IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E259/84

BETWEEN	ALBERT THOMAS	PEITIONER
A N D	MYRTLE ROSALIE JOHNSON	RESPONDENT

Mr. Terrence Ballantyne, & Mr. Paul Beswick
for Plaintiff.

Mr. Clark Cousins for Defendant
instructed by Messrs. Rattray, Patterson, Rattray

HEARD: DECEMBER 8 & 11, 1998 AND 29TH OCTOBER, 1999

RECKORD J.

On the 18th of April, 1981, the plaintiff entered into an agreement with the defendant to purchase property in Manchester.

On the 6th of February, 1997, the plaintiff obtained an order for specific performance in the Supreme Court against the defendant in respect of the said contract. An order was also made for damages to be assessed for reduced acreage lost by the plaintiff. The plaintiff who lived abroad had difficulty in contacting the defendant. When he did make contact he told her he wanted the property to build a house for his retirement. He had contracted to purchase 3 acres, two roads and 26 perches. Defendant sent him transfer for only 2 acres, 3 roads and 2 perches which the plaintiff refused to sign.

Under cross-examination the plaiantiff said the purchase price was $14,000.00, he had paid $7000.00 with the balance of $7000.00 outstanding to be paid on completion. He signed

transfer for 2½ acres in 1993 and returned it to his attorneys. If provisions had been made to compensate him for the shortage he may have signed the transfer earlier.

Mr. Barrington McKoy, a Quantity Surveyor, was next called by the plaintiff. He was contracted to do an appraisal with respect to building in 1991 as opposed to building in 1998 on 4,107 square feet of land. Based on drawings provided for residence of a 2 story building, 4 bedrooms, family , dining, living, kitchen, utility powder room, verandah, patio and helpers room, double car port and water tank, it was his opinion that in 1981 to construct a dwelling as described would be about $42.00 per square feet - 4107 @ $42.00 per square foot equals $172,494.00. Professional fees at approximately 10% equals $17,249.00 - total $198,743.40. For the said structure in 1998, cost is approximately $3,200 per square foot which equals $13,142,200. Professional fees @ 10% equals $1,314,240 total $14,456,000.

This was the end of the plaintiff's case. Attorney for defendant indicated he was calling no witness and rested his case.

Mr. Cousins submitted the following

1. The reason why the defendant was unable to convey what she had agreed to sell was not due to any fraud, bad faith or misrepresentation. He referred to letter

dated 16/8/85.

2. Sub-division approval was granted in September 1983.

3. As far back as November, 1985, the defendant had forwarded an instrument of transfer for the land she was capable of conveying which the plaintiff refused to sign. That 1988 transfer conveyed exactly the same area of land agreed to when he signed in 1997.

4. Plaintiff knew from 1985 by his then attorneys Myers, Fletcher & Gordon, the defendant was unable to convey the $3\frac{3}{4}$ acres the subject of the agreement for sale and this was confirmed to him by his current Attorneys Ballantyne, Beswick & Co. as far back as 1987.

5. It was only in March, 1986, that the plaintiff for the first time agreed to accept the lesser acreage that the defendant was able to transfer.

6. That the defendant was at all material times ready, willing and able to transfer the portion of land that she able to transfer (Mr. Cousins tendered a draft outline of his submissions)

At no time at all did the plaintiff or the defendant seek to rescind the contract. Defendant had sent to the plaintiff the agreement to be signed.

He submitted that the plaintiff was only entitled to abatement in the purchase price as stated in the judgment dated 6th February, 1997.

He further submitted that the plaintiff had taken ten (10) years to file a regular statement of claim in this suit. In 1993 an application was made by the plaintiff to amend and serve the statement of claim out of time. Almost four years later, February 1997, by way of a judgment by consent the plaintiff was able to get the relief which, had the plaintiff sought on his own, the Court may very well have refused for his gross and inexcusable delay. (See E. 224/90 - Park Traders (Ja. Ltd.) V Bavad Limited. Once the plaintiff saw that there was the reasonable prospect of selling on his terms, he ought to have demonstrated that he was eager and desirous and prompt in invoking the Courts equitable jurisdiction and easily obtained judgment by default and assessed damages no later than 1988.

See Malhotra vs.Choudury (1979) 1 AER p. 186.

Mr. Cousins submitted that a reasonable time within which the plaintiff ought to have brought this case on for hearing would have been the latest 1987 - 88; i.e. within 2 - 3 years after 1985 when it was clear to him that he could no longer acquire the $3\frac{3}{4}$ acres contracted for but only the lesser acreage which the defendant could convey.

We basically have no evidence to go on as to the value of the reduced acreage in 1988. The plaintiff admits he has not yet paid the balance of the purchase price. Fully 50% of the value of the land which defendant sold in 1981 has been denied to her for the better part of over ten (10) years.

Finally, Mr. Cousins submitted that the plaintiff was not entitled to anything other than normal damages. He suggested interest up to 1985.

On behalf of the plaintiff Mr. Ballantyne submitted that no explanation was given why only over 2 acres was being transferred instead of over 3 acres. Despite several letters to defendant no explanation given until 1993.

By consent of the parties an order for specific performance was granted against the defendant on the 6th of February, 1997. Reason for delay on the part of the plaintiff was due to defendant's refusal to reply to correspondence.

Mr. Ballantyne submitted that plaintiff was entitled to following damages :- Damage for shortfall. There were two valuations before the Court - one from Mr. Fairbourne Maxwell for $140,000 to $125,000. The other from E.H. Swaby & Associates for $700,000. Since lots were being sold for $700,000 in the area he submitted this to be a more realistic appraisal of the true value.

On the question of balance of purchase price counsel for the plaintiff referred to the agreement for sale and submitted that consequential damages is available to a plaintiff who through no fault of his own is not responsible for the delay

in obtaining title especially if in fact the defendant was made aware at the outset the purpose for which the land was acquired - See Stroms Bruks Aktie Bolag vs. John & Peter Hutchinson H.L. (1905) A C p. 515.

Phillips v Lamdin (1949) 1 AER p.770

Defendant's delay was due to her failure to act timely.

In reply, Mr. Cousins submitted that there was no evidence of wilful delay on the part of the defendant - the plaintiff was guilty of wilful delay - 10 years taken to file Statement of Claim.

FINDINGS.

After hearing the evidence called by the plaintiff and hearing the submissions by both Attorneys, the Court is asked to assess the damages claimed by the plaintiff. It is noted that the defendant neither testified nor called any witness.

Mr. Cousins for the defendant contends that there was a defect in the defendant's title which she had no power to remove or cure and therefore the plaintiff was not entitled to any damages for loss of bargain or consequential loss. He admitted however that the plaintiff was entitled to an abatement in the purchase price.

In considering the question of damages, the principle laid down by Alderson B. in Hadley v Baxendale (9 Exch 354) must be followed.

> "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonable be considered either arising naturally i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

A rider was added to this principle, to the effect that where knowledge of special circumstances is relied on as the damages recoverable, that knowledge must have been brought home to the defendant at the time of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances (See British Columbia etc Saw Mill Co. v Nettleship (1868) L.R. 3 C.P. 499.)

In Hadley v Baxendale (supra) Cockburn C.J. observed.

> "No doubt, in order to recover damages arising from a special purpose the buyer must have communicated the special purpose to the seller".

It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can do so, as if his rights had been observed. In case of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonable foreseeable as liable from the breach. What was at that time reasonably foreseeable

depends on the knowledge then possessed by the parties, or at all events, by the party who later commits the breach.

While there is some evidence from the plaintiff that he told the defendant that he wanted the property for building a house for his retirement, there is no evidence of giving details of the house he had proposed erecting. Any damages which the plaintiff suffered therefore cannot be said to have been in the contemplation of both parties at the time they made the contract. The loss would be too remote.

Further, as indicated by defence attorney, because of the subsequent defect in the defendant's title, she could not convey the property she had contracted to the plaintiff. The plaintiff therefore would not be entitled to any damages for loss of bargain or consequential loss - See Bain v. Fothergill (1874) L.R. 7 H.L. 158.

This leaves to be considered the damages suffered by the plaintiff for the reduced acreage lost from the acreage specified in the agreement for sale.

The defendant agreed to sell to the plaintiff a parcel of land measuring three acres, two roads and twenty six perches for $14,000.00. He paid her $7000.00 leaving a balance of $7000.00 to be paid on completion. After an inordinate delay the defendant was only able to convey two acres, three roads and 0.2 perches - The plaintiff lost three quarters of an acre.

Mr. Fairbourne Maxwell, Valuation Surveyor of September Houses Limited values this strip of land at between $140,000.00 and $175,000.00 (See report dated December 7, 1998). Messrs. E. H. Swaby & Associates Valuations gave a valuation of

$700,000.00 "for the acre in question" (see report dated 26th November, 1998.

In the report submitted by Mr. Maxwell, he stated that residential lots of average sizes of $\frac{1}{3}$ acre were sold in nearby residential sub-divisions for $700,000.00 in 1997 and 1998. The area of land in question is $\frac{3}{4}$ of an acre. Although it has been described as having no economic use due to its shape I agree with counsel for the plaintiff that a more realistic appraisal of the true value would be $700,000.00.

Damages is therefore assessed in favour of the plaintiff against the defendant in the sum of $700,000.00 less the sum of $7,000.00 due to the defendant by the plaintiff as balance of the purchase price - interest on the balance to be 6% per annum from the date of the service of the writ to date of judgment.

There will be cost to the plaintiff to be agreed or taxed.

The defendant's requests for Court to limit the interest to 1985 has been considered but refused for the reason that both parties have been guilty of inexcusable delay in bringing this case to an end.

On my own part, I wish to apologise for the delay in this judgment.