# In The Supreme Court of Bermuda

**APPELLATE JURISDICTION**

**2013 No:9**

**RMS CONSTRUCTION LIMITED**

**Appellant**

**-v-**

**TOM B STONE LTD**
**(trading as Sticks and Stones)**

**Respondent**

## JUDGMENT

(In Court[1])

Date of hearing: August 23, 2013
Date of Judgment: August 30, 2013

Mr. Kevin Taylor, Marshall Diel & Myers, for the Appellant
Mr. Christopher Swan, Christopher E. Swan & Co., for the Respondent

### Introductory

1. The Appellant appeals against the Judgement of the Magistrates' Court (Wor. Maxanne Anderson (Acting)) dated October 3, 2012 granting judgment in favour of the Respondent in the amount of $12,776.00 pursuant to an oral contract the existence of which was the central issue in controversy before the trial court.

2. The Appellant accepts the primary facts found by the Learned Acting Magistrate but invites the Court to conclude that the trial court erred in law in inferring from those facts (together with other crucial facts which were agreed) the existence of a valid contractual claim.

3. The Respondent contended at trial and on appeal that there was an enforceable contract pursuant to which the Appellant was obliged to reimburse the Respondent for

[1] The Judgment was circulated without a hearing with a view to saving costs.

the labour costs of certain remedial works carried out by the Respondent, a sub-contractor, at the request of the Appellant (the General Contractor) on the construction site in question.

**Facts found by the Magistrates' Court**

**Agreed facts**

4. The case proceeded on the basis of an agreed bundle of documents and oral evidence. Although no express finding was recorded to this effect, it was common ground that the Appellant (as General Contractor) and the Respondent (as a sub-contractor) were both hired by Fairpoint Development Company ("Fairpoint") to carry out certain works at a condominium development in Fairylands, Pembroke.

5. According to the Respondent's own case as summarised in a letter to the Magistrates' Court dated April 5, 2010:

    (a) the Respondent installed the floors at the site under a 2005 contract with Fairpoint;

    (b) in August, 2006, Fairpoint brought defects in the floors of a number of units to the Respondent's attention. In December, 2006, the parties met to discuss whether faulty installation by the Respondent or moisture caused by the Appellant's omissions were the cause of the floor problems;

    (c) on January 22, 2007 the Respondent determined that moisture coming into the building was the problem. The Respondent then met representatives of Fairpoint and the Appellant at the site after a storm to see how much water was leaking into the building. The Appellant's representative asked the Respondent to replace the flooring in the unit;

    (d) the invoice which formed the basis for the Respondent's claim was for labour only.

6. The Defendant's response in a letter dated March 4 2010 denied that there was any written or oral agreement between the parties for the Respondent to carry out any work at the site.

7. It was common ground that the Appellant did not expressly admit responsibility for the moisture damaging the entirety of the floors and that the Appellant did not expressly agree to pay for the replacement cost. It was also agreed that the only invoice the Respondent ever generated in relation to its claim was dated January 31, 2007 and was addressed to Fairpoint. The Appellant did admit responsibility for partial damage caused by water leaking through certain windows as confirmed in a July 9, 2007 letter to the developer.

**Findings by the Court**

8. The Learned Acting Magistrate expressly found as follows:

   (a) there were moisture problems which caused damage to the floors in the unit in question which the Appellant admitted being partially responsible for;

   (b) although it might have been theoretically possible to remove and replace only those portions of the flooring which were damaged by moisture the Appellant accepted responsibility for, all the flooring had to be replaced and Fairpoint paid for the materials in this regard;

   (c) the Appellant agreed that the remedial work should be carried out. This was consistent with the Respondent's evidence that whenever a problem arose in the course of the project the parties worked together to complete the relevant work.

**Key legal and factual findings by Magistrates' Court**

9. The crucial legal finding, based on the facts found by the Learned Acting Magistrate to have been proved, was that a legally enforceable contractual obligation on the part of the Appellant to pay the Respondent its labour costs of replacing the floors in question did exist. She stated as follows:

> "*15. Was there a contract between the parties? The CJ in Aptech Granite & Marble Limited-v- Pereira Engineering Ltd. {2009 No. 299} at paragraph 7 states: 'The only reliable way of determining what the terms of an oral contract of this nature entered into between companies the principals of which had an ongoing business relationship is to have regard to not simply the oral evidence of the two protagonists, but the course of dealing between the parties and the commercial context as well.' The Plaintiff gave evidence that during the course of this project whenever there was a problem, it was addressed by either party and they worked together to complete the project as required. The Plaintiff also gave evidence that Mr. Betschart agreed that the floors and sub-floors should be removed so that the remedial work could take place. The Defendant gave evidence that anything done to rectify the problem should be included in good faith, but both the defendant and Plaintiff are running businesses and I assume were not working for free.*
>
> *16. In these circumstances, I find that the Plaintiff has on the balance of probabilities proven that the Defendant is liable to pay him the sum claimed…*"

**Grounds of appeal**

10. The Appellant contended that there was no evidence to support the finding of any course of dealing between the parties indicative of an oral contract and that the Learned Acting Magistrate erred in law in applying the *Aptech* case which was wholly distinguishable on its facts.

11. Mr. Taylor submitted that prior to the work in question being carried out by the Respondent the Plaintiff had never paid the Respondent for any other work. The Respondent's contract was with Fairpoint, the developer. Against a background of a dispute between the parties as to responsibility for the damaged floors, there was no evidence that the Appellant even discussed paying the Respondent for carrying out the remedial work.

12. The Appellant's counsel distinguished *Aptech Granite & Marble Limited-v- Pereira Engineering Ltd.* [2012] SC (Bda) 12 Civ (29 February 2012)[2] by referring to the facts of that case as summarised in paragraphs 1, 6 and 7 of my judgment. He submitted that the appropriate test for inferring a contract from conduct was that set out in the following findings of Morison J approved by the Court of Appeal in *Baird Textiles Holdings Ltd.-v-Marks and Spencer* [2002] 1 All ER (Comm) 737 at 743[3]:

> *"(1) A court will only imply a contract by reason of the conduct of the parties if it is necessary to do so. It will be fatal to the implication of a contract that the parties would or might have acted as they did without any such contract. In other words, it must be possible to infer a common intention to be bound by a contract which has legal effect. If there were no such intent the claim would fail.*
>
> *(2) All contracts, to be enforceable must be sufficiently certain to enable the courts to give effect to the parties' intentions rather than to give effect to a contract which the court has had to write for them. On the other hand it can be said that the Courts do not incline to adopt a 'nit-picking' attitude to such matters and will endeavour, where possible, to construe the obligations in a way which gives effect to the parties' bargain. There is a line to be drawn between a generous attitude to making contracts work and striking them down on grounds of uncertainty.*"

13. These submissions on both the law and the facts seemed clear and compelling. It seems apparent from the Learned Acting Magistrate's admirably comprehensive and legible notes of the submissions made before her, that neither counsel assisted her by placing any legal authorities before the trial court. It seems probable that the reference

[2] [2012] Bda LR 12.
[3] [2001] EWCA Civ 274 at paragraph 13.

in her Judgment to the *Aptech* case was the product of her own researches and that counsel were not afforded an opportunity to comment on the relevance of this case (a point I shall return to below). Nevertheless, Mr. Swan did make one legal submission in reply at trial which he repeated on appeal.

14. Mr. Swan submitted below that where a person renders a service there is an implied term that they will be paid. He did not recycle his pizza order analogy before me. But he did rely upon the original proposition that the Respondent had a reasonable expectation of being paid for the work he had done, fortifying the submission by reference to the following passage in the Vice-Chancellor's judgment in the *Baird Textiles* case:

> "*[24] The crucial point, in my view, arises from the third issue, namely whether the obligations arising from the alleged implied contract would be sufficiently certain to be contractually enforceable. Counsel for Baird submitted that on questions of certainty the court takes a benevolent view and seeks to uphold the contract by so construing its terms as to produce certainty rather than the converse. He relied on the dictum of Steyn LJ in First Energy (UK) Ltd v Hungarian International Bank [1993] 2 Ll.R. 194, 196 on the need for the law to protect the reasonable expectations of honest men. He cited as examples Abrahams v Reiach Ltd [1922] 1 KB 477 and Paula Lee v Robert Zehil & Co Ltd [1983] 2 AER 390 in which problems of certainty were overcome by the implication of a requirement of reasonableness.*"

15. This passage merely recited submissions, the soundness of which in general terms was not doubted, but which the English Court of Appeal held at paragraph [30] (upon which the Appellant's counsel also relied) did not apply to the facts of that case. But these principles did appear to me to best reflect the case advanced by Mr. Swan at trial and which swayed the Court below to rule in his client's favour. The Respondent had performed work at the request of the Appellant and reasonably expected to be paid for it.

16. To meet the powerful argument that the previous course of dealing between the parties did not support the contract he contended for, Mr. Swan skilfully extracted the following *dictum* of Staughton LJ in *The Elli* [1993] 1 Lloyd's Rep 311 at 320 from paragraph [20] of the Vice-Chancellor's judgment in the *Baird Textiles* case:

> *'...it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract.'*

17. Applying this *dictum* to the facts of the present case, it would indeed theoretically be open to this Court to affirm the findings reached by the Learned Acting Magistrate even if the legal basis for such findings were to be rejected. However, the Respondent's counsel could not embellish the evidence which was before the Court. The Respondent's evidence only explicitly established an agreement by the Appellant (which had no pre-existing contractual relationship with the Respondent) that certain remedial work needed to be done without any admission that the Appellant was obliged to pay the Respondent for remediating all or most of the damage. Counsel was bound to concede that:

    (a) the only invoice ever produced by the Respondent was addressed to the developer, not to the Appellant (although Mr. Swan was unwilling to concede that this invoice was prepared after the work in question had been carried out) ;

    (b) there was no contemporaneous documentation evidencing the oral agreement;

    (c) there was no other documentation adduced at trial memorializing the alleged oral agreement which pre-dated the issuance of proceedings in the Magistrates' Court.

**Findings**

**Applicable legal principles**

18. Although this was a small claim in dollar terms, the legal character of the basis of the Respondent's case merited careful legal analysis. The Learned Acting Magistrate, in the absence of any meaningful guidance on the law from either counsel, appears to have conducted research on her own. If this occurred, her instincts were correct. However, having discovered a case she considered to be pivotal, fairness required her to afford counsel an opportunity to advance supplementary submissions, even if only in writing, to meet the point the authority was considered by the Court to support.

19. This complaint was not raised by the Appellant because it was effectively cured by the pursuit of the appeal in circumstances where neither party sought to challenge the factual findings made at trial in any event. But had the *Aptech* point been addressed before judgment, the present appeal could conceivably have been avoided. The need for a judge who is considering citing in his judgment a potentially pivotal authority not referred to in argument to afford counsel an opportunity to comment is a somewhat obscure rule of practice but it is one which supported by authority. In *Stanley Cole (Wainfleet) Ltd.-v-Sheridan* [2001] EWCA Civ 1046, for instance, Buxton LJ opined as follows:

"*50. It would of course have been a lot better had the Chairman told the advocates of the authorities that he intended to cite, if for no other reason than to avoid the subsequent extensive use of court time over a dispute in which some £3,000 is in issue. But his failure to do so cannot possibly justify the allowing of the appeal. It may also be noted that the only effect of such a decision would be remission of the case to a further enquiry in which, because of the unchallenged findings already made by the tribunal, the outcome would inevitably be the same.*"[4]

20. Be that as it may I am bound to accept the submission, seemingly made for the first time on appeal, that the reasoning underpinning my decision in *Aptech Granite & Marble Limited-v- Pereira Engineering Ltd.* [2012] SC (Bda) 12 Civ (29 February 2012) has no application to the present case. The essential basis of the decision to infer the terms of a contract (the price) from a prior course of dealings was an agreed pattern of similar previous contractual arrangements between the parties before the Court. There was no dispute in that case as to the existence of a binding contract; only the precise terms were in dispute. This is clear when paragraphs 6 and 7 are read together:

"*6.It is common ground that the Defendant from time to time orally engaged the Plaintiff to do tiling work for which invoices were rendered and paid. The Defendant contends that the agreed rate for laying tile was $6.50 per hour and that the Plaintiff was never hired to do other work which the Defendant's own employees could have performed. The Plaintiff insists that he was entitled to vary the hourly rate based on the type of tile being laid and that although the rate charged was not spelt out on all of his company's invoices, the rate could by means of simple arithmetic be calculated in each case.*

*7. The only reliable way of determining what the terms of an oral contract of this nature entered into between companies the principals of which had an ongoing business relationship is to have regard to not simply the oral evidence of the two protagonists, but the course of dealing between the parties and the commercial context as well.*"

21. I accept Mr. Taylor's submissions as to the limited circumstances in which the Court should infer a contract merely from conduct. In particular, I agree with Morison J (as approved by the English Court of Appeal in *Baird Textiles Holdings Ltd.-v-Marks and Spencer* [2002] 1 All ER (Comm) 737 at 743) that:

[4] An example of counsel being afforded to advance supplementary submissions to respond to an authority identified by the Court after reserving judgment is provided by *Cox-v-Lambert* [2008] Bda LR 69 at paragraph 4.

> "*It will be fatal to the implication of a contract that the parties would or might have acted as they did without any such contract. In other words, it must be possible to infer a common intention to be bound by a contract which has legal effect.*"

22. I also accept Mr. Swan's submission that the following broader principle applies to determining whether or not an oral contract has been entered into, based on the *dictum* cited at paragraph [20] of the *Baird Textiles* case:

> *"'...it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract."*"

23. Applied to the present case, the alternative central legal question is whether, having regard to the parties' pre-existing contractual relations with the developer, their agreement in or about late January 2007 that the Respondent should carry out remedial work which the Appellant did not expressly agree to pay for was "*only consistent only with there being a new contract implied, and inconsistent with there being no such contract*".

**Findings on merits of appeal**

24. The facts correctly found by the Learned Acting Magistrate (considered together with the agreed background facts) did not support the finding of a contract between the parties based on any previous course of dealing between them, applying the legal principles first addressed in argument before me on appeal.

25. Was the conduct of the parties only consistent with them having created for the first time a contract pursuant to which the Appellant (rather than the developer) would pay the Respondent for work done at the same site? In my judgment this crucial question, also first identified in argument before me as the pertinent one, can only be answered in the negative. Not only is there no evidence of an express agreement to pay. There is no evidence that the Respondent even alleged that any such contract was entered into until issuing proceedings in the Magistrates' Court some four years after it sent an invoice to Fairpoint (the developer) in respect of the work in question. This is a very hollow evidential foundation on which to base an implied agreement which was wholly inconsistent with the parties' previous commercial relationship. I find that this Court should take the same view of the facts of the present case as did the Vice-Chancellor (Sir Andrew Morritt) in the following passage in *Baird Textiles Holdings Ltd.-v-Marks and Spencer* [2002] 1 All ER (Comm) 737 at 748, upon which Mr. Taylor aptly relied:

> "*30.I agree with the conclusion of the judge… This is not a case in which, the parties having evidently sought to make a contract, the court seeks to uphold its validity by construing the terms to produce certainty. Rather it is a case in which the lack of certainty confirms the absence of any clear evidence of an intention to create legal relations…. It cannot be said, let alone with confidence, that the conduct of the parties is more consistent with the existence of the contract sought to be implied than with its absence. The implication of the alleged contract is not necessary to give business reality to the commercial relationship between M&S and Baird…*"

26. The fact that the developer had only agreed to supply the materials for the remedial work and apparently declined to pay the Respondent's labour costs, combined with the Appellant's acceptance that it was responsible[5] for an unidentified (but clearly small) portion of that work having to be done, complicated the general picture painted before the Magistrates' Court. But the Respondent's only claim was based on an alleged oral contract in respect of all of the remedial work done. And the commercial relationship between the parties was such that clear evidence was required to support proof that the Appellant agreed to pay the Respondent for carrying out the remedial work. Credible evidence that the Respondent expected to be paid by somebody (most logically the developer) coupled with evidence that the Appellant agreed that the remedial work should be carried out does not suffice to support the Respondent's claim.

**Conclusion**

27. For the above reasons, the appeal is allowed and the order of the Magistrates' Court granting judgment to the Respondent with costs is set aside. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the Appellant shall be awarded the costs of the present appeal and the costs of the trial to be taxed if not agreed.

Dated this 30th day of August, 2013 _____

IAN R.C. KAWALEY

[5] It is unclear what cause of action available to the Respondent (as opposed to the developer which contracted with the Appellant) this admission potentially supported. The Appellant's counsel pointed out that no claim in tort was advanced in the proceedings below.