[2016] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 15/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN THOMAS HAMILTON & ASSOCIATES LIMITED APPELLANT

AND DIGICEL (JAMAICA) (MOSSELL) LIMITED (T/A DIGICEL) RESPONDENT

Keith Bishop and Andrew Graham instructed by Bishop & Partners for the appellant

Maurice Manning and Miss Michelle Phillips instructed by Nunes Scholefield Deleon & Co for the respondent

15, 16 December 2015 and 29 April 2016

PHILLIPS JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] On 26 October 2011, King J dismissed Thomas Hamilton & Associates Limited's, (the appellant) claim against Digicel (Jamaica) (Mossel) Limited, trading as Digicel, (the

respondent), for wrongful and premature termination of a service contract, and awarded costs to the respondent to be agreed or taxed. The learned judge also non-suited the respondent in respect of its counter claim but refused to award the appellant costs on the respondent's counter claim. This is an appeal from that order.

Background

[3] By virtue of two written contracts, the appellant, an electrical engineering contractor agreed with the respondent, a telecommunications company which provides cellular telephone services to Jamaica and other Caribbean countries to provide routine maintenance and refueling of all its generator sets, at various cell sites in Jamaica. The duration of each contract was for one year. The first contract commenced on 1 June 2004 and expired on 31 March 2005. The second contract was commenced on 1 April 2005. It was however signed in June 2005 and expired on 31 March 2006.

[4] At the expiration of the first contract, and prior to the signing of the second contract, the appellant continued to provide maintenance and refueling services for the respondent's generators and was duly remunerated. Upon the expiration of the second contract on 31 March 2006, the appellant continued to maintain the respondent's generators until 29 May 2006, when by way of letter dated 29 May 2006, the respondent ended that arrangement. The termination became effective at 1 June 2006.

[5] Its contract was however not renewed. There is an irreconcilable divergence in the evidence for the appellant and the respondent as to the reason the appellant

continued to service the respondent's generators after the expiration of the second contract.

The appellant's version

[6] The appellant claims that it had a legitimate expectation that it would remain in the contract for at least another year. According to the appellant, prior to the expiration of the contract, it organized to remove its equipment and workmen from the respondent's property, but was "encouraged" by Mr Lincoln Brown, the respondent's electro-mechanical manager, who was acting as its agent to continue to perform the service contract.

[7] Sometime in March 2006, at a meeting, with the respondent and the appellant's agent, Mr Thomas Hamilton, Mr Hamilton informed the respondent that the appellant had received information that the appellant's service would have been "unceremoniously replaced". He however received no confirmation.

[8] By continuing, the appellant contends that it acted to its detriment by:

(1) making firm contractual agreement with a landlord to house the workers and office;

(2) making and agreeing contracts with technical employees for an additional year of work;

(3) paying insurance premium for one year's coverage;

(4) providing refueling tanks at strategic locations to the cell sites;

(5) employing and training a cadre of workers with the ability to respond to any emergency situation required by the contract (Damon Scott and Steve Edwards as supervisors, and Nocander Douglas, Steve Brown and Orville Robinson as technicians);

(6) owning and maintaining three specialized trucks and other pieces of equipment for serving of the generators;

(7) stocking parts as was required under all previous contracts; and

(8) obtaining insurance coverage with a limit of liability of $10,000,000.00 at a premium of $100,000.00.

[9] He further complained that he suffered loss of income by not "seeking to engage in new or additional employment since the claimant was expected to remain in contract for at least another year". The appellant was expected to earn more than it earned the previous year. Consequently, the appellant claimed the following:

a. The sum $1,764,909.14 which represents spare parts acquired pursuant to contract between the parties;

b. The sum of $330,000.00 for office and lodging in the western region;

c. The sum of $32,914,306.34 for loss of income;

d. The sum of $1,833,595.00 for salary and wages to workers;

e. The sum of $100,000.00 paid for insurance premium;

f. The sum of $1,000,000.00 for fuel and storage tank;

g. Interest at the commercial rate on all sums due;

h. Attorneys-at-Law costs; and

i. Costs.

The respondent's version

[10] The respondent resisted the claim. It trenchantly refuted the appellant's assertion that pursuant to the contract it stocked items which amounted to $1,764,909.17. It further stated that it was not liable to the appellant for stocking items to perform its contract.

[11] It was the respondent's contention that it was dissatisfied with the performance of the appellant. On 31 March 2005, the end of the first contract year, the appellant's performance was evaluated and the appellant was informed of the respondent's dissatisfaction with its performance. So as to secure a renewal of the contract, the appellant agreed to remedy the deficiencies. On that understanding, the contract was renewed.

[12] The respondent further contended that during the second contract period, the appellant was again advised that its performance was deficient. Consequently, on 16 February 2006, shortly before the second contract period ended, representatives of the appellant and respondent met in respect of the appellant's deficient performance. The appellant was advised that because of its unsatisfactory performance it was unlikely that the contract would be renewed.

[13] Pending the final evaluation, the appellant continued to provide its services on a month-to-month basis. It was never represented to the appellant that the monthly extension of the contract guaranteed its renewal. Any obligation which the appellant undertook for a period in excess of one month from the date the contract expired was at its own risk.

[14] The respondent also counterclaimed and alleged that consequent on the appellant's refusal to either complete installation or properly service its generators, it "suffered loss of down time and revenue in respect of its cell sites". It claimed that the downtime and losses were a "result of the [appellant's] breach of its contractual obligations and/or negligence". According to the respondent, the appellant was in breach of the contract and or was negligent in that it failed to:

a. employ adequate trained and skilled personnel;

b. service and/or maintain the Defendant's generators;

c. keep sufficient parts and equipment in stock;

d. respond adequately to service calls;

e. properly manage and supervise its technicians; and

f. install and commission sites as required under the agreement.

[15] The appellant, in its response to the respondent's defence and counter claim, denied that the respondent provided it with a written report in which it expressed its dissatisfaction with its performance. It asserted that it was subject to two performance appraisals by the respondent. It was graded on a scale of one to five, five being the

highest. There were six areas of appraisal and the appellant was assessed as grade three in three areas and grade four in the other three. The appellant also averred that the only disagreement between the parties in the meeting of 16 February 2006 was in respect of the purchase price of a battery charger which the appellant had imported and sold to the respondent.

[16] It averred that its agent had raised a concern with the appellant about a rumour that it would be replaced, but the agent for the respondent neither admitted nor denied the rumour. The appellant denied that the respondent suffered loss in respect of its cell sites as a result of the appellant's failure to properly manage them.

The learned judge's findings

[17] This court does not have the benefit of the learned judge's written reasons. The exchanges between the learned judge and counsel for the appellant are however helpful in discovering the learned judge's thought process.

[18] At pages 16 and 17 of the supplemental record of appeal, were the following exchanges between the learned judge and counsel Mr Bishop:

> "HIS LORDSHIP: Mr. Bishop, I will be frank with you and the biggest hill that you have, you have pleaded and defended upon a cause of action which can only assist you by to do what you ask me to do, which is to stretch and adopt a Public Law into a Private Law for the first time. And I am not - I am not at all hesitant to break new ground if it serves fairness, but it is not just for the sake of breaking ground. One has to look at the history and

genesis of those two from legitimate expectation and if one traces that, you see that though there are similarities, they are not related at all. The doctrine on legitimate expectation was born in Common Law. It was born in - born in that area and there is nothing which will justify it being moved across.

HIS LORDSHIP: And further even if you had started off as estoppel, you would still have had certain difficulties in relation to what you must establish in order to defend upon . I will certainly listen to whatever you want to offer me by way of persuasion, but I am telling you the areas of difficulty I see you have so that you can tackle yours and see if you can get past them. Because if you can't, all this effort that you spend on the issue of damages is expending energy in vain."

[19] At page 49 to 551 of the further supplemental record of appeal, the learned judge said:

"Judge: Does Defendant have an obligation to even do an evaluation much less allow Claimant to participate in it?

A At March 2006, Claimant was still required to attend to all services

Judge: Did your client have any legal obligation to perform after March 2006?

A No, but look at what transpired. Look at Amended Particulars of Claim. My client threatened to leave.

Judge: Even if he threatened to leave he could also change mind and stay.

Judge: But what is contractual basis for staying. He acted to his detriment by keeping employees in the region.

Judge: He knows he doesn't have a contract and there is no obligation to give a contract. At end of evaluation period on his own evidence he may not get a contract. That is a chance he is taking.

Keith Bishop Having regard for 1st year - he held over and was paid on invoices for work done. It gives rise to a legitimate expectation.

Judge: If you are depending on then plead it, then Defendant knows what case to meet. But you plead legitimate expectation – then he approaches case differently.

Keith Bishop I could draw a parallel to fraud. But I see cases from this Court that say you don't have to plead fraud

Amended Particulars – paragraph 13 leave no doubt – that employee was about to leave and by remaining had to put in place insurance, housing, spare parts.

MCGREGOR ON DAMAGES CITED:

Judge: That is an employee case which employee has obligation to work only for employer.

Judge: Even if you started off as estoppel , certain difficulties in order to establish dependency on estoppel

Companies have legal advisors of state of law: If there being no written contract you have no legal obligation to offer a contract, they act on certainty of law as is this, they act on that advice.

Is it fair to change? I'm not unsympathetic to plight of claimant. Perhaps most businessmen would do same. It was a chance to get a

> contract. It remained a chance - no certainty. It may be a reasonable business decision but in law it does not enable a claim.
>
> RULING:
>
> On claim – judgment to Defendant with costs to be agreed or taxed.
>
> On counterclaim, the Defendant is non-suited with no order as to costs."

The appeal

[20] The appellant expressed its dissatisfaction with the learned judge's decision by filing the following ground of appeal:

> "The learned judge erred in finding that the words 'legitimate expectation' can only be used in public law and never used in private law although they were used by the Appellant in the Particulars of Claim and witness statement to describe the state of mind of the Appellant's agent/servant who was asked to remain on the job and perform the required tasks for and on behalf of the Appellant."

The appellant also challenges the learned judge's findings of fact and law:

> "The mention of the words 'legitimate expectation' are confined to public law and cannot be used in private law as was used by the appellant."

[21] Mr Bishop argued that the use of the words "legitimate expectation" bears a particular meaning when used in public law but there is no bar or injunction for the use of the words in private law. It was his submission that when the words are used in private law, they should be given their ordinary meaning. The judge he argued, was

wrong in finding that the words 'legitimate expectation' refer only to the public law concept. He said public law does not own those words when they are used together.

[22] Mr Bishop posited that the concept of legitimate expectation arises from administrative law, which is a limb of public law, it is generally used in judicial review and it applies to fairness and reasonableness. The doctrine he said, used in public law, imposes a duty on the public body to give a fair hearing. It extends the protection of natural justice or fairness. Persons may generally claim a benefit or privilege under the doctrine which he posited, arises from an expressed promise or the existence of regular practice.

[23] It was his submission that the appellant's attempt to remove its workers and equipment was halted by the respondent's agent who encouraged the appellant to remain and to continue performing the contract of service and refueling of the generators "with the legitimate expectations by the [Claimant] that it would be offered a contract for another year".

[24] He argued that it was clear that the appellant gave the words their ordinary meaning. No issue he said was raised in the defence that the appellant was relying on a public law doctrine in private law. The defendant merely denied the appellant's allegations of legitimate expectations. He said the word 'legitimate', was used by the appellant in his evidence in chief, but there was no mention or use of those words in cross-examination.

[25] He pointed out that the learned judge made reference to the words at page 12 by asking counsel whether he was saying that payment of invoices during the period the appellant held over gave rise to a legitimate expectation of a new contract. He said counsel responded in the affirmative.

[26] Counsel complained that the learned judge failed to analyze and weigh the evidence of both cases and did not determine the matter by applying the required standard. He referred the court to Stuart Sime's work, A Practical Approach to Civil Procedure, fifteenth edition. The learned judge, he said, focused entirely on legitimate expectations and decided accordingly. He submitted that the learned judge was wrong in law, because the issue was never raised in the defence. The respondent merely denied that the appellant had a legitimate expectation, but did not state that the words, when used together were only applicable to public law.

The respondent's submission

[27] The respondent resolutely resisted the appeal and contended that the words "legitimate expectation" are confined to public law and therefore cannot be used in private law as used by the appellant. In support of that proposition Mr Manning referred the court to the cases of **O'Reilly v Mackman** [1982] 3 All ER 1124; **CCSU v Minister for the Civil Service** [1984] 3ALL ER 935; **Josie Rowland v The Environment Agency** [2003] EWCA Civ 1885; **Pennock v United Farmers of Alberta Co-operative Limited** 2008 ABCA 278; **Attorney General of Hong Kong v Ny Yuen Shiu** [1983] 2All 346 and **Ex Parte Reprotech** [2002] UKHL8.

Discussion/Analysis

[28] The issues determinative of the matter are:

(a) Whether the public law concept of legitimate expectation grounds a cause of action in private law?

(b) If the answer is in the affirmative, whether the appellant had a legitimate expectation that its contract would be renewed;

(c) Was the appellant's contract wrongfully terminated?

Discussion

Is the concept "legitimate expectation" applicable to private law?

The law

[29] The orthodox rule is that 'legitimate expectation' is a public law concept which is inapplicable to private law. That there is a dichotomy between private law and public law in respect of the applicability of the concept 'legitimate expectation' was made plain by Lord Diplock's following enunciations in the House of Lord's decision of **O'Reilly v Mackman** [1982] 3 All ER 1124 at page 1126:

> "It is not, and it could not be, contended that the decision of the board awarding him forfeiture of remission had infringed or threatened to infringe any right of the appellant derived from private law, whether a common law right or one created by statute. Under the Prison Rules remission of sentence is not a matter of right but of indulgence. So far as private law is concerned all that each appellant had was a legitimate expectation, based on his knowledge of what is the general practice, that he would be granted the maximum remission, permitted by r 5(2) of the Prison Rules, of one third of his sentence if by that time no disciplinary award of forfeiture of remission had been made against him. So the

> second thing to be noted is that none of the appellants had any remedy in private law.
>
> In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted out with the powers conferred on it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it."

[30] The statement of Lord Fraser in the Privy Council case **Attorney General of Hong Kong v Ng Yuen Shiu** [1983] 2 All ER 346, an appeal from Hong Kong certainly confirmed that position. In determining whether an alien had a legitimate expectation that his case would be treated on its merits, that announcement having been made by the Hong Kong government, at page 351, Lord Fraser had this to say:

> "Their Lordships see no reason why the principle should not be applicable when the person who will be affected by the decision is an alien, just as much as when he is a British subject. **The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.** The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.
>
> **In the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow,** provided they do not conflict with its duty, is applicable to the undertaking given by the

> government of Hong Kong to the respondent, along with other illegal immigrants from Macau, in the announcement outside Government House on 28 October 1980, that each case would be considered on its merits." (Emphasis supplied)

[31] In the English House of Lords decision, **R v East Sussex County Council, (Appellant's)**; **Ex parte Reprotect (Pebsham) Ltd and One Other Action** [2002] UKHL 8 (28th February, 2002), Lord Hoffmann, with whom the court agreed, plainly confined the concept to public law. He said:

> "In any case, I think it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in **Newbury District Council v Secretary of State for the Environment** [1981] 578,616, estoppels bind individuals on the ground that it would be estoppel unconscionable for them to deny what they have represented or agreed. But these concepts or private law should not be extended into "the public law of planning control, which binds everyone." (See also **Dyson J** in **R v Leicester City Council ex p Powergen UK Ltd** [2000] JPL 629, 637.) There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see **R v North and East Devon Health Authority, ex parte Coughlan** [2001] QB 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see Coughlan's case at pp 254-255) while ordinary property rights are in general far more limited by considerations of public interest: see Alconbury.
>
> 35. It is true that in early cases such as the **Wells** case and **Lever Finance Ltd v Westminster (City) London Borough Council** [1971] QB 222, Lord Denning MR used the language of estoppel in relation to planning law. At that

> time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful. In the **Western Fish** the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the **Powergen** case [2000] JPL 629, 638. It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet."

[32] The Privy Council decision **Wendal Swann v Attorney General of Turks and Caicos Islands** [2009] UKPC 22 (21 May 2009), a case to which Mr Bishop referred the court, in support of his contention that the words 'legitimate expectation', can be used in private law seemingly counters the foregoing arguments.

[33] In light of the apparent unequivocal pronouncements which were made by the judges in earlier cases on the matter, it is helpful to briefly outline the circumstances of that case. Mr Swann held the post of chairman of the Public Service Commission of Turks and Caicos Island (PSC). It was on a part time basis. He received an allowance as remuneration instead of a salary. His appointment was made pursuant to the Constitution.

[34] Two years later, he was reappointed for a further two years by the Governor. The appointment continued to be part time. Approximately 11 months after, a new Constitution came into force and the post became fulltime. The remuneration increased to $90,000.00 per annum.

[35] The appellant was consequently paid US $8,640.00 which amounted to $90,000.00 per year for four months. In the middle of the fourth month, however, the Cabinet which was presided over by the Governor, met. A decision was arrived at to reduce the chairman of the PSC's salary to $30,000.00. The appellant was informed two weeks and six days after whereupon he forthwith applied for notice of application for leave to apply for judicial review in which he sought an order, *inter alia* to quash the decision. The Chief Justice upon hearing arguments refused the application.

[36] Lord Neuberger cited the following statement of the Chief Justice, who he said, expressed the following concerns at paragraph 13 of his (the Chief Justice's) decision:

> "… whether the [appellant] had an arguable case that this was a public law rather than a private law matter,… whether in any event judicial review was appropriate if he had an alternative remedy...and whether he had a sufficient interest to continue with his application."

[37] Lord Neuberger, in quoting the Chief Justice's reasons for refusing the application said:

> "His reasons were that the appellant's 'essential claim [was] for damages as a result of an alleged breach of an agreement as it relate[d] to his salary,' which 'would be enforceable by an ordinary action', that 'the judicial review procedure [was] neither necessary nor appropriate', and that 'even if it [was] arguable that there [was] a collateral public law issue ' and the appellant had sufficient interest to pursue it, the Chief Justice 'would exercise [his] discretion to refuse leave in this case' (quoting from paragraphs 29 and 30 of the judgment)."

[38] The appellant appealed and the Court of Appeal dismissed the application. No reason was given for the dismissal. The appellant being aggrieved appealed to the Board. Before the Board, the issues were, *inter alia*: whether the governor was empowered by the 2006 Constitution to determine the rate of remuneration of the chairman of the PSC. If so, whether in arriving at a determination he was obliged to consult or whether it was at his discretion; whether it was the legislature that had decided the remuneration; whether the Cabinet could overrule the Governor's decision to pay the appellant at the rate of $90,000.00 per year; and whether there was a binding agreement between the Governor and the appellant.

[39] The Board however only determined the procedural issue: whether the Chief Justice was entitled to refuse the appellant's application for leave to apply for judicial review and to require him to issue a writ instead. In so doing, the Board indentified "the nature and the legal basis of the appellant's claim. Lord Neuberger expressed the view that:

> "In order to found a legal claim on that complaint, the appellant would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of the PSC."

[40] The Board held the view that his case was "on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel). The Board however accepted that it was conceivable the appellant could have mounted "an argument on the public law ground of legitimate expectation", although his primary argument was in contract.

[41] In the Board's opinion, it was not an appropriate case for judicial review. Lord Neuberger said:

> **"That is primarily because his [the appellant's] claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel).** Furthermore, proceeding by writ would in any event be the more convenient course, given that a properly particularized pleaded case would be appropriate, and discovery and oral evidence will probably be required.
>
> **The Board accepts that the appellant may conceivably be able to mount an argument on the public law ground of legitimate expectation,** but this would be very much of a fallback contention. In any event, it is a contention which would be based on the same evidence, and indeed much of the same argument, as his possible ground, which itself would be an alternative to his primary argument, namely the claim in contract." (Emphasis supplied)

[42] The Board however was of the opinion that although the appellant "plainly [had] a legitimate interest in maintaining a claim for about $15,000.00; and indeed, he [had] a right to bring an action to recover that sum [it considered] that the appellant's complaint that he has not been paid some $15,000.00 which he is owed cannot possibly justify investigating the public law issues which he seeks to raise in his judicial review application".

[43] The following view expressed by Lord Nueberger however suggests that there may be circumstances in which a conflation of public and private law would allow the concept to be imported into a claim in private law. The learned judge said:

> "There are occasions where it may be appropriate to permit public law issues to be raised in what is essentially a private

> law claim, but they are relatively exceptional. Those occasions would normally be where the public law issue is of particular importance to the applicant or where they should be aired in the public interest. However, there is no suggestion of either of those exceptional factors applying in this case."

Analysis/Discussion

[44] There are certainly no exceptional factors in the instant matter. It raised no public law issues nor was any reason advanced as to the public interest value of the issues in this case. In light of the forgoing, I am consequently of the view that in the circumstances of this case, the concept is inapplicable to the instant case. In my view, in spite of the learned judge's unmitigated rejection of the concept as being inapplicable to private law, his finding of its inapplicability to the instant case cannot be faulted.

[45] Even if the concept "legitimate expectation" were applicable to private law, as pointed out by Mr Manning on Mr Hamilton's evidence, after the meeting of 16 February 2006, which was held to evaluate the appellant's performance, Mr Hamilton did not expect "that it would be well between the parties". Indeed so charged was the meeting with acrimony that Mr Hamilton, who represented the appellant at the meeting admitted to making the following utterance:

> "I said I don't like to [expletive deleted] without kissing."

[46] On Mr Hamilton's evidence and the evidence of Mrs Grant Williams, who was at the material time, the respondent's network operations manager, it was manifest that it was unlikely that the appellant's contract would be renewed. The respondent's

complaints were not limited to the issue concerning overpricing of battery chargers, but included the duplication of invoices (page 12 of the further supplemental record of appeal) and repairs at German Hill (page 13 of the further supplemental record of appeal).

[47] Ms Olive Grant-Williams', evidence was that:

> "The Defendant in any given year engages the services of several contractors to assist in maintaining its generators and cell sites. It is the policy of the Defendant that an evaluation for each contractor is done once per year to assess the performance of the contractor. The evaluation of contractors is critical, as whether or not the contract is renewed is dependent on the outcome of the evaluation. Contracts are not automatically renewed and an evaluation of performance must be done before a decision is taken to renew.
>
> That the Defendant has a set procedure for evaluating contractors. An evaluation form is completed by the Defendant's field engineers who are responsible for monitoring and signing off on the work done by the contractors. These field engineers usually provide managers with a verbal report along with the evaluation forms. Based on the assessment forms and verbal reports, the contractor would either be warned verbally and if there was no subsequent improvement, the contract would not be renewed upon expiration. The evaluation period/assessment is usually completed after the expiration of the contract period."

[48] Mr Hamilton's evidence supported Mrs Grant-Williams' that there was a period of evaluation in February, prior to the expiration of the contract. He said:

> "The period you do evaluation in February, somewhere about there but when we are working the contract does not come up for discussion until when they either say your contract is renewed or not renewed, whatever work you

doing we have to do those same way, they don't stop, also it is just formality that you go do an evaluation."

It was also the evidence of Mr Hamilton, the appellant's witness, that the evaluation was a part of the renewal process (page 29 of the supplemental record of appeal).

[49] Mr Hamilton's evidence at pages 32 to 45 of the supplemental record of appeal, erases any doubt that the renewal of the contract, hinged on the evaluation.

"HIS LORDSHIP: Things having happened as they have, are you using that holding over term to describe beyond 31st of March 2006 up to when the determination took place. The second period now, the end of the second contract?

A If I would use it? Yes because we did not know what it would go to. So, the holding over period would go over to that period into the next. Those are period …

Q The evaluation process it if came back unfavourable, would have meant, could have meant no new contract would be granted to you?

A Yes, if the evaluation period is unfavourable then, yes but I am saying, can I say something else?

Q well, I just wanted an answer to the question. You said yes, it would mean that?

A Because we didn't get anything so we didn't know.

Q Okay. All right. And you knew that it was the position at the end of the first contract that is the consequence of an unfavourable evaluation, you would

have known that from the end of the first contract?

A We know all along that once that happens you would have the evaluation is telling you how your performance is. So, if the performance is, once that evaluation, you would renew that's what I am saying.

HIS LORDSHIP: What are you are saying, you haven't said it very clearly. Are you saying that if it, you already agreed that an unfavourable evaluation you understood to mean …

DEFENDANT: Contract would not be renewing.

HIS LORDSHIP: I think court was asking having understood that in relation to evaluation period at the end of the first contract, did you understand it as well to be so in relation to second contract. Is that what you are asking, Mr. Mannings?

DEFENDANT: That is where I was going.

HIS LORDSHIP: Going? I thought you had reached. I anticipated for you.

DEFENDANT: Very well, in relation to first, that you understood that an unfavourable evaluation would mean no new contract and you said yes, you understood that the first period that is no different from the second period?

A Yes.

HIS LORDSHIP: I will have to check my record but I am sure you had asked that.

DEFENDANT: You don't have to check your record my junior says yes?

HIS LORDSHIP: I would hate to think I was advocating on your behalf.

DEFENDANT: No, m'Lord, it is just a very good question to ask. Okay Mr. Hamilton, I am going to see if I can go to another area quickly. Your claim – well let me go to some of the issues that arose in the process of evaluation. You know Olivier Grant-Williams, you know her?

A Yes, I know her.

Q Yes. Who did you understand her to be in relation to the defendant's company?

A She is a manager for one of the departments that we work on the generator.

Q She is a manager for the department?

A That we carried out maintenance of generator.

Q And when Mrs Williams says that she met with you several times to express certain dissatisfaction that would be true?

A No, not all true.

HIS LORDSHIP: Counsel that's not yet evidence in this case.

DEFENDANT: Guided, m'Lord.

Q Would it be true to say that Mrs Williams met with you and other representatives from your organization from you company on a number of occasions to express Digicel's dissatisfaction with the services being provided?

A We met twice on occasion.

Q When you said we met?

My company and the staff of the Digicel in meeting.

Q You say met twice in the second contract actually?

A Yes, once was an evaluation was carried out and when they have a dispute with the battery charger.

Q Once was when you had a meeting dispute with a battery charger or over charging, the battery charger.

Q You were having dispute with …

HIS LORDSHIP: Just a moment.

DEFENDANT: Just a moment

HIS LORDSHIP: Yes.

Q And am I correct to say that on those two meetings that you speak about, were meetings to complain about performance and service of Thomas-Hamilton and Associate Limit?

A No, they were argument about price of the battery charger.

Q Well, if that talking …

A We were having dispute about …

Q Were they happy with the price, sir?

A No, I don't think so.

Q Okay. The meeting, the evaluation meeting you are talking about was the meeting of February 16, 2006?

A I think that the evaluation meeting was, I can't recall."

Was the contract wrongfully terminated?

The appellant's submissions

[50] Mr Bishop contended that the appellant's contract was wrongfully terminated. He complained that in dealing with that issue, the learned judge failed to consider:

a. the principle of holding over for several months under the same terms and conditions of the previous contract;
b. the appellant's case was strengthened by the respondent purchasing all the spare parts;
c. the appellant and the respondent under the contract were responsible for refueling the respondent's generators in several locations;
d. the appellant employed additional staff and kept them in position to respond to emergency requirement;
e. evidence of loss of the appellant's income;
f. the failure to provide the appellant with any warning letter nor was the evaluation report discussed with the appellant;

Counsel also argued that the learned judge should have had serious concerns about the evaluation process and the termination letter which gave the appellant two day's notice.

The respondent's submission

[51] The respondent however stridently submitted that the contract came to an end on the 31 March 2006 by the effluxion of time. He contended that the appellant is not entitled to the reliefs or sums claimed. It was his submission that any obligation/expense incurred by the appellant was incurred in furtherance of its obligations under the contract period ending 31 March 2006 and or performance on an interim basis for which the appellant has been compensated.

[52] Any obligation/expense which was undertaken for a period greater than one month was therefore undertaken at its own risk with the knowledge that the award of a new contract for a new contractual period was not guaranteed. Mr Manning cited the following authorities in support of his contentions: **Pennock v United Farmers of Alberta Co-operative Limited** 2008 ABCA 278; **Ex Parte Reprotech** [2002] UKHL8; and **Teo Siew Peng and Another v Neo Hock Peng and Others** [1998] SLR 472 and Volume 9, Halsbury's Laws of England, 4th Edition.

Was the contract breached?

The law

[53] The learned author of Halsbury's Laws of England, 4th Edition, Volume 9, at paragraph 529 defined contracts for a fixed term thus:

> "Where the parties to a contract stipulate that the contract is to continue for a definite period, the contract cannot be terminated before the expiration of that period, unless the parties are empowered so to do by the terms of the

> contract, or agree to abandon it; and if the duration of a contract for a fixed term is conditional on the approval of one of the parties, the contract can only be terminated within that period provided the disapproval of the party was genuine and not capricious.
>
> Where the contract provides that it is to continue for a fixed term and thereafter until determined by notice, the contract cannot be terminated before the specified period expires, but it is a matter of construction of the words used in the contract whether the contract is one that can be terminated at the end of the period by a notice given during that period, or is one which can only be determined after the expiry of the definite term by notice given after the end of the term."

[54] It is not disputed that the second contract had come to an end in March 2006. The language of the contract between the parties was unequivocal. Under the heading, "Termination of Agreement", the contract stated:

> "Failure to comply with any condition set forth in this agreement will result in a written warning and if repeated, termination of this agreement. This agreement takes effect on the date of signing of this document by all parties and is valid for one year from the date of signing. It may be terminated by either party on the basis of two (2) months notice in writing to that effect."

[55] The assertion that the appellant was entitled to two months' notice is therefore untenable in light of the explicit language of the agreement. At the expiration of one year, the contract would have terminated by effluxion of time. There was therefore no need for notice to be given. Either party could, however, have terminated the contract before its expiration in March 2006 by the giving of two months' notice.

[56] As noted, and as has been accepted by the appellant, its renewal was dependent on its evaluation report. No evidence of the necessary cogency has been advanced to demonstrate that the appellant could reasonably have expected that a new contract was likely. The appellant also failed to satisfy the court that he was led to that belief by an agent of the respondent who was authorised to do so.

[57] On the evidence, the contractual arrangements, after the termination of the contract on 31 March 2006, which the learned judge accepted, was that the appellant held over on a month to month basis. If the appellant, on the evidence, had a reasonable expectation, that a new contract would have been awarded, and the circumstances were such that it would have been unconscionable for the respondent to resile from its representations to that effect, the relevant concept would have been estoppel. Estoppel was however not pleaded.

[58] It was formerly held to be settled law that estoppel had to be specifically pleaded. In **Morrison Rose and Partners v Hillman** (1958 M No 2930) [1961] 2 QB 266, Holroyd Pearce L.J. said estoppel:

> "is not merely evidence. It is well settled that it must be pleaded as an allegation, though evidence may thereafter be given in support of the plea." (page 270)

See also **Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society (formerly North Hampton and County Building Society)** [1970] 3 All ER 961.

[59] The learned authors of Bullen & Leake & Jacobs Precedents of Pleadings, 13th edition, were of like view. Page 1148 of the text reads:

> "Every estoppel must be specifically pleaded, not only because it is a material fact, but also because it raises matters which might take the opposite side by surprise, and usually raises issues of fact not arising out of the preceding pleadings….It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer (**Houstoun v Sligo** (1885) 27 Ch D 448; and see **Sanders (orse Saunders) v Sanders (orse Saunders)** (1952) 2 All ER 767, p 769, per Lord Merriam P.). On the other hand, where a party omits to plead the defence of estoppel, when he has the opportunity of doing so, he cannot thereafter rely on it (Matthew Osbourne (1853) 13 CB 919 and see **Trevivian v Lawrence** (1704) 2 Smith LC 13 ed 655."

[60] Since the advent of the CPR and the resultant new regime, what is of importance now, is that the general nature of the claim must be made clear from the pleadings. Rule 8.7(1)(a) of the CPR requires a claim form to "include a short description of the nature of the claim".

[61] 'Legitimate expectation', was pleaded. It is undeniable that by the appellant's pleadings, the respondent was aware of the appellant's contention that it was led to believe that its contract would have been extended for another year, and acting on that promise, it operated to its detriment. The appellant was nevertheless required to delineate the parameters of the case which the respondent had to answer. Legitimate expectation, albeit somewhat analogous to estoppel, is a different concept as was made plain by Lord Hoffmann in **Ex Parte Reprotech**.

[62] Lord Hoffmann's statement that "public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel" is supportive of Mr Bishop's argument that the evidence in support of a claim for estoppel would not differ from that which would be required to support a claim of legitimate expectation. It is however of significance that the first and only mention of 'estoppel' was by the learned judge during the submissions. Page 51 of the further supplemental record of appeal reads thus:

> "Even if you started off as estoppel, certain difficulties in order to establish dependency on estoppel [sic]."

[63] The respondent was entitled to know, at the latest, during the trial, exactly what he was confronting. If the appellant intended to rely on estoppel it ought to have amended its pleadings to include that claim. There was however, no application by the applicant to amend its pleadings to include estoppel.

[64] In **McPhilemy v Times Newspapers Ltd**, [1999] 3 All ER 775, at page 792-793 of the decision Lord Woolf enunciated:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party's witness statements will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise**. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party.** In particular they are still critical to identify the issues and the extent of the dispute between the parties.

> What is important is that the pleadings should make clear the general nature of the case of the pleader." (Emphasis supplied)

[65] In any event, on the appellant's evidence, a plea of estoppel would not succeed as it was aware that it would be highly unlikely that its contract would have been renewed. In the circumstances, I agree with Mr Manning that any obligation which was undertaken by the appellant beyond 1 June 2006 would have been undertaken at its peril, the appellant having been notified that by way of letter dated 29 May 2006, that the contractual arrangements would terminate on 1 June 2006. Indeed for the appellant to have incurred expenses for another year would have been foolhardy. The appellant is therefore only entitled to expenses it reasonably incurred for the period between the 31 March 2006 and 1 June 2006 for which it has been compensated.

[66] In light of the foregoing, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

F WILLIAMS JA (AG)

[67] I too have read in draft the judgment of my sister Sinclair-Haynes JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.