

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 2004/HCV 02338

BETWEEN	MARCIA SENIOR	CLAIMANT
AND	DERRICK ROCHESTER	1 ST DEFENDANT
AND	SOUTHERN FRUITS AND FOOD PROCESSORS LIMITED	2 ND DEFENDANT

Mr. Dale Staple instructed by Kinghorn and Kinghorn for the claimant.

Mrs. Grace-Ann Cameron-Small instructed by Lyn-Cook, Golding & Company for the defendants.

Heard 31st July and 15th August 2007 and 25th July 2008

Campbell, J.

**Agreement to Compromise Criminal Prosecution
Whether Illegal as against Public Policy
The Doctrine of Waiver**

An Adjourned Pre-Trial Review

1. At a Pre-Trial Review in the claim brought for malicious prosecution on the 31st July 2007, I ordered that the parties should consider;
 - i. Whether **Paragraph 5 of the Agreement to Compromise dated 6th April 2004 is a bar to the prosecution of the case by the claimant.**
 - ii The parties were further ordered to reduce their legal submissions on preliminary point to writing and have them filed on or before 13th August 2007
2. The claimant had worked with the 2nd defendant as an Accountant Administrative Manager from 1992 until her employment was terminated in 2003. The 1st defendant is Managing Director of the 2nd defendant. On the 29th August 2003, the 2nd defendant instituted criminal proceedings against the claimant that she fraudulently converted \$49,499.55 to her own use and benefit.

3. On the 6th April 2004, the claimant and the 2nd defendant entered into an “Agreement to Compromise” in which the following terms were agreed;

- (1) Maxine Senior will withdraw Pliant no. 323/2003 against Southern Fruits & Food Processors Limited.
- (2) Southern Fruits and Food Processors Ltd. will withdraw its counterclaim against Maxine Senior in the said Plaintiff no.323/2003.
- (3) Southern Fruits & Food Processors Limited will pay to Maxine Senior the sum of \$100,000.00 in settlement of her claim in Plaintiff no.323/2003 within 7 days of the date hereof.
- (5) Southern Fruits and Food Processors Ltd. hereby agree to withdraw and discontinue their complaint against Marcia Senior in the criminal suit of R v Marcia Senior for fraudulent conversion which is set for hearing on the 20th July 2004.

4. On the 9th day of August 2004 a “no order” was made at the request of the defendants in pursuit of the Agreement to compromise in the said Resident Magistrate Court for the Parish of St. Elizabeth in respect of the criminal proceedings brought by the 2nd defendant against the claimant.

5. On the 5th October 2004, the claimant initiated an action in the Supreme Court for malicious prosecution against the 1st and 2nd defendants; the claim was particularized inter alia;

On the 29th day of August 2003, the defendants unlawfully, maliciously and without reasonable and probable cause instituted criminal proceedings against the claimant, namely, that the claimant “being entrusted by Southern Fruits and Food Processors Limited with money in order that she might pay the said money for items in respect of the said Company fraudulently converted \$49,499.55 to her own use and benefit; contrary to section 24 (1) (111) (a) of the Larceny”.

6. In their defence the 1st and 2nd defendants contended, inter alia;

Following the termination of the Claimant’s employment in 2003 checks of the offices previously occupied by the Claimant revealed cheque requisition voucher in the name of the 2nd Defendant and signed by the Claimant dated 21st February 2003 the payee of which was Pneumantron Limited, a Company located at 37 Caledonia Road, Mandeville in the parish of Manchester engaged in the business of providing electrical supplies, among other things.

That the sum of the Claimant's unauthorised purchases from Pneumatron Limited was Forty Nine Thousand Four Hundred and Ninety Nine dollars and Fifty-five Cents (\$49,4999.55) which the Claimant settled using Cheque No. 005676 drawn on the account of the 2nd Defendant held at the Bank of Nova Scotia, Junction Branch which had been pre-signed by the 1st Defendant.

The Claimant was subsequently arrested and charged with offence of Fraudulent Conversion. These charges were however withdrawn by the Defendants when the Claimant appeared before the Resident Magistrate for the Parish of St. Elizabeth on the 9th August 2004 further to a compromise arrived at with the Claimant.

7. The claimant submitted that the requirement that the charge was determined in the claimant's favour was satisfied. That the essence of this requirement is not that there was a determination of the claimant's innocence, but that there has not been judicial determination of the claimant's guilt. **Casey v Automobiles Renault Canada Ltd**, 54 DIR (2d) 600. The claimant further submitted, it is enough if the prosecution was discontinued. They relied on **Romegialli v Marceau** (42 DLR 92D) 481.

It was further submitted that it does not matter the circumstances under which the criminal proceedings were determined in the claimant's favour. There was no agreement that he would bring no other proceedings.

8. The 1st and 2nd defendants submitted that the 2nd defendant, as a result of the agreement, withdrew and discontinued the prosecution. It is noted that, had the 2nd defendant not withdraw and discontinued the criminal proceedings, then the claimant would, instead of this claim, sue the 2nd defendant for breach of contract. By complying with paragraph 5, the defendants were deprived of such a defence.

The Relevant Law

9. A contract to stifle a criminal proceeding is illegal at common law as being contrary to public policy. It is not in the interest of the public that criminal prosecutions should be stymied by agreement even if there is no financial gain or otherwise. The person who is making the decision either to prosecute or not, has a social responsibility to be free from the influence of indirect motives. There is an exception to this general policy, in that offences that may be

pursued either in the civil or the criminal courts are not caught by the prohibition. In *Cheshire Fifoot & Furmstron, Law of Contract, Thirteenth Edition*, at page 381;

“An agreement to stifle a prosecution, i.e., to prevent proceedings already instituted, from running their normal course, or to compromise a prosecution, as illegal and void, even though the prosecutor derives no gain, financial or otherwise, and even though the agreement secures the very object for which the proceedings were taken.

This rule, however, applies only where the offence for which the defendant is prosecuted is a matter of public concern, i.e. one which pre-eminently affects the interests of the public. If the offence is not of this nature, but is one in which the injured person has a choice between a civil and a criminal remedy, as for instance in the case of libel or an assault, a compromise is lawful and enforceable.”

The proceedings were for fraudulent conversion and it would be open to the injured party to pursue a civil claim for money had and received. The contract is therefore not caught by the general prohibition and is legal and enforceable.

10. The attorney-at-law who witnessed the agreement is the one who filed, on behalf of the claimant, the action for malicious prosecution. The claimant agreed that the defendant should not prosecute the criminal proceedings against her, and having so secured that agreement, then instituted an action on which the outcome of those proceedings were vital. Albeit counsel has argued that no undertaking was given to the defendants that the claimant would not initiate such an action. I think it is fair to assume that had the defendant been alerted that he would be sued for malicious prosecution, he would not agree to halt the prosecution. Can the claimant have it both ways? I think not. He cannot have it both ways; he cannot approbate and reprobate or blow hot and cold. It seems to me that the claimant has waived her right to pursue the claim for malicious prosecution. Once a person has committed herself unequivocally to one of two inconsistent rights she cannot afterwards resort to the other. See **United Railway of Havana and Regla Warehouses Ltd. (1961) A.C.** at page 1065 per Lord Denning. To my mind, the right to agree with the complainant in criminal proceedings to have those proceedings stopped in lieu of the claimant surrendering her rights to maintain a certain action is inconsistent with the right of bringing an action for malicious prosecution.

11. In **Halsburys Laws of England, 4th Edition** Ee-issue Vol. 16, para. 955 the learned authors state as follows;

“Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.”

12. In **National Water Commission v Balteano Duffus** Appeal no. 91 of 2002, delivered on the 20th December 2004, the Court of Appeal had to consider whether an employee of the appellant had waived his rights to pursue a claim for wrongful dismissal despite having applied for and obtaining retirement benefits. In **Evans v Bartlam** (1937) 2 All ER 646, Harrison J. quoted with approval Lord Russell of Killowen description of the doctrine of waiver, where at page 998 he said;

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit.”

The claimant’s conduct, I find, induced the defendants to withdraw their criminal complaint against the claimant that he would not otherwise have done. That the agreement so entered has caused the defendant to “withdraw and discontinue” the complaint in the Resident Magistrate Court. I hold the view that the claimant is estopped from bringing an action for malicious prosecution against the defendant. The doctrine of estoppel applies and the claimant is barred from proceeding. In exercise of the court’s general power of management, the claimant’s claim is dismissed pursuant to Rule 26, 1 (2) j. No order as to costs.