THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2005

CLAIM NO: SKBHCV 2000/0123

BETWEEN:

ST KITTS DEVELOPMENT CORPORATION — Claimant

AND

GOLFVIEW DEVELOPMENT LIMITED — 1st Defendant
MICHAEL SIMANIC — 2nd Defedndant

Appearances: Mr. Sylvester Anthony for the Defendant
Mr. Frank Walwyn and Mr. Fitzroy Eddy for the Claimant

2008: 6th June

Judgment on Assessment of Damages

[1] **BELLE J.** This is an admittedly and unfortunately long-standing matter for assessment of damages pursuant to an Order of the court made on the 7th day of September 2004. The record shows that after a 9 day trial the court dismissed a claim made against the two Defendants and ordered that the amount of the deposits advanced by the Claimant to the 1st Defendant should be repaid and based on the Claimant's breach of contract that damages and costs should be awarded to the 1st Defendant on its counterclaim, such damages to be assessed.

[2] At the outset counsel for the Claimant submitted that the 1st Defendant should not be heard in these proceedings for assessment of damages because it had failed to pay the Orders for costs in this action made by the Court and the Court of Appeal. However I have not acceded to the Claimant's request because there has been inordinate delay (almost four years) in making this application. In the circumstances I believe that the court is entitled to hold that the issue of costs would best be sorted out at the end of these proceedings when all outstanding issues relating to liability on the Defendants' Counterclaim have been concluded.

SUBMISSIONS

[3] The 1st Defendant's counsel submitted that the court should proceed on the basis that damages for breach of contract should be in the nature of compensation and the measure is the amount of injury sustained by reason of the breach. He cited **(Laird v Pim) (1841) 7 M7W474** as referenced in **Halsbury's Laws of England** 4th Edition Volume 42 at page 183. Counsel argued that on a breach of contract for the sale of land, the vendor is entitled to damages for the loss of bargain; the aim being to place the injured party so far as money can do, in the position as if the contract had been performed. Damages he submitted can also be claimed for consequential loss suffered as a result of breach of contract.

[4] With regard to consequential loss counsel for the Defendant stated that the vendor ought to receive the damages such as may fairly and reasonably be considered to arise from the breach and cited **Hadley v Baxendale** (1854) 9 Ex 341. But counsel acknowledged that a party would not receive damages for items that are too remote. The person suffering damage also has a duty to mitigate the loss flowing from the other party's wrongs and he cannot claim damages for any loss, which he ought reasonably to have avoided.

[5] The extent of the duty depends upon the circumstances in which the breach occurred and whether the repudiation was accepted immediately or he waited until the time for performance arrived. But at the end of the day the person claiming damages is required to

act reasonably. In that context he submitted that the 1st Defendant's act in securing a construction loan from Barclays Bank to procure construction materials from alternative sources, in one case at an increased price and in another at a reduced price, were reasonable steps to mitigate the loss arising as a result of the breach.

[6] What this amounts to in this case is that the 1st Defendant according to counsel should be able to claim damages for any losses, which are a direct consequence of the Purchaser's breach of contract. In that regard Counsel cited the Defendant's need to obtain a loan for construction financing for EC$2,970,000.00 which was personally guaranteed by the 2nd named Defendant and his wife and carried an interest rate of 13.5 %. The total costs of the loan were calculated as interest of $260,940.42, a lending fee of $9,299.90 Stamp duty of $2.67, Deed of Debenture $3,719.96 and legal fees amounting to $3,952.42 for a total of US$277,915.40. Counsel submitted that these expenses were a direct consequence of the breach of the contract by the Claimant and therefore the Defendant is entitled to recover these expenses.

[7] Counsel also mentioned certain material which the Claimant agreed to undertake responsibility for purchasing and shipping on the behalf of the 1st Defendant. The cost of these materials less taxes was CAN$70,220.80. This amount was paid to Carrera Homes Inc. on January 15, 1999 by wire transfer to account Number 1161-476. He identified the relevant items under this heading as, hand rails and pickets at CAN$23,527.85; interior doors and frames at CAN$37,920.00 and 1000 sheets of plywood at CAN $18,400.00

[8] Also listed among the losses were the sums of CAN$23, 527.85 and CAN 37,920 tendered towards the purchase of construction materials to the Claimant which construction materials the 1st Defendant never received and had to purchase elsewhere. These sums advanced counsel submitted, should be repaid along with any increased costs incurred. The amount of the increased costs was not mentioned.

[9] Another loan of CAN$65,000.00 was also mentioned by counsel for the 1st Defendant as a consequential loss. This was a loan repaid on the behalf of the Claimant to Claudia

Scivoletto, the wife of Jack Scivoletto. These funds were paid by the 1st Defendant on January 26th, 1999 by wire transfer to account number 1161-476, Bank of Montreal Canada. Although this money was repaid it was advanced again on the Claimant's behalf for the payment of roofing materials from Canadian Metal Building Products in April 1999, a purchase which was to be paid for by the Claimant and which has never been repaid by the Claimant. This left sums of CAN$65,000 .00 and US$45,000.00 due and owing to the 1st Defendant by the Claimant.

[10] The sums owing in Damages then according to counsel for the Defendants were.

(i)	Costs incurred re: loan from Barclays Bank	US$277,915.40
(ii)	Amounts advanced on construction materials	CAN$61,000.00
(iii)	Loan repaid to Claudia Scivoletto	CAN $65,000.00
(iv)	Purchase of roofing materials	US$45,000.00

[11] Counsel for the Claimant responded that claims for the expenses relating to the loan from Barclays Bank of US$1.1 million should fail because the Defendant GDL had an obligation to obtain construction financing under the contract (as amended). Counsel for the Claimant was of the view that the Court had held at trial that the agreement between the parties was one of vendor and purchaser where the Claimant agreed to buy 8 units at a purchase price of US$170,000.00 per unit and the purchaser, the 1st Defendant was supposed to complete the project. The loan and interest were therefore the 1st Defendant's responsibility.

[12] Counsel further submitted that the claim for damages for the purchase of certain materials for $70,220 .80 did not form part of the purchase and sale agreement between the parties and was not paid pursuant to that agreement. According to counsel, what the evidence reveals is that Carrera Homes as a favour though not a party to the agreement purchased material for the Defendant company which was provided to the 1st Defendant's agent Mary Simanic. Mary Semanic took possession of the material and then shipped it to the 1st Defendant. According to counsel the 1st Defendant had the obligation to prove that such material as was missing was the responsibility of the Claimant. Counsel submitted that

they had not done so. He observed that moreover the 1st Defendant's agent received the material and made no complaint as to completeness or appropriateness. The 1st Defendant returned none of the material to Carrera Homes.

[13] Counsel was of the view that this claim should have been made against Carrera Homes Inc. Counsel then delved into the claim in more detail. He submitted that with respect to the specific claim about material, on cross-examination Simanic confirmed that the felt paper was inconsequential. He confirmed receiving the ⅜ "plywood and having used it. He confirmed receiving the chlorine tablets, but it was agreed by both parties that these tablets were purchased by his daughter, Tanya Simanic. A number of items were listed as faulty. These items included casings, Jambs, doors & hardware. But Simanic looked to a company called Triwin Industries rather than Carrera Homes to fix the problems with the doors, which they did.

[14] Counsel submitted that if the claim was to be considered at all, the 1st Defendant was obliged to prove the quantum of the loss with respect to the sum of CAN$70.220.80. There has to be some evidence to prove how much of the material it did not receive, the proper calculations showing deductions for the material it did receive and the evidence that the Claimant was responsible for the loss as a result of breaching the Agreement of Purchase and Sale. Since the Defendant has not done any of these things the court should not award damages based on the CAN$70,220.80 claim counsel said.

[15] As far as the $65,000 loan is concerned counsel submitted, this loan was used in the project for the Claimant and became the obligation of the 1st Defendant. He referred to a specific finding of fact at paragraph 19 of the judgment, that pursuant to Amendment #4 (the November 21, 1998 amendment), GDL/the 1st Defendant was required to repay the loan of CAN$65,000 to Claudia Scivoletto. This assertion has no been refuted by counsel and a review of the judgment reveals this finding by the court.

[16] With respect to the sum of US$45,000 for the purchase of roofing material, Counsel argued there was a clear ruling by the court that the cheque representing the US$45,000

had not been cashed. Since no money was advanced, there can be no damages sustained as claimed by the 1st Defendant. I agree. Again the fact that the cheque was not cashed does appear as a finding of fact in the court's judgment.

[17] I see the final argument of counsel for the Claimant as the most significant however. Here counsel goes back to the basic principle that the Defendant can only be compensated for loss suffered. as a result of the breach. He cannot be placed in a position, which is indeed better than he was in if the contract had not been breached. He argued the true measure of the damages was the difference between the contract price and the value at the date of the breach, of the land remaining on the vendor's hands, after taking into account the necessary expenses of raising out of the land the amount of such deficiency. I hold that this is a correct representation of the legal position of the 1st Defendant. The method of calculating the damages is illustrated in the case **Johnson (E.) & Co. (Barbados) Ltd v N.S.R. Ltd** 49 WIR page 27 and **Johnson v Agnew** [1980] AC 367.

[18] Counsel confirmed the correctness of most of the statement of the law on damages for breach of contract earlier enunciated by the 1st Defendant's counsel and concluded that a vendor left in possession of the land sold , by virtue of the purchaser's default, and suing for damages for breach, should be allowed to recover , besides the amount of any actual fall in the value of the land between the date of the contract and that of the breach, the estimated amount of expenses of raising by sale the deficiency in the sum of money which the purchaser contracted to pay. Otherwise, the vendor would certainly not be put in as good a position as if the contract had been performed especially where there has been no fall in value of the land at the date of the breach of contract.

[19] With reference to the factual background then the Claimant's counsel argued that at closing the Claimant was to purchase 8 units at $170,000. On breach, the 1st Defendant elected to affirm the contract and sue for the breach. If damages would therefore follow the principle in the argument above, being the deficiency between the purchase price and the market price all of the evidence showed that there would be no deficiency between the purchase price and the market price. As a result of the breach, the Defendant ended up

with 8 units with a market value substantially above what the Claimant agreed to pay. The result of the breach was therefore a windfall for the Defendant.

[20] Counsel referred to the evidence in the following terms:

"The evidence from the cross-examination of Michael Simanic at trial (Thursday, December 11, 2003) was that the units were valued by the expert appraiser at $290,000 each and there was "merit" to that figure. Further evidence at trial showed that the Defendant sold 8 of the units in the development in March 2000 for approximately US $1,465,000, or an average of US$183,125 per unit. The evidence clearly showed that the Defendant could easily sell the units for at least US$185,000 well above what the Claimant contracted to pay."

[21] Indeed I perused the transcript of evidence and noticed that in cross examination Mr. Michael Simanic was asked whether he believed there was any merit to the US$290,000 which was stated in the Bently Report and his answer was "yes." Further evidence under cross –examination proved that the units were sold for sums as high as US$195,000.00

[22] Counsel also argued that the Defendant mitigated its losses by taking advantage of the strong market for the units and commenced renting out the remaining units. The net rental income per lot was $2400. Since two units comprise a lot, the net rental income per unit is $1,200. There have been no denials of these assertions. According to counsel the remaining units had been rented from March 2000 through to the end of the trial. Mr. Simanic according to counsel had stated that the units were rented or easily rentable. To the extent that the units were not rented, the 1st Defendant, which had control of the units, must bear the liability for foregone rent. There was no attempt by the 1st defendant to refute these assertions.

CONCLUSION

[23] In conclusion Counsel for the Claimant argued that the amount of profit made over and above the sale price of $170,000 and the amounts realized from the rental of the units

have to be set-off against any amounts claimed by the Defendant for damages. Under any scenario then the Defendant cannot prove the actions of the Claimant have left it in a worse position by failing to close on the purchase of the 8 units. Again there has been nothing argued to refute these assertions.

[24] I am not totally satisfied that the Claimant's answer covers all possible scenarios of loss which may have been suffered by the 1st Defendant. However based on the evidence which I have perused from the court transcripts, along with the submissions of counsel and the Court's findings at trial, I have to conclude that the 1st Defendant has failed to prove that it suffered any damage as a result of the Claimant's breach of contract. I accept that on the evidence the claims related to the US$1.1 million loan from Barclays Bank and the sum of CAN$65,000 would have been incurred in any event to complete the project. I also find the sums spent on sourcing new material have not been specifically set off against the value of the material received in good condition and as a matter of mixed fact and law the 1st Defendant has not shown that the Claimant was responsible for the deficiencies in the materials which have not been sufficiently itemized. As counsel for the Claimant pointed out there is no clear evidence pursuant to a chain of custody to show that the goods were received in the condition described and no evidence to quantify the amount of the damage suffered if that was the case. But in any event the materials were not provided by the Claimant.

[25] I also proceed on the basis that the Court found as a fact at trial, that the repayment of the loan for $65,000 to Claudia Scivoletto was part of the agreement and not an expense accruing from the breach.

[26] In summary I note that the 1st Defendant was entitled to claim that it should be put in the position that it would have been in had the Claimant discharged its obligations under the agreement. Any damages claimed would be based on evidence that it suffered loss as a result of the Claimant's failure to perform. It is noted as a matter of fact that the agreement referred to, would be that which was amended on a number of occasions. Any thing required to be done as a condition of the amended agreement would be an obligation of

the agreement and could not be considered a result of the breach. An example of this is the loan of US$1.1 million which appears to be an item added in an amendment to the agreement. It is therefore fair to say that based on the findings above the 1st Defendant has failed to prove that it suffered any loss attributable to the Claimant's breach of the amended contract.

[27] In the circumstances I find that the 1st Defendant's claim for damages fails, since it is unable to prove such damages. Consequently the 1st Defendant will pay the Claimant's costs of the assessment of damages proceedings pursuant to Part 65 of the CPR 2000 or as agreed. I would be willing to hear counsel on the issue of costs in due course if they are not willing or able to arrive at an agreed figure.

FRANCIS H V BELLE

High Court Judge