SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2009/026

BETWEEN:

ANTHONY JOHN

Appellant

and

ANTOINE MONERO

Respondent

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Ms. Diana M. Thomas for the Appellant
Mr. Vernantius James for the Respondent

2010: October 26;
2011: June 21.

Civil appeal – Contract – Privity of contract – Third party rights derived from a contract – Contract for the benefit of a third party – Contracts (Rights of Third Parties) Act 1999 [UK] – Articles 961-964 of the Civil Code of Saint Lucia, Cap. 4.01 Revised Laws of Saint Lucia 2006 ("the Civil Code") – Articles 1161-1167 of the Civil Code – Evidence admissible in proof of a matter by way of testimony – Article 230 of the Code of Civil Procedure – Contracting in one's own name that another shall perform an obligation

On 16th July 2000, the vehicles of the appellant, Mr. John, and the respondent, Mr. Monero, collided on the highway. Mr. Monero's vehicle ("the vehicle") sustained damage and Mr. John, a police officer, is said to have accepted liability for the loss. He agreed at the scene of the accident to have Mr. Monero's vehicle repaired to its pre-accident condition; at the time, the pre-accident value of the vehicle was said to be $30,000.00. Mr. John agreed with Michel, a repairman, to have the vehicle repaired at a cost of $3,500.00. Between them, an arrangement was made for the sum of money to be paid by initial deposit and then by instalments. Mr. John had also undertaken to supply Michel with

replacement parts for the vehicle so that it could be repaired. Michel commenced repairs on the vehicle during the first few weeks of its arrival at his garage. The repairs were never fully completed however, since Mr. John never fully paid the agreed sum which was required to complete the repairs and also because he never supplied the replacement parts as he had promised. The vehicle remained in this state (of not being fully repaired) for up to three years, and Michel refused to release it until he had received payment for the work that he had done on it so far. All this time, the vehicle was left unattended and exposed to the tropical elements and it eventually deteriorated to the point where it could only be considered as a total loss. Mr. Monero initiated legal proceedings against Mr. John on 4th April 2006, his claim in contract based on the alleged breach of the agreement said to have been made between himself and Mr. John on the date of the accident – to have the vehicle repaired to its pre-accident condition. Mr. Monero's claim was also based on the breach of the agreement between Mr. John and Michel, the repairman, whom he had contracted with to carry out the repairs on the vehicle. The learned trial judge entered judgment in favour of Mr. Monero in the sum of $30,000.00 – the pre-accident value of the vehicle – plus 30 days loss of use at the rate of $100.00 per day, together with interest and prescribed costs. Mr. John appealed.

Held: dismissing the appeal and confirming the judge's award of damages and the entry of judgment for the respondent, and ordering that the appellant bear the costs of the appeal fixed at two-thirds of the sum awarded in the court below, that:

1. The trial judge found that there existed two separate and distinct agreements, one between Mr. Monero and Mr. John, and the other between Mr. John and Michel. In respect of the latter agreement, Mr. Monero, in his own right (and without relying on third party rights), would have been entitled to claim damages for breach, as, clearly on Mr. John's evidence, not only did he breach the contract as between him and Michel, but that breach also brought about the breach of the contract as between him and Mr. Monero.

2. Mr. John's testimony on oath would have satisfied Article 1163(7) of the **Civil Code** as well as its sweep up provision for the purposes of Article 1163(2) which accordingly would have rendered the oral testimony of Mr. Monero admissible as proof of the agreement between him and Mr. John, for the repair of the vehicle.

3. Mr. John agreed with Mr. Monero to repair and restore the vehicle to its pre-accident condition having damaged it, and engaged Michel to do so. Mr. John breached the terms of his engagement with Michel, and in so doing breached his agreement with Mr. Monero on which he remained liable. This case falls squarely within the four corners of Article 961 of the **Civil Code** which says that a person "…may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated". Thus, even if Michel had been the party in breach, Mr. John would have nonetheless remained liable to Mr. Monero on his contract with him. The position here is that Mr. John has breached both agreements and he does not escape liability merely because Mr. Monero seeks to rely on his (Mr. John's) breach of contract with the repairman. Indeed, it is his breach of the repairman's

contract which caused the breach of his contract with Mr. Monero for the restoration of the vehicle to its pre-accident condition. Accordingly, Mr. John would be liable in any event for the consequences flowing from the breach, be it his breach or the repairman's breach.

Demers Estate v Dufresne Engineering Co. [1979] 1 S.C.R. 146 distinguished.

4. It would have been reasonably foreseeable by Mr. John, that his breach of the repairman's agreement which resulted in the breach of his agreement with Mr. Monero, would have caused Mr. Monero to suffer loss, as well as loss of use of the vehicle, the same having not been repaired at all and now beyond economic repair. Further, the pre-accident value of the vehicle was not seriously disputed. Accordingly, the trial judge's award of damages is not unreasonable in the circumstances as the appropriate reflection of loss flowing from Mr. John's breach of his agreement with Mr. Monero.

JUDGMENT

[1] **PEREIRA, J.A.[1]:** This appeal arises from the judgment entered in favour of the respondent, Mr. Monero, in the sum of $30,000.00 (that being the pre-accident value of his motor car), plus 30 days loss of use at the rate of $100.00 per day, together with interest at the rate of 6% per annum from the date of the claim to the date of payment, and prescribed costs of $9,000.00. This judgment was given against the appellant, Mr. John. At the heart of Mr. John's appeal was the question whether the trial judge erred as a matter of law in awarding these sums to Mr. Monero who had claimed in reliance on the breach by Mr. John of a repairman's contract between Mr. John and the repairman, one Michel (of Michel's Garage), in the sum of $3,500.00.

Background

[2] The background giving rise to the claim may be stated thus:

(a) On 16th July 2000, the vehicles of Mr. Monero and Mr. John collided on the highway. Mr Monero's vehicle ("the vehicle") sustained damage. Mr. John, a police officer, is said to have accepted liability for the loss and agreed to have the vehicle repaired to its pre-accident condition. The pre-

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[1] Formerly George Creque JA.

accident value of the vehicle was said to be $30,000.00. Mr. John then agreed with Michel to carry out those repairs which were to cost $3,500.00. Mr. John caused Mr. Monero to take the vehicle to Michel's Garage. Mr. John was to pay to Michel an initial deposit of $1,500.00 so that the repairs could be commenced and the balance overtime, during the progress of the repairs. Some monies were paid to Michel but it is not clear whether Mr. John had in fact paid the initial deposit. Some repairs were done, but Mr. John never paid to Michel the agreed sum required for completing the repairs nor did he supply various replacement parts for the vehicle which he had also undertaken to do. The result was that the vehicle was never fully repaired up to more than three years later. The vehicle remained at Michel's Garage who had refused to release it until he received payment by Mr. John for the work he had done.[2] Needless to say, the vehicle left unattended in the tropical elements deteriorated to the point where it could only be considered as a total loss.

(b) Mr. Monero initiated legal proceedings against Mr. John well nigh six years later, on 4th April 2006. His claim was based in negligence and also in contract, based on the alleged breach of the agreement said to have been made by Mr. John on the date of the accident that he would repair the vehicle to its pre-accident condition and also on the basis of the agreement made by Mr. John with the repairman for carrying out the repairs. He pleaded particulars of the breach of contract as being Mr. John's failure to comply with the terms of the agreement as between him and Michel.

(c) As such Mr. Monero claimed damages in the sum of $69,600.00.

(d) Mr. John took the point in his defence that the claim in negligence was prescribed, three years having expired from the time the cause of action

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[2] Michel gave evidence to the effect that Mr. Monero had sought to have him complete the repairs and release the vehicle to him but he refused to do so as his contract was with Mr. John who had failed to make payment as agreed.

arose, applying Articles 2122 and 2129 of the **Civil Code**.[3] The master accordingly ruled that the cause of action in negligence was extinguished. The claim accordingly proceeded on the basis of Mr. John's breach of contract having implicitly accepted liability and having undertaken to repair Mr. Monero's car, and having contracted with Michel to effect the said repairs at the cost quoted and agreed with Michel.

(e) At paragraph 6 of his judgment the trial judge summed up the remaining cause of action this way:

> "The claimant therefore relies on third party rights derived from a contract entered into by third parties namely the defendant [(Mr. John)] and Michel the auto body repairman for his benefit sometimes referred to as the jus tertii"

The trial below

[3] At the hearing of the appeal the Court felt constrained to resolve the question as to which contract the learned trial judge based his decision. In some instances he spoke of one agreement and in other instances he spoke of the other. At paragraph 11 of the judgment, after having recounted the evidence of Mr. John as to how the collision occurred the trial judge said "[o]n a balance of probabilities the defendant (John) would be liable for the ensuing damage to the claimant's car." However, such a finding, in my view, is relevant only in respect of the tort of negligence which had already been ruled upon as being prescribed. Nevertheless in the same paragraph the learned trial judge went on to say this:

> "I am equally satisfied that the defendant then and there accepted liability for the repairs to the claimant's car as the claimant told the court."

In my view, this conclusion without more, does not take the matter out of the realm of admission of liability in respect of a tortious act.

[3] Cap. 4.01 Revised Laws of Saint Lucia 2006.

[4] At paragraph 12 the learned trial judge stated thus:

> "... the defendant agreed that he would pay for the cost of labour and parts to repair the claimant's car and undertook to do so after entering into an agreement with Michel ... to pay for [the] same at his own expense on the basis of a cost estimate of $3,500.00..."

It is not clear whether the reference here to an agreement is in respect of the 'John/Michel' contract or is a reference to an agreement between Monero and John or is a reference to both agreements – one as between Monero and John, and the other as between Michel and John.

[5] Again at paragraph 16 of his judgment the learned trial judge had this to say:

> "It was mutually agreed between the parties that the defendant would be responsible for providing all necessary replacement parts for the repair work at his expense although the claimant offered to assist in their procurement. ... The claimant contended that as a result of the defendant's failure to honour his contractual obligations with Michel not only did the initial repair work remain undone but the car had in the meanwhile also sustained further damage and deteriorated"

This would appear to be a reference to parties to the action namely Monero and John and the recognition that John also had an agreement with Michel to carry out the repairs.

[6] Further, at paragraph 18 the learned judge concludes thus:

> "It will be recalled that the pre-accident value of the car as at July 2000 was $30,000.00 and that the **defendant's agreement with the claimant was to repair/restore his car to its pre-accident value"** (my emphasis).

This statement in my view, clearly establishes that the trial judge found that there was an agreement as between Mr. Monero and Mr. John, separate and distinct from the agreement between Michel and Mr. John. In respect of this agreement, Mr. Monero, in his own right, (and without relying on third party rights) would have been entitled to claim damages for breach, as, clearly on Mr. John's evidence, not only did he breach the contract as between him and Michel, but that breach also brought about the breach of contract as between him and Mr. Monero.

[7] At paragraphs 22 and 23 the learned trial judge clearly appreciated that there were two agreements. He said as follows:

> "[22] The contractual obligation of the defendant [(John)] was to repair/restore the claimant's car to its pre-accident condition at his expense. This was estimated at $3,500.00 and the car was left in the possession custody and safe keeping of Mr. Michel for that purpose.
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> [23] The defendant would clearly be liable to Mr. Michel for any balance due and owing under the collateral agreement between themselves for repairs to the claimant's vehicle…"

[8] At paragraph 24 of his judgment the trial judge roundly rejected counsel for Mr. John's contention that Mr. John did not agree to repair Monero's vehicle. He said in part this:

> "For example the Court is invited to find that the defendant did not agree to pay for the repairs to the claimant's car whilst the defendant himself conceded that he had under cross-examination. I am satisfied that it is this which led to the collateral agreement between Michel and himself for the benefit of the claimant and Michel's testimony corroborates that fact. **It is that in my opinion which constitutes the nub of this case."** (my emphasis)

[9] It appears to be as from paragraph 24 beginning with the last highlighted sentence that the focus shifted from the main agreement between Mr. Monero and Mr. John, (whereby Mr. John undertook to repair the car to its pre-accident condition) to what the learned judge terms as the collateral contract between Michel and Mr. John and his consideration of Mr. Monero's entitlement to the benefit of that collateral contract. It is from this point onward that the issue becomes somewhat muddled as it appears that the learned trial judge was then dealing solely with the collateral contract and Mr. Monero's entitlement to benefit from it. He rejected Monero's claim for $69, 600.00.[4] At paragraph 31, the learned trial judge also had this to say:

> "And whilst it is true that the defendant had breached his agreement by reneging on his obligation to pay even the full deposit of the cost of repairs of the claimant's vehicle to the auto body repairman and … never even turning back to ensure that he [sic] claimant's vehicle had been repaired

[4] See paragraphs 30 and 31 of the learned judge's judgment.

> and restored to its pre-accident condition **as promised** (my emphasis) it is my considered view that although his conduct was a contributory factor it certainly was not the dominant cause of the additional loss or physical damage to it and blame cannot be placed wholly at his feet therefor [sic]. The amount claimed for a start appears to be grossly exaggerated and is based on an undated and wholly unsubstantiated report by a mechanic who did not himself testify..."

From all this it is apparent that in this passage the trial judge was addressing the claim for $69,600.00 which he considered to be excessive in the context of the repairs necessary to restore the car based on its further deteriorated state.

[10] At paragraph 32 the learned trial judge concluded, so far as is relevant, as follows:

> "Therefore looking at the entire case in the round it is my view that the ends of justice would best be served by entering judgment for the claimant in the sum of $30,000.00 that is to say the pre-accident value of his car plus 30 days loss of use at $100.00 per day general damages with interest at 6% per annum from the date of filing the claim to date of payment and prescribed costs of $9,000.00 in accordance with Part 65.5(1) CPR... ."

In my view, it is not clear as to which contract this award of damages is based. Clearly, there were two contracts in operation here as expressly found by the trial judge and set out in paragraphs 22 and 23 of his judgment referred to above. No good reason has been advanced for upsetting those factual findings. It was clearly open on the pleaded cases and on the evidence adduced at trial to arrive at those findings.[5] However, if it is considered that the award was based on the collateral third party contract which the trial judge stated as being the nub of the case then the question arises whether as a matter of law the sum representing the pre-accident value as well as loss of use was properly recoverable from Mr. John pursuant to that contract. I now address this.

The Third Party or collateral contract

[11] Touching on this aspect of the matter the parties were directed to file further submissions touching on Articles 961-964 and 1161-1167 of the **Civil Code of St.**

[5] See Benmax v Austin Motor Co. Ltd. [1955] 1 All E.R. 326; Watt (or Thomas) v Thomas [1947] 1 All E.R. 582.

Lucia[6] ("the **Civil Code**). Articles 961-964 of the **Civil Code** may broadly be categorised as provisions addressing the principle known under the common law on privity of contract – in essence being that contracts are normally not binding on persons who are not parties to it.[7] Articles 1161-1167 deal with evidence which may be admissible in proof of a matter by way of testimony. Article 1161 says that "[t]he testimony of one witness is sufficient in all cases in which proof by testimony is admitted".

[12] Counsel for Mr. John contended that Mr. Monero's oral testimony in relation to an agreement reached at the scene was inadmissible for the court to make any findings on the first contract allegedly made between Mr. John and Mr. Monero and that the only admissible evidence of the agreement between Mr. Monero and Mr. John, was Mr. John's testimony on oath pursuant to Article 230 of the **Code of Civil Procedure** which says:

> "The evidence given by a party to a suit examined as a witness may be used as a commencement of proof in writing"

Counsel for Mr. John then goes on to contend that while Mr. John's testimony can be used as commencement of proof in writing to admit oral evidence which is otherwise inadmissible, the oral evidence which is admitted cannot contradict the evidence admitted as commencement of proof in writing. I am unable to accept that there is any contradiction in substance in terms of what Mr. John, on oath, conceded he agreed to do and what Mr. Monero said Mr. John undertook to do. The essential agreement was for Mr. Monero's car to be repaired. Mr. John also accepted that Michel was engaged to carry out the repairs. On these crucial issues, there is common ground. In this regard Article 1163 of the **Civil Code** is applicable. It says, so far as is relevant, as follows:

> "Proof may be by testimony:
> 1. ...
> 2. … In a matter in which the principal sum of money or value in question does not exceed $48;
> 3. …

[6] Cap. 4.01 Revised Laws of Saint Lucia 2006.
[7] See Articles 954-956 of the Civil Code.

4. …
5. …
6. …
7. … **In any case in which there is a commencement of proof in writing.**

In all other matters proof must be by writing **or by the oath of the adverse party.**" (my emphasis)

In my view, Mr. John's testimony on oath will have satisfied Article 1163(7) as well as its sweep up provision for the purposes of Article 1163(2) which accordingly would have rendered the oral testimony of Mr. Monero admissible as proof of the agreement between him and Mr. John for the repair of his car.

[13] As I said earlier, it is common ground that there was a contract between the repairman and Mr. John. Mr. James on behalf of Mr. Monero sought to rely on the **Contracts (Rights of Third Parties) Act 1999 [UK]** as being applicable to St. Lucia. However, Articles 961 and 962 bear note. They say:

> "961. A person cannot, by a contract in his own name, bind any one [sic] but himself and his heirs and legal representatives; **but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated.** (my emphasis)
>
> 962. A party in like manner may stipulate for the benefit of a third person, when such benefit is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified assent."

To my mind, these provisions address third party rights even if not in as detailed a fashion as the UK legislation.

[14] Counsel Ms. Thomas addressed Mr. Monero's right to enforce the third party contract by reference to the case of **Demers Estate v Dufresne Engineering Co.**[8], a decision of the Supreme Court of Canada with reference to the identical article to Article 962, in the **Quebec Civil Code**. The Court held that the mere fact that a contract may benefit a third person does not mean that that person is

[8] [1979] 1 S.C.R. 146.

entitled to a right of action to enforce it. In that case a contract was entered into between an employer and an engineer. The contract contained stipulations in favour of a contractor wherein the engineer came under a duty to give accurate advice as to the method of construction. The engineer breached that duty. It was held that the engineer was liable to the contractor who had a separate and independent right of action to sue the engineer despite the fact that the contractor was not a party to the contract. This case also makes the point that it must be clear that the parties intended to give the particular third person a right of action.

[15] In the instant case, the facts are different. It is not the repairman who breached the contract, it is Mr. John who admitted liability for the damage to Mr. Monero's car and who undertook or promised to restore it to its pre-accident condition and engaged Michel to so do. What I understand the Court to be saying in **Demers Estate** by comparison to the instant case is that were Michel at fault, then Mr. Monero could have sued Michel for damages in his own right, the contract having been made by Mr. John with Michel for Mr. Monero's benefit, even though he was not a party. But that is clearly not the case here. Mr. John agreed with Mr. Monero to repair or restore the vehicle to its pre-accident condition having damaged it, and engaged Michel to do so. Mr. John breached the terms of his engagement with Michel and in so doing breached his agreement with Mr. Monero on which he remained liable. In my view this case falls squarely within the four corners of Article 961 of the **Civil Code** which says that a person '…**may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated'.** Had Michel been the party in breach, Mr. John would nonetheless have remained liable to Mr. Monero on his contract with Mr. Monero. The position then must be that much worse where Mr. John, as the contracting party, may be said to be in 'double breach'. He does not escape liability merely because Mr. Monero seeks to rely on his (Mr. John's) breach of contract with the repairman. Indeed it is his breach of the repairman's contract which caused the breach of his contract with Mr. Monero for the repair of his car to its pre-accident condition. Accordingly, Mr.

John would be liable in any event for the consequences flowing from the breach be it his breach or even if it was Michel's breach of the repairman's contract.

[16] It is not disputed that Mr. Monero has been without his vehicle since the date of the collision in 2000 and that based on Michel's evidence the car has deteriorated over the time it has been sitting at his garage. It is reasonable to infer, as the trial judge obviously did, that the car must be considered as a total loss. It would have been reasonably foreseeable by Mr. John that, his breach of the repairman's agreement which resulted in the breach of his agreement with Mr. Monero, would have caused Mr. Monero to suffer loss, as well as loss of use of the vehicle, the same having not been repaired at all and now beyond economic repair. The pre-accident value of the vehicle was not seriously disputed. Accordingly an award of damages in the sum of $30,000.00 accepted as the pre-accident value of the car plus loss of use at the rate of $100.00 per day for 30 days is not unreasonable in the circumstances as the appropriate reflection of loss flowing from Mr. John's breach of his agreement with Mr. Monero. There is no reason to disturb this award.

Conclusion

[17] The conclusion then is that I would confirm the judge's award of damages and the entry of judgment for Mr. Monero, but for the reasons given above and on which the learned judge ought to have made clear as the basis for resting his decision given his clear factual findings. Accordingly, I would dismiss this appeal.

[18] The appellant shall bear the costs of this appeal fixed at two-thirds of the sum awarded below.

Janice M. Pereira
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]