ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.26 OF 2003

BETWEEN:

MAXWELL FRANCIS

Appellant

and

TIMOTHY DE GARVE as administrator
of the estate of Maybert Dew, deceased

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal

Appearances:

Mr. Dane Hamilton for the Appellant
Ms. E. Ann Henry for the Respondent

2007: March 13;
March 23.

JUDGMENT

[1] BARROW, J.A.: On 27th May 1999 Moe J gave judgment on a claim brought by originating summons by the now deceased Mrs. Maybert Dew. He declared the defendant (the appellant) was in breach of a contract to purchase a property and that the contract was terminated by the appellant's breach. He ordered the appellant to forthwith vacate, that damages be assessed and that that an accounting be taken of all moneys paid in under the contract and the sum determined be set off against the damages claimed. On 9th October 2003 Mitchell J assessed damages and it is against his award of $582,866.32 and costs of $75,664.32 that the appeal was brought.

[2] There was no breakdown in the brief notes of proceedings on the assessment of the amount awarded but such a breakdown is deducible from those notes read in conjunction with the affidavit evidence to which the judge was referred by Ms. Henry, who appeared below for the claimant (the respondent). The breakdown is as follows:

Expenses of cleaning the property and restoring the grounds	$28,936.39
Estimated cost of doing maintenance and repairs for wear and tear over 10 years	$331,642.93
Occupation rent for period March 1991 to 23 December 2001 @ $5,000.00 per month	$645,999.00
Less amount paid by appellant	$422,693.00
	$582,886.32

[3] Hodge's Bay Estate was the property Mrs. Dew agreed to sell to the appellant for $2,000,000.00 by agreement dated 14th August 1990. The property comprised 3 ½ acres of land, a main house and 7 rental units. The house was said to be the oldest on the northern coast of Antigua, built in the year 1690. The purchaser was required to pay $100,000.00 when he took possession, monthly instalments of $20,000.00 and the sum of $100,000.00 every other year beginning March 1993 and ending with a payment on 1st march 1997. Interest at the rate of 7 per centum per annum was to be paid on the outstanding balance. The balance was to be secured by a first charge on the property. Completion was to occur on 1st March 1991. The purchaser was given immediate possession of the property.

[4] The appellant defaulted from the beginning; he did not pay the agreed first payment and there was no transfer to him. He defaulted over the years. Finally the attorneys at law for Mrs. Dew wrote accepting the appellant's breach as repudiation and requested possession. Even after Moe J ordered the appellant to vacate it took the appellant more than two years to do so. Before the appellant vacated he and his wife committed significant depredation of the property,

according to the respondent, removing fixtures that were attached to the house and even the plants they had put in. A neighbour, a medical man, who knew the property and who deposed that early in the occupation by the appellant and his family the appellant had the property in "mint condition" witnessed the state in which the appellant had left the property. He stated that he was shocked and appalled to see the condition of the house. The place seemed to have been vandalized and fixtures and fittings seemed to have been violently removed. The entire premises were littered with garbage and were in an unclean and offensive condition.

[5] There was no participation whatever by the appellant in the assessment of damages. The appellant neither filed any affidavit nor attended the assessment hearing. The appellant did not seek to blame anyone for what he conveyed was an unintended absence from the proceedings. The evidence relied on by respondent as to the value of the property, the cost of repairs, and its rental value was unchallenged. It was stated as a ground of appeal but it was quite sensible of Mr. Hamilton not to argue that there was an obligation on the judge or even that it was appropriate for him to have decided not to proceed with the assessment but adjourn it to afford the appellant an opportunity to contest the damages. In a situation where the appellant had not even filed an affidavit to show an interest in contesting and putting forward his version of the facts it would have been arbitrary and unjudicial for the judge to decide to do what the ground of appeal suggested.

[6] A number of the appellant's grounds of appeal may be considered together under the contention that the award of damages was excessive. Mr. Hamilton submitted on behalf of the appellant that the normal measure of damages is the market value of the property at the time for completion less the contract price, which is the measure that was established in Laird v Pim.[1] This is not an inflexible rule, as Lord Wilberforce stated in Johnson v Agnew[2] and the court may take the value at the date of repudiation or the date of judgment. The notice of appeal in fact

[1] (1841) 7 M & W 474
[2] [1979] 1 All ER 883

contended that damages should have been assessed as at the date of judgment, namely 28th May 1999.

[7] This concentration on the date of assessment was really a foundation for Mr. Hamilton's primary submission, which was that the award of mesne profits for the entire period during which the appellant was in occupation of the property was wrong. Mr. Hamilton submitted that mesne profits were to be awarded only for the period subsequent to the order for the appellant to vacate the property. This submission was founded on the legal proposition that all the damages that a vendor can recover for a purchaser's failure to complete is the difference between market value at time for completion or at the time of judgment and the contract price. Mr. Hamilton relied heavily on the case that accompanied Ms. Henry's written submissions, Barber v Wolfe[3], to support his contention that the judge erred in law in awarding occupation rent to the respondent because that case decided that occupation rent was not recoverable as damages from a purchaser in possession. The short response to that submission is that Barber v Wolfe was expressly overruled by Johnson v Agnew,[4] a case cited by Mr. Hamilton himself,

[8] The decision in the overruled case, that a vendor may not recover occupation rent from a purchaser who was let into possession, was made largely on the now discredited basis that damages were not recoverable by a vendor who claimed specific performance even if he thereafter "rescinded" the contract because that rescission was rescission ab initio. The effect of such rescission, it was said, was to make the contract something that never existed so that the occupation rent for which it provided was not recoverable.

[9] Johnson v Agnew clarified that what was referred to in Barber v Wolfe and the line of cases that it followed as rescission was no more than the termination of a contract brought about by one party failing to complete, thereby repudiating the contract or, in other words, indicating by his breach that he no longer intended to

[3] [1945] 1 All ER 399
[4] [1979] 1 All ER 883 at 894 a

be bound by the contract. It was the acceptance of that repudiation that brought the contract to an end. The contract, in that scenario, is recognised to have existed and to have been brought to an end. This is completely different from treating the contract as never having existed.

[10] On the correct view of the law, as stated in Johnson v Agnew, there is no reason in principle why a vendor should be refused occupation rent. If she were to be refused it would mean, in this case, the appellant would get back all the money he paid pursuant to the contract and would have had the use and enjoyment of the property for 8 years (up to the date of judgment, as counsel would have it) without paying a cent to the vendor. That could not be right. Unsurprisingly, it is now recognised, for example in Halsbury's Laws of England[5], that occupation rent is recoverable from a purchaser in possession.

[11] Before leaving this aspect of the appeal it may be noted for clarification that in a claim by a vendor for damages for a purchaser's breach in failing to complete, damages are not limited to loss on a resale or potential resale. It is not the case that a vendor must either resell or recover nothing. The basic rule of damages applies to contracts for the sale of land that applies to contracts generally: damages are to be awarded to compensate a party by putting her in the same position as if the contract had been performed. Such damages may include a claim for interest on moneys that should have been paid years ago and out of which the vendor has been kept. It may also, as in this case, include the costs of maintenance, to the award of which Mr. Hamilton only partly objected.

[12] Another ground of appeal was that "the judge erred in failing to determine what sums, if any, were expended by the appellant in pursuance of the rescinded contract." The breakdown of the judge's award that Ms. Henry provided in her written submissions shows that the judge gave credit for the moneys paid by the appellant pursuant to the contract, being $422,593.00. The notes of proceedings on the assessment of damages show that the judge accepted the computation

[5] Volume 42, 4th edition reissue (1999), paragraph 232 in the text to footnote 8.

done by counsel, which specifically included a deduction of "the amount paid by the defendant".[6] There is no merit in this aspect of the appellant's contention.

[13] In addition to that deduction the notice of appeal contended that the judge should have considered and taken into account a sum of $400,000.00 that the appellant stated, in his affidavit in opposition to the orders sought on the originating summons, he had spent on restoration of the property. Mr. Hamilton did not address this aspect in oral argument and it is unclear on what basis the appellant contended the judge should have given credit for this sum. The judgment of Moe J on the originating summons that ordered that damages be assessed directed the basis of the assessment. That judgment ordered:

> "5. Further, it is ordered that an accounting be taken of moneys paid in under the contract which is to be set off against damages as claimed."

[14] I do not understand moneys allegedly spent on restoration to be included in the reference to moneys paid in under the contract. That money was not paid in. In any event, it was a bare assertion the appellant made in the originating summons proceedings that he had spent $400,000.00 on restoration. It was totally unsupported. The judgment of Moe J. ordered an accounting be taken of moneys paid in. If the appellant thought that order included his alleged expenditure he had the opportunity to assert that figure and establish it. He did not. As stated before, he did not participate in the assessment, either by filing affidavits or attending the hearing. Especially in those circumstances it could not seriously be argued that Mitchell J, on the assessment, had an obligation to say "But see here, the defendant said he expended $400,000.00 on restoration of the property! It seems to me he may be able to argue this is money he paid in under the contract. I will take that expenditure into account." That would have been quite out of order. I would reject this ground of appeal.

[15] Counsel for the appellant addressed a different aspect of expenditure on the property in his submission (which did not form part of any ground of appeal) that the judge erred in allowing certain items that were included in the cost of cleaning

[6] Record of Appeal p. 181

the premises and minimal restoration of the grounds[7], amounting to $28,936.39. Counsel's complaint was that the purchases of a lawn mower for $1316.78 and a weed eater for $781.40 were capital costs and not costs of cleaning the premises. This seems a valid argument until seen in context. The claim is for restoration of the grounds over the period 27th December 2001 to 2 November 2002. It was probably the sensible thing to buy these pieces of equipment to be used over the extended period that it apparently took to restore the grounds and pay only the labour cost of mowing and weeding rather than the higher cost that, inferentially, would be payable to someone who would provide and use his own equipment. I see no reason to interfere with this aspect of the award.

[16] Another aspect of expenditure of which the appellant complained was the award of $231,864.23 as the estimated cost of doing maintenance or "repairs which would have been required as a result of general wear and tear over the 10 year period of tenure."[8] Counsel submitted this could not constitute a proper item of damages for breach of the contract. Counsel did not say why. He referred to no authority or learning on the subject; only his view. By way of indirect authority on the matter I considered the well-established proposition that a vendor who remains in possession has an obligation to maintain the property.[9] He has a duty to take reasonable care of the property so that it does not deteriorate between the date of the contract and the time when possession is delivered to the purchaser.[10] He must act in this regard as a provident beneficial owner. But until the date fixed for completion a vendor in possession is entitled for his own benefit to the rents and profits.[11]

[17] As a matter of reasoning, without the benefit of the research that counsel would doubtless have done had he earlier decided to take this point, I do not see why a purchaser who is let into possession before completion and who subsequently fails to complete should be in a different position from a vendor in possession.

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[7] This is the heading given to the statement of expenditure at p 88 of the Record of Appeal
[8] Inspection Report of Davis Engineering Services p. 2, Record of Appeal at p 170
[9] Volume 42 Halsbury's Laws of England, 4th edition (1999) at paragraph 180
[10] ibid
[11] op cit, at paragraph 183

Indicative of the similarity of the position of a purchaser in possession is the fact, in this case, that the purchaser received rents that he kept for his own benefit. Ms. Henry extracted that admission from the appellant in cross-examination in the proceedings before Moe J.[12] The notes of evidence on this point are as follows:

> "There are rental units attached to the property. Some of them have been rented over a period of time. I have earned some income from those unites. I have always treated it as my income.
> "I recall the unit which had been occupied by Mr. Tim DeGarve. Since he left it has been rented off an on, short term rentals. Rent ranged from US$40.00 per night to US$60.00 to US$70.00."

[18] On the basis that a purchaser in possession should be in no better position than a vendor in possession there is every reason, in principle, why the appellant should be held liable for meeting the cost of normal maintenance to the property. Accordingly, I see no basis for interfering with the judge's award.

[19] On my view none of the grounds of appeal succeeded. I would therefore dismiss the appeal. In accordance with rule 65.13 I would award prescribed costs to the respondent of two thirds of the cost awarded in the court below, amounting to $ 50,442.88.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[12] Supplemental Record of Appeal No 2 p. 99, line 22