

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1983 B237

BETWEEN MYRTLE BESWICK PLAINTIFF

AND VICTOR SPENCE DEFENDANT

Gordon Robinson for the plaintiff.

February 13, 1985 and March 7, 1985

PATTERSON J.

This suit came before me for assessment of damages. The plaintiff claims damages for breach of a contract for sale and purchase between herself as vendor of premises no. 40 Sandhurst Crescent in St. Andrew and the defendant as purchaser. The agreement and its breach are set out in the statement of claim which reads as follows:

- "1. By an Agreement for Sale and Purchase dated the 6th day of November, 1981 the Plaintiff agreed to sell and the Defendant agreed to purchase premises known as 40 Sandhurst Crescent, Kingston 6 in the parish of Saint Andrew at a price of \$112,500.00, and the Plaintiff will at the trial of this action refer to the said agreement for its full terms and effect.
2. It was agreed that the sale price would be payable by a deposit of \$11,250.00 on the signing of the said agreement, the balance on completion - completion date being the 28th day of February, 1982.
3. The said agreement was subject to the Defendant obtaining and presenting to the Plaintiff's Attorneys at Law, a Letter of Commitment within four weeks of the signing of the said agreement whereupon the Defendant would be put in possession of the said premises with no interest payable.
4. The Defendant failed to present a Letter of Commitment within the time specified under the agreement and the Plaintiff extended the time so limited and the Defendant presented same on or about the 16th day of December, 1981 and was put in possession on or about the 17th day of December, 1981.
5. The Defendant in breach of his agreement with the Plaintiff failed to pay the balance of the purchase price in full on the 28th day of February, 1982, but paid in the following manner: \$11,250.00 on or about the 18th day of November, 1981 and \$3,000.00 on the 28th day of June, 1982 and the balance on the 28th day of October, 1982.

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The Plaintiff therefore claims to recover as damages for breach of contract from the Defendant the sum of \$6,650.00 being interest on the outstanding purchase price from the 28th day of February, 1982 to the 28th day of October, 1982 made up as follows:

Interest at 10% on balance purchase price then owing - \$101,250.00
at 10% from the 28th February, 1982 to 28th June, 1982 - \$3,375.00

Interest on the balance purchase price - \$98,250.00 from the 28th June, 1982 to 28th October, 1982
+ \$3,275.00
\$6,650.00

The defendant entered an appearance, but failed to file a defence, and the plaintiff promptly entered interlocutory judgment in default of defence. A copy of the interlocutory judgment was served on the defendant and, subsequently, the plaintiff obtained an order to proceed to assessment of damages. Notice of assessment was served on the defendant to appear at the assessment - but he did not attend, nor was he represented.

The plaintiff's evidence in support was given by Mr. William Arthur Scholefield, Attorney-at-law. He said that his firm, Judah Desnoes Lake Nunes Scholefield & Co., represented the plaintiff/vendor and that he was personally engaged in the transaction leading up to completion. Miss Gloria Chin Sang, Attorney-at-law, represented the defendant/purchaser. He said that it was agreed between the parties that once the letter of commitment from some financial institution was to hand, the defendant would be let in possession before completion, and that interest would not be charged on the unpaid balance, nor would the defendant be required to pay rent whilst he was in possession before completion. It was known that the defendant would be doing repairs to the premises over that period. Time was not made of the essence in the original agreement and the defendant failed to complete on the 28th day of February, 1982. By then the only amount paid was the deposit of \$11,250.00. The defendant remained in possession and on the 28th day of June, 1982, he

paid a further sum of \$3,000 on account of the purchase money.

By notice served on the defendant on the 12th August, 1982, time was made of the essence of the contract and the defendant was given 21 days in which to complete. He said that on the 31st day of August, 1982 Myers Fletcher & Gordon, Manton and Hart, attorneys-at-law, informed him that the defendant had signed a mortgage and he subsequently received the balance of the purchase money. The witness said that he requested the defendant to pay compensation for the breach of contract, and that since suit the defendant has paid \$2,400 on account.

His evidence is that had the balance of the purchase money been received on the date fixed for completion, the 28th day of February, 1982, and having regard to the rates that commercial banks were giving on fixed deposits at that time, the money could have been invested with a yield of between 12% and 14% per annum. He said that he advised the plaintiff that 10% would be a reasonable rate of interest to be charged on the unpaid balance after the contractual completion date.

I have set out the statement of claim in full as it must be taken that the defendant admits the truth of the statements contained therein, he not having defended the matter. My task, therefore, is to assess the damages to be awarded for breach of the contract.

There is no doubt that the defendant was in breach of the contract by failing to complete on the 28th day of February, 1982, which was the date fixed by the contract, notwithstanding that time was not made of the essence. The very point was decided in Raineri v. Miles and another (Wiejski and another, third parties) (1980) 2 All E.R. 145. Lord Edmund-Davis said: (p. 154)

"..... failure to complete a contract for the sale of land on the specified date constitutes a breach thereof and entitles the other party to recover any damages properly attributable thereto";

provided, however, that the failure to complete was not due to some

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conveyancing difficulty or some difficulty with regard to title, notwithstanding that the time for completion was not expressed to be of the essence of the contract.

The damages to be awarded for such breach of contract are damages for the ordinary consequences which follow in the usual course of things from the breach, or for those consequences of a breach which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract - Hadley v. Baxendale (1854) 9 Ex 341. The plaintiff claims that the damage suffered is the loss of the interest she would have received on the unpaid balance of the purchase price between the contractual completion date and the actual completion date, had she invested such unpaid balance at a rate of ten per centum per annum. Mr. Robinson made it quite clear that the plaintiff was not seeking to recover interest on the unpaid balance of the purchase money after completion date, but in truth and in fact, by claiming that amount in damages as the loss suffered, he is doing exactly what he says he is not doing. The agreement between the parties did not provide for the payment of interest on the unpaid balance after completion date; they could have so agreed, but they did not. Indeed, the defendant was put in possession before completion date without being called upon to pay rent for use and occupation or interest on the unpaid balance.

The general rule is that upon a breach of contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interest from the time when it became due as is payable under the contract, or by statute, or as the court may allow. This will be the measure of damages no matter what inconvenience the plaintiff has suffered from the failure to pay on the day payment was due. (See Halsbury's Laws of England, Fourth Edition - Vol. 12 para. 1179).

The contract, as I have said before, did not provide for the payment of interest, and it was not contended that the amount of interest

claimed is payable by virtue of a statute. It follows, therefore, that any amount allowable must be by virtue of the inherent power of the court to order the payment of interest in circumstances such as this.

At common law, interest is payable in certain cases by way of damages for breach of contract (other than a contract merely to pay money) where the contract, if performed would, to the knowledge of the parties, have entitled the plaintiff to receive interest. In equity, interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor, such as in the case of vendor and purchaser. Equity considers that which is agreed to be done, as actually performed and a purchaser is therefore entitled to the profits of the estate from the agreed time for completion, whether he does or does not enter into possession, but as from that time, the purchase money belongs to the vendor, and the purchaser is obliged to pay interest on it if it is not paid on the date fixed for completion (See Sir James Lowther v. The Countess Dowager of Andover 1 Bro. C.C. 396). Further if, in cases where courts of equity would grant specific performance, the purchaser enters into possession before completion, the general rule is that the vendor is entitled, in the absence of express agreement to the contrary, to interest from the time the purchaser takes possession until payment of the purchase price. (International Railway Company v. Niagara Parks Commission [1941] A.C. 328 per Luxmore L.J. at pp. 344 - 348).

In the instant case, it would seem that at common law, the plaintiff's claim for interest by way of damages cannot succeed on the face of the written document; it does not appear that interest was intended to be paid. There is no evidence to show that it was to the knowledge of the parties that the contract, if performed, would have entitled the plaintiff to receive interest. As Lord Tentorden said in Page v. Newman 9 B. & C. 378 at 381 -

"I think that we ought not to depart from the long-established rule that interest is not due on money secured by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments."

This principle of the common law is not now open to question. However, having regard to the rules of equity, it does appear to me that in a proper case equity may have given its aid to a vendor such as this. The purchaser had been let in possession long before completion date, and he remained in possession thereafter without having paid any further sum other than the deposit. The vendor has been kept out of his money for a very long time after the contractual date for completion. Nevertheless, the vendor waited until after the purchaser had paid the purchase price in full before filing this suit in which he seeks to recover interest only as damages for breach of contract. Interest, where there is a contract to pay it, or if payable by statute, may be recovered in an action brought for interest only, and the indorsement of the claim or the statement of claim on the writ must clearly state that the claim for interest is based on the contract, or by virtue of a statute. But interest payable by way of damages is not considered to be a debt, and can only be recovered in proceedings either for payment of the principal (Re Churcher and Stringer (1831) 2 B. & Ad. 777; Cameron v. Smith (1819) 2 B. & Ald. 305) or, it seems, in proceedings for specific performance. (Marsh v. Jones (1889) 40 Ch. D. 563).

In the instant case, the plaintiff's claim for interest in the form of damages for breach of contract, standing alone as it does, cannot be entertained.

The plaintiff must stand or fall on her pleadings, and the evidence at the assessment of damages must correspond with what is necessary for proof of damage at a trial. Apart from the loss of interest, no other damage was pleaded or proved.

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In the particular circumstances of this case, I make no award of damages.

In passing, I may add that it appears to me that the pleadings do not raise a case for damages in the form of interest, and the plaintiff may not have obtained a judgment if the matter had been contested.