

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1976/R199

BETWEEN REDIMIX CONCRETE LTD. PLAINTIFF
AND KEN HARE DEFENDANT

Dennis Goffe and Miss Christine Isaacs for Plaintiff.

Dr. Adolph Edwards for Defendant.

Heard: December 6, 17, 1984.

Wolfe J.

The Plaintiff herein seeks to recover from the Defendant the sum of Six Thousand and Ninety Dollars and Forty Two Cents (\$6,090.42) being the balance due and owing by the Defendant to the Plaintiff for goods sold and delivered. The Defendant at the hearing admitted owing the sum of One Thousand Five Hundred and Fifty Three Dollars and Eighty Two Cents (\$1,553.82). It must be pointed out at this stage that the sum admitted relates to goods sold and delivered to the Defendant in respect of a project known as the Cunningham Avenue project whereas the balance of Four Thousand Five Hundred and Thirty Six Dollars and Sixty Cents (\$4,536.60) is for goods supplied in respect of the Belgrade Mews project. The significance of this division will in due course be made apparent.

The Plaintiff carries on the business of supplying bulk concrete to construction sites. The Defendant is a contractor engaged in the construction industry. Over a period of time the Plaintiff supplied concrete to the Defendant at a building site known as Belgrade Mews. The Developers of the Belgrade Mews project were Life and General Insurance Brokers Ltd., now defunct. The Plaintiffs experienced difficulties in receiving payments for concrete supplied to the project and indicated to the Defendant that further supplies of concrete would be discontinued. A discussion

ensued between Plaintiff and Defendant whereupon the Plaintiff decided that supplies of concrete would only be resumed if the Defendant gave authority in writing to the Developers, Life and General Insurance Brokers Ltd. to deduct from amounts due to the Defendant such sums owing for concrete supplied from time to time. The Defendant agreed to this and consequent thereto issued in writing the requested authority to the Developers. The authority is couched thus:

Re Belgrade Mews

"This irrevocably authorises you to pay to Redimix Concrete Limited of 7 - 9 Harbour Street, Kingston, amounts due from time to time for concrete supplied and delivered to the above project so soon as bills showing proof of delivery are submitted".

The Plaintiff approved the nature of the authority given and the Developers indicated to the Plaintiff that they were prepared to act upon the instructions of the Defendant.

In accordance with the instructions the Developers made two payments to the Plaintiff and retained an amount of Four Thousand Five Hundred and Thirty Six Dollars and Sixty Cents (\$4,536.60) from amounts due to the Defendant for payment to the Plaintiff. This amount was however never paid to the Plaintiff and has remained unpaid.

The facts are not in dispute. What is strenuously disputed is the effect of the authority upon the contractual relationship of the parties.

Dr. Edwards for the Defendant contends that the written authority given by the Defendant to the Developers has the effect of removing liability from the Defendant as long as the authority remains in force and as long as the Developers are holding funds due to the Defendant. If this contention is sound then the law would be facilitating the easy escape of debtors and would be placing creditors

at a distinct disadvantage.

It is argued that the request made by the Plaintiff for authority to be given to the Developers to pay amounts due for the supply of concrete and the subsequent compliance by the Defendant has the effect of estopping the Plaintiff from seeking to recover from the Defendant. Dr. Edwards refers to it as promissory estoppel and cites Halsburys Law of England 4th Edition Volume 9 paragraphs 575-8 in support.

Paragraph 575.

"Similiar to waiver is the doctrine of promissory or equitable estoppel whereby a party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resite from that position or will be allowed to do so only upon giving reasonable notice".

The question arises what strict right has the Plaintiff represented it would not be insisting upon? Iddare say no such representation is disclosed by the evidence. On the contrary the Plaintiff seeks to reinforce its right to be paid by the Defendant by ensuring that amounts due to it are paid directly by the Developers out of funds belonging to the Defendant and before such amounts can be applied for other purposes.

Paragraph 578

"Another requirement of promissory estoppel, which may be based on the same ground as alteration of position is the rule that it must be inequitable for the representor to insist on his strict legal rights under the contract".

At no time did the Plaintiff indicate that it would not require the Defendant to pay for the goods supplied. While the channel through which payment was to be effected was varied I am of the view that it cannot be successfully contended that it would be inequitable for the Plaintiff to insist upon being paid by the Defendant. The strict legal right under the contract is the right to be paid for

goods supplied to the Defendant and at no time did the Plaintiff ever represent that the Defendant would be relieved of this responsibility.

In fact the Defendant had this to say when he testified:

"Redimix did not tell me that if the Developers did not pay in accordance with the authority I would not have to pay".

I therefore hold that the plea of promissory estoppel fails:

NOVATION

Novation is an act whereby with the consent of all parties, a new contract is substituted for an existing contract and the latter discharged. Usually, but not necessarily, a novation takes the form of the introduction of a new party to the new contract and the discharge of a person who was a party to the old contract. The evidence in the instant case does not support the principle of novation.

Mr. Goffe for the Plaintiff cited and relied upon paragraphs 337 and 477 of Halsbury's Laws of England supra.

Paragraph 337

"As a rule a party to a contract cannot transfer his liability under that contract without the consent of the other party. This rule applies both at common law and in equity and is generally unaffected by statute.

There is, however no objection to the substituted performance by a third person of the duties of a party to the contract where those duties are not connected with the skill, character or other personal qualifications of that party. In such circumstances, however, the liability of the original contracting party is not discharged, and the only effect is that the other contracting party in addition, may be able to look to the third party for the performance of the contractual obligations".

In the light of the foregoing while the Plaintiff may be able to look to the Developers to act in accordance with the authority given to it by the Defendant, the Defendant is not discharged from his obligation under the contract viz the payment of the purchase price for goods delivered to him by the Plaintiff.

Paragraph 477 is my view a restatement of the principle mentioned in paragraph 337 supra.

It must be stated that the Defendant conceded that the written authority did not have the effect of creating a new contract.

Finally it cannot be said that the Developers in conveying to the Plaintiff that they were prepared to act upon the written instruction of the Defendant were guaranteeing the debt of the Defendant. Giving the words their ordinary meaning they amount to no more than the Developers saying, the Defendant has given us instructions to pay to you, upon the presentation of bills, such amounts claimed by you for the supply of concrete and we are prepared to act upon those instructions. In my view the Developers assumed no liability by so acting nor did the Plaintiff by indicating that the arrangements were satisfactory release the defendant from his obligation to pay for concrete supplied.

In any event, even if it could be said that the Developers were guaranteeing payment, a contract of guarantee or suretyship, as it is sometimes referred to, does not have the effect of releasing the principal debtor. Its effect is that if the principal debtor does not pay then the creditor can have recourse to recovering from the guarantor or surety.

For the foregoing reasons I hold that the Plaintiff is entitled to recover from the Defendant the sum of Four Thousand Five Hundred and Thirty Six Dollars and Sixty Cents (\$4,536.60).

There will therefore be judgment for the Plaintiff for the sum of Six Thousand and Ninety Dollars and Forty Two Cents (\$6,090.42) with Costs to be taxed if not agreed.