

TRESTRAIL & TRESTRAIL V BRIGGS [1999] SASC 413

Supreme Court of South Australia - 24 September 1999

FACTS

Briggs owned a block of land in the Adelaide Hills and retained Trestrail to construct a driveway to run from the northeastern corner of the land. Trestrail quoted a piece of \$4000 to \$4500 for the work.

Trestrail started the work but constructed the driveway to run from the northwestern corner of the land. When the works were well under way Briggs inspected the works and found out that the driveway was running from the wrong corner. After some discussions Briggs reluctantly accepted that the driveway would run from the wrong corner on one condition that a motor vehicle would be able to use the driveway. The corners on the driveway were too tight.

Trestrail sued for unpaid work and Briggs sued for breach of contract.

ISSUES

Did Briggs agree to a variation of the original contract?

Was Briggs estopped from claiming breach of contract against Trestrail?

FINDING

Briggs did not agree to a variation of the original contract. She simply accepted the substantial performance by Trestrail after a breach of contract had already occurred.

The conduct of Briggs in allowing Trestrail to complete the driveway did not mean that she was estopped from suing for breach of contract. She allowed Trestrail an opportunity to prepare an acceptable driveway and he still failed to construct such a driveway.

QUOTE

Doyle CJ said:

“Plainly enough, the judge did not find that Dr Briggs agreed to vary the contract. What she did was to accept what must have seemed to be the inevitable. When she came to the site the work was well advanced. It was hardly practicable to go back, undo what had been done, and start again. I do not agree that, by allowing Mr. Trestrail to proceed as she did, Dr Briggs is taken to have agreed to a variation of the contract. There may have been an element of uncertainty about the state of affairs on that day. But, on the Judge’s findings, Dr Briggs made it plain that what Mr. Trestrail had done was not acceptable to her. She could have instructed Mr. Trestrail to cease work, but did not.”

But her failure to do so does not mean, in my opinion, that she was agreeing to a variation of the contract. She was simply accepting the substitute performance, in breach of the contract, for what it's worth. That left it open to her to make such claim as might be available to her, arising from the breach of contract."

"The Judge found that Dr Briggs permitted Mr. Trestrail to proceed specifically on the basis of an assurance that the driveway as proposed by him would be usable. The Judge made a strong finding that the driveway was not usable.

This finding was supported by an inspection that the Judge made of the site, and observations made by the Judge of Dr Briggs' manoeuvring her car on the driveway. The substitute performance by Mr. Trestrail was defective.

If there was an estoppel, or some other basis for refusing to allow Dr Briggs to assert her rights under the contract, justice would surely require that she be at liberty to do so if the basis of any acceptance of the substituted performance was found to be an unfulfilled assurance that the substituted performance would provide a usable driveway."

IMPACT

If a breach of contract has occurred the innocent party will have to decide whether to stop the work or allow the guilty party to correct the work and/or provide a substitute for the work. Allowing the guilty party to complete or substitute the work may not bar the innocent party from later claiming for a breach of contract provided there is no agreement to vary or amend the works.

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