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IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 9/91

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.(AG.)

BETWEEN SAMUEL DALE APPELLANT

A N D KINGSTON & SAINT ANDREW CORPORATION RESPONDENT

Rudolph L. Francis for the Appellant

Garth McBean for the Respondent

May 6, 7, 8 & June 17, 1991

DOWNER, J.A.

The Appellant Samuel Dale is a stall-holder at the Pearnel Charles Arcade in West Parade, Kingston. In his Particulars of Claim, before His Honour Mr. A. S. Huntley a Resident Magistrate exercising civil jurisdiction in Kingston, he claimed damages amounting to $2,380.00 for merchandise he had lost because they were damaged by rain on four occasions. The respondent, the Kingston and Saint Andrew Corporation (K.S.A.C.) did not contest the merits of the case. They made a submission of no case to answer and rested their case. The learned Resident Magistrate then found for the K.S.A.C.. Samuel Dale now appeals to this Court to have the order made below set aside, so that an order may be made on appeal against the K.S.A.C. in terms of the plaint. It is therefore convenient to examine the Act and regulations on which the Resident Magistrate based his decision to disallow the claim in the Court below.

Was the ruling against the appellant on the 'no case submission' correct?

Section 140 of the Kingston and Saint Andrew Corporation Act reads as follows:-

> "140.-(1) It shall be lawful for the Council from time to time to make, alter rescind rules -
>
> (a) for the use of stalls, for permission to bring articles into any public market, in the Corporate Area, and for fixing the fees to be paid therefor."

The issue which arises for determination is whether this section empowered the Kingston and Saint Andrew Corporation to make Rule 6 of the Kingston and Saint Andrew Corporation (Market) Rules 1944. Be it noted there is no dispute that Pearnel Charles Arcade is a market within the contemplation of the Act and the Rules. That rule states:-

> "6. All goods taken into a market shall remain at the sole risk of the owners of such goods and the Corporation shall not under any circumstances be liable for any loss or damage thereto and if any such loss or damage shall be occasioned by the act neglect or default of any officer or servant of the Corporation such officer or servant shall alone be liable for any such loss or damage."

If these rules were to be given the force and effect as contended for by Mr. McBean it would give the K.S.A.C. an exemption as regards the exercise of a duty of care in the markets in which it operates. The risk for any loss which occurred even where the K.S.A.C. failed to provide a safe market would be the stall-holder's, even though the stall-holder hired his

stall and paid the appropriate fees; pursuant to sections 141 142, 143 and 144 of the Act. It would also mean that section 140 empowered the Corporation as regards its markets to abolish the law on vicarious liability. If such exemptions were accorded to the K.S.A.C. they ought to have been able to point to some Act or case authorising these exemptions which would run counter to the general law. This was not done. What however was brought to the attention of the Court by Mr. Francis for the appellant was section 29(d) of the Interpretation Act which reads:-

> "(d) no regulation shall be inconsistent with the provisions of any Act."

A statement of principle by Romer J which illustrates the effect of this provision is to be found in Nicholas v Ta istock Urban Council (1923) 2 Ch. 18 at 31. It was thus:-

> "Now if this by-law is, as in my opinion it is, an invalid by-law, being repugnat to the laws of that part of the United Kingdom in which Tavistock is situated, it follows that the defendant Council are not entitled to prevent the plaintiff and other farmers or Mr. Callaway and other auctioneers from selling their cattle in the market by public auction except upon such part of the cattle market place as may have been lawfully leased to the auctioneer-lessees exclusively."

This statement along with others cited in the case shows that section 29(d) in the Interpretation Act is a statutory declaration of a common law canon of construction.

The relevant Act was in this case the Occupier's Liability Act and section 6(1) is pertinent because it governs

the duty of care in all instances where the parties are in contractual relations for loss on premises. A stall-holder can rely on the implied conditions in the contract. Here is how the provision is made in section 6(1) of this Act:-

> "Section 6(1) - Where any persons enter or use, or bring or send goods to any premises in exercise of a right conferred by a contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care."

When this section is read in conjunction with section 140 of the K.S.A.C. Act above, then the liability of the corporation is emphasised.

As for the unchallenged evidence of rental it is as follows in the evidence of Dale:-

> "The tenancy commenced in 1982. I paid rental for the stall I occupied, when I paid rental I got receipt."

In the light of these provisions and the evidence it is clear that the K.S.A.C. had no power to exempt itself from the 'common duty of care' where the liability is grounded in contract, and the finding of the Magistrate in favour of the K.S.A.C. on this aspect of his ruling cannot be supported. It is necessary to show why the learned Magistrate erred. Here is the basis of his decision:-

> "If we regard Defendant as occupier and plaintiff as visitor what we have herein is a statutory provision Rule 6 of the K.S.A.C. (Market) Rules 1944 which forms part of the letting agreement between the parties and under which any duty by defendant to plaintiff under this act is excluded."

As the learned judge regarded Dale as a visitor rather than a stall-holder in contractual relations with the K.S.A.C. he applied section 3(1) of the Occupiers Liability Act which is as follows:-

> "3(1) - An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise."

This was the wrong approach so his ruling in that regard must be set aside.

It is appropriate at this stage to state that the Magistrate ruled against the K.S.A.C. that the limitation period provided in the Public Authority Act applied to the circumstance of this case. There was no cross appeal on this issue. The other ground on which the learned Magistrate ruled in favour of the K.S.A.C. was that there was not 'sufficiency of proof.' This was how he disposed of the matter:-

> "Plaintiff alleged damage to his goods on 4 dates or 4 groups of dates. The acceptable evidence given relates only to the damages occurring on 26th May, 1984 for which a sum of $257 was claimed (see findings (a) and (b). Having regard to findings (d) to (j) inclusive I am of the opinion that Plaintiff has failed to show any connection between the rain falling on P.C.A. on 26th May, 1984 and any loss allegedly suffered by him. He has failed to mitigate his loss or explain why not. Consequently I regard him as the complete author of his own misfortune. I hold therefore that Plaintiff's evidence properly related only to the claim for $257 and further that the evidence to substantiate that claim is not sufficient. Under this head I found in favour of Defendant."

To appreciate the basis of this ruling it is necessary to consult the record to ascertain how the issue arose. Initially there was an application for Dale to refresh his memory. It was recorded thus by the Magistrate -

> "Mr. Francis on behalf of Plaintiff applies to have witness permitted to refresh his memory from the documents on yellow paper.
>
> Mr. McBean on behalf of Defendant objects - present documents not contemporaneous - also witness admitted that he has thrown away originals - Court and Defendant denied opportunity to test accuracy of alleged transcription."
>
> Permission not Granted

Here is how the judge noted the evidence as regards when the damage was recorded -

> "The morning of 26th May, 1984 I went there and noticed all my stuff damaged by rain. I arrived there at 10:00 a.m. I discovered a whole heap of my things got damaged by rain. It rained that morning. I made a list of the things damaged. I started making the list about 20 minutes after I arrived. I have the list with me.
>
> I made entries re the tenancy losses on 4 pieces of paper and transcribed the entries on a yellow piece of paper. I accurately transcribed the material of 4 documents to the piece of yellow paper."

The next stage is as follows:-

> "I made my own documents when clerk from K.S.A.C. came to assess damage. I came to Court and the opposing lawyer said I did not have the paper. I went back home same day and searched in garbage and found the papers. I have the pieces of paper now. All these 4 papers are in my handwriting.

> "I wrote each of the papers when
> I found my things damaged.
>
> (4 documents dated May 26, 1984,
> 6.6.84. 5.5.85 tendered in
> evidence and accepted Exhibit 2a,
> b, c, e, d). The documents
> contained the value and price of
> the goods that were destroyed.
> Claiming from Defendant $2380.00.
> Before I brought Plaintiff I did
> attempt to get compensation from
> them. Claiming damages from
> Defendant for goods damaged on
> 4 occasions.
>
> XXD
>
> All that happened was that rain
> fell and leaked on goods. I
> still then had the goods. I never
> attempted to sell the goods that
> got wet. I never tried to hang
> out the goods to dry-no goods at all.
> I pay market fees. Representatives
> of market (K.S.A.C. come into market
> from time to time. I have written
> agreement with K.S.A.C. I pay at
> market to representative of K.S.A.C.
> weekly. I said $30.00 per week in
> 1984. I'm saying K.S.A.C. was my
> Landlord."

There does not appear to have been any objection to the reception of the four documents. This was significant since Mr. McBean for the K.S.A.C. objected when permission was sought for Dale to refresh his memory. It would appear that in refusing to permit Dale to refresh his memory, the learned judge exercised his discretion wrongly as there was no challenge to his evidence that he made a list of the things damaged when dealing with 24th May, 1984 and when dealing with the four occasions he said I wrote each of the papers when "I found my things damaged."

The Magistrate found the evidence as regards the 24th May as "acceptable" but held that there was no connection between the rain and the damage to the goods.

The basis of accepting the evidence which was contained in the document of 24th May must have been that the respondent consented to its acceptance and it follows that the evidence in the three documents ought also to have been accepted on the basis of consent. In such circumstances it was open to this court to find for the appellant on this basis.

This was not necessary as the case took an interesting turn which must now be examined, Mr. Francis for Dale submitted that he took notes during the course of the trial and that the Magistrate's notes were inadequate on a vital aspect of the case. Mr. McBean conceded that those notes reflected the evidence of Dale except for minor details on dates, so there was no need to refer Counsel's notes to the Magistrate for his comments.

Here is the extract from Counsel's note -

> "The same morning in question when the things were damaged. I got piece of paper make a list of them. The morning when I was coming to court I was sweeping my house. I swept them out. When I heard Mr. McBean said at Court that I should have them I went home and looked for them.
>
> Court - I don't remember date I found them.
>
> It was the same day that I came to Court that I went back and search and found them. Documents tendered in evidence in Exhibit 2D.
>
> To Court - I remember the dates and the total on each document. The first one is the 26th May, 1984 The total of the goods $257.00 The next paper was in June 1985. The value of the goods damaged is $593.00 The next one is October 1985 $1090.00 The next one is May 1984 for $440.00."

When this fuller note is compared with the Magistrate's note it reinforces the contention that the exhibits were tendered with the consent of the respondent and there was sufficient new evidence to connect the exhibits with the loss. He was asked questions on the exhibits by the Magistrate which he answered and Mr. McBean made no objection to this procedure.

It is against the background of both sets of notes that Mr. McBean's cross examination above must be assessed.

This cross examination must have been related to the goods damaged on the four occasions to which the evidence led referred and consequently as there was no evidence led on behalf of the K.S.A.C. and this was credible evidence, it ought to have been acceded to. As to the evidence that rains caused the damage, direct evidence on this was given on May 26th and inferential evidence as regards the other occasions. A finding therefore must be made in favour of Dale for $2,380.00 damages. In those circumstances the appeal succeeds. The order below is set aside and costs of $500.00 are to be paid to the appellant.

FORTE, J.A.

I AGREE.

BINGHAM, J.A.(AG.)

I AGREE