KALUWA v KALOMO RURAL COUNCIL (1968) ZR 33 (HC)

HIGH COURT
EVANS J
14th JUNE 1968

Flynote and Headnote

[1] Contract - Termination unilaterally - Notice.

If time is not the essence of the contract, then it cannot be terminated lawfully by one party without first giving the other party notice requiring him to complete the contract within a reasonable and stated time.

[2] Contract - Liquidated damages - Penalty clause - Unenforceable.

Liquidation damage clauses are strictly interpreted, and the courts are not bound by the parties' characterisation (in the contract) of a remedy as "liquidated damages".

[3] Contract- Damages - Assessment - Alternative theories of recovery.

If one party to the contract is unlawfully prevented from completing it by the other party, then the first party is entitled to recover damages for breach of contract or alternatively to sue upon a *quantum meruit* to recover reasonable remuneration for partial performance.

Cases cited:

(1) *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616; [1950] 1 All ER 420.

(2) *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd* [1915] AC 79.

(3) *Law v Redditch Local Board* [1892] 1 QB 127.

(4) *Parsons v B N M Laboratories Ltd* [1964] 1 QB 95; [1963] 2 All ER 658.

(5) *British Transport Comm v Gourley* [1956] AC 185; [1955] 3 All ER 796.

(6) *West Suffolk County Council v W Rought Ltd* [1957] AC 403; [1956] 3 All ER 216.

(7) *Thomas McGhie & Sons Ltd v B T C* [1963] 1 QB 125; [1962] 2 All ER 646.

(8) *Hall & Co. Ltd v Pearlberg* [1956] 1 WLR 244; [1956] 1 All ER 297.

(9) *Diamond v Campbell - Jones* [1961] Ch. 22; [1960] 1 All ER 583.

Mitchley, for the plaintiff
Pimm, for the defendant

Judgment

Evans J: The plaintiff, who is a builder, claims damages from the defendant for the unlawful termination on 14th December, 1966, by the defendant, of a contract in writing (hereinafter called "the contract") made between the parties on 23rd March, 1966, and varied on 1st April, 1966, for the erection by the plaintiff for the defendant of four staff houses at Zimba at a price of £9,650. Of that sum, the plaintiff admits having received £7,991, and he agrees that he owes the defendant £100 for hiring the defendant's transport. The defendant maintains that it terminated the contract lawfully because the plaintiff was in breach of it by failing or neglecting to complete the said houses by 30th July, 1966 (hereinafter called "the completion date"), the date for completion provided for by the contract, and the defendant counter - claims against the plaintiff the said sum of £100 and liquidated damages in the sum of £1,822 2s. Qd., being a sum calculated by multiplying by 137 (the number of days between the completion date and the date of the termination of the contract) the sum of £13 6s. 0*d*, which was the amount fixed by the contract as "liquidated and ascertained damages" for each day, after the completion date, during which the houses should remain uncompleted. I shall refer hereinafter to the sum of £13 6*s*. 0*d*. as the "penalty".

For this court, and doubtless for both counsel, this has been a difficult and tedious trial, rendered so by the badly - drafted and scrappily completed printed form of the contract and its alterations by, the apparent absence of any legal advice during its negotiation, by

the lack of any specification, drawings or tenders, by the ignorance, inexperience and lack of business acumen displayed by the plaintiff and the responsible officers of the defendant, notably Messrs Hansya and Sikufweba who were respectively at the material time the defendant council's public works officer and secretary, and by the poor quality of the evidence of all the principal witnesses who without exception were at times evasive and lacking in candour. This case is a typical example of parties, who were inexperienced in the matter of building contracts and who acted throughout without legal advice, getting themselves into a legal tangle and on to bad terms and being therefore obliged to resort to litigation and ask the court to resolve their differences. They would be well advised in future to obtain proper advice in all matters of this nature, especially when, as here, dealing with public money. I am constrained to observe that it is clear from the evidence, including Hansya's own admission in court, that several hundred pounds of public funds were paid to the plaintiff by the defendant on the strength of false progress certificates, by which Hansya certified that the plaintiff had completed certain stages of the works when he (Hansya) knew that he had not. I do not, of course, allow my evaluation of the evidence to be influenced by Hansya's conduct in that regard.

Throughout the trial I closely observed all the witnesses, and I have scrutinised all the evidence which I recorded in detail and which it is not necessary to reiterate now. Of the evidence of the principal witnesses, none of whom impressed me as being completely truthful, I prefer that of the plaintiff, except regarding his allegation that, on an unspecified day in August, 1966, the completion date was erased and left blank in the defendant's copy of the contract. On that point there was a sharp conflict of evidence which I cannot resolve in favour of the plaintiff. I cannot accept that, despite his inexperience, he would have been so utterly foolish as to leave a blank for the completion date in the defendant's copy of the contract and not have his copy similarly altered. As it is, both his and the defendant's copies were produced to the court; but other alleged copies remain unaccounted for, and in each the words "The end of July 30th, 1966" have been written over heavy erasure marks. Upon the whole of the evidence, I find the following facts proved, although those which were in dispute are not proved with any degree of certainty but merely upon the balance of probabilities.

(1) The contract initially provided for the plaintiff to build in three months two houses for the defendant for K5,000, and stated the figure of £13 6*s*. 0*d*. as the penalty.

(2) On 1st April, 1966, the contract was varied - the plaintiff to build four houses by the completion date at the price of £9,650, the penalty remaining unchanged.

(3) The plaintiff mistakenly thought on 1st April, 1966, that he could complete the works by the completion date, imprudently failing to take into account the fact (which was generally known in the building trade) that serious delays in the supply of certain building materials were occurring at the material time consequent upon the Rhodesian unilateral declaration of independence and the further fact that there was a local shortage of skilled workmen, such as carpenters.

(4) By the completion date, the works were far from complete, but the defendant had by then paid the plaintiff some £7,000 on account of the contract price.

(5) After the completion date, the plaintiff continued to build, with the knowledge and approval of the defendant's officers, who, I find, were aware of the difficulties experienced throughout by the plaintiff in the way of obtaining materials and skilled labour and because of one or more short strikes by his employees.

(6) On 9th August, 1966, Hansya wrote to the plaintiff to remind him that the penalty was running as from 30th July and the plaintiff saw him in his office the next day about that letter and he told the plaintiff that he should continue building, that he had written the letter in order to "chase - up" quick completion of the works and that he would supply the plaintiff with a colour schedule (Exhibit P.1), which he subsequently handed to the plaintiff on site. It is dated August, 1966.

(7) On a number of occasions throughout this period, the plaintiff hired the defendant's transport in connection with the works.

(8) On 21st September, 1966, Hansya sent the plaintiff a list of defects in the houses under construction, and the plaintiff remedied them.

(9) On 4th October, 1966, £325 was paid to the plaintiff upon an unqualified (and false) progress certificate issued by Hansya.

(10) On 12th October, 1966, Hansya again wrote to the plaintiff reminding him that the penalty was being invoked from 30th July and, on 13th October, the administrative secretary wrote the plaintiff a letter detailing the amount the penalty would be if the works were not completed by the end of October.

(11) The plaintiff replied on 17th October, disputing the invocation of the penalty and referring to his allegation that the completion date had been erased from the contract and to the facts outlined in (6) above.

(12) The building continued and, on 12th November, the plaintiff was paid a further £500.

(13) Sikofweba (the defendant council's secretary) told the plaintiff on the evening of 14th December, 1966, that the plaintiff would receive a "bombshell" because the council had that day resolved to terminate the contract and, the next day, he wrote to the plaintiff, purporting to terminate the contract with effect from 14th December, 1966, stating that the houses had not been completed 4½ months after the completion date, referring to the penalty and continuing (somewhat curiously) " . . . it is obvious that you cannot afford to pay the large sum of money that stands to be deducted by the Council and, because of that, the Council has decided to terminate your contract . . .".

(14) On or about 17th December, the defendant's servants or agents seized all the plaintiff's building materials, on site and stored at the Hop Inn, and carried on with the works, which were not completed by them until March, 1967. The materials were worth £475.

[1] It is conceded by the defence and I am satisfied that time was not of the essence of the contract, and I hold that the defendant could not therefore lawfully terminate it without first giving the plaintiff notice requiring him to complete the contract within a reasonable and stated time. There is ample authority for so holding (*see, for example, Charles Rickards Ltd v Oppenhaim* [1]. No such notice was given in terms by the defendant in this case, but Mr. Pimm submitted that the letters written by the defendant's officers in August and October, 1966, constituted implied notice to the plaintiff that he should complete within a reasonable time and that time was being made of the essence. No authority for this proposition was quoted, and I can find none, and I reject it. It is not, as was urged, the only reasonable inference to be drawn, and it is clear from the authorities that in order to make time of the essence the notice to be given must specify the time (which must be reasonable in all the circumstances) within which the contract is required to be completed. I am unaware of any authority for the notice, to be effective for this purpose, merely to state or imply that completion should be effected within a reasonable time. I hold that the unilateral termination of the contract was unlawful.

[2] I am also satisfied that the penalty was indeed a penalty and not a genuine pre-estimate of damages. The courts view any liquidated damages clause strictly and are not slow to hold it inapplicable. The actual description in a contract of the sum is of little importance even if the words "penalty" or "liquidated damages" are employed. The distinction between the two, and the tests to be applied, were succinctly stated by Lord Dunedin when delivering his opinion in *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd* [2], at page 86, which is the *locus classicus* on the subject, and his words have been approved in many subsequent cases and are, I think, sufficiently familiar to lawyers that I need not reiterate them here. Suffice it to say that, having regard to the said distinction and tests, I find that the sum of £13 6*s*. O*d*. was a penalty *in terrorem* of the plaintiff. Neither party has given any satisfactory or reliable evidence as to how the sum was arrived at, indeed, it is obvious that they had little or no idea of on what basis or

bases it should have been calculated, and I have little doubt that it was an arbitrary figure. That, of course, is not conclusive against its not being a penalty, but the amount - £13 6*s*. O*d*. - was extravagant and unconscionable (a delay of a year would have rendered the plaintiff liable to pay nearly £5,000, which was the price of two of the houses), it was out of all proportion to the highest rent that the houses could possibly command, and the fact that it was not a pre-estimate of damages is clearly demonstrated by its not having been changed when the contract was varied on 1st April, 1966, when the number of houses to be built was doubled. As Lopes, J, said in *Law v Redditch Local Board* [3] at page 132: "If the intention is to secure performance of a contract by the imposition of a fine or penalty then the sum specified is a penalty," and here, Hansya (who negotiated the contract with the plaintiff) testified that he viewed the relevant clause in the contract as a method of forcing the plaintiff to complete it "so that he feared to pay that amount". For these reasons, I have found that the sum was a penalty and therefore unenforceable by the defendant. Had the defendant waited until the plaintiff performed the contract, or had it terminated it lawfully, it would have been entitled to such damages as it could prove by reason of the plaintiff delay in performance. No such damages have been proved, and the defendant disentitled itself to any by unlawfully terminating the contract. [3] By so doing, it prevented the plaintiff from completing it, and the plaintiff became entitled to recover damages for breach of contract or, alternatively, to sue upon a *quantum meruit* to recover a reasonable remuneration for his partial performance. By his statement of claim, he chose the former remedy, claiming (according to the figures agreed during the trial):

(a) Contract price £9,650

	£	£
Less amount paid to plaintiff	£7,991	
• and agreed transport charges	100	8,091
		£1,559

(b) Interest on £1,559 at the rate of 9 *per cent per annum* from 1st January, 1967, until payment or judgment, and

(c) Damages for breach of contract.

I could not award damages as claimed in *(a)* above because the plaintiff did not in fact complete the contract, and he did not claim upon a *quantum meruit*, so I heard further argument from both counsel upon damages, after informing them that I am going to find for the plaintiff. Mr. Mitchley submitted that the plaintiff is entitled to the following damages:

	£	£
Value of completed works on site when contract terminated		7,909
Plus value of materials seized by defendant		475

Less amount paid to plaintiff	7,991	
and transport charges	100	8,091 5
Plus plaintiff's anticipated profit had he been allowed to complete the contract		293
	330 10	
		£623

Plus interest on that figure of £623 from 1st January, 1967, to judgment.
Mr. Pimm, for the defendant, agreed in the main with Mr Mitchley's above figures but (a) queries! the profit figure of £330 based on the evidence of Mr Harris and (b) submitted that tax should be deducted from whatever is awarded in respect of anticipated profit, in accordance with the English Court of Appeal's majority decision in *Parsons v B. N M. Laboratories Ltd.* [4], in which it was held that the principle (of deducting tax from damages) of *British Transport Commission v Gourley,* [5] applies to the assessment of damages for breach of a contract of service. As to point *(a)* above, I feel obliged to accept the figure of Mr Harris, who was an expert witness, and his figure was not disputed and I have no other evidence on the point. As to point *(b)*, Parsons' [4] case was an action for wrongful dismissal, and damages were assessed for loss of salary over a period of time, and the Court of Appeal held that income tax should be taken into account by way of deduction from the plaintiff's loss of actual earnings, the damages awarded to him as compensation for that loss not being taxable in his hands. In *Parsons'* [4] case, Harman, LJ, said (of *Gourley's* [5] case):

"As I understand it, the case decides that in an action whether in tort for injuries deriving from negligence or in contract for wrongful dismissal, where the loss of the plaintiff consists wholly or in part in a loss of earnings, and where the sum to be awarded in damages will not suffer deduction of tax in his hands, then, in ascertaining the plaintiff's loss, his tax liability, that is to say the sum which he would have had to pay in income tax including surtax in acquiring the lost earnings, must be deducted from his loss in assessing the damages."

The present action does not, in my opinion, fall within the principles of *Gourley's* [5] or *Parsons'* [4] case because it is not an action in tort for injuries or in contract for wrongful dismissal. Further, in *West Suffolk County Council v W. Rought Ltd,* [6] (which was applied *in Thomas McGhie & Sons Ltd v B.T.C.* [7], it was held that, in assessing the amount to be awarded for temporary loss of profits, the liability of such profits
to tax must be taken into account, but in that case (as in *Parsons'* [4] and *Gourley's* [5] cases there was evidence that the damages awarded would not be taxable in the plaintiff's hands. In *Parsons'* [4] case, Harman, LJ, said (at page 672), after referring to the *West Suffolk* [6] case, "Since that time, *Gourley's* [5] case has been consistently applied . . . It has not been applied, as I understand it, in commercial cases to awards for loss of profit. For instance, in *Hall & Co. Ltd v Pearlberg* [8], it was held that lost rent and similar items of loss, which would be taxable in the recipient's hands as profits, ought not to be diminished on the *Gourley* [5] principle, because that would be to charge them twice... So again in *Diamond v Campbell - Jones* [9]. The last paragraph of the headnote reads as follows: 'That since any damages recovered by the plaintiff were liable to attract tax as part of the profits or gains of his business, he was entitled to a sum in damages equal to the gross amount of the profit...'." For the further reason, therefore, that I have no evidence in this case as to whether or not the sum of £330 will be taxable in the plaintiff's hands - I assume on general principles that it will be - I decline to take any tax liability

into account. Indeed, were I to do so, I would not know what calculations to make because I would not know what rate of tax to use and in Zambia there is no standard rate of tax.
The plaintiff's claim for interest is under section 4 of the Law Reform (Miscellaneous Provisions) Act, 1967 (Act No.26 of 1967) which empowers a court, in proceedings for the recovery of any debt or damages, in its discretion to award interest at such rate as it thinks fit on the whole or any part of the damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. No evidence has been adduced to warrant interest at 9 per cent, but I am prepared to award it at the rate of 6 per cent, since that is the rate provided for by the Judgments Ordinance (Cap.16) as the interest payable upon a judgment debt from date of judgment until satisfaction thereof.
There will be judgment for the plaintiff for £623, or K1,246, and interest thereon at the rate of 6 *per cent per annum* from 1st January, 1967, until today. Unless Mr McLean desires to argue the point the defendant will pay the plaintiff's costs of this action.
Judgment for the plaintiff.