IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCV2018/007
BB Civil Appeal No 17 of 2009

BETWEEN

DAVID BROOKS **APPELLANT**

AND

ALISTAIR LINDSAY MORRIS **RESPONDENT**
(The Executor of the Estate of Henry Newitt, Deceased)

Before The Honourables:

Mr. Justice A. Saunders, PCCJ
Mr. Justice J. Wit, JCCJ
Mr. Justice W. Anderson, JCCJ
Mme. Justice M. Rajnauth-Lee
Mr. Justice D. Barrow

Appearances

Mr. Bryan L. Weekes for the Appellant

Ms. Hazelyn E. Devonish for the Respondent

JUDGMENT
of
The Honourable Justice Saunders, President
and the Honourable Justices Wit, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Wit

and

CONCURRING JUDGMENT

of

The Honourable Mr. Justice Anderson

Delivered on the 28th day of November 2019

JUDGMENT OF THE HONOURABLE MR. JUSTICE WIT, JCCJ

Introduction

[1] The facts underpinning this dispute are fairly simple. Mr Newitt, now deceased, owned a luxury Villa at Cherry Lane, Sunset Crest in Holetown. He made it available on short term rental to persons visiting Barbados. He proudly advertised his property on the internet as 'Desert Rose'. Its features included five bedrooms, three baths and a swimming pool.

[2] Mr and Mrs Brooks from California saw the advertisement of the property on the internet and were attracted to it. They communicated with Mr Newitt. Both sides came to an agreement for the Brooks family to rent Desert Rose from 13 to 28 December 2005. The agreement reached is set out in the correspondence between the parties. It was expressly stated that the total cost for the rental period would be US$11,750.00 with a 25% 'non-refundable deposit' payable 'with balance due 8 weeks prior' to arrival. The Brookses duly paid the deposit of US$2,987.00 and paid off the balance of US$8,813.00 on or about 15 October, just about 8 weeks prior to their arrival.

[3] The Brooks family went to Barbados as planned. But, on arrival at the premises, Mrs. Brooks claimed that Desert Rose was unfit for occupation. The Brooks family elected to vacation elsewhere. They wanted their money back but Mr Newitt refused to do that. Rather than keep Desert Rose locked up and empty during this peak period of the tourist season, Mr Newitt offered to make efforts to rent it to someone else, so that, if he was successful, he could give Mr Brooks the net portion of that rent and thus somewhat soften the pain. Mr Brooks did not object and Mr Newitt managed to rent out his Villa for a few days. Those efforts yielded Bds$5,000. Mr Newitt wrote a cheque for that amount which was received and accepted by Mr Brooks. But, when the latter tried to cash the cheque in California, it appeared that the cheque was cancelled.

[4] This was, unsurprisingly, not the end of the story. Mr Brooks sued Mr Newitt for damages. He pleaded that Mr Newitt had breached their contract: the Villa was not fit for occupation and, what was worse, Mr Newitt had refused to address the problem and then refused the Brooks family the use of the premises, thus forcing

them to find another place to stay (which turned out to be more expensive). On that, and no other basis, he claimed damages (the total rental costs of US$11,750.00 plus the extra costs for renting the alternative accommodation), with interest and costs. The defence of Mr Newitt was that none of these accusations was true: he had not breached the contract. On the contrary, it was the Brooks family who, without good reason, had refused to occupy the premises. This, he said, amounted to a repudiation of the rental agreement. So, if anyone had breached the contract, it was Mr. Brooks, not him. And this, he argued, entitled him to retain all the monies Brooks had paid him for the rental of the Villa.

[5] The High Court Judge ruled for Mr Newitt: she found that he had done nothing wrong but that there was credible evidence that for no proper reason the Brookses had refused to occupy the premises, so that they were the party in breach of the contract and therefore not entitled to damages. She did order, however, that Mr Newitt pay Mr Brooks the sum of Bds$5,000 with interest and that Mr Brooks pay one-half of Mr Newitt's costs.

[6] The Court of Appeal agreed with the findings and reasoning of the High Court Judge. But they now had to address another argument developed by Mr Brooks' Counsel. Assuming that Mr Brooks was in breach of the contract, he argued, the 'maximum amount which (the now deceased) Mr Newitt was entitled to retain was the 25% deposit', not the entire rental fee paid to him. The Court of Appeal rejected this argument, stating that the non-refundable deposit was unmistakably what lawyers call an earnest, and a reasonable one at that, but that it was not liquidated damages and 'so damages could not be treated as agreed or fixed by the parties'. For these reasons the Court of Appeal dismissed the appeal of Mr Brooks (Mr Newitt had initially cross-appealed with respect to the order that he pay Mr Brooks Bds$5,000.00, but this was not pursued).

[7] Mr. Brooks has now appealed to this Court. He no longer contests the fact that he had no proper basis for asserting his original claim. And he now accepts (at least formally) that Mr Newitt did nothing wrong. On the contrary, the premise upon which his appeal now rests is that he himself repudiated the contract as he was wrong not to occupy Desert Rose. He argues, however, that the damages he was liable to pay to Mr. Newitt were limited to the non-refundable deposit of 25% of

the contract sum. He also argues that Mr Newitt's estate, the Respondent in this appeal, is obligated to turn over to Mr Brooks the Bds$5,000.00, as this is no longer in dispute.

[8] The questions that are before this Court have to do with Mr Newitt's obligation, if any, given the alleged repudiation by Mr. Brooks of the contract *after* he had fully performed his side of the bargain. Counsel for Mr Brooks focuses on the deposit paid by his clients. He states that the deposit was a genuine pre-estimate of any loss Mr Newitt might suffer if Mr. Brooks breached the contract. Counsel claims that Mr Newitt is therefore obliged to return to Mr. Brooks the 75% (i.e. US$8,813.00) that was paid by him.

Was there a breach of contract?

[9] Upon reflection, we do not think it useful or even proper to delve into the issues brought forward by Mr Brooks' Counsel, however interesting and important they may have been thought to be. It would seem to us that the appeal is built on procedural and legal quicksand. Mr Brooks' case, as it is now presented before us, was never pleaded in the first place. That original case was built on the submission that Mr Newitt breached the parties' contract; this case, on the other hand, takes as its starting point that Mr Newitt did nothing wrong but that it was him, Mr. Brooks, who breached or repudiated the contract by refusing to occupy the rented premises for no good reason at all. This is a fundamentally different premise. And this drastic change alone should prohibit us from entertaining this appeal.

[10] But we have also looked at the substance of the premise that has now emerged. Did Mr Brooks really repudiate the contract? We acknowledge that this was submitted by Mr Newitt and that it was the conclusion of both the High Court and the Court of Appeal. But this conclusion was obviously a mere inference based on the primary fact, found by the High Court Judge, that the Brooks family had refused, without proper reason, to occupy the rented premises. The question is if this inference was correct. We think not. In fact, in our view, the conclusion is untenable.

[11] First of all, Mr Brooks complied with his obligation under the contract to make the payment of the rent in full, first a deposit and then the balance of the rental fee, in a timely fashion, and Mr. Newitt also performed his part of the agreement by making the premises properly available to Mr. Brooks. It is true that Mr. Brooks refused to occupy the Villa, but under the rental agreement there was no duty to do so; occupation was merely a right. In legal shorthand, a breach of contract is often called a failure (including a refusal) to perform but it only occurs if a promisor fails (or refuses) to perform a contractual *obligation* within the time stipulated for its performance (apart from an anticipatory breach of contract, which is not relevant for this appeal)[1].

[12] In the same vein, "repudiation of a contract" means a repudiation of a contractual *obligation* to perform. Here, however, both parties did what they were obligated to do under the contract. In that, neither of them failed. It is true that Mr Brooks not only refused to occupy the premises he had rented from Mr Newitt but also demanded 'to get his money back', which in lay terms may be regarded a renunciation of the contract. However, a 'renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his *obligations under the contract* in some essential respect'.[2] In this case, Mr Brooks had already performed his obligations (timely payments of the rent) so his "renunciation" was nothing more than a strong demand for the return of his money because of his disappointment with the Villa he had rented.

[13] A refusal to occupy, or an abandonment of a rented place may constitute a breach of contract if the refusal is unjustified and if there are still obligations to be fulfilled by the tenant, such as the payment of rent.[3] In this case the refusal was unjustified, but the rent was paid in full and there were no other obligations with which Mr. Brooks needed to comply. So, there was no breach of contract. The logic of this position is reflected, for example, in the Restatement (Second) of

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[1] J W Carter, *Carter's Breach of Contract*, Second Hart Edition, pp 3, 286-7

[2] *CHITTY ON CONTRACTS*, Volume I, p 1554

[3] See, for example, *Sandbanks Hotel Ltd v Wallman*, 184 EG 569, 2 October 1962: W had booked a double room and a single room for three days in a hotel but upon arrival he was dissatisfied with the rooms. He refused to occupy the rooms and went to another hotel. The Judge found his dissatisfaction understandable but unjustified. He had not paid for the rooms in advance. He had thus breached the contract and was ordered to pay the costs of the room less one-third for food and amenities not used.

Property (1977), an official and authoritative (American) compilation of the common law, where it is stated that:

> (a)n abandonment of the leased property by the tenant occurs when he vacates the leased property without justification and without any present intention of returning and he defaults in the payment of the rent.[4]

What is true for abandonment is of course equally true for a refusal to occupy. Interestingly, §12.1 of the Restatement states the following rule:

> Except to the extent the parties to the lease validly agree otherwise [which was not the case in this matter], if the tenant abandons the leased property [and thus breaches the contract], the landlord is under no duty to attempt to re-let the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent, but the landlord may… notify the tenant that he will undertake to re-let the leased property for the tenant's account, thereby relieving the tenant of future liabilities under the lease, including liability for future rent, to the extent the same are performed as a result of a re-letting on terms that are reasonable[5].

It was this last path that Mr Newitt followed, even though he was under no obligation to do so.[6]

[14] The inevitable conclusion is that the appeal is to be dismissed, with costs to be paid by Mr. Brooks in accordance with the agreement between the parties. An order for the Respondent to pay Mr Brooks the amount of Bds$ 5,000.00 is

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[4] Restatement (Second) of Property, Landlord and Tenant, Volume 1, American Law Institute Law Publishers, 1977, § 12.1

[5] Ibid

[6] We note that there may be circumstances where occupancy of the rented premises is of utmost importance for the landlord. One can think of the owner of a small shopping mall who would not be pleased with shopping spaces that are rented but nevertheless unoccupied even though the tenants keep paying the rent. In these kinds of cases, however, the rental agreements or leases will usually have a clause requiring (continuous) occupancy. In any event, this is not such a case.

unnecessary as this was already ordered by the High Court, a decision that is *res judicata*.

JUDGMENT OF THE HONOURABLE MR. JUSTICE ANDERSON, JCCJ

Introduction

[15] I agree with my fellow justices that this appeal must be dismissed, but important nuances in our reasoning compel me to the writing of this separate concurring opinion.

[16] Mr David Brooks ("the Appellant") appealed a decision of the Court of Appeal of Barbados delivered on 31 July 2018. The Appellant contended that the Court of Appeal erred in its application of (i) the law on damages for breach of contract and (ii) the law on implied contractual terms in respect of a contract made between himself and Mr Henry Newitt ("Mr Newitt"), now deceased. The executor of Mr Newitt's estate is Mr Alister Morris ("the Respondent").

[17] The contract between the Appellant and Mr Newitt originated in an advertisement which Mr Newitt caused to be posted on the internet inviting persons to rent, during the 2005 Christmas period, his Desert Rose, a 'luxury 5 bedrooms villa with pool 3 minutes from the beach' in Barbados. The Appellant and his wife, Mrs Soozie Brooks ("Mrs Brooks") were residents of Clemente, California in the United States. Mrs Brooks saw the advertisement and emailed Mr Newitt expressing her interest in the property for her family's planned vacation in Barbados. By a series of emails between Mrs Brooks and Mr Newitt, and subsequently between the Appellant and Mr Newitt, it was agreed that the Brooks family would rent the Desert Rose from 13 to 28 December 2005. Mr Newitt charged US $11,750 as the rental fee for the 16 days. He also required a 25% non-refundable deposit of US $2,937 'to secure the booking'. As required by the terms of the agreement, the Appellant paid both the deposit of US $2,937 and the balance of US $8,813 prior to the arrival of his family in Barbados.

[18] Upon arrival at the Desert Rose, the Appellant alleged that the premises were unclean and uninhabitable, and that Mr Newitt failed to rectify these problems

when they were drawn to his attention. The Appellant further alleged that, in consequence, he was forced to find an alternative and more costly accommodation. He requested a refund of the US $11,750 but Mr. Newitt refused. Mr. Newitt did, however, indicate that he would try to rent the premises to someone else and would give to the Appellant 'whatever money he got from this'. During the period 13 to 28 December 2005, Mr Newitt was able to rent the property for approximately four days for Bds $5,000 and he made out a cheque for this amount to the Appellant but eventually cancelled the cheque before the Appellant could encash it.

Proceedings in the High Court

[19] The Appellant initiated proceedings against Mr Newitt in the High Court of Barbados seeking a return of all moneys paid together with damages for breach of contract. The trial judge, Justice Margaret Reifer, found Mr Newitt and his wife to be reliable witnesses and accepted their evidence that they attended to the preparation of the premises with care and so were not in breach of the implied term that the accommodation would be fit for occupation. The judge also found that it was in fact the Appellant who had refused to accept the premises because, upon their arrival, his wife was not satisfied with the arrangement. The allegation that the premises was unfit for habitation was a mere excuse to avoid the contract. In relation to the 25% deposit, Reifer J held that there was no evidence from the parties that it was intended to be 'presumptively a pre-calculation of damages'. Mr. Newitt was therefore entitled to the deposit plus the remainder of the rental fee as damages for breach of contract. However, given that he was able to mitigate his losses by renting the premises to another tenant for approximately 4 days, Mr Newitt was ordered to repay to the Appellant the Bds $5,000 received for that rental.

Decision by the Court of Appeal

[20] The Appellant appealed Reifer J's decision to the Court of Appeal. Mr Weekes submitted on the Appellant's behalf that Reifer J erred when she found that Mr Newitt was not in breach of the rental agreement. Counsel argued that the judge failed to take any or any 'sufficient account of what should have been the obvious negative impact on Mr. Newitt's credibility'. Additionally, she should not have

accepted the evidence of Mr and Mrs Newitt as they both benefitted as co-owners of the property from the retention of the rental fee. It was submitted that the judge further placed 'undue and unfounded reliance' on her conclusion as to the character of Mrs Brooks and her motivations for not wanting to stay at the property. In the alternative, Mr. Weekes submitted that Reifer J was wrong in law in holding that Mr Newitt could retain all but Bds $5,000 of the total rental price and should have instead ordered the repayment of 75% of the rental sum. He submitted that the 25% deposit was not a payment ensuring compliance by the Appellant but instead a genuine pre-estimate of damages to be suffered by Mr Newitt in case of a breach by the Appellant.

[21] In a judgment delivered by Burgess JA (as he then was) the Court of Appeal dismissed the appeal. The court did not find grounds upon which to disturb Reifer J's findings in relation to the condition of the premises upon the Appellant's arrival at the Desert Rose and the reasons why he and his family left the premises. In relation to the 25% deposit, Burgess JA applied the reasoning in *Workers Trust and Merchant Bank v Dojap Investments Ltd*[7] and the CCJ decision of *Errol Pratt v Karl Renz III*[8] and concluded that the 25% deposit had been forfeited by reason of the Appellant's breach. Burgess JA considered that the quantum of damages to which Mr Newitt was entitled, having regard to the basic aim of the legal principles governing the recovery of compensation for breach of contract, was the sum of money which he would have been paid under the contract for the performance of his side of the agreement. That sum would have been the entire US $11,750 (inclusive of the deposit) paid by the Appellant as the rental fee. However, as Mr Newitt had on his own admission received a double payment of Bds $5,000 for an approximate 5 days he was able to rent the property to someone else, the trial judge was correct in ordering Mr Newitt to pay that sum to the Appellant.

Appeal to the CCJ

[22] Mr Brooks filed an application for special leave to appeal to the CCJ on the basis that (i) the Court of Appeal erred in its application of the law on damages for

[7] [1993] AC 573.
[8] [2014] CCJ 7 (AJ).

breach of contract and (ii) based on the proper interpretation of the agreement, the parties intended the 25% deposit to be a genuine pre-estimate of losses to be suffered by Mr Newitt in case of a breach. Mr Weekes submitted that this was an appeal of interest to Barbados' final appellate court as 'there appears to be no definitive authority as to whether a good faith deposit paid by a party to a contract amounts to a genuine pre-estimate of damages, thereby limiting the recipient of the deposit claim to damages to the amount paid as the deposit'. In an affidavit in opposition, Ms. Hazelyn E. Devonish, attorney on behalf of the Respondent, submitted that the courts below adequately dealt with the case but since Mr. Weekes was of the view that the matter was of great public importance because of its significance to the tourist industry, she would not object to the application for special leave.

[23] By Order dated 29 November 2018 this Court granted leave to the parties to make submissions on the issue of special leave and indicated that the matter would be determined on paper. The Court granted special leave to appeal on 2 April 2019 and ordered the Appellant to file a Notice of Appeal on or before 8 April 2019. The said Notice of Appeal was filed on 5 April 2019. A Case Management Conference was held on 10 April 2019 at which the Court ordered the parties to file an agreed record of appeal, separate statements of facts and issues and written submissions. The hearing of the appeal was set for and was held on 2 July 2019.

The Issues Before the CCJ

[24] Before this Court, the Appellant no longer challenged the finding of Reifer J that the Respondent did not breach the duty to ensure that the property was fit for habitation and that it was the Appellant who wanted to avoid the contract and obtain a full refund. The Appellant's sole remaining challenge to the judgments of the courts below was that the 25% deposit was a genuine pre-estimate of the loss to be suffered by the Respondent in the event of a breach of the contract by the Appellant and therefore the Respondent was only entitled to retain that sum. This requires consideration of two issues: (a) whether there was a breach of contract; and, if so, (b) whether the 25% deposit was earnest money to be forfeited on breach or was a genuine pre-estimate of the loss to be suffered by the Respondent. If the 25% deposit was earnest money, then a third issue arises, (c)

the quantum of damages recoverable by the Respondent and any duty to mitigate loss under the contract.

Was There a Breach of Contract?

[25] Parties to a contract are legally responsible for performing their obligations under the contract. A breach of contract normally occurs when one party to the contract fails to discharge its obligations under the contract, thus ordinarily entitling the innocent party to damages for loss suffered in consequence of the breach. The exercise of a contractual right is usually optional and the failure to exercise that right is not usually discussed in the context of breach of contract except, perhaps, where the failure to exercise the right results in foreseeable loss to the other contracting party. An analogy from anticipatory breach may be apposite. A party must always be ready, willing and able to perform its obligations under the contract. If, prior to the date for the performance of those obligations, the party positively states an intention to not perform its obligations under the contract, that party commits an anticipatory breach of contract which entitles the innocent party to a variety of remedies including, possibly, ending the contract. In the same way, a party who has ostensibly performed its obligations under the contract but, whilst the contract period is running, repudiates the contract and contests the other party's understanding of its terms, may be guilty of committing a breach.

[26] For purposes of establishing the breach, it is not important that the arguments proffered by the disputing party were based on an error or were otherwise misconceived. In *Clausen v Canada Timber & Lands Ltd.*[9] the Judicial Committee of the Privy Council held that a company had breached a contract that was being performed by giving written notice of its intention to cancel the contract. It was not relevant that the notice had been written under a mistake or because of lack of 'a full appreciation of the unsoundness of the position taken up'.[10] What mattered was that there had been a clear and unequivocal intimation by one party to the other of the intention not to carry on with the contract. More on point is the case

[9] 1923 Carswell BC 100, [1923] 3 W.W.R. 1072, [1923] 4 D.L.R. 751. This case was cited in 6 cases with 4 cases indicating neutral consideration and negative treatment indicated in the following 2 cases: *Goldhar v. Universal Sections & Mouldings Ltd.* [1962] O.R. 774, 34 D.L.R. (2d) 82 (a decision which itself has received negative treatment); and *McGrath v. Brown* 131 A.P.R. 214, 21 A.C.W.S. (2d) 378 (which distinguished the case negatively).

[10] Ibid., at para 12.

of *Eng Chow v Balfour*[11]. The appellant had paid a significant sum in advance for his lease but subsequently demanded his money back asserting that the contract was in breach of the Statute of Frauds. The Court of Appeal of the Saskatchewan Supreme Court held that the Statute of Frauds was inapplicable, and that the appellant was, apparently by virtue of his contestation, [12] in breach of the contract.

[27] In the present case, the Appellant had duly discharged his obligation to pay the grand total of US $11,750 for renting the Desert Rose prior to his arrival in Barbados. With the payment of the entire sum required under the contract the Appellant had a right to occupy the property but, as a practical matter, and subject to the caveats just considered, had no duty or obligation to do so. Had he simply refused to exercise his right to take up the accommodation the issue of whether he would thereby have committed a breach of contract would have been academic. However, on the day he was due to take up occupation and refused to do so he also evinced an intention to dispute the sum payable by him under the contract. This may have been because of the interpretation he took of the terms of the contract, wrongful as it turns out, but he thereby acted in a way that indicated he would not be bound by the agreement as understood by the Respondent. As a practical matter, his disputation of the contract exposed the Respondent to the hazards of litigation culminating in the present adjudication and amounted to a repudiation of the contract.

Was the 25% Deposit Earnest Money or a Genuine Pre-estimate of the Loss for Breach?

[28] Mr Weekes, counsel for the Appellant, submitted that the 25% non-refundable deposit paid to Mr. Newitt was a genuine pre-estimate of loss to be suffered by Mr. Newitt in the event of a breach by the Appellant. He relied on the Privy Council decision of *Workers Trust and Merchant Bank v Dojap Investment,*[13] the CCJ decision of *Errol Prat v Karl Renz III,*[14] and the Australian case of *Multiplex*

[11] 1928 Can L II 140 (SK CA); [1928] 3 DLR 608; [1928] 2 WWR 158; 22 Sask LR 556.
[12] It is conceded that the Court of Appeal was not unambiguously clear as to what caused the breach, (only that the contract had been breached) and there is an argument to be made that the breach consisted of the appellant not fulfilling his obligation to pay the remainder of the rent which resulted in a loss of $5 per month for at least 1 year (hence judgment for $60).
[13]. n1 supra.
[14]. n2 supra.

Construction Pty Ltd v Abgarus Pty Ltd,[15] which, he contended, established that when parties to a contract agree to a deposit being paid which is not liable to be set aside as a penalty they have agreed two things: first, there is no need to further quantify the damages caused by the breach and, second, they have effectively put a limit on the extent of the contract breaker's liability in damages. He further argued that the use of the term "deposit" in modern contractual law implied that an amount paid as a deposit is forfeitable if it is not in the nature of a penalty. There was therefore a presumption that an amount paid as a deposit was forfeitable as liquidated damages. Mr Weekes called upon this Court to clarify the law of deposits in Barbados as this was of 'significant importance to the framework within which commerce in Barbados is to operate moving forward'.

[29] Ms Devonish submitted that nowhere in the contract was it suggested that the parties intended the deposit to be a pre-estimate of damages, nor was any evidence led at trial to suggest that it was. The onus was on the Appellant and he had not pleaded or proven that the deposit was a pre-estimate at the trial. Furthermore, normal business practice would show that this non-refundable deposit could not be a pre-estimate of the loss the parties could have suffered. This was a standard term in most contracts of a similar nature. There could be a situation where the Respondent might have suffered no loss and yet be entitled to retain the non-refundable deposit. For example, if the Appellant had changed his mind the day after the deposit was paid and the Respondent had found another tenant immediately, the Respondent would have been entitled to retain the deposit although he had suffered no loss. The deposit was simply a mechanism designed, on the one hand, to ensure that the tenant was guaranteed a place to rest his head when he arrived in the country while, on the part of the landlord, there was some fund to take care of matters preliminary to the arrival of the guest such as the administrative expenses involved in preparing the building and possible agents' fees.

[30] I agree with Ms Devonish that the Appellant has not presented evidence to show that the parties made a genuine attempt at pre-estimating the loss to be suffered by the Respondent in the event of a breach of the contract. Counsel for the

[15] (1992) 33 NSWLR 504.

Appellant submitted that the fact that the parties explicitly stated that the 25% deposit was a "non-refundable deposit" was evidence from which it could be implied that the sum was a genuine pre-estimate of the potential loss to be suffered by Mr. Newitt in the event of a breach. I do not accept this submission. I agree with the Privy Council in *Workers Trust and Merchant Bank Ltd v Dojap Investment Ltd* as to nature of deposits when that court said:

> In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that the forfeiture of such a deposit (customarily 10 per cent. of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract.
>
> … The special treatment afforded to such a deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money... Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture.[16]

[31] I do not think that the decision by this Court in *Errol Prat v Karl Renz III*,[17] was intended to change the law related to deposits; that decision turned on the excessiveness of the deposit in that case. It follows that I agree with Burgess JA when, based on *Workers Trust and Merchant Bank Ltd v Dojap Investment Ltd*,

[16] n1 supra at 578–579, per Lord Browne-Wilkinson.
[17] n2 supra.

he reasoned that the test whether a deposit may be forfeited was not whether the amount was a genuine pre-estimate of the loss which, at the time of contract, it appeared likely that the innocent party would suffer by reason of a breach. Rather, the test was whether the deposit was earnest money for the performance of the contract. There can be no doubt in the present case that the deposit by the Appellant was intended to be an earnest to secure the performance of the accommodation contract given the clear wording of the agreement that 'to secure your booking a 25% non-refundable deposit is required'.

[32] Accepting that the deposit was an earnest for contract performance the question arises as to whether 25% of the contract price was reasonable as a deposit. The central message of *Workers Trust* is that, applying the test for penalties, a "true deposit" may be seen to 'take effect as a penalty' but, as long as the penalty is reasonable, it will be permitted.[18] The sole test is reasonableness and therefore everything turns on the circumstances of the case or the circumstances attending the category of cases into which the case falls. In *Errol Prat v Karl Renz III,* this Court considered that payment of 41% of the contract price as a deposit was wholly extravagant. By way of comparison, the following appears in the legal literature:

> In *Else (1982) Ltd v Parkland Holdings Ltd*, Hoffmann L.J. upheld the forfeiture of about 32 per cent of the pre-paid price, noting that the purchaser had obtained non-monetary benefits before completion, and the breaches were grave and persistent… Similarly, in *Omar v El-Wakil* [2002] 2 P. & C.R. 3, the English Court of Appeal refused to grant relief under section 49(2) of the Law of Property Act. A 31 per cent deposit was upheld on the ground that inability to complete was exactly the risk the deposit is intended to guard against. In Australia, proportionately larger deposits have been held reasonable where the subject matter of the contract could depreciate during the pre-completion period, such as a farm leased for cultivation (*Coates* [1974] W.A.R. 2, 15-7), or a hotel whose value depended on good management (*Re Hoobin* [1957] V.R. 341).[19]

[18] n1 supra at p. 580B.
[19] Lusina Ho, "Deposit: the importance of being (an) Earnest" (2003) 119 Law Quarterly Review 34-39.

[33] In deciding on the reasonableness of the 25% deposit in this case several factors may be considered. Tourism is a global service industry where idiosyncratically high rates for deposits could result in a competitive disadvantage to the Caribbean tourism product. Indeed, regulatory entities in other tourist destinations are concerned at legally unfair terms in vacation contracts and that such unfair terms can include those which allow a business to take a large, upfront deposit and refuse to refund any of the customer's money if they cancel, regardless of the amount the business is losing or the reason for the customer cancelling.[20] However, greatest significance has to be accorded to the finding by the Court of Appeal of Barbados that the 'volatile nature of the market for winter tourism' in Barbados meant that the 25% deposit was reasonable within the local circumstances.

The Damages Recoverable/Duty to Mitigate

[34] In the present circumstances, where there was a breach of contract by the Appellant and his forfeiture of the 25% deposit, the final question arises as to the damages recoverable by the Respondent. This will naturally be the contract sum less any moneys received flowing from the duty to mitigate loss flowing from the breach.

[35] The duty to mitigate arose at the point of the breach, that is, the day on which the Appellant repudiated the contract by refusing to occupy the rented premises and disputing the degree of his liability under the terms of the rental agreement. At the point at which the Appellant demanded the return of (in effect) the 75% of what he had paid, there was no guarantee that he would not have succeeded at law, either fully or in part. The fact that the money was already physically in the hand of Mr Newitt was not legally determinative of the rightful ownership of the money. The duty to mitigate loss flowing from a breach of the contract is calculated to facilitate economic efficiency; in the terms of the present case it encourages the utilization of the contractual asset in question, here the rental of the contracted premises which might otherwise remain unused for the contractual period. Of course, the sum recovered by the Respondent from the efforts at

[20] See: Press release of The Competition and Markets Authority (CMA) "CMA Calls on Holiday Industry to give customers clearer Ts & Cs. Published 17 April 2019.

mitigation must go towards reducing the damages and must therefore be paid to the party in breach.

Conclusion

[36] In consequence of the foregoing I would dismiss the appeal and order that the Respondent must pay to the Appellant the sum of Bds $5,000 obtained through mitigation of loss under the contract. Costs are as agreed by the parties.

Orders of the Court

[37] Having regard to the opinions expressed the following are the orders of the Court:

1. The appeal is dismissed.

2. The Appellant shall pay to the Respondent costs in the sum of Bds $20,000.00

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow