



[2019] JMSC Civ. 77

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 01318

BETWEEN	ORVILLE PALMER	1ST CLAIMANT
AND	LORINDA PALMER	2ND CLAIMANT
AND	GREGORY DUNCAN	DEFENDANT

IN COURT

Mr. Craig Carter instructed by A McBean & Company for the Claimants

Mr. Makene Brown instructed by Chen, Green & Co. for the Defendant

Heard: 26th, 27th February and 12th April, 14th May 2019

Damages - Assessment - Breach of Contract for Sale of Land - Destruction of Property - Loss of Use - Expert Evidence - Loss of Bargain

JACKSON-HAISLEY, J

[1] The claim began by way of Claim Form and Particulars of Claim dated 14th of March 2014 wherein the Claimants Orville Palmer and Lorinda Palmer claimed against the Defendant Gregory Duncan damages for breach of contract and for destruction of property or in the alternative Specific Performance. The Defendant filed a Defence on the 20th April 2014 but on the 20th January 2015 the Defence was struck out and judgment was entered for the Claimants. What remains to be decided is the quantum of damages.

BACKGROUND

- [2] The Claimants and Defendant entered into an Agreement for Sale on July 31, 2013, for the sale of property located at No. 9A Block B Sandhurst, 5 Sandhurst Place, Kingston 6 in the parish of Saint Andrew, being land comprised in the Certificate of Title registered at Volume 436 Folio 55 of Register Book of Titles. The agreed consideration was Twenty-Three Million and Six Hundred Thousand Dollars (\$23,600,000.00). The Defendant made a deposit on the subject property of Two Million Two Hundred and Forty-Two Thousand Dollars (\$2,242,000.00) but failed to pay the balance of the purchase price.
- [3] A part of the arrangement was that the Defendant would settle the Claimants' mortgage with Jamaica National Building Society. In addition, there was also a collateral contract referred to in the Agreement for Sale. This collateral contract provided that the Defendant would give them a Unit in a Development. The parties executed an Agreement for Sale for the unit with a consideration of Twenty Million Dollars (\$20,000,000.00) for stamp duty purposes, as this was the value of the completed unit. Both agreements were to be read in conjunction with each other. The Defendant also failed to complete the development and so did not transfer any Unit to the Claimants.
- [4] The Claimants assert that they have been deprived of the use and occupation of their property since August 2013, when they gave the Defendant permission to use the property to store building supplies. However, the Defendant demolished the premises by causing significant damage to various sections of the property and surrounding areas, by removing the fence, all the doors, windows, the roof and other fixtures causing damage to the walls of the building.
- [5] The Claimants pleaded under the head of special damages;
- | | | |
|------|--|---------------|
| (i) | Damages for breach of contract & destruction of property | 26,000,000.00 |
| (ii) | Loss of use of premises from August 2013 to | 1,500,000.00 |

present time @ \$250,000.00 per month and
continuing

TOTAL

27,500,000.00

Interest at the rate of six percent (6%) on Special Damages from August 2013 to the date of judgment pursuant to the Law Reform (Miscellaneous Provisions) Act.

[6] The Claimant identified and attached certain documents to their Particulars of Claim and notified the Defendant that they intended to tender the said documents into evidence. These documents were:

- i) Agreement for Sale dated the 13th of July 2013;
- ii) Duplicate Certificate of Title registered at Volume 436 Folio 55 of the Register Book of Titles; and
- iii) Report and Valuation on No.5 Sandhurst Place dated 12th of June 2012.

EVIDENCE AT TRIAL

[7] At the Assessment of Damages hearing, counsel for the Defendant sought an adjournment on the basis that they intended to challenge the Judgment. The adjournment was denied and the matter proceeded. The Defendant participated in the proceedings and was represented by counsel who actively participated. The 1st Claimant Mr. Orville Palmer's witness statement was accepted as his evidence-in-chief. He gave further evidence that the Defendant was in the process of building a development on the neighbouring premises which adjoined his property and that the Defendant offered to purchase his property to extend his development and they entered into a contract for the sale of the property. The Claimant adduced into evidence several documents that supported his claim to include the Agreement for Sale, Lease Agreements and Rent Receipts and a Valuation report dated June 2012 prepared by Allison Pitter and Co., Chartered (Valuation) Surveyors. This report ascribed an open market value of \$26,000,000.00- \$28,000,000.00 to the property.

[8] In cross-examination, Mr Palmer indicated that he had a vague recollection of the Collateral Agreement. The Collateral Agreement was also referred to in the Special Conditions of the Agreement for Sale and tendered into evidence. During cross-examination Mr. Palmer admitted that there was no mention of rental cost in his pleadings. Counsel for the Defendant argued that this should have been included as it was easily quantifiable by means of arithmetic and ought to have been pleaded as special damages. He submitted that it was an unfair surprise and consequently a disadvantage to his client. The Claimant also relied on the expert report of Mr. Brian Pottinger, structural engineer whose engineer's report prepared on or about March 3, 2018 also became an exhibit in the case.

SUBMISSIONS ON BEHALF OF THE CLAIMANTS

[9] Counsel for the Claimants submitted that damages for the breach of contract should be awarded based on the loss of bargain which would be the contractual price of the agreement to purchase the Claimants' home which is \$23,600,000.00 plus the cost of the town-house which is \$20,000,000.00 minus the market value of the Claimants' property which averages out at \$27,000,000.00. Therefore, the loss of bargain would be the sum of \$16,600,000.00.

[10] He further submitted that the Claimants should also be awarded consequential losses which is the continued mortgage payments which amounted to \$13,461,424.20 along with the balance payable to settle the mortgage in the amount of \$22,457,119.72. This is because the Claimants would not have been liable to make these mortgage payments had the contract been completed, since the contract was for them to receive a townhouse at the value of \$20,000,000.00 free from any obligations or mortgages, in addition to the cash of \$23,600,000.00. Moreover, the Defendant has agreed to pay their mortgage based on the Agreement for Sale. In addition, they should be awarded a sum reflective of the rental incurred by the Claimant up to December 2018 in the amount of \$7,229,947.52 because if the contract had been performed the Claimants would not have been required to pay rent.

- [11] He also claimed \$17,125,000.00 being the cost to demolish, remove rubble and replace the structure of the Claimants' property as a result of the demolition by the Defendant, this he says is the diminution in value effected to the property by the Defendant and he cited **Laird v Pim** (1841) 7 M.& W. 474 as his authority.
- [12] He concluded that his clients were entitled to \$76,873,491.44 as a result of the Defendant's failure to complete the agreement.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

- [13] Counsel for the Defendant cited the case of **Vera Dallas (by her attorney Elmeda Robinson) v L.P. Martin Company Limited (trading as L.P. Martin Funeral Home)** [2018] JMSC Civ 78 in which Jackson-Haisley J dealt with the issue of a contested Assessment of Damages on a Default Judgment, at paragraph 45:

"From the cases considered certain principles can be deduced. Firstly, in order to determine the true effect of the default judgment the pleadings must be closely scrutinized. An examination of the pleadings will aid in determining what the default judgment is taken to have decided. Secondly, the question as to whether or not all questions with respect to liability have been determined will be dependent on the pleaded cause/s of action. Thirdly, there is a distinction between causation on the liability issue and causation on the quantum issue. The fact of the default judgment means that issues in relation to causation with respect to liability have already been determined however causation issues with respect to quantum remain open. These principles seem to apply not only to default judgments but also to summary judgments and judgments on admission."

- [14] He further cited the case **Merito Financial Services Limited v David Yellow** [2016] EWHC 2067 where Master Mathews applied the case of **Lunnun v Singh** [1999] CPLR 587, which revealed that although the issue of liability was conclusive on the default judgment, the Defendant had the ability to question the quantification of that liability, including the question of causation in relation to the particular heads of loss claimed by the Claimant.
- [15] The Defendant submitted that the Claimants' "default judgment" is only conclusive on the pleadings that were before the Court at the time of the entry of the "default judgment". Therefore, any amendment to the Claimants' Claim Form and/or

Particulars of Claim cannot be considered by the Court at the Assessment of Damages.

- [16]** In addressing the issue of damages for breach of contract, he cited the Halsbury's Laws of England, which states that the function of damages is "to compensate the true loss suffered by the innocent party and place him in the same position, so far as money can do it, as if the contract had been performed.
- [17]** Counsel contended further that the Claimants failed to provide the court with the difference between the price of the property and the value of the land concerned and that the expert report failed to provide the court with a value of the land upon which to base the assessment of damages for breach of contract. He also submitted that the Claimants cannot claim for any wasted expenditure, in the form of rental expenses and or loss of use of the premises.
- [18]** He argued that the Claimants would have contemplated the destruction of their premises pursuant to the agreements and that as extensive construction would have been undertaken on their premises from July 31, 2013 to July 31, 2014 at which time they could not occupy the premises. He further asserted that this is not an expense, which naturally flowed from breach of the contract. He contended that the Claimants caused themselves harm by preventing the Defendant from completing the construction on the premises by filing the Claim before July 31, 2014 and therefore extended the period for which they had to incur this rental expense and loss of use of the premises.
- [19]** He argued that interest on the mortgage could not be considered at the Assessment of Damages as this issue of liability in respect of the mortgage has not been determined or even contemplated by the Court in awarding the "default judgment". He concluded that the Claimants are entitled to neither mortgage nor the recovery of their rental expenses, since the issue of mortgage payments was not a part of original pleadings upon which the Default Judgment was entered. In

addition, the rental expenses were not expenses which flowed from the breach of the contract.

[20] Subsequent to the filing of submissions by counsel, the Defendant himself filed written submissions in which he asked the Court to disregard several paragraphs of the submissions made by counsel and any submissions which suggested that the Claimants are entitled to any damages whatsoever. He reiterated that the Court should make no award of damages to the Claimants.

ISSUE

What is the quantum of damage that should be awarded to the Claimant?

ANALYSIS

[21] In order to arrive at an appropriate quantum of damages to be awarded to the Claimant the court will start off by determining what the Judgment was taken to have decided. This requires me to scrutinize the pleadings. The Claim Form filed March 14, 2014 indicated quite clearly that the Claim was for Damages for breach of contract and for significant destruction and damage done to the property and its surroundings. In the Particulars of Claim filed March 14, 2014 Special Damages is particularized as follows:

- i. Damages for Breach of Contract and Destruction of Property - \$26,000,000.00;
- ii. Loss of Use of Premises from August 2013 to present time at \$250,000.00 per month and continuing- \$1,500,000.00.

It was not until March 8, 2018 that the Claimants filed an Amended Particulars of Claim in which they added another item under Special Damages as follows:

- i. Interest and costs on Mortgage account due from August 2013 to present- \$11,660,935.01

[22] The question for the Court is whether this amended item can be taken into account. Counsel for the Defendant has cited one of my judgments, the case of **Vera Dallas (by her attorney Elmeda Robinson) v L.P. Martin Company Limited (trading as L.P. Martin Funeral Home)** supra where I highlighted the principles to be utilized in order to determine the scope of the assessment of damages. Although I did not then address my mind to a judgment entered after the striking out of a Defence, I am of the view that similar considerations would apply. After an examination of the pleadings at the time judgment was entered, I am of the view that the following was taken to have been decided:

- i. The Defendant breached the contract with the Claimants by failing to complete the contract of sale.
- ii. The Defendant's action resulted in destruction and damage to the property;
- iii. The Claimants are therefore entitled to Damages arising out of the breach of contract and the destruction and damage done to the property;
- iv. The Claimants are also entitled to damages for loss of use of the premises.

[23] It is of note that at the time the Judgment was entered on October 5, 2015, it was the original Claim Form and Particulars of Claim which were before the Court. The Particulars of Claim had attached to it among other documents an "Agreement for Sale" purporting to be dated July 13, 2013. However, when scrutinized this Agreement for Sale was not dated and was actually different from the Agreement for Sale which was later tendered into evidence. This original Agreement for Sale made no mention of any mortgage to be paid by the Defendant, however the Agreement for Sale which was tendered at the Assessment of Damages made reference to the fact that payments shall be made directly to Jamaica National Building Society in settlement of the Vendor's mortgage. It is based on this indication that the Claimants are saying that the Defendant is also liable for their mortgage payments. This Agreement for Sale differed from the first as there was no mention of any mortgage therein. Similarly, there was no mention of any mortgage either in the Claim Form or Particulars of Claim.

[24] It was not until March 8, 2018 that the Claimants filed an Amended Particulars of Claim where they included as an item of Special Damages “Interest and costs on Mortgage account due from August 2013 to present in the sum of \$11,660,935.01. Essentially, the Claimants are seeking to interpose a new item of Special Damages in circumstances where the Judgment granted would not have contemplated this. This would be improper, there being no mention of it either in the Claim Form or the Particulars of Claim or in the documents attached. In respect of liability, the Defendant would not have been given an opportunity to address this in his Defence. I therefore find that the mortgage was not contemplated at the time the Judgment was entered and so I am not prepared to take into account this new head relating to costs on the mortgage account.

[25] I recognise that in some instances amendments are permitted to the Statement of case even at as late a stage as the Assessment of Damages. However, I note that the claim for mortgage would have been significant. The sum being claimed under this head amounts to \$11,660,935.01. Not only is it significant in terms of dollar value but it would also have been a significant part of the Claim.

[26] I agree with the submissions advanced on behalf of the Claimants that in order to arrive at a sum for General Damages the court would have to take into account the loss of bargain. This is in keeping with the principles laid down by G.H. Treitel in the text the Law of Contract, 1991 where in discussing loss of bargain the following is said at pages 830-31:

“the basic object of damages for breach of contract is to put the plaintiff “so far as money can do it....in the same situation....as if the contract has been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain, that his expectations arising out of or created by the contract are protected. This protection of the plaintiff’s expectation must be contrasted with the principle on which damages are awarded in tort.....”

[27] If the contract had been performed then the Claimant would have stood to gain the proceeds of the sale of their property which based on the Agreement for Sale was the sum of \$23,600,000.00. They would also have stood to gain a four bedroom,

three bathroom townhouse valued at \$20,000,000. based on the evidence by Mr. Palmer which I accept.

[28] This figure when arrived at must then be reduced by the value of the property at the time of the loss of the bargain. The Valuation Report is an exhibit and it reflects a market value of between 26,000,000.00 and 28,000,000.00. I am prepared to find the average and assign a value of 27million to the house. When this is deducted from the total, the sum of \$16,600,000.00 is arrived at. That would represent the loss of bargain.

[29] The Claimants' claim also extended to the damages for the destruction and damage done to the property and its surroundings. Counsel for the Claimant relied on the case of **Laird v Pim (supra)** where Parke B at page 854 set out principles to be applied in relation to remedies:

"The measure of damages, in action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too."

[30] The Claimants have relied on a report from Mr. Brian Pottinger. This report speaks to a replacement value however, the Claimants would only be entitled to a sum representing the depreciated value consequent upon the actions of the Defendant. To compensate them for the full replacement value would be tantamount to over compensation for several reasons. At the time this agreement was entered into this house was some 75 years old and was of a timber structure. When the Claimants entered into this agreement it was with the understanding that this structure would have been destroyed. The evidence is not that the Defendant destroyed the complete structure but rather that he destroyed some aspects of the building. In light of that, the Claimants would not be entitled to the full replacement value of a similar unit. They would however be entitled to a percentage of the full replacement value. The total cost to replace the structure is quoted by Mr. Pottinger as being the sum of \$17,125,000.00. I note the evidence given by the Claimant as well as Mr. Pottinger to the effect that the Defendant removed the roof,

all doors, some of the floors, windows, grills, electrical and all kitchen and bathroom fixtures other fixtures. In light of the evidence as to what was removed, I am prepared to discount the figure by eighty percent and to make an award representative of 20 percent of the replacement value. This would amount to the sum of \$3,300,000.00.

CONSEQUENTIAL DAMAGES

[31] Counsel for the Claimants argued that they are entailed to rent and mortgage which they had to pay during the period they were deprived of the property. I have already ruled that since mortgage was not claimed for in the original Claim I would not make an award in relation to mortgage costs. However, the Claimant also seeks rent. Rent in and of itself was not specified in the Particulars of Claim. However, loss of use of property was specified. I take into account that as a result of the Defendant's occupation of the property the Claimants would not have had access to the property to live in if they so desired. In light of that, they would have to seek accommodation elsewhere. As a result, there is basis to award a sum for rental cost. They have tendered into evidence receipts as well as a letter emanating from the University of the West Indies with a statement attached. In relation to the receipts they represent the sum of \$115,000.00 per month for a period of 19 months which amounts to \$2,185,000.00. There is also an additional sum being claimed which represents the value of her housing accommodation from August 2016 to June 2017 as indicated by University of the West Indies in the document which was tendered into evidence which amounts to an additional sum of \$3,007,540.84. The total sum is therefore \$5,192,540.84.

[32] My orders are as follows: -

- (i) General Damages in the sum of \$16,600,000.00 with interest at a rate of 3 percent from March 14, 2014 to April 12, 2019.
- (ii) Special Damages in the sum of \$8,492,540.84 plus interest at a rate of 3 percent from August 2013 to April 12, 2019.
- (iii) Costs to the Claimant to be agreed or taxed.