DIN SHIU PRASAD

v.

ABDUL HABIB SAHU KHAN

[COURT OF APPEAL, 1964 (Mills-Owens P., Marsack J.A., Knox-Mawer J.A.) 16th July, 21st August]

Civil Jurisdiction

Contract—building contract—default by builder—measure of damages.
Damages—building contract—default by builder—measure of damages.
Estoppel—building contract—employer's representation by conduct—detriment to builder.

Where a builder has failed to complete a building contract and his employer has arranged with another builder to complete the building, the true measure of damages is what it costs the employer to complete the building substantially as was originally intended and in a reasonable manner, less any amount that would have been payable to the original builder by the employer had such builder completed the building at the time agreed by the terms of his contract.

The same principle applies where, after the original contract has been terminated by the employer, the same builder is engaged to complete the work by an agreement reserving to each party the right to claim damages for breach of the original contract.

Where a builder who has made default in completing a building contract is led by the employer to believe that if he completes the building for the bare cost of materials and employed labour there will be no claim for damages in respect of his default, and the builder completes the work on that basis, the builder suffers detriment and the employer is estopped from claiming damages for the builder's default.

Cases referred to: *Mertens v. Home Freehold Company* [1921] 2 K.B. 526: *Hirt v. Hahn* (1876) 61 Missouri, 496.

Appeal from judgment of the Supreme Court.

K. C. Ramrakha for the appellant.

A. H. Sahu Khan for the respondent.

The facts sufficiently appear from the judgment.

Judgment of the Court: [21st August, 1964]—

This is an appeal against a judgment of the Supreme Court given on the 21st January, 1964, in favour of the respondent for the sum of £3,300 by way of damages for breach of contract. The respondent has lodged a cross-appeal. In this judgment the appellant, who was the defendant in the original action, will be referred to throughout as the appellant, and the respondent (appellant by cross-appeal), who was the plaintiff in the Court below, will be referred to as the respondent.

The evidence given in the Court below discloses a very complicated set of facts arising from lengthy and largely unbusinesslike dealings between the appellant and the respondent. The nature of the dealings between the parties is to some extent explained by the fact that when the transactions commenced the parties had been friends of many years' standing.

On the 6th October, 1955, the parties entered into a written agreement whereby the appellant undertook to erect for the respondent a block of eight flats in Suva for a contract price of £10,000. Although the document signed by the parties is headed "tentative agreement", it is clear that the parties acted upon it and at all times treated it as a binding contract. Time for completion of the work was fixed at ten months after commencement, subject to extension in certain circumstances which are specified in the agreement.

By the time fixed for completion, namely 6th August, 1956, the respondent had paid to the appellant a sum of £5,300 by way of progress payments but the building was far from completed. The respondent thereupon obtained from two separate architects reports on the work which had been done. Each of the architects reported unfavourably, both as to the standard of the work and as to the progress which had been made. They were called as witnesses on behalf of the respondent at the trial, and upon consideration of their evidence, the Judge in the Court below found as a fact that the value of the work which had been done, up to that stage, was £2,000.

On the 11th October, 1956, the appellant applied to the respondent for an extension of time in which to complete the building, and the respondent granted this until 31st December, 1956. Progress of the work, however, continued to be extremely slow, and after a certain amount of correspondence the respondent finally, through his solicitors, gave the appellant notice on 6th May, 1957, terminating the agreement of 6th October, 1955, without prejudice to his right to damages for breach of contract. This was followed by further negotiations between the parties and a second agreement between them was signed on the 1st February, 1958. This agreement expressly reserved to each party the right to claim damages for breach of the agreement of the 6th October, 1955, and provided that the appellant would complete the building, under revised plans and specifications, on or before the 14th September, 1958. Time was deemed to be strictly of the essence of the contract. The contract price was fixed at £6,626 plus a further sum of £200 for certain demolition work on part of the existing building. There was a liquidated damages clause providing for payment of £50 per month in the event of delay beyond the specified date.

The building was not completed by the appointed date, but the respondent continued to make payments to the appellant. After he had so paid somewhat more than the total contract price of £6,826, in June 1959 he made an arrangement with the appellant whereunder the appellant would continue with the work until completion but on the basis that payment should be made only to cover the actual cost of labour and materials, upon the architect's certificate. The building was finally completed on this basis in September, 1959, by which time the respondent had paid to the appellant £3,544.12.7 in excess of the contract price of £6,826. The total amount paid by the respondent to the appellant was thus £15,670.12.7, representing £10,370.12.7 under the second contract and £5,300 already paid under the first. The respondent sued for a sum representing the amounts which he contended were over-paid on each of the contracts. He also claimed liquidated damages in respect of the delay in completion, at the rate of £50 per month. The appellant counterclaimed for the sum of £4,300 by way of damages under the first contract, and an amount which he claimed was payable to him under a collateral oral agreement with the respondent. The trial Judge held that the respondent was not entitled to any damages under the second contract, but he gave judgment in favour of the respondent for £3,300, representing the difference between the amount paid under the first contract and the value of the work done thereunder. He dismissed the counterclaim. It is against that judgment that the appellant has lodged this appeal, and the respondent this cross-appeal.

A B C D

There are 13 grounds set out in the notice of appeal, which is very lengthy, and, in our opinion, does not require to be set out in detail in this judgment. The cross-appeal is based substantially on the ground that the trial Judge was in error in holding that the respondent had waived his right to damages under the second contract.

E

It is common ground that the contract price fixed in the agreement of 6th October, 1955, namely £10,000, was extremely low and made it virtually impossible for the appellant to make a profit out of the transaction or in fact to avoid making a loss. It is clear from the evidence that the appellant was without capital resources but would depend upon progress payments from the respondent to buy his materials and pay for his labour. The difficulties which arose in the performance of the contract were largely due, and almost inevitably due, to these two factors. At the same time this Court is not concerned as to whether the terms of the contract were fair between the parties. There was a binding contract and the appellant was in breach of it. The respondent was, therefore, entitled to damages in respect of that breach unless his right had been waived expressly or by subsequent conduct. The second agreement of 1st February, 1958, provides that nothing in that agreement should be deemed to extinguish any claims, one against the other, in respect of any breach of the first contract. In our opinion, there is ample evidence to support the finding of the trial Judge that there had been a breach of the first agreement and that the respondent was entitled to damages in respect of that breach. The only question before us with regard to the first agreement is whether those damages have been correctly assessed.

F G H

The amount paid to the appellant under that agreement was admittedly £5,300. The trial Judge has found, on the evidence, that the value of work done under that contract was £2,000 and he has assessed the damage as the difference between those two sums, that is to say £3,300. What we have initially to determine, with regard to the breach of the first agreement, is the proper measure of damages to be applied.

The law regarding the measure of damages in cases where the builder has failed to complete and the employer has arranged with another builder to complete, is well established. It is set out in *Hudson on Building Contracts*, 8th Edition at p. 318, citing an American case *Hirt v. Hahn* (1876) 61 Missouri 496. The principle expressed in that case was approved by the Court of Appeal in *Mertens v. Home Freeholds Company* [1921] 2 K.B. 526. The judgment of Lord Sterndale M.R., at p. 535, and that of Lord Warrington at p. 538, concur in stating that the true measure of damages is what it cost the plaintiff to complete the house substantially as was originally intended and in a reasonable manner, less any amount that would have been due and payable to the builder by the plaintiff, had the builder completed the house at the time agreed by the terms of his contract. Applying that principle to the present case, therefore, the proper measure of damages in respect of the breach of the first agreement would represent the difference between the amount which it cost the respondent to complete the house less what would have been payable to the appellant if he had carried out his contract.

The complication in the present case arises from the fact that after the first contract had been terminated by the respondent on the 6th May, 1957, on the ground of the appellant's breach, the arrangements made by the respondent to complete the building were made with the same contractor under what has been referred to as the second agreement. This course was taken, no doubt, in the interests of economy as it was almost certain that the respondent would not have been able to obtain the services of any other builder without incurring a great deal more expense. None the less, we are of the opinion that the measure of damages under this head of the first agreement must be based upon the same principle, that stated very clearly in the authorities to which we have referred. If the contractor under the second agreement had been a different person the respondent would have had his remedy against him in default of completion thereunder, not against the first contractor. Likewise where, as in this case, the contractor is the same person and there is default on the second contract the remedy lies under that contract. It does not go to swell damages under the first contract. The tenor of the second agreement appears, implicity, to recognise this.

If this view is correct, then the parties must be taken to have settled their own quantum of damages. It must be emphasised that we are dealing solely with rights arising from the breach of the first contract, quite independently of any which might have flowed from breaches of the second agreement. If the second agreement had been faithfully performed, then the total cost to the respondent for the erection of the building would have amounted to £12,126, represent-

ing the amount already paid to the appellant of £5,300 plus the contract price for completion of £6,826. As the amount payable to the appellant, had he completed the building in accordance with the first contract, would have been £10,000 then the quantum of damages properly payable by the appellant to the respondent under this head of the first contract would be £2,126.

There is, however, a possible difficulty in stating this sum with complete accuracy. Specifications for completing the building under the second agreement varied somewhat from those provided for in the original contract. There is, however, nothing in the evidence from which we are able to find that these variations involved any definite sum by way of additional cost. There is no specific finding of the trial Judge on this point and, in fact, the respondent in the course of his evidence said:

> "I paid separately for all variations, which amounted to extras, from the original plan."

In the circumstances we are compelled to hold that the sum of £6,826 represents the figure agreed upon between the parties as the sum required to complete the building on failure of the appellant to fulfil his obligations under the original contract.

In our view, therefore, the damages which should have been awarded under this head for breach of the agreement dated 6th October, 1955, are £2,126.

It is to be noted that there is no claim for liquidated damages, at the stated figure of £50 per month, in respect of delay in completion by the appointed date under the first contract. The sum of £2,126 therefore represents the total damages recoverable with regard to branches of the first contract.

There remains for consideration the question as to whether the learned trial Judge was correct in holding that the respondent was not entitled to damages under the second contract. It is clear that the appellant was in breach of the second contract under two heads:

(a) He failed to complete the work for the agreed sum of £6,826 and the cost to the respondent under the second contract amounted to £10,370.12.7, a difference of £3,544.12.7;

(b) He failed to complete by the agreed date 14th September, 1958, and the work was not finished until September, 1959, the certificate of the Suva City Council being given on 7th October, 1959. The respondent claimed liquidated damages for this delay at the agreed rate of £50 per month, but in respect of a period expiring February, 1960.

The question of the right of the respondent to claim damages under the second agreement is one of considerable difficulty. When it was realised that there was no possibility of completion of the building by the time specified in the second agreement, negotiations took place which finally resulted in resumption of the work by the appellant on the cost-only basis.

In his judgment in the Court below, the Judge points out that the respondent was forced into the position that if he did not agree to pay the appellant to complete the work, he would have been left not only without a builder, but also without an architect. He could, undoubtedly, have had the work completed by another builder, but this would have involved considerably greater expenditure than the employment of the appellant upon a non-profit basis. Certainly, he would have had an action for damages to cover this additional cost, but the financial position of the appellant was such that this action for damages would have been of dubious value. The respondent in making the arrangement with the appellant for the completion of the work did not inform the appellant that he would not thereby abandon his claim for damages under the second agreement. Had he done so, the Judge considers that the appellant would have refused to carry out any further work; and this seems a reasonable inference from the evidence.

The basis of the finding of the trial Judge that the respondent was not entitled to damages under the second contract is that the plaintiff was estopped by his own conduct from claiming those damages. It is necessary, in order to decide this question, to examine in some detail the conduct of the parties after the signing of the second agreement on the 1st February, 1958. The whole course of the negotiations between the parties indicates that one idea was paramount in the mind of the respondent: to extricate himself from the position in which he had been placed by the appellant's failure to carry out his first contract, with the smallest possible expenditure of money. After he had terminated the first contract, by reason of the appellant's breach, he first examined the possibility of having the work completed by another contractor; but the lowest tender received was over £10,000 and he was not prepared to lay out this sum. He, therefore, accepted the offer of the appellant to complete the building for the sum of £6,826. Later it became apparent that the appellant could not carry out his obligations under the second agreement, either for the contract price or within the time specified. The respondent was then once again faced with the alternatives of either making a satisfactory arrangement with the appellant or of terminating the second contract and having the building finished by another contractor. If the latter alternative were chosen he undoubtedly would have an action for damages under the second contract, but further delay would have been caused and he would have been forced into the expenditure of a considerable sum of money.

Negotiations were conducted to some extent between the appellant and the respondent direct, but mostly through the architect appointed by the respondent, Udit Narayan. The correspondence between the parties and the architect was by agreement admitted in evidence at the trial. On 17th April, 1959, the appellant complained in writing to the architect that progress payments were not being made satisfactorily and that the progress of the work was thereby greatly hindered. On the 20th April the architect replied that it would now be necessary for the owner to exercise the remedies available to him under the contract. This letter brought a reply on the 24th April stating that unless the money were paid forthwith the work could not be carried

on any faster. The letter finished: "As for your exercising your powers under the contract you are free to do so". On the 27th May, 1959, the appellant wrote that as the agreed payments had not been made he was now forced to stop all work on the building and that he would hold the architect and the owner responsible for any loss and damage. On the 25th May, two days before this letter from the appellant to the architect, the respondent informed the architect that the appellant had been to see him that morning and stated that he wanted to be paid for labour and the cost of materials in respect of all work done from that time; this was to be the future basis of payment if respondent wished him to finish the job.

The respondent then informed the architect that, in the circumstances, it appeared that the appellant could not go on with the work unless they (the respondent and the architect) agreed to his new terms.

On the 2nd June the respondent wrote to the architect saying that after a very long discussion with his legal adviser he had reluctantly agreed with the appellant's suggestion that from the time work was commenced again the respondent was to pay both the wages and material costs until the work was completed. This then represented the basis upon which work was resumed by the appellant.

The letter to the architect, however, proceeds:

> "We are of the opinion that since the Contractor has nothing to gain from this present work, he will see that the work is done diligently and without loss since any further expenses incurred over and above the contract price will be posted against his account at arbitration."

The paragraph quoted clearly indicates that the respondent had it in mind to claim damages from the appellant in respect of the breaches of the second agreement notwithstanding the arrangement he had made with the appellant for the completion on the basis of paying only for cost of material and employed labour. But he said nothing of this to the appellant. We are satisfied that, as is pointed out in the judgment in the Court below, the appellant would not have been prepared to finish the construction work on the basis agreed upon if there had been an express condition reserving to the respondent the right to claim damages under the second contract. We think that the only inference to be drawn from the facts disclosed in the evidence and in the correspondence is that the respondent deliberately led the appellant to believe that if he completed the building on the basis proposed there would be no claim against the appellant in respect of either the additional cost of the building or of the further delay involved in completition. This, in our opinion, comes within the scope of the statement of the law set out in *Hudson's Building and Engineering Contracts*, 8th Edition at p. 317:

> "it should not be forgotten that waiver of a breach, or a renunciation of the right to damages, or a liability to pay for the work, will not, in general, and in the absence of express provision, be implied from acceptance of the work by the building owner, even in the case of patently defective work. For such a result to

occur, it would, it is submitted, be necessary to find some fresh consideration moving from the builder, or at least sufficient facts to support an estoppel against the employer's relying on the breach, involving some action of the builder to his detriment based upon conduct or a representation of the employer."

The action of the builder to his detriment in this case is his agreement to proceed with the work upon the basis that he receive no remuneration for himself but only the bare cost of the materials and the employed labour. He was, in our opinion, induced to take this action because he must be taken to have reasonably inferred from the conduct of the employer that this would be a settlement of the matter, except in so far as any claims for damages had been preserved under the second agreement, had accrued, and were ascertainable at the time that this arrangement was made. It would not, in our opinion, have been a reasonable interpretation of the arrangement made between the parties in June, 1959, that the respondent should pay substantial sums to the appellant in excess of the contract price of £6,826 which he had already received, and at the same time reserve his right to sue the appellant for the return of those sums as soon as the work was completed. That being so, we find ourselves in agreement with the trial Judge that the respondent was estopped by his own conduct from recovering from the appellant "the additional moneys he willingly and freely paid him to finish the work".

The same reasoning would apply, we think, to the further delay which would be occasioned by the completion of the contract under the conditions arranged between the appellant and the respondent, to the extent that the appellant was led to believe that there would be no further claim under this head in the same way that there would be no claim in respect of the additional cost. In these circumstances we think that the respondent is precluded from claiming any damages by reason of the delay in completion of the building after the 2nd June, 1959, when the new arrangement was made.

Different considerations apply, however, with regard to the delay which had been involved between the due date for completion under the second agreement, namely 14th September, 1958, and the time the new arrangement had been entered into, namely 2nd June, 1959. By the latter date a right to liquidated damages at £50 per month had already accrued, and there was nothing in either the new arrangement or the conduct of the parties in the negotiation of it which should have led the appellant to believe, on reasonable grounds, that if he carried the work through to completion on a cost-only basis the right to this item of damages would be waived by the respondent. We are satisfied that the appellant was induced to undertake the work on these terms on the understanding, not expressed definitely but believed by the appellant on reasonable grounds, that he would incur no further penalties in respect of the carrying out of the work. That belief could properly be reinforced by the fact of the substantial payments which were made by the respondent to the appellant. But we can find nothing in the conduct of the parties to establish any waiver by the respondent of any claim for antecedent breaches of contract; and therefore nothing to deprive the respondent of his

right to claim liquidated damages at the agreed rate for the delay from 14th September, 1958, to 2nd June, 1959. The damages properly payable under this head amount to £450, i.e. 9 months at £50 per month or part of a month.

A

The cross-appeal therefore succeeds to this extent, but otherwise fails.

The total amount for which respondent is entitled to judgment is £2,576, being the sum of the two amounts £2,126 and £450 found in his favour.

B

In the result the judgment in favour of the respondent for £3,300 is set aside. The case is remitted to the Court below to enter judgment in favour of the respondent for the sum of £2,576, together with the propriate costs in that Court.

As to the costs in this Court, both the appeal and the cross-appeal have been successful in some small degree. We do not think that the result justifies an order for costs by either party against the other in this Court. Consequently there will be no order as to the costs of this appeal.

C

Appeal and Cross Appeal allowed in part.