[2016] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2013

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN CARIBBEAN CEMENT COMPANY LIMITED APPELLANT

AND FREIGHT MANAGEMENT LIMITED RESPONDENT

John Vassell QC, Emile Leiba and Jonathan Morgan instructed by DunnCox for the appellant

Gordon Robinson instructed by Winsome Marsh for the respondent

6, 7, 8 October 2015 and 15 January 2016

DUKHARAN JA

[1] I have read the reasons for judgment that have been written by my learned brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 24 January 2013, Sinclair-Haynes J (as she then was) gave judgment for shipping company, Freight Management Limited (FML) against cement manufacturers, Caribbean Cement Company Limited (CCCL). The learned trial judge found that CCCL had contracted FML to transport, by sea, cement from CCCL's plant in Kingston to its

depot in Montego Bay. She ruled that despite FML having provided, at CCCL's request, a vessel to transport the cement, CCCL terminated the contract without having ever used the service. She found that the termination was a breach of contract. The learned trial judge awarded FML damages of US$330,000.00 for loss of use, as FML had lost income from a charter in order to make the vessel available. She also awarded FML interest and costs.

[3] CCCL has appealed from the judgment of Sinclair-Haynes J. It asserts that she was wrong in finding that a contract had been concluded between the parties. CCCL contends that its discussions with FML were subject to a written contract being signed, but there was no such signing. It also asserts that the learned trial judge was wrong to have found that CCCL was prevented, by the way that it later engaged FML, from denying that there was a contract. Finally, CCCL contends that FML had failed to prove that it was entitled to any award of damages and that the learned trial judge was wrong to award it loss of use in the circumstances.

[4] Those are the three main issues to be decided on this appeal. For completeness, however, the grounds of appeal filed by CCCL are set out below:

> "a. The learned trial judge erred in fact and in law in finding by implication that promissory estoppel constitutes a cause of action. Further and in the alternative, that the learned judge erred in finding that the circumstances of the instant case were such as to ground an estoppel.
>
> b. The learned Judge erred in fact and in law in finding the existence of concluded Contracts "A" and "B", in the circumstances of cases involving tender for

services, on the facts which were before the Court below, by:

i. Failing to consider the fundamental principle that 'he who alleges must prove' when the learned Judge failed to take into consideration the fact that the Claimant was unable to say definitively what the final price agreed was, when the commencement date was and how long the contract was to last for; And

ii. Failed to consider that the tender documents signed by the Claimant clearly stated that commencement date of the contract would be confirmed /communicated to them by letter.

c. The learned trial Judge erred in law, in finding that the onus was on the Defendant's Counsel to put to the Claimant's witness a document disclosed by the Claimant [concerning ownership of the Claimant's vessel] which contradicted the evidence of the Claimant's own witness.

d. The learned trial Judge erred in fact and in law, insofar as a determination was made that loss of use was an appropriate head of damages in the circumstances of the case which was before the Court below.

e. Further and in the alternative to Ground d above, the learned judge erred in fact and in law, by awarding damages was made [sic] for loss of use in circumstances where no evidence was put forward to account for the expenses that would have been incurred while using and/or employing the vessel and such evidence could have been readily presented by the Claimant. Additionally, the learned Judge erred in fact and in law, insofar as an award was made for loss of use in the amount of US$396,000 based on FML's claim of US$5,500 for 72 days when the only evidence that was lead [sic] by the Claimant was in relation to the vessel being docked for 60 days."

The tender

[5] The genesis of the dispute was CCCL's public invitation, in August 2002, for tenders to be submitted for providing the shipping services it required. It had traditionally had the cement transported by road on trucks. There was, however, in 2002, some disquiet by the truckers and CCCL wanted to have an alternate means for transporting the product. It invited tenders for shipping services for an estimated 2,600 metric tons of cement per week. The deadline for the submission of tenders was 30 August 2002.

[6] FML and four other proposers submitted tenders. CCCL considered the tenders, and on 22 November 2002, approved FML's tender. The learned trial judge found that CCCL's, then materials manager, Mr Derrick Isaac, had informed FML's managing director, Mr Richard Lake, by telephone, on 23 November 2002, that FML's bid was successful and had been approved. Thereafter, discussions ensued between the parties.

Was a contract concluded between the parties?

[7] One of the questions that the learned trial judge posed for herself was whether CCCL's verbal approval of FML's tender constituted a binding agreement. She did not give a specific answer to that question. She did, however, identify that the decided cases allowed for a consideration of the conduct of contracting parties, in order to determine whether they had concluded an agreement. She then examined the conduct of CCCL and FML between November 2002 and October 2003.

[8] A letter, dated 27 June 2003, written by FML to CCCL, proved pivotal for the learned trial judge. The body of the letter stated:

> "Further to our discussions last week, we would now like to confirm that M/v Island Trader will arrive in Kingston on June 29, 2003 and is scheduled to begin its service to you around July 7. In keeping with our agreement, we will berth at Caribbean Cement Company's wharf. There should be no applicable wharf charges. In preparation to begin service on July 7, we will be conducting some maintenance on the vessel. If during this time it becomes necessary to shift the vessel, we will of course cover any related expenses.
>
> We look forward to commencing our service."

CCCL did not express any dissent to the contents of this letter. In fact, it made no response at all. This letter followed a letter of 17 February 2003, in which FML indicated to CCCL that it was adjusting its charter commitments in order to make the vessel available to provide the service to CCCL. CCCL also remained silent after being sent that letter.

[9] After examining the conduct of the parties between November 2002 and October 2003, the learned trial judge reviewed the assertions in the June letter. She found, at paragraph [101] of her judgment, that "on a balance of probabilities that there was indeed an agreement between the parties". She set out three factors that led her to that conclusion:

> "a. the clear statement of an agreement between the parties for the vessel to...arrive;
>
> b. a stated period for service to commence; and
>
> c. CCCL's silence in the face of those statements."

[10] Mr Vassell QC, on behalf of CCCL, submitted that the learned trial judge's finding was contradictory of the significant amount of documentation involved in the transaction between these parties that, he argued, suggested that a written contract was required. He identified various extracts from the documentation, which he said made it clear that the contract arising from a successful tender, would have been in writing.

[11] Mr Vassell submitted that with that level of formality, and the requirement that the tender be made in writing, accompanied by all that documentation, it could not have been contemplated that the agreement could be concluded by a phone call, as was said to have been done. He submitted that FML recognised that a written contract was required. This, he said, is apparent from FML's letter of 17 January 2003. In that letter, after quoting an increase in price for the service, FML said:

> "If this offer is acceptable, we expect to enter into a formal contract for the provision of the service."

[12] Mr Robinson, on behalf of FML, submitted that the invitation to tender did not specify the manner of acceptance of any tender. He argued that the term used in the form of tender indicating that there would be "written acceptance of [its] tender", was not an indication that there would be a written contract but rather a trigger for the time that work was to begin under the contract. He pointed out that the entire sentence in the tender form supported that interpretation. It stated:

> "I/we also understand that the date for the commencement of the works shall be no longer than 14 days of written acceptance of my/our Tender."

[13] Mr Robinson also responded to Mr Vassell's reliance on the inclusion of the form of contract in the documentation and learned Queen's Counsel's submission in respect of the term used in the form of contract. Mr Robinson submitted that the inclusion of the form of contract with the invitation to tender was only to enable proposers to know the terms of the contract into which they were entering. It did not, he submitted, stipulate a method of acceptance.

[14] Mr Robinson's submissions on this point cannot withstand scrutiny. The invitation for tenders contained a significant amount of documentation. The documents included a form of contract setting out the terms by which CCCL and the successful proposer would be bound. The invitation required proposers to submit a tender form accompanied by at least 10 documents supporting the competency of the proposer to supply the service. There are several places in the documentation, which signal that there was to have been a written contract. These are as follows:

> a. The requirement at section seven of the invitation to tender, that all relevant permits for shipping and offloading of the cargo, should "be in place **before the contract is signed**"; (Emphasis supplied)
>
> b. The statement in the stipulated tender form, which FML signed indicating that it understood that there would have been "**written acceptance of [its] tender**"; (Emphasis supplied)

c. The stipulated signed contract agreement form, signed, sealed and submitted by FML with its tender, which referred to a number of documents including the "The General Conditions of Contract". The contract agreement form commenced with the following premises, which contained blanks that were filled in by FML:

> "This Agreement made the *29th* day of *August*, 2002 between **Caribbean Cement Company Ltd**, (hereinafter "the Employer") of the one part and *Freight Management Limited* (hereinafter "the Contractor) of the other part.
>
> WHEREAS the Employer is desirous that certain Services should be provided by the Contractor, and has accepted a bid for those Services in the sum of ($*432.81*) per metric ton for the Transportation of Cement by Sea from Rockfort, Kingston to Montego Bay, St. James." (Bold type as per original. Italics represent handwritten inserts by FML.)

d. The general conditions of contract, referred to above, which included three specific references to a written contract:

> i. a definition of "The Contract", as , "the agreement entered into between the Employer and the Contractor, **as recorded in the Contract Form signed by the parties**". (Emphasis supplied)
>
> ii. a requirement in clause 5, for the successful proposer to produce a performance bond "before the signing of the Contract".

iii. a requirement in clause 13.1 that, subject to a specific exception, "no variation in or modification of the terms of the Contract shall be made **except by written amendment signed by the parties**". (Emphasis supplied)

The documentation, including the various clauses cited above, invalidate the base of Mr Robinson's submissions on this point. They do not allow for an oral acceptance of FML's tender. Indeed, the term "written acceptance of my/our Tender", could have no other interpretation but that FML expected that the contract would, at least, have been brought about by a document accepting FML's offer contained in its written tender.

[15] The written correspondence up to as late as 17 January 2003 confirms FML's expectation that there would have been a formal contract. The first letter written by FML to CCCL was on that date. The body of the letter stated as follows:

> "Pursuant to your request on 16th January 2003, we have adjusted our price for provision of services in regards to the above captioned tender. **The price is now J$460.00 based on the rate of exchange to the USD and the price of oil as at today's date.**
>
> If this offer is acceptable, we expect to enter into a formal contract for the provision of the service." (Emphasis as in original)

[16] Where Mr Robinson is correct in his submissions is in his stress that the subsequent conduct of the parties supported the learned trial judge's finding that there was a concluded contract. The learned trial judge asked herself the critical question, which is whether there was a contract concluded between the parties. She did this at

paragraph [21] of her judgment: "[t]he central issue is whether there was a concluded contract". She answered that question in the affirmative. She said at paragraph [101]:

> "...This court finds on a balance of probabilities that there was indeed an agreement between the parties as stated".

Based on the conduct of the parties after 23 November 2002, she was, with respect, correct. It may not have been the contract contemplated by the documentation set out in the tender but the conduct of these parties showed that they had reached an agreement, by which they were legally bound.

[17] It is in this context that the letters written by FML to CCCL become relevant. It was a characteristic feature of the relations between the parties that although they held meetings in which discussions took place, only FML sought to commit to written correspondence, the results of the discussions. It did so mainly by three letters addressed to CCCL over the course of the eight months following receipt of the information from CCCL regarding its tender. The learned trial judge found that CCCL's failure to respond to FML's assertions in those letters was an acceptance of the accuracy of the record contained in those letters.

[18] It is important to note in each of those letters, the assertions made by FML, as to CCCL's requests and as to what the parties had agreed. The first letter is that of 17 January 2003, in which FML asserts that CCCL requested a price adjustment. It has been quoted above. As would become its norm, CCCL did not respond to that letter. It did not say that it did not request a price adjustment. It did not say that the increase in the price from $432.81 to $460.00 was unacceptable. Nor did it say that the bases

of the new price required further consideration. Mr Lake testified, during cross-examination, that CCCL accepted the proposed price on each occasion. CCCL did, however, continue to have discussions with FML.

[19] The second letter was dated 17 February 2003. It alluded to the further discussions between the parties and hinted at CCCL's request for a vessel to be provided quickly. The letter stated, in part:

> "Further to our discussions regarding chartering a vessel to provide marine transportation for your product, we would like to report the following developments.
>
> We have utilized the services of a broker to source a suitable vessel for the service. However, this has been extremely difficult as roll-on roll-off vessels are in high demand due to the threat of war.
>
> **We have asked the charterers of our vessel, the Island Trader, to reduce our charter contract, and the vessel will be available on or before 10th May 2003. We expect to begin our service to you at that time.** During our meetings, we also indicated that we would like to offer…warehouse space for rental…." (Emphasis supplied)

CCCL did not demur. It did not say that there was no contract. It did not say that no vessel should be secured until there was a written contract in place. It maintained written "silence". It, however, continued to have discussions with FML.

[20] The third letter is that of 27 June 2003. That letter indicated the expected date of the arrival of the vessel. It has been quoted above but for convenience is reproduced here:

> "Further to our discussions last week, we would now like to confirm that M/v Island Trader will arrive in Kingston on June 29, 2003 and is scheduled to begin its service to you

> around July 7. In keeping with our agreement, we will berth at Caribbean Cement Company's wharf. There should be no applicable wharf charges. In preparation to begin service on July 7, we will be conducting some maintenance on the vessel. If during this time it becomes necessary to shift the vessel, we will of course cover any related expenses.
>
> We look forward to commencing our service."

CCCL did not challenge any of the assertions in this letter or indicate that it would not be utilising the services of the vessel.

[21] Mr Vassell submitted that there was no contract concluded because there was no agreement on the critical issue of the price for the service. That assertion runs contrary to Mr Lake's evidence that FML's pricing was accepted. Mr Lake is recorded, at page 17 of the notes of evidence, as testifying, in answer to a suggestion that there was no agreed price, "No I disagree- There was an agreed price on two occasions". At page 18 of the notes of evidence he is recorded as saying:

> "There were several discussions regarding the logistics of transporting the cement and there was only one request for us to amend the price to update for the exchange rate and this was done and the price was accepted."

[22] The learned trial judge accepted Mr Lake's testimony that CCCL had requested FML to adjust its pricing. She found that "CCCL apparently accepted the change in light of its silence in the face of the letter [of 17 January 2003, communicating the price adjustment] and its conduct [thereafter]" (see paragraph [120]). She rejected as unreliable, the evidence of Messrs Isaac and Spencer.

[23] Learned Queen's Counsel also submitted that since the invitation to tender and the tender document itself contemplated a written acceptance of the tender, there could be no waiver of that requirement. He argued that an oral acceptance would not have been equally efficacious or better than a written acceptance. He relied on a number of extracts from the 13th edition of The Law of Contract by Peel, in support of his submission.

[24] The learned author states at paragraph 2-040 that if an offeror specifies that only a particular method of acceptance is acceptable then no other method of acceptance will bind him. Mr Vassell is not on good ground in asserting that there could have been no contract concluded between CCCL and FML in these circumstances. The reason is that the documentation does not prevent any other mode of acceptance and there are circumstances that allow for waiver of a prescribed method of acceptance.

[25] The learned author goes on to state, at paragraph 2-042, that the requirement of a prescribed method may be waived. One of the circumstances in which a waiver will be allowed is where the offer is made on a form of tender provided by the offeree (which in this case, is CCCL). The learned editor opined that in those circumstances the offeree may elect to accept in another way and that "this will often be evidence that he has waived the stipulation" for a specified method of acceptance. The paragraph states in part:

> "Stipulations as to the mode of acceptance may also be made for the protection and benefit of the offeree, e.g. where a customer submits a proposal to enter into a hire-purchase agreement; or where an offer is made on a form of tender provided by the offeree. If the offeree accepts in some

> other way, this will often be evidence that he has waived the stipulation; and it is submitted that the acceptance ought to be treated as effective unless it can be shown that failure to use the stipulated mode has prejudiced the offeror."

[26] **Robophone Facilities Ltd v Blank** [1966] 1 WLR 1423; [1966] 3 All ER 128 is cited by the learned editor in support of that position. In that case, as in the present case, it was the offeree who had prepared the form of offer for use by offerors. The documentation stipulated that the contract should have been signed by both the offeror and the offeree before it would have effect. An offer was made using the prescribed form of offer. The offeree took a step required by the contract although it had not yet signed the contract document. The step taken involved the offeror's positive participation. The offeror later sought to withdraw the offer and the offeree sued for damages. The court found that the offeree had accepted the offer by proceeding with the prescribed step. It held that the offeror had received notice of the acceptance and was therefore bound by the contract.

[27] In the circumstances, CCCL could have accepted FML's offer by an oral representation, and did so. It proceeded to negotiate with FML about, adjusting the price, securing a vessel and a timeline for the vessel to arrive. The learned trial judge was, therefore, correct in finding that a contract existed between the parties. It came into being by the conduct of the parties after 23 November 2002.

Estoppel

[28] The next issue is whether CCCL, by its conduct, is prevented, by the principle of law, known as estoppel, from denying that there was a contract with FML, or that it is

bound by the requests that it made to FML to provide a vessel to transport the cement. There is more than one type of estoppel in law, but in the context of this case, the one that falls to be discussed is "promissory estoppel".

[29] The learned trial judge found that, by virtue of its conduct, CCCL was estopped from denying, because of the absence of its signature on the form of contract, that a contract existed and that it had accepted the altered price.

[30] CCCL argues that an estoppel only arises if there is no contract between the parties. It further contends that FML cannot rely on promissory estoppel as a cause of action. It asserts, therefore, that the learned trial judge was wrong in her findings, as she did not even consider whether the estoppel was validly pleaded as a cause of action.

[31] Mr Vassell submitted that the law in Jamaica was in line with that in England that promissory estoppel could not, by itself, constitute a cause of action. Mr Robinson argued that it was high time that this jurisdiction adopted the modern approach to promissory estoppel that is used in Australia.

[32] The principle of promissory estoppel was considered by this court in **Manhertz and another v Island Life Insurance Company Ltd** SCCA No 24/2006 (delivered on 27 June 2008). F Smith JA set out the circumstances required for promissory estoppel to operate. He said at paragraph 32 of his judgment:

> "The principle of promissory estoppel usually arises where one party to a contract grants to the other party a concession, not supported by consideration, that he will not

> enforce his rights or a particular right under the contract....Promissory estoppel may apply even though the representation is of a future conduct."

[33] Although the submissions as to whether the English or the Australian position should prevail occupied a significant part of learned counsel's submissions on both sides, the issue, with respect, need not detain the court in this case. This is because the learned trial judge did not rely on promissory estoppel by itself in finding CCCL liable.

[34] It is true that FML sought to rely on the principle as an alternative to the cause of action for breach of contract. That, however, was not the approach that the learned trial judge took. She found that there was a contract between the parties and that CCCL was estopped from denying its existence. She said at paragraph [137]:

> "Having accepted as true the contents of the unanswered letters of 17th January 2003 in which FML claimed to have adjusted its price at the request of CCCL and letter dated 17th February 2003 in which FML informed CCCL that it had reduced its charter to make the vessel available, **CCCL by its conduct would have led FML to believe that its signature was not required** and it had accepted the altered price. **By its conduct, CCCL is estopped both at common law and in equity from resiling from that position**." (Emphasis supplied)

It is implicit in that portion of her judgment that the learned trial judge was stating that a signature was not required for the existence of a contract. In that case, the principle of promissory estoppel would be used to support the claim for breach of contract. There is no dispute that such a use is permissible. In **Combe v Combe** [1951] 2 KB

215 at page 220, Lord Denning MR said that promissory estoppel "may be a part of a cause of action, but not a cause of action in itself".

[35] The learned trial judge was entitled to make the conclusion in law that she did.

Damages

[36] Having found that there was a contract between the parties, the learned trial judge was entitled to find that CCCL repudiated the contract by informing FML's representative that it "no longer intends to pursue the transportation of cement by sea" (FML's letter dated 6 October 2003). FML accepted the repudiation. It wrote to CCCL's general manager by letter of 17 October 2003 indicating that it had sold the vessel. It indicated in that letter, however, that it required compensation for the breach of the contract.

[37] The question of the damages payable in this case, was no less difficult than the issue of liability. The evidence concerning damages was very sparse and the analysis of FML's loss was made more difficult by the fact that there was no course of dealing between the parties, as CCCL never used FML's services.

[38] The learned trial judge found that there was an agreement for FML to provide the vessel in order to commence the service. She found that CCCL understood that in order to provide the vessel, FML had to withdraw it from a charter arrangement that was previously in place at a rate of US$5,500.00 per day. She found that, in declining to use the vessel, CCCL had to compensate FML for having provided it.

[39] There were, however, difficulties in determining what were the expenses involved in providing the charter service. The learned trial judge said that she just had to do her best in the circumstances. FML claimed loss of use for 72 days at US$5,500.00 per day. Mr Lake's evidence, however, spoke to a period of 60 days. The learned trial judge accepted the rate of US$5,500.00. She did, however, make an error concerning the period. Although she spoke to a claim based on 60 days loss of use, she, in fact, arrived at a result based on a claim for 72 days loss of use. The product of the application of the 72 days was US$396,000.00. The learned trial judge reduced the product by one-sixth. She explained her reduction at paragraph [152] of her judgment:

> "I consider reducing the figure claimed by one sixth as reasonable to allow for expenses had the vessel undertaken its voyage. The figure of US$396,000.00 is therefore reduced by one sixth which equals the sum of $330,000.00."

In the end, the effect of her calculation was as follows:

US$5,500.00 x 72 days = US$396,000.00 – US$66,000.00 = US$330,000.00

[40] Mr Vassell submitted that FML had failed to prove its loss and that the learned judge was wrong in awarding it loss of use for its vessel. He argued this point on a number of bases.

[41] One of the issues about which learned Queen's Counsel complained was that the learned trial judge erred in finding that FML had incurred a loss by providing a vessel. He argued that, as there was a document, exhibited during the trial, that showed that an entity other than FML was the owner of the vessel, the learned trial judge erred in accepting that FML was the owner of that vessel. He submitted that the learned trial

judge was wrong in asserting that it was for CCCL to have contested, in cross-examination, FML's claim to title for the vessel, and not to attempt to do so in final submissions. Mr Vassell submitted that CCCL was entitled to rely, as a matter of law, on FML having failed to establish title to the vessel, and to submit that the failure disentitled it to damages for loss of income from its use, or lack thereof.

[42] Another basis on which the learned trial judge erred, Mr Vassell argued, is in her calculation of the damages. In the face of the learned trial judge's finding that there was a contract that stipulated what FML's rights were under that contract, he submitted, she failed to measure the damages according to that contract. Learned Queen's Counsel argued that if there was a breach of contract, the damages would have to be measured by the terms of the contract.

[43] Mr Vassell submitted that there was a more appropriate approach to the task of assessing the damages payable. There were, however, a fair number of assumptions forming part of Mr Vassell's approach. Firstly, he pointed out that there was no guarantee that the weekly shipments would have been 2,600 metric tons. He submitted that the figure should have been discounted by a third to account for variables. It was expressly stated in the invitation for tender, he stated, that CCCL would "not be responsible for any dead freight cost", meaning that it had no responsibility to fill the vessel's freight capacity. There was also a provision, he pointed out, for the contract to be terminated on 12 weeks notice.

[44] Mr Vassell further submitted that the learned trial judge grossly underestimated the expenses involved in providing service. He submitted that instead of assessing expenses using a rate of one-sixth of income, a more realistic rate would have been a half. By learned Queen's Counsel's approach, the calculation of the damages due to FML, assuming CCCL's liability, would be along the following lines:

a. The weekly shipment would have been 2,600 x 2/3 = 1733.33 metric tonnes
b. 1733.33 x J$432.81 (tender price) = J$750,202.56
c. J$750,202.56 x 12 weeks (stipulated notice period) = J$9,002,430.69
d. J$9,002,430.69 ÷ 2 (to account for expenses) = J$4,501,215.34

[45] He argued that the learned trial judge having adopted the wrong approach, it was open to this court to:

a. find that FML had failed to prove its loss and therefore should recover nothing;
b. do the best it can with the available evidence; or
c. send the claim back to the Supreme Court for the assessment of the damages.

[46] Mr Robinson argued that the award of damages should stand. On the issue of the proof of title, he submitted that it was a settled principle that any evidence intended to be used in submissions to contradict a witness should "first be put to the witness for the purpose of giving the witness an opportunity to explain" (paragraph 9 of written submissions). He argued that the title document was not so used in this case.

[47] On the issue of the calculation of damages, Mr Robinson submitted that CCCL had not pleaded or proved any other method of calculating the damages and was not

entitled to turn up at the trial and assert principles by which the damages should be assessed. He argued that rule 10.5 of the Civil Procedure Rules requires a defendant, such as CCCL, to set out the case on which it intends to rely at the trial. Learned counsel accepted that CCCL had stated a basis for its denial that FML had suffered the loss that it claimed. He argued that it did not, however, plead any basis for the assumptions, used by Mr Vassell, of reduced cargoes and increased expenses. Neither, learned counsel submitted, was any evidence led to support those assumptions.

[48] In assessing these competing submissions, it must be noted that the general aim of analysing the issue of damages is to secure for the wronged party an award that will put him in the position, as far as money will achieve, that he would have been had the wrong not been committed. Two types of loss may entitle a wronged party to damages. The first is called "expectation loss", that is, the failure to secure the profit that he would have made if, as in a case of contract, the contract had been performed. The second type of loss is called "reliance loss", that is, the expenditure that the wronged party incurred in preparing, in the case of contract, to perform his end of the bargain. The wronged party is entitled to choose either approach in his claim for damages.

[49] In **Anglia Television Ltd v Reed** [1971] 3 All ER 690, the English Court of Appeal held that a plaintiff was entitled to elect to claim for his wasted expenditure by reason of breach of contract, instead of through his loss of profits. The court made it clear that that plaintiff could not claim both types of loss and must elect between them.

[50] In this case, the terms expectation loss and reliance loss were not used in the court below or in the arguments before this court. It is apparent, however, that the learned trial judge assessed the damages on the reliance loss basis, while Mr Vassell had advocated that, if damages were to be awarded, they should be calculated by the expectation loss method. Mr Vassell complained that it was on the morning of the trial that FML altered its pleadings to claim loss of use of the vessel.

[51] Before assessing whether the reliance method could properly be used, the question of the title to the vessel will be assessed.

[52] The question of FML's title to the vessel is more appropriately addressed as an issue affecting damages. It concerns the issue of whether FML is entitled to damages. Further, the question of the proof of title to the vessel is grounded more in procedure than in the substantive law of damages.

[53] Mr Lake testified that FML was the owner of the vessel. The learned trial judge noted that it was only in final submissions that counsel appearing before her, for CCCL, raised the issue of title. In raising that issue, counsel submitted to the learned trial judge that there was documentary evidence that the vessel was "registered in the name of Caribbean Resources which contradicts the evidence of Richard Lake, that the [vessel] has been owned by the FML for seven years" (paragraph 142 of the judgment). She ruled that it was unfair not to have used that document to challenge Mr Lake in cross-examination on this point. She therefore relied on Mr Lake's evidence, which she had generally accepted as being reliable. The learned trial judge relied on **Allied**

Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation 70 FLR 447, at page 462, in support of her ruling.

[54] The general rule is that the party cross–examining a witness must put his case to the witness or put to the witness anything that contradicts the witness' evidence. This is to give the witness an opportunity to respond or explain the contradiction, if he can. This is because there might be a plausible or reasonable explanation for the contradiction. The rule was explained in **Allied Pastoral Holdings** by Hunt J, at page 462 of the report. He said:

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v. Dunn* (1894) 6 R. 67."

The rule is not inflexible, as there may be circumstances in which the witness has had prior notice that his testimony on the point is not accepted.

[55] The learned trial judge in these circumstances found, in essence, that counsel had a duty, during cross-examination, to challenge Mr Lake on this issue, if he intended

to ask the court to rely on the document. There was no prior indication that FML's claim to ownership of the vessel was challenged, although it was put to strict proof of its loss. There was nothing in the instant case that would warrant a departure from the general rule. In the absence of cross-examination on the point, the judge was entitled to rely on the evidence of Mr Lake, whom she found to be a credible witness, that the vessel was owned by FML.

[56] On the issue of the calculation of the damages, Mr Robinson's submissions fail to take into account the principle that the denial of FML's claim of entitlement to damages, placed the onus on FML to prove its loss. The principle is that he who alleges must prove. CCCL was entitled to complain about the type of evidence produced by FML in proof of its loss. It is disappointing that a company, claiming loss of that magnitude, based on international transactions, only produced oral evidence of its loss, and in particular, only stated the amount of income lost without any accounting for the cost involved in earning that income.

[57] Another difficulty with Mr Robinson's submission is his assertion that the deduction by the learned trial judge for expenses is correct because only the cost of the fuel used in the transportation of the cargo would be attributable to any particular trip. According to learned counsel, the costs of the crew and other overheads would have had to have been incurred in any event. The argument is patently flawed. The vessel owner operates a business and the income from its operation is used to defray the costs of earning that income. If only the cost of fuel was considered in the expense for

a particular trip, what would be the source of the income to pay for the salaries and overheads? A less blinkered approach is required.

[58] Mr Robinson's comments concerning CCCL's calculations of FML's loss, are, however, valid. Those calculations do not provide a satisfactory way of assessing FML's loss. Mr Vassell's criticism of the learned trial judge's approach is only valid if, her finding was that the contract was based on the agreement contemplated by the invitation to tender. If however, the contract was based on CCCL's request to provide a vessel and FML's acceding to that request, the force of Mr Vassell's submission would be blunted. If FML provided the vessel after informing CCCL that it had to take a particular step, at a particular cost, to meet CCCL's request, and thereafter CCCL made no use of the vessel, it would not be unreasonable to order CCCL to compensate FML for the loss that it incurred. The learned trial judge expressly included the conduct of the parties as informing her decision that there was a contract concluded between them. It is apparent that the reliance loss approach was what the learned trial judge applied in assessing the damages.

[59] The other difficulty with Mr Vassell's approach, as mentioned above, are the number of assumptions that support it. The assumption of smaller shipments does not have any grounding in the evidence.

[60] The learned trial judge stated, in assessing the damages, that she was doing the best she could with the evidence that she had. Unfortunately, the evidence was almost

non-existent. Mr Vassell's criticism of the deduction of one-sixth of the income as representing expenses merits further consideration. That will be done below.

[61] What course should an appellate court take in circumstances such as these? An important principle to be considered is that set out in **Flint v Lovell** [1935] 1 KB 354. In that case, Greer LJ stated that the appellate court is reluctant to disturb an assessment of damages by the lower court and will only do so if there is an incorrect principle of law or an entirely erroneous assessment of those damages. He said at page 360:

> "I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

The principle stated in **Flint v Lovell** was adopted by this court in **Robinson and Co v Lawrence** (1969) 11 JLR 450; (1969) 15 WIR 349.

[62] Mr Vassell has correctly outlined the three options open to the court, in the event that it decides that the learned trial judge has erred in respect of the issue of damages. They are, firstly, to refuse any award of damages on the basis of the absence of proof of loss; secondly, to return the case to the Supreme Court for a fresh assessment of damages to be conducted; or, thirdly, to conduct its own assessment of damages.

[63] The second option may be quickly dismissed. In the absence of appropriate evidence, it would be wrong to return the case to the Supreme Court for an assessment of damages. That would have the effect of giving FML an opportunity to bolster a claim, which it failed to justify fully at its first opportunity. In addition, it would not be in the best interest of justice to remit the case for an assessment of damages, as, on the evidence, or lack thereof, this court is in as good a position as any judge at first instance, to assess the damages.

[64] The first and third options require greater analysis. The principles involved in each overlap to a large degree and may be considered together. There is a principle that special damages, such as the damages claimed by FML, must be specifically pleaded and strictly proved. This court has accepted that principle in many cases, including **Robinson and Co and Another v Lawrence**. In that case, this court set aside an award of special damages on the basis that the claimant had not proved his claim.

[65] In **Hepburn Harris v Carlton Walker** SCCA No 40/1990 (delivered 10 December 1990), Rowe P stated the manner in which the principle regarding special damages should be applied. He said at page 3 of the judgment:

> "plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned."

[66] Exceptions to the principle are allowed where it would be unrealistic to require a claimant to have records to substantiate a claim for special damages. This was acknowledged in **Walters v Mitchell** (1992) 29 JLR 173, where this court accepted that in certain cases the principle could not properly apply. This included cases, where people, being involved in "a small scale of trading...do not engage themselves in the keeping of books of accounts. They buy, and replenish their stock from each day's transaction. They pay their domestic bills from the day's sale. They provide their children with lunch money and bus fares from the day's sales without regard to accounting" (page 176D). Wolfe JA (Ag), as he then was, stated that such persons could not be expected to prove their "loss of earnings with the mathematical precision of a well organized corporation" (page 176B).

[67] FML could not claim to fall within the category of persons contemplated by the court in **Walters**. It is expected that a corporation, especially one in an enterprise subject to regulation, such as shipping is, would necessarily have records of its income and expenditure to allow it to demonstrate its loss with "mathematical precision".

[68] There is, therefore, much merit in Mr Vassell's submission that FML should be denied any award of damages. Such a result, however, would not meet the justice of the case. The evidence suggests that CCCL used the threat of shipping, as an alternative mode of transportation for its product, as a bargaining chip in its negotiations with the truckers who normally provided that service. In the meantime, it caused FML to incur expense, and kept it in suspense in its hope of earning an income.

CCCL should be required to provide some compensation to FML. For that reason, the first option suggested by Mr Vassell should not be the route followed.

[69] There is an, albeit slender, basis for adopting the third option, of this court conducting its own assessment. The English Court of Appeal had been placed in a similar position in **Ashcroft v Curtin** [1971] 3 All ER 1208. In that case, an engineer who was the principal of a limited liability company, in which all the shares were held by his family, was injured in a motor vehicle crash. He claimed that the injury curtailed his input to the business, and caused the company to suffer loss. The Court of Appeal found that he had failed to prove the loss, partly because the "the records kept were of a rudimentary nature and the accounts were found to be largely unreliable". Submissions on behalf of the tortfeasor were very similar to those advanced by Mr Vassell, in this regard. Nonetheless, Edmund Davies LJ found that the justice of the case required that there should be a level of compensation. He said at page 1213:

> "My greatest difficulty is in quantifying the loss. Counsel for the defendant submits that the task *cannot* be performed and that the failure should result in a 'nil' award on this aspect of the case. Having rejected the accounts as 'largely unreliable', the learned judge is said to have 'plucked out of the air' the figure of £1,500 as representing the company's annual profitability loss. Counsel says that it cannot be justified and that the consequent award of £10,500 cannot stand. No figure, so it is urged, can replace it.
>
> **That is a conclusion to which I have been frankly loth to arrive, for it does not seem to me to meet the justice of the case**. It means that, in the words of Holroyd Pearce LJ in *Daniels v Jones* ([1961] 3 All ER 24 at 28, [1961] 1 WLR 1103 at 1109), 'arithmetic has failed to provide the answer which commonsense demands'. Furthermore, it is a conclusion which counsel for the plaintiff

> submits is not inescapable." (Italics as in original, bold emphasis supplied)

[70] Edmund Davies LJ found that the court was obliged to set aside the award that had been made at first instance. He, however, arrived at a solution, which he found, although not completely satisfactory, was more in accordance with the justice of the case. He said at page 1214:

> "So approaching the matter, the unsatisfactory conclusion to which I have felt myself driven is that, while the probability is that some loss of profitability resulted from the plaintiff's accident, it is quite impossible to quantify it. But I personally regard it as improbable that the loss would be anything like in the region of £10,500 [the amount awarded at first instance].
> ...
>
> His capacity to engage himself outside the company, finding the sort of work for which he has been trained since he was a boy of 14, has been virtually extinguished. I agree that the risk of his being placed in such a predicament is not great. But it does exist, and I think it justifies some award being made in respect of it. Doing the best I can, and fully realising that I too am rendering myself liable to be attacked for simply 'plucking a figure from the air', I think the proper compensation under this head is £2,500."

[71] In adopting this third option, it must first be said that apart from her slip concerning the number of days said to have been used in the calculations, the learned trial judge erred in that she underestimated the level of expenses involved in earning the income. A rudimentary analysis validates this finding. A rate of one-sixth of the accepted daily income of US$5,500.00, converts to US$916.67 per day. Although there is no evidence as to salaries, other overheads, fuel, docking and any other charges that

FML would have had to incur in earning that income, it seems that the latter figure is, in the circumstances, paltry indeed.

[72] The learned trial judge's assessment of the damages cannot, therefore, stand. Having rejected the other two options available to it, this court should do the best it can in assessing the damages on the available evidence, which is less than adequate.

[73] Although with the reticence that Edmund Davies LJ experienced in **Ashcroft v Curtain**, it would be more appropriate to accept the rate of one-half that Mr Vassell has submitted as representing expenses. That figure converts to US$2,750.00 per day, leaving an equivalent figure as profit on the charter. It is more in line with commercial reality although, the majority of businesspeople would be ecstatic with such a rate of profit. The damages to be awarded, based on the above assessment should be as follows:

US$5,500.00 x 60 days = US$330,000.00 – US$165,000.00 = US$165,000.00

This approach should be regarded as relating to the facts of this case and should not be taken to be an acceptance of claimants disregarding the principle of strictly proving their losses.

Summary and conclusion

[74] Although the invitation to tender and the tender documents indicated that a written contract was required in order to bind the parties, the parties could have waived that requirement. The waiver could have been indicated expressly in writing or by conduct. Once there is evidence of such a waiver, therefore, whether by the conduct or

a subsequent agreement, a court would be entitled to find that despite the previous requirement, a contract was concluded between the parties.

[75] The learned trial judge correctly found that the conduct of the parties, after CCCL indicated to FML that it was the successful bidder, suggested that they considered themselves as parties to a contract. CCCL for its part did not refute any of the assertions made by FML in its letters to CCCL. Those letters referred to meetings between the representatives of the two parties and gave updates as to the actions taken as a result of the stated discussions. The two letters of note concerned the change in the tender price and the vessel being made available. Both steps having been taken, according to the letters, at CCCL's request.

[76] Although in this jurisdiction, the authorities indicate that promissory estoppel may not be used as a cause of action, it may, however, be used to support a cause of action. The learned judge having found on the facts that there was a contract between the parties, was entitled to also find that CCCL was estopped, in the circumstances, from asserting that there was no contract for the supply of the shipping service. The learned judge, therefore, did not treat promissory estoppel as the cause of action. Instead, she accepted that it could have been used to support FML's case.

[77] The usual measure of damages for breach of contract is for the loss of the bargain. A party is, however, entitled to claim, in the alternative, damages based on the profit that he expected to make, or the expense that he incurred in reliance on the performance of the contract. He may choose the method that is best likely to put him

in the position he would have been in had the contract been performed or alternatively had never been made. FML was therefore entitled to claim damages on the reliance basis and the learned trial judge was entitled to apply that basis in her assessment of the damages.

[78] FML, however, failed to heed the guidance, provided by the decided cases, that it should strictly prove its loss. For its failure, it would normally be denied an award of damages. Nonetheless, the justice of the case, based on the peculiar facts of the case, required that it should be awarded some damages. In her assessment of those damages, the learned trial judge erred in underestimating the costs that FML would have incurred in earning the income. The rate of one-sixth that she used should, therefore, be set aside, and a more realistic rate of one-half should be substituted.

Costs

[79] The award for costs in this appeal should recognise that CCCL has been successful in respect of its appeal against the order for damages. The issue of damages could be said to have accounted for one-third of the efforts of the parties. The costs awarded should reflect that fact. FML, being the overall victor, should have two-thirds of its costs of the appeal. The award for costs at first instance should stand.

P WILLIAMS JA (AG)

[80] I too have read in draft the judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

DUKHARAN JA

ORDER

(1) The appeal is allowed in part.

(2) The judgment of Sinclair-Haynes J with respect to liability is affirmed.

(3) The award of damages in the sum of US$330,000.00 is set aside and a sum of US$165,000.00 substituted therefor.

(4) All other orders of the learned trial judge should stand.

(5) The respondent shall have two-thirds of its costs of the appeal. Such costs are to be taxed if not agreed.