

4/11/98 ✓

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEALS NO: 100 &109/96**

**BEFORE: THE HON. MR. JUSTICE FORTE, J.A.  
THE HON. MR. JUSTICE DOWNER, J.A.  
THE HON. MR. JUSTICE PATTERSON, J.A.**

|                |                        |                             |
|----------------|------------------------|-----------------------------|
| <b>BETWEEN</b> | <b>WILLIAM BARRETT</b> | <b>PLAINTIFF/APPELLANT</b>  |
| <b>AND</b>     | <b>ANDREW WILDISH</b>  | <b>DEFENDANT/RESPONDENT</b> |

**Maurice Frankson for the Appellant**

**Allan Wood & Daniella Gentles for the Respondent**

**16th March and May 26, 1998**

**FORTE J.A.**

This is an appeal and cross - appeal from an order of McCalla J (Ag) ( as she then was) , by way of an Assessment of Damages. On 16th March, 1998 we heard the arguments in the appeal and cross-appeal and dismissed the appeal and allowed the cross - appeal. We then varied the order of McCalla J, as will be set out later, and ordered the appellant to pay the costs of the respondent to be taxed, if not agreed.

The case concerned an agreement for the sale of land by the defendant/respondent (hereinafter referred to as Mr. Wildish) to the plaintiff/appellant (Mr. Barrett). By this agreement, Mr. Wildish agreed to sell to Mr. Barrett property (a parcel of land part of Battersea in the parish of Manchester) registered at Volume 234

Folio 87 for a sum of One Hundred Thousand Dollars (\$100,000) or the equivalent in pound sterling. The agreement stipulated that the purchaser would pay all costs in furtherance of the transfer including the transfer tax. It was also agreed that the transfer of the property would be completed on or before the 31st October, 1986.

In his statement of claim, Mr. Barrett alleged that he had paid over to Mr. Wildish the sum of Fifteen Thousand Pounds Sterling ending with a final payment in December, 1986, but in spite of this, Mr. Wildish in breach of the said agreement and without notice to him, transferred the property to a Mr. Joseph Chin on the 1st of October, 1987. As a result, he claimed the following:

- a) A refund of the sums paid to the Defendant
- b) Damages for Breach of Contract
- c) Interest
- d) Costs

On the 2nd August, 1994, Mr. Wildish not having delivered any defence to the claim, interlocutory judgment was entered against him for damages to be assessed.

On the 4th October, 1996 damages were assessed, resulting in the following order:

"Special Damages assessed in the sum of \$7,372.00 with interest thereon at the rate of 3% from 14th day of September to the 4th day of October, 1996; and

General Damages assessed in the sum of \$20,000 Jamaican Dollars plus the equivalent of £15,000 pound sterling calculated at the rate of exchange prevailing on the date of payment with interest thereon at the rate of 20% per annum from the date of service of the writ of summons to the 4th day of October, 1996; and costs to the plaintiff to be agreed or taxed".

The issues as they arose before us, were reduced to two questions:

- i. Was the learned judge correct in awarding General Damages over and above the deposit paid to the plaintiff, and if so, did she apply the correct measure of damages? and;
- ii. Was the learned judge correct in awarding a payment back of the £15,000, which the plaintiff alleged that he had paid to the defendant in furtherance of the sale agreement?

1. **GENERAL DAMAGES OVER AND ABOVE DEPOSIT**

In order to come to a definitive answer on this question, an examination of the agreement for sale is necessary. The consideration is stated as One Hundred Thousand Jamaican dollars (\$100,000) and the terms of the payments are stated as follows:

- i. Deposit of J\$25,808.62 being J\$22,000 deposit on purchase price and J\$3,808.62 as purchaser's immediate advance on the Transfer payable by the purchaser on the execution hereof (receipt whereof is acknowledged by the vendor)
- ii. Balance to be paid in quarterly payments of J\$10,000 purchase price together with 16% interest on unpaid purchase money on submission of bill or receipt from the vendor confirming or evidencing his corresponding purchase payments subject to special condition 1.
- iii. All payments made by the purchaser to the vendor must be in pounds sterling calculated on the Foreign Exchange rate for purchase of sterling (cheques and telegraphic transfers only, not cash) with J\$ or in such other currency as may be agreed from time to time.

The date for completion was set as "on or before the 31st day of October, 1986 on payment of balance of purchase money and costs hereinmentioned".

Then the following Special Condition was agreed:

" The Purchaser shall pay the said quarterly payments and interest on balance of purchase money within four (4) weeks of postage or delivery of the Bills or receipts aforesaid **AND** interest at the rate of 16% shall accrue and be payable on such portion of the amount aforesaid advised by the Vendor and not paid by the purchaser within the time stipulated. **SHOULD** any portion of the amount advised remain owing and due for thirty (30) days after the date for the next quarterly payment with interest on balance of purchase money, the Vendor shall be entitled to resell the said land to whomsoever he wishes without further notice to the Purchaser and at such price as the Vendor shall think fit in **WHICH CASE** the Vendor shall from the proceeds of such re-sale refund the Purchaser in Jamaican dollars such monies paid by him free of interest and less the costs for such re-sale."

This special condition gave to Mr. Wildish the power to resell the property to whomsoever he wishes, once Mr. Barrett is in default of payment or a portion thereof for thirty days and having advised him of the outstanding amount. It was Mr. Wildish's case that Mr. Barrett was in breach of the conditions set out in the special condition clause, and consequently he was entitled to exercise the powers given him under that clause, and this he did.

In support of his claim, Mr. Barrett, in examination-in-chief testified merely to the agreement for the purchase of the land and maintained that he had "paid him (Mr. Wildish) for the land". Mr. Wildish, he said, in spite of the fact that he had paid for the land, sold it to someone else. He gave no details of the agreement, nor of the amounts

he had paid in order to satisfy his obligations under the contract. However, in cross-examination, he admitted that he had not paid all the money "as he never had a chance to complete it". He agreed that the purchase price was J\$100,000, which he estimated at the agreed exchange rate to be equivalent to "twenty something pounds sterling", no doubt meaning in excess of £20,000 sterling. He first contended that he had paid £12,000, leaving a balance of £8,000, and thereafter he increased his payment to £12,500, leaving a balance of £7,500. However, the correspondence between the parties tells a different story, and indeed in my opinion, an accurate description of the state of the transaction between the parties. Consequently without apology, I quote extensively therefrom.

Remembering that the date of completion was set at October 31, 1986, a letter (Ex. 5) dated April 24, 1987 addressed by Mr. Barrett to Mr. Wildish is very revealing, contradicting as it does, the oral testimony of Mr. Barrett and containing an admission by Mr. Barrett, of his inability to meet his obligation under the contract. The letter reads:

"For the attention of Andrew A. Wildish

Dear Andy.

My reason for dropping you these few lines is to let you know that I could not live up to expectation because my side of our business has not matured as yet.

I had a message from Shirley when she returned from Jamaica saying that I have to pay up within the next month or two. Well, after you just left a few weeks before and we had talked about the matter, I never knew that you would foreclose the matter so quickly...

According to your last letter the land was for 100,000 dollars at 8-1 =£12,500. I have paid you £5,000 therefore a balance of £7,500 plus your interest for the time is still due."

Before this is in a letter dated October 1, 1986 Mr. Wildish had written to Mr. Barrett, enclosing a 'Statement of Account' showing the balance owing at £21,761.00 including interest of £594.62. In this letter having reminded Mr. Barrett of the 'Special Condition ' clause he wrote:

"Now, William I am obviously not anxious to invoke these procedures, but I am sure you realise that it could well be to my advantage to do so. The whole object of the exercise in the first place was that my money should not be tied up on a 'soon come' basis.

I will be happy to go along until the end of this year. However, unless settlement of the account has been made by the end of December, I will at that stage have to consider my position.

William, I don't want this taken as a threat, but rather as a warning that I am not in a position to mess about beyond that time."

By this letter Mr. Wildish indicated to Mr. Barrett that there was an outstanding balance, which obviously would allow him to exercise his right under the special condition clause, to resell the property and return Mr. Barrett's deposit to him. Importantly, also is that he extended the date of completion to December, 1986.

Despite the content of that letter, we see Mr. Barrett writing in April, 1987, four (4) months after the date set by Mr. Wildish, conceding that he had not been able to make the required payments. In addition, he admits that at that time he had paid only £5,000 of the purchase price.

In response to Mr. Barrett's letter of the 24th April, 1987, Mr. Wildish wrote on the 15th June, 1987 rehearsing the details of the agreement, and giving a breakdown of the amounts owed including interest. In this letter, he gives Mr. Barrett credit for £2,000 which was paid by cheque dated December 29, 1986.

Presumably this cheque was paid as a result of the December date set by Mr. Wildish in his letter of October 1, 1986. Having given Mr. Barrett credit for the £2,000, he then deducts an amount of £1026.51 which he alleged represented an outstanding balance owed by Mr. Barrett in respect of some other transaction. In this letter also he disagrees with Mr. Barrett, that the agreed exchange rate was at 8 to 1 by stating that it was agreed at JA\$5.3926 to one pound sterling. Of great importance is the following paragraph in this letter in which he now sets a definite date for the conclusion. It reads:

"William unless you can settle by the 31st July, I intend to sell the property. Under the terms of the contract you will be due the following:

Refund the Purchaser in Jamaican dollars  
such monies paid by him free of interest and  
less cost of resale

This amounts to

|                 |                 |
|-----------------|-----------------|
| Money paid      | £7,000.00       |
| Less balance at | <u>£1026.00</u> |
|                 | £5973.49        |

However, I feel that you have absolutely no reason to feel hard done by, because your failure to live up to your agreement has been totally to my detriment and I think I have demonstrated great patience in dealing with the matter".

In this letter also, Mr. Wildish reminds Mr. Barrett of the outstanding amount as at 27th December, 1986, which was as follows:

- £21,761.10 (the amount indicated as owing on October 1, 1986 as per letter of same date) plus interest for October, November and December, 1986 i.e. £659.38 giving a total of £22,420.48.

He thereafter deducts £2000 paid on December 29, 1986, giving a balance owing of £20,420.48.

Then he brings the accounts up to date (i.e. June, 1987) by adding interest from January to June inclusive "calculated at 12% ( rather than the 16% in the contract) and amounting to £1256.27 giving a total balance owing of £21,676.75.

As the evidence unfolded, there was really no contest that Mr. Barrett was in default of payments required under the contract, and as a result , Mr. Wildish was entitled to resell the property, having given him the required notice. As to the latter, the correspondence reveal that Mr. Barrett was not only given notice that he was in default, but was also informed by the letter dated June 15, 1987 that the 31st July, 1987 was the deadline for him to make good those payments that were due. This letter in effect made time the essence of the contract. Mr. Barrett, having failed to meet his obligations, Mr. Wildish in selling the property could not be said to be in breach of the agreement. Indeed the property was sold on the 1st October, 1987, Mr. Barrett, not having met his obligation up to that time.

The learned judge in her judgment came to the same conclusion. She said:

"The evidence adduced shows the plaintiff did not perform his part of the agreement by completing on the date stipulated. The defendant indicated to him in exhibit 7 that unless he did so the property would be put up for sale. The defendant sold the property on the 1st of October, 1987".

Although this finding of the learned judge indicated that she concluded that Mr. Barrett was in breach and had not met his obligation in the time specified, she nevertheless went on to assess liability of Mr. Wildish for breach of the agreement. In introducing her findings on the assessment here is what she said:-

"The plaintiff is not claiming specific performance but has obtained an interlocutory judgment for damages to be assessed for breach of contract as the defendant did not convey the property to him. In my judgment two basic principles of law seem to be applicable in the circumstances. The plaintiff ought to be compensated for

the loss he has suffered but he is also under a duty to mitigate his loss".

In my view these two findings of the learned judge, are inconsistent. Having found that it was Mr. Barrett who had not met his obligations under the contract, it would follow that the learned judge should have found that Mr. Wildish would have been entitled to sell the property by virtue of the special condition and consequently could not be liable for any damages for breach of contract. The only liability to Mr. Barrett that Mr. Wildish would have is to repay to him "in Jamaican dollars such moneys paid by him free of interest". Instead, the learned judge awarded Mr. Barrett the sum of £15,000, which he said he had paid, but which the evidence clearly showed was not correct, plus an amount of Twenty Thousand Dollars (\$20,000) for breach of contract. For the reasons given above, those orders could not stand. The amount which Mr. Barrett paid is shown by the evidence to be £5,973.49 and in addition there was no evidence upon which any amount could be awarded for breach of contract.

For those reasons, the order of the Court below was varied so that the order for damages for breach of contract would be vacated, and for the sum of £15,000 an amount of £5,973.49 was substituted. The order would therefore now read:

"Judgment is entered for the plaintiff as follows:

Special Damages - \$7,372.00 with interest thereon at the rate of 3% from 14/9/95 to today. The defendant to pay to the plaintiff the equivalent of £5,973.49 at the rate of exchange prevailing today with interest thereon at the rate of 20% per annum from the date of

service of the writ of summons to today. Costs  
granted to the plaintiff to be agreed or taxed”.

We also ordered that the respondent should have his cost of the appeal to be  
taxed, if not agreed.

**DOWNER, J.A.:**

I agree

**PATTERSON, J.A.**

I also agree.