

30-09-03

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 21 of 2003
(Grand Court Cause No. 785 of 2002)

BETWEEN

MICRO INDUSTRIES LTD.

Plaintiff/Respondent

AND

CONDOCO GRAND CAYMAN RESORT LTD.

Defendant/Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I. Rowe, Justice of Appeal
The Honourable Mr. Justice M. Taylor, Justice of Appeal

Julian Malins, Q.C., and Kyle Broadhurst, for the Appellants
Raymond Alberga, Q.C., and Anthony Menzies, for the Respondents



Heard: July 28, 2003

Reasons released: September 30, 2003

REASONS FOR DECISION

TAYLOR, J.A.

The appellant purchaser comes to this court for a second time seeking specific performance of the same agreement for sale of a condominium apartment in the Ritz Carlton complex now being built by the respondent on Seven Mile Beach.

In the first action the purchaser sought specific performance of the contract as it relates to the floor area of the unit, which appears in materially different figures in the contract and attached plan. In dealing with this 'horizontal' dispute, a Grand Court judge gave summary judgment in favour of the purchaser but deferred for trial the question whether specific performance should be granted, or only damages. This court upheld the judge's decision on the construction of the agreement, found no basis on which the purchaser could be provided with a smaller suite than that contracted for, and held that specific performance should therefore be ordered summarily. During the hearing of the appeal we were told that the purchaser had started the present second action, one seeking specific performance of the agreement with respect to floor-level siting – the 'vertical' location of the apartment.

In issue in this second action is the meaning of the term of the agreement locating the apartment on the fourth floor of what was to have been a five-storey structure, when construed in the light of a subsequent decision by the vendor to increase the height of the building from five to seven storeys. The purchaser claims the right in these circumstances to have a sixth-floor unit, contending that the contract is one for "sub-penthouse" accommodation. The issue is whether the suite contracted for is one located three stories up from the bottom or one storey down from the top. The action calls into question, among others, those provisions of the contract giving the vendor the right to change the development plan.

The purchaser seeks also to extend the scope of the second action so as to plead a breach by the vendor in adding to the planned development, in proximity to the purchaser's suite, a number of units which will not be owner-occupied, but instead rented out. The purchaser contends that this would result in the apartment contracted for being different in substance from that promised by the agreement, and presumably less valuable.

Applications by both sides were brought on together. The vendor sought summary dismissal of the action while the purchaser sought summary judgment for specific performance and leave to amend so as to add the claim with respect to the proposed addition of rental accommodation. The vendor sought summary dismissal based on the order of this court determining the first action and on the ground that the claim in the second is without merit. The parties agreed that what may be described as the *res judicata*-related argument be first dealt with, and all other issues raised by the applications for summary judgment from both sides be heard later, if need be, as also the purchaser's application to add the further claim.

The Grand Court judge allowed the vendor's application for summary judgment on the *res judicata*-related issues, and dismissed the action in its entirety. We allowed the appeal and referred the matter back to the trial court for determination of all issues remaining to be dealt with. We said that we would later provide written reasons.

The vendor's position on the sole issue before us was that the present dispute ought to have been brought on for decision by the purchaser in, or contemporaneously with, the first action, and that, having failed to have the matter dealt with prior to our decision in the first action, the purchaser is either barred by the rule in *Henderson v. Henderson* from litigating it or should be taken to have effectively concluded the dispute when it approved a formal order of this court in that action describing the apartment by a unit number showing it to be located on the fourth floor. The vendor contended that it could not conform with the decree of specific performance now sought -- that is to say one stipulating for a sixth-floor unit -- without contravening the existing decree calling for one on the fourth floor.

The trial court judge stated the principle laid down by Vice Chancellor Wingram in *Henderson v. Henderson* (1848) [1843-60] All E.R. 378 (at pp. 381-2):

In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata applies*, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but *to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.* [Emphasis added]

The question was twofold: (i) whether the purchaser ought to have brought the vertical dispute forward for resolution before taking its decree of specific performance in this court in the first action; and (ii) whether by taking that decree in terms referring to a fourth-floor suite, the purchaser should in any event be deemed to have accepted a resolution of the floor-level dispute as well as of that relating to the area of the apartment.

The sequence of events in the two actions is important.

The summons by the plaintiff purchaser for summary judgment in the first action came on for hearing on April 24, 2002. The trial court judge gave judgment in that action on May 14, 2002, finding for the purchaser on the interpretation of the contract regarding floor area but leaving for trial the question whether specific performance should be decreed or only damages awarded. At a hearing on June 4, 2002, to settle this order, counsel for the purchaser mentioned

the possibility of a further claim relating to a planned increase in height of the building, but counsel for the vendor said no such decision had been made, that if an increase in building-height were permitted by the planning authority the vendor might not take advantage of it, and thus that any such claim was 'premature'. On July 15, 2002, after the vendor had appealed the summary judgment in the first action but before the purchaser had cross-appealed, the vendor's solicitors wrote in response to correspondence from the purchaser's solicitors that with respect to the possible increase in building size "the debate is entirely premature pending determination of the issue of planning consent and, thereafter, the communication to your client of the decision (should, indeed, that be the decision) to proceed". On October 25, 2002, the purchaser issued its writ and statement of claim in the second action asserting that such a decision had in fact been made. The fact that it had been made was confirmed by the vendor when it filed its defence to the second action on November 27, 2002.

Meanwhile, on November 18 and 19, 2002, the appeal and cross-appeal from summary judgment in the first action came on for hearing before this court. During that hearing counsel for the vendor brought the writ and statement of claim in the second action to our attention, suggesting that the bringing of this further action disentitled the purchaser to the relief sought in the first, a position that we did not accept. On November 28, 2002, we dismissed the vendor's appeal from summary judgment in the first action, allowed the purchaser's cross-appeal and ordered specific performance in respect of the square footage of the apartment for which the purchaser contended, the only matter in dispute in those proceedings.

The formal order of this court in that action, dated November 28, 2002, directed specific performance in the following terms:

Pursuant to Order 86 of the Grand Court Rules 1995, that the Plaintiff be granted specific performance of the written agreement and addenda dated the 7th of February 2000, wherein the Plaintiff agreed to buy and the Defendant agreed to build and sell to the Plaintiff an apartment, with approximately 5490 square feet of liveable area, numbered 411, to be contained in a building to be constructed by the Defendant on the north part of the land described as Registration Section West Bay Beach South, Block 12C, Parcel 11 in consideration of a purchase price of US\$2,875,000.

The reference to the number "411" is taken from the agreement as the number there given to the suite to be sold to the purchaser. The agreement and associated plans show that this suite is located on the fourth level. But whether the vendor would be entitled under the agreement to add further floors to the original plan for the building was in no sense before this court on that appeal, nor was the question whether the purchaser would in that event be entitled to an apartment located on a floor other than the fourth.

In written reasons dismissing the present action, the Grand Court judge observed that at the time of the appeal in the first action the purchaser was already aware that the vendor intended to build a seven-storey structure and "could have asked in that action for an order detailing the square footage without identifying the apartment as no. 411, as specified on the plan, being noted on the order". The judge concluded that the purchaser "was content at that time to specifically ask for apartment 411" and was "estopped from seeking specific performance of the same contract in the terms that the relief is now sought". The judge did not find it necessary to deal more specifically with application of the rule in *Henderson v. Henderson* (above).

Considered in the context of the pleadings in the first case, and of our reasons for judgment on that appeal, the reference to the apartment number stated in the agreement cannot in our view be determinative of the question of the proper vertical location of the apartment in the

event the building were constructed to a different height than that originally contemplated. This was known to be a matter in issue between the parties, but the parties knew, as the record plainly shows, that it was not in issue in that action. The reference to the apartment number in the order served to describe the subject matter as stated in the contract, but the vendor could not by this reference have been misled into believing that the issue raised in the second action had thereby been decided in the first, so as to give rise to an estoppel.

Thus the real question on the present appeal, in our view, was whether under the rule in *Henderson v. Henderson* (above) the purchaser was obliged to bring the second claim before the court for decision as part of, or contemporaneously with, the first action.

It cannot, of course, be said that a contracting party is entitled only to one decree of specific performance in respect of any contract – that would be a licence to the other to breach at will thereafter those terms not dealt with in the initial litigation. The rule in *Henderson v. Henderson* (above), as re-stated by Lord Keith in *Arnold et al. V. National Westminster Bank plc*, [1991] 2 A.C. 93, in a passage (at p. 97) quoted by the trial judge, stands rather for the proposition that it will be an abuse of process for a party to raise in a later proceeding issues which were clearly part of the subject matter of the earlier proceedings between the same parties, and could clearly have been raised in that earlier action.

In this case the ‘vertical’ dispute could not have been argued as part of the first appeal, because there was no trial decision on the point that could be appealed. It could not have been raised in the trial court prior to summary judgment being given in that action because, as the vendor’s counsel stated at that time, no decision had then been made to alter the proposed building height. The vendor’s position on the present appeal is that the purchaser could and

should either have acted to seek a *quia timet* injunction restraining an anticipated breach of contract, or have applied to add the present claim in the first action after summary judgment on all liability issues had been given in that action, and at the latest before the Court of Appeal made its order. Counsel contended before us that if the new claim had to be brought in a separate action, that action should have been dealt with, "or provided for at some point", prior to the order of this court decreeing specific performance in the first.

The law as laid down in *Eshelry v. Federated European Bank Ltd.* (1931), All E.R. 840 (Div.Ct.), is that a writ cannot be amended to add a cause of action which did not exist at the time the writ was issued: see also *Roban Jig & Tool Co. Ltd. et al. v. Taylor et al.*, [1979] F.S.R. 130 (C.A.). There were no grounds on which the purchaser could have obtained a *quia timet* injunction, nothing having been threatened which could have prejudiced its rights before the cause of action accrued. We know of no authority for the proposition that the second action should have been brought on for decision prior to resolution of the appeal in the first. The purpose of the rule in *Henderson v. Henderson* would not, in our view, be served in circumstances such as these by denying the aggrieved party the right to obtain relief in an action for one breach of contract until all subsequent breaches that might be alleged to have occurred were also brought on for adjudication in later actions. Such a requirement could, indeed, prove as much an impediment to the prompt resolution of disputes between the parties as the mischief that the *Henderson* rule seeks to prevent.

It was for these reasons that we allowed the appeal, ordered that the Writ and Statement of Claim be re-instated, and directed that all other matters raised by the applications of both parties be remitted to the trial court for hearing and determination.

We ordered that the appellant have its costs here and below, to be taxed if not agreed.

E. Zacca, P.

I.D. Rowe, J.A.

M.R. Taylor, J.A.

