MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL NO.3 OF 2003

BETWEEN:

KENNETH HARRIS

Appellant

and

SARAH GERALD

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon Madam Suzie d'Auvergne — Justice of Appeal [Ag.]

Appearances:

Mr. Jean Kelsick for the Appellant
Mr. Hogarth Sergeant for the Respondent

2004: September 27;
November 1.

JUDGMENT

[1] GORDON, J.A.: In December 1999 or January 2000 (nothing turns on the date) the Respondent entered into an oral agreement for the construction of a house for the Respondent by the Appellant. The Respondent had lost her house as a result of the activities of the Montserrat volcano and was being assisted in the financing of the house by a grant of some $47,390.00 by the Montserrat Government's Material Assistance Scheme. The Respondent had caused plans of a two bed-roomed bungalow to be drawn by one Mr. Shiels in accordance with instructions she had given to him. The Respondent informed the Appellant that in addition to the $47,390.00 worth of material available to her she had some $41,000.00 in cash for the labour. The learned trial Judge found that it was probable that the

Appellant did tell the Respondent that the sum of $82,000.00 would almost finish the house.

[2] The Appellant commenced construction in early January 2000. The evidence of the Respondent is that she took ill in late December 1999 and did not see the works being carried out by the Appellant until the foundations had been dug and had been 'paved' and steel had been erected thereon. Further, the Respondent alleged that the building was sited in a substantially different position from that shown on the plan. It is common ground that what the Appellant commenced building was a far departure from what was drawn on the plans.

[3] The Respondent complained to the Appellant and, sometime towards the end of February 2000, ceased to pay the Appellant. The Appellant abandoned the works. The Respondent brought an action against the Appellant in which she claimed general damages for breach of contract and special damages in the sum of $4,826.31 being the cost of materials had and received by the Appellant for the construction of the house and $3,840.00 for rental she was forced to pay due to the unavailability of the house for her occupation. The Defence was both a general denial save that a labour only contract to build a house was admitted and a plea of variation of contract. The Defence further alleged that construction was stopped because the Respondent refused to pay the Appellant at the end of February for work done. The Appellant further counter-claimed for the sum of $3,900.00 which he alleged was owed by the Respondent under the contract and for general damages for breach of contract by virtue of the Respondent failing to pay him. The Respondent's defence to the Counterclaim was a denial that she owed $3,900.00 or any other sum.

[4] At the trial of the action the learned trial Judge identified seven issues for determination. I quote from the judgment at paragraph 7:

> "The Court must determine the following issues arising from the pleadings, the evidence and the submissions of Counsel for both parties:-
>
> A. Whether or not Mr. Harris' [the Appellant] departure from the plan was commissioned by Ms Gerald [the Respondent]
>
> B. If not, then can Mr. Harris rely on the defence of acquiescence?
>
> C. Did Mr. Harris discharge his obligations under the agreement?
>
> D. Does Ms Gerald owe Mr. Harris any money for work done?
>
> E. Did Mr. Harris misappropriate building materials?
>
> F. If Mr. Harris breached the agreement, then has Ms Gerald mitigated her loss
>
> G. What remedies are applicable for any breach found?"

[5] The learned trial Judge found as a fact that the Respondent "did not commission a departure from the plan". The learned trial Judge found that the Respondent had proved breach of contract and loss, and so awarded damages as follows: special damages of $4,826.311 for misappropriation of material and $3,840.00 for rent paid by the Respondent up to January 2001, and for general damages, including the cost of mitigating her loss, the sum of $32,078.96.

[6] The Appellant has appealed against this decision and argued three grounds of appeal before us which he distilled from the 18 grounds of appeal set forth in his Notice of Appeal. The grounds argued were firstly, that the learned trial Judge was wrong in law when she rejected the defence of acquiescence; secondly, that the learned trial Judge used the wrong test in determining whether the Respondent had acted reasonably in mitigating (or not mitigating) her loss; and, thirdly, that the learned trial Judge used the wrong measure of damages.

Estoppel by Acquiesence

[7] Learned Counsel for the Appellant argued that although this case had been filed under the regime of the old Rules of the Supreme Court (hereafter RSC), it was caught by the "Transitional Provisions" at Part 73 of the Civil Procedure Rules 2000 (hereafter CPR) and that as such the strict rules regarding pleading contained in RSC had been relaxed in the context of the "Overriding Objective". By this argument Counsel raises the comparison between the rules of pleading under RSC and under CPR.

[8] Order 18 rule 8 of RSC reads as follows:

> "8 (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

The comparable rule in CPR is at Part 10.5, the relevant parts of which read as follows:

"Defendant's duty to set out case

10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) Such statement must be as short as practicable.

(3) In the defence the defendant must say -

(a) which (if any) allegations in the claim form or statement of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) If the defendant denies any of the allegations in the claim form or statement of claim-

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not -

(a) admit it; or

(b) deny it and put forward a different version of events;

the defendant must state the reasons for resisting the allegation.

[9] The essential difference between the two rules, in this context, is that RSC requires that a defence must be specifically pleaded and CPR requires that all facts on which the Defendant relies must be pleaded. I am of the view that the difference in language between the two is formal, rather than substantial. In the instant case the Appellant failed to plead any of the elements of estoppel by acquiescence, namely that the Respondent acquiesced in the breach of contract and that the Appellant acted on that basis to his detriment. It cannot be said often enough that the overriding objective is not a plaster to cover all sores of omission. Where CPR places an obligation to act in a particular way, failure to act in that way will, in most cases, result in a sanction. The case pleaded by the Appellant was variation of contract, a far cry from acquiescence. There is one further point that should be dealt with here. Learned Counsel for the Appellant urged the Court to consider that as the defence of estoppel had been raised in both the witness statements and legal submissions filed on behalf of the Appellant prior to trial, the Respondent could not be heard to say she was taken by surprise.

[10] Part 10.7 of CPR is apposite in this context. It reads:

> Consequences of not setting out defence
>
> 10.7 (1) The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.
>
> (2) The court may give the defendant such permission at the case management conference.
>
> (3) The court may not give the defendant such permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference.

[11] What learned Counsel for the Appellant was attempting to do, in my opinion, was to gain the benefit of amending his defence without amending his defence. This is not allowable.

Mitigation of damages

[12] Learned Counsel for the Appellant argued that the test applied by the learned trial Judge when she said in her judgment that the Respondent "acted as she saw fit in her best interests. This was reasonable conduct on her part" was the wrong test. Counsel argued that the proper test to have been applied was how would a reasonable person have acted. The classic statement on the test of whether a plaintiff's action in mitigation of damages was reasonable or not was stated in Banco de Portugal v Waterlow & Sons Ltd[1] by Lord Macmillan and it is:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to

[1] [1932] AC 452 at 506

> meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

I find the above statement by Lord Macmillan a succinct, clear and wholly correct statement of the law. Having said the foregoing, I find that the learned trial Judge did apply the correct test in determining that the costs incurred by the Respondent in mitigating her loss were appropriate.

Quantum of General Damages

[13] By the time that the Appellant abandoned the works it would appear that a basement with a concrete roof had been built. The learned trial Judge found as a fact, based both on a site visit and the Appellant's own expert witness, that it would be impossible for someone to live in the basement without air conditioning.

[14] In assessing general damages the learned trial Judge relied on the evidence of architect Mr. Dyett that to complete the originally drawn house on the completed basement would cost $159,220.00. The same house without the benefit of the basement would cost $195,000.00. The learned trial Judge then found that the basement was worth $27,088.00. I have been unable to follow the math of the learned trial Judge. The trial Judge then found as a fact that the Respondent spent $56,513.27, less an amount of $4,826.31 being the value of material she found to have been misappropriated by the Appellant, with which she dealt separately, leaving a net spend by the Respondent on the construction of $51,686.96. The learned Judge then said "the difference between the properly built basement and the defective basement is $24,578.96. Again, the math of the trial Judge eludes me.

[15] Learned Counsel for the Appellant urged upon the Court that the method of calculation of the general damages was wrong in law. I agree. As McGregor on Damages[2] puts it:

> "The authorities on the measure of damages in building contracts are sparse, which in view of the existence of so many such contracts is surprising".

McGregor states that:

> "the normal measure of damages is the cost to the owner of completing the building in a reasonable manner less the contract price".

The authority for this statement is Mertens v Home Freeholds Co[3] an English Court of Appeal case. I hold that this is the proper measure of damages in a case such as this where a building contractor wrongfully repudiates the contract to build. On that basis, the Respondent would have been entitled to a considerably enhanced amount for general damages. However, as there was no cross appeal, I am unable to alter upwards the quantum awarded. In the circumstances, I will leave the award made by the learned trial Judge undisturbed.

[16] In the premises, the appeal is dismissed with costs to the Respondent in the sum of $9,333.33 being 2/3 of the costs awarded in the court below.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]

[2] 16th Ed. 1997
[3] [1921] 2 K.B. 526