

(43)

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL No. 12 of 1991

BETWEEN:

1. ALLISON BALCOMBE

and

2. STALK PLANTATIONS LIMITED

Appellants

and

LEON DA BREO

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice C. M. D. Byron J.A.
The Honourable Mr. Justice A. N. J. Matthew J.A. (Ag.)

Appearances: Mr. K. John for the Appellants
Mr. C. Dougan for the Respondent

1992: July 24;
December 7.

JUDGMENT

BYRON, J.A.

This is an appeal against the judgment of Joseph J. delivered on 31st October 1991 on a third party notice in favour of the respondent against the appellants and Henry Da Breo for an order to;

"indemnify the (respondent) in the sum of \$44,000.00 the sum claimed by (Errol Bullock) from the (respondent) in addition to any costs payable by the (respondent) in respect of the claim made by (Errol Bullock) against the (respondent), such costs to taxed unless agreed".

On the same date there was a similar order made on a third party notice in favour of the appellants against Henry Da Breo. Henry Da Breo has not appealed either order.

The appellants have appealed against the judgment on the grounds that the facts pleaded and proved by the respondent do not give rise to any right of indemnity and consequently;

- i. the order for them to indemnify was improper, as the respondent was only entitled to damages, and
- ii. there was no right to bring third party proceedings under Order 16 Rule 1(a) of the Rules of the Supreme Court 1970.

The facts were not disputed. On 6th August 1986 Henry Da Breo assigned truck registration number T8849 to the Caribbean Banking Corporation Ltd by way of security for a loan of \$27,000.00.

In mid May to June 1987 Henry Da Breo sold the said truck to the appellants for \$28,000.00 without disclosing that it was mortgaged. On 3rd July 1987 the appellants sold the said truck to the respondent for \$37,00.00 without disclosing that it was mortgaged. Then on 1st May 1988 the respondent sold the truck to Errol Bullock for \$44,000.00 without disclosing the mortgage. On 3rd June 1989 the bank acting under its Bill of Sale took possession of the truck.

It was found by the learned trial judge and generally accepted that, since the ownership of the truck was assigned to the bank under the Bill of Sale none of these sellers had the right to sell the truck and consequently, all of the sales were in breach of the Sale of Goods Act Cap. 20 section 14(a) which prescribes: -

"14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is

(a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;"

The appellant has challenged the learned trial judge's finding that the right to indemnity arose under the Sale of Goods Act section 14(a) as stated above.

Indemnity

The circumstances under which rights to indemnity may arise are set out in 4th Halsbury vol.20 para.307: -

"Rights of indemnity may arise either from contract, express or implied, from an obligation resulting from the relation of the parties or by statute. The existence of any right of indemnity by virtue of express contract or statute depends upon the terms of the contract or statute in question."

The statute in question, the Sale of Goods Act, does not confer on the buyer the remedy of indemnity for breach of the sellers obligation under the Act. It is now well settled that breach of the condition in 14(a) gives the buyer a right to treat

the contract as repudiated and to claim damages for any loss suffered by reason of the breach. Where the seller fails to pass a good title to the goods sold the buyer is prima facie entitled to recover the whole of the purchase price as on a total failure of consideration. In the leading case **ROWLAND v DIVALL** (1923) 2 K.B. 500 Atkin L. J. said at p.507: -

"It seems to me that in this case there must be a right to reject, and also a right to sue for the price paid as money had and received on failure of the consideration, and further that there was no obligation on the part of the buyer to return the car, for ex hypothesi the seller had no right to receive it."

It has been long recognised that there is an important distinction between a right of indemnity and a right to damages. This was explained in the case of **BIRMINGHAM AND DISTRICT LAND COMPANY v LONDON AND NORTH WESTERN RAILWAY COMPANY** (1866) 34 Ch. 261 where Fry L. J. put it thus at p.276.

"Now in my view the word "indemnity" in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be for a moment confounded, with the right to damages which arises either from a breach of contract or from tort. Let me take in the first instance the case of a breach of contract. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself. When a man contracts that he will do a thing, it can hardly be taken as implying a contract as to what will arise if he does not do the thing. In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is it may be that indemnity will properly express that measure of damages."

This case falls under the same principle. Each buyer who suffered loss by reason of the sellers breach of condition to have the right to sell the truck had a right to damages, for that breach.

It is therefore necessary to determine whether an assessment of the damages for that breach of contract would produce the same financial result as the order for the indemnity.

The amount due on the indemnity in this case was the full judgment obtained against the respondent based on the price for which he sold the vehicle to Errol Bullock. The evidence revealed that the price was \$7,000.00 more than the price he paid the appellants and it is an important question whether he would be entitled to recover that \$7,000.00 from the appellants, in addition to the actual price paid, as damages for the breach of the sale.

Measure of Damages

In Benjamin on Sale of Goods the measure of damages in chain transactions where goods are sold many times over in breach of section 14(a) was discussed. In England the equivalent section is 12(1) and references to 12(1) in the text would equate to 14(a) in the St.Vincent Law). The text reads at p.160: -

"246 - Where A sells goods without title to B, who re-sells them to C from whom they are repossessed by the true owner, the measure of the damages recoverable by B from A will depend on whether or not it was known to A at the time of the contract of sale that B probably intended to resell the goods. If a probable resale of the goods was in the contemplation of A and B at the time, then B will be entitled to recover from A the amount of any sums which he has paid, or has become liable to pay, to his sub-purchaser, C, or the amount of the purchase price paid by B to A, whichever is the greater. If, however, such a resale was not contemplated, then the measure of the damages recoverable was stated by Pearson J. in BUTTERWORTH v KINGSWAY MOTORS LTD to be the lesser of the two following amounts, viz (a) the purchase price paid by B to A, and (b) the amount of any sums which B has paid, or has become liable to pay, to his sub-purchaser, C, less the profit (if any) made by B on the resale

247 - In assessing the liability of each seller in the chain to his immediate buyer, the costs reasonably incurred by the buyer must be taken into account, and if there is a chain of forward sales the costs of all parties are passed on cumulatively up the chain to the first solvent seller. Although it could be argued that, in the example given above A should not be bound to compensate B for any costs incurred by B in relation to his sub-purchaser, C, where no resale of the goods was contemplated, it would seem that knowledge of an intended resale at the time is immaterial."

In my view this statement of the law is sound and I would apply it. In the first place the measure of damages would be (a) the purchase price or (b) the sum which the respondent has become liable to pay his sub-purchase (Errol Bullock) less the profit if any made on the resale. Applying the principles just expressed the record shows that there was no evidence from which it could be held that the appellants contemplated the possibility of the resale of the truck at the time of the sale to the respondent. Therefore the proper award would be the purchase price of \$37,000.00. Even if the other principle was applied the result would be the same because the respondent purchased the truck for \$37,000.00 and sold it to Errol Bullock for \$44,000.00 after some nine months had elapsed. Although there was some evidence that the respondent had effected some repairs the trial judge did not make any findings as to whether or not the difference in price was profit. I would be reluctant to reject the apparent inference that the difference was profit on the basis of the evidence on the record. In the circumstances there is basis only for awarding damages in the sum of \$37,000.00.

In addition to that sum there would be liability for the costs reasonably incurred by the respondent. These costs would include the costs the respondents were ordered to pay Errol Bullock as well as the respondents own costs in resisting that claim provided it was reasonable to do so. See *BUTTERWORTH v KINGSWAY MOTORS LTD* (1954) 2 All E.R. 694 and *BOWMAKER (COMMERCIAL) LTD v DAY* (1965) 1 W.L.R 1396.

This principle has to be balanced against the interest of the appellant who has succeeded on his appeal in establishing his contention that a wrong principle was applied in assessing his liability. This success would normally entitle him to his costs of the appeal. In this case the error of law which the respondent made in basing his entitlement on the principle of an indemnity caused the costs of this appeal which could not be attributed to the breach of the appellant. In my view however the respondent had a legitimate interest in prosecuting the proceedings at first instance which were caused by the failure of the appellants to honour their contractual obligation to have the right to sell the truck and they should pay the costs of the respondents at first instance.

Third Party Proceedings

Order 16 rule 1 of the Rules of the Supreme Court 1970 states that: -

- 16(1) "Where in any action a defendant who has entered an appearance

- (a) claims against a person not already a party to the action any contribution or indemnity; or
- (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by **the plaintiff** ; or
- (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between **the plaintiff** and the defendant but also so between either or both of them and a person not already a party to the action;

then, subject to paragraph (2), the defendant may issue a notice in Form No.16 or 17 in Appendix A, whichever is appropriate (in Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined."

The appellant has rightly contended that rule 1(a) would not apply because there was no indemnity. However the respondent was not limited to that rule. In my view the respondent had a right to bring the third party proceedings under rule 1(b). The plain meaning of the rule clearly accommodates the instant case because the facts show a chain of transactions where the relief claimed by the respondent was substantially the same as that claimed by Errol Bullock and it related to the same truck and the same allegation that it was sold in breach of the vendors duty to have the right to sell it. I would also add that the same principle would support the third party claim of the appellants against Henry Da Breo. I therefore rule that the third party proceedings were properly brought under Order 16 rule 1(b).

The respondent's pleading used the word 'indemnity' in describing his claim. But in his prayer he claimed "special and general damages' and specific allegations were made in relation to the purchase of the mortgaged truck. In my view the issue of the breach of the appellants duty to pass good title as vendor was sufficiently spelt out in the pleadings to ground a judgment on that cause of action.

For the reasons stated above I would order that the judgment of the court below be varied in the following terms: -

1. The appellants pay the respondent damages in the sum of \$37,000.00 and in addition thereto the costs payable by the respondent to Errol Bullock in these proceedings (such costs to be taxed if not agreed).
2. The appellants pay the respondent's costs of this action in the Court below.

I would also order the respondent to pay the appellants the costs of this appeal to be taxed if not agreed.

MATTHEW J.A. (Acting)

On August 6, 1986 the Caribbean Banking Corporation held a mortgage over a truck, registration number T8849, owned by Henry Dabreo. Between May and June 1987, Henry Dabreo sold the truck to Allison Balcombe in his capacity as Managing Director of Stalk Plantations Ltd. In July 1987 Balcombe and Stalk Plantations Ltd. sold the truck to Leon Dabreo for \$37,000. On May 1, 1988 Leon Dabreo sold the truck to Errol Bullock for \$44,000.

There is no dispute that the sales were wrongful as the Corporation had a mortgage on the truck and so on June 3, 1989 the Corporation took possession of the truck from Bullock.

Errol Bullock sued the Defendant Leon Dabreo and on June 21, 1991 the learned trial Judge gave judgment for Bullock in the sum of \$44,000 with costs to be taxed unless agreed.

In a related issue the learned Judge held that Allison Balcombe and Stalk Plantations, who were the first and second Third Parties were to indemnify the Defendant, Leon Dabreo, in the sum of \$44,000, the sum claimed by the Plaintiff, Errol Bullock, from the Defendant in addition to any costs payable by the Defendant to the Plaintiff in respect of the said claim.

She also found that Henry Dabreo, the third Third Party should indemnify Allison Balcombe and Stalk Plantations Limited but the appeal does not relate to this last finding.

The first and second Third Parties now appeal alleging that they ought not to indemnify Leon Dabreo, the Defendant in the original suit. The grounds of appeal are set out at pages 1 - 2 of the record and the relief claimed is that the judgment for the Defendant/Respondent against the Third Parties/Appellants should be reversed.

I hope I do not understand the Third Parties to be saying they are not liable at all to the Defendants. I rather think the Appellants are saying that the third Parties should not be made to pay back \$44,000, but rather \$37,000 since no resale of the truck was contemplated when Balcombe and Stalk Plantations Ltd. contracted to sell the truck to Leon Dabreo.

Learned Counsel for the Appellants made reference to Order 16 of the Rules of the Supreme Court 1970, to Halsbury's Laws of England, Fourth Edition, Volume 2, paragraph 305; and to the case of BUTTERWORTH V. KINGSWAY MOTORS LTD. 1954 2 AER 694. Indeed Counsel submitted that he relied on the case on the question of the measure of damages.

Learned Counsel for the Respondents submitted that any losses incurred by the Respondents are recoverable. Counsel referred to Section 53(2) of the Sale of Goods Act. That section states that "the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty".

The issue in this case as I see it is whether Leon Dabreo can recover from the Third Parties the additional \$7,000 which he made as profit when he resold the truck to Errol Bullock.

In Butterworth's case there were a number of wrongful sales. In that case Bowmakers in January 1951 hired a car on hire purchase to Miss Randolph on the usual terms that she could not sell until all the monies were paid.

In ignorance of the law Miss Randolph on August 1, 1951 purported to sell to Mr. Kennedy, motor dealers, for 1000 pounds. On August 11, 1951 Kennedy, purported to sell to Mr. Hayton, produce merchants, for 1015 pounds. On the said August 11, 1951 Hayton purported to sell to Kingsway Motors, the Defendants, who were also motor dealers, for 1,030 pounds. On August 30, 1951 Kingsway Motors sold to Butterworth, the Plaintiffs, for £1,275.

In July 1952 Miss Randolph got to know that she had no right to sell, so she informed the owners what had taken place. On July 15, 1952 the owners asked the Plaintiff to return the car. On July 17, 1952 the Plaintiffs' solicitor wrote to the Defendants to ask for the return of their money, that is £1,275. The Defendants expressed surprise. However, by July 25, 1952 Miss Randolph had completed all payments and the owners were satisfied.

The Plaintiffs brought an action on September 12, 1952 and

recovered their 1,275 pounds. By then, ^{/the} Defendants were entitled to possession and ownership of the car. ^{The} Defendants brought an action against the Third Party, Hayton, claiming ^{an} indemnity. The Third Party, brought in Kennedy as Fourth Party and Kennedy brought in Miss Randolph as Fifth Party.

The Defendants obtained against the Third Party the amount ^{/for} which he had sold the car to the Plaintiff that is 1,275 pounds less the present value of the car. This looks like an indemnity. Hayton had sold to him for only 1,030 pounds.

I do not see how this case supports the Appellant. The award here is understandable for Hayton knew the Defendants were motor dealers and it must have been in his contemplation that the Defendants would resell the car.

Hayton, the Third Party, received the same measure of damages against Kennedy, the Fourth Party. Hayton had paid £1,015 to Kennedy. The measure of damages here is not so understandable.

At page 702 letter D of the judgment Pearson J. stated:

"The next step is the claim of Mr. Hayton against Mr. Kennedy, the fourth party. This is possibly complicated by the fact that, so far as Mr. Kennedy, knew at the time of the contract of sale, Mr. Hayton was buying for his own use and not for resale. But Mr. Hayton paid 1,015 pounds for the ownership of the car and he received, initially, no ownership or interest at all - at any rate, no ownership. So there was at that time a clear breach of contract. Prima facie, his claim would be for the whole sum of 1,015 pounds because he paid 1,015 pounds and received nothing at all in exchange. Subsequent events have reduced his claim. He has not suffered as much damage as that, but I think the fair view is that the subsequent events have to be taken as a whole, and the effect is that his net claim against the fourth party, Mr. Kennedy, is for 475 pounds, always leaving aside any question as to the parties' costs in this matter. Similarly I think that the same result can be arrived at between Mr. Kennedy and Miss Randolph. The previously mentioned complication does not exist here because Miss Randolph knew that Mr. Kennedy was a motor dealer and was buying for resale."

In my attempt to formulate an answer to the real issue in dispute I refer to two paragraphs of Halsbury's Laws of England, Fourth Edition, Volume 41.

Paragraph 871 deals with effect on damages of sub-contracts by a

buyer. It states in part:-

"..... However, the rule as to remoteness of damages is often effective to prevent the sub-contract being taken into consideration in estimating the loss directly and naturally resulting from the seller's breach. This rule as applied to breaches of contract is that the damages to be awarded must be such as may reasonably have been supposed to have been in the contemplation of both parties when they made the contract as the probable result of a breach of it. The courts will not presume when a contract is made for the sale of goods that it is contemplated by both buyer and seller that the buyer will contract to sell the identical goods to a third person before delivery. Thus, if the buyer does make such a sub-contract, the loss of his profit on his sub-contract cannot be treated as the loss naturally and directly resulting from the seller's breach. However, if it is proved that, at the time of the original contract for the sale of goods, both buyer and seller contemplated that the goods would be resold by the buyer before delivery and that the buyer's loss upon non-delivery by the seller would be his loss of profit upon resale, such loss of profit will be the true measure of damages. But in order to bring the measure of damages within this exception, it is not sufficient that at the date of the contract the seller was aware that the buyer might resell; it must be shown that both parties contemplated that he would resell."

Paragraph 890 is also relevant. It deals with resales. The paragraph states:

"Where a buyer purchases goods which he subsequently resells, it is often difficult to determine whether he can recover from the seller as damages for breach of warranty the actual loss to which he has been put as a result of his liability to his sub-purchasers. Where the buyer's liability to his sub-purchasers is no greater than the loss which he would have suffered if he had used the goods himself, no difficulty arises, but the general rule is that the buyer's sub-contracts cannot be used to increase or minimise his damages, as the sub-contracts are incidental matters with which the seller has nothing to do."

I am of the view that Section 53(2) of the Sale of Goods Act does not imply the indemnity that is advocated by learned Counsel for the Respondent.

I have no doubt that the Defendant's costs of the action incurred in defending the Plaintiff's action is recoverable against the Third Party. This is supported by paragraph 888 of Halsbury's Laws of England, Fourth Edition, Volume 41 which states:

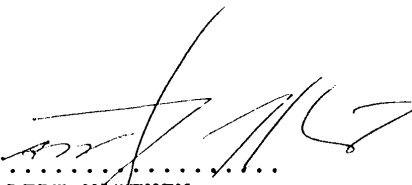
"Where as a result of the breach of warranty the buyer is, through using the goods in the normal manner contemplated by the seller, exposed to proceedings for a penalty or other penal proceedings or to an action for damages, he can, for so long as he is entitled as against the seller to rely upon the warranty, recover the penalty or the damages, his costs and other losses from the seller."

I would vary the order made by the trial Judge and order the Third Parties, the Appellants in this appeal, to pay to the Defendant the Respondent in this appeal, the sum of \$37,000 and the Defendant's costs incurred in defending the action against the Plaintiff, Errol Bullock.

The Appellants are to have the costs of this appeal to be taxed or otherwise agreed.


.....
DENNIS BYRON
Justice of Appeal

I concur.


.....
ALBERT MATTHEW
Justice of Appeal (Ag.)

I concur.


.....
SIR VINCENT FLOISSAC
Chief Justice