IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.98/77

BETWEEN	CHISHOLM & CO. DEVELOPMENT LTD.	PLAINTIFF
AND	WENAIGH LTD.	DEFENDANT

Heard: 8th November, 1982
Delivered: 25th February, 1983.

C. H. Hines and Mrs. Elizabeth Hines instructed by Hines, Hines & Co. for plaintiff.
Mr. Crafton S. Miller and Mrs. M. Earle-Brown instructed by Miller, Mitchell & Co. for defendant.

ELLIS J (AG.)

The Plaintiff claims in this Suit:

(a) Specific performance of an Agreement for the sale of Land.
(b) Damages for breach of Contract.
(c) Damages.
(d) Further and other relief as may be just.
(e) Costs.

The Plaintiff by the witness Chisholm says that by a written agreement the plaintiff agreed to sell and the defendant agreed to buy a lot of land for $10,500. After the agreement was signed an amount of $1,500 was credited as a deposit on the $10,500 purchase price. This came about because another company controlled by the plaintiff, owed the only shareholder of the defendant company $1,500 and it was agreed to liquidate that debt by making it a deposit on the purchase price of $10,500. By the aforesaid arrangement $9,000 was the balance and it was the understanding that the defendant company would pay that amount promptly.

The balance has not been paid and no interest on the outstanding balance has been paid although the defendant has been in possession since March of 1974.

The plaintiff on the question of outstanding interest and other charges invited the courts attention to "Special Conditions" no. 8 at page 3 of the Agreement for Sale and relies on that for entitlement to interest and other charges.

According to the witness, the plaintiff company was indebted to Mortgagees in an amount of $250,000 and was dependent on the purchase

price of the defendant's lot and other lots to liquidate that indebtedness. His dependency on the price of the lots to satisfy his creditors was well known to the managing director and sole shareholder of the defendant Company as that gentleman was then the secretary of the plaintiff Company and was a signatory to the transaction which resulted in plaintiff's indebtedness to mortgagees. On the signing of the Agreement of Sale in 1974 the plaintiff says that he was and is still ready to conclude the sale.

The witness for the plaintiff Company Mr. Chisholm, was cross-examined by Mr. Miller for the defendant. The cross-examination was designed to show, and the answers given did show, that between 1972 - 1980 the market for lots was in a depressed state. In cross-examination it was suggested to the plaintiff's witness that the Agreement was completed in September 1974 and not in March 1974 as alleged. This was denied. The plaintiff admitted that there has been (a) no computation of half costs (b) no account for $230 for utilities (c) no step taken to forfeit the deposit of $1,500 because the defendant Company kept promising to complete the transaction.

The defendant Company gave evidence through Owen Pitter the sole shareholder. He said that in 1974 the defendant Company agreed to buy a lot of land from the plaintiff Company. He said the purchase price was originally $6,000 but that was changed in either August or September 1974 to $10,500. There was no agreement he said, for $1,500 to be paid by the plaintiff Company and for the defendant Company to pay $9,000 immediately. He stated that the plaintiff Company owed him $1,500. That amount has not been paid and he has sued for it. Pitter's testimony disclosed a close relationship between himself, the sole shareholder in the defendant Company and the plaintiff Company. He denied that the defendant Company took possession of the lot as alleged and stated that he was a director of the plaintiff Company.

There was a Consent Order for Specific Performance in favour of the plaintiff Company. There is therefore no necessity to consider that aspect of the plaintiff's claim and also the claim for damages for breach of contract.

The plaintiff claimed damages in addition to Specific Performance. I am therefore to consider (a) a court's competence to award damages in addition to Specific Performance and (b) if there is such a competence, what elements may be included in the damages so awarded.

In the nineteenth century, The Chancery Amendment Act known as Lord Cairn's Act, enacted that a court may make an award of damages in addition to an award for Specific Performance. The Act was repealed by the Judicature Acts of 1925 save and except the sections which empowered courts to award Damages in addition to Specific Performance. The Judicature Act runs in Jamaica and in the circumstance this court holds that there is competence to award Damages in addition to an order for Specific Performance.

Mr. Miller for the defendant argued against the plaintiff's entitlement to damages and questioned the starting date of any damage. Would it be 1974 or 1977? He founded his arguments on the grounds that (1) the plaintiff based his claim for damages inter alia, on the allegation that he had to pay interest of 16% in outstanding loans from 1974 when the defendant was let into possession. He argued that the defendant was never let into possession and a fortiori, the defendant believed that the purchase price of the lot was fully paid from commissions owed to the defendant by the plaintiff. He also said there was no agreement by the parties to utilise $1,500 owing to the defendant as the deposit on the purchase price of the lot. The 16% interest alleged to be payable is too remote; (2) the plaintiff must have been ready and willing to execute a transfer. He said the fact that the plaintiff did not present a transfer for execution and made no request for payment of ½ costs are indicative that the plaintiff was not ready and willing to execute a transfer.

Mr. Hines for the plaintiff said the plaintiff was entitled to damages and cited in support of his contention the case of LAIRD v. PYM 1841 7 Meeson and Welby's Reports at p. 474. His contention is contended that only the quantum of damages demanded a consideration. He adopted Barn Parke's dictum as to what that quantum should be -

"how much worse off is the plaintiff by the diminution in the value of the land or the loss of the purchase money, in consequence of the non-performance of the contract."

He said the balance of $9,000 is outstanding for 8 years and under the agreement attracts interest at the rate of 10% per annum.

He also argued for compensation for direct loss as a result of non performance e.g. taxes from 1974 at $130 p.a. would be $1,040; cost of utilities $230.

In addition he contended for an award of damages to include an amount reflecting the payment interest at 16% p.a. which plaintiff had to pay on $9,000 the outstanding balance of the purchase price. He said that liability for interest at that rate was foreseeable by the defendant Company whose sole shareholder was a director of the plaintiff Company. These damages are not too remote as they would not have arisen had the defendant complied with the terms of the Contract.

In the well known case of Hadley v. Baxendale (1854) 9 Exch. 341 at page 354 Baron Alderson stated the rule as to remoteness of damage thus -

> "Where 2 parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things from such a breach, or sudh as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The rule as stated indicates 2 branches. The one deals with the normal damage which occurs in the usual course of things i.e. a breach of contract and the other with abnormal damage which arises because of special circumstances.

In a case of this nature, where there is a contract in which certain payments are to be made by one party when he is placed in possession or when he is dilatory in paying the purchase price, (See Exhibit 1) those payments to my mind, are to be accommodated under the first branch of the rule in Hadley v. Baxendale. The

payments there would be damages within the obvious contemplation of the parties as expressed in the written contract and maybe termed normal damages. These normal damages, if the contract is valid, cannot be remote since they have been made express terms of the contract. The plaintiff in this case also claims compensation for interest which he paid at 16% p.a. This interest which he paid at 16% per year may be termed abnormal damages and arise from special circumstances. Is he entitled to such Damages or are they too remote?

To answer that question the case of Trans Trust S.P.R.L. v. Danubian Trading Company Ltd. (1952) 2 Q.B. 297 is of assistance. That was a case which dealt with the question of whether or not interest payable on a mortgage was too remote for recovery. At p. 306, Lord Justice Denning stated -

> "..... interest is generally presumed not to be in the contemplation of the parties. That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequence are as a rule too remote. But when circumstances are such that there is a special loss forseeable at the time of the contract as of the consequence of non-payment, then I think such loss may well be reasonable."

The quoted statement was viewed with approval by the English Court of Appeal in Wadsworth v. Lydall (1981) 1 W.L.R. 598. The facts are that plaintiff and defendant entered into a partnership. On dissolution it was agreed that the plaintiff would give up possession of a farm on or before May 15, 1976 and on leaving the farm he would receive £10,000 from the defendant. On May 10, expecting to receive the £10,000 from the defendant in 5 days he entered into an agreement to purchase a farm from A. By this agreement £10,000 of the purchase price was to be paid on completion. On May 15, plaintiff gave up the farm but defendant failed to pay over the £10,000. In July A's solicitor served a notice on the plaintiff to complete. In October the defendant paid over £7,500 which was passed over to A and the plaintiff raised the balance by taking out a mortgage.

The plaintiff claimed for 2 items of Abnormal Damages which arose from the special circumstances viz. a sum of £335 which he had to pay as interest because of the non payment of the £10,000 and £16.20 which

resulted from the cost of raising the mortgage. Those two items were disallowed by the Court of first instance. The Court of Appeal held that the items were not too remote as the defendant knew or ought to have known that if payment was not made the plaintiff would incur expenses in raising alternative financing and interest costs. The Court of Appeal was satisfied on the evidence that there was a special circumstance from which the defendant could have anticipated the abnormal expenditures. Abnormal Damages may be not too remote in the light of the cases.

In the case under consideration having looked at all its circumstances I find:-

1. That there was a valid contract of sale entered into by the parties in March 1974.
2. That the plaintiff was let into possession in March 1974.
3. That damages can be awarded in addition to an order for Specific Performance.
4. The Damages claimed are not too remote.
5. The relationship between the sole shareholder of the defendant Company and the plaintiff Company was a Special circumstance which created a knowledge on the defendant's part that the plaintiff would have had to pay interest on $9,000 within the principle of Wadsworth v. Lydall.

In the light of the findings I am constrained to find in favour of the plaintiff and award damages in addition to the Consent Order for Specific Performance, in an amount of $20,770 made up as follows -

Normal damages -	Taxes from 1974 @ $130 p.a.	- $1040
	Cost of Utilities @ $230 per lot	- $ 230
	Interest on $9000 at 10% for 8⅓ yrs.	- $7500
Abnormal damages -	Interest on $9000 @ 16% for 8⅓ yrs.	- $12000
		$20,770

The plaintiff is to have his costs to be agreed or taxed.

LLOYD B. ELLIS
J. (AG.)