

BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 18 of 2000

BETWEEN:

FURNITURE LIMITED

(Appellant)

AND

VIRGINIA MAPP

(Respondent)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Frederick Waterman, Justice of Appeal and the Hon. Elliott Belgrave C.H.B., Justice of Appeal (acting)

2003: May 25 and July 16

Mr. C.E. Lashley Q.C. for the appellant

Mr. Theodore Walcott for the respondent

DECISION

SIMMONS CJ: This is an appeal against the decision of the Magistrate for District "A" (Civil) in which she dismissed the appellant's claim for \$2,461.00 being the price of a quantity of parquet floor tiles sold and delivered and including the sum of \$82.80 representing bank charges in connection with a stopped cheque. There are no pleadings, strictly so-called, in this matter: only Particulars of Claim. The proceedings [1] commenced by way of the Default Summons procedure in the Magistrates' Court.

[2] On 12 August, 1998 the respondent went to the appellant's business place 'The Liquidation Centre' to purchase 400 parquet floor tiles. She was doing remedial work to the living room of her house and she needed a particular tile. She took along a sample of the tile with her. While waiting to see if the appellant had the quantity of tiles in stock, the respondent spoke to Mr. Ram Mirchandani (Mr. Ram), an officer of the appellant company. She explained to Mr. Ram the need and reason for the specific tiles. She waited for approximately 1½ hours while an attendant searched in the warehouse.

[3] Eventually the attendant returned from the warehouse and told Mr. Ram, in the presence of the respondent, that 400 tiles were available. The respondent then wrote a cheque dated 12 August 1998, for \$2,461.00 to cover the cost of the tiles and a bucket of adhesive.

[4] On 13 August 1998, while the respondent was at work, 14 boxes of tiles were delivered to her home. Each box contained 25 tiles and 16 boxes ought to have been delivered. The 14 boxes were received by a Mr. Carter, a carpenter who was repairing the roof of the respondent's house. Mr. Carter apparently knew the driver of the [2] delivery vehicle and he signed for the tiles and put them aside. When the respondent checked the delivery on August 13th, she asked Carter why he had accepted delivery because the tiles were not what she had ordered. He said that he had merely instructed the delivery man to leave them because he knew him.

[5] In her evidence in chief, the respondent said that "the quantity of tiles was incorrect and the pattern was incorrect." She telephoned Mr. Ram and explained to him that the tiles were short by 50 and the pattern was wrong. Mr. Ram apologized. The respondent's evidence continued:

"Mr. Ram said that he was sorry and would check the warehouse because he still had the sample on his desk. He said they did it by stock number. He also promised to send the sample to the warehouse and get back to me the same day or later next morning. He further said that once he found the tiles and the quantity he would send the correct ones and pick up the wrong ones at the same time."

[6] On 14 August 1998, not having heard from Mr. Ram, the respondent again telephoned him and inquired what was the position with the tiles. He said that the tiles were available. According to the respondent, in so far as the tiles which she had ordered had not been delivered, she stopped her cheque on 14 August 1998. The tiles are still in her possession. [3]

[7] Sometime in December 1998, the respondent spoke to Mrs. Ram Mirchandani (Mrs. Ram), a director of the appellant company, and suggested that she (the respondent) could use the tiles in another room and pay for the 14 boxes which had been delivered. Mrs. Ram's reply was that she would see the respondent in court.

[8] At the trial Mrs. Ram gave evidence on behalf of the appellant. Mr. Ram did not. Mrs. Ram claimed to have knowledge of the transaction. In fact she said that a sample of the tiles came to her and she went to the warehouse and counted 400 tiles. Under cross-examination by Mr. Walcott, however, Mrs. Ram said that she did not see when the transaction took place. She also said that she did not know if the respondent brought a sample of the tiles to the company and she was unaware that the respondent had spoken to Mr. Ram. Amazingly, she conceded that it was possible that the first time she spoke to the respondent was in December 1998.

[9] The Magistrate found that Mrs. Ram did not have first hand knowledge of the transaction and she attempted to "reconstruct a scene". The evidence of the respondent that she spoke to and dealt with Mr. Ram in August 1998 was not challenged. The Magistrate, as she was perfectly entitled to do, accepted the respondent's evidence and disbelieved Mrs. Ram, the principal witness for the [4] appellant. These were matters of fact entirely within the province of the Magistrate and this Court, on well-established principles and for well-known reasons, will not lightly interfere with findings of fact by a court of first instance. An appellate court will only upset findings of fact by a court of first instance if it is satisfied that, on evidence the reliability of which it was for that court to assess, there was a clear error in reaching conclusions of fact. – see *Industrial Chemical Co (Jamaica) Ltd v. Ellis* (1982) 35 W.I.R. 303 (JCPC).

Conclusion

[10] We see no reason to interfere with the findings of the Magistrate who saw and heard the witnesses. Her decision to give judgment for the respondent was amply supported by the evidence.

In respect of the sum of \$82.80 claimed on the face of the claim as "Bank charges for stop payment on cheque tendered for payment by the defendant to the plaintiff" there was no evidence whatever in support of such a claim and it was not sought to amend the claim as drafted to substitute a different basis for claiming the \$82.80. It is disallowed.

There was no claim for return of the tiles but, to the extent that there was a total failure of consideration, it can only be right that the appellant should send and recover the tiles. [5]

Disposal

[11] The appeal is dismissed. The appellant must pay the respondent's costs to be agreed or taxed. [6]

Chief Justice

Justice of Appeal Justice of Appeal (acting)