

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

IN THE MATTER OF the Anglican Church Act Cap. 375 of the Laws of Barbados; The Constitution, Canons and Regulations of the Diocese of Barbados S.I No. 77 of 1992 of the Laws of Barbados

AND IN THE MATTER OF Section 45 of the Supreme Court of Judicature Act Cap. 117A of the Laws of Barbados and Order 29 of the Rules of the Supreme Court of Judicature, 1982

NO. 781A of 2006

BETWEEN:

BARBADOS DIOCESAN SYNOD

APPLICANT

AND

REVEREND WINFIELD COLLINS

DEFENDANT

Before the Honourable Mr. Justice William Chandler, Judge of the High Court.

2006: October 17

2007: January 25

2008: March 14; November 07

2009: July 29

Mr. Brian Barrow of Messrs. Carrington & Sealy, Attorneys-at-Law for the Plaintiff.

Mr. Chezley R Boyce, Attorney-at-Law for the Defendant.

**JUDGEMENT**

**Introduction**

[1] This is an application by way of originating summons filed on the 9<sup>th</sup> day of May 2006 for the following:

- 1 A declaration that the Defendant ceased to be rector of the church of St. Cyprian on the 31<sup>st</sup> day of March 2006 the last day of the month in which he attained the age of sixty-five years in accordance with regulation C10. 11 of Statutory Instrument No. 77 of 1992, the constitution, canons and regulations of the Diocese of Barbados.
- 2 A declaration that the appointment of the Defendant as priest in charge came to an end on the 30<sup>th</sup> day of April 2006 on the expiration of his appointment.
- 3 A declaration that the Defendant has no authority to act as priest in charge of the church of St. Cyprian.
- 4 An order that the Defendant be restrained from doing whether by himself or by his agents or servants or otherwise the following acts or any of them that is to say disturbing hindering or molesting any person duly appointed as the priest in charge in the execution of his lawful assigned duties and/or members of the church of St. Cyprian.
- 5 An order that the Defendant be restrained from officiating as and/or representing to be and/or continuing to function as the priest in charge of the church of St. Cyprian and from preaching at and/or intermeddling with the services to be performed in the church of St. Cyprian.
- 6 An order that the Defendant deliver up or cause to be delivered up to the plaintiff or its servants and/or agents possession of and control over all keys all registers, account books, minute books, rolls of attendance, records of services and all other records with respect to the church of St. Cyprian.
- 7 Such further order as this honourable court deems fit.
- 8 Costs.

### **Background facts**

[2] The following are the facts in this case which are not in dispute:

1. The Defendant was born on or about the 1<sup>st</sup> day of March 1941, and therefore attained the age of 65 years on the 1<sup>st</sup> day of March 2006.
2. The Defendant was first ordained in the Diocese of Barbados in 1976. He worked at St. John Parish Church and St. Marks and the Cathedral then he returned to the United Kingdom. He signed the declaration and oath of the diocese on the 14<sup>th</sup> March 1976. He was given a copy of the regulations when he signed the licence of institution in 2002. He took the oath and licence of institution on his return to Barbados on the 12 August 2006. He said he was aware that, having taken the oath, he was subject to the constitution and canons of the Diocese of Barbados.
3. On the 1<sup>st</sup> day of March 2002 the Defendant was granted a "General Licence" by the Plaintiff to exercise the office of General Preacher within the Diocese of Barbados. This licence authorised him to preach the Word of God and administer the Holy Sacraments of the Anglican Church of Barbados.

4. By letter dated the 7<sup>th</sup> day of March 2002 the Defendant was engaged as Priest-in-Charge of the Church of St. Cyprian (St. Cyprians) with effect from the 10<sup>th</sup> day of March 2002.

5. On the 5<sup>th</sup> day of October 2002 the Defendant was granted a Licence of Institution which installed him in the post of Rector of the Church of St. Cyprian.

The Defendant swore an oath of Obedience and the Declaration as to Synod.

6. The Constitution, Canons, and Regulations of the Diocese of Barbados were promulgated as Statutory Instrument No. 77 of 1992 and Gazetted in the Official Gazette No. 66 dated the 17<sup>th</sup> day of August 1992 pursuant to section 24 of the Anglican Church Act Cap 375 of the Laws of Barbados and are expressly incorporated into the Anglican Church Act Chapter 375 of the Laws of Barbados by virtue of 24A (b) of the said Act.

7. Rule C10:11 of the Regulations requires all members of the clergy to retire from the service of the Synod on the last day of the month within which said member attains the age of sixty-five years.

8. The Defendant was appointed Priest-in-Charge of St. Cyprians from the 1<sup>st</sup> day of April 2006 to the 30<sup>th</sup> day of April 2006 by the Bishop of Barbados by letter dated the 16<sup>th</sup> day of March 2006.

9. On Wednesday the 3<sup>rd</sup> day of May 2006 on or about 6:30 a.m. the Defendant conducted public worship and administered the sacraments and performed rites of the Anglican Church.

[3] On the 5<sup>th</sup> day of May 2006 this Court issued an ex-parte injunction restraining the Defendant from doing whether by himself or by his agents or servants or otherwise howsoever the following acts or any of them that is to say:

(1) Disturbing, hindering or molesting the Priest in Charge in the execution of his lawfully assigned duties and members of the Church of St. Cyprian until further Order; and

(2) from officiating as Priest in Charge and from preaching and intermeddling with the services to be performed in the Church of St. Cyprian until further Order.

[4] The Court further ordered that the Defendant do all things that may have been necessary to enable the plaintiff or its servants and/or agents to obtain possession of and control over all keys, all registers, accounts books, bank books, minute books, rolls of attendance, records of services and all other records with respect to the Church of St. Cyprian until further order.

[5] For the purposes of this decision, it is unnecessary to go further into the aftermath of the issuance of the interim injunction, since that is the subject of proceedings before the Court of Appeal.

**Issues:**

[6] The central issue in this matter is whether the appointment of the Defendant as priest in charge of the Church of St. Cyprian in the Diocese of Barbados terminated on the Defendant reaching the compulsory retirement age of sixty-five years. The secondary issue is whether the Plaintiff is estopped from preventing the Defendant from

continuing to act as priest of the said church by virtue of an alleged representation made by the Bishop of Barbados that he would change the Constitution, Canons and Regulations of the Diocese of Barbados (the Regulations) so as to allow the Defendant to continue in office until the age of seventy years.

[7] These issues arise in the above order because of the pleadings in the matter, however, the resolution of the secondary issue is of more importance since little argument may be made concerning the first issue. In this regard, Regulation C10. 11 provides as follows:

“A clergyman shall vacate his office on the last day of the month in which he attains the age of sixty-five but shall be eligible for appointment as priest in charge or Assistant Curate by the Bishop after consultation with the Diocesan Pastoral Committee.”

- [8] It is clear from this regulation that the Plaintiff, in the absence of an estoppel or some lawful extension of his terms of employment, ceased to hold office on attaining the age of sixty-five years. In addition, the orders sought at paragraphs 3 to 6 inclusive of the originating summons can only be issued and the declarations sought at paragraphs 1 and 2 of the originating summons made if the Defendant ceased to be the priest in charge on attaining his 65<sup>th</sup> birthday.

#### **Issue 1.**

- [9] It is unnecessary to repeat the issue here since it has already been outlined earlier in this decision.

#### **The Law**

- [10] The concept of promissory estoppel may be defined as follows:

“Where one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself introduced.”

#### **Halsbury’s Laws of England 4th Edition 1976 Paragraph 1514.**

- [11] The *fons et origo* of the doctrine known as promissory estoppel or estoppel by representation, a species of the genus known as equitable estoppel, is to be found in the speech of Lord Cairns LC in **Hughes v Metropolitan Railway Co (1877) 2 App Cas 439 at 448**, where he said:

“... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.”

The principle may also be found in the judgment of **Denning J.** (as he then was) in **Central London Property Trust Ltd v High Trees House Ltd [1947]KB 130** more familiarly called “**The High Trees Case**”.

#### **The evidence**

- [12] The evidence in this matter is contained in the affidavit of Canon Eric Lynch filed on the 4<sup>th</sup> May 2006 and the Defendant’s affidavit filed on the 26<sup>th</sup> May 2006 and a further affidavit filed the 23<sup>rd</sup> June 2006 together with the examination in chief and the cross-examination of the deponents. The Lord Bishop filed an affidavit on the 2<sup>nd</sup> October 2006 and also gave evidence and was cross-examined. There is no challenge to the regulations or their applicability to the Defendant. The Defendant submits, however, that an oral representation allegedly made by the Bishop renders those regulations inapplicable to him so far as the age of retirement is concerned. In short, he submits, that the Defendants are estopped from relying on the statutory retirement age by virtue of the representation that the age would be raised to seventy.

- [13] The Defendant gave evidence that, prior to his taking up the post of Rector of St. Cyprians, he had been in contact with the Bishop and enquired about a post in the Diocese of Barbados. The Bishop offered him three parishes, namely: St. Barnabas, St. Cyprians and Christ the King. He accepted Christ the King. He stated that he was working as chaplain at Her Majesty’s Prison, London. He had asked the Bishop to consider his relocation expenses and he asked about the age of retirement. He also gave evidence that age was not an issue.

- [14] He further said that age was only an issue following his removal from St. Cyprian. He said he had not discussed age until then. He was asked in examination in chief:

Question: When you accepted the post as rector was there an age you had agreed at when you would retire?

Answer: No age was agreed as to when I should retire. There were inferences on when I would retire but no age was issued as to when I would retire.

[15] He was referred to a letter of 26 March, 2006 which indicated that the Diocese's Regulations gave an age of sixty five and he would be offered an additional month following his 65<sup>th</sup> birthday. He said the letter required him to retire at age sixty five.

[16] He later said that

"the Bishop made a promise at the stated conversation in 2001 when we first discussed matters in London that the age of 70 would be the outstanding age when the clergy would have to retire and various adjustments would have to be made. The inference was that I would benefit. (emphasis mine) It was one of my terms and conditions that I would retire at age 70. I would not have left my position in London to come to Barbados to take up a job offer to retire at age 65. I was not entitled to gratuity since I opted out of the local Diocese scheme before returning to England in 1984. I did not anticipate a pension from the Diocese of Barbados".

[17] In cross examination he said that he expected to work to age seventy based on a promise of the Lord Bishop. He said the promise related to the fact that he was in a senior position with the Home Office in which he

could have continued to age of seventy five.

Question: Was your understanding of what the Bishop told you that he had to go to Synod Council first with the proposal to have the age raised to seventy?

Answer: The Bishop promised me that I would go to age of 70. I made the decision to return to Barbados on the promise the Bishop made to me.

[18] When asked with respect to letters (JWDH2) dated 03/01/2000 and 20 March 2000 which suggested that he was planning to return to Barbados in any event, he responded:.

"I was not planning to return to Barbados in any event notwithstanding the context of the letter. I was planning to return to Barbados provided the Bishop was offering me a position."

[19] Further, there was evidence adduced and admitted by consent and marked "JWD 2" in the form of a letter dated the 3<sup>rd</sup> day of January 2000 written by the Defendant from the United Kingdom to the Reverend John Holder [as he then was] in which the Defendant enquired of the Reverend John Holder as to the availability of any positions for incumbents which may have become available and about his returning to Barbados to become a clergyman in the Diocesan Synod of Barbados. It reads as follows:

#### **"My Dear John**

Greetings in the name of Our Blessed Lord! May this new year and Millennium bring you many blessings and hopefully realised some of your personal ambitions. I have spent much of the past year analysing newspaper reports, and conversation from clergy concerning the soon vacant seat of Barbados. The result of my analysis is that you are highly thought of as a future Bishop of our beloved Barbados. If that is the Will of God and you are appointed then I hope to join the clergy and lay people at the time and date of consecration in St. Michael's Cathedral. I also hope to return to the Diocese of Barbados between June and September of 2001. I will shortly send a curriculum vitae to the Bishop of the Diocese or the Vicar-general to insure that my future ministerial plans are known. I am sure that the coming months will be very interesting and whoever is appointed as Bishop will soon have to consider the appointment of a Dean and Archdeacon to manage the affairs of the Diocese. I would humbly state that should St. Mary's become vacant I would like to be considered for the position of Rector. My silver jubilee of ordination to the Priesthood falls on the Feast of St. Aidan 2001, therefore if I was asked to preach at a consecration before then it would give me a special cause for a double celebration. "A word to the wise."

My present position as a senior Chaplain to H.M. Prison Pentonville is now in its final stages with several opportunities for training young and inexperienced Clergy behind me. I am trying to complete M.Th studies at Westminster College Oxford after taking a year out and a short period in hospital. We have a very able Bishop in Dr John Sentamu (former High Court Judge in Uganda) and the Diocesan Richard Charles. I would not be surprised if He was next to enter the Province of Canterbury. The church of England is desperate for good and strong leadership, doubtless we in Barbados will also need strong leadership which I hope can be offered to those who are opt teachers and administrators. May God bless the process of selection.

I hope you will let me know if I can be of assistance in the months ahead. I am pretty near to the clerical Taylors at Westminster Wippell and Company, and Vanpoules is also within reach. In the meantime I hope you can share your ministry away from Codrington and try to encounter the Laity. In essence a potential Bishop of Barbados should try to understand the financial management of the Diocese. When I return to Barbados I often encounter the lack of missionary enterprise amongst the Clergy and Laity. I look forward to sharing in a renewed vision for the Diocese of Barbados that vision may well begin with you. May God grant you success. Amella and Jason join me in sending our best wishes to you and your family. "The Grace of Our Lord Jesus Christ, the love of God and the fellowship of the Holy Spirit be with you."

Sincerely Winfield"

[20] The letter dated the 20<sup>th</sup> day of January 2000 (written to the Canon James Springer [as he then was] by the Defendant) is also instructive:

"Dear Archdeacon,

This letter with my Curriculum Vitae herewith enclosed is my official application requesting permission to return to parochial duties in the Diocese of Barbados. My official departure from HM Prison Service Chaplaincy will end sometime after my sixtieth birthday on 1 March 2001, and almost certainly before 1 March 2002. I have longi looked forward to the day when a new opportunity to minister would arise in the Diocese of Barbados. I hope therefore that you might draw this application to the attention of the new bishop when he is appointed (emphasis mine).

Yours truly,

In Our Blessed Lord.

**(Sgd) Winfield S. Collins"**

[21] The evidence of Dr. John W. Holder the Bishop of Barbados is that there was never any arrangement made with the Defendant nor was there any promise made to the Defendant that he would be able to continue in his employment as Rector of the St. Cyprian Church and/or Priest-in-Charge until the age of seventy years. The Bishop, in cross-examination, did not recall any question being raised about the Defendant becoming sixty-five shortly after his appointment to St. Cyprians. The cross-examination is instructive, Counsel asked:

"Do you recall the age he was when he came to St. Cyprians?"

Answer: He came to St. Cyprians in 2002.

Suggestion: The question was raised about the Defendant becoming sixty-five shortly after his appointment.

Answer. I do not recall.

Suggestion: You informed him that at the next Synod meeting, you were going to raise the age of retirement for rectors from sixty five to seventy at the time the offer was made.

Answer: No Sir

Suggestion: You represented to father Collins that the age of retirement would be raised from sixty five to seventy.

Answer: No, Sir - I did not make such a representation.

Suggestion: The reason why the Defendant accepted the post of rector was your undertaking the retirement age would be raised to seventy

Answer: I did not undertake to raise retirement from sixty five to seventy.

Question: Did you promise in Synod between 21<sup>st</sup> and 23<sup>rd</sup> May 2006 to raise retirement age to age of seventy?

Answer: I did not. Such a weighty matter would have to be considered by Synod. The Bishop cannot promise this. The Bishop has no authority to stand in or out of Synod and raise the retirement age, it is a matter for Synod, not the Bishop solo.

### **Plaintiff's submissions**

- [22] The plaintiff submits that the Defendant's employment with the plaintiff terminated in accordance with regulation C10, 11 on his attaining his 65<sup>th</sup> birthday. The plaintiff's counsel further submits that Dr. John W. Holder never made any promise or representation to amend the regulations to facilitate this and that he had no authority to do so since authority was vested solely in the Synod. Further, it is submitted that Dr. Holder never held out himself as having had such authority. The Defendant had on his own volition decided to return to Barbados and did so without reference to any alleged representation. He asks the court to grant the relief prayed for and to reject any submission that there was an actionable promise made to the Defendant upon which he relied.

### **Defendant's submissions**

- [23] The Defendant submits that his employment did not end on his attaining the age of sixty five years but continued based upon a promise made by Dr. Holder to have the age of retirement raised to seventy years. He further submits that he was gainfully employed in the United Kingdom and would not have left his employment but for a promise by Dr. Holder to have the age of retirement for priests raised to seventy years. It is submitted that he acted upon this promise to his detriment by leaving his employment overseas. It would now be inequitable to allow the plaintiff to go back on its promise and terminate his employment. For this breach he is entitled to the damages claimed and severance pay.

### **Discussion**

- [24] An analysis of the evidence of the Defendant reveals that the Defendant inferred from the conversation with the Bishop that he would benefit from an increase in the age of retirement. He noted that the Bishop also told him that various adjustments would have to be made to vary the age from sixty five to seventy. The evidence of the Defendant is very equivocal on this issue of the age of retirement. He gave evidence that no age was agreed on as to when he would retire; that age was only an issue following his removal from the Church of St. Cyprian; that he had not discussed age until then. On the other hand, the evidence of the Bishop is that he made no promise to the Defendant that he would raise the age of retirement to seventy. I saw and heard the Defendant in examination in chief and in cross examination, I also saw and heard the Bishop in examination in chief and in cross-examination. There was no equivocation or indecision in the Bishop's responses to the questions posed to him. He was quite clear that he had made no such promise as alleged. The Bishop made it clear that there was a procedure in place for the appointment of members of the clergy and outlined this procedure in his evidence.

- [25] The Defendant was first licensed in 1976 and worked in Barbados before traveling to the United Kingdom. He knew or ought to have known that the regulations applied to him and governed his appointment. He also knew or ought to have known that the age of retirement could only be increased by amendment to the said regulations. He also knew or ought to have known that the Bishop had no authority to alter his terms of employment.

- [26] On the issue as to whether a promise was made to increase the age, I accept the evidence of the Bishop over that of the Defendant as being a more accurate reflection of the events which transpired. An analysis of the two letters of the Defendant, previously quoted, reveals that the Defendant's position as chaplain of Her Majesty's Prison was coming to an end. In JWD2, the Defendant wrote:

"My present position as a senior chaplain to H. M. Prison Pentonville is now in its final stages with several opportunities for training young and inexperienced clergy behind me."

- [27] With respect to the suggestion that the Defendant would only have returned to Barbados consequent upon a promise of the Bishop to raise the age of retirement, the Defendant, in the said letter of 20 January 2000, said to Dr. Holder:

"I will shortly send a curriculum vitae to the Bishop of the Diocese or the Vicar-general to insure that my future ministerial plans are known. ...I would humbly state that should St. Mary's become vacant I would like to be considered for the position as rector."

- [28] The evidence of the Defendant is that he relied on the 'promise' of the Bishop, that the Bishop would seek to raise the retirement age from sixty five to seventy.

- [29] The Defendant in giving his evidence in chief was asked on four different occasions if he ever discussed a specific retirement age with the Bishop and on every occasion he indicated that this was never done.

- [30] It is of significance that the Defendant was a priest employed in the diocese of Barbados prior to going to England. On his own admission he was aware of the regulations governing his employment. What is the significance of this? The incorporation of the regulations into his contract of employment means that he knew of the age of retirement from as early as 1976 when he was first licensed. He worked in Barbados under these regulations.

- [31] Based on the evidence adduced before me I find that the Defendant was already intent on returning to Barbados from the United Kingdom when he wrote the letter dated 3<sup>rd</sup> January 2000 to the Bishop soliciting a position in the diocese of Barbados and also when he sent his formal application to the Archdeacon for a position in the diocese dated 20<sup>th</sup> January 2000. At that time no offer had been made by the Bishop to the Defendant.

- [32] The Defendant's decision to return to Barbados was not informed by any promise made by the Bishop to the Defendant, rather it was informed by his own solicitation of an opportunity to serve as a priest in Barbados again and the fact that his employment in England was coming to an end.

### **Issue**

- [33] 14.1 *Was there any arrangement made between the Diocesan Synod and the Defendant so as to vary the terms and conditions of his employment to the extent that he would be allowed to carry on his employment until age seventy as opposed to age sixty five as stipulated by the Constitution, Canons and Regulations of the Diocese of Barbados?*

- [34] The resolution of this issue depends upon the resolution of the issue of estoppel raised by the Defendant.

### **The principle of promissory estoppel defined**

- [35] Earlier in this decision, I articulated the principle as distilled from the decision in **Hughes v Metropolitan Railway Co (1877) 2 App Cas 439 at 439**. Estoppel requires, for its application, that the parties (1) have entered into definite and distinct legal terms involving legal results, (2) afterwards by their own act ...enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict legal rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, (3) the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between them.

### **Criterion No. 1**

- [36] He already found that there was no promise on the part of the Bishop on which the Defendant could rely and that the Defendant's decision to return was unrelated to any alleged promise. It is necessary, however, to see any such allegation in the context of the applicable law. The Defendant gave evidence that the alleged promise was made prior to his appointment and that informed his decision to return. He subsequently gave evidence that no age was agreed upon as to when he would retire when he accepted the post as rector. The evidence of the Defendant which I have already quoted leaves a lot to be desired.

- [37] For the equitable doctrine of promissory estoppel to apply there must be an existing legal relationship giving rise to rights and duties between the parties. If the Defendant's contention that the promise was made prior to his acceptance of the position is accepted, then the Defendant has failed to establish the first criterion for the application of the principle, that is, a subsisting legal relationship.

- [38] A further point which arises here, is whether the Bishop had the authority to bind the Diocese. Implicit in the submissions on estoppel by the Defendant, is that the Bishop was the agent of the Diocese or had the legal authority to represent or bind the diocese to a contract of employment between the Diocese and the Defendant.

- [39] Counsel for the plaintiff submitted that the Bishop had no authority to represent the Diocese and that authority is vested in the Archdeacon. In the peculiar circumstances of this case, the onus is on the Defendant to prove that Dr. Holder had such authority. He has failed to do so. This failure becomes more manifest, the Defendant having established that Dr. Holder was not the Bishop when he wrote the letter JWD2 to him.

### **Criterion No. 2**

- [40] ... afterwards by their own act ...enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict legal rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance.

- [41] The Defendant's evidence on this matter is quite equivocal. It is clear that he entered upon his contractual obligations without reference to any promise and that no age of retirement was discussed at appointment. There can, therefore, be no promise to vary the existing contractual terms which would lead the Defendant to suppose that the strict legal rights would not be enforced or kept in suspense or held in abeyance. It must also be noted that if there is no pre-existing contract, there can be no subsequent variation of its terms. The Defendant has failed to establish that there was a clear and unequivocal promise.

### **Reliance and detriment**

- [42] Prior to dealing with the third criterion, I will deal briefly with another criterion for the application of the doctrine of promissory estoppel and that is reliance upon the promisor's promise by the promisee to his detriment. Having found that the Defendant's letters and his viva voce testimony demonstrate that he embarked on his employment without reference to any promise and that Dr. Holder was not yet installed there could, therefore, be no reliance upon such an alleged promise. It is obvious that such findings render the application of the criterion of reliance on a promise impossible. Likewise, if there was no reliance on a promise, no detriment suffered thereafter could be attributed to reliance. Put simply, there could be no detrimental reliance on a non-existent promise.

### **Criterion No. 3**

- [43] The person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between them.

- [44] The Defendant was employed until he celebrated his 65<sup>th</sup> birthday. He was paid and received his emoluments under the contract terms. His terms and conditions were continued when he was granted an extension of time by the Bishop. The Defendant made no representation about a promise to increase the retirement age until his contract was terminated and an extension granted.
- [45] Given his experience as a priest in the diocese of Barbados and his knowledge that his contract would terminate at age sixty five, he must have accepted the extension knowing that his contract had ended.
- [46] Having found that there was no estoppel which could operate in the Defendant's favour, no issue arises as to the inequity of allowing the plaintiff to enforce its full legal rights.

### **Misrepresentation /misstatement vs estoppel**

- [47] The Defendant has framed his case in promissory estoppel, the principles of which have already been distilled in this decision. A misrepresentation is an untrue statement of fact which is made prior to the parties entering into the contract and for the purpose of inducing the party to whom it was made to enter into the contract. While not forming part of the contract, the party to whom a misrepresentation is made may avoid the contract after subsequently discovering its untruth (**see Hedley Byrne & Co v Heller and Partners (1963) 2 All E. R. 575**). If the representee, after discovering the misrepresentation, does any act which shows that he affirms the contract, he waives his right to rescission of the contract.
- [48] The Defendant gave evidence that the alleged promise of the Bishop was made to him prior to his executing his contract of employment with the applicant. He also deposed that he would not have left his employment in England to take up employment in Barbados but for the alleged promise to raise the retirement age to seventy years. Having regard to the Defendant's evidence, it seems to me that the Defendant's action was based on misrepresentation and not promissory estoppel as pleaded. The evidence adduced does not support the pleadings and for this reason also the action fails. In making this finding, I am conscious of the fact that the action was begun by originating summons supported by affidavit and the debate as to whether affidavit evidence constitutes pleadings. That debate, notwithstanding it is trite law that an applicant must deduce evidence in support of his case so as to prove his case on a balance of probabilities. This threshold has not been reached in this case.

### **The age of retirement**

- [49] Regulation C10.11 has already been referred to in this decision. The Diocesan Synod has the authority according to the **Constitution Canons and Regulations of the Diocese of Barbados [Statutory Instrument No. 77 of 1992] and the section 24 (d)** of the **Act** to make such rules, ordinances, canons and regulations as it thinks fit for the general management, discipline and good government of the Church. It is common ground between the parties that the Defendant's terms and conditions of employment are contained within the regulations. Variations to such terms and conditions of employment can only be made by amendment of these regulations.
- [50] The Privy Council in **Gatherer v. Gomez (1992) 41 WIR 68 @ page 74** stated *inter alia* that "... it was important both to the clergy and to their congregations that notice should be given of regulations by the synod." The purpose of notice is to bring the purport and effect of the regulations to the attention of those persons subject to them. This will invoke the binding nature of **Section 4 (1) (b)** of the **Act** and obviate the problem caused by non-publication in **Gatherer's** case above cited. **Section 4 (1) (b)** provides:

"the then existing ecclesiastical law and the then existing articles, doctrines, rites, rules, discipline, ordinances, canons, and regulations of the Church shall, with and subject to such modification and alteration, if any, as after that date may be duly made therein in accordance with Part VI be binding on the members for the time being of the Church."

- [51] The Defendant gave evidence that he was given a copy of the regulations when he signed his licence of institution in 2002. He was therefore aware of the terms of his contract.

### **Amendment of the regulations**

- [52] The regulations can only be amended in the manner prescribed in those regulations. Regulations A 2 provides as follows:

"The Synod may add to, alter or amend Regulations but no alteration or amendment shall be made except in accordance with Article X11 subsection 1 of the Constitution and by the affirmative vote of a majority of the members of each house present and voting together with the assent of the Bishop."

- [53] The regulations can only be amended by Synod acting in accordance with the **Act**. Having been given a copy of the Constitution, Canons and Regulations on the 5<sup>th</sup> day of October 2002, the Defendant cannot claim to be ignorant of this fact since it forms part of the terms of his employment.
- [54] No amendment had been made up to the date of his 65<sup>th</sup> birthday. Having found that there was no representation on which an estoppel could be founded, there is no other ground on which the Defendant's claim to be entitled to continue until age seventy can be sustained.

### **The Defendant's claim**

[55] The Defendant filed an affidavit on the 23<sup>rd</sup> June 2006 in which he claimed severance payments in the sum of \$4,797.70; six months salary in lieu of notice for the period 1<sup>st</sup> May 2006 to 31<sup>st</sup> October 2006 \$12,474.00; benefits in the sum of \$7,200.00 for weddings projected to be conducted; benefits in the sum of \$3,600.00 for funeral services projected to be conducted; traveling allowance in the sum of \$400.00 per month; damages for wrongful dismissal being 60 months salary at the annual salary of \$24,948.00 and interest on all sums awarded at the rate of 8% or such rate per annum as the court may award.

[56] He did not file a counter notice as required by the **Rules of the Supreme Court, (RSC)**, however, the Court does not believe that a mere technical breach of the **RSC** should deprive a litigant from relief which is legitimately merited. In view of my finding that there is no estoppel on which the Defendant can rely, the Defendant's claim fails.

[57] In the event that I am wrong in my finding on the substantive claim I am required to consider what measure of damages the Defendant would have been entitled to had he prevailed. The Defendant has claimed severance payments under the **Severance Payments Act** as well as damages.

**Severance and Damages**

[58] A severance payment is a special form of statutory relief granted in the circumstances outlined in paragraph 3 (3) of **the Severance Payments Act Chapter 355A of the Laws of Barbados (the Act)** none of which is applicable here: **June Clarke v American Life Insurance Company Limited Civil Appeal No. 33 of 1998 (unreported)**.

[59] In the circumstances a claim for severance payment is unmerited and is hereby disallowed.

[60] The calculation of damages for wrongful dismissal is now governed by **Section 39 of the Act** which applies the formula of 2.5 weeks basic pay for every completed year of employment for the first ten years of employment.

[61] The Defendant claimed, by Affidavits sworn on the 28<sup>th</sup> June 2006 the following sums:

Severance pay for the period 1<sup>st</sup> May 2006

|   |                      |  |
|---|----------------------|--|
| up to and including 30 <sup>th</sup> April 2011 | total average salary |  |
|   | -----                |  |
|   | 104                  |  |
|   | \$49,896             |  |
|   | -----                |  |
|   | = \$479.77           |  |
|   | 104                  |  |

Average weekly wage at 2.5 weeks x 4 years

\$479.77 x 2.54 x 4 = \$ 4,797.70

|  |             |                           |
|--|-------------|---------------------------|
| 6 months' salary in lieu of notice at the annuum | \$12,474.00 | salary of \$24,948.00 per |
|--|-------------|---------------------------|

Benefits Rector receives for services rendered

|                                |             |   |
|--------------------------------|-------------|---|
| Weddings (average 24 per year) | \$ 7,200.00 |   |
| Funerals (average 12 per year) | \$ 3,600.00 | Travelling allowance (average \$400.00 per month) |
| Housing allowance              | \$ 4,800.00 |   |
| Group Health Insurance         | \$ 997.58   |   |
| Relocation expenses            | \$ 6,667.58 |   |

Damages for wrongful dismissal

60 months' salary @ \$24,948.00 per year \$124,740.00

Exemplary Damages for insult to Defendant,

Ridicule of Defendant and odium to Defendant

In presence of Archdeacon, Dean, Parochial

Church Council of St. Cyprian's Anglican

Church, Treasurer, Secretary and employees

who were at Diocesan House and members

of the public at all material times \$250,000.00

[62] The plaintiff filed a copy of the Defendant's income statement for 2005 showing a net income \$27,092.63 inclusive of \$4,800.00 travelling and \$1,200.00 housing allowances. It also filed a list of funerals and weddings at the Church of St. Cyprian as presented in the Church's register of services for the period 1<sup>st</sup> May 2006 to July 2009. I have taken the full years of 2007 and 2008 as the basis for calculating the loss which would have been incurred had the plaintiff been wrongfully dismissed since the information available for 2006 relates only to the period May to November and the figures for 2009 relate only to April to July. In 2007 there were seven funerals and one wedding, six of the funerals were for non members at a fee of \$150 each. No fee was paid for members and the one wedding was a non-member at a fee of \$150. This gives a total of \$900 for funerals, \$ 150.00 for weddings, a grand total of \$1,050.00.

[63] In 2008 there were fourteen funerals of which six were non members at fee of \$150 each and two weddings of non-members at \$150, totaling \$ 1,200. This gives an average of \$1,125 per year between weddings and funerals which the court will round off to \$1,000.00 per year to take into account the vicissitudes of life as they impact on the number of weddings and funerals which may have to be conducted by the Church during any particular year.

[64] The total projected loss of income from these sources would be \$4,000.00 for the four completed years of employment giving a total income of \$31,942.63 for each of the four completed years of employment, his weekly pay calculated as his basic pay would have been \$31,942.69 divided by 52 = \$614.28.

[65] His damages calculated in accordance's with **Section 45** of the **Severance Payment Act** would have been \$614.28 x 2.5 x 4 = \$6,142.80.

### Exemplary Damages

[66] The basis of the claim for exemplary damages is insult to himself, ridicule and odium in the presence of the Archdeacon, Dean, Parochial Church Council of St. Cyprian's Anglican Church, treasurer, secretary and employees who were at Diocesan House and the members of the public at all material times. The oral evidence of the Defendant failed to address this issue. He did not give evidence supportive of his claim. The particulars in his affidavit speak more to a claim in defamation than to a claim in breach of contract. Notwithstanding that, the Defendant has failed to establish his claim to exemplary damages under the established principles set out in **Rookes v Barnard 91964) AC 1129 and Cassell & co. Ltd v Broome (1972) AC 1027**. In **Cassell v Brome** Lord Hailsham LC noted that:

"In actions of defamation and in any other actions where damages for reputation are involved, the principle of restitution in integrum has necessarily a higher subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was in before the wrong."

The learned judge continued:

"As between "punitive" and exemplary" one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer "exemplary" not because punitive it is necessarily

inaccurate, but exemplary better expresses the policy of the law as expressed in the cases. It is intended to teach the Defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the Defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect."

[67] It remains only to note that none of the categories of case outlined in the case law exists here and therefore an award of damages designed to teach the plaintiff that tort does not pay is inappropriate.

[68] The Defendant having conceded that \$600.00 is due for leave passage, though not claimed in the Affidavit, it is agreed that the \$600.00 be paid to the Defendant on or before the 31 July 2009.

### **Disposal**

[69] Having regard to my finding that there was no clear and unequivocal promise made by the Bishop to the Defendant to change the age of retirement from sixty five to seventy and that the Defendant has not established the essential elements of the alleged estoppel, I find that the Defendant's employment terminated at the age of sixty five years under regulation C10.11 as incorporated into his contract. In the premises, therefore, I find the plaintiff's case proved, and dismiss the Defendant's claim of promissory estoppel as a shield to the operation of regulation C10.11.

[70] In the premises the following declarations are made:

1. A declaration that the Defendant ceased to be rector of the Church of St. Cyprian on the 31<sup>st</sup> day of March 2006 the last day of the month in which he attained the age of sixty-five years in accordance with regulation C10. 11 of Statutory Instrument No. 77 of 1992, the Constitution, Canons and Regulations of the Diocese of Barbados.
2. A declaration that the appointment of the Defendant as priest in charge came to an end on the 30<sup>th</sup> day of April 2006 on the expiration of his appointment.
3. A declaration that the Defendant has no authority to act as priest in charge of the Church of St. Cyprian.
4. And it is hereby ordered by consent that the sum of \$600.00 being the Defendant's leave passage, be paid to the Defendant on or before the 31 July 2009.
5. And it is further ordered that the Defendant do pay the Plaintiff's costs to be taxed if not agreed.

**William J. Chandler**

Judge of the High Court.