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Kent v. Conquest Vacations Co.

Amita Kent (Plaintiff / Respondent) and Conquest Vacations Company (Defendant / Appellant)

Rohit Kent (Plaintiff / Respondent) and Conquest Vacation Company (Defendant / Appellant)

Ontario Superior Court of Justice (Divisional Court)

Lane J.

Heard: January 12, 2005

Judgment: February 1, 2005

Docket: 716/03, 715/03

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Proceedings: affirmed *Kent v. Conquest Vacations Co.* ([October 30, 2003](#)), Thomson J. ((Ont. S.C.J.))

Counsel: Christopher Ashby for Appellant

Andrew Reddon for Respondents

Subject: Contracts; Civil Practice and Procedure

Contracts --- Remedies for breach — Contractual remedies — Miscellaneous issues

Damages --- Damages in contract — General principles

Judges and courts --- Jurisdiction — Jurisdiction of inferior courts — Monetary jurisdiction — What constituting claim — Claim in contract or tort

Cases considered by *Lane J.*:

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Jarvis v. Swan Tours Ltd. (1972), [1973] 1 Q.B. 233, [1973] 1 All E.R. 71 (Eng. C.A.) — considered

Sokolsky v. Canada 3000 Airlines Ltd. (2003), 2003 CarswellOnt 6088 (Ont. Div. Ct.) — referred to

Rules considered:

Small Claims Court Rules, O. Reg. 258/98

R. 5 — considered

R. 6.02 — considered

Lane J.:

1 This appeal involves two actions in Small Claims Court. Amita Kent and Rohit Kent (the Kents) are married. Together, they purchased an all-inclusive vacation from the appellant, Conquest Vacations Company (Conquest). Although both trips (and their toddler child's trip) were contracted for and paid for together, the terms of the contract set out that each traveller is a party to a contract with Conquest. As the vacation did not meet the description that was presented by Conquest's brochure, the Kents each brought an action against Conquest for breach of contract.

2 The Small Claims Court judge found in favour of the Kents, awarding Mr. Kent \$7,185.80 plus costs and interest, and Mrs. Kent \$8,544.90, plus costs and interest. Conquest appeals on three grounds: first, that the Small Claims Court did not have monetary jurisdiction because the Kents had split their case; second, that Conquest was not responsible for their disappointing holiday; and third, that the damages awarded were excessive.

Jurisdiction

3 Conquest argues that the Small Claims Court did not have jurisdiction to hear these actions because there should have been only one action. Conquest submits that the Kents split their single action into two in order to get around the \$10,000 limit applicable in Small Claims Court. Conquest claims that, since the contract was for two adults and one child to take a vacation together, "it was not in any way separated by individuals." Conquest relies on the facts that the family paid for the vacation with one Visa card, traveled together, and spent time together as a family on the vacation to argue that there is only one cause of action. Conquest claims that the Kents are in breach of Rule 6.02 of the *Rules of the Small Claims Court*, Ontario Regulation 258/98:

6.02 A cause of action shall not be divided into two or more actions for the purpose of bringing it within the court's jurisdiction.

4 If the two actions are more correctly heard as one, the total award of damages of \$15,730.70 exceeds the jurisdiction of the Small Claims Court.

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5 The Kents dispute Conquest's allegations of case splitting, relying on the terms of the contract, which state that each traveler has a contract with Conquest. Since each has a contract, each has an action for breach. Multiple plaintiffs, even if married to each other, maintain rights to seek relief before the Small Claims Court up to the maximum \$10,000 per claim.

6 The "Terms and Conditions" issued to vacationers by Conquest contains the following:

In booking a Conquest Holiday, or Air only, you and those on whose behalf you are booking become party to a contract with Conquest and those companies providing the services included in your holiday.

7 This is Conquest's language, inserted by it in its own interest and it clearly provides that not only the person booking the holiday, here Mrs. Kent, but also those for whom she booked, here Mr. Kent, become party to the contract. Why then cannot each party to the contract assert his or her damages for a breach of it in an action? "The right to sue for damages for breach of contract does not arise out of the contract itself, that is, it is not a matter of agreement but is an independent right given by the law." [FN1]

8 While the damages of the individual parties arise out of a common transaction, they need not be asserted in a single action. Rule 5 of the Rules of the Superior Court, although not directly applicable to the Small Claims Court, is instructive. It provides that two or more plaintiffs, if represented by the same solicitor, "may" join as the plaintiffs in the same proceeding where their claims arise out of the same transaction. The joinder is voluntary.

9 The Kents have not split their case, as prohibited by Rule 6.02. This rule prevents a single plaintiff from dividing an action to come within the court's jurisdiction. This is not so in the case at bar, as both Mr. Kent and Mrs. Kent were parties to the contract and had the right to bring separate actions against Conquest.

Was Conquest Responsible for the Disappointing Holiday?

10 The trial judge found that the resort was "so far from a three star hotel as to be as close as you can get to the worst of misrepresentation." She found that the facilities represented were not there; the plaintiffs were not even at the hotel which they had booked, a fact which they learned from taxi drivers. Although the appellant made some efforts to remedy the situation, the trial judge found them inadequate. The correction sent to the travel agent was lamentably inadequate. The change of name of the resort was of minor interest only; the shortcomings of the resort were barely mentioned. There was ample evidence in the record to support the trial judge's findings. She made no palpable or over-riding error in her fact-finding.

11 Nor did she fall into error as to the applicable legal principles. Her decision is in line with the applicable precedents such as *Jarvis v. Swan Tours Ltd.* [FN2] and *Sokolsky v. Canada 3000 Airlines Ltd.* [FN3]. The trial judge did not err in finding on these facts that the appellant was responsible to the respondents in law for breach of contract.

The Assessment of Damages

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12 As the actions are properly brought separately, the appellant's complaint that damages should be limited to a total of \$10,000 cannot succeed. As to the assessment, the appellant says that they are excessive, particularly when Mr. Kent did not give evidence as to whether or not he enjoyed the holiday. The appellant further submits that some allowance should be made for the fact that there was some enjoyment at the resort.

13 As to Mr. Kent, the fact that he did not give evidence does not materially assist the appellant. Mrs. Kent gave detailed evidence as to the deplorable lack of facilities and the impact on their vacation in terms of stress and disappointment. She also spoke to the fact that her husband could not dive as the promised facility did not exist, they could not play tennis as there was no court, the beach was so bad there was no beach enjoyment at all. She spoke of their mutual disappointment at the loss of the expected opportunity to spend time on the beach with their three-year-old, "probably the biggest disappointment to us." [FN4] This evidence goes to support the damages award to Mr. Kent as well as that to Mrs. Kent.

14 The trial judge was alert to the fact that the Kents did have time at the resort, and meals, etc. She commented that while they had some good weather in January and some good food, they got a lot more that was negative in addition to what was missing. She found that the Kents lost the whole purpose of the vacation. In assessing the damages, she quite properly took account not only of the cost thrown away, but also of the loss of the opportunity for family relaxation and time together. She concluded that she had no hesitation in making an award of the cost of the trip plus twice the cost as a measure of the damages suffered "personally". She found that a similar award was in order for Mr. Kent.

15 In my review of the evidence, there is ample support for these findings. The trial judge might easily have found that the cost of the special attendant for the Kent's son who remained at home was allowable as special damages, but presumably took it into account in the overall assessment instead. There was evidence that the vacation added to the stress of the Kent family rather than relieved it.

16 It was submitted by the appellant that "merely doubling the travel cost to award damages" was no longer an appropriate method of damage assessment. I agree that there is no formula of that sort. In *Jarvis*, the sum awarded was very near to twice the travel cost, but neither Lord Denning nor the other two judges articulated such a formula. It seems to me that all three judges were relating their award in a general sense to the cost of the travel but not in a formulaic sense. I do not think the trial judge acted by formula in the present case. She considered all the circumstances which were personal to these particular plaintiffs and arrived at her figure. She did not "merely" do an arithmetic calculation to reach the damages award. Her calculation was arrived at bearing in mind the appropriate factors. Relating the award in a general sense to the cost of the travel is not an unreasonable approach, for the higher cost is not unrelated to the legitimate expectations of enjoyment which have been frustrated by the breach of contract. To avoid confusion, it might have been better to steer clear of any language that might be regarded as formulaic. These general damages, unlike the decision that the Kents were entitled to a refund of the travel cost, are at large and depend entirely on the impact upon these particular plaintiffs of the loss of their holiday.

17 In the case of the Kents, the amount awarded to each of them is certainly within the bounds of the reasonable award in their particular circumstances as established in the evidence. It must not be forgotten, in assessing this sort of

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damages, that for many people, the Kents no doubt included, the real loss is not the cost, but the scarce vacation time expended in vain and never recoverable.

18 I see no error in the assessment of the damages by the trial judge. The appeal is dismissed with costs. If the parties cannot agree on the costs, they may make brief written submissions within 30 days of the release of these reasons.

[FN1](#) G.H.L.Fridman: *The Law of Contract* 4th edition, (Scarborough: Carswell, 1994) at 702-3.

[FN2](#) (1972), [1973] 1 All E.R. 71 (Eng. C.A.)

[FN3](#) [2003] O.J. No. 3920 (Ont. Div. Ct.)

[FN4](#) Transcript, page 24, line 15 to page 25, line 13.

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