IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1982/H220

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| BETWEEN | EXLEY HO | PLAINTIFF |
| A N D | RUDYARD STEPHENS | DEFENDANT |

SUIT NO. C.L. 1984/S056

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| BETWEEN | RUDYARD STEPHENS | PLAINTIFF |
| A N D | THE ADMINISTRATOR GENERAL FOR JAMAICA | 1ST DEFENDANT |
| A N D | FEDERAL INVESTORS LTD. | 2ND DEFENDANT |
| A N D | KRIAS LTD. | 3RD DEFENDANT |

[Consolidated Actions by Order made in C.L. 1982/H22 on 20th October, 1988.]

Dr. L. Barnett and Mr. P. DePass instructed by Mr. D. Brandon of Livingston Alexander & Levy for Plaintiff Exley Ho.

Mr. Francis and Mr. Norman Harrison for Defendant Stephens

**Heard: 8th, 10th, 11th, 18th November, 1993 & June 10, 1994**

**ASSESSMENT OF DAMAGES**

**HARRISON J. (Ag.)**

Pursuant to the Order of Theobalds, J., dated 5th October 1990, I have assessed damages in respect of a breach of contract relating to the sale of land in Suit C.L. 1982/H220. It is regretted that it has taken some time in handing down this award and I do apologise for the delay.

What is the evidence in this case? The plaintiff and his partner Dennis Hugh are owners of 14 and 16 Red Hills Road, St. Andrew. They carry on the business of manufacturers and distributors of electronic products, and hardware merchants at this address. Business was expanding, hence additional space was required for the manufacturing and storage of raw materials, finished goods and new products.

Dennis Chin, a Real Estate Agent, was contacted in 1981 and he gave the plaintiff information concerning 10 Red Hills Road which bounded 14 and 16 Red Hills Road on the west.

Chin, acting on behalf of the defendant, subsequently informed the plaintiff that 10 Red Hills Road was available at a price of $200,000 and

that a minimum of 50% deposit was required by the defendant/vendor.

The defendant testified that he signed the sale agreement on the 29th day of September 1981 for completion to take place on the 30th of March 1982. However, before he signed, he had requested Chin to communicate the following information to the plaintiff:

1. That the land was bought by him from one Jobson who died intestate and before title was transferred to him.
2. That the Administrator General was administrator of Jobson's estate.
3. That a transfer to the plaintiff would take some time.
4. That he was not legally in possession of the land as Jobson had not put him in possession before he died.
5. That there was a mortgage on the land to United Dominion Corporation.

Chin has testified that he pointed out these problems to the plaintiff who nevertheless agreed to take the property. The sale agreement was subsequently signed and $100,000.00 paid to him.

The defendant/vendor failed to complete the contract within the stipulated time so the parties had to resort to a number of interlocutory applications in the Supreme Court in order to resolve certain issues. On the 6th April, 1983 an order was eventually made for specific performance of the agreement.

The evidence also revealed that sometime in 1984 or 1985, the defendant had occupied the land making use of it. According to him, he had built three 'massive' sheds on it and they were used for storing his trailers and lumber. He had also leased a portion of the land to a third party and was collecting monthly sums for rent. This agreement commenced in either 1986 or 1987.

There was also evidence that when the plaintiff's nominee, Krias Ltd., bought the mortgage from United Dominion Corporation (U.D.C.) and served notice on the defendant to foreclose, the defendant sought and obtained an order in 1987 to pay off the mortgage. He claimed that he bought the mortgage in order to exercise a power of sale to give the plaintiff title, but this was

not to be.

On the 12th July 1989, the court granted the plaintiff an order for possession of the property. Although he had acquired possession in June 1991, it was not until June 1992, he finally got vacant possession.

Both the plaintiff and his partner have testified that Chin was told that the property was acquired for extension of their present business and that it was needed 'pretty quickly.' They had plans for the development of 14 and 16 Red Hills Road before they decided to acquire No. 10 and the draftsman was instructed to incorporate No. 10 in the plans for 14 and 16 Red Hills Road. This was done some 2 - 3 months after signing the contract. The plans were submitted to the Kingston and St. Andrew Corporation and were finally approved on the 14th February, 1984.

It was further contended by the plaintiff that if the proposed expansion was carried out there would have been extra storage and warehousing facilities and a factory for the assembly of Pro-Chef stoves.

Evidence was led that in 1984, the estimated cost of construction would have been in the region on $7.6 million. In June 1991, construction was estimated in the region of $25.6 million and financing for the project was already discussed with Jamaica Citizen's Bank.

Both the defendant and his agent have denied that they were told the reasons why the land was bought and neither were they told of the intended expansion. Although Chin knew that the plaintiff was carrying on business at 14 and 16 Red Hills Road, the defendant has denied knowledge of this.

My task now, is to ascertain the correct principle on which the damages in this case should be determined and the amount of damages the plaintiff is entitled to. What are the principles which guide a court when it comes to assess damages in respect of delay caused by the vendor's wilful refusal to perform his contract and the consequent loss of profit to the purchaser results? The measure of damages is, as stated by Fry J., in **Jacques v Millar** (1877) 6 Ch.D 153, "the value of the possession of the premises to the plaintiff" for the period of the delay. He said at page 159:

> "I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which

> may be reasonably supposed to have been in contemplation of the parties as likely to arise from the partial breach of the contract."

In relation to loss of profits concerning contracts for the sale of land, it has been established in a number of cases that a purchaser may claim the loss of profit he intended to make from a particular use of land only if the vendor had actual or imputed knowledge of special circumstances showing that the purchaser intended to use the land in that way. See **Diamond v Campbell-Jones** [1961] Ch. 22, **Cottril v Steyning and Littlehampton Building Society** [1066] 1 WLR 753.

In **Koufos v C. Czarnikow** [1969 1 AC 350 Lord Reid stated at page 385 as follows:

> "The curcial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

For the defendant, Mr. Francis submitted that in order for the plaintiff to be awarded substantial damages based upon a loss of economic opportunities, it must be proved that the defendant knew of the expansion plans. He cited and relied on the case of **Koufus v C. Czarnikow Ltd.** [1969] 1 A.C. 350. He submitted that neither the agreement for sale nor the statement of claim had asserted that the defendant was aware of the purpose for which the plaintiff was purchasing the property. Furthermore, since the loss of economic opportunities was so material and formed a large item of the plaintiff's claim, it was expected to be seen as a condition in the sale agreement and in the pleadings.

He further submitted that the plaintiff had not proved that he suffered any financial loss in order to justify an award of $4,406,599.00 for "Fair Market Rent" of the proposed expansion at 10 Red Hills Road as set out in Exhibit 6. According to him the plaintiff was required to prove that he had rented somewhere else and had paid this sum of money.

It was further contended that this loss must be specially proved as

an item of special damages and anything else but strict proof of payment or liability to pay would be merely speculative.

In dealing with the above submissions two questions seem to arise for consideration. The first is, whether the statement of claim has sufficiently alleged a claim based on loss of economic opportunities. The second is what, if any, is the effect of the plaintiff's failure to plead this loss in the statement of claim.

Mr. Francis had submitted that this failure would be fatal to the plaintiff's claim for substantial damages. Dr. Barnett on the other hand, submitted that the defendant was not permitted at the stage of final addresses make a pleading point. He argued that when the Court made the order for damages to be assessed, the directions did not contain one for further pleadings. There had been correspondence between the parties including the submission by the plaintiff of his valuation which indicated quite clearly what he was claiming for loss of economic opportunities. Dr. Barnett further argued that the defendant did not request particulars and since he had participated in the conduct of the assessment on the basis of that claim he ought not to raise this point now.

I have examined the statement of claim and it does not expressly state a claim for loss of economic opportunities. It states inter alia the material terms of the sale agreement and that the plaintiff seeks possession of the premises. In my opinion, an allegation of a loss of value of possession of the land was implicit in the statement of claim. There is a well established principle that an action is normally to be tried not on the pleadings, but on the evidence. I find support for this principle in the case of **Gloucester House v Peskin** 4 W.I.R. at page 191 where Marnan J., stated inter alia:

> "... The plaintiff will not, of course, be allowed to set up an entirely new case at trial, but where his statement of claim is merely defective, e.g. for lack of proper particulars of damage, the consequence is, not that he necessarily fails to recover anything, but that he will not be allowed to tender evidence of such loss unless he obtains leave to amend and delivers proper particulars .....Where, however, whatever the state of the pleadings, evidence has been received without objection, the court is entitled to act on that evidence....."

I therefore find merit in the submission made by Dr. Barnett.

I also disagree with the submission that the amount of financial loss must be pleaded in the statement of claim as an item of special damage. It is my view that the particulars of loss set out in Exhibit 6 sufficiently take care of this.

In relation to this claim for loss of economic opportunities Dr. Barnett submitted that the plaintiff's claim was as a result of him being prevented from carrying out the desired expansion. He stated however, that this claim was alternative to a claim of rental of the existing buildings and land. He contended that the defendant through his agent knew of the proposed use of the site and by making time of the essence it was understood that this meant acquisition of the land by the contractual time was a matter of importance to the purchaser. The fact that he paid a 50% deposit in answer to the defendant's demand indicated that the purchaser was anxious to get the land. There was he said, unchallenged evidence that plans were already prepared to build on lands belonging to the plaintiff and he proceeded to incorporate 10 Red Hills Road into the building plans for which statutory approval was obtained. In light of these factors, he submitted that the sum of $4,406,509.00 for fair market rent of the premises from the date of completion of the proposed buildings to June 1991, as set out at page 2 of Exhibit 6, are recoverable as damages.

From the evidence adduced in this case, I am not satisfied on a balance of probabilites that a claim based on loss of economic opportunities has been made out. I am inclined to believe that the defendant was not aware at the signing of the contract of the proposed plans for 10 Red Hills Road.

On the authority of the cases I have referred to, the plaintiff would therefore be entitled to have damages assessed for the loss of the fair market rent of the premises. The measure of damages would be the value of the possession of the land to him for that purpose.

Mr. Francis submitted that the plaintiff is entitled only to damages which the market rent for the land would have generated from the period the Court ordered the defendant to give up possession, that is 12th July, 1989,

to June 1991, the date he was given possession. He highlighted a number of factors to show the defendant's inability to convey title and how this led to his failure to complete. Firstly, the defendant never had legal possession of the property when he bought it from Jobson. Secondly, he did not get possession when the Administrator General became the administrator for Jobson. Thirdly, when the Court made the order for the contract to be specifically performed it was an order incapable of performance. From his point of view, an award of $62,125.00 based upon calculations arrived at in Exhibit 15 by R.L. Palmer, Valuator, would be appropriate.

Dr. Barnett submitted on the other hand, that the breach of contract had occurred from the date of completion and any delay beyond that point gave rise to an action for damages. It was his view therefore that the date on which the order was made giving the plaintiff possession was irrelevant. From his reasoning, a claim in respect of the land would run from April 1983 when possession should have been given, to June 1991 when possession was actually given. He argued that although the defendant claimed he was unable to give possession to the plaintiff he exercised acts of ownership and possession over the land. He submitted that in these circumstances, there would be no doubt that the plaintiff would at least be entitled to damages in respect of a fair market rent of the existing premises which would include rental valuations for both land and buildings.

It was contended by Mr. Francis that the defendant should be credited with the value of the sheds as they were erected on condition that he would remove them. He also submitted that the purchase money should be deducted from any damages the plaintiff is to receive.

The question whether or not the defendant could remove these structures depended on the nature of their annexation. They were made of hollow steel uprights, embedded in concrete foundations and fitted with steel straps. According to the defendant they were built to withstand hurricane force winds and withstood hurricane "Gilbert." I am of the view therefore that these sheds now form part of the realty and do belong to the owner of the land. See **Reynolds v Ashby and Son**[1904] A.C. 468. I do not agree with Mr. Francis

that the purchase money ought to be deducted from the damages to be awarded.

I agree with Dr. Barnett firstly, that damages would become assessable from the date of completion and secondly, that in assessing the value of possession of the premises, the rental value of both land and buildings must be taken into consideration. On his calculation a sum of $808,700.00 based upon the method of appraisal in Exhibit 6, would be reasonable. This sum was arrived at after taking into consideration the rental to be obtained from the land, three sheds, and building leased to a third party for the period April 1983 to June 1991.

The evidence has revealed that it took close to ten(10) years for this contract to be performed. A number of factors can be attributed to the defendant for his failure to complete. He purported to sell a property for which he had no legal title at the time of entering into the contract of sale with the plaintiff. Neither was he in possession of this property. Despite these disabilities he nevertheless demanded and received a 50% deposit on sale. As a matter of fact his agent did inform the plaintiff, that if the full price was paid he would have been given possession immediately. How he hoped to have achieved this in view of his inability to convey title is beyond one's imagination.

In April 1983, the Court decreed specific performance of the contract but according to him it was an order incapable of performance. He was not in a position to perform but shortly thereafter in 1984, he built "massive" sheds and exercised acts of ownership and possession by parking his trailers there and storing lumber. Then in 1986, he entered into a lease agreement with a third party in respect of a portion of the land and collected rent from him until June 1991.

In 1987 the plaintiff attempted to derive title through its nominee Krias Ltd. but the defendant would have none of this. He sought and obtained an order of the Court to have Krias Ltd. accept full payment of the mortgage from him in order to discharge the said mortgage. In his testimony, he said this would have given him a power of sale over the property in order to convey title to the plaintiff. This was a mere gesture on his part and, the

plaintiff was once more disappointed and deprived of his title. In my view, it could be said that this type of conduct on the part of the defendant lacks bona fides.

The appraisal of 10 Red Hills Road was conditional upon satisfactory identification of the land by a Commissioned Land Surveyor. Mr. David Plant, Commissioned Land Surveyor, carried out a survey of the property. His evidence revealed that apart from a small encroachment at the south western corner, the boundaries were consistent with the Appraiser's Report.

On my calculations therefore, an award based on a loss of fair market rent of the premises, would entitle the plaintiff to the sum of $876,521.00 and it is arrived at as follows:

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| Value of three sheds as at April 1983 ..... | $268,000.00 |
| Market rent based on 15% of value ..... | $40,200.00 |
| Value of land as at April 1983 ..... | $140,000.00 |
| Market rent based on 5% of value ..... | $7,000.00 |

If annual market rent is to be increased at a constant rate of 15% then the market rent for period April 1983 to June 1991 would be allocated as follows:

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| April 1983 to April 1984 ..... | $47,200.00 |
| April 1984 to April 1985 ..... | $54,280.00 |
| April 1985 to April 1986 ..... | $62,422.00 |
| April 1986 to April 1987 ..... | $71,785.00 |
| April 1987 to April 1988 ..... | $82,553.00 |
| April 1988 to April 1989 ..... | $94,936.00 |
| April 1989 to April 1990 ..... | $109,177.00 |
| April 1990 to April 1991 ..... | $125,554.00 |
| April 1991 to June 1991 ..... | $36,097.00 |
| Total: | $684,004.00 |

Rent from building leased to third party

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| 1987 ..... | $31,320.00 |
| 1988 ..... | $36,847.00 |
| 1989 ..... | $43,350.00 |
| 1990 ..... | $51,000.00 |
| 6 months during 1991 ..... | $30,000.00 |
| | $192,517.00 |

Grand total in respect of market rent: $875,521.00

Damages are therefore assessed in favour of the plaintiff in the sum of $876,521.00 with interest thereon at the rate of 3% from 12th July, 1989 to today.

The Plaintiff shall have his cost taxed if not agreed.