Weerakoon

v.

Hewamallika

COURT OF APPEAL.
SOZA, J. AND VICTOR PERERA, J.
C.A. (S.C.) 371/67 (F)—D.C. COLOMBO 62408/M.
NOVEMBER 6, 7, 8, 1978,

Contract—Arbitration clause—Whether condition precedent to instituting action—When ouster of Court's jurisdiction.

Damages—Anticipatory breach—Party to contract announcing intention not to perform—Does this amount to rescission—Measure of damages.

Adjournment of trial—Application to trial Judge—Refusal—Exercise of discretion vested in trial Judge—When will Appellate Court review exercise of such discretion.

Held

(1) The discretion whether to adjourn the hearing of a case on an application made by a party is in the trial Judge and an Appellate Court though it has the power will normally not interfere with the exercise of such discretion. In the present case the refusal of the application on behalf of the defendant for the adjournment of the trial did not result in a denial of justice to the defendant and the Appeal Court would not interfere merely because a better case might have been presented on behalf of one of the parties if an adjournment had been granted.

(2) The contract between the parties in the present case did not make arbitration a condition precedent to the institution of an action in Court. The mere use of phraseology that the award of the arbitrators shall be final and conclusive and binding on the parties does not oust the Court's jurisdiction; such a clause must be one that operates to regulate the accrual of the cause of action.

(3) Where one party to a contract announces that he will not perform it, this does not amount to rescission of the contract unless the other party also accepts such renunciation. The latter can then treat the contract as at end and sue for damages for breach of contract. The contractor's stoppage of work in April 1962 constituted a renunciation of his obligations under the contract. The finding of the learned District Judge was that the contract was terminated in June 1962 and this was supported by an averment in the contractor's own amended answer. In the circumstances of the contractor's renunciation of his obligations it could therefore be safely assumed that the owner had accepted the renunciation and the contract was terminated. The contractor could not in any event now make out a different case after pleading June 1962 as the date of renunciation in his answer—section 150, explanation (2) of the Civil Procedure Code.

(4) In the present case where it was a building contract entered into between the parties the damages will include the difference if any between the price of the work as agreed upon in the contract and the actual cost to the owner of its completion substantially as originally intended and secondly any loss of rent on the building or any loss of use of the building. The right to recover the second item of damage is dependent upon whether the use for which the building was intended was within the contemplation of the parties at the time the contract was made. The contractor was therefore liable in damages from the date of rescission, namely, June 1962, in the present case and for overholding the site as well as for the loss of prospective rents.

Per SOZA, J.

"We might remember here the fact that in Roman-Dutch Law the mere fact of breach does not entitle the injured party to claim damages in the absence of some actual loss sustained. The true *damnum* in contract is compensation for patrimonial loss. In this respect our law differs from the English law. The measure of damages will consist of the actual loss the owner has sustained as well as such future loss as may be the necessary consequence of the breach. The injured party has the right also to claim by way of damages the reasonable profits which he has lost (*damnum emergens et lucrum cessans*). As far as money can do it, the damages awarded will be commensurate to place the innocent party in the position in which he would have been had the contract been performed."

Cases referred to

(1) *Evans v. Bartlam, (1937) 2 All E.R. 646.*
(2) *Gardner v. Jay, 29 Ch. D. 50.*
(3) *Maxwell v. Koun, (1928) 1 K.B. 647.*
(4) *Amerasekera v. Cannangara, (1940) 41 N.L.R. 333.*
(5) *Ford v. Clarksons Holidays Ltd., (1971) 1 W.L.R. 1412; (1971) 3 All E.R. 454.*
(6) *Scott v. Avery, (1856) 5 H.L. Cases 811; 25 L.J. Ex. 308; 28 L.T. (O.S.) 207.*
(7) *Bradley v. Newson Sons & Co., (1919) A.C. 16; 88 L.J. (K.B.) 35; 119 L.T. 239; 34 T.L.R. 613.*
(8) *Universal Cargo Carriers Corporation v. Vitati, (1957) 2 Q.B. 401; (1957) 2 All E.R. 70; (1957) 2 W.L.R. 713.*
(9) *Johnstone v. Milling, (1886) 16 Q.B.D. 460; 54 L.T. 629; 2 T.L.R. 249.*
(10) *Hochster v. De La Tour, (1853) 2 E. & B. 678; 22 L.J. (Q.B.) 455; 22 L.T. (O.S.) 171.*
(11) *Frost v. Knight, (1872) L.R. 7 Exch. 111; 26 L.T. 77.*
(12) *The Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co., (1884) 9 A.C. 434; 51 L.T. 637; 53 L.J. (Q.B.) 497.*
(13) *Dodd v. Churton, (1897) 1 Q.B. 562; 76 L.T. 438; 66 L J. Q.B. 477.*
(14) *Heyman and another v. Darwins Ltd., (1942) A.C. 356; (1942) 1 All E.R. 337; 166 L.T. 306; 58 T.L.R. 169.*
(15) *Michael v. Hart, (1902) 1 K.B. 482; 86 L.T. 474; 18 T.L.R. 254; 71 L.J. (K.B.) 265.*
(16) *The Holland Ceylon Commercial Co. v. Mahuthoom Pillai, (1922) 24 N.L.R. 152.*
(17) *Alawdeen v. Holland Colombo Trading Society Ltd., (1952) 54 N.L.R. 289; 51 C.L.W. 82.*
(18) *Sinhalese Film Industrial Corporation Ltd. v. Madanayake, (1971) 74 N.L.R. 89.*
(19) *Salih v. Fernando, (1951) 53 N.L.R. 465.*
(20) *Dodwell & Co. v. U. S. Shipping Board Merchant and Fleet Corporation, (1934) 36 N.L.R. 1.*

APPEAL from the District Court, Colombo.

C. Ranganathan, Q.C., with *Joe Weerasekera*, for the defendant-appellant.
H. W. Jayawardene, Q.C., with *H. C. Perera* and *Lakshman Perera*, for the plaintiff-respondent.

Cur. adv. vult.

February 2, 1979.

SOZA, J.

The original plaintiff-respondent instituted this suit on a building contract entered into by him with the defendant-appellant seeking to recover certain overpayments and damages for breach

of contract. The original plaintiff-respondent died when this appeal was pending and the present added respondents were substituted in his room. Four questions arise for our determination namely:

1. Whether the trial judge had exercised his discretion correctly when he refused an adjournment of the trial.
2. Whether the failure to go to arbitration bars the present proceedings.
3. Whether there was a breach of contract by the contractor in that before the day for completion when the work was a long way from being completed, he evinced his intention not to fulfil it.
4. Whether damages have been correctly assessed.

The defendant-appellant had made a claim in reconvention which was dismissed. But that part of the decision was not canvassed before us.

The facts of this case may be briefly stated as follows: On 16.11.1961 the original plaintiff-respondent (whom I will call the owner) by Articles of Agreement P1 entered into a contract with the defendant-appellant (whom I will call the contractor) for the construction of a four-storeyed building comprising 16 maisonnettes. Clause 23 of the Schedule of Conditions attached to the Articles of Agreement provided that the work would be "entirely completed" on or before the 16th May, 1963, subject to the provision for extensions contained in the contract document P1. By this clause time was stated to be of the essence of the contract.

It was found however that the building site had suffered some dimunition owing to encroachments by neighbours and hence certain adjustments were made to the building and reductions in the money payable by the owner to the contractor see P8 (a) and P8. After the contract P1 was entered into the owner made certain payments totalling Rs. 47,000 to the contractor—see P2, P3, P4, P6, P7, P9 and P10. There was some difficulty regarding windows but this appears to have been ironed out—see P11 to P14.

The owner was not satisfied with the work or its progress and on 3.4.1962 wrote letter P5 to the contractor pinpointing various defects and shortcomings which he said amounted to a repudiation or breach of contract. There was a stoppage of work for the Sinhalese New Year holidays and thereafter, as it eventually turned out, the contractor failed to resume work despite reminders (see P11) by the owner. On 17.5.1962 the contractor

wrote letter P12 to the owner asking for a six-month extension of time on various grounds and stating he would otherwise have to stop work. The extension was flatly refused by the owner by his letter P14 of 28.5.1962 wherein he charged the contractor with trying to make out a case for an extension to cover his own lapses and default. He warns the contractor that if he stops the work it would be at his own risk. From here the contractor's lawyer took over the correspondence and the parties traded accusations against each other—see P15 to P24. On behalf of the contractor it was stated in P15 of 1.6.1962 that the work was not stopped but was being continued and that the question of the extension would be referred to arbitration as provided for in paragraphs 8 and 9 of the Articles of Agreement P1.

Appropriate steps were not taken to refer the dispute between the parties to arbitration. The contractor agreed to hand over the site after the work done was valued. Mr. H. E. Gonsal an architect nominated by the owner and Mr. W. A. Fernand an architect nominated by the contractor valued the work done and their reports are before Court—see P25, P27 (not to be confused with letter P27 of 22.12.64 so marked obviously by an error) and P32. On 23.1.1964 the owner's Proctor wrote P25 to the contractor's Proctor demanding that the site be handed back and that the overpayment of Rs. 22,230.87 be repaid. Finally on 5th March, 1964, long after stipulated date of completion, the site was handed back to the owner—see P28 and P29. On 14.3.1964 the owner's demand for Rs. 22,230.87 was reiterated by letter P31. The contractor's lawyer wrote P30 of 25.3.1964 denying the owner's claim and demanding Rs. 30,940 for extra work done and loss suffered. On 30.4.1964 the plaintiff instituted this suit for the recovery of the overpaid sum of Rs. 22,230.87 and a sum of Rs. 29,900 as damages for delay in completing the work. Damages were calculated at the rate of Rs. 1,300 per month for the 23-month period from 11.4.1962 when the work was stopped up to 5.3.1964 when the site was handed back. When P1 was drawn up the rate of Rs. 1,300 had been agreed on by the parties as the basis for computing liquidated damages. In any event this rate was claimed as a reasonable estimate of the owner's loss. The contractor while denying that the owner was entitled to any payment claimed Rs. 21,812.49 in reconvention.

I will now take the first question for determination. This case was first taken up for trial on 22.1.67 and on this day Mr. E. G. Wikramanayake, Q.C., with Mr. P. N. Wikramanayake appeared for the owner while Mr. Adv. Jayasuriya appeared for the contractor. Eleven issues were raised. It was on this day submitted that the contractor had done extra work valued at

Rs. 30,940 while the owner had to his credit a sum of Rs. 9,127.51 on the advances. This latter sum was not deposited as it had been deducted from the amount due to the contractor. After issues were framed the case was fixed for further trial for 25th July, 1967. On this day the same counsel appeared for the owner. For the contractor however, the appearance of Mr. N. E. Weerasooria, Q. C., was marked with his own appearance as junior counsel by Mr. S. W. Jayasuriya. Mr. Weerasooria was not present in Court as he had been suddenly taken ill that very morning and entered to hospital. Mr. Jayasuriya asked for an adjournment on the ground of Mr. Weerasooria's illness. The Court refused the application and directed that Mr. Jayasuriya who was junior counsel should carry on the case. Mr. Jayasuriya then stated that he was not able to proceed with the defence because most of the documents—in fact all the documents—were with Mr. Weerasooria. The Court refused an adjournment and the trial proceeded. The owner gave evidence and was cross-examined. He also called as a witness Mr. Gonsal who had valued the work done on the premises. On behalf of the defence the contractor called as his witness Mr. W. A. Fernand. In appeal learned counsel for the appellant contended that the refusal of an adjournment had resulted in grave prejudice and injustice to the contractor.

The discretion to adjourn the hearing of a case is in the trial Judge. On the question of the exercise by a Court of a discretion vested in it there is the leading case of *Evans v. Bartlam* (1) decided by the House of Lords. In this case Lord Wright had occasion to make the following observations at page 655 :

> "A judge's order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers, and would be interfered with by the Court of Appeal only in exceptional cases, yet it may be reviewed by the Court of Appeal".

In the same case Lord Atkin explained the attitude an appellate tribunal would take when invited to consider the question of the exercise of a discretion vested in an original court (at pages 480 and 481) :

> ".....while the appellate court in the exercise of its power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done, it has both the power and duty to remedy it".

In the case of *Gardner v. Jay* (2) decided by the Court of Appeal Bowen, L.J. considered the discretion of a Judge to decide upon the mode of trial and stated as follows :

> "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed, but still it is a discretion, and for my own part I think when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so ? "

In the case of *Maxwell v. Koun* (3) the Court of Appeal reversed the trial Judge's order refusing an adjournment to the plaintiff who was absent on the ground that plaintiff's action or most of it would fail owing to such absence and justice would not be done. In this case, Atkin, L.J. said as follows at page 653 :

> "I quite agree that the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does so ; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has the power to review such an order, and it is, to my mind, its duty to do so ".

The limits within which the Appellate Courts will act when called upon to review the exercise of a discretion vested in a trial judge as set out in these cases are applicable in Sri Lanka too. A discretion necessarily involves a latitude of individual choice. As Soertsz, S.P.J. said in *Amerasekera v. Cannangara* (4) :

> "There are no hard fast rules, and where a trial Court has exercised the discretion vested in it substantially in a manner conducive to justice, a Court of Appeal will not interfere merely because if it had been the original Court it would have exercised this discretion differently. "

In the instant case the refusal of an adjournment did not result in a denial of justice to the contractor. He was represented by a senior member of the Bar, Mr. Jayasuriya. It was this same counsel who had appeared for him earlier too on the day issues

were framed. Mr. Jayasuriya was counsel of the contractor's choice and would have conducted the case had the trial not been adjourned after the issues were framed on 22.01.1967. It is true that on the trial date owing to the illness of Mr. Weersooria junior counsel for the contractor was handicapped in that he did not possess the documents. But even junior counsel must be properly briefed and possess at least copies of the documents and be ready to carry on the case in the absence of senior counsel. If Mr. Jayasuriya as junior counsel was not posted with copies of the documents it must be regarded as a lapse on the part of the instructing Proctor. Mr. Jayasuriya was counsel retained by the Proctor and not brought into the case by the senior counsel and he should have been given as complete a brief as his senior. For failure to do so the contractor's Proctor has only himself to blame. The Court is not prepared to condone laches or extend its indulgence to those who have been negligent in getting ready for trial. In any event, these documents could easily have been fetched within a short time. In fact the case was heard over the whole day and there was ample time to get the documents down from Mr. Weerasooria's residence. I do not think it can be said from what has transpired in this case that there was a denial of justice to the contractor. His case was well presented and argued by Mr. Jayasuriya. The owner and his witness were duly cross-examined. So also the evidence of a witness was led on behalf of the contractor. It cannot be said that the case has suffered as a result of Mr. Jayasuriya having to conduct it. This Court will not hesitate to interfere where in the exercise of the discretion of the trial Judge injustice has been caused ; but I do not think the facts and circumstances of this case call for interference with the order refusing adjournment of the trial. The Court will not interfere merely because a better case might have been presented if an adjournment was granted especially where the reason for this is that junior counsel had not been properly briefed.

The next point for consideration is whether the contract between the parties made arbitration a condition precedent to the institution of an action in Court. I cannot say I agree with the learned Judge's views that there was an arbitration. There was in fact no arbitration and I will examine the question on that basis. What has to be determined is whether paragraph 8 of the Articles of Agreement P1 is what is commonly called a *Scott v. Avery* clause making arbitration compulsory before the filing of a suit. All that paragraph 8 says is that all disputes should be referred to arbitration, and that the award of the arbitrators

or the umpire, as the case may be, shall be final and conclusive and binding on the parties and may be made a decree of Court in accordance with the provisions of the Civil Procedure Code. It is well settled that an arbitration agreement not expressly purporting to oust the jurisdiction of the court is not to be read as doing so. The standard phrase that an arbitrator's award shall be ' final and binding ' does not oust the court's jurisdiction—see *Halsbury's Laws of England (1973) 4th ed. Vol. 2 p. 277 paragraph 543.* In *Ford v. Clarksons Holidays Ltd* (5) the court considered an arbitration agreement which said that in the event of any dispute " the decision of a mutually acceptable independant arbitrator shall be accepted by all parties as final ". This provision was held by the Court of Appeal not to oust the jurisdiction of the Court. It is open to the parties to a contract to covenant that no action shall be brought except upon an award, or (what amounts to the same thing) that the only obligation arising out of a particular term of the contract shall be to pay whatever sum an arbitrator may award—see *Russel on Arbitration* (1963) *17th ed. p. 37.* This rule has evolved from the decision in *Scott v. Avery* (6) where the House of Lords held that while it is a principle of law that parties cannot by contract oust the courts of their jurisdiction any person may covenant that no breach of the contract shall occur till a third person has decided on any difference that may arise between himself and the other party to the covenant ; in other words, the right of action shall arise only on what that third person decides. The distinction to be borne in mind was clearly explained in that case by Lord Cranworth in his speech from the Woolsack (p. 848) :

> " If I covenant with A to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenanter from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A.B. that if I do or omit to do a certain act, then I will pay to him such a sum as J.S. shall award as the amount of damage sustained by him then, until J.S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken and no right of action has arisen. The policy of the law does not prevent parties from so contracting ".

A *Scott v. Avery* clause operates as a covenant regulating the accrual of the cause of action and not as a covenant ousting the jurisdiction of the Court. In the instant case the arbitration clause does not seek to regulate the accrual of the cause of action. Even by implication the provision for arbitration does not measure up to the requirements of a *Scott v. Avery* clause. I therefore hold that arbitration was not a condition precedent to the institution of this suit.

No application was made during the course of the case for stay of proceedings to enable reference of the dispute to arbitration and this aspect of the matter does not therefore arise for consideration.

I will now turn to the question of the breach of contract. The agreed date of completion was 16th May, 1963, and time was of the essence of the contract. What is alleged against the contractor is that he is guilty of an anticipatory breach—an expression at times condemned as infelicitous—see for instance the comments of Lord Wrenbury in the case of *Bradley v. Newsom, Sons & Co.* (7) on the use of this expression. But as Devlin, J. observed in *Universal Cargo Carriers Corporation v. Citati* (8) " anticipatory breach "

> " means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited ".

The expression " anticipatory breach " was first coined by Lord Esher, M.R. in the Court of Appeal case of *Johnstone v. Milling,* (9) and, coming as it does from such distinguished mint, enjoys unabated currency in this field of the law.

The case for the owner is that before the day fixed for completion of the work the contractor unequivocally and absolutely evinced his intention not to fulfil it. Such an intention may be evinced by an announcement or declaration—*Hochster v. De la Tour* (10), *Frost v. Knight* (11), or by conduct *Universal Cargo Carriers Corporation v. Citati* (*supra*), *The Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* (12). In the instant case there was no renunciation by announcement or declaration. But deeds speak more eloquently than words and the stubborn fact is that the contractor did not work after 11.4.1962.

As Lord Devlin said in *Universal Cargo Carriers Corporation v. Citati* (*supra*) at p. 436 :

> "The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract".

The contractor by his letter P12 of 17.05.1962 applied for an extension of time to complete the work and declared he would stop work if this was refused. It was refused by the owner by his letter P14 of 28.05.1962 wherein he accused the contractor of having already stopped work. Both parties were alive to the provision for arbitration but there was a deadlock with the contractor claiming that only the question of the extension should be referred for arbitration and the owner insisting that all the disputes arising from the contract should be so referred. Despite his protestations the contractor did no work after 11.04.1962.

No doubt if an extension was justified owing to extra work and defaults of the owner then that would be relevant on the question of the contractor's failure to keep to the date of completion. The principle involved here is that where one party to a contract is prevented from performing it by the act of the other (e.g. by imposing extra work) he is not liable in law for that default—see *Dodd v. Churton* (13). In the case before us, the contractor alleged delays because of—

(i) alterations in the specifications resultant on encroachments which had reduced the extent of the site,

(ii) the laying of drainage mains holding up the work,

(iii) alterations in the type of windows, and

(iv) the insistence on a seven day curing period for R.C. C. columns.

The owner rightly dismissed these grounds as specious excuses put forward by the contractor to cover his own defaults. The alteration in the extent of the site if anything reduced the size of the building and the work entailed; if anybody was responsible for delay over the laying of the drainage mains it was the contractor himself as this should have been attended to before he started on the main building; the proposal to have a different type of windows came from the contractor himself and the curing period for R.C.C. columns was according to P.W.D. standards. It is patent there was no substance in the grounds put forward by the contractor. He was trying to take

refuge in an application for extension as he knew he would not be able to keep to the completion date. The contractor had, to use another word which though not wholly apt is firmly entrenched in our legal parlance 'repudiated' the contract. The legal effect of such 'repudiation' may best be described in the language of Lord Macmillan in *Heyman and another v. Darwins Ltd.* (14):

> "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken".

Therefore an announcement by one party to a contract that he will not perform it does not of itself amount to a breach of contract or a rescission of it. The two parties must rescind—see also *Michael v. Hart* (15). As Viscount Simon pointed out in *Heyman and another v. Darwins Ltd.* (*supra*) (p. 361)—

> "repudiation by one party standing alone does not terminate a contract. It takes two to end it, by repudiation on the one side, and acceptance of the repudiation, on the other".

On the wrongful renunciation of the contract by the contractor there were two courses of action open to the owner. He could accept the renunciation, treat the contract as at an end and sue the contractor for damages as for breach. But he is not bound to accept the renunciation. He may attend upon his contract and wait for the time of performance still holding it as prospectively binding for the exercise of this option which may be advantageous to the innocent party and cannot be prejudicial to the wrongdoer. This means he may keep the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete

the contract, if so advised, notwithstanding his previous repudiation of it but also to take advantage of any supervening circumstance which may justify his declining to complete it. These principles were laid down in 1853 by Lord Campbell, C.J. in *Hochster v. De la Tour (supra)* and their correctness has never since been doubted. They have been approved in South Africa (*Wessels' Laws of Contract in South Africa* (1951) 2nd ed. Vol. 2 page 794 paragraphs 2935 to 2939) and in Sri Lanka (*Weeramantry's The Law of Contracts* (1967) Vol. 2 pages 879 to 881). Bertram, C.J. accepted these principles in *The Holland Ceylon Commercial Co. v. Mahuthoom Pillai* (16). Gratiaen, J. adopted them in *Alawdeen v. Holland Colombo Trading Society Ltd.* (17) and in the Privy Council judgment delivered by Lord Diplock in *Sinhalese Film Corporation Ltd. v. Madanayake* (18) we have the latest formulation:

> "It is common ground that the legal consequences of an anticipatory breach of an executory contract are the same in Roman-Dutch law as at common law. Where one party to an executory contract makes it manifest to the other party that he does not intend to perform an obligation imposed upon him by the contract which is fundamental to it, his conduct constitutes an anticipatory breach or wrongful repudiation of the contract by him. The other party may then elect either to ignore the wrongful repudiation and to treat the contract and the obligations which it imposes upon him as well as upon the repudiating party as still binding upon them, or to treat the contract and the obligations which it imposed upon each party as no longer binding on them, save as respects the liability of the repudiating party for damages for non-performance. Although the latter choice is often described as an election to rescind the contract, their Lordships would observe, that the non-repudiating party's obligation to perform the contract any further is terminated by operation of law and not as the result of any agreement between the parties to rescind it".

In the case before us did the owner treat the renunciation as an immediate breach or stand upon his contract? In his letter P14 of 28.5.1962 the owner wrote to the contractor as follows:

> "Now that you have threatened to stop work I may add here, if you do so, it will be solely at your risk. I must know definitely within three days from date hereof if you are unable to carry on with this work".

Within these three days there was no meaningful response by the contractor and no tangible steps were taken by him to tender performance. Instead he drew the red herring of a claim for extension of time across the track. His conduct considered against the background of stoppage of work from 11.4.1962 clearly and unequivocally constitutes a renunciation of his obligations under the contract.

I must now consider the question whether the owner accepted the renunciation. The learned District Judge has held that the contract was terminated in June 1962. This finding is supported by the contractor's averment in his own amended answer that "in or about June 1962 the parties mutually agreed to terminate the contract owing to various differences that arose between them in or about May 1962". One thing is clear from this averment. The contract was at an end by June 1962 save (though the contractor would not admit it) as respects the liability of the contractor for damages for non-performance. It is not necessary to look for the date of termination in the correspondence. In the circumstances of the renunciation of his obligations under the contract by the contractor it can safely be presumed that the termination was achieved by the owner's acceptance of the renunciation. Having pleaded June 1962 as the date of renunciation, it is not open now to the contractor to contend that the contract was kept alive till the date of completion fixed in the Articles of Agreement—see explanation 2 to section 150 of the Civil Procedure Code.

The date of rescission of the contract was therefore June 1962 and the question of damages must be examined with reference to this date. We might remember here the fact that in Roman-Dutch Law the mere fact of breach does not entitle the injured party to claim damages in the absence of some actual loss sustained. The true damnum in contract is compensation for patrimonial loss. In this respect our law differs from the English law. The measure of damages will consist of the actual loss the owner has sustained as well as such future loss as may be the necessary consequence of the breach. The injured party has the right also to claim by way of damages the reasonable profits which he has lost (*damnum emergens et lucrum cessans*). As far as money can do it, the damages awarded will be commensurate to place the innocent party in the position in which he would have been had the contract been performed—see *Wessel's Law of Contract in South Africa* (ibid) pages 859, 895, *Salih v. Fernando* (19), *Dodwell & Co. v. U.S. Shipping Board Merchant and Fleet Corporation* (20).

In the type of case we are considering the damages will include first the difference, if any, between the price of the work as agreed upon in the contract and the actual cost to the owner of its completion substantially as originally intended, and secondly any loss of rent on the building or any loss of use of the building. The right to recover the second item of damage is dependant upon whether the use for which the building was intended was within the contemplation of the parties at the time when the contract was made—see *Halsbury's Laws of England* (1973) Vol. 4 page 651 paragraph 1277.

In the instant case the contractor knew he was building 16 flats for the purpose of letting them out to tenants. Even in 1967 when the owner gave evidence the building was not wholly complete. However damages are not being claimed against the actual cost of completion.

The damages claimed in this case are for loss of prospective rents and for failure to hand up possession of the site. For loss of rents the rate claimed is Rs. 1,300 per month. In fact this was the rate agreed on by the parties for calculating liquidated damages. The learned District Judge calculated the loss of rent at Rs. 3,740 per month which speaking for myself seems closer to the realities of the matter. It was strenuously argued for the contractor that the loss of prospective rents should not have been calculated for any period prior to 16th May, 1963, the agreed date of completion. Ordinarily prospective rents can be awarded only from the agreed date of completion. But here we cannot overlook the fact that the owner is entitled under the contract itself to receive back possession of the site if the work was unreasonably stopped and the contract terminated. One ground on which damages are being claimed is the overholding of the site by the contractor. The stoppage of work coupled with the overholding of the site prevented the owner from completing the building himself at a time when there was a greater availability of building materials. As a result of the contractor's delay in handing back the site the owner found himself severely hampered not only by a steep rise in prices but also by a dearth of building materials and in fact he could not complete the building even by 1967. If as the contractor himself says the contract was terminated in June 1962 he should not have delayed nine months to hand back the site. If he handed over the site when the contract was terminated it would have cut costs and time for the owner. If he did not, he must pay for it. He must make good the loss to the owner in costs and time. Loss of time involves loss of

prospective rents. This is directly attributable to overholding the site. The contractor is therefore liable in damages from June, 1962. In fact in law damages are recoverable from the date of rescission. The rate of Rs. 1,300 per month as damages for overholding the site is in my view eminently reasonable. But this should be calculated from June 1962.

The contractor must count himself lucky that there was not a more formidable formulation of the claim for damages.

The owner is entitled to damages at Rs. 1,300 per month for overholding the site and loss of prospective rents. The damages will have to be calculated from the date of breach namely, June 1962 until 5th March, 1962, in view of the basis on which the owner has advanced his claim. This will entail a reduction of Rs. 2,600 from the amount awarded under this head.

On the claim for the return of the overpayment of Rs. 22,230.37 the learned District Judge acted on the evidence of the plaintiff and Mr. Gonsal, an architect. Further the contractor himself has not pursued his claim in reconvention before us. In these circumstances the award of the learned District Judge under this head must stand.

I therefore affirm the judgment and decree entered by the learned District Judge subject to a reduction of Rs. 2,600 in the principal sum awarded. Subject to this the appeal is dismissed with costs.

VICTOR PERERA, J.—I agree.

Appeal dismissed.