IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. OF 1999/A109

BEWTEEN	ALEX'S IMPORTS LIMITED	CLAIMANT
A N D	KEITH TENNANT	DEFENDANT

Abe Dabdoub and J. Dabdoub instructed by Dabdoub, Dabdoub and Co. for Claimant.

Lance Cowan instructed by Cowan, Dunkley and Cowan for Defendant.

Heard: November 21, 22, 23, 24, 30, 2005 and May 5, 2006

Daye, J.

Alexander Haber is a young entrepreneur who is engaged in business as an authorized used car dealer and traded under the name Alex's Imports Limited. He commenced his business at Cottage Road the second city, Montego Bay, St. James then he expanded to the towns of Ocho Rios and Mandeville.

In 1997 he decided to further expand his business to the corporate area of Kingston and St. Andrew. In furtherance of this, his company Alex's Import Ltd. on the 7th February, 1997 entered into an agreement of sale whereby he undertook on certain conditions to purchase the land and premises at 72A Hagley Park Road, Kingston 10. Mr. Keith Tennant a businessman was the owner and vendor of this property which he agreed to sell for JA $15 million. Alex's Import Limited paid the deposit and advance payment on the 5th February, 1997.

The property was registered and comprised in certificate of title volume 1065 Folio 81. On the 17th July, 1997 the property was transferred to Alex's Import as the registered owner. This was two month after the stipulated date for completion.

Notwithstanding this Alex's Import Limited sued the vendor on 1st October 1999 for damages for breach of this contract of sale of land. The company contends that the defendant/vendor breached the Agreement of Sale via,

1. failed to provide it with a title free from encumbrances as there is a concrete wall and building encroaching over the eastern boundary of the premises which in breach of Restrictive Covenant (No. 4) of the said title,

   and

2. failed to hand over the premises to the company "Vacant Possession"

The company claims that it has paid the full purchase price and fulfilled its obligation under the Agreement.

The relevant conditions of this Agreement of Sale is contain in the First Schedule as follows:

6.	PURCHASE MONEY	FIFTEEN MILLION DOLLARS ($15,000,000.00)
7.	INTEREST RATE	FORTY PERCENT PER ANNUM (40% percent)
8.	BALANCE PURCHASE MONEY	TWELVE MILLION SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS ($12,750,000.00)

9.	COMPLETION DATE	ON OR BEFORE THE EXPIRATION ON NINETY (90) DAYS FROM THE DATE OF THE DEPOSIT AND ADVANCE PAYMENT
10.	DEPOSIT	$1,500,000.00
	ADVANCE PAYMENT	$750,000.00

The agreement for sale also provides:

COMPLETION	On the date set out in item 9 of the First schedule and payment of all money payable by the purchaser hereunder on exchange for duplicate Certificate of Title for the said property duly registered in the name of the Purchaser and or it nominee
POSSESSION	Vacant on Completion
INCUMBRANCES	Free from incumberances other than Restrictive Covenants and easement (if any) endorsed on the Certificate of Title, Volume 1065 and Folio 81

Mr. Tennant the vendor in his defence and counter-claim contend that Alex's Import Limited the purchaser did not fulfill its obligation under the contract of sale dated February 7, 1997. He claimed the purchaser did not pay the balance of the purchase price of $12,750,000.00 by the completion date of May 7, 1997 and he had to sue them on 22nd March, 1998 to recover that price and did obtain judgment against then on November 1, 1998 (See Writ of Summons, Statement of Claim Suit No. C. of 1998/T048, Index to List of Document, P 22-24 and 25 respectively)

In addition the vendor contend that Alex's Import Limited took full possession of premises 72A Hagley Park Road, Kingston 8 on or about February 7, 1997 before the

date of completion May 7, 1997. At that time he says Alex's Import Ltd. knew about the breach of the Restrictive Covenant of the vendor's title which was the boundary defect. Alex's began renovation on the premises after taking possession of the property knowing of the breach of restrictive covenant on the title and the defect in boundary. This he claimed constitute a waiver by Alex's Import Ltd. of the right, if any to have the vendor remedies any defect in title.

Further the vendor claims Alex's Import Ltd. took possession of 72A Hagley Park Road on February 7, 1997 with full knowledge that occupants were on the property. Therefore, it was the company's responsibility to evict these occupants if they were tenants.

Mr. Tennant, the vendor says that as a result of Alex's Import Ltd. failure to pay the balance of purchase money on time he suffered loss and damages.

Alex's Import raised the plea of Res judicature or estoppel to the claim of damages on the ground Mr. Tennant had obtained judgment for damages in prior suit of 1998 between the parties. (See Index to Judges Bundle, pages 70-71)

It is not in dispute that Alex's Import Limited took possession of 72A Hagley Park Road, Kingston 10 on or around February 7, 1997 when the Agreement of Sale was signed. It is not in dispute either that Alex's Import Ltd. went into possession after the Company had paid the deposit and advance payment under the Agreement of Sale on the 5th February, 1997. It is not in dispute the date of completion was 3 months (i.e May 7, 1997) after a deposit of advance payment was made. It is agreed that the Agreement of Sale expressly provides that the premises should be "vacant on completion" It is agreed Alex's Import Limited went into possession before the completion. It is also agreed that

Alton Morgan & Co. had carriage of sale for this Agreement. These facts that are not disputed I find proved by the claimant on a balance of probability.

The issues that are to be determined are:

(1) What is the status of Alex's Import Limited in relation to premises 72A Hagley Park Road, Kingston 10 on or about 7th February, 1997 a licensee or purchaser in possession.

(2) Did Alex's Import obtain vacant possession on completion.

(3) Was there a breach of the and an encroachment of the eastern boundary of the premises on February 7, 1997.

(4) Was the vendor obliged to remedy any breach covenant or title?

(5) Did Alex's Import Limited entry into possession of premises 72 Hagley Park Road and by its acts of renovation waived the breach of and defect on title of the premises?

(6) If the vendor has breached the Agreement of Sale of the premises what is the question of damages that Alex's Import Limited is entitled to?

(7) Is the vendor bound on estoppel from claming damages for breach of the Agreement of sale from Alex's Import Limited when it obtained damages for liquidated sum under the Agreement of Sale in a prior suit of 1998?

The status of Alex's Import Limited- Licensee or Tenant

How did Alex's Import Limited enter into premises?

Alexander Haber testify in evidence in-chief that Mr. Keith Tenant in February 1997 put Alex's Import Limited in possession of part of the property at 72A Hagley Park Road which was part of the front area of one of the buildings on the premises. He said

this agreement was a result of a Licence Agreement and the rental was $60,000.00 per month (witness statement Alexander Haber paragraph 9). On February 3, 1997 Alton E. Morgan, Attorney at law with carriage of sale of this Agreement of Sale, wrote to Alex's Import Limited attorney Mr. Charles Sinclair, that Alex's Import was anxious to take possession of the premises and his client should execute and return a Licence Agreement that was enclosed with a cheque of $84,000.00 as monthly rental. (See Index to list of documents, Page 6)

Further correspondence ensued between both attorneys about the licence agreement up to the 21st February, 1997. There were unresolved differences between the lawyers whether the rent to occupy the premises was $60,000.00 per month or $84,000.00 per month. It is at this stage that Mr. Alton Morgan declared that the licence Agreement was redundant because the purchaser took possession of the premises and made extensive modification. His interpretation of these events was that Alex's Import Limited was a purchaser in possession. As a consequence Mr. Morgan demanded Alex's Import Limited pay the sum of $125,000.00 monthly as interest on the balance of purchase money of $12,750,000.00

Mr. Tennant in cross examination accepts that Alex's Import Limited was put in possession of 72A Hagley Park Road, Kingston 10 about February 1997. He agrees the company was put in occupation at the front of the main building and the company had possession of part of the ground floor and the entire top floor while a construction company, a leather company and a pharmacy was at the back. He said the rental charged was $60,000.00 per month to Alex's Import Ltd. and this money was paid to his attorney,

Mr. Alton Morgan. He testifies that he does not know of any licence agreement sent by his attorney to Alex's Import Ltd. Attorney for the premises.

Mr. Alton Morgan, Attorney-at-law with carriage of sale testified on cross-examination about the purchasers' possession of the premises and the licence Agreement in these terms:

> ".....the claimant/purchaser took de facto possession. He took possession of part of the premises. Yes, I am aware that the vendor did not intend to give full possession. Yes, the reason for the licence agreement is that the contract for sale did not give possession or occupation at the time. The licence agreement gave the right of occupation which does not prejudice the contract of sale. It is a supplemental agreement. I am not aware that the rental of $60,000.00 per month was paid by the purchaser to the vendor with the purchaser in occupation. The occupation of the premises took place without my involvement. The parties made arrangements outside the formal contract. I do not know what the terms of the oral arrangement between the parties".

Based on the evidence identified I find that Alex's Import Limited was put in possession of part of the premises 72A Hagley Park Road on or about February 5, 1997. That at the time it entered into possession it was in the contemplation of the parties that Alex's Import Limited ought to be a licensee. This was the status of Alex's Import Limited at the premises even though no licence agreement was executed and no licence agreement was admitted in evidence. Alex's Import Limited status as a licensee continued until May 8, 1997 which was the date fixed for completion of the Agreement of Sale. Alex's Import Limited paid a rental of $60,000.00 per month to Mr. Tennant during this period.

Vacant Possession

It was term of the Agreement of Sale of the 7th February, 1997 between the parties that the vendor had the duty to deliver premises 72A Hagley Park Road, Kingston 10 vacant possession on completion. When Alex's Import Limited took occupation of the premises in February 1997 tenant of the vendor Mr. Keith Tennant was in possession. These tenants had offices on a second building at the back of the property. There was a construction and a doctor's office, a leather business and a pharmacy respectively. Mr. Tennant admits this in cross-examination. Mr. Tennant did not give any notice to quit to any of the tenants in February 1997. He said he was not entitled to evict these tenants because Alex's Import Limited had taken possession of part of property and had such responsibility (see witness statement paragraph 6-11) In cross-examination Mr. Tennant admit he did not personally evict the tenants but he was aware they left. He did discuss with his attorney to give the tenants notice to quit on his behalf. He is aware that the tenants at the premises did not move out until February 1998. The Attorney on behalf of Mr. Tennant said he was aware that there were other tenants of the premises. He does not give any evidence of being instructed or of giving these notices to quit.

No rent was collected by Alex's Import Limited from the tenants of 72A Hagley Park Road from February 1997 to February 1998. In cross-examination Mr. Keith Tennant testifying that he did not inform the other tenants that Alex's Import Limited is the owner of the property and that they should pay rent to Alex. Mr. Tennant's evidence is that he collected the rent before the property was sold. Mr. Tennant's attorney gave no evidence that he collected rent on his client behalf. I infer that Mr. Tennant did not

complain about arrears of rental from the tenants who were operating business on his property because the rent was collected by him or on his behalf for these tenants.

Restrictive Covenant/Boundary Encroachment/Defective Title

Mr. Alexander Haber testified that there is a concrete wall and building encroaching on the eastern boundary of 72A Hagley Park Road. The area of this encroachment he says was approximately 530 square feet. He supports his claim by relying on a Surveyor's Report of 1998. This he point out is a breach of Restrictive Covenant 4 and the Certificate of Title of 72A Hagley Park Road is not free from encumbrances as required under the Agreement of Sale. He exhibited letter and a surveyor identification report of 1987 to show that the vendor Mr. Tennant was aware of this defect in title as also his lawyer (witness Statement dated 3rd September 2005 page 8, page 20 and page 23 and Index to List of Documents 1, 4, 5, 16, 26-28)

In cross-examination Mr. Keith Tennant admits he knew of the defect in title to premises from the surveyor's report of 1987. He says he has not taken any step to rectify it. He also states Mr. Haber had knowledge of this defect and took possession of it. He agrees that title was not transferred to Alex's Import Limited but to Alex's Import. I hold there is a boundary encroachment on the premises. This was known to all parties before the Agreement of Sale was signed in February 1997. This was not corrected by the vendor after the name of purchaser was purportedly transferred on the title.

Was Vendor obliged to remedy Breach

Mr. Alton Morgan, Attorney-at-Law with carriage of sale acknowledge by letter January 30, 1997 as follows:-

> "The provision in the contract that the title should be free from encumbrances and easement will oblige our client to ensure that the boundary defects are remedied....Our client will have the boundaries re surveyed and the plan attached to the title re-registered".

Mr. Alton Morgan in cross examination testifies that it was always intended that the vendor would rectify the title and the purchaser would cooperate with the process. In his evidence-in-chief he testify that he wrote the purchaser's attorney outlining the cost to the defendant for the process for correcting the boundary defect in title and having the land resurveyed. He says he did not apply under Sec. 54 Registration of Title Act to re register the land with new plan to correct the boundary defect because the claimant/purchaser lodged a caveat on the property on the 23rd June, 1997. (Witness Statement dated 25the September, 2004 Paragraph 7-9). He further testifies that because of the change in the contemplated performance of the contract it was not possible to do a Section 54 application. The explanation he gives is that the time for this application of six to eight months would be outside the time for completing the Agreement of Sale. Mr. Morgan says the purchaser accepted transfer on18th July, 1997 knowing of the defect in title. He implied that the vendor was discharged of the duty to rectify the defect in title. Mr. Tennant agreed at a mediation to rectify the defect on title. However, he is not aware that an order was made on Case Management on 25th May, 2005 to that effect.

I hold that there was a duty on the vendor to rectify the boundary defect on title. Under the Agreement for Sale there was no action or conduct by the purchaser that expressly or impliedly relieved the vendor of that duty. The Caveat lodged by the

purchaser, may delay the application to re-register the land. This act did not discharge the vendor of his duty. The vendor did not on the 18th July, 1997 transfer the premises to the purchaser with a title free from encumbrances. Up to the time of trial the vendor still has not provided a title free of encumbrances. The vendor has therefore breach this term of the Agreement of Sale.

Waiver

Mr. Morgan Attorney-at-Law with carriage of Sale in his evidence-in-chief indicated he "advised the defendant that by taking possession before completion the claimant had waived the defect in title and acceded to Special Condition 7" (paragraph 8 witness statement). Special Condition 7 of the Agreement of Sale provides inter alia that:

> "The said property is being sold as is .....it being understood and agreed that the Purchaser is purchasing with full notice of the actual state and condition of the said property and shall take it as it stand."

This condition of the agreement for sale, in my view is intended to cover the physical state of the property which is the building. An encroachment on the boundary of a property by a building does involve a physical incursion on the property. However, it cannot be described as the physical condition of the property or building. In any event I hold that it would be inconsistent interprets the special condition clauses in a contract so that it defeats a main condition of the Agreement of Sale. One of the main conditions of the Agreement of Sale is that the property should be sold.

> "Free from incumbrances other that the Restrictive Covenants and easement (if any) endorsed on the Certificate of Title."

A boundary encroachment is an encumbrance not endorsed on the title. It is a defect in title. Special condition 7 does not derogate from the condition to provide a free title.

Now in relation to Alex's Import Limited possession of 72A Hagley Park Road. I again hold that the purchaser went into part possession on physical occupancy of the premises. Other tenants were occupying the premises at the time. Alex's Import took up occupancy. This occupancy by Alex Import Ltd. is not equivalent to taking possession of 72A Hagley Park Road. So therefore the premises on which thee vendor contends that Alex's Import Ltd. waive it rights to have the defect in title remedied fails. Similarly the claim of waiver fails.

The vendor asserts that Alex's Import Ltd. made modification and extensively renovated the building it occupied soon after the Agreement for Sale was signed. The vendor claims this was done with full knowledge of the defect in the title. They argue that the conduct was consistent with the company waiving its right to call upon the vendor to remedy the defect in title.

Mr. Keith Tennant's evidence is that he observes a business was in operation after Alex's Import went into possession. He notice changes to the building which was aesthetic. By this he means the building was painted on the outside and there was a sign marked "Alex". He did not go into the building. This is what he called renovation. Attorney-at-Law with carriage, Mr. Alton Morgan, testified that the painting of the building and the putting up of a sign it what he calls modification. The court holds that these external acts are not substantial work on the building. They did they amount to any structural change to the building. The vendor can not rely on these acts as proof that Alex's Limited had waived its right to have the defect in title remedied.

Mr. Cowan counsel for the vendor submit on the authority of **Voumard**. **The Sale of Land in Victoria, 4th ed. (1986)** that firstly, the purchaser will take the property subject to any defects of title of which he had actual notice prior to the making of the agreement, provided he knew that it was intended that he should take subject to those defects. Secondly, he submits that where the written contract does not limit in any way the title to the property agreed to be sold, or make any mention of burden or encumbrances affecting it, if the purchaser knew before he signed the contract that the vendor's interest is less than it would appear to be on the face of the contract, and knows also that it is intended he should take the lesser interest or should take the property subject to the burdens or encumbrances, or should take the property "**as is**", he will be bound by his knowledge and will not be entitled to call for a title free from such known defects.

Each of the proposition advanced rest on condition that the purchaser knows and intended to take the property subject to defects. It cannot be reasonably concluded that Alex's Import Limited intended to take the premises subject to the defect.

I accept the claimant's submission that a purchaser who take possession before completion and does so with knowledge of defects in title amounts to a waiver of all defects which are irremovable but not others (Gibson's Conveyance 20th ed.)

In Re **Gloag and Miller** (1883) 23 Ch. D. 320 the principle was stated in the following terms:

> ".....when a purchaser knows of the existence of conditions or circumstances affecting the title to the property, and over which the vendor has no control and he notwithstanding thinks fit to take possession of the property, or to remain in possession or to make structural alterations in it, he waives, not his right to require good title to be shown, but his right to insist on the

> particular irremovable objective of which he had knowledge before he took possession."

I apply this principle to the instant Agreement for Sale. The boundary defect is a condition affecting the title over which the vendor has control. It cannot be termed irremovable. Thus Alex's Import did not waive its right to insist that the vendor remedy the defect in title.

Quantum of Damages

Special Damages

Alex's Import Limited has proved the following:-

(a) $800,000.00 being the cost of alternative rental for period July 17, 1997 to February 28, 1998 at $100,000.00 per month.

(b) $50,000.00 being legal fees for action of recovering of possession against Defendants former tenants.

(c) $361,363.63 being the value at the 7th February, 1997 of the 530 ft. area lost to the claimant as a result of the encroachment.

I do not accept the area of discrepancy in the boundary is minimal and ought not to be compensated.

Measure of General Damages

Alexander Haber gave evidence that as a result of the breach in title his company has been severely inconvenienced in the operation of its business, has lost income and has been unable to treat with its premises to raise finances and has incurred other loss and expenses by reason of the said encroachment in its premises (witness statement paragraph

21). He expanded on his claim of loss at trial in these terms:

> "I have loss income. Even up to today the title is in the name "Alex Import" and not "Alex's Import Ltd." So the title has no use to me. I was obtaining a loan from Alex's Import Limited from N.C.B. to buy the property. The loan was rejected due to an encroachment on the title. So I had to take money out of my cash flow to buy the property cash. It cause me to loose business, i.e. income. I was an authorized car dealer. The cash I use to purchase cars. At that time car sales was very high, business was booming. I could purchase cars from Japan and turn that money five to six times per year and earn net profit of 20-30 percent per year. As a result of not getting the loan I had to take out $10 million from cash flow.
> I estimate I lost over $10 million to $25 million. It was over a one year period. At that time I was the largest car dealer in Montego Bay and I had business in Mandeville, Ocho Rios and Kingston.
> I had 400 cars at that time."

This evidence was not challenged in cross-examination. The claimant therefore asks the court to find that as a result of the breach of the Agreement of Sale to give a good title he lost $10 million.

Interest

Further he seeks interest on this sum of $10,000,000.00 from date due to date of judgment. He led evidence through Louise Brown, Senior Director of the Bank of Jamaica of the average commercial banks basic prime lending rates for period July 1997 to October 2005. (See **British Caribbean Insurance Co. V. Delbert SCCA 111/94** per Carey, J.A). The claimant attorney submitted the method of computing the interest is as follows:

Year	Average Interest	Interest per year on $10 Million
1997	44.45	$ 1,852,003.33 (17/7/97-31/12/97)
1998	38.76	$ 3,876,000.00
1999	40.05	$ 4,005.000.00

2000	32.86	$ 3,200.000.00
2001	29.41	$ 2,941,000.00
2002	26.14	$ 2,641,000.00
2003	25.10	$ 2,510,000.00
2004	25.02	$ 2,502,000.00
2005	19.76	$ 1,646.666.66 (October 2005) $25,232.799.99

The claimant does not give evidence as to the expected interest rate he was likely to obtain from the N.C. B. Neither has he given any evidence as to the length of time as to the repayment of such a loan. Unless the claimant was to obtain a loan from the bank at a fixed interest rate and a rate lower than the average prime basic lending rate then I can only infer that he would face the same average interest in servicing his loan for the bank. Although Alex's Import Limited claimed $10 million was taken out of its cash flow it is not accurate to use $10 million as his actual loss of income. The 20-30 percent loss of profit per year on his $10 million is a realistic sum as to his loss. That would calculate at about $2 million to $3 million per year.

Where a contract is broken, the general principle is that the injured party is entitled to recover as damages all loss which may be fairly and reasonably considered as arising in the natural course of thing from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract as the possible result of the breach (**Hadley v. Baxendale) (1854) 9 Ex. 341**. If the vendor knows that the purchaser intend to develop the land for profit the purchaser

can obtain damages by reference to the profit which both parties contemplate he would make

(See **Cotteil v. Steyning Little Hampton Building Society (1966) 1 W.L.R. 753**. Mr. Tennant knew Alex's Import wanted this property for the business of storage and the sale of car parts.

The claimant has a duty to mitigate his loss. Although the defect in title is not corrected he cannot fairly expect loss of profit for 8 years 1997 to 2005. I hold 2½ years loss of profit as being reasonable. I take into account the duty to mitigate. This period would be 7th May, 1997 date of completion of contract to date writ served in 1999. I award the claimant $5 million loss of profit ($2 million x 2½ years). I award the claimant 12 per cent interest (average interest for 1997-1999) on the sum awarded from date of writ of summons to date of payment. I have not used the average interest rate because the loss of profit of 20-30 percent is a net figure. Also I find that the loss of profit is not money which the vendor has withheld from claimant.

Counter-Claim/Res Judicature/estoppel

The Vendor/Defendant obtain judgment against the Purchaser/Claimant arising from breach of the same Agreement of Sale in a prior suit of 1998. The judgment in favour of the Vendor/Defendant was:

(a) $754,520.15 being liquidated damages on the late payment of $10,000,000.00;

(b) $3,83,904.11 being liquidated damages on the balance purchase price of $2,750,000.00 plus interest up to February 28, 1998 amounting to

$638,904.11 with interest containing to accrue on the sum of

$2,750,000.00 at the rate of $3,103.70 per dien until paid.

In the face of this the Vendor/Defendant has counter-claim in the present suit for General and Special Damages, loss and interest against the claimant. The ground on which this is made is that the defendant.

(i) was unable to repay his loans in a timely manner or at all and incurred additional interest charges and other charges.

(ii) Loans were relegated to none performing loans and he was classified as a delinquent debtor.

(iii) Suffered injuries to his credit worthiness. The issue is whether the vendor is estopped from bringing the counter-claim Rowe, P. in **Administrator General of Jamaica v. Stephens et al** (1991) 28 J.L.R. 144 accepted and applied the principle of estoppel found in **Henderson v. Henderson** (1843)-1860] All E.R. 378. It was that:-

> "cause of action estoppel arises to where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the later having been between the same parties or their privie and having involves the same subject matter cause of action estoppel extends also to points which might have been but where not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action."

Could the present claim for damages, interest be brought in the prior suit? In my view the vendor could have brought such claim. Mr. Cowan submitted it was not possible to do so because these claim did not arise. In any event the claims are general and lack particularity. No evidence or material was provided to support these claims. These claims are barred and the vendor is estopped from raising them in his counter claim.

Judgment for claimant on the Claim and Counter-Claim

Special Damages $1,241,363.63

Interest at 12 percent per annum date of service of writ to date of judgment

General Damages $5 million.

Interest at 12 percent per annum from date of completion of Agreement of Sale to date of Judgment.

Cost to claimant to be agreed of taxed

Order that Registrar of Title rectify the endorsement on Certificate of Title registered at Volume 1065 Folio 81 by inserting the words "Limited" next after the words Alex's Import to read Alex's Import Ltd.