[2015] JMSC Civ.233

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 01608

BETWEEN	**NATIONWIDE NEWS NETWORK LTD.**	**CLAIMANT**
AND	**AIG JAMAICA INSURANCE COMPANY LTD.**	**DEFENDANT**

Lord Anthony Gifford, Q.C. and Mrs. Emily Shields instructed by Gifford, Thompson & Bright for the Claimant.

Mr. Ransford Braham Q.C., Mrs. Camille Wignall Davis and Mr. Mark Paul Cowan instructed by Nunes, Scholefield, Deleon and company for the Defendant.

HEARD ON THE 6th, 10th, 15th July, 3rd September and 27th November, 2015

Insurance contract - Anticipatory breach - Estoppel by convention

CRESENCIA BROWN BECKFORD, J

PRELUDE

I wish to thank counsel for the breadth of their submissions and their apparent industry. I have fully considered them and they proved to be most useful to me in my determination of this matter. I further wish to acknowledge the clear identification of the issues in dispute by Counsel. I have taken the liberty of quoting directly and indirectly from the submissions on matters not in dispute for which I crave your indulgence. I also wish to apologise for the delay in delivering this judgment and thank the parties and counsel for their patience.

INTRODUCTION

[1] The Claimant has been found liable in the sum of $12,000,000.00 plus costs, arising from a defamation suit brought against it by Mr. Percival James Patterson (Mr. Patterson). The Claimant now contends that the Defendant is liable to indemnify it for the said sum. The Defendant contends it only liable to pay the amount of $9,000,000.00.

[2] The basis of such disagreement is the application of "DEFENDING AND SETTLING LAW SUITS (Defense part of limits)" clause of the policy contract. The relevant portion referred to as the 'hammer clause' states:

> *We have the right to investigate any claim and, with your written consent, settle any claims or suit if we believe that it is proper. Our duty to defend ends if you refuse to consent to a settlement we recommend and claimant will accept. You must then defend the claim at your own expense and negotiate any settlement. Our liability for any settlement or judgment will not be more than the amount for which we could have settled (had) you consented.*

[3] By this token the defendant sought to limit its maximum indemnity of the Claimant to $9,000,000.00. This was on the basis that the Claimant had refused to consent to a settlement which Mr. Patterson was prepared to accept.

[4] The Claimant contends that invoking the 'hammer clause' was an anticipatory breach and in repudiation of the corhact. The defendant contends the Claimant is estopped by convention from denying that the clause applies.

DECISION

[5] There could be no anticipatory breach of contract as there was never an intention by the defendant to abandon and altogether refuse to perform the contact.

[6] The Claimant is estopped by convention from denying the applicability of the 'hammer clause'. The Defendant is not bound to indemnify the Claimant in respect of all sums which the Claimant is liable to pay to Percival James Patterson pursuant to a

judgment delivered by this Honourable Court on the 30th October 2014 against the Claimant and in favour of Percival James Patterson in Claim No.2010 HCV 002214.

THE CLAIM

[7] This claim arises by way of Fixed Date Form filed on the 13th day of March 2015 where the Claimant, NATIONWIDE NEWS NETWORK LIMITED is claiming against the defendant AIG INSURANCE COMPANY LIMITED inter alia the following orders:

(1) A Declaration that the Defendant is bound to indemnify the Claimant in respect of all sums which the Claimant is liable to pay to Percival James Patterson pursuant to a judgment delivered by this Honourable Court on 30th October 2014 against the Claimant and in favour of Percival James Patterson in Claim No. 2010 HCV 002214

(2) An Order that the Defendant do pay the Claimant the sum of $17,503,646.67. (This sum was abandoned in the course of argument as discussion as to the amount of costs to be paid was ongoing and likely to bear fruit.)

[8] The Claimant grounds its claim on a policy of insurance from American Home Insurance Company who agreed to pay on behalf of the Claimant, a radio station, such amounts as the Claimant was legally required to pay to compensate others for a loss arising from a wrongful act committed by the Claimant, up to a limit of $30,000,000.00. The liabilities of American Home Assurance Company have been assigned to the Defendant.

[9] The Claimant now submits the defendant is liable to pay as there was no offer of settlement as the wording of an apology, the frequency with which the apology would have carried and the medium through which the apology would have been carried were never agreed. Accordingly, the 'hammer clause' could not apply and the limit of the insurance policy remains at $30,000,000.00.

[10] The Claimant relied on the case of **Western Broadcasting Services v Edward Seaga** Privy Council Appeal No. 43 of 2005 from Jamaica for the proposition that in a

libel case where the apology had not been agreed on, there was no settlement. In that case it was considered that "*the content and publication of the apology*" was an essential term of the settlement agreement.

[11] Further, the application of the 'hammer clause' was wrong, premature and was an anticipatory breach by the Defendant.

[12] The Defendant accepts that **Western Broadcasting** applied and that there was no settlement. The Defendant however counters that there was a shared assumption that the 'hammer clause' applied and the Claimant was estopped by convention from denying that it did.

[13] There were two witnesses of viva voce evidence. Mr. Cliff Hughes on behalf of the Claimant and Mrs. Rarane Langley on behalf of the defendant. Having observed the witnesses the court accepts Mrs. Langley as a forthright witness. Mr. Hughes on the other hand seemed to tailor his answers and so appeared to be less forthright. To the extent that they differ, Mrs. Langley is to be preferred to Mr. Hughes.

AGREED FACTS

[14] The following facts are not in dispute.

i. The Claimant was insured by the Defendant pursuant to a professional indemnity policy of insurance.

ii. An action was filed against the Claimant by Mr. Percival James Patterson for damages for defamation in respect to a number of reports broadcast by the Claimant in May 2009.

iii. Mr. Patrick Foster Q.C. of the law firm Nunes, Scholefield, DeLeon & Co. was retained to represent the Claimant in the said defamation

action pursuant to the Defendant's right under the policy to take conduct of the Defence on behalf of its insured.

iv. Mr. Patrick Foster Q.C. conducted settlement negotiations on behalf of the Claimant with a view to arriving at an amicable settlement of the defamation claim, and in the course of those discussions Mr. Patterson agreed to accept a total of $9,000,000.00 in settlement of his claim for damages and costs. There was no agreement on the wording of an apology.

v. The Claimant thereafter requested that the conduct of its defence be transferred to Lord Anthony Gifford Q.C. of Gifford, Thompson & Bright.

vi. As a condition of the transfer of the file to Lord Gifford as requested, the Claimant invoked a clause under the policy of insurance referred to as the 'hammer clause' which had the effect of limiting the indemnity under the policy to $9,000,000.00 inclusive of legal costs.

vii. The defamation action proceeded to trial on November 26 – 29, 2013 and judgment was entered against the Claimant on October 30, 2014 in the sum of $12,000,000.00 plus costs to be taxed or agreed.

ISSUE 1 Anticipatory Breach

[15] The Claimant argues that the defendant invoking the 'hammer clause' was a clear case of anticipatory breach of contract. The contract of insurance contained a clear promise to compensate others for a loss arising from the Claimant's wrongful act. This was done between the 2nd and 3rd May, 2015. Trial in the Patterson matter was due to commence on the 6th May, 2013. The only relevant course for the Claimant to take was to wait for performance to arrive and wait to sue as he is entitled to do.

[16] The Claimant relied on the following passage from **Chitty on Contracts** 28th edition paragraph 25-020.

> *Anticipatory breach. If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an "anticipatory breach" of the contract and entitles the other party to take one of two courses. He may "accept' the renunciation, treat it as discharging him from further performance and sue for damages forthwith ,or he may wait the time or performance arrives and then sue.*

[17] The question of whether a notice of recission induced by a mistake as to the law, was a repudiation of the contract was considered by the House of Lords in the case of **Woodar Investment Development Ltd v Wimpey Construction UK Ltd** [1980] UKHL 11 (14 February 1980) [1980] 1 WLR 277, [1980] 1 All ER 571.

[18] The facts as summarized by Lord Wilberforce are as follows:

> *The appellants ("Wimpey") are defendants in this action brought by the respondents ("Woodar") upon a contract of sale dated 21st February 1973. This contract related to 14 acres of land at Cobham, Surrey, near to the site later occupied by the Esher by-pass. There was the prospect of planning permission being granted for development. The purchase price was £850,000 and there was a special condition (Condition I) that upon completion the purchasers should pay £150,000 to a company called Transworld Trade Ltd. Completion was fixed for the earliest of three dates namely (i) two months from the granting of outline planning permission for the development of the property, (ii) 21st February 1980, (iii) such date as the purchaser should specify by not less than 14 days' notice in writing.*
>
> *The contract contained a special Condition E under which there was reserved to the purchasers power to rescind the contract in either of three events. The first related to failure to obtain outline planning permission, the second to the failure to obtain an easement giving access to the property, the third (E(a)(iii)) was in the following terms:*
> *"[if prior to the date of completion]*
> *"(iii) Any Authority having a statutory power of compulsory acquisition "shall have commenced to negotiate for the acquisition by agreement "or shall have commenced the procedure required by law for the compulsory" acquisition of the property or any part thereof."*
>
> *On 20th March 1974 the appellants sent to the respondents a notice in writing purporting to rescind the contract under this provision. The notice stated that the ground relied on was that the Secretary of State*

for the Environ-ment had commenced the procedure required by law for the compulsory acquisition of 2.3 acres of the property.

It was in fact known to both parties at the date of the contract that certain steps had already been taken in relation to these 2.3 acres.

[19] The issues are identified by Lord Wilberforce and the applicable principles of law bear repeating in his own words.

This gives rise to the first issue in this appeal: whether, by invoking Special Condition E(a)(iii), and in the circumstances, the appellants are to be taken as having repudiated the contract. The respondents so claim, and assert that they have accepted the repudiation and are entitled to sue the appellants for damage.

My Lords, I have used the words "in the circumstances" to indicate, as I think both sides accept, that in considering whether there has been a repudiation by one party, it is necessary to look at his conduct as a whole. Does this indicate an intention to abandon and to refuse performance of the contract? In the present case, without taking the appellants conduct generally into account, the respondents' contention, that the appellants had repudiated, would be a difficult one. So far from repudiating the contract, the appellants were relying on it and invoking one of its provisions, to which both parties had given their consent. ***And unless the invocation of that provision were totally abusive, or lacking in good faith, (neither of which is contended for), the fact that it has proved to be wrong in law cannot turn it into a repudiation. (Emphatismme)***

[20] He continued succinctly stating the principles in the following way:

My Lords, in my opinion, it follows, as a clear conclusion of fact, that the appellants manifested no intention to abandon, or to refuse future performance of or to repudiate the contract. And the issue being one of fact, citation of other decided cases on other facts is hardly necessary. ***I shall simply state that the proposition that a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating it is supported by James Shaffer Ltd. v. Findley Durham & Brodie [1953] 1 W.L.R. 106 and Sweet & Maxwell Ltd. v. Universal News Services Ltd. [1964] 2 Q.B. 699.(my emphasis)***

[21] Lord Wilbrforce concluded, in agreeing with the majority decision.

In my opinion therefore the appellants are entitled to succeed on the repudiation issue, and I would only add that it would be a regrettable

develop-ment of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obliga-tions. To uphold the respondents' contentions in this case would represent an undesirable extension of the doctrine.

[22] Lord Scarman also supported the decision of the majority. He put the position thus:

> *"If an anticipatory breach is relied on, the renunciation must be "an intimation of an intention to abandon and altogether to refuse performance "of the contract"; or, put in other but equally clear words, "the true question "is whether the acts or conduct of the party evince an intention no longer to "be bound by the contract": Lord Coleridge C.J. in Freeth v. Burr (1874) L.R. 9 C.P. 208 at p. 213. The emphasis upon communication of the party's intention by his acts and conduct is a recurring theme in the abundant case law.*

[23] Lord Scarman went on to discuss the application of this principle to the particular facts and said:

> *Difficulty, however, does arise in the application of the principle to particular facts—as the difference in judicial opinion in the present case shows. The dividing line between what is repudiatory and what is not emerges from three very persuasive dicta to be found in the case law. When the Federal Commerce 17case, supra, was in the Court of Appeal, Lord Denning M.R. said, [1978] 3 W.L.R. 309, at p. 342F:-*
>
> > *"I have yet to learn that a party who breaks a contract can excuse himself "by saying that he did it on the advice of his lawyers: or that he was "under an honest misapprehension …I would go by the principle "that, if the party's conduct ['contract' must be a misprint] —objectively.*
>
> *In the Spettabile case, 121 L.T. 628, Atkin L.J. at pages 634-5s aid of the various definitions of repudiation:—*
>
> > *"They all come to the same thing, and they all amount at any rate to this, "that it must be shown that the party to the contract <u>made quite plain</u>"[emphasis supplied] his own intention not to perform the contract."*

> *In James Shaffer Ltd. v. Findlay Durham and Brodie [1953] 1 W.L.R. 106 the Court of Appeal had under consideration a breach of a long-term supply contract where the defendant, who had undertaken to pass on orders of not less than a specified value each year, failed to do so. He honestly believed his failure was not a breach of contract: but the Court of Appeal held that it was, his construction of the contract being erroneous in law. The court held, how-ever, that the breach did not evince an intention not to be bound by the contract. Singleton L.J., who referred to Freeth v. Burr and the Spettabile case, made this comment, at page 120:*
>
> > *"Streatfield J. said that this was a very difficult case and near the line."I think that that is a true description. Sometimes when a case is put in "one particular way it has great appeal, and, when it is put in the other "way, it has an almost equal appeal. I do not think that it is right to look "at the interview of May 18 alone; as I understand the law, it is our "duty to have regard to the circumstances."*
>
> *Morris L.J. (bottom of page 124) and Upjohn J. (page 127) said the same thing.*

My Lords, as I see it, the error of the majority of the Court of Appeal in the instant case was, notwithstanding some dicta to the contrary, to concentrate attention on one act, i.e. the notice of rescission with its accompanying letter. They failed to give the consideration which the law requires of all the acts and conduct of the defendants in their dealings with Mr. Cornwell—the "alter ego" of the plaintiff company. The law requires that there be assessed not only the party's conduct but also, "objectively considered", its impact on the other party.

[24] The state of the law was reviewed by the Court of Appeal in **Eminence Property Developments Ltd. v. Heaney** [2010] EWCA Civ 1168 (21 October 2010) [2011] 2 All ER (Comm) 223.

[25] The issue on appeal was whether a vendor of land, who served a notice to complete making the time for completion of the essence of the sale contract, and then, mistakenly, treated the contract as at an end prior to the expiry of the notice, was thereby itself in repudiatory breach of the contract entitling the purchaser to terminate the contract.

[26] Lord Justice Etherton with whose judgment the panel agreed, having reviewed these applicable cases, made these observations:

> *61. I would make the following general observations on all those cases. First, in this area of the law, as in many others, there is a danger in attempts to clarify the application of a legal principle by a series of propositions derived from cases decided on their own particular facts. Instead of concentrating on the application of the principle to the facts of the case in hand, argument tends to revolve around the application of those propositions, which, if stated by the Court in an attempt to assist in future cases, often become regarded as prescriptive. So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, "perspicuous". It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contact.*
>
> *62. Secondly, whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value. The innocent and obvious mistake of Mr. Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in The Nanfri.*
>
> *63. Thirdly, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in Woodar (at p. 281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.*
>
> *64. Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply, as is well illustrated by the division of view among the members of the Appellate Committee in Woodar itself.*

[27] This difficulty of applying the test to particular facts is captured by the authors of **Chitty on Contracts** 28th Edition where at paragraph 25-018 it is said

> *Even the giving of notice of recission, or the commemcement of proceedings by one party claiming recission of the contract, does not necessarily entitle the other to treat the contract as repudiated, since such action may be taken in order to determine the respective rights of the parties, and so not evince an intention to abandon the contract. On the other hand, it is, generally, no defence for a party who is alleged to have repudiated the contract to show that he acted in good*

faith. The courts have struggled to reconcile the latter proposition with their reluctance to conclude that a party who has acted in good faith but was mistaken has thereby repudiated the contract. The result of this tension is that the cases in this area are not all easy to reconcile. The position would appear to be that it may not be a repudiation for one party to put forward his genuine but bona fide interpretation of what the contract requires of him but that where that party performs in a manner which is not consistent with the terms of the contract, it is no defence for that party to show that he acted in good faith." (emphasis mine)

[28] Applying this "test" to the instant case, these are the circumstances I find to have existed, my reasoning being further development in the discussion of the issue of estoppel by convention.

[29] There was commenced settlement negotiations between the parties in the Patterson case. Agreement was reached on quantum but the settlement was not concluded as there was no agreement on the wording of the apology.

[30] On 30th April 2013 the Claimant through its principal Mr. Cliff Hughes expressed reservations and brought to a halt the negotiations. He was advised of the 'hammer clause' and its implication.

[31] Mr. Hughes, following discussion and consultation decided to proceed to trial and wished to engage the services of new attorney. The Defendant advised him that as a consequence of his decision the 'hammer clause' would be invoked. This was also a pre – condition of the matter being transferred to the new attorneys. Mr. Hughes on behalf of the Claimant agreed and accepted that the 'hammer clause' applied.

[32] This was an innocent mistake on the part of the Defendant and was not in any way occasioned by any spite or ill will.

[33] The defendant continued to honour the obligations under the contract to wit

(1) Remaining willing to pay the balance on the insurance moneys (as believed by them).

(2) Payment of Attorney's fees

(3) The policy provided that the defendant would pay the amounts the Claimant was legally required to pay as a result of one **or more** claims. There is no evidence or suggestion that the Defendant was or would refuse to pay any claims other than the Patterson claim.

[34] Applying this test to the instant case, I find as a fact that no reasonable person in the position of the Claimant could form the view that the Defendant had clearly shown an intention to abandon and altogether refuse to perform the contract.

[35] The Defendant remained at all times willing to perform the contract subject to the application of the 'hammer clause'. Correspondence between the Claimant's Attorneys-at Law and the defendant make it abundantly clear that the Claimant could not be of this view as they expected the Defendant to continue to perform its obligations under the contract. The stance of the Defendant was always that it would pay the sum it believed to be due. There is no inference that could be drawn that it would not perform its other obligations under the contract.

[36] That the 'hammer clause' applied was a genuinely held mistaken view of the law. This view was shared by the claimant even with the benefit of the availability of 'independent' legal advice of the highest calibre.

[37] I find as a fact that the Defendant did not repudiate the contract of insurance with the Claimant when it invoked the 'hammer clause'.

ISSUE 2 ESTOPPEL BY CONVENTION

[38] The Defendant submits that the Claimant is estopped by convention from challenging the applicability of the 'hammer clause' and is therefore limited to the balance remaining from the $9,000,000.00, the limit of its liability by virtue of that clause.

[39] The exposition of the law on estoppel by convention is not disputed. As such I will gratefully adopt in great measure the discussion from the closing submissions of the Defendant.

[40] Estoppel has many descriptions and titles and is not considered to be an equitable doctrine in all cases. Indeed it has been held that estoppel by convention is not equitable in its origin, but originated from the common law. Irrespective of its origin, however, there is a settled principle of estoppel known as 'estoppel by convention.

[41] This principle of 'estoppel by convention' is distinct from 'estoppel by representation' or what is generally referred to as 'equitable estoppel'. Based on the authorities, an estoppel by convention arises where parties to a transaction act on an assumed state of fact or law shared by the said parties or made by one of them and acquiesced in by the other. The classic representation made by one party to the other or encouragement made by one party to the other and the other party relying on the representation or encouragement and act to its detriment, is not the same thing. In the case of estoppel by convention the assumption can be generated spontaneously, so long as both parties accept the assumption and agree to it; there is no need as in the case of 'equitable estoppel' to prove a representor and a representee or an encourager and an encouraged. There is also no need for a contract supported by consideration.

[42] In many instances, the assumption of the parties is contrary to the express terms of the formal contract between them. This however is of no moment. The assumption even if generated by mistake, misapprehension, stubbornness, or ignorance, or even if it would amount to breach of contract will not without more defeat an estoppel by convention, if the other elements required to ground the estoppel are present.

[43] The other elements required to ground an estoppel by convention (in addition to the shared assumption) is the requirement that it must be established that it would be unjust or unconscionable for one party to be allowed to resile from the convention. Further if it is established that to resile from the convention will cause prejudice or

detriment to the party seeking to maintain the convention that is sufficient to establish injustice and unconscionability.

[44] The learned authors of **Chitty on Contracts** 31st edition paragraph 3-107 have articulated the doctrine as follows:

> "*Estoppel by convention may arise where both parties to a transaction act on an assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption if it would be unjust or unconscionable to allow them or one of them to go back on it. Such an estoppel differs from estoppel by representation and promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption, which was not induced by the party alleged to be estopped, but was based on a mistake, spontaneously made by the party relying on it and acquiesced in by the other party. It seems however that the assumption with representation, required to give rise to other forms of estoppel, to the extent that it must be unambiguous and unequivocal and this common feature can make it hard to distinguish between these two forms of estoppels. Estoppel by convention has also been said to arise out of express agreement by which the parties have compromised a disputed claim and where there is such a compromise to support consideration and according to the principles discussed earlier in this chapter, it is binding as a contract. So the there is, it is submitted no need to rely on the estoppel by convention."*

[45] The modern doctrine of this species of estoppel is propounded in **Republic of India v India Steamship; (No 2) The Indian Endurance** [1997] 4 All ER 380. In this case the plaintiffs, the Republic of India and the Indian Ministry of Defence, were the owners of a cargo of munitions carried on board the defendants' vessel in September 1987 pursuant to bills of lading for a voyage from Sweden to India. During the voyage, part of the cargo was jettisoned and part of the remaining cargo was damaged by a fire on board the vessel. Following the discharge of the cargo in India, the Plaintiffs issued proceedings in India seeking damages in respect of the jettisoned cargo [only].

[46] In 1989 the Plaintiffs issued a writ in rem out of the Admiralty Court in England, which was served on a second vessel owned by the Defendants, claiming total loss of the cargo, including the jettisoned part. Thereafter judgment was given in the Indian proceedings against the Defendants, who then applied for an order striking out the claim

in rem filed in England. On a preliminary issue, the judge held that while the two actions involved the same cause of action they were not between the same parties, since the action in rem was an action brought against the ship rather than the owners, and that therefore the proceedings were not barred by s 34 of the **Civil Jurisdiction and Judgments Act 1982**. That decision was reversed by the Court of Appeal and the Plaintiffs appealed to the House of Lords.

[47] The House of Lords held that the action in rem issued by the plaintiffs was an action 'between the same parties, or their privies' within the meaning of s 34 as the Indian action in personam in which the plaintiffs had obtained judgment. Since no estoppel had arisen to preclude the Defendants from relying on s 34, that section was a bar to the action in rem. The appeal would accordingly be dismissed.

[48] The Plaintiffs had relied in the alternative on estoppel by convention and estoppel by acquiescence in their argument that the proceedings in England were not barred and the court had to expound on both principles in coming to its final position that the said proceedings were barred. Lord Steyn, for example, opined at p. 392:

> *"It is settled that an estoppel by convention may arise where the parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one or acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption … It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."*

[49] In order to ground an estoppel by convention therefore, there must be an assumed state of fact or law or mixed fact and law in order to sustain a plea of estoppel by convention.

[50] The following extract from the reasoning of Lord Steyn in relation to the particular facts in **The Indian Endurance** case, is also instructive as to the elements of estoppel by convention. He reasoned at p. 393:

> *But in order to establish an estoppel by convention the plaintiffs had to prove that the defendants evinced by their conduct that they were content that the taking of a judgment in Cochin would not prejudice the resolution of other proceedings on their merits, that is, that in future proceedings no plea or defence on the [1997] 4 All ER 380 at 393 basis of a judgment in Cochin would be raised, whatever the outcome of the proceedings in Cochin….*

[51] In the end the argument of estoppel by convention was not upheld by the House of Lords, on the facts of the case.

[52] One of the most cited cases on estoppel by convention is the case of **Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commercial Bank Ltd** [1982] Q.B. 84. In that case the Defendant, a bank agreed to lend money to ANPP (a subsidiary of the Plaintiff). In the end, the loan was provided through the Bank's subsidiary referred to as Portsoken. This was part of a much broader set of arrangements under which the Bank provided finance to the Plaintiff secured by mortgages over properties owned by the Claimant. The Claimant gave a guarantee to secure all monies it owed to the Bank. The parties both believed that the guarantee extended to cover the loan by Portsoken to ANPP (to wit, from the bank's subsidiary to the guarantor's subsidiary) though on a strict interpretation of the guarantee it arguably did not cover the indebtedness to Portsoken. The Bank and the Plaintiff had conducted their negotiations for the overall financing of the Plaintiff from time to time on the basis that the guarantee covered the loan by Portsoken to ANPP. The Claimant went into liquidation and the question was whether the cash realized from the sale of the Claimant's assets had to be applied partly to pay off the indebtedness to Portsoken.

[53] The English Court of Appeal held that the Claimant was estopped by convention from denying that the guarantee was binding and effective and covered the liability of

ANPP. Lord Denning found that there was clear conduct which underpinned the shared assumption between the parties at p 31:

> *"The evidence is overwhelming to show that, from the very moment when the $3,250,000 was advanced to A.N.P.P., all the parties thought that it was secured - not only by the mortgage of the Harrison Building - but also by the guarantee of the plaintiffs. In pursuance of that belief the bank embarked on a course of conduct - rearranging their portfolio of investments - releasing properties and moneys to the plaintiffs - which they would not have done except on the basis that the guarantee of the plaintiffs covered the loan to A.N.P.P….."*

[54] Lord Denning (as well as Lord Brandon) also considered the Plaintiffs' argument that the course of conduct arose from a mistaken belief induced by the bank and reasoned as follows:

> "*Now assuming that this belief was mistaken, and the judge thought it was but I do not, a question arises about the law of estoppel. The mistake by the bank was self-induced; they had overlooked the wording of the guarantee. So, therefore the mistake is contrary to the wording in this case of the contract. They thought it applied to monies owing to Portsoken as well as money owing to the bank. This was the bank's own mistake. It was not induced by the plaintiff, nor did the plaintiff do anything to contribute to it or to reinforce it. Except this, that they did not contradict it. They did not tell the bank that it was mistaken. But then it is said, how could the Plaintiff be expected to contradict it when they were under the same mistake. So runs the argument on behalf of the Plaintiff. The bank made a mistake of its own - everything it did followed from its own mistake. So it should put up with the consequences…*
>
> *[But] Suppose that the plaintiffs knew that the bank were under a mistake – and did not tell the bank - but took advantage of it for their own benefit. Could the plaintiffs then take advantage of it? Clearly not. Then what difference does it make that the plaintiffs were under the same mistake?*
>
> *…. If parties to a contract by their course of dealing put a particular interpretation of the terms of it on the fate of which each of them to the knowledge of the other, act and conduct their mutual affairs, they are bound by the interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not. Or whether they were mistaken on it, or whether they had in mind the original*

terms or not. Suffice it that they have by the course of dealing, put their own interpretation on their contract and cannot be allowed to go back on it…

So I come to this conclusion when the parties to a contract are both under common mistake as to the meaning or the effect of it and thereafter embark on a course of dealing in the footing of that mistake thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. …

When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. That general principle applies to this case. Both the plaintiffs and the bank proceeded for years on the basis of the underlying assumption that the guarantee of the plaintiffs applied to the $3,250,000 advanced by the bank for the Nassau Building. Their dealings in rearranging the portfolio, in releasing properties and moneys, were all conducted on that basis. On that basis the bank applied the surplus of $750,000 (on the English properties) in discharge of the obligations of the plaintiffs under the guarantee. It would be most unfair and unjust to allow the liquidator to depart from that basis and to claim back now the $750.000."

[55] The judgment of Lord Justice Everleigh is also instructive. He expressly identified the principle of estoppel by convention and explained it thus:

"…I would prefer to treat this case of one of estoppel by convention. Counsel for the bank referred us to that passage in Spencer Bower. "When the parties have acted in their transaction upon an agreed assumption that a given state of facts is to be accepted between them as true then as regard that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed…. estoppel operates so as to prevent a party from denying the representation or an assumed state of facts in relation to the transaction supported by that representation or assumed state of fact. The estoppel does not go beyond the transaction in which it arose.

[56] Lord Brandon in **Amalgamated Investment** at p. 131 deals with the 'origination of error' as well as the distinction between that principle and estoppel by representation:

> *"I consider first the argument based on the origin of the bank's mistaken belief. In my opinion this argument is founded on an erroneous view of the kind of estoppel which is relevant in this case. The kind of estoppel which is relevant in this case is not the usual kind of estoppel in pais based on a representation made by A to B and acted on by B to his detriment. It is rather the kind of estoppel which is described in Spencer Bower and Turner, Estoppel by Representation, 3rd ed. (1977), at pp. 157-160, as estoppel by convention. The authors of that work say of this kind of estoppel, at p. 157:*
>
> *"This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."*
>
> *Applying that description of estoppel by convention to the present case, the situation as I see it is this. First, the relevant transactions entered into by the plaintiffs and the bank were the making of new arrangements with regard to the overall security held by the bank in relation to both the U.K. and Nassau loans. Secondly, for the purposes of those transactions, both the bank and the plaintiffs assumed the truth of a certain state of affairs, namely that the guarantee given in relation to the Nassau loan effectively bound the plaintiffs to discharge any indebtedness of A.N.P.P. to Portsoken. The transactions took place on the basis of that assumption, and their course was influenced by it in the sense that, if the assumption had not been made, the course of the transactions would without doubt have been different.*
>
> *Those facts produce, in my opinion, a classic example of the kind of estoppel called estoppel by convention as described in the passage from Spencer Bower and Turner, Estoppel by Representation, which I have quoted above, and so deprive the first argument advanced on behalf of the plaintiffs of any validity which, if the case were an ordinary one of estoppel by representation, it might otherwise have."*

[57] The defendant submits that the decision in ***Amalgated*** emphasizes the difference between estoppel by convention and estoppel by representation and confirms

that the former may arise based on the common assumption shared by the parties, even without the encouragement or representation by one to other. Further, it makes the point that even if the assumption was occasioned by a mistake or misunderstanding as to the nature of the contract held by one party and acquiesced in by the other, or even held by both parties from the inception of the contract, that mistake or misunderstanding does not defeat the estoppel. The convention can still be upheld even if on the face of it, it is contrary to the terms of the contract or if it is based on a state of facts which the parties know to be untrue. This I accept to be a correct statement of the law.

[58] In the case of **Ballena Investments Limited v Vincent Chen and Ronnie Chin Loy** Suit NO. C.L 1999/B065 (unreported) the principle of estoppel by convention was applied by McCalla J. (as she then was.) She relied on Amalgamated Investment and the dicta of Lord Denning M.R. and agreed with the plaintiff's contention that the defendant was estopped by conduct. It is note-worthy that she came to that position notwithstanding that there may have been an unlawful demand for payment.
This was the hearing an application for leave to enter summary judgment. The court had to consider among other things.

(1) Whether or not a promissory note was willfully repudiated by the party.

(2) Whether the guarantee had been discharged by the repudiatory breach.

[59] The Court of Appeal in **Humphrey Lee McPherson v Damion Chambers and Smart Technologies Jamaica** 2010 JMCA App 7 considered the principle of estoppel by convention. The Applicant had placed great reliance on **Amalgamated Investment.**

[60] The applicant had sought leave to appeal a decision of Rattray J. The applicant /Claimant had filed a Notice of Application for Court Orders seeking an order for summary judgment. The respondent /Defendant had filed a defence pleading the strict terms of a Contingency Agreement. The applicant/Claimant filed an application for Court Orders for Summary Judgment among other things seeking an order that:

(a) The Defendants' Defence discloses no reasonable grounds for defending the claim; or
(b) The Defendants' Defence is an abuse of the process of the court; or
(c) The Defendants' Defence is likely to obstruct the just disposal of the proceedings.

[61] McIntosh JA. (AG.) (as she then was) considered the principle of estoppel by convention in this context:

> *[21]"…It would seem then that it is not the agreement as it stood, that entitled him to 30% of the appraised value of the software, as stated in his letter of October 28, 2008, (referred to earlier), but an interpretation of the agreement based on the principle of estoppel by convention and it is therefore necessary to consider whether there is any foundation for that contention.*

[62] She considered the principles as discussed by Lord Denning M.R. in the ***Amalgamated c***ase. Though she declined to find that estoppel by convention applied in the particular case, it was clear that estoppel by convention is applicable in this jurisdiction.

[63] In its further written submissions, the Claimant contends that the 'hammer clause' having been 'imposed' or 'invoked' against it, it had no option but to prepare for trial and seek to defend the libel action successfully. It was the Claimant's only good option, it is further argued, since Mr. Patterson was refusing to settle and the Defendant was imposing a limit on its liability. It was at this point that the claimant changed its attorneys in favour of a different firm in which it had greater confidence.

[64] Respectfully, the evidence of Mr. Hughes himself establishes quite a different position from that posited in paragraph 10 of his affidavit sworn on the 24th June 2015, and which was argued that he remained disposed to tendering an apology, even in the terms of that drafted by Mr. Foster when the 'hammer clause' was invoked.

[65] His evidence in cross-examination is that on the 30th April, 2013 he did ask Mr Patrick Foster to stay his hand in relation to the negotiations for a settlement. This was in an email sent April 30, 2013 at 4.25 p.m .This, it is noted, was before he was advised

in email of May 2, 2013 from Mr. Foster, of Mr. Patterson's rejection of his apology and of Mr. Foster's view concerning the prospect of a settlement. Mr. Hughes further said as at that date the settlement discussions were not closed. His evidence in fact was that on the 30th, he had no issue as to how Mr. Foster was handling the negotiations for a settlement.

[66] This is consistent with paragraph 14 of Mrs. Langley's Affidavit sworn to on June 9, 2015 that on April 30, 2013 Mr. Hughes telephoned her to discuss the matter and raised concerns regarding the attempts at settlement. To my mind it is reasonable to infer that he was considering going to trial. This was independent of the advice of Mr. Foster which he received on May 2, 2013 or any prospect of Mr. Patterson agreeing to the wording of the apology as proffered by him.

[67] This position was concretised by May 3, 2013 when Mr. Hughes communicated his decision to Mrs. Langley. He had by then decided to engage the services of present counsel, Lord Gifford Q.C. of the law firm of Gifford, Thompson and Bright. He advanced for this decision the reason, among others, that they (Nationwide) sensed that Mr. Foster was not confident about the strength of their case.

[68] The evidence of Mrs. Langley in cross-examination is that she had a conversation with Mr. Hughes about his choice to change attorneys. Among his reasons for going to trial was that his new attorney would successfully defend the matter and Mr. Foster would not and that he discussed a number of reasons why he believed he would be successful.

[69] I accept this evidence. This is consistent with her affidavit sworn on 9th June 2015 stating thus:

> *"[18] That in the course of the telephone discussion with Mr. Cliff Hughes regarding the transfer of the matter I informed him of the Defendant's preference, based on what we regarded as good legal advice, for the matter to be settled and recommended same to him. He was not in agreement and I as such indicated to him that as a condition of the transfer of the matter to new attorneys and for it to proceed to trial the Defendant would be invoking a clause contained in the policy*

of insurance which we refer to as the "'hammer clause'" and would be applying a maximum limit of $9,000,000.00 which was the total sum Mr. Patterson was prepared to accept in settlement of his claim."

[70] It is therefore more probable that the decision to go to trial was based on the Claimant's belief in the strength of its case rather than on the failure to arrive at a settlement. I find on a balance of probabilities that this was the case.

[71] As a result of this decision to go to trial, finally on May 3, 2013, the 'hammer clause' was invoked. Thus far from the Claimant going to trial because the 'hammer clause' was being invoked, the 'hammer clause' was invoked because the claimant decided to go to trial.

[72] Prior to this, it is admitted, Mr. Hughes, principal of the Claimant had been told of the 'hammer clause' and understood that it would be invoked to limit the Defendant's liability to $9,000,000.00 and a copy of the relevant clause was in fact sent to him on May 3, 2013. In his affidavit sworn on June 24, 2015 he states that:

"[15] Paragraph 18 of Mrs. Langley's affidavit is admitted in that Mrs. Langley did say to me and later advised me in writing that we had limited funds left to go to trial with a new attorney. She did inform me that as a condition of the transfer of the matter to a new attorney they would invoke the 'hammer clause'…"

.

[73] It is common ground that the claimant raised no objection to this. Mr. Hughes expressly states in his affidavit that he accepted from Mrs. Langley that the 'hammer clause' applied because he thought she was correct. The Claimant sought no legal advice specific to its application. In fact the position seems to have been accepted by us new attorneys as well who never challenged the defendant in their several correspondence the Defendant. The Claimant operated under this assumption up until after the trial as evidenced by the account called "*legal defence fund"* which was opened to garner funds to pay the judgment debt.

[74] I find therefore that there was this common assumption and it formed the basis of further dealings between the parties again as evidenced by the several pieces of correspondence between the claimant's new attorneys and the Defendant.

[75] As submitted by the defendant, motive is irrelevant to the issue of whether there was a shared assumption. However, it is of great moment to the issue now to be determined, that is whether in all the circumstances it would be unjust or unconscionable for the Defendant to seek to take advantage of this shared misassumption.

[76] The Claimant submits that it would be unconscionable for the Defendant to take advantage of an error which it initiated.

[77] It was submitted on behalf of the Defendant that the Defendant in losing its right to conduct the defence and engage in further settlement talks was a detriment in and of itself regardless of whether the Defendant would have otherwise been bound to make payments up to its full policy limit of $30,000,000.00.

[78] Again I adopt much of the discussion of the Defendant as to the applicable law.

[79] On the question of injustice or unconscionability the Defendant first relied on the case of **Grundt v Great Boulder Pty Gold Mine Ltd** (1937) 59 CLR 641 at 675-676 as follows for guidance:

> "*Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognised grounds of preclusion is contained in the reasons I gave in Thompson v Palmer (1933) 49 CLR at page 547, and it is convenient to repeat it:--"whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to*

abide by the assumption because it formed the conventional basis upon which the parties entered into contractual and other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, ...; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption."'

[80] The Jamaican case of **Kelly and others v Fraser** [2012] UKPC 25, an authority on equitable estoppel or estoppel by representation was also referred to as useful authority on the question of detriment. The Defendants summary of the case and the decisions are repeated.

[81] Here, the respondent Michael Fraser, became President and Chief Executive of the Island Life Insurance Company on February 1, 2000. He was previously employed to Life of Jamaica Limited and had contributed to its pension scheme. At some stage between March and August 2000 he discussed with Mr. Clive Masters, the Vice-President responsible for the Employee Benefits Division, the possibility of a transfer of the accrued value of his entitlement under the Life of Jamaica scheme to the Island Life Plan. A letter requesting the transfer was sent to the trustees of the Life of Jamaica scheme on 21 August 2000. A cheque for $14,7222,000.00 was sent to the trustees of the Pension Plan for the employees of Island Life Insurance Company Limited representing Mr. Fraser's accrued contributions under his previous employer's pension scheme.

[82] On December 1, 2000 Mr. Masters wrote to Mr. Fraser in the following terms:

"Re: Transfer of Pension Contributions

Further to your letter dated October 31 and subsequent discussions, we wish to confirm that the Trustees of the Life of Jamaica Pension Plan have transferred an amount of Fourteen Million Seven Hundred and Twenty-two Thousand Dollars ($14,722,000) to Island Life Salaried Staff Pension Plan... Your total contribution has been invested in our Diversified Investment Fund (DIF) as part of a United States Dollars (US$) denominated asset of the fund. The security purchased by the fund is the GOJ Global Bond 2007 with

a maturity date of September 1 2007 and a coupon rate of 12.75%. Interest will be paid semi-annually. The value of your contribution expressed in United States Dollars was $327,074.53 at November 2, 2000 the date that the security was purchased…"

[83] The trial judge found that at the time the trustees of the Plan were not aware of the transfer request addressed to Life of Jamaica Limited or of the receipt and investment of the transfer funds, or indeed of the correspondence and statements addressed to Mr. Fraser on the subject. They were therefore never in a position to approve the transfer or exercise their powers under rule 15 and did not in fact do so.

[84] In 2003, a decision was taken to discontinue and wind up the Pension Plan. A total surplus of $65,000,000.00 was ascertained and a decision was taken distribute it to the contributors in proportion to their benefit entitlements. It was also decided that because the transfer from Life of Jamaica in 2000 had not been approved by the trustees, Mr. Fraser's share of the surplus should be calculated without regard to any benefit entitlement attributable to it. On that footing he was entitled to J$866,688.43 of the surplus. Had the whole of his entitlement been taken into account, he would have received J$6,809,571.00 from the surplus.

[85] The argument on behalf of Mr. Fraser was that the trustees were estopped by Mr. Masters' letter of December 1, 2000 from relying on the fact that they did not approve Mr. Fraser's transfer of benefits.

[86] At first instance, Mangatal J found that the estoppel could not be made out as there was no evidence of detrimental reliance. The learned judge was of the view that at the time of transfer Mr. Fraser had no expectation of a surplus over and above his unit entitlement as he did not know that the Plan would have been wound up "much less that there would be a surplus in the fund which would increase his entitlement to a larger extent than if he had invested his pension from LOJ elsewhere."

[87] The Court of Appeal overruled Mangatal J on the detriment point and gave judgment in favour of Mr. Fraser. The Trustees then appealed that decision and argued before the Board that no relevant detriment was suffered. Lord Sumption opined at paras. 17:

> *"[17] The relevance of detrimental reliance in the law of estoppel by representation is that it is generally what makes it unjust for the representor to resile from his previously stated position. However, for this purpose, the ordinary rule is that the detriment is not the measure of the representee's relief, and need not be commensurate with the loss that he would suffer if the representor did resile: see Avon County Council v Howlett [1983] 1 WLR 605, where the authorities are reviewed by Slade LJ at pp 620-625. Indeed, the detriment need not be financially quantifiable, let alone quantified, provided that it is substantial and such as to make it unjust for the representor to resile. A common form of detriment, possibly the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain: Greenwood v Martins Bank Ltd [1933] AC 51 and Ogilvie v West Australian Mortgage and Agency Corporation Ltd [1896] AC 257, 268, as explained in Fung Kai Sun v Chan Fui Hing [1951] AC 489, 505-6.*
>
> > *[18]…It is correct that detriment is not presumed and must be proved. But it may be proved, and often is, by establishing facts from which it can be inferred. Where a person has been led to assume that no issue arises as to the regularity of his transaction, he is unlikely at the time to apply his mind to alternative possibilities. The question what he would have done, and with what results, is in practice bound to be a matter for retrospective and hypothetical reconstruction. The fact that he has not engaged in this process in his written or oral evidence at trial will not necessarily prevent the court from doing so if there is some other proper evidential basis for the reconstruction."*

[88] Lord Sumption found that had Mr. Fraser been told that the trustees had not accepted his funds he would have either 1) persuaded the trustees to approve the transfer or 2) transferred his fund to another pension provider. As between these two alternatives "*it is a sufficient detriment that as a result of the representations Mr. Fraser was, without knowing it, at risk of having no legal entitlement in respect of substantial*

funds that ought to have been held in trust for him, and that either of those two alternatives would have allowed him to escape from that situation. "

Lord Sumption then concludes the point on detriment at para. 20:

> *Mangatal J rejected Mr. Fraser's case on detriment because she asked herself the wrong question. The relevant question was whether Mr. Fraser was worse off by being led to believe that his transfer fund had been duly invested on the term of the Plan, than he would have been if he had not been told that and had raised the issue at the time. Instead, what the judge asked herself was whether Mr. Fraser was worse off by asking for the transfer in the first place than he would have was by leaving his pension fund where it was. She therefore allowed herself to be influenced by the wholly irrelevant consideration that Mr. Fraser had no reason in 2000 to anticipate a windfall from the distribution of the surplus of Island Life's pension scheme.*

[89] The case of **Moratic Pty Limited v Gordon and another** [2007] NSWSC 5 is also relied on. There, the Claimant Moratic Pty Limited was the lessee of the Oaklands Hotel, in respect of which it held an hotelier's licence to which seven Poker Machine Entitlements (PME) were attached. The Defendants Mr. Lawrence James Gordon and Mrs. Judith Ann Gordon were the lessors, and owners of the freehold. Although a PME allocated in respect of a hotelier's licence is transferable to another hotelier's licence, a transfer does not have any effect unless it approved by the Liquor Administration Board, and an application for such approval must demonstrate, to the satisfaction of the Board, that the proposed transfer is supported by each person who, in the Board's opinion, has a financial interest in the licence [(NSW) Gaming Machines Act 2001, s 19(1), (2)(a), (3)(c)]. The Gordons, who opposed the transfer, claimed that they have a financial interest in the licence by reason of a lessee's covenant to pay, in addition to the fixed rent, a "further rent" equivalent to 4% of annual liquor purchases for the hotel (clause 20). No amount had ever been demanded or paid under that covenant, and Moratic brought proceedings to resolve the issue as to whether clause 20, in the events which occurred, conferred on the Gordons a financial interest in the licence, and claiming a declaration that it is not liable to pay any amount under clause 20. The Gordons brought a cross-claim for the "further rent" under clause 20, for the whole of the term of the Lease from its inception to date. It is common ground that if clause 20 is enforceable, the amount due to the Gordons as at 30 June 2006 would be 4% of $972,478.

[90] The Court in **Moratic** dismissed the Claimant's arguments on implied variation and promissory estoppel but determined that a conventional estoppel applied so as to preclude either party from departing from the basis of their relationship with respect to the "further rent clause". In reviewing the law, Justice Brereton broke down the ingredients of the conventional estoppel as follows:

> *…It is necessary for a plaintiff to establish (1) that it has adopted an assumption as to the terms of its legal relationship with the defendant; (2) that the defendant has adopted the same assumption; (3) that both parties have conducted their relationship on the basis of that mutual assumption; (4) that each party knew or intended that the other act on that basis; and (5) that departure from the assumption will occasion detriment to the plaintiff.*

[91] The learned judge at paras. 39-40 accepted that Moratic assumed, at the time of its purchase of the hotel business and subsequently, that the only rent payable under the lease was that reserved by clause 4.1 - the necessary though unspoken corollary of which was that clause 20 was a "dead letter". It was also accepted that Moratic acted, and conducted its relationship with the Gordons, in reliance upon the assumption that the only rent payable under the lease was that reserved by clause 4.1. Supported by the fact that Moratic only ever paid the rent reserved by clause 4.1, and no "further rent".

[92] Justice Brereton in ***Moratic*** then turned to the conduct of the Gordons and at para. 47 found that the defendants adopted the same assumption:

> *…the overwhelmingly probable explanation for the absence of any demand on their part for "further rent", at least after 1997, and moreso after the assignment of the lease to Moratic in 1999, particularly in the light of their annual reminders in respect of the 4% increment under clause 4.1, is that, like Moratic, they assumed that the only rent payable was that reserved by clause 4.1. In that context, and in the absence of other evidence, the circumstance that payment of "further rent" under clause 20 was neither tendered nor demanded at any stage during the lease, before or after its assignment to Moratic, shows that lessor and lessee conducted their relationship on the basis of the assumption that the only rent payable under the lease was that reserved by clause 4.1, and each knew that the other was doing so. The inference that the Gordons adopted and conducted their relationship with the lessee on*

that basis, and knew that Moratic was also doing so, is all the more readily to be drawn in the absence of any explanation on the part of the Gordons for their not having insisted upon payment of "further rent" at any earlier stage. If there were an explanation for their not having earlier demanded "further rent", other than that the parties treated clause 20 as a "dead letter", it was open to them to advance it, and they did not do so.

[93] In making out all the elements of the conventional estoppel, the Learned Judge observed the following at para. 41 concerning the final component of 'detriment':

I further accept that Moratic will suffer detriment if its assumption is falsified. First, it will have acquired the hotel business at a price which it would not otherwise have been prepared to pay; secondly, it will be saddled with a liability to pay "further rent" in respect of the whole of the lease term from 1993, before as well as after the assignment, which it would not otherwise have incurred; and thirdly, in respect of the period since 1999, there is detriment in being required to pay the accumulated arrears of "further rent" in a lump sum, rather than progressively year-by-year.

[94] The Claimant also relies on **Kelly's** case and paragraph 17 in particular which was as follows:

The relevance of detrimental reliance in the law of estoppel by representation is that it is generally unjust for the representor to resile from his previously stated position... A common form of detriment, possibly the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action…

[95] The Claimant contends the representor was the Defendant. That the Defendant when it invoked the hammer clause on May 2, 2013 caused the Claimant to ready itself for trial. The claimant has relied on the case of **Keen v Holland** [1984] 1 W.L.R. 251 at p.261 in support of its submission that it was the Defendant that made the representation that the 'hammer clause' applied and so it would be unconscionable for them to have the benefit of that representation.

[96] As **Amalgamated** has shown however, it does not matter who made the representation. As Lord Denning said "when the parties to a transaction proceed on a basis of an underline assumption (either a fact or law, and whether due to misrepresentation or mistake makes no difference) on which they conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so". The Claimant therefore cannot rely solely on the fact that the representation was made by the defendant to ground unconscionability.

[97] The 'hammer clause' though invoked wrongfully, was however occasioned by the decision of the Claimant. The Claimant, having been advised that the 'hammer clause' could be invoked took the decision to go to trial, concomitantly accepting the limitation that the 'hammer clause' imposed. One must inescapably form the view that the Claimant knowingly assumed the risk. Both parties conducted themselves under that view.

[98] Put another way the Claimant was saying to the Defendant. I agree you will only pay $9,000,000.00 because I don't believe you will have to pay anything at all. As a corollary I do not believe I will have to pay anything at all as my case is that good. I will take that risk as my chances of success are high. My old Attorney does not believe this to be the case. My new Attorney does. The action of withdrawing the offer of settlement shortly after taking over conduct of the case as well as his Attorneys expressed views in correspondence with the Defendant support this finding.

[99] In that sense there was no unilateral action by the defendant. The question of injustice or unconscionability has to be viewed through these lens. When so viewed far from the defendant imposing its will on the Claimant, there was equality of arms between the parties.

[100] Does the Claimant now get to say, having lost on that gamble, you have to pay up I think not. To allow the Claimant to do so would be simply unfair. The Claimant would be having its proverbial cake and eating it too.

[101] On the other hand the defendant did suffer a detriment when it gave up its right to conduct the defence to the claim by Mr. Patterson. The policy limit being up to $30,000,000.00 does not negate this detriment. The defendant as a business enterprise is entitled and I daresay required to conduct its affairs to limit its financial obligations.

CONCLUSION

[102] The Defendant has clearly made out its case of estoppel by convention. There was a common assumption between the parties that the 'hammer clause' applied and this formed the basis of their further dealings. There was detriment on the part of the Defendant in not pursuing a settlement. It would be unjust and unconscionable to allow the Claimant to resile from its position of assuming the risk of proceeding to trial in the matter of Claim No. HCV 002214 on the basis of the discovery of the Defendant's error as to the law and for the Defendant to pay to the Claimant any further sum.

ORDER

1. The declaration as sought in the Fixed Date Claim Form is refused.
2. Costs to the Claimant to be agreed or taxed.