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Contracts - Damages - Contractor Able to Recover Value of Work Done Despite Wilful Departure. Kirk Reid Co. v. Fine, 205 Va 778 (1965)

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CURRENT DECISIONS

Contracts—Damages—Contractor Able to Recover Value of Work Done Despite Wilful Departure. By contract dated December 23, 1958, the complainant, an air conditioning contractor, agreed to install air conditioning and heating systems in a building owned by defendant in Norfolk, Virginia for $253,700.00. An action was brought by complainant on mechanic's lien to recover the final $14,473.00 of the contract price. The defendant answered denying indebtedness and filed a cross bill praying for judgment in the amount of $75,000.00 alleged due because of failure of performance and breach of contract. The commissioner in chancery ruled that the air conditioning unit failed to meet the contract requirements due to changes made in the system without the consent of the defendant, and that complainant had knowingly departed from plans and specifications to the point where there was no substantial performance, thereby precluding recovery by him on the contract. The commissioner also found the difference in value between the equipment contracted for and the equipment actually installed to be $24,252.50, recommending the defendant be awarded judgment for that figure on his cross bill. Final judgment was entered by the Court of Law and Chancery of the City of Norfolk awarding said amount of the cross bill and dismissing the bill of complaint. On appeal, the Virginia Supreme Court of Appeals affirmed the decision of the lower court with respect to the questions of architect's authority and amount of damages. However, it reversed the lower court's holding that complainant could not receive credit for the amount remaining due on the contract because changes "knowingly" made by complainant constituted a substantial breach, and allowed such credit against the amount awarded on the cross bill.[1]

The final decision of the court was predicated on a holding quoted with approval from the Supreme Judicial Court of Massachusetts that an award of damages should not put a plaintiff in a better position than he would have been had the contract been performed correctly.[2]

1. Kirk Reid Co. v. Fine, 205 Va. 778, 139 S.E. 2d 829 (1965).

2. "It is not the policy of our law to award damages which would put a plaintiff in a better position than if the defendant had carried out his contract . . . the fundamental principle of the rule of damages is compensation . . . Compensation is the value of the performance of the contract, that is, what the plaintiff would have made if the contract had been performed . . .

"The Plaintiff is entitled to be made whole and no more. This is true in an action against a defendant for a breach of contract, albeit a wilful one, even though the

Despite the obvious logic of such a statement, it was the general rule in earlier cases[3] that where there was no substantial performance, the contractor was barred from any recovery at all in a suit on the contract.[4] The rationale underlying the disallowances varied; some courts held wilful departure akin to fraud for which the contractor should be punished by allowing him to recover nothing,[5] or felt the contracting party entitled to an honest attempt at strict performance of the agreement.[6] Although impossibility was a defense for the contractor, it was interpreted strictly.[7] More important, the courts generally held that good faith was an element of substantial performance and there could therefore be none on wilful departure from the contract.[8]

The instant case is typical of the more modern trends in this area. The older and stricter ideas of fraud, punishment and literal performance have softened into more equitable considerations emphasizing the actual damage sustained by the contracting party because of the failure of the contractor's performance. As these trends become more deeply seated, the considerations formerly made in deciding the question of substantial performance and total disallowance of recovery are being made instead in deciding the measure of damages.

Two methods of determining the measure of damages prevail. Neither is new,[9] and both are based on the concept that the owner is to be made whole and no more, but each attempts accomplishment of this end in a different way, and consequently may result in widely divergent effects on the parties. The first method consists of determining the cost of making the work done conform to the terms of the contract,[10] and is commonly known as the "cost rule". The second consists of determining the value of the work done as against its value

same defendant suing as a plaintiff on the same contract might be barred by the rule of (no recovery)."—Ficara v. Belleau, 331 Mass. 80, 82, 117 N.E.2d 289, 290 (1954).

3. For example see May v. Menton, 18 Misc. 737, 41 N.Y.S. 650 (1896).

4. Bowen v. Kimball, 203 Mass. 364, 89 N.E. 542 (1909); Homer v. Shaw, 177 Mass. 1, 158 N.E. 560 (1900); May v. Menton, *supra* note 3.

5. Elliott v. Caldwell, 43 Minn. 357, 45 N.W. 845 (1890).

6. Elliott v. Caldwell, *supra* note 5, D'Amato v. Gentile, 54 App. Div. 625, 66 N.Y.S. 833 (1910).

7. See note 5, *supra*.

8. D'Amato v. Gentile, *supra* note 6; Shell v. Schmidt, 164 Cal. App. 2d 350, 330 P.2d 817 (1958): Kizziar v. Dollar, 268 F.2d 914, 361 U.S. 914 (C.C.A. 10th 1959).

9. Cost rule: Haysler v. Owen, 61 Mo. 270 (1875). Value rule: Scott's Ex'r v. Chesterman, 117 Va. 584, 85 S.E. 502 (1915); Mack v. Sloteman, 21 Fed. 109 (C.C. Wis. 1884).

10. For examples see: DiMare v. Capaldi, 146 N.E.2d 517 (1917); Ficara v. Belleau, *supra* note 2; Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78; RESTATEMENT, CONTRACTS § 346(a) (1) p. 573.

if it had been done according to the terms of the contract, with the difference being the amount of damages.[11] This is known as the "value" rule. The use of one or the other generally depends on several factors.[12] In the earlier cases the cost rule was applied if the contractor was allowed to recover at all, where wilfullness of departure was proven, even though this might result in great expense on the part of the contractor.[13] This use was quite natural when the prevailing idea was that the contracting party was entitled to strict performance on the part of the contractor in carrying out the contract terms,[14] and therefore any imperfections should be altered to conform with contract terms at the contractor's expense.[15] The idea of punishment probably entered the picture also, particularly when the cost of making the work comply was staggeringly high.

Today, the cost rule still prevails but with the demise of the harsher concepts of fraud and punishment, it is tempered by equitable considerations.[16] Now, generally, if making the work conform to the contract is impossible,[17] or if it would work a hardship on the contractor out of proportion to the benefit to be obtained, or if it would involve unreasonable economic waste,[18] the "value" rule is substituted. In either case, the contracting party is made whole, but often the application of the "value" rule results, as it did in the instant case, in a saving by the contractor of a substantial part of the tremendous cost which would have been sustained in making the work already done conform.

There are several questions which the instant case does leave un-

11. For examples see: Rino v. Statewide Plumbing and Heating, 74 Idaho 374, 262 P.2d 1003 (1953); Barcroft Woods v. Francis, 201 Va. 405, 111 S.E.2d 512 (1959); Mohs v. Quarton, 257 Wis. 544, 44 N.W.2d 580 (1950); RESTATEMENT, CONTRACTS § 346(a)(2) p. 573.

12. A more extensive discussion of the various rules applicable may be found in Shell v. Schmidt, *supra* note 8, and at 76 A.L.R. 2d 792.

13. Young v. Cumberland County Educational Society, 183 Ky. 625, 210 S.W. 494 (1919); Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410 (1911); Elliott v. Caldwell, *supra* note 5; Lanbert v. Jenkins, 112 Va. 376, 71 S.E. 718 (1911); Haysler v. Owen, *supra* note 9.

14. Pence v. Dennie, 182 Pac. 980 (1919); Springer v. Jones, 123 N.E. 816 (1919).

15. "The Owner is entitled to the money which will permit him to complete (according to the contract) unless the cost of completion is grossly and unfairly out of proportion to the good obtained, when that is true the measure is the difference in value."—Cardozo, J., in Jacob and Youngs v. Kant, 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921). See also: 5 WILLISTON ON CONTRACTS 3825, 3826 (§ 1363). For an example of the cost rule applied to remediable defects see Mann v. Clowser, *supra* note 10.

16. Barcroft Woods v. Francis, *supra* note 11.

17. Jacob and Youngs v. Kant, *supra* note 14.

18. RESTATEMENT, CONTRACTS § 346; Shell v. Schmidt, *supra* note 8.

decided, however. It still may be possible that a contractor, suing on a contract where the defendant could prove wilful departure, might be barred from any recovery in the absence of a cross bill, at least under state procedure; but the tide appears to be running against such results. Balancing the damages sustained by each party is the concept now dominating the courts' considerations, and the instant case is a good example of the trend.

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Contracts-Agency—RIGHT TO COMMISSION: The respondent, George H. Engeman, a real estate broker, entered into a "Sales Agreement" with Grace and Aubrey Hummer on August 21, 1959 whereby Engeman was granted an exclusive right to sell the Hummers' farm. The agency was to be effective for a thirty-day period and then become terminable at will upon ten days' prior notice in writing. In accordance with the agreement, the broker initiated his efforts to sell the farm by contacting his "best clients," showing the property to prospective buyers, and advertising its availability by "word of mouth." On August 29, he submitted a signed contract which he had obtained from one Noyes, but Hummer rejected the agreement, on the advice of his attorney, since the terms of the proposed sale had been altered.

Shortly thereafter Hummer sent Engeman notice that the agency had been revoked and subsequently sold the farm himself, whereupon the broker brought an action for his commission. In an amended pleading, Engeman alleged that the listing agreement was valid and that the exclusive agreement had made such irrevocable until expiration of the thirty-day period stated therein. In substance, he contended that Hummer had become liable for the sum requested, by invoking his *power* to terminate the agency when he had relinquished his *right* to exercise it under the "Sales Agreement" listing his farm.[1]

The trial judge, upon hearing the arguments of counsel, stated that no issue of fact had been presented for determination by the jury and entered judgment for the plaintiff, as a matter of law, in the amount of the commission. Following the court's denial of a motion to have a jury impaneled to assess damages, the defendants appealed from the order to the Supreme Court of Appeals of Virginia.[2]

1. Piper v. Wells, 175 Md. 326, 2 A.2d 28 (1938).
2. Hummer v. Engeman, 206 Va. 102, 141 S.E.2d 716 (1965).