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IN THE ROYAL COURT OF THE ISLAND OF JERSEY

26FEB1985

Before: P.L. Crill, C.B.E. - Deputy Bailiff
Jurat the Hon. J.A.G. Coutanche
Jurat Mrs. B. Myles

A.C. Gallie Limited — Plaintiff

-v-

William Herbert Davies — First Defendant

Tom Oscar Philip Walker — Second Defendant

Advocate D. Le Quesne for the Plaintiff
Advocate R.J. Michel for the First Defendant
Advocate G. Le V. Fiott for the Second Defendant

THE HISTORY

This action is a continuation of the hearing which, apart from directions, given by the Deputy Bailiff on the 11th September, 1984, last came before the Court when Judgment was given by the Court on the 11th October, 1977, on the issue of liability. It is not, therefore, necessary for us to set out the heads of claim which were recited and dealt with in that Judgment. Nevertheless, the Judgment did not quantify the damages but apportioned responsibility for some of the defects which had manifested themselves in the Plaintiff's building at Rue des Pres. Whilst the Judgment sets out the salient facts and need not be repeated here, it is important in this continued hearing at this part of the case to set out the time table of events surrounding the action. It is as follows:

1. Works at Rue des Pres commissioned by the Plaintiff Company from Mr. Davies the Architect, the First Defendant, and carried out by Mr. T.O.P. Walker, the Second Defendant, the builder, were carried out with practical completion in 1968.

2. Following the appearance of certain defects and not receiving satisfaction from the Architect, the Plaintiff, and for the purposes of this action it may be taken to be Mr. B.K. Barrette, who is the beneficial owner of the Plaintiff Company, dismissed Mr. Davies and called upon the services of Mr. Peck, also an Architect R.I.B.A., in the autumn of 1969.

3. In 1970 the builder sued the Plaintiff for the retention money under the contract.

4. Between 1970 and 1973, exploratory work and observations were carried out by Mr. Peck, with his consulting engineer, Mr. J.J. Fincham of the firm of Andrews, Kent and Stone, and certain tentative findings were reached.

5. A Mezzanine floor was added to the Warehouse portion of the premises increasing the square footage of that portion of the premises from about 4,000 square feet to about 7,000 square feet. That work was carried out in the Spring of 1973, and was completed by March of that year.

6. 1973 - 1976 further investigations were carried out by Mr. Peck.

7. 1974 the present action was commenced. (by order of Justice)

8. 3rd March, 1976, the action by the Second Defendant against the Plaintiff, and the Plaintiff's action against the two Defendants were consolidated.

9. The hearing of the action started on the 8th March, 1976, and the last hearing was on the 15th November, 1976.

10. 1977, 11th October, Judgment given on liability.

11. 1977 after the Judgment the Plaintiff looked for alternative permanent accommodation.

12. 1977 - 1981 abortive discussions for settlement.

13. 1977 - 1981 all the parties appealed to the Court of Appeal. Judgment was given in April, 1981.

14. July, 1981, the remedial works were put in hand.

THE PRELIMINARY ISSUES.

1. When should the Plaintiff have put in hand the remedial works? It was agreed that the Court would be asked to fix this date (and that it would follow from its finding that that would be the appropriate date at which the damages would be assessed.)

2. Should the Second Defendant have had the opportunity of carrying out and repairing his own defective work, independent of the defective work for which the responsibility lay with the First Defendant in respect of faulty design?. As to the second point, the Quantity Surveyors could have separated and quantified the share of the remedial work found to be the responsibility of the Defendants, but, as we have said, the Royal Court was only apportioning the blame for the proved defects. It did not say, and if it did, it was only indirectly and per incuriam, that the builder had the right to remedy his defective work. It would be against all commonsense and fairness that a builder Defendant found

to be in the wrong should be able to foist his unwelcomed services again on a successful Plaintiff. Further, it would be unreasonable to expect the Plaintiff to allow Mr. Walker, or instruct any other builder, to carry out Mr. Walker's part of the defective work, when the major structural works, except that of the floor, which we were told in the end was not repaired, except that it was smoothed over at the time the mezzanine floor was built, but leaving the excessive slope unaffected, could well ruin all or some of the earlier remedial works, and which, in the event, as far as the builder was concerned, was clearly the minor part. Even the First Defendant, Mr. Davies, in a letter to Advocate Day, of the 17th May, 1971, felt that it was "purposeless to endeavour to cure these defects until the cause was known". This of course is true, for in June, 1972, an offer was made by the Second Defendant to carry out remedial works which the First Defendant thought he should do. This came to nothing as the Second Defendant suggested that some of the defects could be due to lack of proper maintenance. That, therefore, leaves over the question of the proper time for the Plaintiff to have carried out the remedial works.

THE LAW.

The date at which damages are normally assessed may vary. It may be at the date of (1) the breach of contract or the negligent act, although this is not a universal rule; (2) at the hearing; or, (3) at a later date when the Plaintiff carries out the defective work himself after the trial. The later English Authorities, notably the case of Dodd Properties (Kent) Ltd., -v- Canterbury City Council 1981 AER page 928, show that, in applying the principle that damages should be compensatory so as to put the Plaintiff in the same position as if the wrong had not been committed, the cost of repairs, or remedial works as they have been called in the present action, are to be assessed at the date when they could reasonably have been undertaken by the Plaintiff. As MEGAW LJ said in the Dodd Properties case at page 933 letter (J):

> "The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all the relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repairs is to be taken in assessing the damages."

In cases of this nature the Royal Court has adopted the English Courts' principles as varied from time to time by those English Courts. It seems to us that to require the Plaintiff who undertakes to put right the loss himself, for example by repairing premises in cases of defective work, to act reasonably accords with both justice and commonsense. Paragraph 1194 of the Twelfth Volume of Halsbury, Fourth Edition, puts it like this:

"1194. Standard of conduct required of the plaintiff. The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. One test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default. In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty. Similar principles apply in tort.

Although it may be reasonable to require the plaintiff to expend money in mitigating his loss, as for instance in carrying out repairs to a damaged article or hiring a substitute, he is not obliged to risk his money too far. He need not seek to recover compensation from a third party who, in addition to the defendant, is also liable to him, and he need not seek to lessen his loss by embarking on complicated and difficult litigation against a third party, even if he is given an indemnity as to costs by the defendant. Furthermore, it seems that the plaintiff's impecuniosity or financial weakness may properly be taken into account in deciding whether he has acted reasonably.

The plaintiff is under no obligation to destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent persons.

A plaintiff will not be held to have acted unreasonably if he was ignorant of mitigating steps available to him."

We have examined the evidence in the light of that passage and our decision is based on the application of it to the facts.

THE FACTS

Mr. Peck, the Plaintiff's new Architect, was not in a position to say what the cause of the major defects were until 1976. He agreed, however, that by 1973, he would have been in a position to carry out exploratory works involving cutting away part of the fabric. Yet he would have hesitated to advise a client to do this until the cause of the defects was known, which, in his opinion required monitoring the site for a further period. His evidence in this respect was supported by the advice of the consultant engineer, Mr. Fincham. Nevertheless, he agreed with the Court, in words suggested by it, that in 1973, he could have "have had a go". But of course there is all the difference between doing just this and actually carrying out the remedial work. And even if the remedial work could have been carried out in 1972 (or 1973,) certainly in 1972, in his letter of the 18th September, of that year, the Quantity Surveyor, Mr. C. Smith, said at the bottom of the page "as before, in our opinion, the proposed remedial works on which his estimate is based will not guarantee a cure for some of the defects". Also according to Mr. Waite, a consulting engineer called by the Defendants, whilst he could have ascertained what the cause was and carried out the remedial work by the end of 1972, or in about two years from the time of his first receiving instructions, he agreed, nevertheless, that he had not seen all the documents and that he had no reason to suggest that the advice of Messrs. Peck and Fincham as well as their methods of arriving at the cause of the defects were wrong. On the other hand,Mr.Barrette, must have given some instructions to Mr. Peck although he could not recall them, in at least 1973, to ascertain the cost of the repairs, at any rate those which were then thought to be necessary. This much is clear from two letters in mid 1973. The first is from the Plaintiff to his lawyers of the 3rd July, 1973, and is as follows:

"Dear Mr. Becquet,

Will you please instruct Mr. Vibert to proceed with a letter to Advocate Day along the lines of his suggested letter of the 19th January with the following differences.

1. The Quantity Surveyors present estimate of the cost of rectification is now £9360.00 including the cost of taking up and relaying the floor.
2. Estimated cost of moving out of our warehouse and back, plus rental £1,000.00.
3. Estimated fees for Quantity Surveyor, Engineers and Architects £1,625.00
4. Amount paid to date by A.C. Gallie Ltd., for remedial and exploratory work not covered by the above £112.40

The above totalling £12,097.40 to which must be added the legal costs of both yourself and Advocate Vibert.

We also believe that Advocate Vibert should request a decision from Advocate Day within a maximum of 28 days as to whether his clients are going to settle. If this is not forthcoming we suggest we take immediate steps for either arbitration or take the case to Court.

Yours faithfully,

p.p. A.C. GALLIE LTD.

Managing Director."

That letter in turn was passed on to Advocate Vibert who wrote to Advocate Day, acting for the First Defendant, on the 2nd August, 1973, in the following terms.

"Dear Advocate Day,

A.C. Gallie Limited - Breakwell & Davies

We must now proceed to settle this claim, which I would hope may be achieved by negotiation rather than litigation, but I shall have to embark on the latter course if there are no early signs of progress along the former.

I will give you a fairly close indication of the amount which A.C. Gallie Limited will be claiming against the three parties alleged to be responsible, the architects, the building contractor and the engineer, and I suggest that it would be a sensible move on their part to confer together with a view to their offering an overall comprehensive settlement of the dispute.

I enclose a copy of the Quantity Surveyor's estimate of last September of the cost of rectification at £6,400; the Surveyors state that building costs have since inflated by about 20%, so the estimate would now stand at £7,680.

Earlier this year a mezzanine floor was built into the warehouse. This necessitated opening the floor for foundation bases for the new steelwork, which revealed that certain areas of the floor were not reinforced as they should have been. However, it became apparent that the existing concrete floor was very much out of level. The Quantity Surveyors advise that the cost of breaking up the existing concrete floor and laying of a new concrete floor with the necessary reinforcement will cost about £1,700. This work will necessitate moving out of the warehouse, renting other premises for the period, and moving back, which will probably involve a cost of about £1,000.

To the above estimates will have to be added professional fees which will be incurred in carrying out these works - see Exclusion 5 in the attached estimate. Fees incurred to date with architects, engineers and quantity surveyors amount to approximately £1,150.

So the provisional total claim is in the region of £11,530 plus legal fees.

I am sending a copy of this letter to Advocate Fiott for the contractor, and to Messrs. C.H. Rothwell & Partners.

Yours sincerely."

His letter was rejected by Mr. Davies' lawyers. There was, as they said in their reply of the 31st August, 1973, total disagreement at the last "round table". By that time, of course, the mezzanine floor had been completed and the Plaintiff had that part of the business which he had temporarily evacuated from the warehouse into his builders premises alongside at the Rue des Pres, back into the premises. Moreover, at that time, according to Mr. Peck and Mr. Barrette, there was very little temporary warehouse accommodation available to which the business could have been moved. It has to be remembered that not only had the business to be moved but there were offices and living accommodation to be taken care of as well. Later efforts in 1976 were also fruitless. Moreover, from 1973, the Plaintiff was trying, likewise unsuccessfully, to negotiate with the Island Development Committee over another site in Rue des Pres. Mr. Michel said that there was nothing present in 1981 that had not been present in 1973 and certainly by 1976. All the exploratory matters should have been carried out, he said, in 1973, contemporaneously with the mezzanine floor work. Any delay after 1973 was entirely due to the Plaintiff's own actions. In 1973, the Plaintiff Company had an opportunity

to use part of the adjacent contractor's premises for storage and it would have been possible to have extended that period to enable the exploratory work at least to have been done and possibly the remedial works as well. It was not the Defendants' responsibility, or indeed their fault, if the Island Development Committee had been intransigent over the Plaintiff's wish to expand his business, and thus, his premises. No attempt had been made to find alternative accommodation until 1977, and whilst it had been thought that the remedial works would take between nine and twelve months, in fact they took six months and therefore an extension of temporary accommodation could have been obtained from the builder carrying out the mezzanine floor works. It was not right to stress the pleas denying liability because, in fact, there had been before the case was heard, five experts taking up three different views as to the causes of the defects. That of course was an argument which could apply equally in favour of the Plaintiff, who wanted to know the cause of the defects. The Plaintiff had obtained a usable warehouse, albeit one which was slightly defective and which might cause difficulties. He had had the use of those premises for a considerable time and to have delayed repairing them until 1981 was wholly unreasonable. The financial position of Mr. Barrette was at the most awkward but not impossible. We had been told by Mr. Barrette that he had ploughed most of his profits of the business back into the firm and in fact a dividend had not been declared until 1976. He suggested that the Court should ask itself whether it would be unjust to assess the date as early as 1973.

For the Second Defendant, Advocate Fiott urged that Mr. Walker's responsibility was very small having regard to the findings of the Royal Court in its earlier Judgment. One had to distinguish between faulty design which was the major cause of the trouble and bad building works which were relatively minor. The Plaintiff Company had no intention of doing anything until it had Judgment in its favour. After the Court of Appeal Judgment in April, 1981, it then remedied the defects. As late as the 2nd March, 1981, a letter from Mr. Peck to the Plaintiff's advocate showed the Plaintiff was still not sure what it wanted to do and was asking for a firm specification for certain sections of the work after further opening up. That showed an intention to carry out the works as late as possible.

Apart from urging that Mr. Walker's work could have been separated from the work due to Mr. Davies' negligence, a submission which we have rejected earlier, Advocate Fiott adopted Mr. Michel's arguments. Advocate Fiott drew our attention in particular to a letter from the Plaintiff's advocate to him of the 11th June, 1978, the third paragraph of which reads: "Now that the defects in the building need no longer be preserved for the purposes of evidence, my clients will proceed with rectification." Why, therefore, was this not done, he said. It was not necessary to preserve the building for some three and a half years after that time. Furthermore, on the 7th July, in a letter to Mr. Peck from the Plaintiff's advocate there was a reference to "talk of getting the repair work done." That talk Advocate Fiott said was in 1971, nine years before. On the 16th July, 1981, in a further letter from Advocate Vibert to Advocate Fiott, Advocate Vibert said that it had never been practicable to effect the necessary repairs whilst the warehouse was occupied. If that was so, Advocate Fiott submitted, then how was it that in 1973, as we have already mentioned, it was possible to provide for a sum to cover moving out in the course of the correspondence in mid summer of that year. We have come to the conclusion that in 1973, it would not have been an appropriate time, nor reasonable for the Plaintiff, as it was then advised, to have attempted to mitigate its loss.

We are therefore left with a date after 1976. If we were to follow the case of Radford -v- De Froberville (1973) 1 ALL E.R. page 33, as being of persuasive authority, we might have found that the proper date was indeed that of the actual carrying out of the works, namely, July 1981. At page 57 of the Judgment Oliver J. says this:

"Secondly, once proceedings have been commenced and are defended, I do not think that the defendant can complain that it is unreasonable for the plaintiff to delay carrying out the work for himself before the damages have been assessed, more particularly where his right to any damages at all is being contested, for he may never recoup the cost. If, therefore, the proceedings are conducted with due expedition, there seems to me to be no injustice if, by reason of the time that it takes for them to come to trial, the result of inflation is to increase the pecuniary amount of the defendant's ultimate liability. She retains, after all, the use of the money in the meantime and can crystallise her liability by a payment into court if she so wishes."

Nevertheless, because the cause of the defects was not known until 1976, that is almost up to the time of the first hearing of the action on liability, we think that the Plaintiff was entitled to wait at least until the hearing had been completed, so that the Court could visit the site, if it thought it necessary. In the event, it did think it necessary, and found it useful to have done so, and to have seen the property in its defective state. But the question we have to ask ourselves is whether the Plaintiff was reasonable to have waited beyond the date of the last hearing of the action which was in November, 1976. Should he have waited until the Judgment, and furthermore, should he have waited indeed until the Court of Appeal had given its decision in April, 1981.

The arguments for accepting July 1981, in addition to Radford -v- De Froberville, are these.

1. On the 3rd June, 1981, the First Defendant's lawyers wrote to the Plaintiff's lawyers as follows:

"Dear Advocate Vibert,

Gallie - Davies - Walker.

I do not know if you intend, before commencing work, to attempt to persuade my clients in the above matter that your plans for repairing the defective building are reasonable as to method and cost. To do so would seem sensible since argument as to quantum would then be avoided.

In any event, please confirm that my own clients may now survey the building with a view to assessing what work they consider needs to be done and the probable cost of such work.

Yours sincerely,

R.G. DAY."

Mr. Le Quesne submitted that that letter meant that, at any rate the First Defendand, was not concerned as to the date when the remedial work should be done, but only the quantum.

2. The Second Defendant was still, in July, 1981, insisting on his "right" to remedy his share of the defective work.

3. From 1976 to 1981 the Plaintiff had tried very hard to find alternative premises. First of all, in the Spring of 1977, two of his employees had been engaged in getting in touch with every Estate Agent in the Yellow Pages of the Telephone Directory, without success. Secondly, he had found temporary accommodation in 1976, for

part of his goods in Commercial Street, in a loft at St. John's and in a small display area somewhere else in St. Helier. However, the area which he would have had available at that time was roughly one eighth of his total warehouse space. Furthermore, the Plaintiff made it clear that he required secure and dry premises. The evidence to the contrary was very slight and we accept that these two needs existed. Moreover, it was for the Plaintiff to decide if he could continue to work in the premises and not for the wrong doer. It is quite true, however, that the Plaintiff did not advertise for premises and because of the fortunate increase in his business, then began to look for permanent premises and, accordingly, did not feel it necessary to move out temporarily because that would have been a wasted effort.

4. The dictum of Oliver J. in Radford -v- De Froberville that the Defendants had had the use of their money earning compound interest and therefore it was only fair that they should pay the cost of the repairs for remedial works as at July, 1981.

5. The onus was on the Defendants to show that what the Plaintiff did was not reasonable, and not for the Plaintiff to show that what he did was reasonable. In considering the Plaintiff's actions the Court should ask itself whether it was commercially prudent for him to have acted as he did by waiting till July, 1981.

6. The Court should take into account the consistent denial of the liability by the Defendants whether ~~that~~ had foundation or not for their beliefs.

7. On the authority of Dodd Properties -v- Canterbury City Council the Court should look at the position from the point of view of the Plaintiff alone.

8. If the date of 1981 is not allowed, then the Plaintiff after all the time he had spent on the case, would be out of pocket. Clearly, if Mr. Le Quesne is right, there is a considerable difference between the date, say, in 1976 or 1977 and July, 1981. A table of comparative figures was produced by counsel, Mr. Michel for the First Defendant, which showed that if the work had been carried out in 1976, it would have cost £13,000, and in 1977, £14,300. The figure given by the Plaintiff for 1981 was £32,300, excluding costs and fees. By 1976 and certainly 1977, inflation had risen to a high level and it must have been clear to anyone planning to carry out building works that the longer they delayed the higher would would be the cost. It is true that Advocate Day's letter of the 3rd June, 1981,

taken out of context, seems to have overlooked the question of the appropriate date when the remedial works should have been carried out. The probable cost which he suggested when known would, we think, have reminded him of that aspect very quickly. The First Defendant therefore is not estopped from pleading an earlier date. Since also the whole of the remedial works, whether attributed to the First or Decond Defendant, should have been carried out together, neither is the Second Defendant prevented from urging an earlier date. Whilst the denial of the Defendants is certainly a matter to take into account at least up to the date of the trial, and, depending on the circumstances, even afterwards, in this case we do not think that further delay after the last hearing in November 1976 could be justified from the point of view of knowing the cause of the defects and putting them right.

We are satisfied that apart from the question of moving out of the premises whilst the work was carried out, it would have been possible, we think, for that work to have been effected, not later than 31st December, 1976. By that time it was no longer necessary for the premises to be kept for examination by the Court, ~~and Judgment had been given, although it is perfectly true that appeals were pending or at any rate had been started, to the Court of Appeal.~~ It was not put to us precisely but what was inferred was that it was not reasonable for the Plaintiff to break up his business between a number of small areas, but that rather he wanted one large area which he eventually found permanently further along near Miladi Farm Estate, and that it was impossible to obtain temporary accommodation of sufficient size. We think it ought to have been possible because he found a number of small areas as we have already said, in 1976, to move out earlier than he did. It is certainly true that, if by doing so, he would have incurred extra expense by having to run his business from, say, three or four smaller places of some 2,000 to 3,000 square feet each, that would have been a matter to take into account when assessing damages. It would have been a natural and probable consequence of the Defendants wrong doing.

We accordingly assess the date at which it would have been reasonable for the Plaintiff to have mitigated his loss and carry out the remedial works as the 31st December, 1976.