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**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW**

SUIT NO. C.L. – 148 of 1998

BETWEEN	BRYAN JOHNSON	CLAIMANT
AND	LOW-BAN ENGINEERING LTD.	DEFENDANT

Mr. Garth Lyttle instructed by Garth Lyttle & Co for the Claimant
Mr. Maurice Manning instructed by Nunes Scholefield DeLeon & Co for the Defendant

Heard June 22, and July 5, 2006 and August 14, 2009

Agreement for Sale of property; Claimant Purchaser fails to provide mortgage funds to meet completion date; Defendant vendor demanding interest for the period of delay between time due and time of payment, pursuant to terms of Agreement; Claimant alleging that property was not in any event complete as there were defects; whether the existence of defects, short of making the property “un-inhabitable” state would relieve Claimant of obligation to pay interest.

CORAM: ANDERSON J.

The essential facts of this case are not greatly disputed.

The claimant was one of a group of three individuals including his wife who entered into an agreement for the purchase of a residential unit in Sydenham Villas, a housing scheme developed by the defendant company. The number was Lot 167. The claimant had in the company of his wife seen the house under construction in mid 1997. They signed the agreement for the house on September 15, 1997. A deposit of \$220,000.00 was paid along with a further payment of \$176,245.00 on a total sale price of \$2,200,000.00. Pursuant to the terms of the agreement, the claimant was to secure a mortgage for the balance of the purchase price, \$1.8 million and completion was by the date set for 90 days from the date of execution. It is common ground that the balance of the purchase price was not paid on or before the 90th day from the date of execution of the sale agreement, and the vendor’s attorney-at-law wrote to the claimant’s attorney-at-law demanding payment of interest at the rate of 25% on the unpaid balance purchase price.

According to the claimant, on the day the letter of demand was received, he and his wife visited the property and found that it was in the same condition as it was on the day the contract was executed. The mortgage proceeds were eventually received by the vendor's attorney on March 18, 1998, who advised that the figure of \$123,090.24 was due as interest for the delay in completing the sale on time and that as soon as the sum the amount claimed for interest was received, letters of possession would be issued.

The claimant says that when he visited the property along with his attorney on 21/3/1998, they found the same defects and in addition the back door was wrenched off. On May 5, 1998, the claimant's attorney wrote a letter protesting the demand for interest given what he alleged was the state of the property and in return received a response that unless the demanded interest was paid, the premises would not be delivered.

The sum was paid under protest on 8th June 1998. The claimant's attorney by the same letter demanded:-

- the return of the \$123,090.24
- refund of \$44,000.00 paid as half cost of the Transfer instrument
- repayment of \$125,000.00 – 5 months x \$25,000.00 paid as mortgage to NHT
- repayment of rental \$63,000.00 – 5 months x \$13,000.00

On 11th June 1998, letter of possession was handed over. According to the claimant, even after the letters of possession were issued, they were still unable to move into the house as the defects previously observed, were still there. Defects had been pointed out in a letter to Hugh Bonnick, the managing director of the defendant company, on 24th June 1998 and the defects were subsequently remedied and the claimants moved into the property on 29th August 1998.

The defendant through its supervisor Garfield Nelson asserts that certain fixtures and fittings (toilets, lavatory basins, kitchen sinks, electrical fixtures and plumbing accessories) are only installed immediately before the occupant moves in. He says that all the defects in the house and all other work was completed by the contractor by the 15th June 1998, that is one week after the payment of the demanded interest. But he also says

that some delays in the work to correct the defects, were occasioned by some workmen employed by the claimant who had been seen installing tiles and doing other work.

Another witness for the defendants, Herbert O'Connor sought to confirm what Nelson had said and suggested that he had approved payment for work done on the claimant's property the fortnight ending June 15, 1998 and the work would have been completed at least one week previously, that is the week of the receipt of the interest demanded

Hugh Bonnick, the Managing Director for the defendant said that the claimant's home (along with others in the scheme) was complete in 1995 and the Quantity Surveyors, Stoppi Cairney Bloomfield provided a Certificate of Practical Completion for the claimant's lot on the 26th October 1995. Bonnick also confirmed that the claimant's attorney-at-law had objected to the payment of half the attorney's costs for preparation of the Transfer.

The claimant in his claim seeks a refund of the one hundred and twenty three thousand and ninety dollars and twenty four cents (\$123,090.24) paid to the defendant as interest for forty two days from the scheduled completion date December 14, 1997 to the date of the receipt of the mortgage proceeds March 18, 1998. The claimant also seeks an order that the defendant pays to it one hundred and twenty five thousand dollars paid for five months mortgage to the Nation Housing Trust while they were still not occupying the house. He also claimed sixty three thousand dollars (\$63,000.00) which he had to expend in renting another property until they were able to move in the property purchased from the defendant. Finally, the claimant seeks the return of forty four thousand dollars plus GCT paid to the defendant's attorney-at-law to cover one half cost of the transfer instrument. The claimant also claims interest at 25% on all the above sums. The defendant rejects all the claims made by the claimant and relies upon the agreement for sale as providing a proper defence for all the claims. In particular, the defendant at paragraph 16 of the defence avers that any loss or damage sustained by the claimant was a direct consequence of the delay by the claimant in securing a mortgage within the time

set out in the agreement for sale. I will deal with each element of the claimant's claim in turn

The Interest Amount

In the submissions by the Claimant's attorney-at-law, it is conceded that the Claimant did not provide the commitment letter required by the terms of the sale agreement by December 14, 1997. In fact, as noted above, the defendant received the balance of the purchase price from the claimant's mortgagee on the 18th March 1998. Pursuant to clause 7(e) of the Sale Agreement it was provided that "for all purposes of this agreement, time shall be of the essence of the contract *in respect of the obligations of the purchaser*". It was also provided by clause 7 (i) that the claimant would pay interest at a rate equivalent to the rate charged to the defendant by the defendant's commercial bank on all monies payable under the agreement which was not paid on the dates stipulated for payment to the date of the actual payment.

The Claimant's attorney-at-law submits that while the Claimant did not pay the balance as required by the Sale Agreement, the defendant was not ready willing or able to deliver the property for occupation until July 15, 1998. With respect, this ignores the relevant provisions in the agreement. The Claimant asked the court to find that there was an implied term in the agreement that "required the defendant to complete and deliver the house at the same time the mortgage proceed (sic) was handed over to him and it failed to dos so". It was suggested that interest could only be claimed if the purchaser were in possession of the property before the mortgage money was paid. This is respectfully a misconception.

As submitted by the defendant's attorney on authority, "where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot relieve himself from payment of interest by alleging that the delay in completing the contract was caused by the vendor, but it is otherwise where there is no express stipulation".

It is the position of the defendant that pursuant to clause 4 of the Agreement for Sale they had no obligation to hand over the property until completion as defined in the agreement had taken place. Clause 4 provides as follows

“Completion –

On payment in full of the purchase money and cash fees and costs of transfer and such other amounts payable by the purchaser hereunder in exchange for the duplicate certificate of title for the said lot together with a registrable transfer in favour of the purchaser or his nominee within 90 days of the date hereof”.

In the case of **Arlene Wilson v Trevland Manufacturing Co. Ltd.** in the Jamaican Supreme Court Harris J, as she then was stated:

“It is shown therefore that a purchaser who delays is under a duty to pay interest on outstanding purchase money in the absence of an agreement to the contrary whether or not he actually entered into possession. If however the delay is due to the willful default of the vendor, the court will not enforce payment”.

It was the contention of the defendant that the interest to which it was entitled under the terms of the agreement was not paid until June of 1998 and at that time letters of possession were issued by the defendant. Since pursuant to the terms of the agreement completion and letting into possession would not have become obligatory until the date when all funds, including the interest, were paid it seems to me that the Claimant is on shaky ground and is unable to sustain his claim for the return of the interest paid.

The terms of the agreement with respect to interest on unpaid sums are clear and, unambiguous and accordingly, the claimant’s claim in relation to this sum must fail.

Half Costs of the Transfer Agreement

Clause 5 of the Agreement for Sale obligated the claimant to pay the sums set out in item 6 of the First schedule to the Sale Agreement. This schedule included the sum of forty four thousand dollars (\$44,000.00) for one half of the attorney’s costs incidental to the preparation and completion of the transfer and the applicable GCT amount. Again the provision is clear and unambiguous. The Claimant signed the agreement in full knowledge of the provision being there and counsel cannot call in aid of his submission

that it should not be paid, his view of the relevance of the guidelines of the Bar Association. It is regrettable that the claimant's claim for this sum must also fail.

Claim for repayment of mortgage and rental income

The claimant bases these claims on his evidence that the defects which were noted at the visit in December 1997, were still existing after the payment of the balance of the purchase price in March 1998. It was the submission of the claimant that the house was "not habitable" and as a consequence the claimant and his wife had to incur these additional costs.

The claimant points to defects in the construction of the house, but it is far from clear from the evidence that any of the defects complained of would have been sufficient to prevent the claimant occupying the premises and seeking to have those defects remedied within the period for defects liability, that is, one hundred and eighty (180) days from the date of the sale agreement. It is equally clear that if this had been done and the defendant was given written notice of those defects within the time as required by the agreement for sale, it would have been liable to the Claimant in damages for failure to correct such defects as complained of. To the extent that there was evidence of any structural defect in the property, (a crack on the floor of the living room, the back door to be reinstalled and to be intersection of walls and floors to be hacked and dressed) according to the evidence of the defendant's witness Garfield Nelson, these were remedied sometime before the 30th June 1998. I accept that evidence and would accordingly hold that once that had been completed no claim for mortgage or rental could be sustained. Indeed, the Claimant did, in fact, eventually abandon the claim for the rental.

In all the circumstances, it seems to me that the claimant would have been better advised to move into the property as soon as payment of the outstanding interest had been done, and if necessary, effect such corrections as they thought fit and then seek to recover such expenditure as damages from the defendant.

Given that the trigger for the delivery of possession was “completion” and that this was effectively delayed by the Claimant, it is my view that no claim for either mortgage or rental for alternative accommodation could be sustainable against the defendant before June 1998. Nor is there any basis for giving the relief sought under this head after June 8 to the date of actual occupation, either July 15 as stated by the Defendant, or August 31, as stated by the Claimant, unless there had been much more compelling evidence that the home was uninhabitable between the date of the payment of interest and the date when the Claimant could have occupied. Regrettably, there is no concept of “occupation” in the agreement for sale or which can be implied by this court in it.

.In the circumstances, I hold that the Claimant has failed to establish his case in law and I accordingly give judgment for the defendant with costs to be taxed if not agreed.

A handwritten signature in black ink, appearing to read 'Roy K. Anderson', is written over a circular stamp. The signature is fluid and cursive, with a large loop at the end.

ROY K. ANDERSON

PUISNE JUDGE

AUGUST 14, 2009