 6/12
- # + Halsbury's Laws of England Vol. 16: Estoppel: Para 1505-6  
(4th Ed'n),
  - Para 1591
  - Para 1592 -3
  - Para 1595
  - Para 1599
  - Para 1600
  - Para 1603
  - Para 1609
  - Para 1618
  - Para 1620
  
- # W ightman -v- Cathcart Properties Ltd, (1970) JJ 1433
- # Trustees of La Roque Methodist Chapel -v- States of Jersey Sewerage Board (1976) JJ 429
- # Markland Company Ltd -v- Knight S.S. Company, Ltd, (1910) 2KB 1021, C.A.
- # Halsbury's Laws of England (4th Ed'n), Vol 17: Evidence: paras 13, 14 & 15.