

EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2018/0028

BETWEEN:

[1] NIXON JAWAHIR
[2] JAVER NICHOLAS- JAWAHIR

Claimants

and

ISABELLA SHILLINGFORD

Defendant

Before: Ms. Agnes Actie

Master

Appearances: Mr. Anwar Brice for the claimants
Mr. Dexter Theodore QC for the defendant

2018: October 2
2019: January 14

JUDGMENT

[1] On 7th June 2018, the claimants obtained summary judgment against the defendant for a specified sum of \$41,606.86 with damages to be assessed. The matter is now before the court for an assessment of damages.

Background

[2] The defendant in this claim is an Attorney-at-Law, whose services were retained by the claimants. The claimants, husband and wife, approached the St Lucia Mortgage Finance Company Ltd. (SMFC) for a loan to purchase property and to construct their family home. In order to qualify for the loan, SMFC offered the claimants a consolidation loan in the sum of \$71,600.00 to settle existing debts namely: a

student loan of \$41,606.86 with Bank of St Lucia; a vehicle loan of \$22,539.06 and a **Court's** debt of \$4,516.60.

- [3] SMFC through letters dated 15th August 2016 and 28th December 2016, instructed the defendant to prepare the consolidation loan and the mortgage loan, respectively. The defendant provided SMFC with a letter of undertakings in respect of the loans.
- [4] On 25th November 2016, SMFC disbursed the sum of \$41,606.86 to the defendant to radiate the student loan at the Bank Of St Lucia. The defendant failed to pay over the said sum to Bank Of St Lucia. As a result, SMFC refused to disburse any further sums under the consolidation loan to settle the other debts.
- [5] **Due to the defendant's breach, the** claimants had to continue making payments towards the outstanding debts together with payments of the loan under the consolidation loan.
- [6] **It is the claimants' evidence that the** continued payments of the existing student loan and the other debts along with the repayments under the consolidation loan created a financial burden which resulted in the imposition of late-payments' penalties together with accrued interest on the existing loans.
- [7] The claimants filed a claim against the defendant seeking the return of the sum of \$41,606.86 disbursed by BOSL, accrued interest and late-penalty payments on the existing student loan, vehicle loan and the **court's debt respectively**, together with arrears of interest on the mortgage loan. The claimants also claimed for the legal fees paid to new counsel for the preparation of documents to complete the loan transactions.
- [8] The defendant filed a defence admitting liability for the sum of \$41,606.86 disbursed for the student loan but contends that the other sums claimed are too remote and should not be allowed. The parties at case management conceded to summary judgment for the sum admitted with damages to be assessed on the disputed sum.

The issue is whether the claimants are entitled to the amounts claimed for the **defendant's breach** or whether the damages claimed are too remote in the circumstances

The Law

[9] The object of an award of damages for breach of contract is to place the claimant in an equivalent position financially to the position that he/she would have been in if the contract had not been breached.

[10] The measure of damages allowed consequential on a breach of contract was established in the seminal case in *Hadley v Baxendale*¹ where it was held that:-

“where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of the contract itself (direct loss), or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (consequential loss) “

[11] In recent times, the courts have moved to moderate the two limbs of the *Hadley v Baxendale* principle into a single integrated rule. The text **Halsbury's Laws of England**² at paragraph 534 states:-

“**Nevertheless, the broad effect of recent authority** has been to analyse the *Hadley v Baxendale* principle as disclosing not a two-part but a single rule, an approach which corresponds with how the matter is approached in practice. The two aspects of the general principle do not, on this approach, need to be treated antithetically and indeed on occasion run into one another. The broad rule is said to be, essentially, that the innocent party recovers that loss which was in the assumed contemplation of both parties in the light of the general and specific facts (as the case maybe) known to both parties or, put another way, that the question is whether, on the information available to the defendant when the contract was made, he should reasonably have realised that such loss was sufficiently likely to result **from the breach of contract.**”

¹ (1854) 9 Exch 341 at 354 [1843-60] All ER Rep 461 at 465.

² Volume 29 (2014) at Paragraph 534.

[12] The **defendant's main contention in the case at bar is that the amounts claimed are** too remote as the claimants should have taken action to mitigate their loss. The issue of remoteness of damages was distilled by the English Court of Appeal in Siemens Building Technologies FE Ltd v Supershield Ltd³ where it was stated:

“The law on remoteness of damage in relation to claims for breach of contract is grounded on the policy that the loss recoverable by the victim should be limited to loss from which the party in breach may reasonably be taken to have assumed a responsibility to protect the victim. It follows that the question of remoteness cannot be isolated from consideration of the purpose of the contract and the scope of the contractual obligation. The underlying policy is implicit in Lord Reid's speech in *Czarnikow v Koufos*, where he referred to what the parties may be supposed to have contemplated as grounds for the recovery of damages and linked this to the question whether the loss was sufficiently likely to result from the breach to make it proper to hold that loss of that kind should have been in the contract breaker's contemplation.”

[13] At paragraph 43 of the judgment Toulson LJ said:

“*Hadley v Baxendale* remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach..

.....
If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.” (My emphasis)

[14] What was the information available to the defendant and what kind of loss could have been held in contemplation of a breach? The claimants assert that the defendant was specifically aware of the fact that the consolidation loan to clear off the existing debts was a condition necessary in order to qualify for the mortgage loan. It is the evidence that the defendant gave an undertaking to the SMFC to clear the outstanding debts. SMFC **acting on the defendant's** undertakings disbursed **to the claimants'** the first disbursement under the mortgage loan.

³ [2010] EWCA Civ 7.

- [15] The defendant admits that she did not clear the outstanding student loan and to date had not reimbursed the claimants or SMFC with the sum disbursed.
- [16] The court, in a claim for breach of contract, is required to conduct an enquiry into the loss actually sustained by the claimant as a result of non-performance subject to the issue of remoteness of damages. The foreseeability and remoteness of damage rule depends on the degree of relevant knowledge held by the defaulting party at the time of the contract. **The defendant will only be held liable for the claimant's losses if** they are generally foreseeable or if the claimant tells the defendant about any special circumstances in advance.
- [17] The defendant, as an Attorney-at-Law, acting within the scope of her duty under the retainer should have contemplated that the failure to clear the student loan would **have resulted in the bank's refusal to disburse further sums to clear the other** debts. The defendant should also have held it in contemplation that the claimants would have had to continue their commitments to service the existing loans and the mortgage loan as a result of her non-fulfillment of her obligation under the retainer.
- [18] The **defendant's non-**fulfillment of her obligation to clear off the existing debts imposed an onerous financial burden on the claimants. It is reasonable to consider that the natural consequences of the loan remaining unpaid would be the accrual of interest and late payments fees. I am of the view that the losses actually sustained by the claimants were direct consequences of the **defendant's** non-performance under the retainer and cannot be regarded as too remote in the circumstances.
- [19] **The claimants' in an effort to mitigate their loss had to retain new counsel to complete** the legal documents to secure the loan. I accept the evidence presented by the claimants and am of the view that the losses suffered by the claimants were all within the scope of the duty owed by the defendant. The losses suffered were known or should have been reasonably contemplated as the natural occurrence at the time of the contract. In the circumstances, I am of the view that the claimants are to be

compensated for the arrears, interest, penalty payments and consequential losses suffered as a result **of the defendant's breach** and I so order.

ORDER

[20] In summary, it is ordered that the defendant shall pay the claimants the following sums:

- i. Interest on the student loan - \$ 2,487.66
- ii. Penalty payments on the student loan - \$806.00
- iii. Interest on vehicle loan - \$5,249.22
- iv. Penalty payments on vehicle loan - \$992.00
- v. Arrears of interest on mortgage loan - \$24,521.43
- vi. Interest on court's debt- \$166.37
- vii. **Penalty payments on court's debt** - \$651.11
- viii. Legal fees for completing preparation of consolidation loan- \$2,315.13
- ix. Interest on the total sum of \$37,188.92 at the rate of 6% from the date of filing the claim until payment in full.
- x. Prescribed Costs in the sum of \$3,347.00 pursuant to CPR 65.5.

Agnes Actie
Master, High Court

By the Court

Registrar