[2020] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL COA2019PCCV00007

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**TITINA COSTLEY**	**APPELLANT**
AND	**SUNLIGHT UNITED SERVICES**	**RESPONDENT**

Miss Zara Lewis for the appellant

Raoul Lindo instructed by Lindo Law for the respondent

12 February and 3 April 2020

MORRISON P

[1] I have read in draft the reasons for judgment of my sister Simmons JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

[2] I too have read the draft reasons for judgment of my sister Simmons JA (Ag) and agree with her reasoning and conclusion.

SIMMONS JA (AG)

[3] On 12 February 2020, after considering the submissions in this matter, we made the following orders:

"1. The appeal is allowed.

2. The award of damages of $10,000.00 on the counterclaim is set aside.

3. In its place, the sum of $178,879.36 is awarded as damages for breach of contract on the counterclaim.

4. Costs of $60,000.00 to the appellant.

5. The sum of $20,000.00 paid by the appellant as security for costs on 14 March 2017 is to be repaid to the appellant."

[4] It was indicated to the parties that the reasons would be provided and this judgment is a fulfilment of that promise.

Background

[5] On 4 December 2012, a claim was filed by the respondent in the Resident Magistrates Court (now called the Parish Court) for the parish of Saint Mary, against the appellant for breach of contract. The respondent derived its authority to do so on behalf of Port Maria Enterprises, from a Power of Attorney dated 6 September 2012. The initial sum claimed was $222,016.29. The claim was, however, amended at the start of the trial to reflect the increased sum of $484,450.39.

[6] The particulars of claim stated that the appellant, who was the owner of "Starlight Collection Bailiff and Associates" (Starlight Collection), was contracted to collect sums owing to "Port Maria Enterprise". It was alleged that the appellant collected and failed to pay over the sum claimed of $484,450.39, despite being requested to do so. The contract was subsequently terminated.

[7] The respondent was then contracted by Port Maria Enterprise to collect the outstanding sum from the appellant, and to take legal action, if necessary.

[8] The appellant counterclaimed for the sum of $280,933.51, which was said to represent the costs incurred in collecting the sums owed to Port Maria Enterprise.

[9] There was no dispute that Starlight Collection and the respondent had the authority to act on behalf of Port Maria Enterprise.

[10] The details of the contract between the appellant and Port Maria Enterprise are not in dispute. By Power of Attorney, dated 31 August 2010, Starlight Collection was authorized to collect the debts owed to Port Maria Enterprise and to apply a service charge not exceeding 25% to the arrears of each debtor. At the trial, Miss Sharon Gardner, who gave evidence for the respondent, stated that the payment of that service charge was the responsibility of the debtor. The appellant also gave evidence that whilst at the outset she had indicated to Port Maria Enterprise that it would be responsible to pay the collection fees, they eventually agreed that she would contract with the debtors to secure those fees. This was evidenced by one of the contracts which was admitted in evidence. The third provision of that contract stated:

> "Starlight Collection Bailiff & ass. will thereby collect money owed to the client, and provide client with a report as well as cheque for the amount collected, minus the percentage charged to customers for bailiff fee, at the end of each month. NOTE: it is the customer that pays the Bailiff fee and not the Client."

[11] On 2 March 2016 judgment was granted in favour of the appellant in the sum of $10,000.00 on the counterclaim.

The appeal

[12] On 14 March 2017, a notice of appeal was filed on the following grounds:

> "The lower court erred in fact in awarding damages in the sum of **Ten Thousand Dollars ($10,000.00)** as the evidence before the Court supported a finding of a higher quantum of damages; and
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> The lower Court erred in law as the principles in determining the measure of damages for a breach of contract were not applied according to law."

[13] The appellant also sought the following order:

> "That the lower court's ruling on the counter claim in awarding damages in the sum of $10,000.00 be set aside and damages in the sum of two hundred and eighty thousand nine hundred and thirty-three dollars and fifty-one cents ($280,933.51) be awarded to the appellant."

Appellant's submissions

[14] Counsel for the appellant, Miss Lewis, submitted that the learned Parish Court Judge failed to apply the correct measure of damages in making the award. Reference was made to **Caribbean Cement Company Ltd v Freight Management Limited** [2016] JMCA Civ 2 where Brooks JA stated:

> "[77] The usual measure of damages for breach of contract is for the loss of the bargain. A party is, however, entitled to claim, in the alternative, damages based on the profit that he expected to make, or the expense that he incurred in reliance on the performance of the contract. He may choose the method that is best likely to put him in the position he would have been in had the contract been performed or alternatively had never been made…"

[15] Counsel stated that although the contract contained no express stipulation as to the arrangement to be followed on termination, the sum of $280,933.51 claimed is rightly owed to the appellant. It was also submitted that the failure of Port Maria Enterprise to

allow the appellant to collect the debts according to the terms of the contract, restricted her ability to earn her income under the contract. This, she said was contrary to the principle in **Lauder and Jones v Brady** [2015] JMSC Civ 68, that she should be put in as good a position as she would have been, had there been no breach.

[16] In the circumstances, it was submitted that the appellant was entitled to the sum of $178,879.36, which was computed as follows:

> $280,933.51 (original balance claimed on collector's fee) LESS $102,054.15 (sums claimed in respect of 6 debtors from whom nothing was collected).

Respondent's submissions

[17] Counsel, Mr Lindo, submitted that the appeal is without merit as no evidence was presented to the Parish Court Judge on which she could properly have made an assessment of any damages arising from the breach of contract.

[18] It was also submitted that the Parish Court Judge did not err in law by awarding the sum of $10,000.00, which counsel said represented nominal damages, as this was an available option once the court was of the view that a contractual relationship existed between the appellant and Port Maria Enterprise. Reference was made to paragraph 343 of McGregor on Damages, 15th edition, in support of that submission, where the learned author stated:

> "To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies

> the court on neither, his action will fail, or at the most he will be awarded nominal damages."

[19] Counsel submitted that the basis for the award is apparent from the Parish Court Judge's reasons.

[20] It was also submitted that the decision of the learned Parish Court Judge should only be disturbed if it is palpably wrong. Mr Lindo stated that she could not be faulted in concluding that the appellant was not entitled to recover the amount claimed. He stated that, in those circumstances, pursuant to section 251 of the Judicature (Parish Courts) Act, this court can substitute its own findings for that of the court below. It was, however, submitted that the court should not do so as this would result in substantial injustice being done to the respondent.

Discussion and analysis

[21] In **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, Lord Diplock gave guidance on how the appellate court ought to treat the exercise of the discretion of the single judge, and the circumstances in which it was appropriate for that court to interfere with the decision. He said:

> "It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it… It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion

must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[22] In this matter, the learned Parish Court Judge made the following findings:

(1) That a contract existed between the parties.

(2) That the contract was terminated unilaterally.

(3) There was no termination clause in the contract.

(4) In the absence of evidence that the appellant had entered into contracts with all 45 debtors named in the list of outstanding debtors (exhibit VIII) there was no basis to make an award on the counterclaim according to the sum claimed.

[23] Based on the viva voce and documentary evidence in this matter, the finding that a contract existed between the parties cannot be faulted. What has given us pause is the award of damages in the sum of $10,000.00, as there is nothing in the Parish Court Judge's reasons which demonstrates the methodology she employed in arriving at that figure. Another issue is her finding that no other document which was tendered into evidence, apart from the sole Delinquent Payment Agreement (exhibit VII), could be used to prove the claim.

[24] The importance of providing sufficient reasons for a court's decision was underscored by Morrison P in **New Falmouth Resorts Limited v National Water Commission** [2018] JMCA Civ 13, where he said:

> "…as Lord Phillips MR said in **English v Emery Reimbold & Strick Ltd**, '[t]here is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions ...' Such reasons can, as Lord Brown explained in **South Bucks District Council and another v Porter (No 2)**, 'be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision'. The important consideration, as the authorities make plain, is that the reasons given should be sufficient to give the parties, in particular the losing party, an intelligible indication of the basis for the court's decision."[1]

[25] In **Smith (Personal representative of Hugh Smith (deceased)) and others v Molyneaux (British Virgin Islands)** [2016] UKPC 35, Dame Mary Arden, who delivered the decision of the Board, had this to say:

> "36. The Board finally has to consider whether the judge gave an adequate reason for his finding of permission. It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded: see, generally, the decision of the Court of Appeal of England and Wales in *English v Emery Reimbold & Strick Ltd* [2002] EWCA 605; [2002] 1 WLR 2409, especially at paras 15 to 21. The judge does not have to set out every reason that weighed with him, especially if the reason for his conclusion was his evaluation of the oral evidence:
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> > '… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those

[1] Paragraph 50

> matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. (*English v Emery Reimbold & Strick*, para 19 per Lord Phillips MR, giving the judgment of the court)'
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> 37. **If an appellate court cannot deduce the judge's reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself**: see *English v Emery Reimbold at para 26.*" (My emphasis)

[26] Section 251 of the Judicature (Parish Courts) Act also gives to this court the power to assess damages where appropriate. It states:

> "Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon my ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.
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> And the Court of Appeal may either firm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree or order to be entered for either party as the case may require, may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order or remit the cause to the court with instructions, or for rehearing generally; and may also make such order as to costs in the court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:
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> Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause…"

[27] In light of the above, it is open to this court to make its own assessment of the amount of damages which should be awarded on the counterclaim. It has been noted that exhibit VIII was admitted in evidence through the appellant and seems to have been the basis on which the claim was amended to reflect an increased sum.

[28] Exhibit VIII, which is similar to exhibit IV (which had notations), which was admitted in evidence through the respondent, sets out in tabular form the amount owed to Port Maria Enterprise, the amount paid to Port Maria Enterprise, the balance owed to Port Maria Enterprise, the collector's fee due on the debt, the amount paid on the collector's fee and the balance outstanding on the collector's fee in respect of each debtor. Its accuracy does not appear to have been in question as there was no objection to its admission in evidence. Neither was there any indication that its admission was for a limited purpose. However, the learned Parish Court Judge found that the appellant had failed to prove on a balance of probabilities that she was likely to collect fees in the sum stated in that document, based on the absence of delinquent payment agreements (similar to exhibit VII) from all the debtors in respect of the fees claims. In adopting that approach the learned Parish Court Judge fell into error.

[29] An award of damages for breach of contract is designed to put the claimant in as good a position as he would have been in, if the contract had been performed (see **Robinson v Harman** (1848) 1 Exch 850 at 855). The information in exhibit VIII relates to 43 debtors. Of that number, payments were received from 37 of the debtors. It can be inferred that the appellant had entered into "Delinquent Payment Agreement[s]"

similar to that admitted in evidence (Exhibit VI). The total amount of fees said to be owed was $280,933.51. However, that amount included a total of $102,054.15, which related to six debtors from whom no payment was collected.

[30] The appellant's evidence is that she would enter into "Delinquency Payment Agreements" with the respective debtors. It is also her evidence that she would deduct her fees from the amount collected before remitting the balance to Port Maria Enterprise. The appellant also stated that for the two years during which she worked for Port Maria Enterprise, she did not receive any payment for fees from them. In light of that evidence, I am of the view that the $102,054.15 represents projected payments due from those six debtors, in the event that they would sign a "Delinquency Payment Agreement" and make payments to the appellant. It, therefore, should not be included in any assessment of damages for the breach of contract. When that sum of $102,054.15 is deducted from the total amount claimed/required to place the appellant in the position she would have been in had the contract been performed, the balance is $178,879.36.

[31] In conclusion, I found that there was merit in the appeal and there was a sufficient basis on which this court should undertake an assessment of the damages.

[32] It is for these reasons why I concurred in the decision of the court as set out at paragraph [3] herein.