[2015] JMSC Civ. 61

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV 05654

BETWEEN	**CLIVE BANTON**	**1ST CLAIMANT**
AND	**SADIE BANTON**	**2ND CLAIMANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**DEFENDANT**

Garth McBean QC. Dian Johnson instructed by Garth McBean & Co. for Claimants.
Sandra Minott-Phillips QC., Renee Gayle instructed by Myers Fletcher & Gordon for Defendant.

Assessment of Damages – Breach of contract for sale of land - whether breach date rule applies - Expert evidence - whether hearsay – characteristic unknown to the parties is to be taken into account.

Heard: 16th-17th February 2015 and 20th March 2015

Batts J.

[1] This judgment was delivered orally on the 20th March 2015. I now reproduce it in writing.

[2] In this matter a written judgment as to liability was delivered on the 4th July 2014. On the 16th and 17th February 2015 evidence was taken and submissions made as to damages. I then reserved to consider my decision and now state the damages to be awarded.

[3] The matter concerns an agreement for the sale of land. The Defendant wrongfully terminated the said agreement. The issue for my consideration is what if any is the compensation due to the Claimants in consequence of such a wrongful termination.

[4] Claimants' Counsel contends that the measure of damages is the loss of bargain. This is to be assessed by computing the difference between the contract price on the one hand and the market value of the property as at the date the contract was breached on the other hand. Counsel submitted that the value as at the date of judgment should not be used because specific performance was not available as an alternate remedy. The Claimant called evidence and submitted that the appropriate award was: the US $225,000.00 contract price

less US $1,224,204.26 (market value in May 2011)

= US $999,204.00

[5] Counsel for the Defendant submitted that the appropriate measure of damages is the difference between the contract price on the one hand and the market value of the land at the date of judgment. Furthermore, in assessing that value no account is to be taken of any use to be made of the land which was not within the contemplation of the parties at the time the contract was entered into. In the instant case, submitted Counsel, the court should disregard any evidence related to the potential earnings from sand or aggregate mining. There was no pleading or any evidence to suggest that the Claimants made it known that the property was being acquired with any such purpose in mind. The award, submitted Counsel, ought to be no more than US $30,844.00.

[6] Each party had an expert. It is agreed that the contract price was US $225,000.00. It is also agreed, or at any rate no issue was taken with the fact, that the deposit paid of US $75,000.00 was returned.

[7] At the commencement of this matter Mrs. Minott-Phillips QC. relied upon Rule 32.7 (2) and opposed the giving of oral evidence by the Claimant's expert. She also relied on the Order of the court made on the 9th July 2014. I ruled that the experts would be allowed to give evidence orally. This is because where experts differ, it is only by seeing and hearing them give evidence that a court can usually decide which opinion to prefer. Learned Queens Counsel also applied to have her expert give evidence first due to his personal circumstance. However, I agreed with Mr. McBean's submission that the Claimants evidence be taken first.

[8] Mr. Kenneth Allison a Chartered Valuation Surveyor of Allison Pitter and Company then gave sworn evidence. He identified an expert report which he had prepared. Mrs. Minott-Phillips QC objected, and I upheld her objection to the document being tendered. It was clear that the document did not only contain the opinion of Allison Pitter & Co. as it sought to incorporate the opinions of Blastec Company Ltd. (hereafter referred to as Blastec) with respect to matters outside the experience and expertise of Allison Pitter & Co. It was clearly hearsay and inadmissible to prove the truth of its contents. The report was however severable and I ruled accordingly.

[9] Mr. McBean QC. then applied for permission to call the other expert. Mrs. Minott-Phillips QC. vigorously opposed this course particularly having regard to the history of the matter which she recounted in detail. Further, she submitted that the intended evidence was irrelevant having regard to the pleadings which relied on no specific or peculiar purpose for which the land was being purchased by the Claimants.

[10] I decided that I would be granting no adjournment to facilitate the calling of any expert not now available. The Claimants had had ample time to put their house in order. In any event it was difficult to see the relevance of the evidence of Blastec (Mr. Neuville) which related primarily to earnings to be made from mining sand

on the land, and to the results of geological studies done showing available aggregate deposits on the property.

[11] Mr. McBean QC. proceeded with the examination in chief of Mr. Kenneth Allison. He deponed that he had known that property for many years, and was very familiar with it even prior to being asked to do this report. He had done assessments in 2009 and 2010 in relation to highway construction. For the purpose of this case he had visited the property in October and November of 2014 and again on the 17th January 2015. He said prior to 2010 the property was used as a tobacco farm. Floods in 1986 damaged that farm. In 2010 it was used for cash crop farming. There was also sand mining. The owners of the said land, he said, had equipment on adjoining property and mined sand. There was he said a mining licence #QC1221 which expires 3rd March 2015. He affirmed that his expert valuation was done based on an existing use of the land. By "existing" the witness explained he meant in 2011. It was as at that year that he did his valuation. In doing his valuation he said he relied on other sales in the area. He said Blastec's opinion did not impact his opinion on the market value of the land. He only relied on Blastec for what he called the 2nd scenario of his report. He said the report has 3 valuations. The first valuation is independent of the other 2.

[12] As indicated in paragraph 8 above, upon Mr. McBean attempting to tender the report I ruled that it could not be admitted. The document included the opinion of Blastec and as such its prejudicial effect outweighed any probative value. Mr. McBean applied for permission to allow his client time to excise Blastec from the report. I adjourned to 2:15pm for that purpose.

[13] Upon the hearing being resumed Mr. Allison explained the adjustments made to the document and over Mrs. Minott-Phillips' objection, I admitted the revised report as Exhibit '5' being a report dated 16th February 2015. My basis for doing so was the evidence of Mr. Allison that his opinion did not rely in any way on the report of Blastec or Mr. Neuville.

[14] When Cross-examined Mr. Allison admitted that apart from the dates there were other changes made to his expert report. Counsel demonstrated, and the witness admitted, that he erred by stating that the property is owned by Jamaica Redevelopment Foundation. He admitted that his reference to a licence to mine was a reference to a licence to HB Construction Ltd. He admitted that the land had been substantially mined out. He said the area of the river over which there is a licence had been substantially mined out.
The following exchange occurred:

> "Question: You mean supply is exhausted?
> Answer: Not completely
> Question: It is either mined out or not.
> Answer: I did not say that the land was mined out; I said it is at this point in time mined out.
> Question: You agree that according to your report your last visit took place on 31.10.14?
> Answer: Yes
> Question: Look at Civil Procedure Rules 32.16. I asked that report tendered but not admitted this morning filed on the 2nd February 2015 and served in purported compliance be admitted as an Exhibit."

[15] Surprisingly, Mr. McBean objected and of course cited my earlier ruling. I decided to admit the document as Exhibit 6. This was the original report of Mr. Allison with the references to Blastec. It seemed to me only fair that if Defence Counsel now reversed her position on an earlier objection that I allow the document in evidence.

[16] There was no further cross-examination of Mr. Allison nor was there any re-examination. The Claimants closed their case.

[17] The Defence called Mr. Mervyn Down of DC Tavares Finson. I disclosed to the parties that whereas I was not personally acquainted with this witness his firm had done valuations on my behalf. The parties had no objections to my continuing to hear the matter.

[18] The expert report of DC Tavares & Finson and the answers to questions of the expert were admitted as exhibits 7 and 7 (a) respectively.

[19] When crossed examined Mr. Down admitted that although he described the land as sandy loam, he had not tested to what depth. He admitted that the Rio Minho runs across the property. He had not measured the width of the river, but estimated it at 50 to 200 meters in some areas. He admitted that where sand is depleted it can be replenished by heavy rainfall. The following exchange occurred:

> "Question: You saw evidence of mining on the property?
> Objection: Please read the whole sentence.
> (Read)
> Answer: Yes in the river bed the mining licence is specific to the Rio Minho river.
> Question: You indicated that the river runs across the property?
> Answer: Yes.
> Question: The mining of aggregate was it in the river bed that ran across the property?
> Answer: Yes"

[20] At this juncture an objection was taken and detailed submissions made and responded to, as to the admissibility of evidence about mining activity or aggregate. There was no pleading it was said as to a specific purpose for which the land was acquired. I decided to allow the evidence to be lead and promised to indicate my reasons at a later date. It seems to me that the principle to be extracted from the authorities cited, is that where the purpose of purchase is for some hidden or rather peculiar use, then in the

absence of disclosure, it ought not to be taken into account. On the other hand where the activity or purpose is obvious and apparent then no difficulty should arise. In this case the expert has said sand mining was being conducted in the river. That at the very least would have been within the parties' contemplation or ought reasonably to have been.

[21] Cross-examination thereafter resumed. The witness admitted that the presence of sand mining would increase the value of the property, if the sand could be mined. The witness was taken through his report and in particular the evidence of other sales of neighbouring properties. He did not know if those other properties had mining or rivers running through them. He had been familiar with the property in question for over 10 years. He gave evidence that the river bed had been mined periodically over the years. The following exchange occurred:

> "Question: On your visits the mining activity was obvious to you in the river bed?
>
> Answer: Over these 10 years on the various visits at least 4 only 1 occasion when actual mining. On visit in 2014 when I did valuation there was little or no mining, either in the river bed or at the adjoining crushing plant.
>
> Question: Do you agree that on the river, there is a section on either side of the river?
>
> Answer: Yes, North West and South East."

[22] Later he was asked:

> "Question: Have you seen valuation report of Allison Pitter?
>
> Answer: No
>
> Question: Look at page 19, 23 (Exhibit 5 & 6). This valuation is higher than yours.
>
> Answer: Yes
>
> Question: Do you agree, did you take into account sand mining?

Answer: No

Question: Had you done so would the value be more?

Answer: Yes it would all other things being the same."

[23] There was no re-examination of this witness. In answer to a question from the court as to why had he not taken sand mining into account when valuing the property, the witness said

> "Answer: Because indications were from the owners at the time when they were not making much money from the sand mining. Most of the things they tried had failed. That is not to say sand mining could not be done. It did not appear that it was a serious factor. Property had been on the market for 10 years, since 2004 and the values we had stated there were no offers.
>
> Judge: Did you do the auction?
>
> Answer: We did not have it listed with us but it was on Jamaica Redevelopment website."

[24] After the close of the evidence, I had the benefit of written and oral submissions. These I have carefully considered. The issues for my determination are as summarized earlier. In the interest of keeping this oral judgment within manageable proportions I will not restate these submissions but will shortly state my conclusions.

[25] Having considered the authorities; and in particular the case of Rajah Tewari v Attorney General SCCA 67 of 1998 unreporrted judgment delivered on 31st July 2000 and Molhotra v Choudry (1979) 1 A.E.R. 186; it is my decision that the relevant date for the assessment of damages is the date of breach of contract. The breach date rule applies where the vender is unable to give title not where he fails or refuses so to do. In this matter the evidence is that the vender (a mortgagee) had allowed the mortgagor to redeem his mortgage. Therefore as at the date of breach the

vender had been unable to make a title. It certainly would be unfair and not consonant with common sense to hold a defendant liable for a value, as at a trial date, for land which they no longer owned or had the capacity to transfer. I will therefore in this assessment consider the 5th May 2011 as the material date for the assessment of the value of the land.

[26] On the evidence I find as a fact that the potential for sand mining in the river bed which passed through the property was open and obvious and known to all. It was therefore within the contemplation of the parties, or ought reasonably to have been, that the potential use for such activity would positively impact the value of the land. I therefore take into account that potential use and agree with the Claimant's expert that it is relevant to and does positively impact the market value of the property.

[27] I do not however, accept that as part of that assessment evidence of an income stream from mining on the land itself is permissible. This is because there is no evidence that a licence to mine on the land is in existence nor is there any evidence as to the likelihood of such a licence being granted. There is moreover no evidence that the Claimants or the Defendant was aware that the property contained aggregates or sand in sufficient quantities below the surface such as to make mining a viable proposition. In short, there is no evidence before me from which it can be concluded that mining on the land (as distinct from in the river bed) was within the contemplation of the parties at the time the agreement for sale was entered into. I therefore pay no regard to a loss of income from mining on the land as pertinent to the value or as a separate and additional head of damage. Furthermore no such claim was pleaded.

[28] I find also that Exhibit 6 insofar as it references or relies upon the opinion of Blastec is singularly unhelpful. This is not only due to irrelevance but also because one expert giving evidence cannot by mere reference to the

opinion of another expert, convert that other expert opinion into evidence. Blastec has not given evidence before me. I therefore for that reason also, disregard the opinion of Blastec.

[29] I find as a fact also that the opinion of Mr. Allison and his report as detailed in Exhibit 5 is the preferable valuation for the purpose of this assessment of damages. Mr. Meryn Down admitted that his reports of 2014, 2004 and 2010 took no account of possible sand mining in the river bed. Further that had he done so, all other things being equal, he would have given the land a higher value. Mr. Down was not asked to, nor did he, critique the opinion of Mr. Allison.

[30] Mr. Allison, in a full detailed and very impressive analysis, has outlined the basis on which his opinion was rendered. He has also supported his conclusions by reference to sales comparisons of other properties in the area. I accept the lower of the range of values he gives.

[31] In the circumstances and for the reasons stated above I find as a fact that as at the 5th May 2011, the property in question had a true market value of US $1,165,908.80.

The Claimants loss of bargain therefore, when the agreement for sale was wrongfully terminated was:

US $1,165,908.80
less US $225,000.00

=US $ 940,908.80

[32] In the result there is judgment for the Claimants against the Defendant for US $940,908.80.

The judgment is in the currency of the United States and having heard submissions I award interest at 1% from the 5th May 2011 until today's

date. Thereafter interest will run on the judgment in the manner prescribed by law until payment.

Costs to the Claimants to be taxed if not agreed.

I granted a Stay of Execution for 6 weeks.

David Batts
Puisne Judge