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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E336 OF 1989

BETWEEN	AARON DUMAS	APPLICANT
A N D	WINSTON BARRINGTON RODNEY	RESPONDENT

Mr. Terrance Ballantyne) of Ballantyne Beswick & Company for the Applicant
Mr. Paul Beswick)

HEARD: 1ST JUNE AND 28TH APRIL, 1995.

EDWARDS J.

I have been asked to assess damages pursuant to an order made by the Court on the 7th January 1992 in respect of an Originating Summons taken out by the Applicant Aaron Dumas.

At the hearing of the Originating Summons the Respondent Winston Barrington Rodney did not appear and was not represented.

The Court made the following order:-

1. That the Respondent be and is hereby ordered to effect Specific Performance of the Agreement in writing dated the month of January and the year 1985, between Winston Barrington Rodney and Aaron Dumas in relation to the sale and Purchase of Lot 7 on the sub-division plan of the land the subject of the application herein dated the 19th day of October 1984 and prepared by Rita E. Richards, Commissioned Land Surveyor.
2. The applicant's damages for breach of contract in lieu of or in addition to Specific Performance be assessed;
3. That the Respondent do pay any amount of additional Transfer Tax and/or other fees costs and or taxes arising consequent upon the Respondent's delay in completion of the agreement for sale; all necessary and consequently accounts, directions and enquiries.

In order to ascertain the measure of damages if any, it will be necessary to review the facts and to find out what is the nature of the breach of contract.

At the hearing before me the applicant testified that in January 1985 an agreement to sell was executed by himself and the Respondent under which the Respondent agreed to sell and he agreed to purchase:-

> All that parcel of land described on the sub-division plan hereto annexed and marked Lot No. 7 and being a part of the land comprised in Certificate of Title registered at Volume 579 Folio 36 of the Register Book of Titles.

The consideration was $28,000 and vacant possession would be given upon completion.

The agreement contained two special conditions viz:

1. Completion date to be on or before the 30th day of September 1986.
2. In the event of the Agreement herein being rescinded the purchaser shall be entitled to receive forthwith the amount of the deposit paid herein together with any other amounts paid towards settlement of the purchase price, and any other amounts paid by the purchaser which is properly refundable to him, and such amounts shall be refunded free from interest or deductions.

It should be noted from the date fixed for completion, that the agreement contemplated that it would take up to twenty one months for completion to be effected.

The agreement also stated quite expressly what the purchaser would be entitled to receive "in the event of the agreement ..... being resinded".

Completion did not take place within the period stated as a special condition in the agreement. More than two years after that date had elapsed, a notice dated 21st February 1989 was served on the Respondent requiring completion within 30 days and making time of the essence.

The Respondent responded by letter dated 28th July 1989 in which he advised the applicant that he had taken a decision to cancel the agreement.

He gave as his reasons:

> (a) a "Special provision in the contract which provides for cancellation of the agreement if the development does not materialise after two years".

The contract for sale presented to the court does not contain the provision mentioned above.

> (b) "The attorneys for the applicant had sent him a notice on the 21st February 1989 requiring him to complete the sales by the 21st March 1989".

In his letter of cancellation he said that:

> "In spite of this notice I was very hopeful that a certain vital requirement, namely to get the roadway from Mr. Pingsam Rose would be accomplished and sub-division submitted to Parish Council, but so far Mr. Rose has not made any commitment.
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> I spoke to him by phone on the 1st of this month. He said he took a new job and could not come out this summer and so far he could not tell me when he would be coming. He said he would have to see the land for himself then make a decision.
>
> I cannot just stay and wait and wait like that. So then I have made the decision within legal limits".

It is clear from the above that something outside the express control of the Respondent prevented him from complying with the demand to complete within 30 days of the 21st February 1989. This included the fact that he could not get the land for the road which he regarded as vital to the viability of the project.

It should also not be forgotten that special condition No. 1 required that completion should be on or before 30th day of September, 1986.

Paragraph 8 of the affidavit dated 11th October 1989 which was filed by the applicant in support of the Originating Summons of the same date states that:

> "In breach of the Agreement, and notwithstanding requests made orally by the Applicant to the Respondent, and by the applicant's attorney-at-Law to the Respondent on the applicant's behalf the Respondent has wrongfully failed and/or refused and/or continued to neglect and/or refuse to complete the said sale agreement or take any steps towards completion".

Although by not entering an appearance or filing a Defence to the Originating Summons the Respondent may be taken to have admitted to a breach of contract which would ordinarily result in damages being awarded against him, the evidence adduced at the hearing before me suggests otherwise.

A mortgage was taken out by the Respondent in respect of the land of which the applicant's Lot forms a part.

The bank which was the mortgagee was pressing for repayment of the sum of $30,481.61 which was outstanding and had threatened to sell the land and recover its money.

The applicant who knew that money was outstanding on the mortgage gave evidence that he paid off the mortgage in 1986 because he had a vested interest.

The transfer of the mortgage to the applicant was endorsed on the Title to the land on the 19th May, 1987.

The applicant in his capacity as mortgagee did not exercise the usual powers of a mortgagee to sell the land.

Instead he embarked on a scheme to obtain approval of a different sub-division plan of the land one which was conceived by him.

To this end he had the land surveyed, discovered that someone had "captured" the land and successfully took him to court to have him evicted. This took two years.

He paid the taxes that was due in respect of the land. He submitted for approval of the relevant authorities a new sub-division plan in which the number of lots was reduced from 9 to 6 lots.

He also proposed a new entry road - no doubt taking into account the difficulty which the Respondent was encountering in getting the land for the road.

He said also that the Respondent's sub-division had taken in other lands that were not the Respondent's and the new-subdivision would cure that defect. This fact would militate against the Respondent getting sub-division approval of his plans.

The Applicant admitted that he did not know what was the status of the sub-division approval which was being sought by the Respondent. By submitting his plan for approval the Applicant was in effect rejecting the plan which was prepared by the Respondent which included his Lot No. 7.

The approving authorities would be presented with a dilemma if they had to consider the two applications for sub-division approval in respect of the same land. The Respondent's plan had nine (9) lots while the Applicant's plan had 6.

The Law in regard to damages for breach of contract arising from a contract for the sale of land is somewhat different from that arising from a breach of contract in regards to other matters.

The object of damages in the ordinary breach of contract is to put the Plaintiff in the position he would have been in had the contract been performed.

In the case of the land, it is recognised that there may be difficulty in getting title.

> "Another old rule, reaffirmed by the House of Lords in 1874 states that if a vendor of land is unable, without any fault on his part, to show a good title, the purchasers damages are limited to the money wasted in investigating title. This rule has been criticised by most, though not all critics and the modern tendency of the courts is to restrict it.
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> See eleventh edition of Cleshire Fifoot and Furmiston Law of Contract at p. 598.
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> The damages which a purchaser of Realty can recover for a breach of contract by the vendor are, in general, limited to the expenses which he has incurred. This Rule forms an exception to the ordinary law of contract that aninjured person is entitled to be placed in the same position as if the contract had been performed.
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> Thus if a vendor who has not expressly undertaken to deduce a good title is unable acting in good faith, and without committing a breach of trust to make a title, the purchaser is an action for breach of contract can recover only the expenses he has incurred but not damages for the loss of his bargain (Bain v Fother Gill (1874) L.R. 7 H.L. 158. This is an exceptional rule which applies only if the vendor, through no default of his own is unable to carry out his contractual obligations to make a good title". See Halsbury Laws 4th Edition Volume 42 paragraph 267 page 183.

The vendor in the instant case is the brother-in-law of the applicant and the evidence does not disclose that he has not acted in good faith, or that he has acted in breach of trust.

It is not disputed that he made unsuccessful attempts to get from Mr. Ping Sam Rose land for the roadway which was vital to the sub-division.

In fact the applicants sub-division has proposed a new roadway.

In these circumstances the applicant can recover only the expenses he has incurred but not damages for the loss of his bargain.

He said the Respondent knew that he intended to put a building on the land as an investment and he is in effect claiming damages for loss of bargain. Specific Performance of the contract has been ordered but the evidence suggests that this may give rise to certain difficulty as the applicant states in his evidence that the Respondent's sub-division had taken in other lands that were not his.

> "Where one party has obtained a decree of specific performance which proves impossible to execute, the innocent party may rescind the contract and seek damages, which will be assessed as at the date the contract is finally abandoned, not the date of the original breach. Malhotra v Choundan 1980 Ch. 52, 1979 1 A.E.R. 186 C.A. The damages cannot be enhanced by any delay of that party in bringing or presenting his claim for damages. See H.L. 4th Ed. Vol. 42 paragraph 271 page 187".

The application of the rule in Bain v Fothergill applies equally to delay in completion as to failure to complete.

As regards the measure of damages in cases where there is delay in completion, Mayne v McGregor on Damages 12th Ed. paragraph 458 page 46 tell us that:-

> "No more than nominal damages should be recoverable in the infrequent case that could fall within the Rule. Damages calculated by the amount of the deposit and the expenses of investigating title are only relevant where the Plaintiff never gets the property; damages for loss of bargain are expressly forbidden".

The applicant who took over the mortgage on the property has given evidence that in his capacity as mortgagee, he intends to carry on with seeking approval of his sub-division plans and that when sub-division approval is granted

he will have his own title prepared and assigned to him. But this Court is not asked to adjudicate on those issues.

I am only asked to assess damages and I find that the case falls within the ruling given in Bain v Fothergill and the applicant is nor therefore entitled to damages for the loss of his bargain.

He has also obtained a decree of specific performance and as the reasons for the delay in completion also come within the rule, then damages calculated by reference to the amount of the deposit and the expenses of investigating title will only be applicable if he never gets the property.

I award the applicant nominal damages of $1000.00 for breach of contract occasioned by the delay in completion plus costs to be agreed or taxed.