OSMAN THOMAS SONS & BROS LTD v HASSAN

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COURT OF APPEAL FOR SIERRA LEONE, Civil Appeal 38 of 1976, Hon Mr. Justice M E A Cole PJ, Hon Mr Justice S T Navo JA, Hon Mr Justice M S Turay JA, 29 June 1976

[1] Contract – Breach of contract – Sale of goods – Failure by seller to present purchaser's cheque for deposit – Repudiation of contract by seller – Concerns about purchaser's ability to perform insufficient

[2] Contract – Breach of contract – Damages – Sale of goods – Basis for award of damages – What reasonable businessmen would contemplate as natural and probable consequences if contract broken

On 11 December 1975 the appellant and respondent concluded a contract for the sale of 700 mattresses to the respondent at Le38 each. The respondent by way of deposit gave the appellant a post-dated cheque for Le15,200 dated 24 December 1975. The cheque was neither presented on 24 December nor returned to the respondent. While retaining the respondent's cheque the appellant refused to carry out the terms of the original contract. The respondent sued the appellant for breach of contract and was awarded damages by Idogu J in the High Court on 3 December 1976. The appellant argued that it did not perform the contract because of the respondent's suspected inability to pay.

Held, per Turay JA, dismissing the appeal:

1. The repudiation of a contract by one of the parties before the time for performance does not of itself put an end to the contract. There must be two to a rescission though it discharges the other and entitles him at once to sue for a breach. A contract is a contract from the time it is made and not from the time that performance of it is due. *Hochester v De La Tour* (1853) 2 Ellis & Bl 678 applied.

2. The appellant failed to present the respondent's cheque on 24 December and did not provide a convincing reason for its failure to do this. It was not the function of the Court of Appeal to review the trial judge's findings of fact or to test or weigh evidence. If there was, as in this case, evidence upon which the court of trial could find as it did, the Court of Appeal would not interfere. There was ample evidence to justify the conclusion at which the trail judge arrived and there was no reason for interfering with his decision *Chief Kweku Serbeh v Ohene Kobina Karikari* (1938) 5 WACA 34 applied.

3. The assessment of damages for breach of contract in cases such as this was based on what reasonable businessmen must be taken to have contemplated as the natural and probable result if the contract should be broken. As reasonable businessmen, each must be taken to understand the ordinary practice and exigencies of the others' trade or business which need not generally be the subject of special discussion. In the instant case the possibility of the non-availability of manufactured mattresses in the country at the material time must have been present in the minds of the parties. The trial judge was well justified in reaching the conclusion that he did in relation to damages. *A/B Karlhamns Oljefabriker v Monarch Steamship Co* (1949) SC (HL) 1 applied.

Cases referred to

A/B Karlhamns Oljefabriker v Monarch Steamship Co (1949) SC (HL) 1
Chief Kweku Serbeh v Ohene Kobina Karikari (1938) 5 WACA 34
Frost v Knight (1872) LR 7 Ex 111

Hadley v Baxendale (1854) 9 Ex 341
Hochester v De La Tour (1853) 2 Ellis & Bl 678

Legislation referred to
Court of Appeal Rules rule 9 para 6

Appeal
This was an appeal from the judgment of Idogu J on 3 December 1976 awarding damages against the appellant to the respondent, Joseph Hassan, for breach of contract. The facts appear sufficiently in the following judgment.

Mr F M Carew for the appellant.
Mr Berthan Macauley Jr for the respondent.

TURAY JA: This is an appeal from the Judgment of Idogu J in a case for damages against the appellant for breach of contract dated the 3rd of December 1976.

The court is most grateful to counsel for the appellant for the very clear and succinct manner in which he has put forward submissions on behalf of the appellant in this case. We dealt with the three grounds of appeal as amended and expressed the view that there was a valid contract between the parties as from the 11th of December 1975.

The learned trial judge in his usual graphic style outlined the material facts and I do not think I can do better than adopt his statement of facts: on the 11th of December 1975 the appellant and respondent concluded a contract for the sale of 700 mattresses to the respondent at Le38 each. The respondent by way of deposit gave the appellant a post-dated cheque for Le15,200 dated the 24th of December 1975. This cheque was neither presented on the 24th of December nor returned to the respondent. While retaining the respondent's cheque the appellant refused to carry out the terms of the original contract voluntarily entered into the 11th of December 1975. It was submitted by counsel for the appellant that as a result of information obtained on the 12th of December, that is a day after the receipt of the post-dated cheque, the appellant decided to deal with the respondent in respect of the concluded contract on a cash payment basis. Moreover, the appellant's counsel argued that because of the financial inability of the respondent, following the receipt of this secret information from Bank Manager at Clock Tower, the cheque was not presented. With respect to learned counsel this explanation is not only extraordinary but is as mysterious as Dr Livingstone's treks in Africa. The repudiation of a contract by one of the parties before the time for performance does not of itself put an end to the contract. There must be two to a rescission though it discharges the other and entitles him at once to sue for a breach. A contract is a contract from the time it is made and not from the time that performance of it is due. Thus in *Hochester v De La Tour* (1853) 2 Ellis & Bl 678 the appellant entered into a contract with the respondent on the 12th of April 1851 as a courier and to accompany him on a foreign tour. The employment was to commence on the 1st of June 1851. On the 11th of May 1851 the respondent wrote to the appellant informing him that his service would no longer be required. The appellant at once brought an action for breach of contract although the time for performance had not arrived. It was held that he was quite entitled to do so. The sense of this rule was clearly stated by Lord Cockburn CJ in the subsequent case of *Frost v Knight* (1872) LR 7 Ex 111 which dealt with the discharge of a contract even if performance is contingent.

The appellant could have repudiated the contract on the 12th if so minded but did not do so. It also failed to present the cheque on the 24th. No convincing reason has been advanced for this admittedly unsatisfactory state of affairs. Rather, counsel has invited the court to look at the whole evidence more particularly Exhibits A & D, the proforma invoice and the cheque which

he maintains are irrelevant to the issue. Having heard that argument developed we have thought it helpful to make plain our opinion that the trial judge's findings of fact were soundly based. It is not the function of this court to review findings of fact. Indeed, learned counsel for the respondent, Mr Berthan Macauley Jr drew our attention to this elementary practice. The principles of our jurisdiction are well known. It is not for us to test or weigh evidence. It there be, as in this case there plainly was, evidence upon which the court of trial could find as it did, this court does not interfere. See the Privy Council's judgment in *Chief Kweku Serbeh v Ohene Kobina Karikari* (1938) 5 WACA 34.

The case depended very largely upon the evidence of the witnesses, and the trial judge had the advantage of seeing the witnesses and of hearing them give their evidence. He accepted the evidence of the plaintiff/respondent in respect of the material question in issue. In cases which turn on the conflicting testimony of witnesses, and the belief to be reposed in them an appellate court can never recapture the initial advantage of the judge who saw and believed. This court is therefore of the opinion that there was ample evidence to justify the conclusion at which the trial judge arrived and there is no reason for interfering with his decision.

We did however, refer to a matter which the court had noticed, not referred to in the appellant's grounds: the question of special damages. Counsel for the appellant, Mr Carew, forcefully urged that this head of claim should be disallowed mainly on the ground that it was not specifically pleaded and strictly proved. It is, of course, true that special damages should, as a rule, be pleaded and proved but this was not one of the grounds of appeal. When a contract is broken and action brought upon it, how are we to arrive at the amount which the appellant or respondent, if successful, is entitled to recover?

The foundation of the law of damages for breach of contract is to be found in the judgment of the court of the Exchequer in *Hadley v Baxendale* (1854) 9 Exhibit 341. Explaining the principles of this case Lord Wright, delivering the opinion of the House of Lords in *A/B Karlhamns Oljefabriker v Monarch Steamship Co* (1949) SC (HL) 1 pointed out that the question in such cases is always what reasonable businessmen must be taken to have contemplated as the natural and probable result if the contract should be broken. As reasonable businessmen, each must be taken to understand the ordinary practice and exigencies of the others' trade or business which need not generally be the subject of special discussion. In the instant case the possibility of the non-availability of manufactured mattresses in the country at the material time must have been present in the minds of the parties. Indeed the plaintiff/respondent under oath said in the court below that he made every effort humanly possible to procure from other sources but in vain. And this was not controverted. Admittedly rule 9 paragraph 6 of the Court of Appeal Rules says:

> "in deciding the appeal, the court shall not be confined to the grounds set forth by the appellant" but the provision to the above paragraph states "That the court shall not rest its decision on any ground not set forth by the appellant unless the parties have had sufficient opportunity of contesting the case on that ground."

The case was not contested on this ground and indeed it could not have been since it was not one of the grounds of appeal.

Mr Carew, in an able argument has contended on behalf of the appellant in the alternative that there was no contract between the parties because, he says, of the lack of consideration since the cheque had not been honored. This argument though attractive overlooks the crucial point, namely, that the cheque, as pointed out earlier, was not presented on the due date ie 24 December 1975 and has since been in the possession of the appellant. We are therefore satisfied that the trial judge was well justified in reaching the conclusion that he did in relation to damages. For reasons given above, we will dismiss this appeal with costs. Such costs to be taxed.

Appeal is therefore dismissed.

The Le1000.00 admitted owing by the appellant should be refunded to the respondent at 4% interest from date of judgment in the court below. The amount plus interest to be paid within 7 days of this judgment.

Reported by Anthony P Kinnear