1979/3

ROYAL COURT (INFERIOR NUMBER)

Before: Mr. P.L. Crill, Deputy Bailiff
Jurat H. Perree
Jurat M.G. Lucas

Between: John Derrick Houiellebecq Plaintiff

And

Between: Coutanche & Bidel (Coatings) Limited Defendant

Advocate F. Hamon for the Plaintiff
Advocate D. Le Cornu for the Defendant

This action arises from work carried out by the Defendant Company at the Plaintiff's property at Fauvic, Grouville, on the 5th and 6th April, 1977. It is to be noted, however, that in the course of his evidence the Plaintiff referred also to a third day, although the pleadings only mention two days, and there is some conflicting evidence as to whether the work was carried out on that day but we think in fact there were three days.

At the time the work was ordered, the Plaintiff was in business as a photographer and, as pleaded in the Order of Justice, was intending to open a Guest House business and a Tea and Coffee Parlour as well as a Restaurant.

Previously he had been a decorator and had been an experienced photographer for some years. Thus, what was in being on the premises at the time when the work was carried out was a photographic business only from which the Plaintiff

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told us he made between £6,000 and £7,000 a year although no income tax or other figures were produced. On the 1st April of that year, in anticipation of the opening of the catering and Tourist side of his business, he borrowed £15,000 from the Trustee of the Estate of the late Louis Jules Sangan.

The contract for the work was made between the Plaintiff and Mr. Coutanche, the principal of the Defendant Company. It was for the sand blasting of some walls in the area of the premises which had been used as dark rooms and which were designated for future use as a "Food Hall". This area formed the middle of the North side of the property whose Eastern end abutted on to the main coast road leading to Gorey. To the West of the area were a designated kitchen and preparation/ store room and a photographic studio. In the North West corner of the area an open stair-well gave access (when the stairs were in place), to the first floor and to a near-by room in which, as well as in the ground floor studio, the Plaintiff kept some valuable photographic equipment. At the East end of the area was a small fixed window which gave on to an open yard. To the South of the area was another room which was to be used as part of the Restaurant. To the East of this room the Plaintiff and his wife had their private rooms above which was their private bedroom.

The Plaintiff claims that as a result of the Defendant's work, a large quantity of silicone quartz dust permeated throughout the house. The resultant cleaning up delayed the opening of his catering business. In addition he and his wife, both of whom were not in the best of health, suffered physical discomfort for several weeks due to the dust.

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The first matter the Court has to decide is whether the Defendant Company is in breach of its contract. That the Defendant Company owed a duty to the Plaintiff is clear. The measure of that duty has been laid down in many English cases but in particular also in the Jersey case of Dawson v Rothwell, Jersey Judgments Volume 1 at page 1703 and the relevant passage is set out on page 1704. "We believe it to be the law that the public profession of an art or skilled employment is a representation and an undertaking to all the world that the professor or workman possess the requisite skill and ability to prosecute the employment which he has undertaken to a successful termination. Consequently, in the case of any contract for work there is an implied engagement on the part of the person undertaking to do the work that it will be performed with due care, diligence and skill according to the orders given and assented to". There is nothing to suggest that the blasting itself was carried out other than with skill and diligence but nevertheless we have to ask ourselves did the Contractor exercise due care in relation to the masking and ventilation requirements of such work? The Defendant Company had a duty to ensure that the rest of the property was protected as far as it reasonably could from the effects of the sand-blasting which manifested itself in the amount of dust which the company knew or ought to have known would be generated by the work. Moreover, it had been put on its guard by an incident a short time before as to the way in which dust could permeate buildings through any sort of opening. It therefore had to mask as many of such openings or cracks through which it could reasonably be expected that dust might pass. Because the property is an old one it was, of course, almost impossible to ensure one hundred per cent that

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all possible crevices were sealed and we find, with one exception, that the masking was reasonably and sufficiently done although it is true that Mr. Shipley, an Insurance Adjuster called by the Defendant, said that the masking was not one hundred per cent when he saw it on the following Tuesday. He said also that most of the masking had in fact been done by Mr. Houiellebecq. We know also that, according to Mr. Houiellebecq and supported by at least one of the employees of the Defendant Company, that some dust escaped on the first day into the Tea and Coffee Room and further masking was required. The exception as regards masking was the top of the stair well which we find was protected inadequately. This might not have mattered had not the operation caused the build-up of considerable air pressure in the room where it was being carried out because the nature of the work required the introduction of air into the room under great pressure. Mr. R.M.G. Coppell the Senior Accident Prevention Officer of the States told us that the air flow was 150 cubic feet per minute. Unless it could escape it would invariably seek out the weaker places in the walls and seep through carrying with it the silicone dust. This is in fact what it did. The Defendant Company, through Mr. Coutanche, appreciated that the air needed an escape route. The only suitable one was the small fixed window, which we have already mentioned, giving on to the yard. That the question of ventilation was important was appreciated by Mr. Coutanche who said that had the window been removed ninety per cent of the dust would have escaped through it; Mr. Coppell was not so sanguine. It was not surprising, therefore, that Mr. Coutanche warned Mr. Houiellebecq about the dust. He said that he told him the dust would be considerable. Mr. Houiellebecq admitted

he knew that there would be some dust and that sand-blasting was dangerous and uncontrollable inside as well as out but he had the impression that Mr. Coutanche was capable and was an expert at that particular job. We think he was entitled to expect Mr. Coutanche to be just that and to rely on him accordingly. We reject the suggestion that because Mr. Houiellebecq had had some experience earlier as a decorator he was using his own experience in deciding what preventative steps should be taken before the work was carried out, and was therefore taking upon himself the responsibility for seeing that proper precautions were taken. We accept Mr. Coutanche's evidence also that had the window been removed a great deal of the dust would have been extracted through it. Mr. Le Cornu submitted, citing from Charlesworth on Negligence, that the Defendant Company was entitled to succeed if it showed that it had acted in accordance with general and approved practice in work of this nature. As to this, we had no evidence as to what general and approved practice was except, of course, Mr. Coppell thought that some ventilation was necessary, not only through the window, but through one of the doors which lay to the West of the area. If ventilation was required, and none was provided, how can it be said that the Defendant Company had acted in accordance with general and approved practice unless, indeed, it was prevented from providing the appropriate ventilation by the very act of the Plaintiff himself? It is here that there is a direct conflict of evidence. The Defendant Company through Mr. Coutanche said that he, Mr. Coutanche, asked the Plaintiff if he could remove the East window and that the Plaintiff refused and gave as his reasons, first, that he did not wish his neighbours to know

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what he was doing and, secondly, that he had not received permission from the Island Development Committee to carry out the work; the inference of course being that the Island Development Committee might get to know of his work through some neighbours. We should add that the contract between the parties was oral and only the Plaintiff and Mr. Coutanche were present at any time during the negotiations. As regards the question of the neighbours, the property is not isolated and to carry out the work the Defendant Company brought in through the front a compressor which was placed near the entrance which, as we have said, was near the West end of the area in question. We were told also that the compressor would make about as much noise as a motor lawn mower. It was, in our opinion, unlikely that the neighbours would object to any interior work of the sort envisaged since we were told by Advocate Hamon for the Plaintiff (and this is of course a matter of record) that none of them objected subsequently when Mr. Houiellebecq, or his Company, applied for a liquor licence.

As regards the Island Development Committee the Defendant Company produced a letter from the Chief Executive Officer in which the date of an application for "proposed internal alterations to form a health/food/sea-food restaurant and auxiliary facilities" was given as the 12th April, 1977, which was of course some days after the work had been carried out by the Defendant Company. Written consent was given by the Island Development Committee on the 2nd June, and a commencement of work notice was received by the Committee on 22nd June. There is therefore some support for Mr. Coutanche's evidence in as much as at that time Mr. Houiellebecq had not received

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formal Island Development Committee permission. However, we recalled him to the stand and he told us that all the neighbours knew that he was intending to open Tea Rooms at least. He had previously got into touch verbally with various States Departments and he was satisfied that he would have got permission eventually for the work. He had made a modest start in fact in February and March by knocking down some internal partitions.

There is also some support for Mr. Coutanche's evidence as regards the East window from his senior employee on the site, Mr. J. Boyle. He said that he had asked the Plaintiff if the window could be removed but was refused with the same excuse about the Plaintiff not wanting the neighbours to know. He said that he warned Mr. Houiellebecq that in the absence of this opening it would be a harder job. However, assessing the evidence we are not satisfied that Mr. Houiellebecq was asked unequivocably to remove the window or that subsequently he refused to do so. But even if he had been and had refused what would have been the position? Mr. Coutanche said that he told his men to ask Mr. Houiellebecq again about the window. He did not attend at the site at the beginning of the work but left matters to his men. If, it was vital, as we are satisfied it was, for there to be some ventilation, and the window was the only substantial way, Mr. Coutanche had a choice; he could have refused to do the work or obtained from Mr. Houiellebecq an undertaking to accept the resultant risk. He did neither of these but merely hoped for the best. We cannot overlook also the further evidence of Mr. Coppell. He told us that the material used to blast was washed bank sand but that in his opinion it was dangerous material as it

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contained ninety three per cent silica; there were other more suitable materials on the market which could have been used. He himself would not have recommended inside blasting at all and he would have expected an experienced sand-blaster to make sure that there was ventilation in that situation. The Plaintiff had suggested in his pleadings that the Defendant Company should also have used some sort of vaccum cleaner to extract the dust. However, we are satisfied from what Mr. Coppell said that that would not have been reasonably practical even if such vaccum cleaners were available for such small scale works.

Accordingly, we find that in not making sure that there was adequate ventilation before the work began the Defendant Company failed in its duty towards the Plaintiff.

We next have to consider the damages. The original heads of special damages were as follows:-

1.	Loss of twleve beds at £45 per week for twenty-two weeks	£5,000.00
2.	Labour and materials to clean the whole of the house and proposed restaurant, store rooms and the photographic studio	£2,500.00
3.	Complete loss of all curtains and bed-spreads	£1,242.00
4.	Complete loss of all wall and ceiling coverings	£ 762.00
5.	French Polishing furniture	£ 170.00
6.	Cleaning typewriter	£ 24.00
7.	Cleaning carpets	£ 63.60
8.	Complete loss of photographic portraits on canvass ready for Easter	£ 864.00
9.	Re-issue of the same orders	£ 274.00
10.	Loss of photographic business due to the studio being unusable	£3,490.00

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11.	Stripping, cleaning, re-assembling and testing of all lenses, cameras and belcar studio electronics	£2,575.00
12.	Hire of compatible equipment whilst the Plaintiff's equipment was being repaired	£3,240.00
13.	Estimated loss on the proposed tea and coffee parlour restaurant	£13,057.00
		£33,261.60

The Plaintiff has withdrawn items 1, 12 and 13, preferring to leave it to the Court to take these matters into account in assessing general damages. It is well that he did so because we were far from satisfied with the evidence on these three items. As it was, the lack of supporting documents to substantiate items 2, 3 and 4, made it impossible for us to distinguish between them and accordingly we have awarded a figure of £1,500 in respect of items 2, 3 and 4.

We are satisfied, however, that the Plaintiff has proved sufficiently items 5, 6, 7, 8 and 9 and we award these items in full. As regards item 10 we have had no proper accounts produced to us and we have assessed the Plaintiff's loss at £1,300. We allow item 11 in full. The total of special damages is, therefore, £6,770.60.

Having regard to the obvious distress to the Plaintiff, to his wife, the complete destruction of his plans and the subsequent delay in building up the important element of goodwill in the new business, and of retaining the confidence of his former customers in his photographic business, we assess the general damages at £5,000.

This is a claim in contract notwithstanding that the Defendant Company in its answer pleads as if it were brought in tort. In essence, the action may be described as one of

negligence ex contractu. We do not feel it incumbent on us to rule whether in such a claim brought in contract the Law Reform Miscellaneous Provisions (Jersey) Law, 1960, applies. But as that Law is based on the corresponding English Act, although with some minor differences, we think that we are entitled to look to the English Authorities. When we do so we find a similar result can ensue whether one applies the law of tort or contract as regard diminution of damages. The Defendant Company had an obligation to carry out its work carefully but that obligation arose out of a contract between it and the Plaintiff. It is true that no-where in the English Act, or in the Jersey Law, are the provisions relating to contributory negligence confined exclusively to actions brought in tort, but both the Act and the Law were passed undoubtedly with tort rather than contract in mind. Nevertheless, there is some indication that the English Courts may be moving towards the application of the provisions of the English Act to actions brought in contract but we agree with the author of McGregor on Damages, 13th edition, where he says that authority is sparse. Moreover, Chitty says that "the position must await authoritative determination". As far as concerns this jurisdiction we do not feel we need attempt this. When we used the words earlier "a similar result" we meant that where the Plaintiff was the author of his own misfortune, then, to the extent that that can be quantified, a defendant should not be liable to recompense him.

We have to ask ourselves whether the amount of damages should be reduced, and if so by what amount because of the Plaintiff's own actions. First, it is apparent to us that some inkling of what might be expected from the degree of dust must have been known to the Plaintiff on the first day (which we

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were told was in fact in the afternoon). Yet he did not stop the work because he wanted the job to be completed. He told us, and the Defendant Company did not deny that it knew this, that he was hoping to open at least part of the premises, certainly the restaurant and tea parlour, at Easter. Secondly, even after the mess which he and his wife were confronted with on the second day due to the fine dust permeating slowly and settling down during the night, he asked the Defendant Company's workmen to sand-blast further walls South of the original work area. Thirdly, he did not call off the work until the following day when there was only about half of one small wall to do. And fourthly, he did not have the house cleaned by professional cleaners because he and his wife were, quite understandably, distrustful of contractors and decided to clean the house, furniture and fabric themselves with assistance from a friend.

As regards mitigation we may cite the judgment of Lord McMillan in Banco de Portugal v Waterlow which is set out on page 227 of McGregor the relevant part of which is as follows: "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty". While we think it would have been better if the Plaintiff had employed professional cleaners he did not take such an unreasonable step as to disentitle him to recover. Yet what he did here is a factor which we are entitled to take into account in assessing the damages.

If we had been applying the provisions of Law Reform Miscellaneous Provisions (Jersey) Law, we would have reduced

the damages by half. As it is we feel justified in reducing them by the same amount, even though the action is brought in contract. because of the Plaintiff's own actions which we have mentioned. The position is put thus by Paul J. in his judgment in Quinn v Burch Ross Builders Limited, which is referred to in the Court of Appeal and is to be found at page 376. 2 Queen's Bench Division, 1966. He says, that in contract, it has long been held that it is a good defence to an action founded on breach of contract that the party suing has chosen himself to act in a way in which a reasonable man would not act and so brought about the damage claimed. This is really a matter of causation. We find that it was not reasonable for the Plaintiff to allow the contractors to continue to work after lunch time on the second day. He should have stopped the work there and then. Damages, therefore will be reduced by 50% and accordingly the total awarded is £5,885.30. To this sum will be added interest from the date when the action was first issued to the date of judgment today at the rate of 10% and the Plaintiff will have his costs.