

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/025

BETWEEN:

D & B TRUCKING & TRAILER HAULING SERVICE LIMITED

Appellant

and

CARIBBEAN INSURERS LIMITED

Respondent

Before:

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson K. Baptiste

Justice of Appeal [Ag.]

The Hon. Mr. Edward Bannister, QC

Justice of Appeal [Ag.]

Appearances:

Mrs. Tana'ania Small-Davis for the appellant

Ms. Hazel-Ann Hannaway Boreland for the respondent

2010: January 12;
February 8.

Civil Appeal – Contract – term made in an oral contract – whether the time stipulation was a condition – whether time of the essence – breach of contract – whether injured party may rescind – quantum meruit – damages – costs-offer to settle – whether CPR Part 35 applies – whether there should be a departure from CPR 64.6(1)

The appellant a haulier, and the respondent an Insurance Company, entered into an oral contract for the lifting of some containers from the sea after a vessel sank in the harbour in the Virgin Islands. A fixed rate per ton based on the manifest weight was agreed. The actual weight, due to being submerged in the sea, was unknown. It was an express term of the agreement that the respondent would pay within 30 days of presentment of the appellant's invoice. There was no express term making time of the essence of the contract. The actual weight of the containers turned out to be heavier than the manifest weight. The respondent failed to make payment within the 30 days of the appellant presenting its invoice. Thereafter, the appellant presented a further invoice based on the actual weight of the containers. The respondent refused to pay and the appellant filed a suit claiming in essence on a quantum meruit basis. The appellant's case was that the time stipulation was a condition and was of the essence of the contract; that the

respondent having breached that term, wrongly repudiated the contract and as a result the appellant was entitled to rescind it and to charge on a quantum meruit applying the actual weight, of the containers to the agreed rate. The trial judge concluded that time was not of the essence and that the appellant was not entitled to rescind but rather was entitled to damages being the agreed price. The trial judge also ordered the appellant to pay the costs of the respondent on the basis that the appellant had refused an offer of settlement by the respondent. The appellant, being dissatisfied, appealed.

Held: dismissing the appeal as it relates to the question as to whether the judge ought to have made an award on a quantum meruit basis and allowing it as it relates to the costs award by setting aside the order of the trial judge and substituting an award of prescribed costs to D&B pursuant to CPR 65.5(2)(a) in the court below and 1/3 of that sum on appeal.

1. Breach of a contract does not make it disappear, entitling the injured party or the court to re-write the contract by the insertion of new or revised terms. Quantum meruit has no place where the innocent party has completed the work he had been contracted to do before the breach.

Photo Production Limited v Securicor Transport Ltd. [1980] AC 827 applied.

2. Save for well established classes of contract, a stipulation as to time of performance in a contract is not generally regarded as being “of the essence”. This is based on the view that delay does not normally deprive the injured party of the substance of his bargain, damages being an adequate remedy. The general rule is that “delay will justify termination of a contract only where it does cause serious prejudice to the other party”. In this case it cannot be said that failure by the respondent to pay by the stipulated time destroyed the substance or foundation of the contract.
3. CPR 35.15 is not applicable to the circumstances of this case. As such there was no good reason for departure from the general rule under CPR 64.6(1) which requires that the unsuccessful party must pay the costs of the successful party.

JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** The issue in this appeal arises from the construction of a term in an oral contract made between the appellant (“D&B”) and the respondent (“Caribbean Insurers”). Essentially, a term of the contract provided that Caribbean Insurers would make payment to D&B within 30 days of D&B presenting its invoice to Caribbean Insurers for services rendered. The question for determination, so

far as is relevant to this appeal, is whether (a) the time stipulation was a condition and/or (b) time was 'of the essence' of the contract.

The Background

[2] The background giving rise to this appeal may be summarised as follows:

(1) The vessel "Island Seal" sank with her containerised cargo in the vicinity of Port Purcell in Road Harbour. This posed a shipping hazard and required urgent removal of the containers from the sea.

(2) On or about 28th August 2006, the appellant ("D&B") and the respondent ("Caribbean Insurers") through its agent Mr. William Bailey entered into an oral contract for the removal by D&B of the containers.

(3) The parties filed an agreed statement of facts prior to trial.¹ Paragraphs 2 and 3 respectively, of the agreed statement are as follows:

"2. The Claimant and the Defendant agreed that the rate for services for removal of the containers from the sea would be \$450 per ton. At the time of the Agreement, both the Claimant and the Defendant had only the weights for the containers as listed in the Bill of Lading for their shipment. In light of this, the Claimant agreed to charge the rate at the manifest weight in consideration for the Defendant paying the invoice within 30 days of its presentation.

3. No agreement as to rate was made in connection with the removal of other ship and container, debris polluting the sea or for taking the said debris and condemned containers to the incinerator for proper disposal..."

"(c) There was some discussion about the containers being heavier than their manifest weight due to their being submerged in the sea. D&B was the only entity with adequate equipment for the job. The actual weights of the

¹ See; pg. 35 Record.

containers were indeed considerably heavier (by some 66.7 tons) than their manifest weight.

(d) D&B performed in total, its part of the bargain, by all accounts, in a prompt and satisfactory manner. It presented its invoice (which was not itemized) to Caribbean Insurers on 30th August 2006 in the total sum of \$65,896.00.² Thirty days passed without any response or payment being tendered by Caribbean Insurers.

(e) D&B chased up Caribbean Insurers for payment sometime thereafter, Caribbean Insurers then requested an itemised invoice.

(f) On 2nd October 2006, D&B sent to Caribbean Insurers an itemized invoice but for the sum of \$78,757.60. This was based on the actual weights of the containers rather than on the manifest weights. This was on the basis that D&B considered that Caribbean Insurers, by not paying the initial invoice within the 30 day period, had wrongfully repudiated the contract and thus D&B was entitled to treat the contract as having been rescinded, and to charge on a 'quantum meruit' applying the actual weight of the containers to the agreed rate.

(g) Caribbean Insurers refused to pay. D&B filed suit for the sum of \$78, 757.60."

Trial Judge's findings

- [3] The trial judge found, in essence, [Judgment para. 24], that time was not made of the essence of the contract and thus the stipulation for payment within 30 days was not a term, the breach of which entitled D&B to terminate the contract; that having regard to the nature of the services to be performed, the term was not so serious that breach of it would entitle D&B to treat the contract as being at an end; that accordingly, D&B's remedy was for damages for breach by suing for the full contract price, namely, the agreed rate applied to the manifest weight of the containers.

² This sum included charges for removal and disposal of debris from the sea. Those extra charges are not part of this appeal.

- [4] Judgment was entered for D&B in a total sum of \$46,127.30. [Judgment para. 35]. D&B was ordered to pay costs to Caribbean Insurers pursuant to CPR 64.6 [Judgment para. 36].

The Appeal

- [5] D&B contends on this appeal that the trial judge in so finding, erred in law and that she ought to have found, based on the evidence, that the time stipulation was a condition and that time was 'of the essence' of the contract entitling D&B to rescind on Caribbean Insurer's default in making payment within the stipulated thirty day period; that on rescission, D&B was entitled to claim on a quantum meruit basis – in essence, as if there had been no agreement in place at all.
- [6] D&B also challenges the costs order made by the trial judge. On this issue the trial judge stated at paragraph 36 of her judgment as follows:

“Now I turn to costs D&B did not succeed in their main claim and although they were partially successful on the other issues, I take into consideration that they refused an offer of \$40,000.00. This litigation could have been avoided. In all the circumstances it is just if they pay Caribbean Insurers costs on the basis argued for by Mrs. Hannaway-Boreland, that is that this be treated as an issue of quantum only. Accordingly, D&B shall pay costs under Part 64.6 of CPR to Caribbean Insurers”.

Was the stipulation for payment within 30 days a condition of the contract – was time “of the essence”?

- [7] It is not disputed that there was no express agreement making “time of the essence” of the contract. It is also not disputed that there was no express term to the effect that if Caribbean Insurers did not pay by the stipulated period then D&B would then charge based on the actual weight or at some other rate. It is common ground that Caribbean Insurers was in breach of the stipulated term for payment within 30 days.

The legal principles

- [8] Both sides are in agreement on the applicable legal principles as stated in such treatises as **Halsburys Laws**³, and **Peel**⁴ on **Contract**. I extract the following statements from **Halsbury's Laws** paragraph 538:

“General Rule. Where one party to a contract who has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach...

In a case where it is alleged that a party has a right to rescind for breach, it must be determined (1) whether there has been a breach of a term of the contract or a mere misrepresentation; and (2) whether the breach is sufficiently serious to justify rescission as opposed to a claim for damages.”

- [9] **Halsbury's Laws** paragraph 542 sets out the general principle as to the consequences flowing from a breach of a condition and those flowing from a breach of warranty. Generally, “breach of a condition entitles the innocent party to rescind the contract and claim damages for any loss he may have suffered whereas a breach of warranty only entitles him to damages”.
- [10] Paragraph 543 says in essence that save for well established classes of contract such as hire purchase agreements and sale of goods⁵ the question whether a term is a condition or a warranty depends on the intention of the parties gleaned from the structure of the contract. The fact that a term is called a “condition” or a “warranty” is not decisive of the fact. “Where the contract contains no indication on its face of the status of the terms, the court must look at the contract in the light of the surrounding circumstances in order to decide the intention of the parties. Important factors to be taken into consideration are the extent to which the fulfilment of the term would be likely to affect the substance and foundation of the

³ Halsbury's Laws of England 4th Ed. Vol. 9

⁴ Edwin Peel, On Contract 12th Ed.

⁵ Where either by statute or the process of judicial determination certain terms are implied as conditions

adventure which the contract is intended to carry out, and whether the obligation arising from the term goes so directly to the substance of the contract that its non performance may fairly be considered as a substantial failure to perform the contract at all.”

Time “of the essence”

- [11] The prevailing equitable rule is that a stipulation as to time of performance in a contract is not generally regarded as being “of the essence”. **Peel** states at paragraph 18-088 that “it is based on the view that delay does not normally deprive the injured party of the substance of his bargain, damages being an adequate remedy. Hence the general rule is that delay will justify termination only where it does cause serious prejudice to the other party.”
- [12] All the cases accordingly show that time stipulations will be treated as “of the essence” where it is critical to the performance of the contract that they should be. For example where a taxi is booked to take one to an airport to take a specified flight. The late taxi would cause serious prejudice to the customer. The foundation or substance of the contract will have been destroyed. This is quite different from the case where goods are delivered by a seller to a buyer with a time stipulation for payment by the buyer. If the buyer is late in making payment it is not considered that this would cause serious prejudice to the seller. The substance or foundation of the contract could not be said to be destroyed.
- [13] In the case of D&B it is common ground that D&B did all it was required to do. There were no remaining obligations to be preformed in the future. All that was required was for Caribbean Insurers to make payment for the services. They failed to make payment by the specified date. Surely, it cannot be said that Caribbean Insurers’ failure to pay by the stipulated time destroyed the substance or foundation of the contract. The substance of it was completely performed by D&B. It may be important to a party wishing to be paid in 30 days after he has completed the work which he was contracted to perform that he should be paid on

time, but the point of the contract is not destroyed if he is not. The typical method by which one protects oneself against late payment for services rendered or goods supplied is by stipulating for interest for late payment. It is noted that D&B did make a claim for interest as from the date of the contract⁶ even though there was no stipulation as to interest in the contract, and the trial judge did in fact award interest at the claimed rate from the date of the claim, (presumably, as compensation to D&B for being kept out its money). There was no appeal from the award of interest and so nothing further need be said on this point.

- [14] I do not consider that the principle is affected merely because the haulier may have offered better terms in consideration of the promise to pay by a specified time after performance than he would have offered had no such promise been made. The haulier is simply trusting that the term will be honoured. If it is not, the contract still 'works' (unlike the taxi driver who turns up too late for the customer to catch his plane). Further, the trial judge at paragraph 7 of her Judgment stated thus:

“ ...

Mr. Maduro entered into this arrangement, as again he made it clear, although his normal rate was \$500.00, because this was a new crane (the only one of its capacity in BVI) and this was the first time D&B was doing business with Caribbean Insurers and he hope to do more business with them in the future. He was satisfied with the bargain that he had made on behalf of D&B and it appears that from his point of view it was based on sound commercial reasons.”

No issue has been taken with this finding. This affords as good a reason for the terms of the bargain struck as found by the trial judge as the arguments advanced by counsel for D&B in seeking to treat the time stipulation as a condition or as “of the essence”.

Rescission/consequences of discharge

- [15] Even if the view expressed above was wrong, and one was to treat the 30 day

⁶ See: prayer (b) of the statement of claim.

stipulation as being “of the essence” the consequences would not be those for which counsel for D&B contends. At this juncture it is useful to quote a passage from **Chitty on Contracts**⁷ which cited the dictum of Lord Porter in **Heymans v Darwins Ltd**⁸ thus:

“To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect.”

Lord Wilberforce in **Johnson v Agnew**⁹ emphasised that “this so-called ‘rescission’ is quite different from rescission ab initio such as may arise for e.g. in cases of mistake, fraud or lack of consent”. In **Photo Production Limited v Securicor Transport Ltd.**¹⁰ the House of Lords stated the true position to be –

“where the innocent party elects to terminate the contract, i.e. put an end to all primary obligations of both parties remaining unperformed – that:

(a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay money compensation to the other party for the loss sustained by him in consequence of their non performance in the future and

(b) the unperformed primary obligations of that other party are discharged.”

- [16] Counsel’s contention on behalf of D&B that the trial judge ought to have found a rescission entitling D&B to claim on a ‘quantum meruit’ and similarly urged in this appeal is, in essence, an invitation to treat the “rescission” as a “rescission ab initio”. The facts and circumstances do not support a rescission ab initio. The contract does not disappear so as to entitle the haulier to charge on some other basis for the work done. What “rescission” conveys in this sense is as stated by Lord Porter above, i.e. ‘the injured party is absolved from future performance of his

⁷ 30th Ed. para. 24-047

⁸ [1942] AC 356, 399

⁹ [1980] AC 367

¹⁰ [1980] AC 827

obligations under the contract' or put another way, he is relieved from any outstanding obligations which he was required to perform (there are none in this case) and the guilty party must pay damages or compensate the injured party for any loss suffered or for the guilty party's breach. In particular, the terms of the contract against which the secondary obligation of the party in breach are to be measured, remain as they always were. They are not replaced with a vacuum, entitling the injured party or the court, in essence, to re-write the contract by the insertion of new or revised terms.

[17] This case is quite different from the case where a party commences work under a contract and is prevented by the other party from completing it. The party who has done the work is entitled to be paid on a quantum meruit basis precisely because there was no term of the contract providing for what was to happen if the work was only part completed as a result of the other party's breach. Quantum Meruit has no place where the innocent party (as here) has completed the work he had contracted to do before the breach¹¹.

[18] For these reasons, I am of the view that the learned judge was right to conclude as she did at paragraph 24 of her Judgment. Given the circumstances of this case this is so whether or not time was 'of the essence'. All that D&B is entitled to is the outstanding price under the contract plus interest, which is, in essence, what was awarded by the trial judge. This ground of appeal accordingly fails.

The costs award

[19] Counsel for Caribbean Insurers seeks to defend the trial judge's deprivation of costs to D&B and its liability for payment of costs to Caribbean Insurers by utilizing CPR 35.15 which deals with costs where an offer is not accepted. CPR 35.15(1) states in effect that:

“...if a defendant makes an offer to settle which is not accepted and in –

(a) the case of an offer to settle a claim for damages - the court awards less than 85% of the amount of the defendant's offer;

¹¹ See: Chitty on Contract 30th Ed. para. 29-067

(b) in any other case - the court considers that the claimant acted unreasonably in not accepting the defendant's offer; the claimant must pay any costs incurred by the defendant after the latest date on which the offer could have been accepted without the court's permission."

[20] CPR 35.15(1)(b) clearly does not apply since this claim does not fall in the category of "any other case". The award of costs to Caribbean Insurers cannot be justified under CPR 35.15(1)(a) as the total award in favour of D&B is in excess of the offer of \$40,000.00 rather than being less than 85% less. There is no finding that D&B otherwise acted unreasonably. It was not, in my view simply a matter of quantum of damages. The matter involved construction of the contract between the parties and a determination of the consequences flowing from the breach of a term therein. CPR 35.15 is simply not applicable to the circumstances of this case. Accordingly, there was no good reason for the departure from the general rule under CPR 64.6(1) which requires that the unsuccessful party must pay the costs of the successful party. The trial judge accordingly erred in ordering D&B (the successful party), in the absence of reasons for so doing, to pay Caribbean Insurer's costs. She ought to have given D&B its costs. This ground of appeal succeeds.

[21] I would order that D&B should have its costs on a prescribed basis in accordance with CPR 65.5(2)(a) in the court below. On appeal, D&B was only partially successful and accordingly I would award costs on appeal at 1/3 of the costs below.

Conclusion

[22] For the reasons given, this appeal is dismissed as it relates to the question as to whether the trial judge ought to have made an award on a quantum meruit basis on the contract there being no basis on which such a claim could succeed. I would allow the appeal as it relates to the costs award by setting aside the order of the trial judge awarding costs to Caribbean Insurers and in its place by awarding

prescribed costs to D&B pursuant to CPR 65.5 (2)(a) in the court below and one third of that sum on appeal.

Janice George-Creque
Justice of Appeal

I concur.

Davidson K. Baptiste
Justice of Appeal [Ag.]

I concur.

Edward Bannister, QC
Justice of Appeal [Ag.]