IN THE SEYCHELLES COURT OF APPEAL

XAVIER BRUTUS **APPELLANT**

VERSUS

MARCEL BELLE **RESPONDENT**

Civil Appeal No. 34 of 1997

(Before: Silungwe, Ayoola & Adam JJA)

Mr R Hodoul for the Appellant
Mr A Juliette for the Respondent

JUDGMENT OF THE COURT
(Delivered by Ayoola J.A)

Mr Xavier Brutus ("the appellant") and Mr Marcel Belle ("the respondent") entered into a building agreement in writing some time in July 1994 whereby the appellant, a contractor, would construct a house on the respondent's land at Intendance. The cost of the construction which was to be undertaken in four stages was R55,000. Construction work was according to the agreement of the parties to commence on 1st August 1994 and the construction was to be completed within three months. The respondent was to provide all the materials for the construction while the appellant was responsible for labour only. It was an implied term of the agreement between the parties that the appellant shall construct the said house "in a substantial and workmanlike manner and supervise his workers on the construction."

The appellant commenced construction work pursuant to the agreement and completed the first two stages of the works for which the appellant was duly paid R30,000 due on the contract. Alleging that the appellant after receiving a total of R37000 had committed a breach of the express and implied term of the agreement, the respondent commenced

an action against the appellant by his plaint dated 12th June 1995 claiming a total sum of Rs.342,000 for loss and damage suffered by him as a result of the alleged breach.

On his part, the appellant counterclaimed for a total sum of R15,000 being as to R10,000 amount due to him under the third stage, as to R3000, works under the third stage, and R2000 loss and profit in respect of stage four.

The breach alleged by the respondent on his plaint were that the appellant failed to complete the house within three months as agreed and that he failed to construct the house in a substantial and workmanlike manner and to properly supervise his workers. He adduced evidence which the trial judge found acceptable in proof of the alleged breaches. The learned judge rejected the evidence of the appellant in regard to the reasons he had advanced for the delayed performance of the contract. For his counterclaim, the appellant averred that he had completed all works under stage three of the contract.

The learned trial judge (Amerasinghe, J) in his judgment held in regard to the respondent's claim: (1) that the appellant had completed stage three of the contract although not within the three month period; (2) that the appellant committed a breach of the term of contract in regard to the time for completion; (3) that the appellant was in breach of contract in failing to construct the house in "a substantial workmanlike manner" and further to maintain services of a makertance quality." In the result, he found the appellant liable for the loss and damages, suffered by the respondent. In regard to assessment of damages he was of the view that the respondent was not entitled "to any compensation of the magnitude that he had ought." He rejected the estimate prepared by the respondent's expert witness on the ground that it was at variance with the respondent's claim in that the former was estimate for a new construction while the latter was for rectification of defects and completion of construction. Being of the view that there were no estimates in relation to the claim he decided to rely on "arbitrary assessment." On such assessment he awarded R100,000 to the respondent. He held that the

respondent was not entitled to a refund of R37,000 paid to the appellant which was part of the respondent's claim.

On the counterclaim the judge held that the appellant was entitled to a sum of R10,000 being the balance of amount due on the completed third stage. He entered judgment for the appellant in that sum.

On this appeal from Amerasinghe, J's decision, a number of issues had been canvassed by Mr Hodoul, learned counsel for the appellant. It was argued by him that there had been a breach of the express term as to time for completion; (2) the appellant should not have been held liable for apparent defects which had occurred in respect of those stages of the contract for which payment had been made; and (3) that the trial judge was in error when in the absence of evidence of the quantum of the respondent" loss he relied on "arbitrary assessment" to make his award.

The first two issues can be shortly disposed of. Although the learned judge had found a breach of the term as to time of completion established, no damages have been awarded in regard to that breach. The respondent's claim for compensation for alternative accommodation which would have had some relevance to the delayed performance had been abandoned at the trial. Besides, it is evident that the respondent could not use the alleged breach of the term as to time of completion as justification for terminating the contract. While the law permits withholding of payment due as an extra-judicial remedy for non-performance of a contract, a party, being creditor, who wishes to repudiate the contract must bring an action under Article 1184 of the Civil Code of Seychelles. In the result while the alleged delayed performance may be ground for claim for damages, it cannot be used as justification for an extra-judicial repudiation of the contract. If the respondent had wanted to be free of the contract by reason of the delayed performance he should have proceeded under Article 1184 of the code.

The question put at the forefront of the appellant's argument that the trial judge had failed to apply appropriate provisions of the Civil Code, namely Articles 1789 – 1799 was argued at the trial. It was not

expressly pronounced on by the learned judge. The argument had been repealed on this appeal that the respondent could not make a claim in respect of the stages of construction for which he had paid. It is difficult to find anything apposite to the point argued in Articles 1789 – 1799 of the Civil Code and particularly Article 1791 specially emphasised by the counsel for the appellant. It seems evident from the tenor of Articles 1790 and 1791 that those Articles deal with a different situation from that which had arisen in this case. It is expedient to state that there is nothing in Articles 1789 – 1792 which expressly fetters the employers right to make a claim in case of a breach of a term of the contract, notwithstanding that the contract was to be performed in stages. Whether an employer is to be precluded from making a claim after he had paid the contractor for work done up to that stage must depend on (i) whether in the circumstances the principle of estoppel applied or (ii) whether the parties had expressly or by necessary implication agreed that payment after due examination should be conclusive evidence that the work had been satisfactorily done. In any event, payment for work done cannot be reasonably held to preclude the employer from claiming damages for latent defects. It is instructive that in the case of Fisherman's Cove Ltd v/s Petit and Dumbelton Ltd [1979] SLR 40 where the parties had agreed in a building contract that the final certificate shall be conclusive evidence in any proceedings arising out of the contract that the works have been properly carried out and completed in accordance with the terms of the contract, it was held that the employer was not barred from adducing evidence that the contractor should be liable for latent defect.

In the final analysis, the decisive issue on this appeal, is whether the trial judge having held in effect that there was no evidence of the quantum of the loss suffered by the respondent before him should proceed to use an "arbitrary assessment."

Compensation is at the root of all claims for damages. The damages which are due to the creditor cover, in general, the loss that he has sustained and the profit which he had been deprived, except where sought for damages have been sought for any injury to or loss of profits

of personality : Articles 1149(1) and (2) of the Civil Code. A party who claims damages for pecuniary loss (material damage) must prove such loss. It is in the sphere of moral damages that damages are at large and the court is free to award what it considers reasonable in the circumstances.

In the present case, there was clearly no evidence in support of the award made by the learned judge Looking through the record there was no evidence which we can lay hold of to assess the entire loss that the respondent had suffered in terms of money. In such a case as this , not only must the plaintiff prove that a breach of contract has occurred, he must also prove the quantum of his damages. If defects due to poor workmanship are alleged, the cost of rectifying such defect or the amount by which the value of the property has been reduced should be proved by credible evidence. Where material loss suffered has not been proved in monetary terms the plaintiff would have failed to prove a vital aspect of his claim. The respondent had only itemized part of the cost of rectifying the defects in exhibit P8 to which we shall return later.

The appellant's appeal in respect of the counterclaim has been confined to failure of the judge to award him loss of profit on stage four of the contract. The only reason why the appellant had not been awarded damages for loss of profit was that : "there (was) no reason to conclude that the defendant would proceed to the fourth stage when the plaintiff has failed to pay a balance of Rs.10,000 for the third stage." This reason was patently untenable since a party's failure to fulfill his obligation should not have been used as justification for depriving the other party of his due compensation. The appellant should have been awarded the sum he claimed for loss of profit on stage 4 of the contract since the contract had not been properly determined.

I now return to the question of the quantum of the respondent's loss. It is evident that he had suffered loss by reason of the appellant's breach of the implied term to carry out the work in a workmanlike manner. He itemized the defects he had rectified in exhibit P8 which was dated 5th April 1995. Mr Hodoul, counsel for the appellant had argued

that if the Court finds that the claim could be entertained it should be for damages in respect of stage 3 only and that exhibit P8 should be used as guidance.

The argument that the respondent's claim should not have been entertained has been rejected. There is also no reason to limit his claim to stage 3. In any event much of the rectification listed in exhibit P8 had related to the roof which was a stage 3 work. In the result exhibit P8 could be taken as a quantification of the respondent's loss. In the result the respondent should have been awarded the sum of R20,780 only as shown on exhibit P8. This has been possible only because of the concession implied in the submission of Mr Hodoul that exhibit P8 could be used as guidance.

In the result this appeal is allowed. The judgment of Amerasinghe, J dated 2nd November 1997 awarding R90,000 to the respondent is set aside. In place therefor, judgment is entered for the respondent in the sum of R20,780 on his claim and for the appellant in the sum of Rs.12,000 on his counterclaim. For avoidance of doubt since this in effect amounts to cross-judgment, section 226 of the Seychelles Code of Civil Procedure shall apply. The appellant is entitled to costs of the appeal.

Dated at Victoria, Mahe this 9th day of April 1998

.....	.....	.....
A.M Silungwe	E.O Ayoola	M.A Adam
Justice of Appeal	**Justice of Appeal**	**Justice of Appeal**

Handed down
Adam JA