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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 136 OF 1999

BETWEEN	CAROL JOHNSON REHDI	PLAINTIFF
AND	ROBERT MARTIN	DEFENDANT

Ian G. Wilkinson instructed by Ian G. Wilkinson & Co for the plaintiff

Miss Sandra Johnson instructed by Sandra Johnson & Company for the defendant.

Heard: September 26, 27 and, October 22, 2002

ASSESSMENT OF DAMAGES

JONES, J. (Ag.)

Let me first begin by commending counsel on both sides for the industry, zeal, and courtesy in which they discharged their responsibilities in this matter.

The plaintiff in this action is an auditor residing at 296 Cedar Grove Estate, Gregory Park, in the parish of St Catherine. In 1998 she lived next to property at 51 Anderson Avenue, Bridgeport, in the parish of St Catherine, and was informed that the property was for sale. As a result, she made such enquiries as were necessary to allow her to purchase the property.

On October 8, 1998, the plaintiff signed an agreement for sale and purchase with the owner and defendant Mr. Robert Martin. The agreed price was stated at Two Million Five Hundred Thousand Dollars (J$2,500,000.00). The terms of the agreement were unambiguous; a deposit of Three Hundred and Seventy Five

Thousand Dollars on the signing of the agreement, with the balance on completion. Completion was set for ninety days from the signing of the agreement, and possession was vacant. The agreement between the parties was subject to the purchasers obtaining a mortgage loan of Two Million One Hundred and Twenty Five Thousand Dollars ($2,125,000.00) from a reputable financial institution, and the delivery by the purchaser of a letter of commitment from a reputable financial organization for the balance of the purchase price within forty-five days of the date of signing.

This is how the plaintiff in her own words, described the events that unfolded:

> *"In December 1998 a letter was sent to our attention regarding rescinding the agreement. I instructed my attorneys that I did not agree with the rescission. We had already submitted all documents and signed the transfer. I learned as I went to the Titles Office and found out that the property was transferred. On January 5, 1999, I saw a copy of the transfer and title. I was then certain that the property was transferred."*

The defendant then returned the plaintiff's deposit of Three Hundred and Seventy Five Thousand Dollars (J$375,000.00) together with interest of Ten Thousand Eight Hundred Thirty Dollars and Thirty Two Cents (J$10,830.72). The total amount refunded was Three Hundred and Eighty Five Thousand Eight Hundred Thirty Two Dollars and Seventy Two cents (J$385,832.72). The plaintiff's half cost of the attorney's fees were never refunded.

It is sufficient to note at this point, that no issue as to liability arose in this case. The defendant simply conceded liability with the result that the plaintiff obtained an interlocutory judgment and an order from this court to proceed to assessment of damages.

The question then arises – to what damages is the plaintiff entitled? Is she entitled to damages based on the loss of her bargain or merely her expenses in investigating title and cost of the transaction? It is commonplace to say that contractual damages are usually awarded to compensate an injured party to a breach of contract for the loss of his expectation or bargain. This general rule at common law was stated over a hundred years ago by Parke B. in ***Robinson vs. Harman*** **[1848] 1 Exch. 850** at page 855. He said:

> *"... that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed"*

This well known aphorism remains unchallenged, and has been applied uniformly by our courts over the years. It is subject to an exception; upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. That is the rule in ***Bain vs. Fothergill*** **LR 7 HL 158.** In the words of Pollock B at page 170:

> *"I am of opinion that upon a contract for the sale of real estate where the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain.*
>
> *This was so decided as far back as the year 1775, in the case of* ***Flureau vs. Thornhill****, and has been acted upon and almost universally acquiesced in ever since, and the rule is in my judgment consistent with good sense, and with what may be supposed to be the intention of the contracting parties; nor does it contravene any principle of law which has been established with reference to the amount of damages that may be recovered on breach of contract."*

So it is that this rule is only applicable where the vendor is unable to carry out his contractual obligations because he cannot give a good title to the purchaser. Indeed, there is a positive obligation on the part of the vendor to demonstrate that he has used his best endeavours to obtain a good title. This latter proposition is supported by the case of ***Malhotra vs. Choudry*** **[1980] Ch. 52.** It was held:

> *"...that where a vendor of real property sought to limit his liability for breach of contract under the rule in* ***Bain v. Fothergill****, he had a duty to show that he had used his best endeavours to fulfil his contractual obligations, the onus being on him, both in the case of a defect of title and of conveyance; that, in the absence of fraud, mere unwillingness to carry out the duty could constitute bad faith sufficient to exclude the rule and to entitle the purchaser to substantial damages; and that, since the defendant had shown no enthusiasm for carrying out his duty ...he had not discharged the burden of proof that he was unable to convey the property to the plaintiff and, in those circumstances, the plaintiff was entitled to substantial damages"*

In the present case the defendant Robert Martin gave no evidence, and therefore, no reason as to why he transferred the property to a third party, despite, his contractual obligation to the plaintiff. As the obligation is on the defendant to show that he was unable to transfer the property to the defendant, this court concluded that the defendant's refusal to discharge his obligations, without more, is sufficient to take this case outside the rule in ***Bain vs. Fothergill***. For that reason, the court concluded that the statement of principle in ***Robinson vs. Harman*** (supra) applies to this case. As a result, it is my judgment that the defendant is entitled to recover damages for the loss of his expectation or bargain in not acquiring the premises at 51 Anderson Avenue, Bridgeport, viz., the difference between the

contract price of Two Million Five Hundred Thousand Dollars and the market value.

The second issue raised by the parties to this dispute is the date to be used for the purpose of the assessment. Should the date on which the breach took place be applied or should the date at which the damages are assessed be used?

Mr. Wilkinson for the plaintiff argued forcefully that justice demanded that the damages be assessed at the date of judgment. On the other hand, counsel for the defendant Miss Johnson vigorously asserted that the date on which the breach took place should be applied. She pointed out that the underlying principle in the assessment of damages is compensation. Consequently, the general rule is that damages for breach of contract are assessed at the date of the breach. Counsel referred the court to the case of ***Diamond vs. Campbell-Jones and others*** **[1960] 2 WLR 568.** where the court found that the defendants had wrongfully repudiated the contract. In that case the plaintiff contended that the proper measure of damages was the profit which it was reasonable to suppose he would have made had he converted the property. The defendant on the other hand contended that the proper measure was the difference between the sale price and the market value of the property at the date of the breach. It was held that special circumstances were necessary to justify imputing to a vendor of land a knowledge that the purchaser intended to use the land in any particular manner. The plaintiff was not, therefore, entitled to damages measured by reference to the profit obtainable by converting the property, and the proper measure of damages was the difference between the

purchase price and the market value of the property at the date of the breach of contract.

Buckley J. in delivering the judgment of the court said at page 579:

> *"The damages should be assessed in accordance with the principle normally applicable to cases of breach of contract for the sale of land, where the breach does not arise from a defect in the vendor's title, that is, by reference to the difference between the purchase price and the market value at the date of the breach of contract."*

This court accepts that the rationale for this rule is based on the view that any variation in the market price that takes place after the breach of contract, is not caused by the breach itself, but perhaps, as a result of the injured party's failure to mitigate his damages in seeking an alternative house to purchase. The limitations of this breach date rule were explained by the learned author of ***Trietel's Law of Contract Ninth Edition***; the following passage appears at page 865:

> *"The principle of assessment by reference to the time of breach is based on two assumptions: that the injured party knows of the breach as soon as it is committed, and that he can at that time take steps to mitigate the loss which is likely to flow from it. Where the facts negative these assumptions, the courts will depart from the principle, and assess the damages by reference to "such other date as may be appropriate in the circumstances." In particular they will have regard to the time when the breach was, or could have been discovered; and to the question whether it was possible or reasonable for the injured party to make a substitute contract immediately on such discovery."*

A good example of the limits placed on this rule can be seen when there is a breach of contract for the sale of a house, and the injured party lacks the means to purchase a substitute house on the market. It has been held that in those circumstances, damages should be assessed at the date of the judgment.

Further encroachments were made in the breach date rule in **Wroth vs. Tyler.** **[1872] 2 WLR 405** where it was held that:

> *"... where damages were awarded in substitution for specific performance, section 2 of Lord Cairns' Act empowered the court to award damages which would put the plaintiffs into as good a position as if the contract had been performed, even though to do so would mean awarding damages assessed by reference to a period subsequent to the date of breach of the agreement..."*

In ***Radford vs. DeFroberville*** **[1977] 1 WLR 1262** Oliver J took the view that the decision in ***Wroth vs. Tyler*** (supra) was equally applicable to common law damages. He said at page 1286

> *"Wroth. v. Tyler establishes that, at least where damages are awarded in lieu of specific performance, an appropriate date of assessment may be the date of judgment, but if the function of an award is to put the plaintiff in as good a position as if the contract had been performed, I do not see why, in principle, the same should not equally apply in an appropriate case of the breach of a contract which cannot be specifically performed. The practical difference, no doubt, in most cases lies in the duty to mitigate, for it is difficult to see how, assuming that it is reasonable for a plaintiff to seek specific performance, he can be under a duty to mitigate by acquiring equivalent property until he knows whether or not the court is going to give him his decree. That, of course, does not apply where the contract is one which cannot, as here, be specifically performed. In such a case, the plaintiff's right to damages must be qualified by his duty to mitigate. The question then, as it seems to me, comes down to one of the reasonableness of the steps actually taken by the plaintiff, and, in my judgment, the proper approach is to assess the damages at the date of the hearing unless it can be said that the plaintiff ought reasonably to have mitigated by seeking an alternative performance at an earlier date, in which event the appropriate measure would seem to me to be the cost of the alternative performance at that date"*

The matter of a more flexible assessment date in contract cases was finally settled by the English House of Lords in ***Johnson vs. Agnew*** **[1979] 1 All ER 883.** The facts and the decision are taken from the head note:

"By a contract dated 1 November 1973 the vendors agreed to sell a house and some grazing land to the purchaser. The properties were mortgaged under separate mortgages. The purchase price exceeded the amount required to pay off the mortgages and also a bank loan obtained by the vendors for the purchase of another property. The contract fixed the completion date as 6 December. The purchaser paid part of the deposit and accepted the vendors' title, but did not complete on that date. On 21 December the vendors served on the purchaser a notice making time of the essence of the contract and fixing 21 January 1974 as the final date by which completion was to take place. The purchaser failed to complete, and on 8 March the vendors commenced an action against her, claiming specific performance and damages in addition to, or in lieu of, specific performance, and alternatively, a declaration that the vendors were no longer bound to perform the contract, and further relief. On 20 May the vendors issued a summons under RSC Ord 86 for summary judgment for specific performance. An order for specific performance of the contract was made on 27 June, but it was not drawn up and entered until 26 November. By then the mortgagees of the house had obtained an order for possession. On 7 March 1975 the mortgagees of the grazing land also obtained an order for possession. On 3 April they contracted to sell the land and on 20 June the mortgagees of the house contracted to sell the house. Completion of both sales by the mortgagees took place in July. Thus the vendors, who had taken no action to enforce the order for specific performance, were not in a position to convey the properties to the purchaser after 3 April. On 5 November they applied by motion (i) for an order that the purchaser should pay the balance of the purchase price and for an enquiry as to damages, or (ii) alternatively, for a declaration that they were entitled to treat the contract as repudiated by the purchaser and an enquiry as to damages. The judge dismissed the motion. The vendors appealed, seeking an order for payment of the balance of the purchase price, or, alternatively, damages at common law for breach of contract, and in the further alternative damages in lieu of specific performance under the Chancery Amendment Act 1858...

The Court of Appeal held:

(i) that, as the vendors were no longer able to perform their obligations under the contract to convey the properties, it would be wrong to compel the purchaser to pay the balance of the purchase price, and so the vendors could not obtain relief under the order for specific performance;

(ii) that where a vendor elected to pursue the remedy of specific performance and obtained an order, he could not, if it became impossible to enforce the order, revert to the position before

the election and claim the alternative remedy of repudiation of the contract and damages;

(iii) but where, as in the present case, an order for specific performance was no longer capable of being worked out, damages in lieu of specific performance could be awarded by the court under the equitable jurisdiction created by the 1858 Act.

The court allowed the appeal on the ground that it would be equitable to allow the vendors damages in lieu of specific performance because it was the purchaser and not the vendors who had rendered specific performance impossible, and ordered the damages to be assessed as at 26 November 1974 (ie the date of entry of the order for specific performance) and discharged the order for specific performance.

On appeal by the purchaser,

Held -

(i) ...

(ii) The fact that the vendors were entitled to recover damages at common law did not affect the measure of damages, because damages awarded under the 1858 Act were assessed in the same manner as damages at common law ...

(iii) The date at which the damages should be assessed should be fixed not at 26 November 1974 but at 3 April 1975 (ie the first date on which the mortgagees contracted to sell part of the property) as the vendors had acted reasonably in pursuing the remedy of specific performance and that was the date at which the remedy became aborted. It followed that the appeal would be dismissed subject to the variation of the order of the Court of Appeal by the substitution of 3 April 1975 for 26 November 1974 as the date by reference to which the damages should be assessed...Decision of Court of Appeal [1978] 3 All ER 314 varied."

The Supreme Court of Jamaica had an opportunity to examine this issue of the breach date rule as opposed to the date of assessment rule in two cases coming before it in 1978. The court arrived at differing conclusions in each case based on an

interpretation of whether damages were to be assessed at common law or on the basis of Lord Cairns Act. In the first case, ***Rose & Hanchard vs. Chung & Patrick City Limited*** **[1978] 16 JLR 141** it was held:

> *"The Supreme Court of Judicature of Jamaica has jurisdiction to award damages in substitution for or in addition to an order for specific performance because (a) the old Court of Chancery in Jamaica had such jurisdiction prior to the consolidation of the courts of Law and Equity into one Supreme Court of Judicature of Jamaica on January 1, 1880, and (b) in the absence of any authority to the contrary, there is a presumption of inherent jurisdiction in a superior court when exercising its equitable jurisdiction.*
>
> *(ii) The retroactive effect of the Local Improvements (Amendment) Act, 1968 put Harvey - McIntosh in the position of a purchaser holding a valid contract for the sale of land and although the plaintiffs were entitled to seek the relief of specific performance, the court would exercise its discretion not to grant such relief since a third party had acquired a legal interest in the property, the boundaries had been redefined and buildings had been erected thereon.*
>
> *(iii) Damages would be awarded in lieu of an order for specific performance and the plaintiffs' measure of damages is the market value of an equivalent lot of land at the date of assessment, less the purchase price and excess paid, together with a refund of the purchase price and excess paid.*
>
> *(iv) The plaintiffs should receive interest on the damages awarded in lieu of specific performance at 6% per annum from the date of judgment and interest on the purchase price and excess at 7% per annum from June 24, 1965 until payment.*

In the second case, ***Rall-Morgan vs. Chung and Anor*** **[1978] 16 JLR 129** the court held:

> *(i) specific performance of a contract will not be decreed if it is impossible for the defendant to comply with the order of the court, whether or not the impossibility arises from the defendant's acts. In the instant case, the defendants had transferred the land to a third party thus rendering it impossible to decree specific performance in respect of same in favour of the plaintiff;*

(ii) *in appropriate cases, the Supreme Court of Jamaica, has the jurisdiction to decree specific performance and may award damages in addition thereto. In the circumstances of this case, specific performance having been rendered impossible, only an award of damages is cognisable;*

(iii) *at common law damages for breach of contract for sale of land are assessed as at the date of the breach. The measure of damages is the difference between the contract price and the market price at the date of the breach;*

(iv) *where there is an advance of money as consideration for the purchase of a particular item the supply of which becomes impossible due to default of the seller, the court may order a refund of the money to the buyer. In the instant case, the court should order the return of all moneys paid by the plaintiff on account of the purchase price.*

Counsel for the plaintiff referred the court to the case of ***Tewari vs. Attorney-General SCCA No. 67 of 1998*** (unreported). This was a judgment from the Court of Appeal which while not expressly mentioning the ***Rall Morgan or Rose Hanchard*** cases (supra), dealt with the question of the date of assessment in cases of breach of contract. The approach of the Court of Appeal to this issue is summarised in a passage from the judgment of Harrison J.A at page 3:

> *"The measure of damages for breach of contract is based on the principle of restituto in integrum, restoring the plaintiff to the position he would have been in if the contract had been performed (Engell v. Fitch (1869) L.R. 4 Q.B, at page 666). in the case of breach of contract involving the sale of land where the seller can give title to the purchaser but fails or refuses to do so, the quantum of damages is the loss of bargain. In those circumstances, the breach-date rule would not apply. This loss is the difference between the contract price and the price of the land at the date of judgment..."*

> *should have given evidence to shew how and to what extent that claim ought to be mitigated. No such evidence was attempted to be given. It is entirely upon the absence of that evidence that I rest my judgment."*

As the defendant in this case has the burden of proving that plaintiff did not take reasonable steps to mitigate his damages; and, the defendant has not given any evidence concerning the opportunities for obtaining other properties of a similar type and price; it was not possible to say whether the plaintiff was able to mitigate his damages. It is plain that the defendant has not discharged that burden here. As a result, this court concluded as a matter of law that the plaintiff is entitled to damages to be assessed at the date of this judgment.

It was not in dispute that the contract price for the house was Two Million Five Hundred Thousand Dollars ($2,500,000.00), and the date of the breach was November 23, 1998, viz., the date of the transfer of the property to the third parties. What then is the current value of the premises? Valuations from two experts were submitted to the court for consideration. The court found it necessary to evaluate the evidence presented as the valuations for the premises varied significantly.

The first valuation by Mr Phillip Myers from Phillips Myers and Associates was entered as Exhibit 11. The second by Mr Dwight Phillips from C.D Alexander and Company was entered as Exhibit 14. The summary sheets for both valuations appear below:

Exhibit 11

VALUATION SUMMARY

Lot #51 Anderson Avenue, Bridgeport, St. Catherine

Client:	Mr. Mark Redhi Lot #52 Anderson Avenue, Bridgeport, St. Catherine
Owner:	Robert Livingston Martin
Title Reference:	Volume 1145 Folio 21
Lot Size:	241.75 sq. m. i.e. 2599 sq. ft.
Facilities:	4 Bedroom two bathroom residence inclusive of a self contained one-bedroom flat and disposed over 148.5 sq. m. i.e. 1596 s.f.

VALUES

Open Market Value :	J$3.9M (Three Million Nine Hundred Thousand Jamaican Dollars)
Forced Sale Value :	J$3.4M (Three Million Four Hundred Thousand Jamaican Dollars)
Mortgage Value :	J$3.12M (Three Million One Hundred and Twenty Thousand Dollars)
Reinstatement Value: (Assumed New)	J$4.8M (Four Million Eight Hundred Thousand Dollars)

October 16, 1998

Exhibit 14

THE C.D. ALEXANDER COMPANY REALTY LIMITED

A MEMBER OF THE MUSSON GROUP OF COMPANIES

HEAD OFFICE:
P.O. BOX 795, 168 HARBOUR STREET, KINGSTON, JAMAICA, W.I.
TELEPHONE: (876) 922-0160-4 FAX: (876) 922-2088
E-MAIL: cdalexander@mail.infochan.com
WEBSITE: www.cdalexander.com.jm

REAL ESTATE BROKERS, APPRAISERS & AUCTIONEERS

APPRAISAL SUMMARY

PROPERTY ADDRESS	:	No. 51 Anderson Avenu Bridgeport, Saint Catherine
TITLE REFERENCE	:	Volume 1145 Folio 21
DATE OF INSPECTION	:	May 23, 2001
PURPOSE	:	Market Value
TYPE OF PROPERTY	:	Residential
AREA OF LAND	:	241.55 square metres
AREA OF BUILDING	:	153.48 square metres
MARKET VALUE	:	$3,200,000.00 [redacted] 2001
LAND VALUE	:	$600,000.00
REINSTATEMENT COST	:	$4,650,000.00
ESTIMATED RESTRICTED REALIZATION PRICE (FORCED SALE VALUE)	:	$2,500,000.00

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Mr. Phillip Myers said that he is a valuation surveyor and consultant and provides appraisals on all aspects of real estate. He said that he was retained to value the premises at 51 Anderson Avenue in Bridgeport St Catherine. He visited the premises twice for the purpose of the valuation and valued the property at J$3.9 million in October 1998.

He said that he subjected it to three tests. First, the comparative approach, which compares the facilities being valued with similar properties in the neighbourhood and in other adjoining areas; second, the replacement approach, which takes into account the value of the elements used in construction; third the income approach, which looks at the income the property would command. He said he used all three approaches, but gave less credence to the investment (incomes) approach in his report. He did not know the owner, but ascertained that information from the title.

He said that he inspected four to five properties in the area, of the basic type, and took into consideration the fact that the property that he was valuing had improvements. He estimated that the basic properties were in the range of J$2.5 Million. He was not able to say what the current value of the property at this time. However he saw the property in May to June of this year and formed the impression that his value was still good or may even be higher.

Mr Myers said that when he did the valuation in 1998 he did not enter the house itself, but inspected the structure, and noted the window placements which would give a guide as to the facilities in the building. He said that the structure has a room added to the front next to the veranda area as well as what appears to be a

one bedroom self-contained flat added behind the carport. He was not able to see inside the room that appeared to be a one bedroom flat but was able to arrive at a conclusion from the window and door placements. However he could not say as a fact what was contained inside the room. He admitted that it would have been better to have seen inside the room before coming to a conclusion. He concluded that the addition of high-end fixtures to the properties in Bridgeport area would not necessarily increase the value.

Mr Myers admitted that it was possible to arrive at different assessments using all three approaches as valuation is not an exact science. He defined market value as the price for which property is likely to change hands for, where the buyer and seller have an appreciation of the attributes of the property and where there is no undue influence on either party to sell or to buy having regard to the fact that that opinion has been arrived at by consideration of two or more of the three approaches to value of that particular property. He said that the major amenity in a valuation is the living space in a house.

Mr. Myers said that the other properties in the Bridgeport area were inspected on the October 6, 1998. He was not able to get into the yards of these premises. The inspection was therefore an on site inspection from the gate looking on. He said that these properties were basic structures without improvements and would be valued less than the property at 51 Anderson Avenue. He said that the market value of J$3.9 Million in October of 1998 took into consideration the fact that he did not see inside the premises.

Mr. Dwight Philips then gave his evidence. He said that he is a valuation surveyor with over 20 years experience and that he carried out a valuation on premises at 51 Anderson Avenue, in Bridgeport, St Catherine. In conducting this valuation he was able to measure the building and the land externally and also inspect the interior of the building and taking note of the accommodation. He said he used the three methods mentioned by Mr. Myers in carrying out the valuations.

In his assessment the method that carried the heaviest weight was the sales comparison approach as this is the one that is usually used for residential valuations. The other determinant would be the number of habitable rooms and the land size. In this case, there were four bedrooms and he did not find a self contained one bedroom flat at 51 Anderson Avenue. He said that there was a laundry behind a carport. He valued the premises at market value of J$3.2 Million in May 2001.

He said that on the assumption that the building remained the same he would be able to assess the value in 1998 using the sales comparison method. He said that based on his research he estimated that the property at 51 Anderson Avenue would be valued between J$2.5 to J$2.6 Million in 1998. He said that he examined about six to seven properties for the purpose of his assessment on sale prices for the area during 1998. The information was gathered by using the volume and folio information from the Stamp Office and then obtaining copies of the titles from the Registrar of Titles. As a result of that investigation he then obtained the addresses and visited the properties in the Bridgeport area. By consent the following titles were entered as exhibits.

1. Registered title Volume 1107 Folio 659 with a sale price J$2.85 Million, sold on 23/11/98 and registered on 20/6/00 ; Exhibit 15;

2. Registered title Volume 1244 Folio 827 sold on 18/5/98 for J$2.7 Million and registered on the 28/1/99; Exhibit 16;

3. Registered title Volume 1103 Folio 327, sold on 27/3/98 for J$2.7 Million and registered on the 9/6/98; Exhibit 17;

4. Registered title Volume 1140 Folio 240 sold on the 10/12/98 for J$2.8 Million and registered on the 28/1/99; Exhibit 18;

5. Registered title Volume 1137 Folio 615 sold on the 2/12/98 for J$2.4 Million and registered on the 22/4/99; Exhibit 19

Mr Phillips said that the Bridgeport development has a basic prefabricated construction. The basic structure of the house was two bedrooms, but they were on different land sizes. Some of the homes were on lands with 2600 sq ft, and the others were on lands of 3700 sq ft. He said this fact would be significant to any valuation. The house at 51 Anderson Avenue was on the smaller land size i.e. 2600 sq ft. He said that four of the five properties examined were on properties that were on lands with 3700 sq ft. The lands in Exhibits 15, 16, 17, and 18 were the bigger lots. The land on Exhibit 19 was a smaller lot. All five units that he examined had extensions.

He said that his understanding of market value was the price agreed by a willing buyer and seller in an arms length transaction i.e. without duress.

Mr Phillips said that the property at 51 Anderson Avenue would be worth J$3.3 Million today. He said that the margin for error in a valuation for a community like Bridgeport would be between J$150,000 to J$100,000. He concluded that a valuation in 1998 of J$3.9 Million for the premises at 51 Anderson Avenue would not

be correct. The highest price that a property was sold for in Bridgeport in 1998 was J$3.2 Million.

This court accepted the valuation of Mr Phillips as more probable for the following reasons. First, the court accepted the evidence that similar properties sold in the Bridgeport area in 1998 were in the range of $2.5 to $3.2 million. Therefore, it would be highly unlikely that a comparable type property at 51 Anderson Avenue would be have a market value of J$3.9 Million in 1998. The other valuator Mr Myers did not provide the court with a comparative analysis of sale prices, although that is regarded as one of the accepted methods of arriving at market value. Secondly, the evidence was that Mr. Myers was unable to have access to the property at 51 Anderson Avenue for the purpose of the valuation. As a result, he erroneously concluded that the room at the back of the house was a one bedroom flat. Mr. Phillips who had an opportunity to inspect the interior of the premises gave evidence that it was merely a storeroom. This in my view was one of the reasons for the inflated valuation by Mr. Myers.

As a result, the court accepted that the market value of the premises at 51 Anderson Avenue at May 2001 was approximately Three Million Three Hundred Thousand Dollars ($3,300,000.00). In trying to arrive at the current market value the court accepted that the total appreciation between 1998 ($2.5 million) and 2001 ($3.3 million) would be 32% which gives a 10.67% per annum annual appreciation rate. At the annual appreciation rate of 10.67% per annum the annual appreciation between 2001 and 2002 for the subject property is $352,110.00. This would give a current market value for the premises to be J$3,652,110.00.

In view of what I have found, I assess general damages representing the plaintiff's loss of bargain resulting from the defendant's breach of contract to be, J$3,652,110.00 less the contract price of J$2,500,000.00, and interest paid by vendor of J$10,832.72, which amounts to One Million One Hundred Forty-One Thousand Two Hundred Seventy-Seven Dollars and Twenty-Eight Cents (J$1,141,277.28). There shall be a judgment for the plaintiff in the sum of ***J$1,141,277.28*** together with interest at the rate of 12% from the date of judgment until payment. In addition, the plaintiff shall have cost in accordance with Schedule A of the Rules of the Supreme Court (Attorney at Law's Cost) Rules 2000.

In the present case, there was no evidence that the plaintiff took steps to mitigate his loss. However, it is a proposition of law that where the plaintiff has established a prima facie case for damages it is for the defendant to prove the existence of a state of affairs which entitle him to mitigation. Authority for this can be found in the case of ***Roper vs. Johnson*** **[1873] LR 8 CP 167.** The facts in that case were that the plaintiffs and the defendants had a contract to purchase coal. The defendant refused to deliver the coal and the plaintiffs brought an action for breach of contract. At the trial, the plaintiffs proved that the price of coal had risen during the whole period and was still rising. No evidence was given to indicate whether the plaintiffs could have gone into the market and obtained a new contract for coals. It was held that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, damages representing the differences between the contract price and the market price would be awarded.

Keating CJ in delivering the judgment of the court observed at page 178:

> *"It seems to me that, when the plaintiffs have shewn that there has been a distinct breach of the contract on the part of the defendant, and have further shewn that at the periods at which the coal should have been delivered, they could only have obtained them at an advanced price, they were entitled to the difference between that advanced price and the contract-price, unless the defendant gave evidence that another similar contract might have been obtained on more mitigated terms."*

Grove J remarked that at page 184:

> *"The expression "mitigation" used in the judgment of Cockburn, C.J., in Frost v. Knight, rather shews that the onus of proof lies on the defendant. The plaintiffs having made out a primâ facie case of damages, actual and prospective, to a given amount, the defendant*