

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial (Civil) Appeal No. 1 of 2014

BETWEEN:

HUSBANDS TRANSPORT INC

APPELLANT

AND

HINDS TRANSPORT SERVICES LTD

RESPONDENT

BEFORE: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Sherman R. Moore, CHB, and The Hon. Andrew D. Burgess, Justices of Appeal.

2015: January 29

2015: March 11

Mr. Arthur Holder for the Appellant

Mr. F. Albert Pollard for the Respondent

DECISION

INTRODUCTION

[1] **BURGESS JA:** This is an appeal from the decision of Chief Magistrate Beckles delivered on 12 March 2014. In that decision, the Chief Magistrate determined that the respondent had substantially performed a contract between the appellant and the respondent for the provision of heavy lifting

services to the appellant by the respondent. She further determined that the respondent was not guilty of a fundamental breach of that contract. In consequence, she ordered the appellant to pay to the respondent the sum of \$2,000.00 on or before 11 June 2014 plus interest at the rate of 4% per annum based on the principle of *quantum meruit*.

FACTUAL BACKGROUND

- [2] We begin by giving the factual background to the appeal.
- [3] The appellant is a company incorporated under the **Companies Act, Cap. 308 (Cap. 308)**. Its registered office is at 7th Avenue, Hart's Gap, Hastings, Christ Church. The respondent is also a company incorporated under **Cap. 308**. Its registered office is at Kendall Hill Complex, Kendall Hill, Christ Church.
- [4] On 12 April 2012, the appellant telephoned the respondent and entered into an oral contract for the services of the respondent to lift five 40ft containers and one 20ft container onto and off the appellant's trailers. By the terms of this contract, the respondent was to lift these containers onto the trailers at Hart's Gap, Hastings, Christ Church, on the day of the contract. The appellant was then to transport these containers to the Flour Mill at Spring Garden, St. Michael. The respondent was to return to the Flour Mill on the

Monday following the date of the contract and lift the containers off the trailers in order that the containers could be weighed at the Flour Mill.

- [5] On the day of the contract, the respondent lifted the containers onto the trailers at Harts Gap as agreed and the appellant transported them to the Flour Mill. However, the respondent did not return on the Monday and never lifted the containers off the trailers at the Flour Mill.
- [6] The appellant made numerous efforts to contact the respondent on the Monday in question and on several days after that to have the containers lifted off the appellant's trailers, but to no avail. The appellant thereafter secured the services of another lifting service provider, Ince Transport Service, and had the containers lifted off.
- [7] On 28 April 2012, the respondent tendered to the appellant an invoice for the sum of \$2,643.75 which was the contract price. The appellant refused to pay claiming that the contract was discharged by the respondent's breach and that it was under no obligation to pay.
- [8] The appellant subsequently received a letter from the respondent's attorney-at-law in relation to the sum claimed by the respondent from the appellant plus legal costs of \$396.56. The appellant refused to pay either the sum claimed or the legal costs.

HEARING BEFORE THE MAGISTRATES COURT

- [9] Upon the appellant's refusal to pay, the respondent initiated proceedings in the Magistrates Court for District "B", the jurisdiction in which the contract was made. In its "Amended Particulars of Claim", the respondent claimed that the appellant was in breach of the agreement, in that it refused to pay the sum of \$2,643.75 to the respondent for the services it, the appellant, had requested under the contract.
- [10] In its "Defence", the appellant did not deny that it refused to pay the sum claimed by the respondent. However, it denied that the refusal to pay constituted a breach of the contract as claimed by the respondent. On the contrary, it contended that there was no obligation on it to pay as the respondent "breached a fundamental term of the contract" and as such the contract was discharged and it was therefore within its right not to pay any monies to the respondent.
- [11] At the trial, Chief Magistrate Beckles found for the respondent and gave judgment for the respondent in the sum of \$2,000.00 with costs and interest at 4% per annum from the date of judgment. The sum awarded was arrived at as a result of the court deducting from the sum claimed by the respondent the sum of \$643.75 for inconvenience caused to the appellant as a result of the respondent not performing the contract as stipulated in the contract.

[12] Chief Magistrate Beckles gave three reasons for her decision. These are (i) that the doctrine of substantial performance operated to allow the respondent to claim the stipulated contract price, “subject only to a cross-action or counterclaim for the omissions or defects in execution”; (ii) that the respondent was “entitled to recover reasonable numeration (sic) on a quantum meruit” for what it had done; and (iii) that the respondent did not “commit a fundamental breach of the nature which would allow the Appellant to treat the contract as discharged or to terminate the contract”.

ISSUES IN THIS APPEAL

[13] In its notice of appeal filed on 17 March 2014, the appellant advanced a single ground of appeal, namely, that the decision of Chief Magistrate Beckles “is erroneous in point of law”, and sought an order that the decision be set aside. The written submissions to and oral arguments of counsel before this Court proceeded on the basis that the question as to whether the Chief Magistrate’s decision was erroneous in point of law depended on three considerations. These are (i) whether the doctrine of substantial performance was correctly applied; (ii) whether the respondent was entitled to restitution on the basis of *quantum meruit*; and (iii) whether the respondent was guilty of a discharging breach of contract.

[14] We address these considerations *seriatim* hereafter.

WAS THERE SUBSTANTIAL PERFORMANCE?

- [15] We turn first to the question whether the performance rendered by the respondent, the lifting on but not the lifting off of the containers, amounted to substantial performance of the contract. In doing so, we consider it advantageous to situate the doctrine of substantial performance in its jurisprudential context.
- [16] The major legal consequence of parties entering into a contract is that the parties are placed under a legal obligation to deliver the performance agreed on in the contract. That obligation is strict and is only satisfied where the performance rendered is precise and exact according to the terms of the contract. This principle is vividly illustrated in the old case of **Cutter v. Powell (1795) 6 T R 320**. In this case, Powell agreed to pay Cutter 30 guineas provided that he, Cutter, “proceeded, continued and do his duty” as second mate in a vessel sailing from Jamaica to Liverpool. The voyage began on 2 August and Cutter died on 20 September when the ship was 19 days short of Liverpool. Cutter’s widow brought an action to recover a proportion of the agreed sum. It was held that she could not recover. By the terms of the contract the deceased was obliged to perform a specific duty before he could demand payment and he had not performed that duty as required by the contract.

- [17] To the same effect is the case of **Sumpter v. Hedges [1889] 1 Q B 673**. In this case, the plaintiff agreed to erect two houses and stables for £565 upon the defendant's land. The plaintiff did part of the work to the value of about £333 and then abandoned the contract. The defendant himself completed the buildings. It was held that the plaintiff could not recover the value of the work done as he had not performed the contract as stipulated in the agreement.
- [18] It is to be noticed that, in each of these cases, the defendant made an uncovenanted profit, and in effect was unjustly enriched, since he obtained part of what the plaintiff had promised to perform without having to pay anything. The doctrine of substantial performance is a judicial device aimed at mitigating or avoiding these consequences and at allowing a non-performing party to claim restitution in respect of the performance that has, in fact, been rendered.
- [19] According to the doctrine which traces its roots to the judgment of Lord Mansfield CJ in **Boone v. Eyre (1779) 1 Hy Bl 273**, if there has been a substantial though not an exact and literal performance by the promisor, the promisee cannot treat himself as discharged. **Boone v. Eyre** itself was a case concerning the sale of a plantation, together with its slaves. It was suggested by Lord Mansfield CJ that the fact that the seller could not establish

ownership of every single slave stated to be included in the contract would not prevent him from recovering from the buyer under the contract.

[20] The operation of the doctrine appears more clearly in the English Court of Appeal case of **Hoening v. Isaacs [1952] 2 All E R 176 (Hoening)**. In that case the plaintiff was engaged to decorate and furnish the defendant's flat for £750, to be paid "net cash, as the work proceeds, and balance on completion". The defendant paid £400, moved into the flat and used the new furniture, but refused to pay the balance on the ground that some of the work was defective. The official referee found that there were some defects, but that the contract had been substantially performed. The Court of Appeal held, relying on its earlier decision in **H Dakin & Co Ltd v Lee [1916] 1 KB 475**, that notwithstanding that there was not complete performance of the contract, the plaintiff was entitled to be paid the balance due, less only a deduction for the cost of making good the defects or omissions. There was substantial performance of the contract and the defects in the work were not sufficient to amount to a substantial degree of non-performance to discharge the defendant from his obligations under the contract.

[21] Since **Hoening**, the doctrine of substantial performance appears to have been infrequently invoked. However, the recent English Court of Appeal decision in **Williams v. Roffey Bros & Nicholls (Contractors) Ltd. [1991] 1 Q B 1**

shows that the doctrine is still available. In that case, the defendant promised to pay the plaintiff the sum of £10,300 at the rate of £575 for each flat in which carpentry work was completed. The plaintiff substantially completed the work on eight flats but the defendant made only one payment. The Court of Appeal applied **Hoenig** and held that, there had been substantial completion on eight flats, the plaintiff was entitled to payment subject to a deduction for the cost of making good any defects.

[22] The preponderance of authorities therefore supports Mr. Pollard's insistence that the strict rule of precise and exact performance in our law is subject to the doctrine of substantial performance. But, the English Court of Appeal case of **Bolton v. Mahdeva [1972] 1 WLR 1009** shows the limitation on this doctrine. In that case, the plaintiff contracted to install a central heating system in the defendant's house for the sum of £800. The system installed gave out much less heat than it should have done, and caused fumes in one of the rooms.

[23] The Court of Appeal held, distinguishing **Hoenig**, that the plaintiff could not rely on the doctrine of substantial performance to recover. For the doctrine to apply, it must be shown that the performance which was in fact rendered was substantial taking into account the nature and amount of the defects and the primary object of the contract. Thus, although the complete system had

been installed by the plaintiff in the case before that court, the system did not fulfill its primary function of heating the house. There was no substantial performance in those circumstances and the doctrine could not therefore be invoked.

[24] It is clear to us from the authorities that on principle the determinative question in the case at bar is whether the performance by the respondent was substantial taking into account the nature and amount of the defect in performance and the primary object of the contract. In our view, it was not substantial.

[25] First, as regards the primary object of the contract, the Chief Magistrate found as follows:

“It is clear from the evidence that the ultimate goal of the Respondent was to have the containers weighed at the Flour Mill - this could only be done if the containers were lifted onto the trailers at Harts Gap, taken from Harts Gap to the Flour Mill and then whilst at the Flour Mill, the containers were lifted off in order to be weighed. Therefore the Court accepts that the arrangement was for both the lifting on and the lifting off of the containers. This is even supported by the documentary evidence provided to the Court which speaks to “lifting on and off” of the containers.”

[26] Second, as regards the nature and amount of the defect in performance, the undisputed evidence is that the appellant lifted the containers on to the trailers but did not lift them off at the Flour Mill. Surely, this is evidence of the appellant’s abandonment of the contract when it was at most only half

done. In **Hoenig** Denning LJ expressly opined at p 180 “abandonment of the work when it is only half done” cannot constitute substantial performance.

- [27] In our judgment, applying this dictum of Denning LJ, the respondent’s abandonment of the work when it was at most only half done cannot amount to substantial performance. We would only add that this is even more so where such abandonment, as in this case, deprives the appellant of the ultimate goal of the contract, namely, having the containers weighed.

RESTITUTION ON A *QUANTUM MERUIT*

- [28] We now turn to the second judicial device to which the Chief Magistrate had regard in attempting to mitigate the consequences of the strict performance rule insisted on by the appellant and to allow the respondent to claim restitution in respect of the performance they had in fact rendered. This is the principle of *quantum meruit*.

- [29] The *quantum meruit* principle was explained by Collins LJ in **Sumpter v. Hedges** [1889] 1 Q B 673 where he said at p 676:

“There are cases in which, though the plaintiff has abandoned the performance of the contract, it is possible for him to raise the inference of a new contract to pay for the work on a *quantum meruit* from the defendant’s having taken the benefit of that work, but, in order that it may be done, the circumstances must be such as to give an option to the defendant to take or not the benefit of the work done.....”

[30] Collins LJ then explained why that principle could not be applied in the case before him as follows:

“In this case I see no other facts on which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has work done upon it, affords no grounds for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land.”

[31] So the key to restitution on a *quantum meruit* is that it must be possible to raise on the evidence the inference of a new contract to pay for the performance in fact rendered. In the case before us, there is not even a scintilla of evidence to raise an inference of a new contract that the appellant would pay the respondent for the lifting on of the containers on a *quantum meruit*. This being so, it is not open to the respondent to make any claim on the basis of a *quantum meruit*. Accordingly, it is our judgment that the Chief Magistrate fell into error to the extent that she made any award on the basis of a *quantum meruit*.

FUNDAMENTAL BREACH BY APPELLANT

[32] We turn finally to the appellant’s defence that the respondent was guilty of a repudiatory breach and that it was consequently absolved of its obligations to pay under the contract.

[33] It is well established law that a party to a contract may treat a contract as discharged if the other party to the contract has committed what is

sometimes called a fundamental breach, sometimes a discharging breach, and sometimes a repudiatory breach. In all of these cases, what is contemplated is a breach which substantially deprives the innocent party of the consideration for which that party has contracted. How does one determine whether the breach is of the nature just described?

[34] In **System Sales Ltd v Arletta Browne-Oxley, Civil Appeal No. 10/2006 (date of decision 15 May, 2014)**, this Court explored this question extensively. There, it noted that there are two approaches to this question which are evident in the cases. These are, first, what is called the traditional approach which focuses on the nature of the term breached and, second, what is called the modern approach, also called the “gravity of the breach” approach, which focuses on the consequences of the breach.

[35] The traditional approach answers the question of whether a breach is a discharging breach by asking whether the term which has not been performed is a condition or a warranty. If the term breached is a “condition”, the breach will be without more a “fundamental”, “discharging” or “repudiatory” breach entitling the innocent party to rescind the contract. *Per contra*, where the term breached is a warranty it will never give rise to the right to rescind the contract. It may be noted that this approach is firmly

grounded in freedom of contract principles that it is for the parties, not the courts, to decide what the effect of a breach should be.

[36] The traditional approach was modified in the leading English Court of Appeal case of **Hong Kong Fir Shipping Co. v. Kawasaki** [1962] 2 QB 26 which introduced the second approach, the so-called modern approach or “gravity of the breach” approach. On this approach, the focus is not on the parties’ intentions at the time of the contract, but on the effect of the actual breach that has occurred. If the effect of the breach is so serious as to strike fundamentally at the purpose of the contract, then it will be treated as repudiatory, in the same way as if it were a breach of a condition. If it is less serious it will give rise to a remedy for damages only, in the same way as a breach of warranty.

[37] In the case before us, the Chief Magistrate found that the foundation of the contract was the lifting on and off of the containers so that the containers could be weighed. Whether that term be regarded as a condition or as an intermediate term, its breach by the respondent had the consequence that the appellant was deprived of benefit contemplated by the contract, namely, having the containers weighed. There was therefore a discharging breach by the respondent which conferred an option on the appellant to treat the

contract as discharged: **Johnson v. Agnew [1980] A C 367 at 373 (HL)** per Lord Wilberforce. This it did by refusing to pay the contract sums.

DISPOSAL

[38] For all the foregoing reasons, the appeal is allowed and the judgment in favour of the respondent set aside. Costs for the appellant in this Court and in the Magistrates court.

Chief Justice

Justice of Appeal

Justice of Appeal