IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. 1995/0695

PETER JN. MARIE
CLOTILDA JN MARIE

Claimants

AND

WINSTON CENAC

Defendant

Appearances:

Mr. Alvin St. Clair for Claimants
Mr. Oswald Larcher for Defendant

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2008: April 3

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DECISION

ASSESSMENT OF DAMAGES:

[1] This application is made pursuant to the judgment of Hariprashad – Charles J of 1st March 2004 in which it was ordered inter alia that the Defendant pay to the Claimants damages and costs to be assessed by a judge in chambers.

[2] The relevant facts which give rise to the judgment are, briefly, that, the Claimants retained the services of the Defendant (now deceased) who was a solicitor for the purchase of a portion of land and paid to him the sum of $116,760.00. Owing to a defect in the title to the land which had not been "appropriately dealt with" by the Defendant, the Deed of Sale which he had prepared on behalf of the Claimants was improbated and declared null and void by the court. That sum of money was never returned to the Claimants.

[3] It is the argument of Counsel for the Claimants that the measure of damages to which the Claimants are entitled is such as would put the Claimants in the position they would have been in had the sale gone through i.e. that they would now be the owners of a property valued in excess of $600,000.00 and that sum together with their outlay (expenses) should be their damages.

[4] Conversely Counsel for the Defendant submits that the Claimants are only entitled to the return of the purchase price together with interest from the date of the Agreement for sale to the date of the execution of the Deed of Sale. He further contends that the Claimants ought to have taken all reasonable steps to mitigate the loss sustained consequent upon the Defendant's wrong and having failed so to do are not entitled to claim damages for any loss which they ought reasonably to have avoided. Counsel suggests that on the date of the impossibility of the conveyance, the Claimants should have requested the return of the purchase price and purchased another property and ought not to have remained inactive and then claim a loss.

[5] According to the learning gleaned from Charlesworth and Percy on Negligence 11th edition at page 639, paragraph 8 – 285, the broad and fundamental principle as to the measure of damages is that as espoused by Lord Blackburn in Livingstone v The Raywards Coal Co (1880) 5 App. Cas 25: "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".

[6] Those authors go on to state that although it is not inflexibly applied, the rule is that the time at which damages are ordinarily assessed is the date of the breach.

[7] I am of the view that in applying this principle for our present purposes, the date at which the breach occurred was the date on which the Claimants signed the agreement for sale, 28th August 1987, when the Defendant represented to them that a good and marketable title could pass.

[8] Counsel for the Defendant argued that since the central issue was at all times the sale of the land, title to which was defective and theoretically impossible to cure, the Claimants could only be entitled to the return of the purchase price, expenses incurred up to the date of payment of the purchase monies and interest commencing from the date of the Agreement of sale to the date when the transaction became defective and incurable.

[9] In the case of Pilkington v Wood (1953) Ch 770, when a solicitor negligently failed to detect a flaw in the title of the seller of land, it was said that the measure of damages was the

difference between the market value at the date of the breach had a good title been given and the market value with a defective title.

[10] Following the decision in that case, it would seem that the Court must accept in part this argument of Counsel for the Defendant and return to the Claimant their purchase monies together with interest. However although the difference in market value at date of breach and market value with defective title in effect amounts to nil, it must be noted that the Claimants have since payment of the purchase monies been deprived of their assets. Consequently I am of the opinion that they are entitled to be paid interest on the purchase price of the land from date of payment on 30th October 1989 until repayment of the funds.

[11] Counsel for the Defendant's argument with respect to the Claimants' duty to mitigate their losses cannot be sustained because as was concluded in the Pilkington case (supra), the buyer was not required to mitigate his loss (by suing the seller on his covenant for title) in order to protect his Solicitor from his own carelessness. This opinion is however of not much import to the final outcome of our case.

[12] Counsel for the Claimant asserts that the Claimants are entitled to be reimbursed for losses incurred for the purchase of the property viz stamp duty, notarial fees, surveying costs, land taxes etc. Counsel seems to be suggesting that the Claimants are entitled to benefit on both sides. He is on one hand claiming for the loss of the bargain i.e. to be put in the position that he would have been in if the contract had been performed and on the other hand to be put in the position as if the contract had never been made at all i.e. if the contract had never been, those expenses would never have been incurred. This position

cannot be maintained for according to the majority decision of the Court of Appeal in Cuillinane v British "Rema" Manufacturing Co (1954) 1QB 292, not only may a Claimant not claim the alternative measure where he has made a bad bargain but also he cannot divide his claim so as to sue as to part for loss of profits and as to part for expenses rendered futile by the breach.

[13] In further support of the decision to refuse this claim, I refer to the case of C & P Haulage v Middleton (1983) 1 WLR 1461 (the facts of which are not particularly relevant). There Ackner LJ determined that the plaintiff was not entitled in an action for damages for breach of contract to ask to be put in the position in which he would have been if the contract had never been made when it is easy to assess what his position would have been if the contract had been performed.

[14] In coming to his decision he referred in his judgment to a statement by Berger J in the British Columbian case of Bowlay Logging v Domtar:

> *"The law of contract compensates a plaintiff for damages resulting from the defendant's breech, it does not compensate a plaintiff for damages resulting from making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from the defendant's breach".*
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> *In the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts,*

the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise..."

The fundamental principle upon which damages are measured under the law of contract is restitutio in integrum. The principle contended for here by the plaintiff would entail the award of damages not to compensate the plaintiff but to punish the defendant".

[15] Fox LJ agreed with Ackner LJ. He opined that while accepting that wasted expenditure can be recovered when it is wasted by reason of the defendant's breach of contract, it was equally likely to be wasted if there had been no breach.

[16] In light of the foregoing the order of the court is that:

Defendant to pay to the Claimant the sum of $116,760.00 together with interest at the rate of 6% p.a. from 30th October 1989 until payment.

Costs to be prescribed costs in accordance with Part 65.5 CPR 2000.

SANDRA MASON QC

High Court Judge