

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

C.L. R280/1986

BETWEEN	MICHAEL ROSS	PLAINTIFF
AND	THE ATTORNEY GENERAL (FOR MINISTER OF HOUSING)	DEFENDANT
AND	NATIONAL HOUSING CORPORATION LIMITED	FIRST DEFENDANT
AND	FRANK HALL HOMES LIMITED	SECOND DEFENDANT

R.B. Manderson-Jones for the Plaintiff

David Johnson and Andrew Irving for the Attorney General

Miss Helen McLean for the first Third Party

Christopher Honeywell and Miss Karen Robertson for the Second Third Party

HEARD: DECEMBER 3, 4, 5, 13, 1990.

CORAM: WOLFE J.

By an Agreement of Sale dated the 23rd day of February, 1984 the Plaintiff agreed to purchase from the Minister of Housing Lot 34 part of 1 and 3 Oliver Road, in the parish of Saint Andrew and being part of the land registered at Volume 1056 Folio 87 and Volume 73 Folio 7 together with a 3 bedroom town house to be built thereon. Purchase price \$274,900.00.

The development was a joint venture between the Minister of Housing and the National Housing Corporation Limited. The land was owned by the Minister of Housing who commissioned the National Housing Corporation Limited to develop the land. The National Housing Corporation Limited contracted the services of Frank Hall Homes Limited to effect the development. The houses were built and in November, 1984 the Plaintiff took possession of his holding. At the time of entering into possession the Plaintiff found the following defects.

1. The walls of the house were not square hence the Plaintiff was unable to fit square tiles to the floor downstairs.
2. The roof leaked in many places. All rooms upstairs had water damaged ceilings in many places.
3. Bath in the master bedroom shifted its position whenever it was used. This was due to the fact that it had been improperly seated.
4. The tiles on the master bathroom floor were improperly laid and consequently cracked when they were walked upon.

5. The tiles on the walls of the master bedroom were not of uniformed colour and in less than two (2) months they loosened from the walls.
6. The second bathroom had problems similiar to those of the master bathroom in the master bedroom.
7. The closet doors were not properly primed before painting and being of pine the notches in the wood appeared as big brown spots through the white paint.

The second third party, Frank Hall Homes Limited, was notified of the defects and they sent workmen to remedy the defects. The workmen remedied two of the defects. They chipped and straightened one of the walls downstairs but left it unpainted. The bath in the master bedroom was properly reseated but in the process the bath was damaged. Frank Hall Homes Limited offered to compensate the Plaintiff for the damage to the bath by deducting the cost of the bath from money owing by the Plaintiff to Frank Hall Homes Limited. The Plaintiff found the proposal unacceptable. The Plaintiff disputed owing any money to Frank Hall Homes Limited. The developers refused to continue the remedial work unless the Plaintiff settled his indebtedness to them. This stale mate signalled the commencement of legal proceedings between Frank Hall Homes Limited and the Plaintiff and the Minister of Housing.

Significantly, the Plaintiff moved into this defective house and occupied it for two years before moving out. Before entering into possession the Plaintiff did a walk through inspection of the house to satisfy himself that all was well.

In August 1986 the Plaintiff engaged the service of a Mr. Roger Williams, a Quantity Surveyor, to make a report on the status of the building. A report was duly furnished. This report was admitted into evidence as Exhibit III and indicated that an expediture of Thirty Four Thousand Forty Five Dollars (\$34,045.00) would be required to remedy the defects. The report is some two years after the Plaintiff entered into possession of the premises.

The Defendant accepts that subsequent to the handing over of the town house to the Plaintiff certain defects were discovered. The Defendant, however, joined issue with the Plaintiff as to the number of the defects and further states that the defects were remedied, save and except for the painting of the

walls downstairs and the replacing of the tiles in the bathroom in the master bedroom. The Defendant contends that these items of work were postponed at the request of the Plaintiff. The Defendants concede that they offered to compensate the Plaintiff for the damaged bath.

The Defendant called three witnesses. Mr. Karl Woolery, the site engineer, testified that upon taking possession the Plaintiff complained of the following defects.

1. Leaking roof
2. Improperly dressed walls
3. Defective bathroom fixtures and bathroom tiles.

He further testified that he mended the leaking roof by chasing the wall and fixing the metal flashing where the shingle portion of the roof joins the parapet wall. A split shingle was also replaced. The defective bathroom fixture was remedied by reseating the bath. The improperly dressed walls were properly dressed but were not repainted at Mr. Ross' request because he was in the process of laying tiles and installing kitchen fixtures.

The different colour tiles in the bathroom upstairs was a designer's defect, said Mr. Woolery, and were used in all the houses in the development. Mr. Ross was the only purchaser to complain about the tiles. The tiles which were removed to reseal the bath were not replaced as the Plaintiff had indicated that he intended to put in tiles of his own choice. No further complaints were received from the Plaintiff about the roof or the reseated bath or the redressed wall.

Mr. Richard Todd, a director of Surrey Construction Company Limited, who was the site manager supported the evidence of Mr. Woolery in every material particular. He regarded as ludicrous the report of the Quantity Surveyor that the entire roof would have to be replaced to remedy the defective roof. Since the repair work by his workmen no further reports had been received from the Plaintiff re the roof, the reseated bath and the redressed walls.

Mr. Carlton DaCosta, Managing Director of Frank Hall Homes Limited, the developers, testified that complaints were received from the Plaintiff. The complaints related to:

1. The leaking roof
2. Chipped bath
3. Painting of walls

He said he gave instructions to Richard Todd of Surrey Construction Limited to effect the remedial work. He received no further reports from the Plaintiff.

Mr. DaCosta gave evidence that subsequent to the complaints by the Plaintiff and his instructions to Surrey Construction Limited to effect the remedial work, Messrs. McMorris Sibley, Robinson, Architects and Planners, issued a certificate of completion to the Mortgage Company, Victoria Mutual Building Society, certifying that the construction had been satisfactorily completed.

The significance of this certificate is to be garnered from Clause 5 of the Agreement of Sale, titled "Mutual Agreements".

"MUTUAL AGREEMENTS"

It is Mutually Agreed by and between the Parties as follows:-

- (a) For the purpose of this agreement possession shall be deemed to be given to the Purchaser by the Vendor giving to the Purchaser a letter authorising the Purchaser to take possession of the premises and the date of delivery of possession shall be deemed to be the date named in the said letter as the date on which the Purchaser is authorised to take possession. Until a letter of possession shall be given to the Purchaser the Vendor shall be deemed to be in possession of the said premises as the owner thereof, PROVIDED HOWEVER that the Vendor shall not be bound to give nor the Purchaser to take possession of the premises nor shall possession be deemed to have been delivered unless and until the Vendor shall have obtained from a Quantity Surveyor or Architect a Certificate that there has been erected on the land hereinbefore described a dwelling house of the type, size, shape and construction provided for in paragraph 1 hereof subject to the provisions relating to minor alterations contained therein; and upon the Vendor obtaining the said Certificate the Vendor shall be deemed for the purposes of this Agreement fully and faithfully to have performed and satisfied the covenant contained in the said paragraph 4 (a) hereof subject to the provisions relating to minor alterations contained therein; and subject to paragraph 4 (a) hereof all liability of the Vendor hereunder whether express or implied shall thenceforth cease and determine. For the purpose of this paragraph the Quantity Surveyor or Architect shall be deemed to be the agent of the Purchaser and the said Certificate shall be evidence in any proceedings arising out of this contract that the works have been properly carried out and completed in accordance with the provisions of this Contract."

Mr. DaCosta swore that the Plaintiff would have been unable to obtain a mortgage without such a certificate. To quote him "No Mortgage Company will lend money on a new development without such a certificate". What effect must be given to the under lined portion of paragraph 5 of the Agreement of Sale.

The Plaintiff, sought of the court the following reliefs:

- 1) Damages
- 2) Recovery of \$20,000 charged as increase in purchase price.
- 3) Interest on damages and on the above amount for such period and at such rate as the court thinks fit.
- 4) Costs
- 5) Such further and other relief as the court thinks fit.

The Relief at (2) above was not pursued. So the court is left to decide whether or not the Plaintiff is entitled to damages arising from the defects.

It is common ground that when the Plaintiff took possession certain defects existed. The issue therefore is whether or not the defects were satisfactorily remedied.

Re Leaking Roof

The Plaintiff's evidence is that "the roof leaked in many places and that all the rooms upstairs had water damaged ceilings in many places". The Defendant's witnesses admitted that where the shingle roof joined the parapet wall leaked and that a split shingle also leaked. The Defendant's witness further testified that the leaking roof was satisfactorily repaired. In fact they all said that after the roof was repaired no further complaints were ever received from the Plaintiff.

The Quantity Surveyor employed by the Plaintiff spoke to the need for the shingles on the roof to be replaced.

His verbatim evidence is:

"I examined the building with the eye of a Quantity Surveyor. Shingles could have become defective by ordinary wear and tear. I cannot say that shingles were defective when they were put on to the roof. If the house started to leak from the outset there is every likelihood that shingles were defective when put on. Inspection was done in August 1986. Can't say defects existed at time of construction".

It is to be observed that the Quantity Surveyor did not actually observe whether or not the roof was leaking at the time of his inspection. What he observed were water marks on the ceiling. From the evidence of the Plaintiff, who occupied the premises for two years, I did not get the impression that the roof was leaking like a sieve. Most of the leak appeared to have been in the area where the shingled roof joined the parapet wall.

I accept the evidence of the Defendant's witnesses that the roof was satisfactorily repaired hence there were no further complaints from the Plaintiff. Bearing in mind the evidence of the Quantity Surveyor that the defective shingles could have been the result of ordinary wear and tear it is inconclusive that the entire roof was a bad job. I am therefore of the view and I so hold that whatever defects existed in respect of the roof they were satisfactorily addressed by the Developers.

Re Bathroom Master Bedroom

The clear and unequivocal evidence is that the bath was properly reseated. At least one of the Defendant's witnesses admitted the bath was chipped. There was a proposal to credit the Plaintiff's account with \$1500.00 being the cost of replacing the bath. However the proposal was not finalized as Plaintiff disputed owing the Defendant or the Developers any money. The \$1500.00 included the cost of the bath \$900.00 and the cost of labour \$600.00. The Quantity Surveyor's report fixes the cost of replacing the bath as \$2000.00 in 1986.

I allow the Plaintiff the sum of \$2000.00 for replacing the bath and order that the defective bath be handed over to the Developers on the payment of the said sum.

Ceiling

Mr. Richard Todd admitted that:

"I found remedial work to be done to ceiling to put back gypsum and repaint."

This work was still incomplete and the Quantity Surveyor has estimated that it will cost \$1200.00 to effect the repairs to the ceiling. I therefore award \$1200.00 for the repairs to the ceiling.

Tiles

I accept the evidence of Mr. Todd and Mr. Woolery that only two rows of tiles had to be removed in reseating the bath and that these tiles were not replaced, at the request of the Plaintiff, as he wished to replace them with tiles of his own choice.

The evidence is that the wall tiles did have two different colours. The fact that they were supplied by the manufacturers in that condition is no answer to the Plaintiff's complaint. The cost of making good this defect has been estimated at \$1600.00 and this amount is allowed.

I find that no report was ever made to the Developers or anyone that the closet doors or the entrance were defective. The failure to so report these defects leads me to conclude that they did not exist at the time the Plaintiff took possession and that if the Quantity Surveyor did in fact observe these defects they are the result of ordinary wear and tear.

Mr. Johnson for the Defendant sought to avoid liability on two bases viz:

1. That the defects were not structural -
2. That the architect's certificate is evidence that the works have been properly carried out.

1. Clause 4 (c) of the Agreement of Sale states:

The Vendor hereby covenants.

"To remedy and make good any structural defects in the walls, roofs, floors, foundations, or any part of the structure which shall appear or arise within one hundred and eighty days of the date of the issue of the Architect's Certificate of Completion mentioned in Clause 5 (a) hereof and of which written notice shall have been given to the Purchaser within such period and which (notwithstanding the issue of the said Certificate) shall be due to materials or workmanship and not in accordance with paragraph 4 (a) of this Agreement shall within reasonable time after the receipt of written notice on that behalf be made good by the Vendor and unless the Quantity Surveyor or Architect mentioned in paragraph 5 (a) hereof otherwise directs at its own costs. PROVIDED HOWEVER that on the VENDOR obtaining a new certificate from a Quantity Surveyor or an Architect certifying that the defects complained of herein have been made good as aforesaid such certificate shall be final and binding on the parties hereof and all liability to the Vendor hereof shall henceforth cease and determine."

The Defendant contends that Clause 4(c) makes the Defendant liable only for structural defects. The Defendant has covenanted only to repair structural defects. He is therefore not liable to make good any defect which is not structural.

It is clear to my mind what Clause 4(c) seeks to address. Structural defects may be such that they do not become evident until a long time after the Purchaser has taken possession. A structural defect may appear ten years after all the contractual obligations under the contract have been discharged. To avoid the uncertainty of the parties having to be looking over their shoulders the Agreement for Sale places a limitation period upon any claim in respect of structural defects.

2. What is the effect of the Architect's Certificate? What meaning must be ascribed to the words "shall be evidence in any proceedings arising out of this contract that the works have been properly carried out and completed in accordance with the provisions of the contract."

In my view the words mean that the Architect's Certificate is prima facie evidence of the work having been satisfactorily completed. The prima facie evidence may be rebutted by evidence to the contrary.

In the instant case all parties knew of the defects and it is agreed that some of the defects still exist notwithstanding the Architect's Certificate. This evidence to the contrary rebuts the prima facie evidence.

If the above approach is wrong, then I would say that reliance upon the effect of the Architect's Certificate has been waived by the Developers doing remedial work after the Architect had issued a completion certificate.

Re Third Parties

The first Third Party conceded that it is liable under the contract of indemnity to indemnify the Defendant for any damages which may be awarded against the Defendant and arising ex contractu.

The Second Third Party while admitting that it is liable to indemnify the First Third Party states that there is no contractual relationship between the Defendant and it. The Defendant accepts this position.

There will be Judgment for the Plaintiff in the sum of \$5300.00 computed as follows:

To replace bath	-	\$2000.00
To repair ceiling	--	1200.00
To replace wall tiles	--	1600.00
To replace floor tiles	-	500.00
		<u>\$5300.00</u>

With costs to be taxed if not agreed. Apart from proving the cost of remedying the defects the Plaintiff has not in my view adduced any evidence to show that he has suffered any other damage.

There will be no award of interest as the expenditure has not yet been incurred by the Plaintiff. In any event this is not money which the Plaintiff would have invested. He would have used it to purchase the necessary material

to effect the repairs and to pay the workmen to effect the repairs. So it cannot be said that he has lost any interest.

Judgment for the Defendant against the First Third Party with costs to be taxed if not agreed.

Judgment for the First Third Party against the Second Third Party with costs to be taxed if not agreed.

Judgment for the Second Third Party against the Defendant. No order as to costs.

Costs awarded against the Defendant and the First Third Party to be paid by the Second Third Party.