[2014] JMSC Civ 206

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV03801

BETWEEN	**LEON COURTNEY ROBINSON (Executor of the Estate of Herman L. Denton, Deceased)**	**CLAIMANT**
A N D	**MICHELLE CHEN**	**1ST DEFENDANT**
AND	**THELMA AGATHA CHEN**	**2ND DEFENDANT**
AND	**ERROL ALPHANSO CHEN**	**3RD DEFENDANT**

Ms. Audré-Lois Reynolds instructed by Bailey Terrelonge Allen for the Claimant

Ms. Arlean Beckford and from August 5, 2014, to October 3, 2014 Mrs. Yualandé Christopher-Walker instructed by Arlean D. M. Beckford & Co. for the Defendants

October 30 - 31, 2013; July 16, 2014; August, 5 & 26, 2014; September 9 & 26, 2014; October 3, 2014; and December 19, 2014

Method by which Damages to be awarded in lieu of Specific Performance should be computed

D. FRASER J

INTRODUCTION

[1] On October 3, 2014 I handed down a written judgment in this claim. In that judgment ***Leon Robinson (Exec. of estate Herman Denton dec'd) v. Michelle Chen et al No 1*** [2014] JMSC Civ 146 the facts were fully outlined. The judgment records the following orders:

[2] **On the claim:**

a. It is declared that the Agreement between the defendants and Herman L. Denton (deceased) has been frustrated and cancelled by the order for

Specific Performance granted to Dennis Wright and Lisa Rose Wright in Claim No. 2004HCV02341 on July 20, 2006.

b. The claimant is not entitled to forfeit the deposit paid by the defendants.

c. The defendants owe rental to the claimant representative of the estate of Herman Denton from November 1997 at the rate at $20,000.00 monthly until they deliver up possession of the property, less the sum of $3,400,000 paid to Herman L. Denton.

d. The defendants shall quit and deliver up possession of the said property to the claimant within 14 days of the payment of any sum due and owing to them, in the event that a sum of money is owed by the estate of Herman Denton to the defendants after the sum owed for rental is set off against the damages due to the defendants from the estate of Herman Denton. This order is subject to the eventual award made for damages and will be varied if necessary.

e. The defendants shall withdraw the caveat lodged against the property within 7 days of delivering up possession to the claimant.

f. Costs to the claimant to be agreed or taxed

[3] **On the Counterclaim:**

a. The defendants are awarded damages for breach of the 1997 Agreement for Sale they entered into with Herman L. Denton.

b. The claim for a declaration that the rental in the sum of $1,440,000.00 collected from the Wrights by Herman Lloyd Denton be applied to the purchase price as agreed by the parties is refused.

c. The claimant is not entitled to forfeit the deposit herein or any portion of the monies paid under the contract.

d. Costs to the defendants to be agreed or taxed.

The court will hear further submissions on October 10, 2014 on the quantum of damages to be awarded, and on any interest to be awarded on sums due.

[4] In light of the court's order further written submissions were in due course received from the parties, though later than the date contemplated, due to a series of extenuating circumstances. This judgment deals with the issues of damages and interest reserved from the first judgment.

THE SUBMISSIONS ON DAMAGES AND INTEREST

Counsel for the Claimant

[5] Counsel for the claimant submitted the law is clear that in the circumstances of this case the normal measure of damages should apply which would be the difference between the market value at the contractual time for completion less the contract price. Further that the price at which the property was resold was, unless rebutted, evidence of the market price. Counsel relied on **McGregor on Damages** by Harvey McGregor, Seventeenth Edition, at paragraph 22-005.

[6] Counsel submitted that the property was sold to the Wrights for a lesser price than that at which the property was being sold to the defendants. She relied on a copy of the Agreement between Rev. Denton and the Wrights. That Agreement was however never admitted into evidence even though it is appended to a Notice of Intention to Adduce Hearsay Evidence contained in Documents filed February 24, 2012. Though the intention to adduce the evidence was filed as a part of a judge's bundle in this matter, it was never put forward during the hearing as an agreed bundle and the copy Agreement was never admitted into evidence. The stated intention to adduce it as evidence was never acted upon and hence the court cannot now properly have regard to that copy Agreement. The position of the claimant is however not unduly prejudiced by the courts inability to have regard to that Agreement. This is so because, as stated at paragraph 22-005 of **McGregor on Damages**, *"...apart from being*

evidence of the market price, the price at which the claimant has contracted to sell the land to a third party is irrelevant; accordingly it was held in Brading v. McNeill[1] that such a resale price, lower than the market price could not decrease the damages below the normal measure."

[7] Counsel submitted that the relevant date for ascertaining the market value of the property was in November 1998 as the contract should have been completed in one year and it was determined that the defendants came into possession in November 1997. Counsel therefore maintained that the defendants' evidence of the value of the property as at later dates was therefore of no assistance on the issue of damages to be awarded.

[8] Counsel also advanced that damages in lieu of specific performance being damages to be assessed on an equitable basis, the conduct of the party to whom damages was being awarded must be considered by the court. In that regard the court was invited to take the following into account:

a. the defendants would have already earned a benefit from occupation of the premises at a fixed rental of $20,000 per month for seventeen (17) years. This was sufficient benefit to them in these circumstances where they were themselves in continuous breach during the life of the Agreement;

b. while the defendants had been in default all throughout the Agreement, in contrast the vendor was in breach only having failed to stamp the Agreement, and through entering another agreement with the Wrights as late as February 2002. Counsel submitted that the vendor's default was relatively minor compared to that of the defendants which went to the root of the contract, and therefore the circumstances did not give rise to any equity in favour of the defendants.

[1] [1946] Ch. 145

c. even at the time when the defendants submitted the Commitment Letter from the building society, the amount of the commitment was insufficient to clear the amount outstanding under the Agreement. A shortfall of $500,000 remained which the defendants have at no time said they were ready to pay;

d. similarly to the case of ***Johnson v. Agnew*** [1980] AC 367, the Estate of Herman Denton has in fact suffered a loss on the sale to the Wrights. An inference can be drawn from the fact that the vendor has sold the property for a lower price that he was just frustrated with the lack of performance by the defendants. Rather than any 'mala fides' as the defendants state in their submissions, it is evidence of desperation resulting from the defendants continued breaches. This submission is included subject to the finding of the court that the evidence of the value of the sale of the property to the Wrights is not properly before the court

e. the issue of the value for which the property has been sold in this instance must be considered by the court in its equitable jurisdiction as this is the only property which forms the Estate of Herman L. Denton, Deceased. Therefore there is no more money to be used to settle any damages awarded to the defendants. As the court is aware, the action is only to complete that transaction and comply with the orders for specific performance granted to the Wrights. The equitable maxim of the court not acting in vain is relevant and should be considered in the award to be made.

f. as the defendants were admittedly at fault all throughout the Agreement, and did not at any time lead evidence that they were in a position to complete the agreement, they were not entitled to substantial damages.

g. further the defendants having failed to lead evidence as to what was the market value at the time of completion, the only evidence that the court can have regard to is that the new agreement was entered into for a lesser price. Therefore only nominal damages could be awarded to the defendants in this case.

[9] Concerning the rental to be paid, the court having found that the defendants have paid in total the sum of $3,400,000, counsel submitted that to calculate the rental now due from the defendants the sum of $3,400,000 should be subtracted from the total sum due for rent from November 1997 to November 2014 and continuing until the defendants vacate the premises.

Submissions on behalf of the Defendants

[10] The challenges suffered by the defendants concerning legal representation in respect of the property, the subject of this dispute, which were outlined in some detail in ***Leon Robinson (Exec. of estate Herman Denton dec'd) v. Michelle Chen et al No 1*** continue. Mrs. Yualandé Christopher-Walker who appeared for the defendants in respect of the submissions to determine whether the case should be re-opened to add the Wrights, no longer appears in respect of this last phase to determine the applicable damages. The defendants however forwarded submissions under the hand of the 1st defendant, which appear to have benefitted from some legal counsel.

[11] These submissions disagree fundamentally with the approach suggested in the submissions of counsel for the claimant. The defendants contend that the proper measure of damages in this case ought to be such as may fairly and reasonably be considered as either arising naturally; or such as would be in the contemplation of the parties. ***Hadley v Baxendale*** (1854) 9 Ex 341. Further that damages being compensatory in nature, the innocent party should be placed so far as money can do so, in the same

position as if the contract had been performed. Therefore while damages are normally assessable as at the date of the breach if that principle is likely to cause injustice, the court will assess damages at another date. See ***Johnson v. Agnew.***

[12] It was also submitted that there are two schools of thought regarding the measure of damages: a) that damages ought to be assessed as at the date of the breach; or b) damages ought to be assessed as at the date of the hearing. It was acknowledged that the court found that the effective date of the rescission and cancellation of the contract was July 20, 2006, the date the Wrights obtained an order for specific performance of their contract with the deceased. However, it was submitted that, as it was in 2002 that the Agreement which gave rise to the inevitable order for specific performance arose, it was reasonable to conclude that the effective date of the breach was in 2002.

[13] It was further advanced that up to 2002, the most recent valuation of the property was $5,900,000.00 – the appraised value as at November 12, 2001 used to negotiate the mortgage loan that was being sought in 2001. (See appraisal of W & L Associates - Exhibit 15) It was noted that the appreciation in the value of the property between 1997 and 2001 was 18%. That period was viewed as three rather than 4 years and averaged to an increase of 6% per year. Applying an increase of 6% to the figure as at 2001, it was submitted that as at 2002 the value should be approximately $6,254,000.00.

[14] It was contended however that even with interest awarded on this sum, it would not adequately compensate the defendants for the loss suffered given the value of properties today. The defendants highlighted that had Rev. Denton returned their monies, they would have been placed in a position to mitigate their losses by possibly acquiring another property of equal value elsewhere. As that had not been the case, the defendants

maintained that the court ought to exercise its discretion by assessing damages as at the date of the hearing. ***Johnson v. Agnew*** was again relied on as also the cases of ***Beard v. Porter*** [1948] 1 KB 321 and ***Wroth v. Tyler*** [1974] Ch 30.

[15] The defendants relied on a valuation of the property dated January 30, 2012 tendered into evidence during the hearing of the matter. (See appraisal of W & L Associates Ltd - Exhibit 16). Noting that the appraised value, almost three years ago was $14,250,000.00 they applied the previously stated rate of appreciation of 6% per annum to submit that the property was now valued approximately $16,000,000.00. The defendants further submitted that the costs associated with acquiring property (i.e. stamp duty, registration fee, cost of preparing agreement for sale, attorneys-at-law fees, valuation fees, surveyor's fees) sum to approximately 10% of the value of the property being acquired, therefore taking the real cost of acquiring a similar property to approximately $17,600,000.00. The defendants noted that this sum was not far from the value of $17,300,000.00 stated by the appraiser as the reinstatement cost of the property. It being reasonable to assume that the value of the property had increased since the last valuation the defendants submitted that they ought to be awarded damages for breach of contract in the sum of $17,600,000.00 - $18,000,000.00 with interest from the date of the hearing.

[16] On the question of the rental ($20,000 per month) now due the defendants submitted that the sum of $1,260,000 for the period November 1997 to January 2003 should be deducted from the total sum of $4,100,000 for the period November 1997 to November 30, 2014 leaving a balance of $2,840,000.00. With $3,400,000.00 being on account having been paid to the deceased Rev. Denton by the defendants as found by the court, the defendants submitted that deducting $2,840,000.00 due and payable to

the claimant for the period February 2003 to November 2014 from this sum, the defendants would be entitled to a refund of $560,000.00.

ANALYSIS

[17] An appropriate starting point is the question of whether or not as submitted by counsel for the claimant only nominal damages should be awarded to the defendants. In the ***Mediana*** [1900] A.C. 113 at 116, Lord Halsbury L.C. in explaining the meaning of nominal damages said:

> "Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

[18] It cannot be correctly maintained in this case that the defendants have not suffered real damage. They have lost the right to purchase the property the subject matter of this dispute and will have to seek to secure alternative accommodation. This is therefore not a case where nominal damages could properly be contemplated.

[19] The court having determined that substantial or real damages should be awarded the next issue is what measure of damages should be used? The date of breach or the date of hearing. If the date of breach is to be used it was the defendants' submission that the order for specific performance in 2006 would have to relate back to the date of the Wrights' agreement in 2002 which would be the date of breach. Counsel for the claimant on the other hand submitted that the relevant date should be the initial date for completion in November 1998.

[20] The initial completion date cannot be the relevant date as even on the claimant's case the agreement would have subsisted until November 2001. It was established in the first judgment in this case ***Leon Robinson (Exec. of estate Herman Denton dec'd) v. Michelle Chen et al No 1***

that the agreement was frustrated in July 2006. That would therefore be the effective date of breach. Even though the agreement that was being specifically enforced was entered into in 2002, it was not until the order for specific performance of that agreement was obtained that it was determined which of the two existing agreements would be enforced by the court and held to be valid.

[21] As noted in the first judgment the defendants were first in time in seeking specific performance. That application was frustrated by the tragic passing of their counsel Mr. Hussey and their subsequently sitting on their rights after being unable to obtain their file from his estate until 2010. Had the defendants' application proceeded, quite likely they would have been entitled to specific performance being the first purchasers in time, subject to their ability to have completed the agreement in a reasonable time.

[22] The defendants have however maintained that for justice to be done in this case the measure of damages should be determined as at the date of hearing, given the significant appreciation in value of properties to enable to defendants to obtain a similar property. In ***Wroth v. Tyler*** based on the vendor's failure to complete, purchasers of a house were able to obtain damages from the vendor calculated as the market price of a similar house at the time of the judgment less the contract price. This was held to be the just measure of damages given that house prices had steeply increased over the relevant period due to rapid inflation. Concerning whether the purchaser should have sought to mitigate his damages by earlier seeking to acquire a similar property before the escalation of prices, the court held that the award was appropriate as the purchasers claim for specific performance might have succeeded given that there were ways to defeat the rights of the vendor's wife under the Matrimonial Homes Act 1967 which was the factor which prevented the vendor from completing.

[23] Applying that principle to the instant case had the initial claim for specific performance of the defendants' agreement with Rev. Denton proceeded there was a good chance it may have succeeded. Further until the Wrights obtained an order for specific performance of their agreement with Rev. Denton, and perhaps until the defendants should reasonably have acted so that they would have become aware of that order, they would have had a legitimate basis to believe that their agreement was still subsisting.

[24] In ***Beard v. Porter*** the defendant agreed to sell to the plaintiff, who, he knew, required it as his home, a house occupied by a tenant. Relying on the tenant's promise to quit, the defendant undertook, as a term of the contract, to give vacant possession by a specified date, and the sale was meanwhile completed. The tenant having failed to quit by the date in question or at all, the plaintiff was obliged to purchase a second house. In his action against the defendant for damages, the Commissioner of Assize awarded him, inter alia, the amount of the solicitor's costs and stamp duty incurred on the second purchase. It was held by Tucker and Somervell L.JJ., Evershed L.J., dissenting, that that item of damage was properly awarded since solicitor's costs and stamp duty were not part of the purchase price of the second house, for which price the plaintiff must be presumed to have obtained full value.

[25] The propriety of damages being awarded as at the date of hearing was also applied by the House of Lords in ***Johnson v. Agnew.*** However unlike in ***Wroth v. Tyler*** and ***Beard v. Porter*** it was the vendors who were the beneficiaries of the principle in ***Johnson v. Agnew***. The summary contained in the abstract taken from Westlaw will suffice. The plaintiff vendors, being in arrears with mortgage repayments, entered into a written agreement for the sale of the properties. The purchasers failed to complete whereon the vendors obtained an order for specific performance. The purchasers failed to carry out the order, and the mortgagees duly enforced their securities by selling the properties. The

proceeds of the sale were insufficient to discharge the mortgage in full, and the vendors moved for an order that the purchasers should pay the balance of the purchase price to the vendors. The judge made no order, and the Court of Appeal allowed the vendor's appeal. On appeal by the purchaser, it was held by the House of Lords dismissing the appeal, that where specific performance was ordered but not complied with, damages was still available as an alternative remedy, and damages would be assessed on a common law basis as at the date when the remedy of specific performance was aborted.

[26] The case of ***Malhoutra v. Choudhury*** [1980] Ch. 52 C.A. (not cited by either party) is also instructive. In that case the English Court of Appeal while accepting the principle that damages should be assessed in a manner to ensure the plaintiff was not disadvantaged in the computation of the award, moved back one year from the date of judgment due to the purchasers delay in pursuing his claim.

[27] The difficulties created by the peculiar twists and turns of this case extend to the determination of the measure of damages. The court has to strike the appropriate balance given the facts before it. Accordingly I find that damages should be determined as at the date of breach, July 20, 2006. This in keeping with the underlying principle in cases such as ***Wroth v. Tyler***, ***Johnson v. Agnew*** and ***Malhoutra v. Choudhury*** that there is a need to ensure the award is fair to both sides in light of the overall circumstances of the case including the contemplations and actions of the parties. The following factors have led the court to that conclusion:

a. The delay of the defendants in seeking to pursue enforcing their interest in the property after the death of Mr. Hussey despite the challenges they encountered in obtaining their file from his estate. It was not until one year after the claimant filed this claim against the defendants in 2009 that they took action seeking to set aside the

order of specific performance granted to the Wrights. They did not become aware of the order prior to 2009, but had they despite the difficulties they faced acted more promptly they would have become aware earlier;

b. The fact that, as pointed out by counsel for the claimant, the defendants have obtained the benefit of living in the premises at the same rent for seventeen years. Even if they still expected to obtain the property the low rental would have enabled them to save money that they would otherwise have expended. That benefit would make it unjust for the date of hearing to be used as the date at which the measure of damages should be calculated;

c. The defendants were themselves in breach throughout the agreement having failed to meet the payment deadlines and even at the point of obtaining the commitment letter in 2001 were still $500,000 short of the full purchase price.

[28] Counsel for the claimants submitted that the estate has no money to pay damages given that the property was sold for less than what it was being sold for to the defendants and the action was being brought solely to enable the order for specific performance to be complied with. Counsel urged that the court should not act in vain. The value of the deceased's estate was however not an issue before the court. In any event the question of the adequacy of assets to fulfill any award of damages should not be the courts first concern. If that were the case many legitimate awards for damages would never be made. The question at this stage is what damages are just on the facts of the case. The court does however appreciate that the issue raised by counsel for the claimant is very relevant given that the order for possession made in the first judgment in this matter is subject to the award of damages being paid to the defendants. However the first step is for the appropriate award of

damages to be made. Thereafter if the award is not paid the parties will need to take further action as necessary.

[29] The defendants in their submissions pointed out that the property saw an increase in value of 18% between 1997 and 2001. As the letter of commitment was received in late 2001, I will use the same value of $5,900,000 in 2001 as the starting value in 2002 and estimate that the property would have enjoyed a similar 18% increase in value between 2002 and July 20, 2006 which would yield the sum of $6,962,000. This would be the measure of damages due to the defendants subject to any rent due and owing by them being set off against this sum.

[30] Concerning the rental to be paid, it is correct as submitted by counsel for the claimant that the court having found that the defendants have paid in total the sum of $3,400,000, the rental now due from the defendants is the sum of $3,400,000 subtracted from the total sum due for rent from November 1997 to December 2014 and continuing until the defendants vacate the premises. As at December 2014 that would be $4,120,000 - $3,400,000 which is $720,000. The total sum for damages due to the defendants as at December 2014 would therefore be $6,962,000 - $720,000 = $6,242,000.

[31] Interest on the damages due would ordinarily run from the date of the breach and I see no reason to depart from the regular rule in this case. The estate of Rev. Denton would have received a benefit from the effective forward payment of rent for many years and the defendants would have received a benefit of paying a low fixed rental which overtime would become more and more favourable to them as the cost of living increased. The rental due having been set off against the damages due interest should be awarded on the balance in the usual manner.

DISPOSITION

[32] The court having now determined the damages to be paid and the rental due makes the following order which is to be read in conjunction with the order made in ***Leon Robinson (Exec. of estate Herman Denton dec'd) v. Michelle Chen et al No 1.***

ORDER

[33] **On the claim:**

a. The defendants owe rental to the claimant representative of the estate of Herman Denton from November 1997 at the rate at $20,000.00 monthly until they deliver up possession of the property, less the sum of $3,400,000 paid to Herman L. Denton. As at December 2014 the sum owed is $720,000.

b. Costs to the claimant to be agreed or taxed

[34] **On the Counterclaim:**

a. The defendants are awarded damages for breach of the 1997 Agreement for Sale they entered into with Herman L. Denton in the sum of $6,962,000 less the sum of $720,000 owed for rent to the claimant representative of the estate of Herman Denton as at December 2014. The defendants are awarded interest on this sum at the rate of 3% per annum from July 20, 2006 to December 19, 2014.

b. Costs to the defendants to be agreed or taxed.