

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

BETWEEN



THE PRECISION GROUP LTD
TRADING AS TCI BEACH BUDDIES

Plaintiff

-AND-

GRAND TURK TAXI ASSOCIATION
A COMPANY LIMITED BY GUARANTEE

Defendant

Ms. Ingrid Lee Clarke Bennett and Mr. Craig Oliver for the Plaintiff

Mr. Courtenay Barnett for the Defendant

Heard on the 14th and 23rd of February 2017

The Court also considered the parties closing submissions delivered in writing to the Court by the Plaintiff on 22 March 2017 and by the Defendant on the 16 March 2017

A draft of this judgment was circulated to Counsel on the 8 June 2017

JUDGMENT

Introduction

1. The Plaintiff Company, Precision Group Ltd., offers taxi and tour services in Grand Turk. Its principal is Michael Basden.
2. The Defendant, the Grand Turk Taxi Association (GTTA) is, as its name suggests, the body that seeks to regulate taxi services in Grand Turk and is the holder of an agreement with Grand Turk Cruise Centre permitting their members exclusive access to the Cruise Terminal for the pick up and discharge of cruise ship passengers visiting the island on the Carnival Cruise Line. The Plaintiff has been a member of the GTTA since some time in 2013 or 2014.

The Claim

3. The Plaintiff's claim against the GTTA is for tortious interference with its business relations the particulars of which are set out in paragraph 26 of the Statement of Claim where it is pleaded that Defendant owed a duty of care to the Plaintiff as a member of the GTTA which it breached by "*unfairly singling the Plaintiff out for a sanction*" and restricting its access to the Cruise Terminal thereby impeding its ability to carry on its business of offering tours and other transportation services to cruise ship visitors.

The Facts

4. The taxi operated by the Plaintiff is brightly coloured in blue and white with a swathe of green, blue and yellow across both sides which features several brightly coloured cartoon characters. The Plaintiff's phone numbers and web address are emblazoned across the bottom of the van, the words "Find us" and the Trip Advisor logo and the Facebook logo appear on the front doors of the vehicle and the side panels bear the words "Taxi & sightseeing," "Exclusive souvenir store" its logo "TCI Beach Buddies" and its tagline, "Let us make you smile." A combination of the images and words above appear on the back of the van as well. The Plaintiff achieved this effect by having a vinyl wrap applied to the vehicle in Florida before it was shipped to Grand Turk, for which it paid \$2,100.
5. On the first occasion he drove it to the Cruise Terminal, the President of the Defendant Association, Mr. Robert Hall, spoke to Mr. Basden and advised him that he would not be allowed to return to the taxi rank the following day as his vehicle did not comply with the rules set by Carnival for taxis operating at the Terminal.
6. On 5 June 2015, Mr. Hall wrote to Mr. Basden¹ to formally advise him that he would not be allowed to collect passengers from the area to which the GTTA had exclusive rights under the Agreement. In his letter, Mr. Hall stated that he had spoken with the General Manager of Carnival who brought it to the GTTA's attention that they had an agreement which "*clearly states [that] all vehicle (sic) must be the same colour...*" and stated further, that in time, all 'other coloured' vehicles would have to be white.
7. The Defendant exhibited a copy of a Draft Agreement dated 12 October 2005² to which its members affixed their signatures in apparent acceptance of its terms. Clause 7 of the Agreement states,

" GTTA will ensure that all taxi drivers will adhere to all applicable laws regarding taxi operations in the Turks and Caicos Islands, and specifically to:
 - a. *All vehicles will be painted in the same color (sic)*
 - b. *All vehicles will be clearly marked with the word "Taxi" as well as the GTTA logo*
 - c. *All vehicles will have air conditioning in operation*
 - d. *Capacity of vehicles will not be more than 8 people."*
8. The Plaintiff's case is that it was never made aware of the agreement or the provision requiring that all vehicles be painted the same colour, that the GTTA taxis operating at the Terminal are not all the same colour and that the GTTA's interpretation of the provision as requiring the vehicles be painted in one solid colour is wrong. In his evidence, Mr. Basden notes that opposite the taxi rank on what is known locally as the Carnival side, is a rank of sightseeing tour operators one of which, Island Trams Limited, has buses wrapped in a multi-coloured tropical design.

¹ Trial Bundle at p 14

² Trial Bundle at p 10

9. This would, on the face of it, be consistent with the Agreement between the GTTA and the Cruise Terminal which stipulates that it only applies to taxis that are picking up individual cruise passengers who are paying directly for transportation and specifically states that pre-purchased excursions are excluded and further, that there is no commitment by the cruise lines or the Terminal to use the GTTA taxis for excursions. It reserves an area for the use of GTTA taxis only.
10. In his witness statement dated 31 August 2016, Mr. Hall acknowledged that not all GTTA taxis were painted the same colour but asserted that each of the taxis had one solid colour of paint and no lettering except for the word "taxi" which was sufficient compliance with the Agreement. He also accepts that, although copies of the Agreement were available for purchase, they were not given to new members of the GTTA.
11. Although the Agreement which is exhibited is headed DRAFT AGREEMENT, the signatures of all the founding member of the GTTA are appended thereto and I accept Mr. Hall's evidence that the Agreement governs its relationship with the operators of the Cruise Terminal. I take judicial notice that the operators of the Cruise Terminal control the terminal and are able to exclude persons from entering upon the property. I have no difficulty in accepting that they are able to make exclusive arrangements for transportation on those premises and no reason to doubt that they made such an exclusive arrangement with the GTTA.
12. The GTTA is plainly empowered by clause 16 of its Memorandum of Association to enter into any arrangement with any person or company that may seem conducive to the objects of the GTTA or any of them and to obtain from any such person or company any rights, privileges, charters, contracts, licences and concessions which the GTTA may think desirable. This the GTTA did in negotiating the exclusive rights to pick up passengers requiring a taxi on disembarkation. It does not appear from the evidence that this exclusive arrangement has ever been challenged by those who provide transportation services to or from the Terminal. The GTTA also negotiated loans for its members to allow them to purchase buses and Mr. Hall's evidence is that members availed themselves of the opportunity which is pretty strong evidence of an agreement.
13. I also accept that the Plaintiff was not given a copy of the Agreement and did not know and was never told that a condition of the Agreement executed between the GTTA was that all the vehicles operating at the Terminal under this Agreement had to be the same colour and marked with the word Taxi and bear the GTTA logo.
14. While it is plain that the GTTA is not fully compliant with the Agreement insofar as not all the vehicles that operate in its exclusive zone are of the same colour, I accept Mr. Hall's evidence that these taxis have passed muster and have been permitted to offer taxi services at the Terminal as they were each painted one colour and only had taxi lettering. Certainly the operators of the Cruise Terminal who imposed the conditions have raised no objection to them and the Agreement remains in place.
15. I accept his evidence that someone from Carnival objected to the Plaintiff's bus being in the rank. That such an objection would be raised is consistent with the intent of the Agreement which was

to achieve some uniformity among the GTTA member taxis that picked up cruise ship passengers at the Terminal and I have no reason to doubt Mr. Hall's truthfulness on this point. As Mr. Basden had observed, any taxi or bus of any stripe could pick up passengers elsewhere and drop them off and any taxi or bus of any stripe could collect passengers who had booked excursions on the web at any other point except the area which was reserved exclusively for the GTTA members to pick up passengers.

Tortious Interference with business relations

The law

16. I could not, in reviewing the law in this area, find any economic tort in English law of "*tortious interference with business relations*" as pleaded by the Plaintiff. In *OBG Limited v. Allan* [2007] 2 WLR 920, a case which is widely recognised as clarifying this area of the law, the House of Lords identified two torts: one of causing loss by unlawful means (or "*interference with trade or business by unlawful means or, more shortly, the tort of unlawful interference:*" per Lord Nicholls at paragraph 141) and the other, procuring a breach of contract. A purported separate tort of "*interference with contractual relations*" - or preventing performance of a contract by lawful means - was expressly denied by the majority.
17. The tort of procuring a breach of contract does not arise for consideration as the Plaintiff has no contract with the Cruise Terminal to provide taxi services capable of being breached.
18. I turn then to consider whether the Taxi Association is liable to Mr. Basden for having caused him loss by unlawful means. To succeed in such claim, the plaintiff must prove on a balance of probabilities that the defendant **intentionally caused loss** to the plaintiff by interfering with the liberty of third parties to deal with him **using unlawful means**.

Intention

19. A defendant will have the requisite intention if the loss suffered by the plaintiff is either the end he desired or the means to an end he desired:

"The concept of intention is in both cases the same. In both cases it is necessary to distinguish between end, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions." (per Lord Hoffman in OBG v Allan, paragraph 62)

20. What the case establishes is that liability arises where a person intends to do a wrongful act. The test is fundamentally subjective and depends on showing the defendant had the relevant intention.

Using Unlawful Means

21. The majority of the House (with Lord Nicholls dissenting) restricted the means that would satisfy this element to acts that (i) are against a third party (ii) are actionable by that party or would be if that party suffered loss and (iii) interfere with the freedom of the third party to deal with the

plaintiff. In other words, the 'means' used by the defendant will be 'unlawful' for the purposes of the tort if the *third party* - in this context, the Cruise Terminal - has suffered damage or been subject to a threat of what would have been an actionable [civil] wrong if it had been carried out.

22. The Court gave the example of A, intending to cause loss to B, threatens to assault C so that C was no longer at liberty to deal with B.

Discussion

23. There is no question that the Plaintiff's vehicle does not conform to the conditions imposed on the GTTA by the Cruise Terminal as set out in paragraph 7 of the Agreement. It is also plain from the evidence of Mr. Hall that, in refusing to allow the Plaintiff to join the taxi rank in the vehicle, I am satisfied that Mr. Hall was acting in a good faith attempt to uphold the contract between the GTTA and the Terminal as he understood it. He did not have the requisite intent to establish the tort. Further, no civil wrong was committed *against the Cruise Terminal* which had granted the GTAA exclusive right to pick up passengers at the Cruise Terminal. GTTA's act in restricting the Plaintiff's access to the terminal was not intended to cause loss to the third party, which is the Cruise Terminal or, at its very widest construction, any visitor or visitors and did not cause any loss to them.
24. The mere fact that a plaintiff's business is adversely affected by an act of a defendant is not sufficient to establish the tort and the Plaintiff's claim for causing loss by unlawful means (or unlawful interference with business causing loss, per Nicholls LJ) on the ground that the GTTA restrained the Plaintiff from carrying on the business of picking up passengers at the Terminal is dismissed.

Breach of Duty of Care

25. Although pleaded under the same head of tortious interference, the pleadings assert a separate head of liability and allege that the GTTA owed a duty of care to the Plaintiff which was breached when the GTTA singled it out for a sanction. The content of that duty is not articulated in the pleadings. In her written submissions, Ms. Clarke-Bennett argues that the Association's 'rules' must be enforced against all members equally and that in not allowing the Plaintiff to join the taxi rank, the GTTA was guilty of arbitrarily picking and choosing which of the conditions set out at clause 7 of the Agreement it chose to enforce. By indiscriminately applying the 'rules' to one individual as against another, Ms. Clarke-Bennett asserts that the GTTA was guilty of a breach of the principles of natural justice.³
26. The Plaintiff relies in support of its submissions on the cases of *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 and *Abbott v Sullivan and Others* [1952] 1 QB 189. I do not find either authority helpful. The cases concerned the expulsion or punishment of a member of a trade union on the ground that the member had breached *a rule of the association* and the issue for resolution in each case was whether the union had acted in excess of its jurisdiction under the association's rules in applying the sanctions.

³ Pp 12-13 of the written submissions

27. The GTTA in this case did not find that the Plaintiff breached an internal rule nor did they apply a sanction against the Plaintiff for any such breach. They restricted the Plaintiff from joining the taxi rank in its new vehicle in the circumstances where the vehicle did not comply with the conditions of the GTTA's agreement with the Cruise terminal which bound all its members. It was, as Mr. Barnett has submitted, entitled to do so.
28. The Plaintiff remains a member of the GTTA and is at liberty to re-join the taxi rank in its original vehicle. It is also at liberty to drop off passengers at the Terminal and at liberty to pick up passengers who pre-purchase excursions through the cruise line.

Misrepresentation?

29. The Plaintiff also claims damages for negligent misrepresentation. The claim is supported by the pleading at paragraph 24 of the Statement of Claim which states:

*"That alternatively the Defendant was negligent in failing to advise of **the terms of the alleged agreement and/or the alleged colour policy, if same did exist.**"*

30. In her written submissions, Ms. Clarke-Bennett states that,

*" the failure to communicate the **alleged rule** has the effect in law of a representation that there is in fact no rule:*

1. *The representation was negligent;*
2. *The Plaintiff had no communication that a rule existed;*
3. *The Plaintiff acted on his belief that there was no rule to his detriment;*
4. *The Plaintiff has suffered loss and damage as a result of the misrepresentation.*

31. As no rule of membership in the Association is in issue, the submission is that the terms and conditions under which the GTTA were able to secure for their members the exclusive right to pick up passengers at the terminal were not communicated to new members, and not communicated to the Plaintiff in particular, and that, but for the failure of the GTTA to advise him that taxis on the rank had to be of uniform colour, the Plaintiff would not have purchased the vinyl wrap for his vehicle.
32. Where economic loss is caused by negligent misstatement, liability may be imposed: see *Hedley Byrne & Co v Heller* [1963] 3 WLR 101. No misstatement per *Hedley Byrne* is alleged by the Plaintiff. Rather, the Plaintiff asserts that *the failure* of the GTTA to advise the Plaintiff of the terms of its agreement with the Cruise Terminal relating to the colour of taxis on the rank amounted to a positive misrepresentation that taxis could be of any colouring and have any lettering.
33. Unhappily, Ms. Clarke-Bennett in her written submissions failed to provide any authority for this proposition.
34. In the course of its own research, the Court found support for the submission in the matter of *Conlon v Simms* [2006] EWCA Civ 1749 where Jonathan Parker LJ stated that, "*Non-disclosure where*

there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose”.

35. The learned authors of **Chitty on Contracts** have, however, described this statement of principle as ‘doubtful’. They state at para 7-156 ⁴:

“If silence when there is a duty to disclose amounted to an implied representation that there was nothing to disclose that would make even a non-fraudulent non-disclosure into a positive misrepresentation for which damages could be recovered.....whereas it has been held that if the non-disclosure is negligent, it does not give rise to liability ...at common law” without more.

36. The learned authors of Chitty on Contracts suggest that a negligent failure to speak may give rise to liability if there is a duty of care to volunteer the information⁵ but it was doubted by the Court in *Banque Financière de la Cité SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co Ltd (formerly Hodge General and Mercantile Co Ltd)* [1991] 2 AC 249, that this could give rise to liability save in circumstances where the failure to speak could be interpreted as a positive assertion.⁶ In my view, nothing on these facts could give rise to such a finding.

37. Invited by the Court to provide authority for the proposition that GTTA’s failure to advise the Plaintiff about the terms and conditions of its agreement with the Cruise Terminal could give rise to liability in the GTTA for misrepresentation, Mr. Oliver who now has conduct of the brief submits that,

“When the Defendant knew (or ought to have known) of the terms of its agreement with the Grand Turk Cruise Center, and of the requirements imposed thereunder upon the members of the taxi association, and where the agreement formed the basis of the exclusive operating relationship between the Defendant and the Cruise Center, and where the Plaintiff could not reasonably have been expected to know either of the existence of such an agreement or its terms, the Plaintiff submits that there existed a duty of care from the Defendant to the Plaintiff to disclose the same. The relationship that existed between the Plaintiff and the Defendant was such that, as a member of the association there is a direct relationship between the two; where the association is placed in the position that it owes a duty of care to its members to protect and represent their interests, that is exactly what is bargained for when a person or body elects to become a member and pay the dues of membership. Further the association being so placed has a duty imposed upon it to fully and properly communicate in advance prior to membership anything which may negatively or detrimentally affect the interests of a potential member, especially when the rule which has not been stated by negligent omission strikes at the very heart of the member’s ability to fully take advantage of the primary benefits of membership by having his vehicle on the line. This failure by a person so placed in a special relationship to the Plaintiff is equivalent to a material non-disclosure.”

⁴ Thirty-Second Edition

⁵ Para 7-156

⁶ Per Lord Templeman at p 275: *“In the present case there was no negligent mis-statement and the silence of Mr. Dungate did not amount to an assertion that Mr. Lee was trustworthy and the banks did not rely on the silence of Mr. Dungate.”* [1991] 2 A.C. 249 Page 275

38. He submits further that in determining the issue of whether there was a breach of the GTTA's duty to volunteer the information, the test is whether, were the Plaintiff aware of the relevant condition in the contract, would he have taken the steps and incurred the expense of having his vehicle wrapped. He relies in support of this submission on *The Home Office v Dorset Yacht Company Limited* [1970] AC 1004 but the test propounded by that Court test is one of foreseeability on the part of the person said to owe the duty not the knowledge on the part of the person suffering the loss or damage.
39. Mr Oliver's reliance on the *Dorset Yacht* case is, in any event, misplaced as the head of claim under consideration is not the pleaded negligence claim *simpliciter* but the claim of negligent misrepresentation. The question is not whether there was a duty of care and a breach of that duty but whether the failure to disclose was tantamount to a positive assertion of a particular state of affairs giving rise to liability in the GTTA for misrepresentation.
40. The renewed submissions do not cast any doubt on the observations of the Court in *Banque Financière* that a failure to speak can only found liability if it can be interpreted as a positive assertion.
41. By way of illustration, the GTTA's Executive would have had a duty to advise the Plaintiff that the vinyl wrap with which he proposed to adorn his vehicle was outwith the conditions of its agreement with the Cruise Terminal, if the Executive had been made aware of the member's intention to do so. Failure to so advise could readily be interpreted as a positive assertion. On the facts before the Court, the failure of the GTTA - innocent or negligent -to advise the Plaintiff of the terms of its agreement with the Cruise Terminal cannot be construed as a positive assertion that the Agreement imposed no conditions on members as to colour or otherwise of their vehicles nor indeed that it imposed no conditions at all. It follows that the claim under this head must fail.
42. The Plaintiff has failed to discharge its burden and the claim is dismissed. Costs follow the event and the Plaintiff is ordered to pay the Defendant's costs. The only thing left for me to do is apologise to Counsel for the long delay in considering the further submissions on behalf of the Plaintiff and rendering a final judgment in this matter. I thank Counsel for their patience.

DATED 17 NOVEMBER 2017


CHIEF JUSTICE

