IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
IN THE HIGH COURT OF JUSTICE
(CIVIL)

GRENADA

Claim Number: GDAHCV2012/0424

Between :

THOMAS CHASE
ZARAH CHASE

Claimants

AND

CABLE AND WIRELESS (GRENADA) LIMITED

Defendant

Before:
Raulston Glasgow — Master

Appearances:
Pauline Hannibal of counsel for the Claimants
Rosana John of counsel for the Defendant

2014: October 29;
November 22:
2015: January 29

RULING ON ASSESSMENT OF DAMAGES

APPLICATION

[1] **GLASGOW, M [AG.]:** The present application for assessment of damages was filed on October 9, 2014. The application is supported by the affidavit of the claimants (hereinafter "the applicants") filed on even date. When the application came on for hearing on October 29, 2014 the parties were given an opportunity to file witness statements, submissions and authorities in support of their contentions on the assessment. The applicants duly filed their authorities and submissions on

November 14, 2014. The defendant (hereinafter the respondent) filed submissions and authorities in support of its contentions on December 5, 2014. No further evidence was filed beyond that filed by the applicants on October 9, 2014.

BACKGROUND

[2] The applicants are husband and wife entrepreneurs who write and publish what is described as "*a dictionary of Grenadian Creole English with Grammar and Syntax.*" On April 12, 2012 the applicants delivered a written request to the respondent to purchase 30 books to be distributed to 13 libraries across the island of Grenada. The $100.00 per book price was "*a special lower than retail price*" offer. On April 14, 2012 the respondent's corporate communications manager wrote to the applicants to "*confirm that we will purchase 200 copies @ $100.00 per copy to be handed over to Mrs. Lillian Sylvester, Chief Librarian.*" The 200 books were delivered to the chief librarian. In fact, there was a handing over ceremony at which 30 books were delivered to Mrs. Sylvester on April 19, 2012. The handing over ceremony was conducted by the applicants, the respondent and the chief librarian and was publicised through the print media on or before April 27, 2012. The balance of the books being 170 in number were delivered to the chief librarian by April 20, 2012

[3] Further to those events, the applicants sent the respondent an invoice dated May 3, 2012 requesting payment for the 200 books which had been delivered pursuant to the agreement. The respondent responded by letter dated May 18, 2012 in which it expressed regret for a "*misunderstanding*". The respondent informed the applicants that it intended to purchase $2000.00 worth of books, that is to say, 20 books rather than the 200 books stated in the email confirming the agreement. The respondent offered to pay for an additional 13 books in addition to 20 which had already been paid for. The respondent apologised for the "*miscommunication*" and reiterated that "*it was never our intention to invest $20,000 (twenty thousand dollars) in the purchase of the books, as our budget would not allow for this.*"

[4] The issue of the money owing took a very acrimonious turn thereafter with correspondence being sent back and forth. A telling communication was sent from the attorneys for the respondent to the applicants on June 26, 2012 in which the respondent details efforts to retrieve the 170 books from

the chief librarian. In short, the chief librarian rebuffed those overtures on the grounds that she did not receive the 170 books from the respondent and that the books could only be returned on the authorisation or instructions of the applicants who had delivered same to her.

[5] The applicants never issued a request for the return of the books and as such the books remained with the chief librarian. The applicants submit that they did not dismiss the respondent's request that they demand the return of the books. Rather, they informed the respondent that it should facilitate this exercise by issuing a public statement in which the respondent would inform the public of the alleged misunderstanding. The respondent did not respond to this offer and as such the applicants never sought the return of the books. The applicants further offered that the respondent pay for the full order of 200 books by way of 2 or 3 instalments. This offer was also not accepted.

[6] Following the flurry of missives, the applicants launched this action on October 17, 2012 by filing a claim form and statement of claim which were served on the respondent on October 18, 2012 along with the requisite accompanying forms. The respondent never acknowledged service. Accordingly, the applicants requested and were granted a default judgment on February 11, 2013. The default judgment included damages and interest to be assessed. As stated above, the parties filed evidence and submissions in support of their contentions on the assessment of damages and the hearing proceeded today. There was no cross-examination of witnesses but the court heard counsel for the parties both on their written submissions and on oral arguments.

ARGUMENTS ON ASSESSMENT

Applicants' contentions

[7] The applicants' position is quite simple. The measure of damages to be received is compensatory, that is to say, an award that would place the innocent party in the same position as if the contract had been performed in so far as money can achieve such an outcome. The applicants' award of damages in these circumstances would be the amount that the respondent should have paid for the additional 170 books which were delivered but have not yet been paid for by the respondent.

[8] Further, the applicants argue that the respondent should not complain that the applicants did not mitigate their losses. While the applicants agree with the legal principle that mitigation of losses must be pursued, it is their view that what the respondent sought from them by way of mitigation of losses was unreasonable. They were only required to take reasonable steps to mitigate their losses. Accordingly the demand that the applicants retrieve the 170 books from the chief librarian and seek to sell them on the open market was an unreasonable requisition. The unreasonableness, argue the applicants, lay in the fact that taking such a measure may have proven ruinous to their entrepreneurial good will. In oral submissions in amplification of this argument, the applicants reminded the court that they did consider the offer of retraction and asked the respondent if it would concomitantly issue a public statement that it only intended to purchase 20 books[1]. The applicants proposed this public retraction by the respondent in an effort to forestall any public condemnation that may flow from a demand that the chief librarian return the 170 books. The respondent did not accept the request for the public statement.

Respondent's posture

[9] The respondent agrees with the applicants on the law as it relates the object and measure of damages in cases of this sort. The respondent's view is that a defendant is only responsible for the *"resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result from his breach."*[2]

[10] The respondent, however, disagrees with the applicants on the question of mitigation of losses. The respondent argues that -

> *"The claimant is only required to act reasonably and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interest of the Defendant and keep down the damages, so far as it is reasonable and proper by acting reasonably in the matter. One*

[1] See paragraph 17 of the applicants' affidavit filed on October 9, 2014

[2] Citing from Halsbury's Laws of England Volume 12, 4th edition, paragraph 1174. Counsel also cites General Tyre and Rubber Co v Firestone Tyre Co. [1975] 1 WLR 819; British Transport Commission v Gourley [1956] AC 185 and McGregor on Damages, 14th edition, paragraph 1-10

test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default. In actions relating to the sale of goods it is frequently the claimants' duty where there is an available market, to mitigate his loss by going into the market and buying or selling the same as the case may be"[3]

[11] In its written submissions and oral arguments, the respondent contends that the applicants did not act to mitigate their losses. They were advised of the error made by the respondent and were asked to retrieve the 170 which were the subject of the "*misunderstanding*". The respondent's stance is that the applicants could have taken the books and sold them on the open market or they could have pursued "*...another corporate entity that was willing to donate to the purchase of the copies of the Book.*"[4] The respondent further submitted that it acted reasonably by offering to pay for another 13 books in addition to the 20 books that it intended to purchase. The applicants' refusal to retrieve the books was a failure to mitigate their losses. This inaction should considerably affect the quantum of damages to be awarded to the applicants.

ANALYSIS AND CONCLUSION

[12] The parties agree on the basis for the applicants' entitlement to damages in this case. It may be apposite to recite the following observation from **Halsbury's Laws of England** -

"In cases of breach of contract the contract breaker is responsible and responsible only for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result from his breach or for which there was a serious possibility or real danger... The requisite degree of foresight may be attributed to the contract breaker under what is known as the rule in Hadley v Baxendale either (1) because the damage is such as may fairly and reasonably be regarded as arising naturally, that is to say according to the usual course of things, from the breach or (2) because of special knowledge which he had at the time of making the contract."[5]

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[3] Halsbury's Laws of England, supra, n.2 at paragraph1194
[4] Paragraph 4 of the respondent's submissions
[5] Supra, n.2 at paragraphs 1174 and 1175

[13] I would find therefore that, subject to what is said hereinafter about mitigation, the applicants are entitled to the entire sum that remains unpaid for the balance of the books since it would have been or ought to have been within the contemplation of the parties that the applicants would have suffered this loss if there was a breach of the sort claimed in this case.

[14] The respondent disputes that the applicants should be awarded all their losses since, in the respondent's estimation, the applicants did nothing to mitigate their losses. The burden is on the respondent to prove this assertion[6]. In this context, the respondent submits that the applicants' failure to retrieve the 170 books from the chief librarian was unreasonable and a failure to mitigate their losses. I disagree. The legal obligation to mitigate a claimant's losses only obliges the claimant to act reasonably. Accordingly it is said that the claimant –

> *"is under no obligation to do anything other than in the ordinary course of business and where he has been 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 defendant whose breach has occasioned the difficulty..."* In this regard, the claimant "*is under no obligation to injure... his commercial reputation.*"[7]

[15] It is difficult to accept the respondent's view on this issue. The act of demanding the return of the 170 books would have, at the very least, attracted public disparagement and may have, in all likelihood, proven ruinous to the applicants' commercial reputation. I find that the applicants acted reasonably in the circumstances since they did not dismiss the evidently difficult proposition to demand the return of the books. Rather they sought to limit the commercial fallout by requesting that the respondent issue a public statement to the effect that the respondent only intended to purchase 20 books as opposed to the publicised 200 books. It does not require any speculation as to why the respondent refused this offer to issue the public statement. The issuance of such a statement would have shown where the fault lay in respect of this public embarrassment and would have affected the respondent's commercial reputation.

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[6] Halsbury's Laws of England, supra, n.2 at paragraph 1193
[7] ibid at paragraph 1194

[16] I conclude that the applicants were not obliged at law or otherwise to take any step that would lead to a diminishment of their entrepreneurial interests. In all the circumstances, the demand for the return of the books was not something one would expect in the "*ordinary course of business...*" Further, there was no guarantee that the applicants would have been in a position to attract another business entity to donate the books or that they would recoup the losses on the open market.

[17] The applicants are entitled to the resultant losses which the respondent ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result from its breach or for which there was a serious possibility or real danger. In this context, the applicants' evidence on the assessment of damages is that they seek special damages of $18000.00. The contract price for 200 books was $20,000.00. The respondent admits that it paid $2000.00 which is the contracted cost of 20 books. The respondent offered to pay for additional 13 books. This was not the bargain. They are obligated to pay the entire sum of $18000.00 which is the balance of the contract price. The applicants are therefore awarded damages of $18,000.00 plus costs assessed at $1620.00. Interest will accrue on the total award of $19,620.00 from today's date until payment

Raulston Glasgow
Master