



In The Supreme Court of Bermuda
No. 5 of 2018

Between:

PAULINA FERNANDEZ

Appellant

And

GERALD BURGESS

Respondent

JUDGMENT

Date of Hearings: 8 August 2018 and 13 August 2018

Date of Judgment: 23 October 2018

Appellant: Paul Harshaw (Canterbury Law Limited)

Respondent: In Person

Meaning of “Repudiation of Contract”
Duty of Magistrates’ Court to provide Reasons for final Judgment
Appeal against Acting Magistrate’s Judgment for Breach of Contract

JUDGMENT of Shade Subair Williams J

Introduction

1. By Notice of Intention to Appeal filed in the Magistrates’ Court on 15 November 2017 and by Notice of Appeal filed in the Supreme Court on 15 May 2018, the Appellant appealed against the final judgment of learned Acting Magistrate Susan Moore-Williams made on 8 November 2017 wherein she found that the Appellant had been in breach of her contractual obligations to the Respondent. The trial initially commenced before the learned Magistrate, Tyrone Chin. However, he recused himself shortly thereafter on the basis of a personal

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conflict of interest. The trial was continued through to completion before Acting Magistrate Ms. Moore-Williams.

2. Having heard arguments from both parties, I reserved my ruling and indicated that I would provide written reasons. Regrettably, the delivery of this ruling was necessarily delayed on account of my medical leave from office during the months of August and September 2018.

Summary of the Facts

3. The contractual dispute arises out of a one-year contract made between the parties on 14 April 2015 for the Respondent's hire of a taxi cab owned by the Appellant ("the contract"). One of the terms of the contract required the Respondent to make rental payments in the weekly sum of \$600 effective from 15 April 2015 through to 14 October 2015. Mr. Burgess was also required under the contract to make weekly payments of \$400 from 15 October 2015 until 15 April 2016. The only express term for rental exemption was contingent on the taxi being placed in the garage for a period exceeding one day, in which case the Respondent would not be obliged to resume rental payments until after the completion of repairs.
4. In the contract the parties' duties for the upkeep and maintenance of the taxi is outlined in some detail and it was agreed that only the Respondent would be permitted to drive the taxi.
5. The termination clause required either party to provide 30 days' notice.
6. On the evidence at trial, Mr. Burgess stated in his evidence in chief that he had to travel for medical treatment and other business which he later described in his evidence as a vacation. At the suggestion of Ms. Fernandez he parked the taxi at her residence on 30 November 2015 and returned to Bermuda on 14 December 2015. He complained that he made several unsuccessful attempts to recoup the taxi after his return but was unable to reach the Appellant. During this period the Respondent said that he had seen another person driving the taxi in breach of their agreement. This resulted in a verbal confrontation between the parties.

The Issues of Conflict

7. From the Appellant's perspective, the Respondent was in breach of the contract on each occasion that he failed to make timely rental payments. More so, the Appellant's case is that the Respondent repudiated the contract when he failed to make rental payments for the two week period of his travel overseas.
8. The Respondent, however, argued that while he accepted that he often made late payments, it was due to his difficulty in reaching the Appellant (a fact not stated in the trial evidence). In any event, the Appellant accepted those payments and continued to honour and recognize the existence of the contract notwithstanding those regular late payments. As for the non-payment of rent for the period of his travel, the Respondent's case is that he was entitled not to pay the Appellant as she later breached the contract in permitting another person to drive the taxi after his return to island.

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9. The Respondent also claimed that he suffered an 18 week loss which accounts for the time he was deprived of access to the taxi after his return to island on 14 December 2015. He stated in evidence at trial that his income rate was \$400 per week. (In Mr. Burgess' evidence he described May to September as the busiest part of the year and January to February as the slowest seasons.)

The Final Judgment of the Acting Magistrate

10. The judgment passed by the learned Acting Magistrate is recorded as follows:

“Judgment is entered for the Plaintiff in respect of his claim for loss of earning for 18 weeks at \$600 per week totaling \$10,800. Regarding the Defendant’s counterclaim, I find for the Defendant regarding monies deducted without consent of unpaid taxi radio radio fees- \$562.50, increase in insurance costs minus \$280.00 paid by the Plaintiff- \$1,099.24; and against the Defendant regarding unpaid taxi rent for November 2015 of \$100 and cost of repairs- \$715.00.

Parties to bear their own costs.”

Grounds of Appeal

11. The Appellant’s grounds of appeal were pleaded as follows:

(1) The learned Acting Magistrate failed to give any or any adequate reasons for her judgment; and / or

(2) The learned Acting Magistrate gave judgment for the Respondent in an excessive amount in that-

(a) The period of time for which loss of income is claimed, 15 December 2015 through 14 April 2016 amounts to 17 weeks, not 18 weeks, and

(b) The Respondent’s evidence at trial was that his loss of income was estimated to be \$400 per week at the relevant time, but the learned Acting Magistrate gave judgment for loss of income in the amount of \$600 per week, contrary to the Respondent’s own evidence; and/or

(3) The learned Acting Magistrate failed to appreciate that by failing and/or refusing to pay the weekly rental for the taxi cab during the period 30 November 2015 through 15 December 2015 and thereafter the Respondent had repudiated the contract entered into on 14 April 2015 and the Appellant was entitled to accept that repudiation and did so; and/or

(4) The learned Acting Magistrate failed to appreciate that by the Appellant saying in evidence that she would permit the Respondent to resume hiring the taxi cab once he paid

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the arrears of rent she was offering to waive the repudiation of the contract by the Respondent; and/or

(5) The learned Acting Magistrate failed to appreciate that the Appellant was under a duty to mitigate her loss following the Respondent's repudiation of the contract and was not only entitled but duty bound to find another driver to rent the taxi cab; and /or

(6) The said Judgment was against the weight of the evidence.

The Relevant Law:

Repudiation of Contract:

12. Mr. Harshaw relied on an extract authored by the learned editors of Chitty on Contracts (Thirty-Second Edition) Vol. 1 para 24-013:

“Acceptance of repudiation. Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must “accept the repudiation”... An act of acceptance of a repudiation requires no particular form...It is usually done by communicating the decision to terminate to the party in default...although it may be sufficient to lead evidence of an “Unequivocal overt act which is inconsistent with the subsistence of the contract without any concurrent manifestation of intent directed to the other party.”

...Unless and until the repudiation is accepted the contract continues in existence for “an unaccepted repudiation is a thing writ in water”...Acceptance of a repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on “the particular contractual relationship and the particular circumstances of the case.”

Duty of Magistrate to give Reasons for Judgment:

13. In Leader v Stewart et al [2016] SC (Bda) 101 App (23 November 2016) the learned Hon. Chief Justice, Ian Kawaley (as he then was) considered the importance of the duty of a magistrate to provide reasons at para 17 of his judgment:

“...The importance of express reasons being given by the Magistrates’ Court on the most important points in controversy in a case which has been seriously contested cannot be over emphasized. This is an important part of the judicial function, both in terms of explaining to the parties and an appellate court the basis for a significant decision. As the Judicial Committee of the Privy Council recently opined in Smith-v-Molyneaux [2016] UKPC 35 (Dame Mary Arden):

“36...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

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appeal court, why one party has lost and the other party has succeeded: see, generally, the decision of the Court of Appeal of England and Wales in English v Emery Reimbold & Strick Ltd [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:

“...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 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)’

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.”

14. These general principles which call for the provision of express reasons by the Court are not unique to civil cases but are principles which apply all around. Express reasons are also statutorily required by a Magistrate in criminal matters. Section 83(5) of the Criminal Jurisdiction and Procedure Act 2015 requires a magistrates’ court’s final judgment in writing to include the point(s) for determination, the decision made on such points and the reasons for the decisions.

15. Section 21 of the Summary Jurisdiction Act 1930, before it was repealed by Schedule 3 of the Criminal Jurisdiction and Procedure Act 2015, provided:

“When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the point or points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it.”

16. Thus, the requirement for Magistrate Court judgments to be accompanied by written reasons is a principle of great vintage and importance. It is unfortunate that such a fundamental and longstanding principle is in need of such reiteration by the appellate courts.

Analysis and Decision:

17. In my judgment the complaint contained in Ground 1 of the appeal is meritorious as the learned Acting Magistrate did not provide any reasons for her decision to enter judgment in

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favour of the Plaintiff/Respondent. Of course, this alone, is not a sufficient basis for interfering with that judgment.

18. I find that any late rental payments made prior to the Respondent's travel overseas on 30 November 2015 did not result in an acceptance of repudiation of the contract. The Appellant clearly would have waived any rights arising out of those breaches by continuing to permit the Respondent to drive the taxi during that period. However, the Appellant's tolerance of those late payments did not amount to an amendment of the terms of the contract. So, the Appellant was not bound to continue accepting late payments from the Respondent.
19. The Respondent obviously repudiated the contract by his non-payment of the rent for the taxi cab during the period 30 November 2015 through 15 December 2015 and thereafter. The Appellant accepted this repudiation through overt acts such as retaining control over the taxi cab because of that non-payment. This is not defeated by any later and unsuccessful attempts to settle this dispute on a with-or-without prejudice basis.
20. Having accepted the repudiation, the Appellant was in fact under a duty to mitigate her loss and did so by securing another driver to rent the taxi cab.
21. For these reasons the appeal is disposed of as follows:
 - (i) the allowed is allowed on grounds 2-6;
 - (ii) the Judgment of the Magistrates' Court in the amount of \$10,800 is set aside; and
 - (iii) the learned Acting Magistrate's Order for each party to pay its own costs is set aside and is substituted for an Order that the Respondent pay 75% of the costs in the Magistrates' Court to be taxed if not agreed.
22. I have not interfered with the learned Acting Magistrate's decision on the Defendant's/Appellant's counterclaim as there were no grounds of appeal and no cross-appeal proposing for the Court to do so on any basis. However, if the costs awarded by Acting Magistrate Moore-Williams arise out of an entitlement accrued during a period subsequent to 30 November 2015, either party may file a Form 31D to be heard on whether the Magistrates' Court order on the counterclaim should be varied or set aside.
23. Unless either party files a Form 31D within the next 7 days to be heard on the issue of costs, I order that costs shall be in the appeal, in favour of the Appellant. Such costs shall be on a standard basis to be taxed if not agreed.

Tuesday 23 October 2018

SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT