Supreme Court - Civil - Agreement for Sale of Apartment (Strata Lot) - Delay in completion - Consent judgment for specific performance - Damages - Assessment - Quantum - Basis - Rental which could have been obtained for apartment - Evidence - Rent Restriction Act - Permitted increase - Award + interest rate [p. 5 and 6] Continued to p. 6 (end)

IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. CL. L. 158 OF 1988

BETWEEN	CATHERINE LYN	PLAINTIFF
A N D	PROPERTY MANAGEMENT DEVELOPMENT & SERVICES LIMITED	DEFENDANT

Mrs. Janet Morgan and Miss P. Blake instructed by Milholland, Ashenheim and Stone for Plaintiff.

Mr. A. Irving instructed by Vaccianna and Whittingham for Defendant.

Heard: 26th, 27th and 28th July, 1994

WESLEY JAMES, J.

On the 25th July, 1994 the parties consented to judgment being entered in the terms following:-

(1) Specific performance of Agreement dated 1st September, 1985 for sale by the defendant to plaintiff of premises, Apartment L Strata Lot No. 11, 17 Hopedale Avenue, Kingston 6, registered at Vol. 1212 Folio 32 of the Registered Book of Titles.

(2) Damages for breach of contract to be assessed by a judge alone.

(3) Costs to be agreed or taxed.

It is the assessment of those damages with which we are here concerned. The plaintiff, Catherine Lyn testified that she is a qualified Actuary and is a Fellow of the Institute of Actuaries since July 1993. She worked with an International Firm of Actuaries, for some eighteen (18) years.

On 1st September, 1985 the plaintiff entered into an agreement with the defendant to purchase the apartment described in paragraph (1) of the Consent judgment dated 25th July, 1994. The date for completion was originally set for the 28th March, 1986 but was subsequently extended to March 1989.

However, plaintiffs instructions to her Attorney in respect of completion were given in April, 1989. What is common ground is that up to the time of assessment of damages, the plaintiff has not got the benefit of the conveyance of Apartment "L" Strata Lot No. 11 to her.

Since specific performance has been agreed, the measure of damages to which the plaintiff may be entitled would be those which may flow from the delay in complerion. What then are the items which must be considered to arrive at an award of damages?

By their agreement the apartment could have been rented at Five Hundred Dollars ($500.00) per month at the time when completion should have taken place.

The question of what rental could be obtained for the apartment after 1989, was vigorously disputed by the defendant. Plaintiff admitted in cross-examination that she could not say what was the best market value rental obtainable for the apartment between the years 1990 to 1993 and in respect of 1994, the figure of Two Thousand Five Hundred Dollars ($2,500.00) plus maintenance of Eight Hundred and Ninety Dollars ($890.00) per month given by her was on the basis of inquiries. That being so, this piece of evidence would breach the hearsay rule and had it not been for the defendant's concession in computing rental for 1994, that sum may have been lost to plaintiff.

It is on the basis of using the rental at completion date (i.e. $500 per month) and that at July, 1994 of Three Thousand Three Hundred and Ninety Dollars (i.e. $2,500 + $890), plaintiff arrived at the average monthly rental for the period. From that figure she deducted the average monthly maintenance which she calculated at Four Hundred and Twenty One Dollars ($421.00) per month and she made an allowance of 10% which she estimates would cover periods when the apartment may be without tenants.

From a rental of Five Hundred Dollars ($500.00) per month in April 1989 and rising to Three Thousand Three Hundred and Ninety Dollars ($3,390.00) per month in July 1994 and using the method outlined above, the plaintiff arrived at an estimated loss from rental income over the period from April 1989 to July 1994 of approximately One Hundred and Twenty-two Thousand Dollars ($122,000.00) gross.

While the plaintiff may have used the occasion to display her skills as an Actuary, I am not attracted to her evidence as it relates to rental obtainable for the apartment, the subject matter of this action and her method of arriving of what the rental should have been.

Counsel for the plaintiff submitted that in the absence of data as to the actual rental of the apartment, the best evidence available as to rental income has been employed by the plaintiff by taking the rental agreed at the time of agreement Five Hundred Dollars ($500.00) per month and that presently being collected Three Thousand Three Hundred and Ninety Dollars ($3,390.00) per month, as two points of reference to arrive at an average gross monthly rental.

I am not aware of any such formula employed as the plaintiff did in proof of rental in respect of Apartment "L". It appears from her testimony, that direct evidence of rental of or obtainable for the apartment was available, but she chose not to call it. It follows that the mathematical accuracy of the result of her calculations is left in doubt and therefore unreliable.

Notwithstanding plaintiff's evidence on her estimated monthly rental, she agreed with Counsel for defendant that if between 1990 and 1993, rental had moved from Five Hundred Dollars ($500.00) per month to One Thousand Dollars ($1,000.00) per month, the average rental would be much lower than her calculations show and she further agreed that actual figures will always differ from the estimated ones.

The defendant's evidence on the issue of what rental was charged or obtainable during the relevant period would appear to be more helpful than that of the plaintiff. There is some evidence that fees were paid to have premises at 17 Hopedale Avenue, assessed by the Rent Assessment Board. **See Exhibit "F" (receipt from Rent Assessment Board - dated 2nd February 1990).** However, there is no evidence of assessment in respect of Apartment "L". In any event, the payment of the fee for having the premises assessed is evidence only of an intention to have them assessed.

What is undisputed is that the rent of Five Hundred Dollars ($500.00) per month was obtainable at the date when completion was possible, that is, on or about April 1989.

Since there is some evidence of payment of fees to have the premises assessed by the Rent Assessment Board and there is no evidence otherwise, it would appear that those premises are subject to the provisions of the Rent Restriction Act.

There is evidence from the defendant that the Rent Assessment Board had done an assessment of Apartment "C", which is similar to Apartment "L".

A copy of the notice of the defendant's intention to increase the rental of that Apartment "C" from Five Hundred Dollars ($500.00) per month to One Thousand Dollars ($1,000.00) per month, was by consent admitted in evidence as Exhibit D.

As a matter of Law, I would hold that the only increase which is permissible for the years 1992 to 1993 is at the rate of 7½% per annum, which the Rent Restriction Act allows.

The plaintiff also gave evidence that in arriving at estimated loss, she would have suffered she calculated and deducted from income, payments she would have had to meet in respect of mortgage, upkeep and peril and mortgage insurance. Those payments amounted to Fifty Four thousand Dollars ($54,000.00), over the relevant period.

In support of the submissions that damages are recoverable for delay in completion of a contract for sale of land, the following authorities were cited by Counsel for the plaintiff. Phillips v Lamdin 1949 2 K. B. 33, Lehrer v Gordon [1964] 7 WIR p. 247 wwhere it was held that the vendors delay in completion of a contract ..... entitled the plaintiff to cover damages calculated from the date when her own default ceased. But even before the above mentioned cases, it was decided in Jones v Gardiner 1902 1 Ch. 191 that where delay has been occasioned by default of the vendor not in consequence of want of or defect in title or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract that damages could be recovered.

In the instant case on the evidence, this is clearly one in which the delay was caused from the fact that the defendant did not use reasonable diligence to perfrom his side of the contract.

Turning now to the measure of damages to be awarded the case of Royal Bristol Permanent Building Society v Bemash [1887] Ch. Div. Vol. XXXV 390 decided that the purchaser was entitled to damages in the nature of compensation for loss of a tenant, and that the damages would be the amount of rent lost.

Having regard to the evidence, I would allow the plaintiff rental at the following rates§-

1989	April to December	9 months	@	$ 500	per month	$ 4,500.00
1990		12 months	@	$ 500	per month	6,000.00
1991		12 months	@	$1,000	per month	$ 12,000.00
1992						$ 12,900.00
1993						$ 13,868.00
1994						$ 23,730.00
						$ 72,998.00

From this figure of $72,998 I would deduct $54,000.00 the monthly payments in respect of principal and interest, mortgage, upkeep and peril and mortgage insurance, leaving a balance of Eighteen Thousand Nine Hundred and Ninety-eight Dollars ($18,998.00)

The plaintiff gave some evidence that she would have accumulated the net income from rental in an Interest Bearing Account, such as a Saving Deposit Account. She nevertheless gave no evidence nor did she call any to say what rate of interest was obtainable at any given time.

The Counsel for the plaintiff submitted that the income from rental of the premises could have earned interest over the period of at least an average bank savings rate of 18% per annum less tax of 33 1/3% thus making it interest at the net rate of 12% per annum.

I make two (2) observations regarding these submissions.

(a) there is no claim for interest in the Statement of Claim.

(b) even if there was, there is no evidence before me to indicate what rate of interest was obtainable during the relevant period at any financial institution.

Counsel for plaintiff also submitted that the sum of One Thousand Five Hundred and Fifty Dollars ($1,550.00) expended by the plaintiff as the fee for the mortgage commitment letter be awarded to her. I cannot see the basis on which this could be done. The plaintiff had to seek mortgage financing to purchase the premises. In her evidence, she testified that the facility for the mortgage is still available. The submissions therefore fails.

Having regard to the evidence, I would award the plaintiff the sum of $18,998.00 being the difference between $72,998 for rental over the relevant period less $54,000, the amount which the plaintiff said she would have paid in respect of certain inescapable commitments.

I make no award in respect of interest on what the plaintiff referred to as Saving Deposit Accounts. I refer to paragraph 13 of Exhibit "C" the mortgage commitment letter, and it will be appreciated that the monthly payments totalled Six Hundred and Ninety-Five Dollars and Seventy-nine cents (695.79), a sum which is more than the rental of Five Hundred Dollars ($500.00) per month.

I would award the plaintiff interest at the rate of 6% per annum on the sum of Eighteen Thousand Nine Hundred and Ninety-eight Dollars ($18,998.00) with effect from 28th July 1994.

The plaintiff will also have costs to be agreed or taxed.

Cases referred to

(1) Phillipps v. Landin (1949) 2 ICB 33

(2) Lehrer v Gordon (1960) 7 WIR 247

(3) James v Gardiner (1902) 1 Ch 191

(4) Royal Bristol Permanent Building Society v. Bemash (1887) Ch. Div Vol XXXV 390