IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0018 of 2015
(High Court No. HBC 67 of 2005)

BETWEEN	:	**MANOHAN ALUMINIUM & GLASS (FIJI) LIMITED**
		Appellant
AND	:	**FONG SUN DEVELOPMENT LIMITED**
		Respondent
Coram	:	**Calanchini, P** **Jameel, JA** **Mutunayagam, JA**
Counsel	:	**Mr. S. Chandra for the Appellant** **Ms. N. Choo for the Respondent**
Date of Hearing	:	**14 February 2018**
Date of Judgment	:	**8 March 2018**

JUDGMENT

Calanchini, P

[1] I have read in draft form the judgment of Jameel JA and agree that the appeal should be dismissed.

Jameel, JA

Introduction

[2] This is an appeal from the judgment of the High Court of Suva dated 18 March, 2015, awarding damages to the Respondent, (the original Plaintiff) in a sum of $34,000.00, together with interest and costs of $5000.00, in respect of breach of contract by the Appellant, (original Defendant).

The Statement of Claim

[3] The Respondent was the proprietor of the building known as Nasilivata House in Samabula, Suva. The Appellant was a manufacturer of aluminium and glass joinery and held itself out as able to supply and install good quality aluminium windows. In or about May 2002, the Appellant and Respondent entered into an agreement in terms of which the Appellant agreed to supply and install aluminium windows for the fifth floor of the said building for a total price of $27, 180.00 plus VAT.

[4] The agreement between the parties was based on a quotation of the Appellant, dated 19 April 2002. The Appellant undertook to complete the work within seven to eight weeks, from the date of commencement of the work. The Respondent paid a sum of $20,000.00 as deposit and part-payment for the work. However, the Appellant breached the contract, by failing to complete the work on time, and in a workmanlike manner. The Respondent had demanded that the Appellant rectify the faulty workmanship, but the Appellant failed to do so. Therefore, the Respondent obtained a quote from another company for rectification of the faulty workmanship. The sum quoted was $100, 840.00, plus VAT. This was the sum claimed by the Respondent, as damages for breach of contract by the Appellant.

The Statement of Defence and Counterclaim

[5] The Appellant admitted it entered into the agreement, for the supply of *'Powder quoted Aluminum Framed windows in 60 mm Frames with 50 mm Grey Tinted Awning sashes on top panel and fixed glass on bottom'*. It averred that despite completion of installation by 27 July 2002, the Respondent, in breach of the agreement paid only $20,000.00 and refused to pay the balance. It admitted that the Respondent had requested the fault in the windows to be rectified but contended that it was not obliged to do so, because the leakage was not due to faulty workmanship on its part. In its Counterclaim, the Appellant claimed that it had completed the work as agreed, and demanded the balance sum, of $10,459.61.

Reply to Defence and Defence to Counterclaim

[6] The Respondent denied that the contract had been duly performed by the Appellant, and pleaded that the Appellant was guilty of faulty workmanship.

The Judgment of the High Court

[7] Several witnesses gave evidence. The learned trial Judge found that the Respondent relied on the expertise of the Appellant to design a window that was suitable for a fifth floor of a commercial building. When approximately fifteen percent of the installation was done, $20,000.00 was paid to the Appellant. The learned trial Judge found that Appellant had breached the contract and was entitled to general damages in a sum of $20, 000.00. The learned trial Judge dismissed the Appellant's Counterclaim, on the basis that it had failed to prove successful completion of the Contract.

The First Ground of Appeal

The Vijay Krishnan Report-the allegation of lack of Independence

[8] The essence of the first ground of appeal is that the learned trial Judge erred by considering Vijay Krishnan's Report of 30 July 2003 as an independent Report, when Vijaya Krishnan was an employee and advisor to the Respondent only. This was factually incorrect.

[9] I propose to deal with this ground of appeal under two headings, *viz*, its admissibility and its content-value.

(a) Admissibility of the Vijay Krishnan Report

[10] Vijaya Krishan did not give evidence, as both parties had been unsuccessful in their attempts to contact him. However, the evidence revealed that the parties had agreed to get Vijay Krishnan to inspect the premises and prepare a report. At the trial, Counsel for the Appellant submitted that the Report was prepared with the consent of parties. His Report was not objected to when produced. Nevertheless, in view of the matters raised in paragraphs 6 and 7 of the Appellant's Written Submissions, it becomes incumbent on me to deal with it.

[11] In view of the fact that Vijay Krishnan was not available to give evidence, it remains for this court to consider the weight to be given to the evidence contained in his Report. The windows were installed around September 2002, the site inspection was done on 14 June 2003, and the Report is dated 30 June 2004. In view of the short period of time between the date of the inspection and the date of the Report, I am of the view that the contents of the Report are sufficiently contemporaneous and properly reflect the observations of the site inspection.

[12] It was Vijay Krishnan who had introduced the parties to each other, and the Respondent was persuaded to retain the services of the Appellant because of Vijay Krishnan. However, he was not involved in the installation. If the Respondent had reason to apprehend that Vijay Krishnan would be partisan towards the Appellant, it is unlikely that it would have consulted him in respect of the water leakage. On the basis of the entirety of the evidence led in regard to the relationship between the parties, I am not persuaded that Vijay Krishnan's Report was partisan or lacked independence. I am therefore satisfied that he had no motive to conceal or misrepresent matters in the Report.

[13] Further, the Report had been prepared in 2003, long before the Respondent instituted action for damages. The correspondence between the parties reveals that the Respondent made many efforts to persuade the Appellant to repair the leakage, but the Appellant continued to deny that the leakage was not caused due to its faulty workmanship and

refused to effect the repairs. It was in those circumstances that the parties agreed to obtain the services of Vijay Krishnan to inspect the site and report on his findings. I am therefore satisfied that although Vijay Krishnan was not called as a witness, and was not available for cross examination, the Report was not prepared under circumstances which suggest that there was an attempt to prevent a proper evaluation of its weight. I am therefore of the view that the Report was admitted in accordance with law, and its evidentiary value has been assessed correctly, by the learned trial Judge.

[14] Vijaya Krishnan was not an employee of the Respondent, instead, his services were retained as a Consultant Project Engineer. Vijay Krishnan's Report was not challenged when led in evidence, nor did the Appellant lead any other evidence to rebut its contents.

(b) Value of the Contents of the Vijay Krishnan Report

[15] The Report, as did the testimony of the witnesses, revealed that there were basic structural defects in the design and construction of the windows themselves. They were unsuited to needs of the building, because the frames used were classified as a 'domestic type' which are usually used in residential buildings of only up to two storeys high and did not contain the basic precautionary measure namely drainage slots, also known as *'weep holes'*, for preventing the ingress of water into the building. The manufacture of the windows was within the sole control of the Appellant. Thus, faulty workmanship was established, and rightly attributed to the Appellant. The complaints received by the Respondent were also produced, in relation to the years 2003 and 2005.The evidence established that the learned trial Judge did not rely entirely on the Report of Vijay Krishnan, to award damages. For the reasons set out above, in my view, the learned trial Judge did not err in considering the contents of Vijay Krishnan's Report. The first ground of appeal is therefore dismissed.

The Second Ground of Appeal – Inappropriateness of adopting the principles in Hadley v Baxendale in awarding damages

[16] The essence of the second ground of appeal is that the learned trial Judge erred in basing the award of damages on the principles laid down in **Hadley vs Baxendale**, (1854) 9 Ex.341, despite the failure of the Respondent to prove, either actual loss, or replacement cost of the windows or any losses whatsoever. For the reasons I will set out below, in my view, the learned trial Judge did not err in law in adopting the principles in **Hadley v Baxendale,** *(supra).*

The compensatory principle in awarding damages for breach of contract

[17] Damages are compensatory in nature. They reflect pecuniary compensation awarded to a successful Plaintiff who establishes that he has suffered damage, loss or injury, due to either the commission of a tort by the defendant, or a breach of contract arising from the act of the defendant.

[18] The starting point for determining the measure of damages both in contract and tort, was laid down in the speech of Lord Blackburn in **Livingstone v Raywards Coal Co.** (1880) 5 App. Cas.25 at 39, where he defined the measure of damages as:

> *"that sum of money which will put the party who has been injured, or who has suffered as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."*

[19] Whereas in tort, the right to an award of damages would depend on the position of the claimant had the tort not been committed, in awarding damages for breach of contract, it

would depend on the position that the claimant would have been in, had the contract not been broken.

[20] This proposition reflects the principle of *restitutio in integrum* and has been followed as far back as 1848. The award of damages for breach of contract is compensatory rather than punitive, and as stated by Parke B is as follows: -

> *"If the plaintiff has suffered damage that is not too remote, he must, so far as money can do it, be restored to the position he would have been in, had that particular damage not occurred."* **Robinson v Harman** (1848) 1 Exch 850;

[21] This principle was followed in **Wertheim v Chicoutimi Pulp Co.** [1911] AC 301 at 307; **The Edison** [1932] P 52 at 62-63, per Scrutton LJ; B. **Sunley & Co. Ltdv Cunard White Star Ltd** [1940] 1 KB 740 at 745, [1940] 2 All ER 97 at 100, *per curiam.* (cited in Cheshire, Fifoot & Furmston's Law of Contract, Butterworths, 1996).

[22] The principle propounded in **Hadley v Baxendale,** *(supra)* is that damages can be recovered only if, at the time the contract was made, the breaching party had reason to foresee that consequential damages would be the probable result of breach.

[23] It is helpful to set out briefly the facts in the celebrated case of **Hadley v Baxendale** *(supra).* It involved a claim for breach of contract by a mill owner against a carrier for failure to deliver a crankshaft within the time specified by the contract of carriage. The carrier did not know that the crankshaft was critical to the whole of the output of the mill. The plaintiffs claimed against the defendants for a loss of profit, for the whole of their production between the dates when the crankshaft should have been delivered, and the date when it was actually delivered.

[24] For convenience, the two limbs of the relevant portion of the judgment have been reproduced. Alderson B said:

"Now we think the proper rule in such a case as the present is this:

(a) Where two parties have made a contract,

(b) which one of them has broken,

(c) the damages which the other party ought to receive in respect of such breach of contract should be

[The first limb]

(ci) such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or

[The second limb]

(cii) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. (Emphasis added).

The Plaintiff in **Hadley v Baxendale** *(supra)* was unsuccessful on the basis that the damage claimed was too remotely connected to the breach of the defendant.

[25] The principle laid down in **Hadley v Baxendale** *(supra)* is that damages must be limited to the consequences that can be reasonably anticipated by the parties, as flowing naturally from the defendant's breach of the contract. This pre- supposes that any special circumstances must be either known by the Defendant or made known by the Plaintiff to the Defendant, thus putting the Defendant on notice, so that knowledge can then reasonably, be imputed to him. **Hadley v Baxendale,** *(supra)* does not, as contended by Counsel for the Appellant, lay down that the Plaintiff must prove actual pecuniary losses or the cost of using alternate means to achieve what the Defendant failed to perform. I am therefore of the view that this ground of appeal has been formulated on a misconception of the substance of the principles enunciated in **Hadley v Baxendale**, (*supra*).

[26] The judgment in **Hadley v Baxendale,** *(supra)* was developed further in two leading cases: **Victoria Laundry (Windsor) v Newman Industries,** [1949] 2 KB 528 and **Koufos v C.Czarnikow Ltd (The Heron),** [1969] 1 AC 350.

The Extent to which knowledge will be imputed

[27] In **Victoria Laundry** (*supra)* the rule in **Hadley v Baxendale** *(supra)* was explained with reference to three main propositions:-

(a) that an aggrieved party can recover only such part of the loss actually resulting, which was at the time of the contract reasonably foreseeable as liable to result from the breach.

(b) what was at that time reasonably foreseeable depends on the knowledge possessed at the time the contract was entered into, by the parties, and specifically by the party who later commits the breach,

(c) knowledge which is required to be possessed ' is of two kinds; one imputed, the other actual. Everyone, is tested from the point of a reasonable person, and is taken to know the *"ordinary course of things"* and consequently regarded as having knowledge of what loss is liable to result from a breach of contract, in the 'ordinary course of matters'.

[28] In **Czarnikow Ltd. v. Koufos** *(supra)*, at p 385, Lord Reid said:

> *"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach..."*(Emphasis added).

[29] What type of knowledge can be imputed will depend on the facts of each case. One basis on which knowledge can be imputed in this case, was the fact that the Appellant was both the manufacturer as well as the installer of the windows. It was the Appellant that took the measurements of the window frames. All the different stages of production were solely under the control of the Appellant. Thus, it is reasonable to impute to the Appellant, knowledge of the repercussions of the failure to supply windows suitable for the fifth floor of a commercial building.

[30] The test according to the **Victoria Laundry Case** *(supra)*, is what could be foreseen to happen in *'the ordinary course of things'*. Applying that test to the facts of this case, leakage through unsuitably designed windows was a direct and foreseeable consequence, within the knowledge of the manufacturer of the window, namely the Appellant. The Appellant who held itself out as a manufacturer and installer of windows, submitted its offer in the form of the quotation, and later took the measurements of the windows for preparation of the design and manufacture of the windows, can be imputed with the knowledge of the type of windows that were required for the fifth floor of a commercial

building, in Suva. It had to know the weather and wind patterns of Suva, and that the windows had to be of a specific design and strength for a commercial building of those dimensions and for that purpose. Thus, the Appellant knew that its failure to manufacture and install the proper design and quality of window for the special needs of the building, could result in loss and damage to the Respondent. The natural consequence of failure to provide and install suitable windows, was the continued leakage of rainwater into the building. The Appellant was therefore in breach of contract.

[31] On the authorities discussed, and the facts of this case, I am of the view that the principles laid down in **Hadley v Baxendale** *(supra),* were properly applied by the learned trial Judge. The second ground of appeal is therefore dismissed.

The Third Ground of Appeal – Unjust Enrichment

[32] The third ground of appeal urged is that the learned trial Judge failed to consider that the property of the Appellant fixed to the building of the Respondent continued to be used by the Respondent, resulting in unjust enrichment to it. This was not specifically raised by the parties of the in their pleadings nor included in the Pre-Trial Conference Minutes. However, since the evidence raises the issue, I am prepared to consider it.

[33] Unjust enrichment has been described as follows:

> *"Unjust enrichment arises in a situation in which the defendant is enriched at the expense of the claimant and there is in addition a reason, not being a, manifestation of consent or a wrong, why that enrichment should be given up to the claimant"* (Peter Berks, Unjust Enrichment, second ed. 2005).

[34] Unjust enrichment has also been described as follows:

> *"The principle of unjust enrichment requires first, that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the claimant, and that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim".* (Chitty on Contracts, Vol 1, para 29-018, Sweet & Maxwell, 2004).

[35] The particular terms of the contract may sometimes make it difficult to ascertain the extent of the enrichment.

> *"Services may take many forms and while some result in an indirect accretion to the defendant's wealth, for instance by improving his property, other 'pure 'services do not.* (Chitty on Contracts, Vol. 1, para 29-021, (*supra*).

[36] The second witness for the Plaintiff was Samuto Chang, from ViewTech the company that had given the quotation for the replacement of the windows. He said that since the installed windows were of residential quality, and were improperly designed, the company was not prepared to risk attempting repair. He thus recommended a total removal of the existing windows and replacement with windows suitable for the '*environment*'. In view of this, it also included the price of scaffolding. It quoted a sum of $76, 840.00 for the removal of the existing windows and installation of new windows, and $24,000.00 for the scaffolding. This makes up the sum of $100,840.00 set out in the Respondent's Statement of Claim. However, the learned trial Judge did not allow this sum on the basis that the design in the proposed new windows was different from the design of the existing windows installed by the Appellant.

[37] Despite the Respondent's willingness to deposit the balance sum of $10,000.00 in the Solicitor's Trust Accounts until the Appellant rectified the faulty windows, the Appellant was unwilling to accept this course of action and continued to refuse to attend to the repairs. The failure to repair could be attributed to more than one reason; that the Appellant itself knew that the windows were so badly structurally designed that it saw no purpose in attempting to repair them, or that the Appellant was unwilling to perform the contract. Either way, it made no difference to the correct finding that there had been a breach of contract by the Appellant.

[38] In **Daydream Cruises Ltd v Myers**, [2005] FJHC 316, Connors J considered the issue of unjust enrichment in respect of a claim of breach of contract and unjust enrichment. The Plaintiffs pleaded that the Defendants had benefitted from the use of the name 'Daydream Island'. In determining this claim, Connors J. having considered the relevant authorities said:

> *"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." – Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbaur LD [1943] A.C. 32 at 61 per Lord Wright.*
>
> *The remedy for unjust enrichment is restitution which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff. The measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff. A restitutionary order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have been unjustly obtained and retained by the defendants to the detriment of the plaintiffs.*
>
> *In **Pavey & Mathews Pty Ltd v Paul [1987] HCA 5, (1987) 162 CLR 221**, the High Court of Australia recognized unjust*

enrichment as a valid basis of liability in a claim for restitution for quantum meruit".

The three elements of a claim for unjust enrichment are- ***National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1997] 1 NZLR:***

(i) Proof of enrichment by receipt of a benefit;
(ii) Enrichment at the expense of the plaintiff; and
(iii) That retention of the benefit is unjust.

[39] In **Daydream Cruises Ltd v Myers,** (*supra)* the claim of unjust enrichment was upheld on the basis that the 1st Defendant has received the benefit of the use of the Plaintiffs' name, and the infrastructure and facilities erected on it by the Plaintiff together with the expertise and services of the Plaintiffs. In the circumstances of that case, it was held that the right to use that island was clearly a '*significant enrichment'* of the 2nd Defendant.

[40] In the present case, the property in the windows passed to the owner when the contract price was paid by the Respondent. The fact that twelve years after the breach of the contract, the windows were, due to the efforts of the Respondents yet in place, does not amount to due performance of the contract by the Appellant, nor does it amount to unjust enrichment on the part of the Respondent. There can be no unjust enrichment based on goods and services manufactured and delivered in breach of contract.

[41] The retention of the faulty windows by the Respondent cannot be regarded as unjust enrichment, because the Respondent had paid for them. Even a claim for set-off would not have been possible because the Respondent had paid $20,000.00, and the Appellant claimed $10,459.61, being the balance due. However, since the Appellant had breached the contract, the Counterclaim was correctly dismissed by the learned trial Judge.

[42] When the money was paid by the Respondent, and the windows were affixed, as part of the contract of services, the property in the goods passed from the Appellant to the Respondent. Thus, in the totality of the circumstances of the case, I hold that the learned trial Judge did not err in not considering that the windows that were affixed to the Respondent's building, belonged to the Appellant. I therefore dismiss the third ground of appeal.

[43] In my view, the Respondent suffered loss and damage as a result of the leakage in the windows manufactured and installed by the Appellant. The leakage was a direct cause of the failure on the part of the Appellant to properly perform the contract entered into between the parties. This entitles the Respondent to damages. In the absence of a pro-rated breakdown in the Appellant's quotation distinguishing between the goods and services components respectively, (i.e the cost of the windows as distinguished from the cost of the installation of the windows). I am of the view that the contract entered into between the parties, was a contract for services, and the Appellant failed to perform the contract. I am of the view that in all the circumstances of this case, it would not be correct to hold that the Respondent has benefitted, or that its property has been enriched by the faulty windows installed by the Appellant.

[44] I therefore see no reason to interfere with the findings and judgment of the learned trial Judge. I therefore dismiss the appeal.

Mutunayagam, JA

[45] I agree with the findings and conclusion of Hon. Madam Jameel, JA.

The Orders of the Court are:

1. *The Appeal is dismissed, and the judgment of the High Court dated 18 March 2015, is affirmed.*
2. *The Appellant is ordered to pay to the Respondent a sum of $5000.00, as costs of the appeal.*

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Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL

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Hon. Mr. Justice A. B. Mutunayagam
JUSTICE OF APPEAL