ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.20 OF 2003

BETWEEN:

SOUMITRA SENGUPTA

Appellant

and

WOODS DEVELOPMENT LIMITED

Respondent

Before:

The Hon. Mr. Adrian Saunders — Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal

Appearances:

Ms. E. Ann Henry for the Appellant
Mr. Dane Hamilton for the Respondent

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2004: May 27;
September 20.

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# JUDGMENT

[1] GORDON J.A.: This is an appeal and cross appeal from a judgment of Mitchell J. in which he awarded the sum of $150,000.00 general damages against the Respondent for breach of implied terms of a building contract. The Appellant has appealed on the sole issue of quantum of damages and the Respondent has filed a Counter-Notice appealing against the whole judgment.

[2] The facts are that in 1995 the Appellant entered into a purchase agreement to purchase a unit from the Respondent at the Woods Shopping Centre for the purpose of housing his dental practice. The subject of the purchase was described as Plot U 13 Parcel 988; Block 42 1894A in the Registration Section Cassandra

Gardens and New Winthropes and the purchase price was US$181,000.00. At the time of purchase, the Shopping Centre was under construction and the Appellant, in fact, did not take possession of the unit until February 1996. Within months of the Appellant taking possession, the floors in the unit started to crack. The Appellant complained to the Respondent who denied liability.

[3] I believe that it will be more convenient to treat with the Respondents grounds of appeal first, and then to deal with the Appellants ground.

[4] The first six grounds of the Respondents grounds of appeal relate to the stamping, or lack thereof, of the agreements referred to in the Statement of Claim. The Appellant pleaded in his Statement of Claim in part as follows:

> "3. By an instrument of transfer dated May 2 1995 the Defendant sold to the Plaintiff for value its entire interest in parcel 988 together with rights specified in the First Third and Fifth Schedules to a Deed of even date and made between the parties.
>
> 4. By the said Deed dated May 2 1995 and made between the Defendant as Vendor of the first part and as Manager of the second part and the Plaintiff as Purchaser of the third part The Plaintiff was inter alia made entitled to enter into possession of the said parcel 988 upon 'the date of payment of all monies due under the Building Agreement contained in the Eighth Schedule hereto'.
>
> 5. By the terms of the said Building Agreement, the Defendant agreed to contract erect and complete unit U13 on the said parcel 988 for a price of US$181,000.00 which said price was paid in full in accordance with the terms and manner specified in the said building agreement."

[5] The Respondent pleaded in his defence as follows:

> "1. The Defendant admit[s] paragraphs 1, 2, 3, 4 and 5 of the Statement of Claim"

[6] Learned Counsel for the Respondent directed the Court's attention to section 4 of the Registration and Records Act, Cap 375 which states that no deed shall be received in evidence in any proceeding whatever, whether at law or equity, in Antigua and Barbuda unless such deed shall have been duly registered. Deed in

that Act is defined as including every document in writing relating to land in Antigua and Barbuda. We were further referred to section 21 of the Stamp Act, Cap 410 which precludes the pleading or giving in evidence of any document, nor can any such document be admitted to be good, useful or available in law or equity unless it is duly stamped in accordance with the law (Section 21 of the Stamp Act). It was the argument of Counsel for the Respondent that the effect of these two sections meant that if a Deed was neither recorded nor registered, a Court could take no notice of that instrument. He further argued that as the case of the Appellant, as pleaded, hinged on the "Deed" and that as no oral agreement was pleaded in the alternative there was nothing for the Court to base a finding on, even though it came to the conclusion that there had been a breach of the terms of the contract to build by the Respondent.

[7] Let it be said at first that the law is clear that even where parties choose not to take the point of the inadmissibility of an unstamped document that requires stamping, there is a duty on the Court not to admit such a document. Undoubtedly, the thinking behind such a rule is that the Court should not lend itself to be a part of an action that is a fraud on the revenue of the State.

[8] Based on the pleadings themselves, however, there is evidence of a contract between the parties to this appeal pursuant to which the Respondent sold and the Appellant bought parcel 988 and that the Appellant paid the sum of US$181,000.00 for both the purchase of the lot and for the construction of a unit on the lot. So much is admitted by the Respondent. Thus, a contract to build, which does not require to be by deed, and hence does not need to be stamped or recorded, is properly before the Court. The Appellant alleges that there were certain implied terms of the agreement between himself and the Respondent. The Respondent did not address these allegations except by way of a general denial. Three alleged implied terms in particular are of interest, and they are:

- that the Respondent would use materials of good quality

- that the Respondent would use materials reasonably fit for their intended purpose
- that the foundation walls and floor slabs would be constructed in conformity with the soil requirements.

I am of the view that the implied terms are terms which would be implied in any building contract in which they were not specifically excluded.

[12] I therefore hold that whilst there may be technical merit in the Respondent's first 6 Grounds of Appeal that technical merit does not avail the Respondent. I would therefore dismiss those grounds. I cannot help remarking that any other conclusion would be offensive to a concept of justice.

[13] Ground 7 of the Respondent's Notice of Appeal is that the learned Judge erred in law and in fact in holding that in breach of the contract, the Respondent carried out defective work, using unsuitable materials, failed to remove the clay soil under the floor slab and failed to design a proper or adequate floor slab so that the unit was not fit for use upon apparent completion.

[14] Mr. Jean Beaulieu who gave evidence on behalf of the Respondent admitted that the Woods Development was his brain child and that not only was he one of the main shareholders, but he was also the general supervisor of the construction. In cross-examination he stated that reinforcing steel of grade 60 was the original specification for use in the floor slab but this was changed to fiberglass. Tellingly, he also stated the following:

- "Yes. all of those reports recommend as a remedy for the problem that reinforced steel should be placed in the slab
- "Yes, in hind sight, steel would be the thing to do
- "Yes, I agree that the properties of steel makes it a better reinforcement given the properties of the site, the conditions and topography. It is a better choice, but not the only one.
- "Yes, it is better than fiberglass

- "Yes, some of the units have been repaired…….
- "Yes, the repairs to all the floor slabs in the units have used reinforcing steel.
- "No, Woods Development does not consider itself responsible for the damage to Dr. Sengupta's unit."

[12] Learned Counsel for the Respondent argued that as the design of the floor slab was entrusted to a competent engineer of 40 years experience who was an independent contractor, and that as there was no evidence that the sub-contractor, Tropical Builders who constructed the floor slab, had failed to conform to the design of the Respondent's engineer that any negligence on their part could not be attributed to the Respondent. In support of this proposition learned Counsel quoted the case of D & F Estates Ltd v Church Commissioners of England[1]. I find that case to be of no assistance in this present case. The head note reads:

> "In the absence of a contractual relationship between the parties, the cost of repairing a defect in a chattel or structure which was discovered before the defect had caused personal injury or physical damage to other property was not recoverable in negligence by a remote buyer…..because the cost of repair was pure economic loss which was not recoverable in tort." (My emphases)

The present case is based on contract and damages are being sought for breach of the terms of that contract.

[13] I therefore have no hesitation in agreeing with the learned trial Judge when he said:

> "It was an implied term of the agreement that the foundation walls and floor slab would be built in conformity with the soil requirements. In breach of the contract Woods Development carried out defective work, using unsuitable materials…… They failed to design a proper or adequate floor slab, so that the unit was not fit for use upon apparent completion. When Dr. Sengupta made complaints about the faulty construction and defects, the directors of Woods Development made no effort to remedy them."

[1] [1988] 2 All E.R. 992

[14] The final point raised in respect of the defects by the Respondent is that if the defects did occur, then they occurred more than one year after completion of the building and as such they were outside the defects liability period as set forth in the construction contract, the very contract learned Counsel for the Respondent has persuaded the Court is inadmissible. Running with the hares and hunting with the hounds has always been a recipe for schizophrenia. Unfortunately, Counsel having persuaded the Court that the actual construction contract contained as a schedule of the Deed was inadmissible as evidence, he cannot now seek to rely on a specific term therein.

[15] I turn now to the Appellant's grounds of appeal. The first ground is that the learned trial Judge erred in law when he found that the Appellant had failed to prove his special damages in respect of remedial works actually carried out by the Appellant prior to the trial of this matter. The Respondent replies with the argument that the Appellant failed to allege in his Statement of Claim "any special damage" with all the necessary particulars. Perhaps, this is an appropriate point to remark that when Records of Appeal are prepared and they omit significant parts of the relevant evidence before the trial Judge (in this case there were no witness statements included) then a Court of Appeal is at a distinct disadvantage when any fact is in issue. I shall revert later to this point.

[16] Paragraph 812 of Halsbury's Laws of England, 4th Edition (Reissue) Vol 12 (1) reads in part as follows:

> "A distinction is frequently drawn between the terms 'general' and 'special' damages which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract) general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise normally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties….. The distinction between the two terms is also drawn in relation to proof of loss: here general damages are those losses, usually but not exclusively non pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms."

[17] In this case the Appellant pleaded in his statement of claim particulars of the physical damages resulting from the breach of contract. He then pleads that he suffered loss and damage. He further pleaded that he had undertaken certain remedial works, to the extent that he was able to afford. He then pleaded that he would "claim the estimated cost of remedial works at the date of trial". The Appellant further claimed that he had "suffered distress and inconvenience by reason of the defendants breaches of contract and such damage is continuing". This latter claim, without more, is clearly a claim in general damages, using the categorization set out in Halsbury's. However, immediately under that latter pleading there appears "Particulars" wherein the Appellant sets forth his claim for repairs in the sum of $545,000.00, loss of use of the premises during repair at $10,000.00 per month and relocation costs of $100,000.00 all of which fall squarely within the class of general damages. Finally, in the prayer to the Statement of Claim, the Appellant claimed: "(1) damages for breach of contract; (2) interest thereon at such rate as the Court deems just."

[18] I believe that it now falls to be determined whether this case proceeded at trial under the old Rules of the Supreme Court, or under the new Civil Procedure Rules 2000 (hereafter CPR). Part 73 of CPR, the Transitional Provisions provides that cases started before the commencement date of CPR in which a trial date has been fixed shall be unaffected by CPR. In other words the old Rules of the Supreme Court apply. However, CPR would apply to cases started prior to the commencement date of CPR, for which a trial date had not been fixed before the commencement date. A review of the case file in this matter indicates that the trial date was set after the commencement date for CPR and hence it is those latter rules of procedure which apply to this case.

[19] CPR Part 8.7 (2) and (3) in speaking to the Claimant's duty to set out his case state as follows:

> "(1) The claimant must include in the claim form or the statement of claim a statement of all the facts on which the claimant relies.
>
> (2) The statement must be as short as practicable."

[20] The equivalent rules under the old Rules of the Supreme Court was Order 18 r. 7, r. 12. and r. 15. I repeat the relevant portions for convenience.

> "7. Subject to the provisions of this rule and rules 10,11 and 12, every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.
> "12. (1) Subject to paragraph 2 every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the forgoing words –
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
> (b) …….
> "15. A statement of claim must state specifically the relief or remedy which the plaintiff claims…"

[21] It seems to me that the two rules of pleading seek to do the same thing, that is to ensure that the party pleading sets out with sufficient clarity his case so that the other party is clear as to what case he is expected to meet. In Perestrello E Companhia Limitada v United Paint Co Ltd[2] Lord Donovan made the following helpful statement which I hold to be apposite, both under the Rules of the Supreme Court and under CPR. He said:

> "There is plenty of authority for the proposition that a plaintiff need not plead general damage; but since the expression 'special damage' and 'special damages' are used in such a wide variety of meaning it is safer to approach this question by considering what a plaintiff *is* required to plead rather that what he is not.
> The Rules of the Supreme Court are of no direct assistance. RSC Ord 18 r. 7 requires every pleading shall contain a summary of the material facts and by r 12 (1) "every pleading must contain the necessary particulars of any claim…" By r 15 (1) "A statement of claim must state specifically the relief or remedy…" claimed. It follows that the necessity of pleading damage (meaning injury) or damages (meaning the amount claimed to be recoverable), if it arises at all, does so as the general requirement of any statement of claim that it shall "put the defendants on their guard and tell them what they have to meet when the case come on for trial" (per Cotton LJ in Philips v Philips (1878 4 QBD 127 at p 139).

[2] [1969] 3 All E.R.478

> Accordingly if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting in computing a payment into court.
> The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. The question to be decided is not one of words but one of substance.
> The same principle gives rise to the plaintiff's undoubted obligation to plead and particularize any item of damage which represents out of pocket expenses, or loss of earnings, incurred prior to trial and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded"

[22] Using that yardstick, has the Appellant foreshadowed with sufficient particularity the case the defendant will have to meet? In my view he has. I am fortified in my view in that if the Respondent had required more information, then he could have sought such information pursuant to Part 34 of CPR. In consonance with the Overriding Objective, I hold that the technical rules regarding pleading which have evolved under the old Rules of the Supreme Court are to be interpreted not as giving rise to defences in and of themselves, but rather to ensure that at a trial between parties fairness is achieved and ambush avoided.

[23] In this case I hold that the Statement of Claim does put the Respondent on his guard and tells him what he has to meet at the trial in regard to what is called general damages, being those costs which the Appellant will have to incur to cure the breaches of contract. I further hold that the sums of money already expended by the Appellant are not recoverable in that such sums should have been specially pleaded to put the Respondent on his guard, and if necessary to provide the Respondent with a guide of the sum of money that could have been paid into Court, were he minded to do so.

[24] Finally, I deal with the quantum of damages awarded by the learned trial Judge. Unfortunately, the written judgment contains no help in determining how the

learned Judge arrived at the sum of $150,000.00 for general damages. As best as I can determine, the damage for which compensation is sought to be given in the judgment is “much inconvenience, aggravation and discomfort” and having to put up with shoddy accommodation. I hold that the trial Judge erred in not assessing the evidence of the cost of repairs that was before him. As I remarked earlier on in this judgment, the record of appeal was deficient in that no witness statements were included. I find, therefore that I have not the full facts before me to enable me to come to a proper figure. In the circumstances, I would remit this matter back to the High Court for the trial of the sole issue of quantum of general damages as defined at paragraph 16 above.

[25] The Appellant’s appeal therefore succeeds to the extent above and as stated, the Respondent’s cross appeal is dismissed. Costs are awarded to the Appellant to be calculated at the rate of two thirds of the prescribed costs calculated on the basis of the amount awarded for general damages.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal