[2021] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00050

APPLICATION NO COA2021APP00011

BETWEEN	**GREGORY DUNCAN**	**APPELLANT**
AND	**ORVILLE PALMER**	**1ST RESPONDENT**
AND	**LORINDA PALMER**	**2ND RESPONDENT**

Appellant in person

Craig Carter instructed by Althea McBean & Co for the respondents

18 January, 24 February and 11 June 2021

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree that it was for the reasons given that we refused the application to adduce fresh evidence. Insofar as the appeal is concerned I agree with her reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

[2] The appellant is a developer, and owner of Lot 9B Block B, 3 Sandhurst Place, Kingston 6 in the parish of Saint Andrew, registered at Volume 1184 Folio 751 of the

Register Book of Titles ('3 Sandhurst Place') on which he was constructing a townhouse complex.

[3] The respondents are husband and wife and owners of the neighbouring property, Lot 9A Block B, 5 Sandhurst Place, Kingston 6 in the parish of Saint Andrew, registered at Volume 436 Folio 55 of the Register Book of Titles ('5 Sandhurst Place').

[4] This is an appeal from an award of damages for loss of bargain, which Jackson-Haisley J ('the judge') made on 14 May 2019 at an assessment of damages hearing in the Supreme Court.

[5] In general terms, the appellant was to have purchased 5 Sandhurst Place from the respondents, for a price of $23,600,000.00, by repaying the mortgage on the property which was due to the Jamaica National Building Society ('JNBS'). The respondents were to then transfer the property to the appellant. In exchange for the purchased property, the appellant was to also have built and transferred to the respondents, a four-bedroom townhouse with an ascribed value of $20,000,000.00. The respondents allowed the appellant to take early possession of the property. The appellant failed to complete the agreement for sale, which was consequently cancelled. The respondents remain the owners of the property which they had intended to transfer to the appellant, however, he had damaged the main building on the premises. He also did not provide the respondents with the townhouse as agreed.

[6] The main question to be determined is whether the judge erred in her calculation of the damages which she awarded to the respondents for loss of bargain, as well as for consequential losses which flowed from the appellant's breach of contract.

[7] Another issue arose as to whether the appellant's constitutional right to participate in the assessment of damages hearing had been breached.

Background

The pleadings

[8] The respondents, on 14 March 2014, filed a claim form in which they sought damages from the appellant for breach of contract and destruction of property, or, in the alternative, specific performance. As the pleadings will become important in the consideration of the matter, the main paragraphs in the particulars of claim filed on 14 March 2014 ('the original particulars of claim') appear below:

> "4. That on or around the 31st of July 2013 the above parties entered into an Agreement for Sale in respect of a property located at Lot No. 9A Block B Sandhurst in the parish of Saint Andrew registered at Volume 436 Folio 55 of the Register Book of Titles (hereinafter referred to as the subject property) for the value and or consideration of Twenty-Three Million and Six Hundred Thousand Dollars ($23,600,000.00).
>
> 5. That [the appellant] made a deposit on the subject property of Two million Two Hundred and Forty Two Thousand Dollars ($2,242,000.00), however he has failed to provide a Letter of Commitment as to the completion of the sale transaction.
>
> 6. That [the appellant] was given permission to use the premises in August of 2013 to store building materials, however he proceeded to demolish the premises and [the respondents] have been deprived of the use and occupation of the subject property since August, 2013.
>
> 7. [The appellant] acted in breach of the said contract by causing significant damage to various sections of the subject property and areas surrounding it, by removing the fence, all doors, windows, the roof and other fixtures causing damage to the walls of the building in September, 2013.
>
> 8. Damages [sic] to the subject property due to [the appellant's] reckless conduct has prevented [the respondents] from using the subject property, and [the appellant] has failed and or neglected to complete the Sale Agreement.

9. By reason of the matters aforesaid, [the respondents] have been put to considerable inconvenience, suffered loss, damage and incurred great expense.

10. [The respondents] are seeking in the alternative Specific Performance of the above contract requiring [the appellant] to Complete the Sale.

PARTICULARS OF SPECIAL DAMAGES

	$
i.) Damages for Breach of Contract & Destruction of Property	26,000,000.00
ii.) Loss of Use of Premises from August, 2013 to present time @$250,000.00 per month and continuing	1,500,000.00
TOTAL	27,500,000.00"

[9] In the prayer of these particulars of claim, the respondents claimed the sum of $27,500,000.00, interest, costs and further and/or other relief. In the alternative, the respondents claimed an order for specific performance requiring the appellant to complete the agreement for sale, and an order that the appellant restore the building and premises to the value and condition in which he found them. The respondents attached to the particulars of claim the 31 July 2013 agreement, the title for Lot 5 Sandhurst Place and a June 2012 valuation report for the premises.

[10] There is no dispute that the appellant filed a defence, which was eventually struck out on 20 January 2015, and judgment entered for the respondents, in the sum of $20,833,739.00, for damage to property and loss of use from October 2013 to January 2015. On 4 February 2015, the appellant applied to set aside the judgment. On 24 March

2015, the court heard the application and ruled that the judgment should stand, but set aside the award that had been made. The court also ordered that the matter proceed to an assessment of damages hearing.

[11] Three years after judgment had been entered against the appellant, on 8 March 2018, the respondents filed an amended particulars of claim ('the amended particulars of claim'). The main changes appear below with the underlining as it appears in the document:

> "9. That on or around the 2nd day of August 2013 the above parties entered into a second and/or collateral Agreement for Sale in respect of a property located at Unit #4 of Lot 9B Block B Sandhurst in the parish of St. Andrew registered at Volume 1184 Folio 751 of the Register Book of Titles at a value of $20,000,000.00 for the purposes of Stamp Duty and Transfer Tax Only in partial exchange for and conditional upon the transfer of all that parcel of land at 5 Sandhurst Place registered at Volume 436 Folio 55.
>
> 10. That by failing to complete the Sale Agreement of July 31, 2013, [the appellant] in consequence also failed to honour the second and/or collateral Agreement for sale.
>
> …
>
> **PARTICULARS OF SPECIAL DAMAGES**
>
> i. Loss of Use of Premises from August 2013 to present $6,097,881.72
>
> ii. Interest and costs on Mortgage account due from August 2013 to present $11,660,935.01
>
> Total $17,758,816.73"

[12] In these amended particulars, the respondents claimed special damages in the sum of $17,758,816.73 and damages for breach of contract and destruction of property. The orders which they sought in the alternative remained the same. However, they attached additional documents to the amended particulars of claim. These included the 2 August 2013 agreement, mortgage statements as at 30 November 2017, statement of rental which they had incurred, lease agreement and rental receipts for the respondents' residence at 38 Charlemont Drive, Kingston 6 and an engineer's report for 5 Sandhurst Place.

The evidence

[13] On 10 May 2016, the respondents filed the witness statement of Orville Palmer, the first respondent. Upon filing the amended particulars of claim, they also filed the supplemental witness statement of Orville Palmer. This stood as his evidence-in-chief at the assessment of damages hearing.

[14] Afterwards, on 22 February 2019, the respondents filed the witness statement of Brian Pottinger, a civil engineer.

[15] The appellant did not file any witness statements ahead of the assessment of damages hearing, which took place on 26, 27 February and 12 April 2019, with judgment handed down on 14 May 2019.

[16] Mr Palmer testified that in January 2013 he and his wife purchased 5 Sandhurst Place. The appellant was in the process of building a development on the neighbouring premises at 3 Sandhurst Place and offered to purchase their property. They were reluctant to sell the property which they had just bought, and into which they had not yet moved.

[17] By agreement for sale dated 31 July 2013, in order to extend his development, the appellant contracted with the respondents to purchase 5 Sandhurst Place from them. The arrangement between the parties was that the appellant would settle the respondents' mortgage of $23,600,000.00 with JNBS and build and transfer a townhouse in his

development to them. In order to effect the entire arrangement, the parties also signed an agreement for sale dated 2 August 2013, with the appellant described as the vendor and the respondents, the purchasers. The value of the completed townhouse was $20,000,000.00 for stamp duty and transfer tax purposes only. The 31 July and 2 August 2013 agreements were to be read together. A construction agreement, the terms of which will be highlighted later, was attached to the 31 July 2013 agreement.

[18] The appellant made a deposit of $2,242,000.00 on the respondents' property at 5 Sandhurst Place. The agreement provided that this payment would be used to cover the costs of transfer "in exchange for Certificate of Title duly registered in the name of the Purchaser and/or his Nominee(s)". The 31 July 2013 agreement was stamped. As is customary, there were several other special conditions included in the agreement. A few are highlighted below:

> "2. It is understood and agreed that the [respondents'] Attorneys-at-Law shall be entitled to pay Stamp Duty and Transfer Tax, from the sums paid and that if for any reason whatsoever any of the said Payments have to be refunded to the [appellant] and:-
>
> (a) The amount to be refunded is equal to or more than the total of the duty and Tax so paid, then the [appellant] shall to the extent of such duty and/or Tax so imposed be deemed to have been refunded same by delivery up to him of the original Transfer Tax receipt and stamped agreement duly noted by the [respondents'] as cancelled, in addition to the refund of the balance deposit and further payment not used for Stamp Duty and Transfer Tax.
>
> (b)…
>
> 3. …
>
> 4. It is understood and agreed that [the appellant] shall bear the full cost of transferring the property and shall pay the sum of Two Million Two Hundred and Forty-Two Thousand Dollars ($2,242,000.00) towards the

costs associated herewith and that the said sum shall be paid to [the respondents'] Attorney-at-Law upon signing.

5 …

6. It is understood and agreed that [the respondents] shall not be obliged to deliver the Duplicate Certificate of Title for the property sold to [the appellant], [the appellant's] Attorneys-at-Law until [the appellant] has paid [the respondents'] Attorneys-at-Law all moneys due as this Agreement is a cash sale. Letter of Undertaking should be provided within FORTY-FIVE (45) days or balance purchase price should be paid before Transfer is lodged at the Title's Office.

7. **The Agreement is subject to and contingent upon a collateral agreement to be executed by the parties for the Transfer of a completed four (4) Bedroom Townhouse in Phase 2 of the Development of 5 Sandhurst Place to be constructed by [the Vendor]. All costs of the Transfer of the Townhouse Unit shall also be borne by [the appellant] herein save and except [the respondents'] Attorneys-at-Law fees.**" (Emphasis supplied)

[19] The appellant and the respondents also signed an undated agreement titled "5 SANDHURST PLACE, ST. ANDREW COLLATERAL AGREEMENT FOR CONSTRUCTION OF DWELLING HOUSE PHASE II 'MONICA'". The appellant was described as "the Developer" and the respondents "the Owner".

[20] In the agreement, it was acknowledged that the respondents were the owners of 5 Sandhurst Place, and the developer, the appellant, wanted the owners to sell the land to him "for the consideration and on the terms and conditions set forth in the Agreement for Sale appended hereto (hereinafter referred to as 'the said Agreement')". It appears that the agreement for sale referred to was that dated 31 July 2013.

[21] The third recital is important for an understanding of the agreement between the parties. It stated in part:

> "**WHEREAS** [the appellant] pursuant to the terms of the said Agreement has agreed as part of the consideration for the purchase of the said land to transfer to [the respondents] a four (4) bedroom, three (3) bathroom Townhouse with powder room, constructed on Phase Two of the proposed development called 'Monica' … to be built on … the land comprised in Certificate of Title registered at **VOLUME 436 Folio 55** … known as **No. 5 Sandhurst Place, Kingston 6, Saint Andrew** (hereinafter referred to as 'the Townhouse').
>
> **WHEREAS** [the appellant] wishes to acquire the said lands to expand and incorporate into the abovementioned 'Monica' development as Phase Two thereof.
>
> **AND WHEREAS** [the respondents] is desirous of selling the said lands to [the appellant] and entering into this agreement to achieve the abovementioned purposes." (Emphasis as in original)

[22] The construction agreement, therefore, provided that the townhouse to be provided to the respondents would be built as a part of phase two of the development on the land which they were going to sell to the appellant, and it was part of the consideration for the land being sold to the appellant. Clause 12 of the construction agreement made it clear that the building of the townhouse was contingent upon the agreement for sale which the parties had signed for the sale of lands situated at 5 Sandhurst Place, and further, if the agreement for the sale of 5 Sandhurst Place became void for any reason, the construction agreement would itself also become void and of no effect. The agreement did not refer to a value for the townhouse.

[23] The agreement for sale dated 2 August 2013, which the parties signed, was never stamped. This agreement, referred to the townhouse to be built and transferred to the respondents as Unit # 4. The description of the property is important:

> "Unit #4 being part of ALL THAT parcel of land part of SANDHURST in the Parish of SAINT ANDREW being the Lot numbered NINE B BLOCK B on the plan of Sandhurst aforesaid deposited in the Office of Titles on the 3rd of November, 1943 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed **and being the land**

> **comprised in Certificate of Title formerly registered at Volume 435 Folio 50 [sic] but now being all the land comprised in Certificate of Title registered at Volume 1184 Folio 751 of the Register Book of Titles**." (Emphasis supplied)

Although it is not clear whether this could in fact have occurred, from the above clause it appears that it was intended that the respondents' property, once sold to the appellant, would have been incorporated into the title for the appellant's neighbouring property at 3 Sandhurst Place.

[24] The townhouse, which was valued at $20,000,000.00 for the purpose of stamp duty and transfer tax, was "In partial exchange for the Transfer of ALL that parcel of land at 5 Sandhurst Place, Kingston 5 in the parish of St. Andrew registered at Volume 1184 Folio 751". Special condition 6 made it clear that the 2 August 2013 agreement was contingent upon the 31 July 2013 agreement which provided for the sale and transfer of 5 Sandhurst Place. The transfer costs relating to the completed unit were to be borne by the appellant. All three agreements were to be read together.

[25] In August 2013, the respondents gave the appellant permission to use their property to store building material, however, he proceeded to substantially demolish the main building on the premises. The appellant removed the roof, doors, windows, grills, all electrical and other fixtures from the main building, reducing it to bare walls. He also removed the gate and portions of the fence. The house was made 'uninhabitable'. Before the damage, according to the June 2012 valuation report that the respondents had, the property (land and buildings) had a market value of $26,000,000.00 to $28,000,000.00.

[26] Eventually, by letter dated 27 January 2014, the respondents cancelled the agreement with the appellant for the sale of 5 Sandhurst Place, because the appellant failed to pay the balance price or settle the mortgage. The property was not transferred to the appellant and, as a consequence, he did not build and hand over a townhouse to the respondents.

[27] In 2018, the respondents obtained an engineer's report, which indicated that the replacement cost of the main building was $16,500,000.00. The engineer opined that it was safer to replace it than to repair a structurally unsound building, and so advised that the building be demolished. The cost of demolition of the house and boundary wall, and removing the rubble, was $625,000.00. The respondents were not able to pay to replace the building, as they had to continue paying the mortgage for the property at 5 Sandhurst Place, as well as rental in order to provide shelter for their family.

[28] The respondents had also been unable to use and occupy the premises since August 2013. They claimed for rental which they had to pay for alternative accommodation, and also claimed for the mortgage payments which they had to make. Through Mr Palmer's evidence in chief, they entered various documents into evidence as exhibits including: the agreement for sale dated 31 July 2013, the title for 5 Sandhurst Place, the agreement for sale dated 2 August 2013, the June 2012 valuation report prepared by Allison Pitter & Co for 5 Sandhurst Place, the lease agreement and receipts for rental.

[29] According to the June 2012 valuation report, the property had a main building, attached to which, at the rear, was a cottage. The valuators described the main building as an older type residence, with the building probably constructed in the 1950's with the building materials of the day. The cottage was however constructed with more recent technology. The issues relating to structural damage were focused on the main building.

[30] The valuators also stated that the walls were made of concrete nog, the floors covered with terrazzo tiles, while the windows were made of a "combination of timber framed older 'French' casement type and adjustable louvre blades". The doors were mainly made of timber, the ceiling, gypsum board with timber strips, while the roof was a pitched timber-framed type with sarked box eaves, and was clad with wide trough aluminium sheets. The main building was described as being in fairly good state of repairs with no major defects observed. The valuators however noted sagging to the gypsum ceiling board on the verandah, a trail of termites on the northern wall in the dining room

and efflorescence to one wall in the front bedroom. They stated that selective repainting and upgrading would be to 'good advantage'. The estimate of the replacement cost for the facilities, "ASSUMED NEW" was in the order of $24,700,000.00, including professional charges and contingencies but excluding site acquisition costs. The valuators did not provide a value for the buildings in their original state in 2012. As indicated above, the total property value of $26,000,000.00-$28,000,000.00 covered both the land and the structures on it.

[31] Mr Palmer had not placed the construction agreement into evidence in the course of his examination-in-chief. In cross-examination, counsel for the appellant referred Mr Palmer to the construction agreement in which he agreed to transfer 5 Sandhurst Place to the appellant in exchange for the appellant building for him a four-bedroom three-bathroom townhouse. Mr Palmer responded that he vaguely recalled that that would be a part of the agreement. The judge allowed the construction agreement for the townhouse to be tendered into evidence, although it was objected to by the respondents.

[32] The other evidence before the judge came from Brian Pottinger, a civil engineer. His witness statement was allowed to stand as his evidence-in-chief. Mr Pottinger visited 5 Sandhurst Place and inspected the structures on the premises. On 3 March 2018, he completed an engineer's report. This was admitted as an exhibit in the proceedings. In the report, Mr Pottinger indicated that the main building was old, over 75 years, and was a timber structure with a stucco finish. The timber frame, which was the chief structural component of the main building, showed signs of degradation due to exposure to the elements (sun, rain etc), as the roof and ceiling had been removed, as well as the windows and doors. Insofar as the interior of the building was concerned, many cement tiles were missing from the floor in each room and all kitchen and bathroom fixtures had been removed or were irreparable. He reported that the boundary wall was poorly constructed, as was evident by the amount of honeycombs throughout, overturning and lack of foundation. He recommended that it be demolished and rebuilt. He stated that components of the building were rotting, concluded that the structure was unsafe and opined that it was not feasible for it to be renovated or repaired. He, therefore,

recommended a complete demolition of the existing structure and the boundary walls. As indicated above, replacement of the main building was estimated to cost $16,500,000.00 and demolition works for the existing house walls and boundary walls, $625,000.00. Counsel for the appellant did not cross-examine Mr Pottinger.

The judgment

[33] The judge noted that counsel for the appellant had sought an adjournment of the proceedings on the basis that he intended to challenge the judgment. She refused this application, and the matter proceeded with counsel for the appellant actively participating in the hearing, including cross-examining Mr Palmer and making closing submissions.

[34] Firstly, the judge looked at what the judgment that was entered against the appellant had decided. She compared the original particulars of claim with the amended particulars of claim. Bearing in mind **Vera Dallas (By her attorney Elmeda Robinson) v LP Martin Company Limited (trading as LP Martin Funeral Home)** [2018] JMCS Civ 78, the judge concluded that at the time that judgment was entered in October 2015, it decided that: the appellant breached the contract with the respondents by failing to complete the contract of sale, and the appellant's action resulted in destruction and damage to the property. As a result, the respondents were entitled to damages arising out of the breach of the contract and damage and destruction done to the building, as well as for loss of use of the premises. Having compared the original particulars of claim with the amended particulars of claim, the judge refused to allow the respondents to claim for mortgage costs which had not been mentioned in the original particulars of claim. No issue arises in this appeal in respect of mortgage costs.

[35] Paragraphs [26]- [28] of the judgment are very important for the consideration of this court. There, the judge said in part:

> "[26] I agree … that in order to arrive at a sum for General Damages the court would have to take into account the loss of bargain. This is in keeping with the principles laid down by G.H. Treitel in the text the Law of Contract

> … where in discussing loss of bargain the following is said …:
>
> > 'the basic object of damages for breach of contract is to put the plaintiff "so far as money can do it … in the same situation … as if the contract has been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain, that his expectations arising out of or created by the contract are protected. This protection of the plaintiff's expectation must be contrasted with the principle on which damages are awarded in tort…'
>
> [27] If the contract had been performed then [the respondents] would have stood to gain the proceeds of the sale of their property which based on the Agreement for Sale was the sum of $23,600,000.00. They would also have stood to gain a four-bedroom, three-bathroom townhouse valued at $20,000,000.00 based on the evidence by Mr. Palmer which I accept.
>
> [28] The figure when arrived at must then be reduced by the value of the property at the time of the loss of the bargain. The Valuation Report is an exhibit and it reflects a market value of between 26,000,000.00 and 28,000,000.00. I am prepared to find the average and assign a value of 27 million to the house. When this is deducted from the total, the sum of $16,600,000.00 is arrived at. That would represent the loss of bargain."

[36] In continuing to address the question of damages for destruction and damage to the property and its surroundings, the judge stated at paragraph [29] of her judgment:

> "… Counsel for [the respondents] relied on the case of **Laird v Pim (supra)** where Parke B at page 854 set out the principles to be applied in relation to remedies:
>
> > 'The measure of damages, in action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is

> how much worse 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? It is clear he cannot have the land and its value too.'

[37] At paragraph [30] the judge then stated:

> "[The respondents] have relied on a report from Mr. Brian Pottinger. This report speaks to a replacement value however, [the respondents] would only be entitled to a sum representing the depreciated value consequent upon the actions of [the appellant]. To compensate them for the full replacement value would be tantamount to over compensation for several reasons. At the time this agreement was entered into this house was some 75 years old and was of a timber structure. When [the respondents] entered into this agreement it was with the understanding that this structure would have been destroyed. The evidence is not that [the appellant] destroyed the complete structure but rather that he destroyed some aspects of the building. In light of that, [the respondents] would not be entitled to the full replacement value of a similar unit. They would however be entitled to a percentage of the full replacement value. The total cost to replace the structure is quoted by Mr. Pottinger as being the sum of $17,125,000.00. I note the evidence given by [the respondent] as well as Mr. Pottinger to the effect that [the appellant] removed the roof, all doors, some of the floors, windows, grills, electrical and all kitchen and bathroom fixtures other fixtures. In light of the evidence as to what was removed, I am prepared to discount the figure by eighty percent and to make an award representative of 20 percent of the replacement value. This would amount to the sum of $3,300,000.00."

[38] That discounted amount was included in the award for special damages.

[39] Having heard the evidence and submissions at the assessment of damages hearing, the total award made by the judge, on 14 May 2019, under the head of general damages, was $16,600,000.00 with 3% interest representing loss of bargain, and special damages of $8,492,540.84 with 3% interest.

The appeal and counter-notice of appeal

[40] The appellant filed notice and grounds of appeal on 24 May 2019. The grounds of appeal have undergone a number of amendments. On 18 January 2021, the court granted the appellant permission to file and serve "further further amended" notice and grounds of appeal on or before 20 January 2021. The appellant filed the updated notice and grounds of appeal on 20 January 2021, and it is that document which reflects the matters he raises for the determination of this court.

[41] The grounds of appeal state:

> " (a) That the Appellant will rely on its Affidavit in Support of Application for Court Orders for the stay of execution of Orders of Jackson-Haisley J in support of this application. That the Hon. Justice Jackson-Haisley in performing 'the contract' which includes three (3) separate executed Agreements, failed to incorporate and assess the automatic benefits due to the Appellant…under the Collateral Agreement and the 31st July 2013 Agreement for Sale, which naturally flow from the execution of all the Agreements.
>
> (b) That in the interest of finality the Appellant will compromise and accept the correct application as in the case of **Laird v Pim (supra)** where Parke B at page 854 set out principles to be applied in relation to remedies for the following reasons:
>
> i. The contract would have been performed and as sought by the respondent's alternative orders. Their benefit would be $20,000,000.00 plus $23,600,000.00 from which they must repay the balance of mortgage due to Jamaica National Building Society in respect to Volume 436 Folio 55 before the said free and clear title is handed over to the Appellant. The $43,600,000.00 should also less $2,242,000.00 cost of transfer already paid.

ii. Phase two (2) of the development could now be completed and the restricted parking, landscaping and turning radius constriction within phase one (1) lot 3 would be allowed.

(c) That the Jackson-Haisley J. decision in error double compensated the respondents, by awarding them the land and its value, which is in total contravention with the remedy intended as in the case of **Laird v Pim (supra)**, which states:

i. 'The measure of damages, in action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is how much worse is the plaintiff by the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too.'

(d) That the land is at all material time the exchange for the bargain, if the respondents have the land there was no exchange and suffered no loss. Given the land [sic] current value in keeping with the principles laid down by G. H. Treitel in the text the Law of Contract, 1991 wherein discussing Loss of bargain the following is said at pages 830-31:

i. 'the basic object of damages for breach of contract is to put the plaintiff 'so far as money can it … in the same situation...as if the contract has been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain'. That the law which surrounds Loss of Bargain was incorrectly applied by the Hon. Justice Jackson-Haisley as deposits and further payments received by the Respondents … were never accounted for.

(e) That if the compromised position is not accepted by the courts, then the appellant ask [sic] that this matter no longer proceed on how it was concluded by Jackson-Haisley J. but as presented by the Appellant in its Affidavits and or that [sic] pursuant to Form A1 (page) 45 and Rule 2.2 of the Court of Appeal Rules (CAR 2002).

(f) The Appellant … believes his constitutional rights were breached on February 26th, 27th and April 12th & May 14th 2019 by the decisions of Jackson-Haisley J.

(g) That in the case herein the Appellant states, there is a defense to Quantum open to [the appellant] on the **Bain v Fothergill** principle, which was not raised before the assessment judge and was not considered by her, resulting in the respondent being awarded damages which if [sic] may otherwise have not been awarded had the defendant been allowed to fully participate.

(h) That Jackson-Haisley J decision is aberrant and should be set aside. See (**Hadmor Production Ltd v Hamiltion** [sic] [1982] 1 All ER 1042, 1046 per Lord Diplock; see also **Attorney General v Mckay** [2012] JMCA App 1 paras [19] and [20].

(i) The Appellant … has good reasons and prospect for success to this appeal aided by paragraphs 168, 169, 174, 176 and 180 of the Judgement of The Hon. Mr. Justice Brooks JA, the Hon. Ms. Justice P Williams JA, (AG) The Hon Ms. Justice Edwards JA (AG). Between **Al-Tec Inc Ltd v James Hogan, Renee Lattibudaire**."

The counter-notice of appeal

[42] At the case management hearing of the matter held on 30 June 2020, the court granted the respondents permission to file a counter-notice of appeal. They did so, on 15 January 2021, on the following grounds:

"a. The Learned Trial Judge erred in ruling that [the respondents] were not entitled to the full replacement value of their premises.

b. The learned Trial Judge erred in finding that [the appellant] did not destroy the complete structure but rather only some aspects of the building.

c. That the Learned trial Judge erred when she discounted the award for destruction of property by 80% of the proven sums for the replacement of the structure."

[43] The respondents ask that this court allow the counter-appeal, increase the award of special damages by $14,125,000.00, as well as award them the costs in the appeal and below.

The application for stay of execution

[44] The appellant applied for a stay of execution of the judgment. On 4 February 2020, the court ordered that, while the appellant showed that there was merit in the appeal, a refusal of the application was the course of action which would cause the least injustice in the circumstances.

The application to adduce fresh evidence

[45] By notice of application filed 15 January 2021, the appellant sought permission to adduce fresh evidence at the hearing of the appeal in terms of a November 2020 valuation report for 5 Sandhurst Place. The main ground of the application was that the valuation report relied on by the judge at the assessment of damages hearing "exceeded five … years and did not provide a true or reasonably [sic] value or [sic] the property which squarely and directly affects the quantum awarded in the said assessment Judgement".

[46] On 24 February 2021, we heard this application immediately before the arguments in the substantive appeal.

[47] After considering the affidavit evidence and arguments we ruled as follows:

i. "The Appellant's notice of application filed 15 January 2021 to adduce valuation report dated 25 November 2020 as fresh evidence is refused.

ii. Costs on the application to the respondents to be agreed or taxed."

[48] We promised to provide our reasons at the same time as the decision in the substantive appeal, and now do so.

[49] In his affidavit filed 15 January 2021 in support of the application, the appellant stated that a November 2020 valuation prepared by CD Alexander Company Realty Limited, showed that the value of 5 Sandhurst Place was $54,000,000.00.

[50] The appellant filed a second affidavit on 20 January 2021. The affidavit appeared to be more focused on the making of submissions. He highlighted that, by seeking damages, the respondents were asking that he account for each contract. This automatically warranted a current valuation of the property. He urged that the judge had erred in relying on the 2012 valuation report for the property.

[51] The appellant referred to the principles laid down in **Ladd v Marshall** [1954] 3 All ER 745 in which it was stated that, in order to justify reception of fresh evidence, it would have to be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, the evidence could influence the result of the case, and it should be credible. Relying on **Natasha Richards and Phillip Richards v Errol Brown and The Attorney General** [2016] JMFC Full 05 the appellant argued that the judge erred and breached his constitutional rights, as she denied him the right to obtain and present evidence at the hearing. As a consequence, he had not been able to participate fully at the hearing.

[52] In response, Mr Carter, on behalf of the respondents, relied on his submissions filed on 21 January 2021. Firstly, he reiterated that the appellant did not file any witness statements but had, through his attorney-at-law conducted cross-examination of the main witness for the respondents and had made submissions.

[53] Counsel referred to and relied on **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26 in which the principles in **Ladd v Marshall** were applied. He submitted that the critical question was whether the fresh evidence could have been obtained with reasonable diligence for use at the trial. If it could have been, then permission to adduce it in evidence should be refused. In applying those principles to the case at bar, counsel submitted that there was no evidence that the valuation report could not have been obtained with reasonable diligence for use at the assessment of damages hearing.

Discussion

[54] The applicable principles in the determination of an application to adduce fresh evidence are not in dispute between the parties, and were correctly reflected in their submissions. In **Ladd v Marshall** Lord Denning stated, at page 748:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[55] As counsel for the respondents submitted and with which we agree, the critical question was whether the fresh evidence could have been obtained with reasonable diligence for use at the trial. There is nothing on the record to indicate that the appellant was prevented from filing witness statements or adducing documents at the assessment of damages hearing. There is no reason given as to why a valuation report, in respect of 5 Sandhurst Place, could not have been acquired before the assessment of damages hearing. Furthermore, in order to rely on a valuation report, the appellant would have had to comply with the provisions of the Civil Procedure Rules 2002 ('CPR') in respect of expert witnesses.

[56] In any event, in light of the facts in the case at bar, a 2020 valuation of 5 Sandhurst Place would not have assisted or influenced the court, as the critical date for assessment of damages for loss of bargain is, in the usual case, the date of the breach of the contract.

[57] It was for the above reasons that we refused the application.

Submissions in the appeal

The appellant's submissions

[58] The appellant submitted that the judge ordered specific performance of the 31 July 2013 agreement for sale in an incorrect manner. He argued that the judge was wrong to have awarded the respondents the full purchase price of 5 Sandhurst Place when they had not suffered that loss.

[59] Additionally, in 'performing' the 31 July 2013 agreement for sale, the judge erred in not ordering that JNBS should have been the direct recipient of the balance of the purchase price in exchange for the certificate of title of the property being issued to the appellant. He argued that the respondents refused to act on the order made by the court for the respondents to deliver an executed instrument of transfer to him. Alternatively, in light of the order which was made, the judge should have ordered the respondents to do so.

[60] The appellant argued that it was the 31 July 2013 agreement that was before the court when judgment was entered in favour of the respondents. The 2 August 2013 agreement which provided that the respondents would receive a townhouse to be built on 5 Sandhurst Place and thereafter transferred to them at a value of $20,000,000.00, was only placed before the court by the respondents in their amended particulars of claim.

[61] As was required by the 31 July 2013 agreement for sale, the appellant had paid a deposit of $2,242,000.00 to the respondents' attorneys-at-law. The appellant submitted that another error made by the judge in applying the principles concerning loss of bargain

was that she did not deduct the deposit from the sums awarded to the respondents. He emphasized that the respondents should have been ordered to return the deposit to him.

[62] The appellant submitted that the $43,600,000.00 contract value utilized by the judge had two beneficiaries. The respondents were to have benefitted from a $20,000,000.00 townhouse. He, on the other hand, stood to benefit from the $23,600,000.00 to be paid to JNBS "in exchange of the discharge and the Duplicate Certificate of Titles" for 5 Sandhurst Place. He urged that the respondents had in fact lost nothing, since they still owned 5 Sandhurst Place and it had been agreed that "only by exchange by relinquishing ownership of lot 5 would the opportunity which qualified and quantified the exchange benefit arises [sic]".

[63] The appellant argued that it was his constitutional right to fully participate in the assessment of damages hearing. This right had been breached, as he should have been allowed to file witness statements, and had not been allowed to present any evidence at the hearing.

The respondents' submissions

[64] Mr Carter made submissions on behalf of the respondents. Counsel stated that there appeared to be two issues for determination in the appeal. The first was whether the appellant had been allowed to fully participate in the assessment hearing, and the second, whether the judge had over-compensated the respondents in the award of damages.

[65] Counsel submitted that this court will need to ask itself whether the judge was wrong in arriving at the quantum of damages she awarded to the respondents. Insofar as the function of the court is concerned, counsel highlighted that the appeal court carries out a reviewing function in respect of the decision of the judge at first instance. Relying on **Hadmor Productions Limited and Others v Hamilton and Another** [1983] 1 AC 191 at page 200, counsel submitted that it is only where the exercise of a judge's discretion was based upon a misunderstanding of the law, or of the evidence before him,

or upon an inference that particular facts existed or did not exist, that the appeal court may set the judge's decision aside. He stated that the court would have to be satisfied that the result was plainly wrong before it would interfere.

[66] Turning to the question as to whether the appellant was prevented from fully participating at the assessment of damages hearing, counsel submitted that there is no merit in that ground of appeal. Counsel noted that the appellant has complained that he was not permitted to present evidence at the assessment of damages hearing. In addressing the question, counsel relied on **Natasha Richards and Phillip Richards v Errol Brown and The Attorney General**, in which it was held that a defendant, in proceedings where a default judgment has been entered against him, is to be permitted to actively participate in the assessment of damages hearing.

[67] Counsel submitted that the judge's reasons and the notes of evidence clearly show that the appellant was present with an attorney-at-law at the assessment of damages hearing. The matter proceeded, his counsel conducted cross-examination and made submissions on his behalf. While the appellant had not filed any witness statement ahead of the assessment of damages hearing, there was nothing on the record of proceedings showing any order preventing him from doing so.

[68] Proceeding to the question of double compensation, counsel submitted that, by the agreement for sale dated 31 July 2013, the appellant agreed to purchase the respondents' property for a sum of $23,600,000.00 and, by special condition 7 in that agreement, he had also agreed to transfer a completed four-bedroom townhouse to the respondents. Since the appellant failed to complete the purchase, and breached the agreement, he was liable to pay damages for the breach of the contract. He emphasized that, contrary to the submissions of the appellant, the judge did not make any order for the respondents to transfer the property to him.

[69] Relying on **McGregor on Damages**, 17th edition, counsel submitted that, on suing for loss of bargain and damages for breach of contract, the court is to make an

award that puts the claimant, as far as money can do so, in the position in which he would have been, had the contract been performed. The value of the 31 July 2013 agreement was $23,600,000.00 along with the completed townhouse. The body of that agreement did not disclose a value for the townhouse, however, the respondents had given evidence that it was agreed between the parties to be valued at $20,000,000.00 for the purpose of transfer taxes and stamp duties, which would make the value of the contract to the respondents a sum of $43,600,000.00. The judge then subtracted the approximate value of the property which remained in the possession of the respondents at the time of the breach. Based on a valuation report, the property had an approximate value of $27,000,000.00, thus the loss of the respondents' bargain was $16,600,000.00. Counsel submitted that the appellant had not challenged that "the true value of the contract to [the respondents] was the sum of $43,600,000.00 … and as such the Court was well in its right to accept the value ascribed to the 4-bedroom townhouse as per the evidence of [the respondents]".

[70] Counsel argued that the respondents had also placed in evidence, an agreement for sale dated 2 August 2013 in relation to the townhouse, for this to be used as a memorandum in writing to substantiate the respondents' evidence of its value. The 2 August 2013 agreement for sale, being unstamped, in light of the provisions of section 36 of the Stamp Duty Act, was not being relied on to enforce any rights or remedies in relation to the agreement for the sale and transfer of the property, but instead, to prevent the court from having to engage in guesswork concerning the value of the townhouse. Counsel relied on **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29 in support of this point.

[71] Counsel urged that, even if the 2 August 2013 agreement for sale were to have been excluded from evidence, it would have been in line with the accepted rules of evidence for the judge to have accepted the oral evidence of the respondents as regards the value of the townhouse. The appellant had also not challenged the evidence.

[72] In response to the query as to whether the amended particulars of claim expanded on the remedies sought in the original particulars of claim, counsel submitted that, by referring to the agreement for sale of 2 August 2013, the respondents were not expanding the cause of action or remedies being sought. The relevant breach of contract was that highlighted in the 31 July 2013 agreement for sale, to which reference was made in the original particulars of claim. Thus, the entire compensation had been addressed by the original pleadings. He reiterated that there were three contracts signed between the parties. The respondents had objected to the construction contract being adduced into evidence, but not the August 2013 contract.

[73] Finally, counsel addressed the award made by the judge for the reinstatement of the main building on the respondents' premises. This is the basis of the counter-notice of appeal. He submitted that the judge erred in discounting the proven costs by 80%, as this was not supported by case law, in light of the principles outlined in **Laird v Pim**. Counsel referred to the evidence of Mr Brian Pottinger and that of the 1st respondent, Mr Palmer, in which it was made clear that the appellant had damaged the house leading to a compromise of its structure and foundation. He submitted that the judge fell into error, as no tribunal could have concluded that the structure could have been put to any use after the damage caused by the appellant's actions. The respondents should therefore have been awarded the full sum payable for the rebuilding of their house, $17,125,000.00, instead of the discounted sum of $3,300,000.00. Counsel concluded by asking the court to adjust the damages, by awarding the respondents, an additional $14,125,000.00 for the rebuilding of their house.

The issues which arise for determination

[74] I agree with counsel for the respondents, that the main issues which the court has to determine are firstly, whether the appellant had been given an opportunity to fully participate in the assessment of damages hearing, and secondly, whether the judge had overcompensated the respondents in the award of damages for loss of bargain.

[75] Other questions which arose, but which it turned out, did not need to be determined in order to complete this matter, concerned the fact that the 2 August 2013 agreement for sale was not stamped and the variations between the original particulars of claim and the amended particulars of claim.

The law regarding a review of an award of damages

[76] The principles by which this court is guided, when considering an appeal in respect of the quantum of damages, are not in dispute. In **Desmond Walters v Carlene Mitchell** (1992) 28 JLR 173, Wolfe JA (Ag) (as he was then), in delivering the decision of the court, stated at page 178:

> "An appellate court, notwithstanding that an appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all the questions involved in the action including the question what damages ought to be awarded, will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the judges of appeal think that if they had tried the case in the first instance they would have given a lesser sum. **In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled**." (Emphasis supplied)

[77] While both the appellant and counsel for the respondents have referred to **Hadmor Productions Limited and Others v Hamilton and Another**, it is important to note that the principles outlined in that case relate to appeals in which this court is reviewing the exercise of discretion by a first instance judge, or single judge of this court, in respect of an interlocutory application. Those principles are not applicable to the case at bar.

[78] While the thrust of the appellant's complaints related to alleged errors of law which the judge made, the respondents, in their counter-notice of appeal, assert that the judge also made fact-finding errors. In the case of **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, the Privy Council ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Similarly, in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, it was stated, in part, at paragraph 12:

> "... It has often been said that the appeal court must be satisfied that the judge at first instance has gone '**plainly wrong**'. See, for example, Lord Macmillan in **Thomas v Thomas** [[1947] AC 484] at p 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. **Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence**: **Choo KokBeng v Choo Kok Hoe** [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis added)

[79] I will now move to consider the relevant law in respect of the issues.

Right to be heard during an assessment of damages hearing

[80] The appellant has argued that he was not allowed to give evidence and that his constitutional rights to fully participate in the assessment of damages hearing were therefore breached.

The law

[81] At the time when the assessment of damages hearing took place in February and April 2019, there were two rules in the CPR that spoke to the participatory rights of the appellant where a default judgment has been entered against him. These were rules 12.13 (Defendant's rights following default judgment) and 16.2 (Assessment of damages after default judgment).

[82] Rule 12.13 stated:

> "**Defendant's rights following default judgment**
>
> 12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are:
>
> (a) costs;
>
> (b) the time of payment of any judgment debt;
>
> (c) enforcement of the judgment; and
>
> (d) an application under rule 12.10(2)."

[83] The restrictive impact of this rule was considered by our courts. In **Natasha Richards and Phillip Richards v Errol Brown and The Attorney General** the Full Court, on 14 March 2016, concluded that the rule breached the rights of the defendants, against whom judgment in default had been entered, in denying them the right to participate actively in the assessment of damages hearing.

[84] The issue as to whether this rule was constitutional was eventually settled by this court on 12 April 2019 in **Al-Tec Inc Limited and James Hogan and Others** [2019] JMCA Civ 9. At paragraphs [169], [175], [177] and [179] of the judgment Edwards JA stated:

> "[169] In my view, the provisions in rule 12.13 of the CPR is disproportionate to the aim pursued. The danger associated with barring a defendant from fully participating at an

assessment hearing (which is a trial in itself), is that it creates an avenue, that enables a claimant to make one-sided submissions entirely untested. This is clearly not in the interests of justice. **The perpetual silence that the defendant must maintain on all issues relating to quantum, gives a claimant the unfettered opportunity to claim unreasonable and exorbitant sums, which, had the defendant been allowed to speak, evidence or submissions or both could be presented to the court, as to the reasons why a claimant is not entitled to the sums claimed**.

…

[175] Rule 16(2) reads as follows-

> '(1) An application for a default judgment to be entered under rule 12.10(1)(b), must state
>
> (a) whether or not the claimant is in a position to prove the amount of the damages; and, if so
>
> (b) the claimant's estimate of the time required to deal with the assessment.
>
> (2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days' notice of the date, time and place fixed for the hearing.
>
> (3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.
>
> (4) The registry must then fix:
>
> (a) The date for the hearing of the assessment;
>
> (b) A date by which standard disclosure and inspection must take place;

(c) A date by which witness statements must be filed and exchanged; and

(d) A date by which a listing questionnaire must be filed.'

…

[177] Rule 16.2(4) indicates the anticipation of a greater level of participation than that which is being argued by the respondent is allowable under rule 12.13 of the CPR and it is therefore imperative that the CPR is amended accordingly.

…

[179] … **It follows, therefore, that in finding that rule 12.13 of the CPR is indeed unconstitutional, and this means the appellant is at liberty to address the court on the issue of quantum and to present the authorities that support his argument that the respondents are not entitled to the sums being claimed as damages**." (Emphasis supplied)

[85] As a result of this decision, rules 12.13 and 16.2 have now been amended, since June 2020, to read respectively, with the relevant amendments highlighted:

"**Defendant's rights following default judgment**

12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are-

(a) **the assessment of damages, provided that he has indicated that he wishes to be heard by filing a notice in form 8A pursuant to rule 16.2(4)**.

(b) costs;

(c) the time of payment of any judgment debt;

(d) enforcement of the judgment; and

(e) an application under rule 12.10(2)."

"**Assessment of damages after default judgment**

16.2 (1) An application for a default judgment to be entered under rule 12.10(1)(b), must state –

(a) whether or not the claimant is in a position to prove the amount of the damages; and, if so

(b) the claimant's estimate of the time required to deal with the assessment.

(2) Unless the application states that the claimant is not in a position to prove the amount of damages –

(a) the registry must fix a date for the assessment of damages and give the claimant **and the defendant** not less than **42** days' notice of the date, time and place fixed for the hearing;

(b) **the claimant must file and serve on the defendant all witness statements and written submissions on which the claimant intends to rely within 14 days of service of the notice of assessment;**

(c) **the defendant is at liberty to file and serve witness statements and written submissions on which he intends to rely within 14 days of service of the claimant's witness statements and submissions on him.**

(3) **If the claimant is not in a position to prove the amount of damages the registry must fix a date for a case**

management conference and give the claimant and the defendant not less than 42 days' notice of the date, time and place fixed for hearing.

(4) **Where a defendant against whom a default judgment is entered under this rule wishes to be heard on the issue of quantum he must within 7 days of receipt of the notice under rule 16.2(2) or 16.2(3) file and serve a notice in form 8A.**

(5) The defendant is entitled to cross-examine any witness called on behalf of the claimant, call evidence as disclosed in his notice filed in form 8A and in respect of witness statements which have been filed and served pursuant to rule 16.2(2)(c) and to make submissions to the court." (Emphasis supplied)

[86] It will be seen that the amendment addresses the concerns highlighted by the Full Court in **Natasha Richards and Phillip Richards v Errol Brown and The Attorney General** and later, by this court, in **Al-Tec Inc Limited and James Hogan and Others**.

[87] In this case the evidence was taken, and submissions were made at the assessment of damages hearing, on 26 and 27 February and 12 April 2019. The judge delivered her decision on 14 May 2019. This court handed down its decision in **Al-Tec Inc Limited and James Hogan and Others** on 12 April 2019, the day when the judge reserved her decision. However, the 2016 decision of the Full Court in **Natasha Richards and Phillip Richards v Errol Brown and The Attorney General,** would have been available to the judge, even if not binding on her**.** As noted above, the Full Court had ruled that a defendant against whom a default judgment was entered, was entitled to increased participation in an assessment of damages hearing. The scope of participation is related to quantum, including submissions in relation to the reasonableness of an award.

Discussion

[88] Were the appellant's constitutional rights breached? It is not clear why, in the instant case, the appellant did not file any witness statements ahead of the assessment of damages hearing. There is nothing on the record of appeal reflecting any order preventing him from doing so.

[89] At paragraph [7] of the judgment, the judge indicated that the appellant was allowed to participate in the assessment of damages hearing and explained that:

> "At the Assessment of Damages hearing, counsel for [the appellant] sought an adjournment on the basis that they intended to challenge the Judgment. The adjournment was denied and the matter proceeded. **[The appellant] participated in the proceedings and was represented by counsel who actively participated**." (Emphasis supplied)

[90] A defendant against whom a default judgment has been entered is entitled to give evidence and make submissions. However, these would be limited to issues dealing with quantum and the reasonableness of an award. It appears, however, that the appellant was seeking to again challenge the issue of liability, having failed in a previous application. The assessment of damages hearing was not at an appropriate forum in which to do so. The appellant, through his counsel, was able to conduct cross-examination as well as make submissions on the quantum of damages. The appellant's complaints and grounds of appeal in this regard fail as they have no merit.

[91] What of the law relating to compensation for loss of bargain?

<u>The award of damages</u>

The law on loss of bargain

[92] The appellant's main complaint is that the award of damages which the judge made was excessive, as it overcompensated the respondents, and was based on an incorrect application of the principles on compensation for loss of bargain.

[93] As counsel for the respondents has correctly stated, in compensating a claimant for breach of contract, the aim of the court is to, as far as money can, put the claimant in the position in which he would have been, had the contract been performed. This principle was acknowledged in **Jamalco (Clarendon Alumina Works) v Lunette Dennie**, at paragraph 18 of the judgment of then President of the court, Panton P.

[94] In **McGregor on Damages**, 17th edition, paragraphs 22-034-22-037, the authors look at the normal measure of damages, and, relying on **Laird v Pim,** state that this measure would usually be the contract price less the market price at the contractual time fixed for completion. There could also be consequential losses and incidental expenses.

[95] The case of **Laird v Pim** [1835-42] All ER Rep 67 is the leading authority on the question of compensation for breach of contract, where a purchaser refuses or fails to complete an agreement for sale. In that matter, the defendants promised to purchase a lot of land from the plaintiff. The plaintiff permitted the defendants to take early possession of the land. The plaintiff was prepared to and offered to complete a conveyance to the defendants, but the defendants discharged the plaintiff from doing so, and did not pay the purchase money for the land. The plaintiff claimed that it was wholly entitled, among other things, to the purchase money of £4,125.00 together with interest. At the trial of the action before Rolfe B, it appeared that the defendants, while in possession of the land, had also taken from it and sold a quantity of brick clay. The plaintiff contended that the proper measure of damages was the purchase money, which had been agreed on, with interest. On the other hand, the defendants insisted that the plaintiff could not be entitled to recover the purchase money, as the land had never been conveyed, and the plaintiff still remained the owner of it as before the agreement for sale to the defendants. Rolfe B was of the opinion that the plaintiff could not recover the whole purchase-money, but was entitled to such damages only as had resulted from the defendants' breach of their contract. The judge awarded the plaintiff £750.00 consisting of £680.00 for interest on the purchase money up to the commencement of the action, and £70.00 for the value of the brick clay. The plaintiff challenged the decision of the

judge, desiring that the damages should be increased by the amount of the purchase money of £4,125.00. In ruling on the issue, Parke B stated at page 69:

> "The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. **The question is, how much worse 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? It is clear he cannot have the land and its value too.** A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again. The direction of ROLFE, B, therefore, was quite correct." (Emphasis supplied)

[96] The commentary in **Halsbury's Laws of England** Vol 29 (2019), paragraph 603 is also useful. There the authors state:

> "**When on a contract for the sale of land the purchaser wrongfully refuses to complete, the measure of damages is the injury sustained by the vendor as a result, set presumptively at the difference between the price and the value of the land concerned.** Older cases suggested that the value for these purposes should presumptively be taken at the time fixed for completion. More recently, however, this has been seen to be unrealistic in the light of the lack of a generally available market for land. Today, if the vendor has resold within a reasonable time of the breach the actual difference in price may, in general, be recovered; otherwise, damages are likely to be reckoned as at the time he might reasonably have sold, or has reasonably abandoned any attempt at resale.
>
> In addition, **the innocent vendor may claim** wasted conveyancing costs and **any other consequential losses**, in so far as these result from the breach and are not too remote.
>
> **The vendor may generally retain any deposit, independently of whether he has suffered any loss; but if he does sue for damages credit must be given**

> **for the amount of any deposit retained."** (Emphasis supplied)

[97] **Hooper and Another v Oates** [2013] EWCA Civ 91 demonstrates that the appropriate date for the assessment of damages, where a buyer fails to complete a contract for sale and purchase of land, is not always the date of the breach. The case is also useful as an illustration of an instance when the value of the property being sold had fallen. In that case, the vendors had agreed to sell their property to the purchaser for £605,000.00. The purchaser failed to complete the purchase on the contractual completion date and the vendors accepted his repudiation. The vendors attempted to resell the property at a reduced asking price, but no purchase followed. They placed the property on the market again and received no offers which proceeded to exchange of contracts. They eventually ceased trying to market the property and sued the purchaser. At the determination of damages in March 2012, the evidence of the single joint expert valuer was that the open market value of the property at the date for completion had been £600,000.00, and at the date of valuation it had fallen to £495,000.00. The recorder noted that the normal rule was to assess the value of damages by reference to the date of the breach of contract, but thought that he should depart from that general rule in the interest of fairness, and assess damages at the date which more accurately reflected the overriding rule as to compensating the wronged party. He held that the damages should be assessed by reference to the later date and the sum of £495,000.00.

[98] The purchaser appealed, arguing that there was no good reason for the court to have departed from the normal rule by reference to value at the date of breach where the seller had not resold the property. The summary of the main principles guiding the court are outlined below in full:

> " **The breach date was the right date for assessment of damages for breach of contract only where there was an immediately available market for the sale of the relevant asset or for the purchase of an equivalent asset**. That was unlikely to be the case where the asset in question was land. **If the defaulting party was the buyer, much would depend on what the seller did in response**

> **to the breach.** Absent the buyer being able to show that the seller had failed to take reasonable steps to mitigate his loss, **the eventual resale price was likely to be the figure to be set against the contract price for the assessment of damages, not because it represented market value at the date of the breach, but because it showed what loss the seller had suffered, uncomplicated by issues of remoteness or failure to mitigate.** If the property market had declined during that time, it was of no avail for the defaulting buyer to say that that should not be laid at his door; if the buyer had completed the contract, he would have suffered that decline in value, so that was part of the loss for which the seller needed to be compensated. **Where the seller did not resell and took no steps to do so, the relevant date would be the date of the breach or a date soon after, when the seller was shown, or taken, to have decided to retain the property.** In a case such as the instant case, where the seller had only decided not to resell after taking reasonable steps to find a buyer, there was no basis of policy or principle for imposing on the seller the value as at the breach date rather than the later date when, after taking steps with a view to mitigating his loss, he had finally decided to retain the property upon the failure of his attempt to mitigate. Accordingly, the appeal would be dismissed…" (Emphasis supplied)

[99] In summary, where a purchaser fails to complete, and the vendor sues for damages for breach of contract, the compensation for the breach of contract is assessed by looking at the difference between the purchase (contract) price and the value of the property (market price). If the value of the property falls after the breach, as occurred in **Hooper and Another v Oates**, then the vendor is to be compensated for this diminution in the value of the property. The court will usually assess damages as at the date of the breach of contract.

Analysis-loss of bargain

[100] What did the parties agree? The agreements between the parties contemplated the following:

a. The appellant would purchase 5 Sandhurst Place from the respondents;

b. As a part of the consideration for the property, the appellant would settle the mortgage of $23,600,000.00 with JNBS;

c. 5 Sandhurst Place would be transferred to the appellant;

d. The appellant would then build on 5 Sandhurst Place, Phase 2 of his development including a four-bedroom townhouse at an agreed value of $20,000,000.00 (for stamp duty and transfer tax purposes only) for the respondents; and

e. The townhouse was a part of the consideration that the appellant was providing for 5 Sandhurst Place.

[101] The deal did not go through, however, and the respondents remain in possession of their property, though a building on the property was damaged.

[102] At the assessment of damages, the respondents relied on a June 2012 valuation report, which established the value for the property at between $26,000,000.00 to $28,000,000.00. This information was relevant to determine the market price of 5 Sandhurst Place at the time when the appellant breached the contract. The judge utilized the figure of $27,000,000.00 as the market price of the property. This was in keeping with the evidence. However, it is noteworthy that the June 2012 valuation report was out of date, in light of the January 2014 termination of the agreement for sale. In addition, the respondents did not provide the judge with a valuation reflecting the depreciation (if any) of the property in light of the actions of the appellant, which damaged the main building. This issue will be examined later in this judgment. The judge stated that if the contract had been performed, the respondents would have stood to gain the proceeds of

the sale of the property, $23,600,000.00, as well as a townhouse valued at $20,000,000.00, so that the expected bargain (contract price) was $43,600,000.00. This finding was also in keeping with the evidence, and the appellant does not dispute the contract price.

[103] There is no dispute that if the contract had not been breached, the respondents would have transferred the land to the appellant, who would have paid off the mortgage on the property, and they would have received a four-bedroom townhouse. Since the appellant had not paid for and had not received the property, the respondents still owned it. The judge deducted from the contract price of $43,600,000.00, the $27,000,000.00 market price of the property which the respondents retained, in line with the evidence before her, and assessed the loss of bargain as $16,600,000.00. In my view, the judge was correct. Contrary to the appellant's submissions, the judge did not over compensate the respondents by awarding them the value of the property when they were retaining it. The approach which the judge took placed the respondents, as far as money could, in the position in which they would have been, had the contract been performed.

[104] The appellant has argued that the judge, in enforcing the contract, should have ordered that the remainder of the purchase price be paid to JNBS, and the title for the property handed to him. The judge did not order specific performance of the contract, and so there is no basis on which the respondents could now be ordered to transfer the property to the appellant.

The deposit

[105] The appellant is correct that, in light of the fact that the judge did not order specific performance of the contract, as a result of which 5 Sandhurst Place was not transferred to him, he ought to have been reimbursed the deposit of $2,242,000.00 which he made on signing the agreement for sale. Special condition 2 of the 31 July 2013 agreement for sale, provided that the respondents' attorneys were entitled to use the deposit to pay the stamp duty and transfer tax due on the agreement for sale. This payment was clearly made, as the sum of $2,124,000.00 is endorsed on the stamped 31 July 2013 agreement.

Special condition 2 also provided that, if for any reason, payments had to be refunded to the appellant, he would be deemed to have been refunded to the extent of the stamp duty and transfer tax paid, if he is given the original transfer tax receipt and stamped agreement, with a note by the vendor that the agreement was cancelled. In addition, the vendors would refund the appellant any amount remaining from the deposit over and above the payments made for the transfer tax and stamp duty. In this case, the amount remaining was $100,000.00. In my view, the respondents ought to comply with special condition 2 of the agreement for sale since it has been cancelled.

The counter notice of appeal and the award of special damages

[106] As the cases have shown, the vendor may have suffered consequential losses, for which he may be compensated. In this case, the respondents led evidence that the appellant had damaged aspects of the main building. There was no dispute that the damage to the building was so extensive that it was not financially prudent to repair it. The cost to rebuild was $16,500,000.00, using a basic National Housing Trust rate.

[107] It is important to bear in mind the matters which the judge highlighted before she decided on her approach to the respondents' claim for the replacement cost of the main building. The judge noted that:

> (a) Counsel for the respondents had relied on **Laird v Pim** in which one of the questions to be answered is how much worse the plaintiff is by the diminution in the value of the land, in consequence of the non-performance of the contract;
>
> (b) While the report from the engineer spoke to a replacement cost, the respondents would only be entitled to a sum representing the depreciated value consequent upon the actions of the appellant;

(c) To compensate the respondents for the full replacement cost would be tantamount to over compensation for a number of reasons including that:

(i) At the time when the parties entered upon the agreement for sale the house was 75 years old and was made of timber;

(ii) When the respondents entered into the agreement with the appellant, it was with the understanding that the structure would have been destroyed;

(iii) The appellant had not destroyed the complete structure, but instead, some aspects of the building; and

(iv) The appellant had removed the roof, all doors, some of the floors, windows, grills, electrical and all kitchen and bathroom fixtures.

[108] Having outlined the above points, the judge stated that she was prepared to discount the replacement cost by 80%, and make an award representative of 20% of the replacement cost.

[109] The judge did not make any mistake in her findings of fact or evaluation of the evidence. She was also correct in her statement of the relevant principles of law. I agree with the judge's opinion that it would have been wrong to award the respondents the sum of $16,500,000.00, as this would have clearly overcompensated the respondents. What remains for review, therefore, is her actual decision as to what was a reasonable award in all the circumstances. The question is whether the judge was clearly wrong to have awarded the respondents the sum of $3,300,000.00 as special damages, in light of the damage which the appellant caused to the main building.

[110] In calculating the respondents' loss of bargain, one of the amounts which the judge included in the total contract price of $43,600,000.00, was $23,600,000.00 representing the market price that both parties had ascribed to the property, which included the land and buildings in their original state. The other amount included in the contract price was $20,000,000.00 as the value of the townhouse, which was to have been built for the respondents. Relying on the June 2012 valuation report for the property however, in light of the fact that the respondents still had the property, the judge deducted the sum of $27,000,000.00 as the market value of the property. This was, of course, the value of the property in its original state in 2012. There is no dispute that the appellant damaged the main building. However, unlike the situation in **Hooper and Another v Oates**, no evidence was led to show how the damage to the building impacted or diminished the market value of the property. While the respondents led evidence of the replacement cost of the main building, that cost would not have necessarily equated with the extent of any diminution in value to the property.

[111] The compensation to which the respondents were entitled, in the context of a loss of bargain claim, would have been impacted by the depreciation in the value of their property due to the appellant's damage of the building. A valuation of the property at the time of the termination of the contract, January 2014, would have placed the court in a position to utilize the depreciated value (if any) as the market value, and deduct that figure from the contract price. It bears repeating that this was important, since the value of the property that was provided by the June 2012 valuation on which the respondents relied at trial, covered both the land and the building. The judge was not provided with information as to the value of the property at January 2014 however, and so was placed in the difficult position of trying to arrive at a figure reflecting some element of depreciation of the property. She attempted to do this by extrapolating from the engineer's report. In passing, it should be noted, and ought not to be overlooked, that there is also the possibility that the property could have increased in value by 2014, in spite of the damage to the main building.

[112] In considering this issue, and how the judge approached it, the context in which the claim was brought and later pursued, must be examined. The parties entered into the agreement for sale on 31 July 2013, the appellant began to occupy the property in August 2013, and the respondents terminated the agreement for sale, six months later, by letter dated 27 January 2014. The claim was filed in March 2014. The engineer who prepared the report on, and provided a replacement cost for, the main building, carried out his inspection in March 2018, a little over four years after the respondents had terminated the agreement for sale. The six-month period over which the appellant occupied the main building in particular, is in stark contrast with the 48-month period that, on the evidence before us, elapsed after January 2014, and leading up to March 2018, when the engineer inspected the building and prepared a costing for replacement of the building. Again, it should not be overlooked that the cost to rebuild the main building could well have increased between January 2014 and March 2018.

[113] The engineer's report pointed to the degradation of the building's timber frame due to exposure to the elements, including sun and rain. Mr Palmer testified, clearly in an attempt to address the issue of the duty to mitigate loss, that he and his wife were not able to effect repairs "contemporaneously" to the damage effected to the premises, as they had to be making mortgage payments for the property in which they were unable to live, and had to, at the same time, rent other property in order to provide shelter for the family. From the evidence of the state of the building in 2012, according to the June 2012 valuation report, it does not appear that the building was ready for occupancy in any event, and this may explain why, when the respondents agreed to sell the property to the appellant, they had not yet moved into the house. In any event, the judge awarded the respondents a sum for rental of other accommodation. Returning to the issue of mitigation of loss, it may well have been that it was difficult for the respondents to find money to fix the property at the time, but it is noteworthy that the respondents did not give any evidence of any attempt to limit or minimise the damage to the building, by way of covering it, for example, even if they were not in a position to rebuild immediately.

From the evidence, it appears that the building was left totally exposed to the elements after they terminated the agreement.

[114] In the context of the claim for loss of bargain, in which a new townhouse was to have been provided in which the respondents would live, and the value of which was included in the contract price, it was correct for the judge to highlight that, had the contract proceeded without a breach or termination, the main building was to have been demolished, and the respondents would have lived in the new townhouse to be built on the property they sold to the appellant. This had further implications, as the judge properly noted, because it would not have been proper to provide the respondents with a new building on the property, which they were going to sell, and at the same time, provide them with the value of the new townhouse in which they were to live. At the time when the judge was considering this issue, she had already made an award for loss of bargain, taking into account the value of the $20,000,000.00 townhouse, which the respondents were to have received.

[115] Although the judge's approach appears somewhat informal, it is interesting to note that, in the end, the respondents, with their land still in hand, were awarded $19,900,000.00 in damages, just $100,000.00 less than the value of the townhouse, which was to have been built for and handed over to them. It is also interesting to note that this figure exceeded the replacement cost of the main building. The judge's decision to discount the replacement cost by 80% was as a result of her doing her best in circumstances when the relevant information was not provided to her, and, in my view, in light of all the circumstances, is not irrational. The judge's approach accorded with the principles which Phillips JA highlighted in **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29, at paragraphs [52]-[60]. The court has to do the best it can in circumstances where the quantification of damages is difficult.

[116] Furthermore, having considered the other grounds of the counter notice of appeal, it is my view that the judge did not err when she decided that the respondents were not entitled to the full replacement value of the main building, and was also correct when she

stated that the appellant had not destroyed the complete structure, but only aspects of the building.

[117] In order to arrive at a different compensatory amount, this court would also have had to try to extrapolate from the engineer's report and identify a level of discount, as the judge did. We are not in a better position to assess the damages, which would be appropriate. As has been indicated time after time, in these types of circumstances, the review of this court must be benign. Even if this court could have reached a different conclusion as to (a) how to arrive at a compensatory figure, and (b) the appropriate figure, it does not appear that the judge's decision is plainly wrong or irrational. I am also not convinced that the amount she awarded was so inordinately low so as to make it an entirely erroneous estimate of the damages to which the respondents are entitled.

[118] There is one error, however, that will be noted. The judge treated the award of $3,300,000.00 as an award of special damages. This was erroneous, as the respondents had not spent these funds.

[119] As a result, the award of $3,300,000.00 ought to be upheld as an award of general damages, not special damages; and it follows that, for the reasons outlined above, the respondents' counter-notice of appeal cannot succeed.

Costs

[120] The respondents have failed in their counter-notice of appeal. The appellant has only partially succeeded in his appeal, as the judge's award for loss of bargain has been upheld. However, the appellant has succeeded on a minor point, as he is to be refunded the deposit he made on the property. I suggest that the reasonable outcome in respect of costs is that the parties bear their own costs of the appeal. However, the respondents would still be entitled to the costs awarded at the assessment of damages hearing.

HARRIS JA

[121] I too have read in draft the judgment of my sister Foster-Pusey JA. I agree that it was for the reasons given that we refused the application to adduce fresh evidence. Insofar as the appeal is concerned, I also agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed in part.

2. The counter notice of appeal is dismissed.

3. The award of general damages for loss of bargain, in the sum of $16,600,000.00 with interest at a rate of 3% per annum from 14 March 2014 to 12 April 2019, is upheld.

4. The award of $3,300,000.00 (albeit as general damages) with the interest at a rate of 3% per annum from August 2013 to 12 April 2019 is upheld.

5. The appellant is entitled to the return of the deposit pursuant to special condition 2 of the 31 July 2013 agreement for sale. The respondents are to deliver to the appellant, the original transfer tax receipt and 31 July 2013 stamped agreement, with a note by the respondents that the agreement was cancelled.

6. The respondents are to refund the appellant the sum of $100,000.00, being the amount by which the deposit exceeded the sum paid on the 31 July 2013 agreement for stamp duty and transfer tax.

7. Each party to bear their own costs of the appeal and counter notice of appeal.