

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 149 of 2007**



BETWEEN:

ANGELA HINKSON

Claimant

v

GIBSON CONSTRUCTION LIMITED

Defendants

Appearances: Ms. N. Fraser for the Claimant
Mr. S.E. Commisong for the Defendant

2010: March 1
October 5

JUDGEMENT

- [1] **THOM, J:** Mrs. Hinkson is the owner of approximately seventeen acres of land in Bequia. In 2001 she entered into an oral agreement with Gibson Construction Ltd through its Managing Director Michael Gibson (Mr. Gibson) to lease approximately 30,000 square feet of her property at the monthly rent of \$1000.00. At that time Mr. Gibson was engaged in road construction in Bequia. A few months later Mr. Gibson agreed to lease another portion of Mrs. Hinkson's land measuring approximately 10,000 square feet at the monthly rent of \$500.00.

- [2] Mrs. Hinkson and Mr. Gibson subsequently agreed that Mr. Gibson would construct a water tank for Mrs. Hinkson on Mrs. Hinkson's land. The cost of the water tank was to be deducted from the rent due to Mrs. Hinkson.
- [3] Mr. Gibson constructed the water tank. Mrs. Hinkson complained that the water tank was defective and she had to pay a third party Mr. Leslie \$9,167.40 to repair the water tank.
- [4] The parties were unable to agree the account and Mrs. Hinkson instituted these proceedings in which she seeks special damages in the sum of \$24,152.88 being \$14,834.98 for outstanding rent, \$9,167.40 for repairs to the water tank, Solicitor's letter \$150.00. She also seeks costs and interest at the rate of 6% per annum from the commencement of the claim.
- [5] Mr. Gibson in his defence denies that he is indebted to Mrs. Hinkson and counterclaims for the sum of \$25,072.01, being the difference between the cost for the construction of the water tank and the rent owed to Mrs. Hinkson.

ISSUES

- [6] (a) What was the total rent payable to Mrs. Hinkson.
(b) Whether Mr. Gibson is liable for the cost of repairs made to the water tank. If yes, in what amount.

EVIDENCE

- [7] Both Mrs. Hinkson and Mr. Gibson testified. Neither party called any witnesses.

[8] The parties agreed that Mr. Gibson leased a portion of land measuring approximately 30,000 square feet from Mrs. Hinkson on the 1st day of March 2001 at an annual rent of \$1000.00 per month. In August 2001 the parties further agreed for Mr. Gibson to lease another portion of Mrs. Hinkson's land measuring approximately 10,000 square feet at the monthly rent of \$500.00 per month. When Mr. Gibson agreed to lease the 30,000 square feet of land there was no agreement when Mr. Gibson would vacate the land. Similarly, in August 2001 when they agreed to lease the 10,000 square feet of land there was no agreement when Mr. Gibson would vacate the land. At that time Mr. Gibson was engaged in road construction work in Bequia.

[9] In February 2002 Mrs. Hinkson and Mr. Gibson agreed that Mr. Gibson would construct a water tank for Mrs. Hinkson. The cost of the water tank was to be deducted from the rent payable to Mrs. Hinkson. The original quotation of the cost for the construction of the water tank was incorrect since it included the cost of excavation which cost was borne by Mrs. Hinkson. During the construction phase of the tank Mrs. Hinkson complained to Mr. Gibson of defective construction. At the request of Mrs. Hinkson, Mr. Gibson gave her a letter of warranty the body of which reads:

“Dear Sir

Attention: Mrs. Angela Hinkson

Re: Water storage tank at Spring.

This is to confirm that Gibson Construction Ltd guarantees the integrity of the construction of tank. In response to your suspicion to the tank developing leaks because of what may appear to be cold joints in the concrete walls of the tank, Gibson Construction Ltd will be responsible for the cost to

empty the water from the tank and carry out any repairs necessary.

Sincerely,
Michael Gibson
Managing Director.”

- [10] Mrs. Hinson explained that the water tank was leaking and subsequently submitted an estimate for repairs in the sum of \$9,197.40. No repairs were made by Mr. Gibson to the water tank.
- [11] The parties also agreed that the construction ended in May 2002. Mr. Gibson then commenced construction of a house at Hope Bequia. Mr. Gibson completely vacated the 30,000 square feet of land at the end of August 2004. The total amount of rent paid to Mrs. Hinkson is \$6000.00.
- [12] The parties disagree in their evidence in relation to the time when Mr. Gibson vacated both the 30,000 square feet and the 10,000 square feet of land. They also disagree on whether there was an agreement to lease 1000 square feet of the 30,000 square feet from June 1st, 2002. Also, whether the leaks in the water tank were due to the defective construction of Mr. Gibson, and what was the cost of repair.

SUBMISSIONS

- [13] Both counsel for Mrs. Hinkson and Mr. Gibson agreed that the issue in relation to liability are all issues of fact. Both counsel urged the Court to accept the testimony of their client.

[14] In relation to the issue of damages, Learned Counsel for Mr. Gibson submitted that it is a fundamental rule that special damages must be pleaded, particularized and proved. Learned Counsel further submitted that there is no evidence in support of the claim for special damages in relation to the repairs. No receipts were exhibited. An estimate is not sufficient evidence. Learned Counsel referred the Court to the case of Ilkiw v Samuels and Others. [1963] 2 AER p.879 and 890.

[15] Learned Counsel for Mrs. Hinkson submitted that Learned Counsel only requested receipts as proof of the cost of repair at trial this should have been done at case management. Learned Counsel for Mrs. Hinkson further submitted that in the absence of receipts the Court is not precluded for making a reasonable award for the cost of repairing the water tank if the Court finds that the water tank was defective. Learned Counsel referred the Court to the case of Grant v Matilal Moonan Ltd and Brother [1988] 43 WIR p. 372 and p. 378.

LAW AND COURTS ANALYSIS

[16] I will deal first with the areas in the evidence where the parties disagree.

THE TIME WHEN MR. GIBSON VACATED THE LAND.

[17] Mrs. Hinkson's evidence is that Mr. Gibson continued to occupy the 10,000 square feet of land until August 2003 and the 30,000 square feet of land until August 2004. She agreed that the road construction ended in May 2002 but she testified that Mr. Gibson was constructing a house at Hope and materials, a cement mixer, plant, vehicles, a container with a house above it, and a toilet

remained on the land. Mr. Gibson mixed materials on the land and his trucks would take the material up to Hope.

[18] Under cross-examination Mrs. Hinkson denied that Mr. Gibson gave her the aggregate that remained on the land to build an access road. She agreed that she built an access road on her property in 2004.

[19] Mr. Gibson in his witness statement stated that the road construction ended in May 2002 and he vacated both portions of land in May 2002. He sought the permission of Mrs. Hinkson and she agreed for him to occupy the 1,000 square feet of land to store a container and a house which was occupied by his employees. Mrs. Hinkson told him they would work something out. There was no agreement by him to pay a specific sum for occupying the 1,000 square feet of land. He offered to pay Mrs. Hinkson \$200.00 per month for the 1,000 square feet when she demanded rent after he had sought payment for the water tank.

[20] Under cross-examination Mr. Gibson denied that he mixed cement for the house at Hope on the land. In May 2002 he had moved everything to Ottley Hall in St. Vincent except the container and the house. He did not store materials on the land after May 2002. He agreed that there was no agreement to lease the 1,000 square feet of land.

[21] I believe the evidence of Mrs. Hinkson in relation to the 30,000 square feet of land. When Mr. Gibson leased the 30,000 square feet of land he did not occupy only the 30,000 square feet but without Mrs. Hinkson's permission he proceeded to occupy an additional portion of her land measuring

approximately 10,000 square feet. It was only when Mrs. Hinkson became aware that Mr. Gibson was occupying an additional portion of her land and she spoke to Mr. Gibson that Mr. Gibson agreed to pay her \$500.00 per month for the additional land. Mr. Gibson did not testify that he left materials on the land at the request of Mrs. Hinkson for her to construct a road. This was purely a suggestion on the part of Learned Counsel for Mr. Gibson. I do not believe Mr. Gibson's testimony that Mrs. Hinkson agreed for him to continue to occupy her land in excess of two years between May 2002 and August 2004 and did not seek to set a price for it. Mrs. Hinkson on becoming aware that Mr. Gibson had occupied more land than agreed immediately demanded an additional sum for rent. Further in May 2002 Mrs. Hinkson had an agreement for the cost of the water tank constructed by Mr. Gibson to be deducted from rent due to her. Mr. Gibson testified that in May 2002 he demanded payment for the water tank. I do not believe that while Mrs. Hinkson had to pay for the water tank from the rent she would have agreed for Mr. Gibson to continue to occupy her land indefinitely and not agree on the rent. I believe Mrs. Hinkson's testimony that she had no separate agreement in May 2002 with Mr. Gibson for him to occupy 1,000 square feet of land. Mr. Gibson while constructing the house at Hope after the road project ended continued to occupy the 30,000 square feet of land. He completely vacated the land in August 2004.

- [22] In relation to the 10,000 square feet of land, I do not believe Mrs. Hinkson's testimony in her witness statement that Mr. Gibson vacated the 10,000 square feet of land in August 2003. The road construction having been completed in May 2002 this is not disputed, Mr. Gibson no longer had the need to continue to occupy both the 10,000 square feet and the 30,000

square feet of land. After May 2002 Mr. Gibson was only engaged in the construction of a house at Hope. Further Mrs. Hinkson under cross-examination testified that:

"It is not true that he left the 30,000 square feet of land in 2002. he had a house and container there. After May 2002 when he completed building the road Mr. Gibson told me he had a job in Hope to do and he will continue to use the area of the 30,000 square feet. He had the materials, the vehicle and plant there. He mixed the materials there and his trucks took it to Hope. At the beginning he was building a road then he was building a house at Hope. He did not ask me to leave his container on the 1,000 square feet of land." (Mrs. Hinkson was shown Exhibit 15) "This is the building and under it is the container, the plant and other aggregate and toilet are there. At the side is the drum filled with cement. They are not seen. The picture shows the 30,000 square feet of land."

In view of the above I find that Mr. Gibson continued in occupation of the 30,000 square feet of land until August 2004. He vacated the 10,000 square feet of land in May 2002.

RENT

[23] In view of my findings that Mr. Gibson occupied the 30,000 square feet of land from March 1, 2001 until August 31, 2004 and the parties agreed that the rent was \$1000.00 per month, the total rent for the period amounts to \$42,000.

[24] In view of the parties agreeing that Mr. Gibson occupied the 10,000 square feet of land at \$500.00 from August 1, 2001 and my findings that he vacated the land in May 2002. The total rent for the period amounts to \$5,000.00.

[25] The total rent amounts to \$47,000.00. The parties agree that Mr. Gibson paid a total of \$6000.00. Thus the balance is \$41,000.00.

WATER TANK

[26] Both parties agree that the cost of the water tank was to be deducted from the rent.

[27] Mrs. Hinkson originally contended that the cost of the water tank was \$33,165.20 after the cost of excavation was deducted since this cost was borne by her. However, she subsequently agreed that the correct price was \$34,165.02 as contended by Mr. Gibson.

[28] Mrs. Hinkson stated in her witness statement that after Mr. Gibson commenced construction of the water tank she expressed her concern to him that as a result of the poor quality of the construction there was a strong possibility that the tank would eventually develop leaks. Mr. Gibson gave her a written warranty dated 16th December, 2002. The water tank developed leaks and was unable to retain water. She informed Mr. Gibson on numerous occasions of the leaks but Mr. Gibson took no steps to repair the water tank. She had discussions with Mr. Laun Leslie and he gave her an estimate to repair the water tank in the sum of \$9,167.40. She agreed with Mr. Leslie for him to repair the water tank.

[29] Under cross-examination Mrs. Hinkson agreed that she did not pay Mr. Gibson any money for the water tank because the agreement was the cost of the water tank would be deducted from the rent. She denied that she owed

Mr. Gibson. She testified that she had to pay Mr. Leslie to repair the water tank. Since Mr. Leslie repaired the water tank it has not leaked.

[30] Mr. Gibson in his witness statement stated that after he completed construction of the water tank and sought payment in May 2002 from Mrs. Hinkson, she began to complain that the water tank had developed leaks. Mrs. Hinkson told him it would cost \$4,167.40 to repair it. On June 28, 2004, he made a written request to Mrs. Hinkson for the outstanding sums owed. He also proposed to Mrs. Hinkson that she should pay one half before the amount owed for the water tank prior to any remedial work on the water tank and the other half one month after the repairs were completed. Mrs. Hinkson made no payment. He subsequently received an estimate from Mrs. Hinkson for \$9,167.40. He refused to pay the invoice because he had given her a warranty and he was willing to do the repairs but Mrs. Hinkson chose to have another contractor do the repairs.

[31] Under cross-examination Mr. Gibson testified that Mrs. Hinkson complained to him during the construction stage that the water tank had some marks. Mr. Gibson explained that this was because the vibrator had broken down. The marks he observed were above the water mark and could not cause the water tank to leak. He could not recall when next Mrs. Hinkson complained to him about the water tank. He later testified that she complained several times but she only did so when he demanded payment for the water tank.

[32] Mr. Gibson agreed that he did not investigate the complaint. He testified that his reason for doing so was that Mrs. Hinkson refused to pay the half of the cost of the water tank as proposed by him. I note that at this time Mr.

Gibson was still in occupation of Mrs. Hinkson's land and they had agreed to deduct the cost of the water tank from the rent. The parties had not settled their accounts. Mr. Gibson did not deny that the water tank was defective. Indeed, he could not do so having not investigated the complaint.

- [33] I believe the testimony of Mrs. Hinkson that the water tank was leaking and that she complained to Mr. Gibson on several occasions and he failed to repair the water tank and she caused Mr. Leslie to repair the tank.

COST OF REPAIR

- [34] I agree with the submission of both Learned Counsels that special damages must be pleaded, particularized and proved. In Ilkiw v Samuels and Others [1963] 2 AER p. 879 Lord Diplock stated at p. 890;

"Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized."

- [35] Learned Counsel for Mr. Gibson submitted that Mrs. Hinkson had failed to prove her claim for \$9,167.40 being cost of repairs to the water tank. Learned Counsel submitted that Mr. Leslie was not called as a witness and no receipts were tendered in evidence.

- [36] I agree with Learned Counsel that no receipts were tendered in evidence. I do not agree that the failure of Mr. Laun Leslie to testify or the lack of receipts meant that Mrs. Hinkson failed to prove her claim. The standard proof of required is on a balance of probabilities. Mrs. Hinkson submitted to Mr. Gibson an estimate from Mr. Leslie showing the cost to repair the water tank being \$9,167.40. This sum was not disputed in the defence, nor was it

contradicted in Mr. Gibson's witness statement, nor at trial. Mrs. Hinkson in her witness statement specifically stated that she accepted the estimate and entered into an agreement with Mr. Leslie for him to effect the repairs to the water tank. Mr. Leslie did the repairs and she paid him. Mrs. Hinkson's testimony was not contradicted. Having reviewed the evidence I find that Mrs. Hinkson has proved on a balance of probabilities her claim for \$9,167.40 being the cost of repairs to the water tank.

COUNTERCLAIM

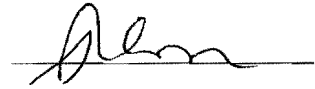
[37] In view of my findings in relation to the rent that is owing to Mrs. Hinkson and the cost of repairs to the water tank, I find that Mrs. Hinkson is not indebted to Mr. Gibson. The counterclaim is therefore dismissed.

CONCLUSION

[38] I find that Mr. Gibson vacated the 10, 000 square feet of land in May 2002. He vacated the 30, 000 square feet of land in August 2004. The total rent due to Mrs. Hinkson after the cost of construction of the water tank is deducted is \$6,834.98. Mr. Gibson is liable to pay Mrs. Hinkson for the cost of repairs to the water tank in the sum of \$9,167.40.

[39] It is ordered that:

- (a) Judgment is entered for the Claimant.
- (b) Mr. Gibson shall pay Mrs. Hinkson special damages in the sum of \$16,062.38
- (c) Mr. Gibson shall pay Mrs. Hinkson interest on the said sum at the rate of 6% from the date of commencement of the claim until payment in full.
- (d) Mr. Gibson shall pay Mrs. Hinkson costs in the sum of \$9,000.00.

A handwritten signature in black ink, appearing to read 'Gertel Thom', is written over a horizontal line.

Gertel Thom

HIGH COURT JUDGE