IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 04745

BETWEEN	**LEIGHTON Mc KNIGHT**	**1ST**	**CLAIMANT**
AND	**NOVELETTE Mc KNIGHT**	**2ND**	**CLAIMANT**
AND	**JAMAICA MORTGAGE BANK**		**DEFENDANT**

Mr. Michael Hylton Q.C. and Sundiata Gibbs instructed by Michael Hylton Associates for Claimants.

Mr. Garth Mc Bean & Mr. Stuart Stimpson instructed by Ramsay Stimpson for Defendant.

Registration of Titles Act s.143- Assessment of Damages - whether losses claimed were caused by the unreasonable lodgement of a caveat.

In Chambers

Heard: 23rd February, 2010 and 22nd March, 2010

E.J. BROWN, J. (AG.)

(1) This is an Assessment of Damages pursuant to an order made by N.E. McIntosh J. on 6th April, 2009. That order directed the Registrar of Titles to forthwith remove caveat number **1498736** lodged against the certificate of title for 21 Dillsbury Avenue by Jamaica Mortgage Bank it falls to be considered under section 143 of **The Registration of Titles Act** which is extracted in full below:

> Any person lodging any caveat with the Registrar, either against bringing land under this Act or otherwise, without reasonable cause, shall be liable to make to any person who may have sustained damage thereby such compensation as a Judge on a summons in Chambers shall deem just and order.

The learned judge having found that "The Defendant had no reasonable cause to lodge this caveat against the Claimant's title," the task of this court is to ascertain whether and what damage was sustained thereby.

(2) The Claimants are required to satisfy the court on a balance of probabilities that the unreasonable lodging of the caveat occasioned damage. There must be a causal link between the damage claimed and the lodging of the caveat. Further, only such compensation as is deemed just shall be ordered.

The Claim

(3) At paragraph four (4) of the third affidavit filed by the Claimants, they claim losses to the tune of $26, 004,303.71. That claim is disaggregated under four heads:

(i) Increased construction costs;

(ii) increased financing costs;

(iii) Loss of interest on the proceeds of sale of the two townhouses they owned in the development and

(iv) Additional expenditure incurred as a result of the delay caused by the caveat.

For ease of reference, the claim was summarized in tabular form as appears here-under:

Heads of Damage		**JA$**
(i) Increased construction costs		15, 661,147.07
(ii) Increased financing costs		1,914,983.09
		17, 576,130.17
Less amounts to be recovered from purchasers		12,737,967.09
		4,838,163.07
(iii) Loss of interest on sale proceeds		20,733,527.76
(iv) Other expenditure		432,612.88
	Total	**$26, 004,303.71**

Assessment

(4) Each head of damage will be assessed seriatim where convenient. Before doing so it is pertinent to set the parameters of this exercise. The impugned caveat was lodged against the title some time anterior to June 2008, when the Claimants discovered it. The caveat was only removed on **16th April, 2009** by order of the Supreme Court made on **6th April, 2009**. It was said by Jenkins J. in **Westpoint Corporation Pty Ltd. v The Registrar of Titles and Anor [2005] WASC 273, 14th December, 2005:**

> Whilst the liability to pay compensation should be determined as at the date of lodgment of the caveat that does not mean that foreseeable future losses should not be compensated for.

So, the court is concerned with how the caveat can be shown to have changed the course of events during its subsistence and thereafter, in so far as those losses can be said to have been foreseeable.

(5) First, increased construction and financing costs. The Claimants deponed in their third affidavit that "just prior to the lodgment of the caveat, arrangements had been made with a new developer and financing had been arranged to complete the new development." The caveat derailed those arrangements and thereafter no financial institution "was prepared to proceed....until the Defendant's caveat was removed."

(6) The Claimants assumed that it would take between 15 weeks and five months to restart the project post caveat; the project was in fact remobilized in November 2009. For the purpose of calculating their loss, the Claimants used a one year delay. It is note worthy that ten (10) months elapsed between the discovery of the caveat and its removal. Therefore, the one year yardstick to measure their losses is abundantly fair and favorable to the defendant.

(7) In July 2007 Messers. Berkley and Spence, Quantity Surveyors, at the instance of the Defendant, estimated the completion cost to be $112,475,735.84. Messers. Berkley and Spence now say the estimated completion cost has been increased to $127,680,733.00. That's a difference of $15,204,994.16. Increased cost carries the ubiquitous corollary of increased financing cost. From the computations annexed to their third affidavit, the Claimants attest this loss to be $ 1,914,983.09. That figure was arrived at by deducting the total interest charges on the previous estimated cost of completion from that on the current estimate.

(8) The evidence is that the increased construction and financing costs would be borne by all the purchasers in the development. There are six other purchasers. The sum recoverable from the other purchasers is $12,737,967.09, which is a deductable from the Claimant's losses. Subtracting the latter sum from the total increased construction and financing costs, that is, $17, 576,130.17, the cumulated loss claimed is $4,838,163.07.

(9) Learned Queen's Counsel submitted that there is a causal link between the lodging of the caveat and the more than one year delay in recommencement of construction. Further, since the Defendant had actual notice of the Claimants' interest, it was entirely foreseeable that the Claimants' would suffer loss as a result of delays occasioned by the lodging of the caveat.

(10) On behalf of the Defendants, learned counsel Mr. Mc Bean submitted that there would have been delay in any event and there is no evidence that financing was in place as the missive relied on from Pelican Finance Limited (PFL) is "a mere Letter of Intent". Mr. McBean highlights the fact that the letters from PFL is dated 7th February, 2008, while the caveat was lodged in October, 2007. However, Mr. Mc Bean appears to accept an increase in the cost of construction but says by virtue of the number of purchasers, the Claimants' will bear only 25% of that cost.

(11) With respect to the apportionment of the increased construction cost, the court is satisfied that the square footage methodology is the acceptable one. It is notorious that costs in construction cannot be arrived at without reference to the measurement of the area involved, whatever the unit of measurement. With the greatest respect to learned counsel, it is a trifle simplistic to submit that the preferred methodology should be percentage ownership.

(12) We come now to the question of whether financing was in place. As the submission is understood, the letter relied on is inchoate. Real proof would be a letter of commitment. The letter from PFL declares the institution's willingness to provide the funds, "subject to a satisfactory resolution of all legal issues relating to the development" as well as submission of a number of items.

(13) No more than a cursory glance at the list of items is needed to arrive at the conclusion that compliance would involve some time lag. As to what that would be precisely, it remains unknown. Further, Mr. Mc Bean's submission cannot be faulted that there is an absence of evidence that they had been met. The most that can be said is that the caveat is not the sole cause of the delay. However, as adverted to earlier, the Defendant is not being tagged with the entire period of the delay. Of necessity, the ascertainment of the proportion of delay must involve an element of arbitrariness, but the unreasonable lodgement of the caveat itself lasted ten (10) months.

(14) That notwithstanding, the supply of these items appear to be secondary to the resolution of the legal issues. One such legal issue which must have been within the contemplation of the parties is the provision of security without interests or encumbrances ranking in priority to that of PFL. It is now a matter of record that the resolution of that legal issue viz. the removal of the caveat was conterminous with the finding against the Defendant in the other part of this action.

(15) So, no commitment letter could have been issued. The Defendant will not be allowed to convert its own sword into a shield. What then of the further contention that the letter from PFL post dates the lodging of the caveat. It is misconceived to submit that the lodging of the caveat did not prevent it being issued or that its issuance evidences available financing in spit of the presence of the caveat, because the operative date is when the caveat was discovered. Further, it would mean losing sight of the gravamen of the Claimants' claim namely, that the efforts to secure financing collapsed upon discovery of the caveat. The force of the claim lies not in the absence of financing but in a thwarting of it by virtue of the presence of the caveat. The court finds itself at a loss as to how this submission advances the cause of the Defendant.

The court accepts the letter of intent as sufficient proof that financing was available but not extended because of the caveat.

(16) That financing having failed to come to fruition, the Claimants would have had to seek new financing in excess of one (1) year hence. That the Jamaican economy was characterized by upwardly spiraling interest rates during the relevant period is a fact as well known as the fact that Christmas Day is the 25th of December. It is therefore reasonable to accept that the increased financing would come at a higher interest rate.

(17) This position was foreshadowed by the learning in **British Caribbean Insurance Company Limited v Delbert Perrier (1996), 33 J.L.R. 119**. According to Carey, J.A. at p. 127:

> i. awards should include an order for the defendant to pay interest;
>
> ii. the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and
>
> iii. the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed.

(18) In this claim, the Claimants have presented extracts of Economic Data published by the Bank of Jamaica. That publication shows that the average lending rates in June 2008 and March 2009 were 21.46% and 22.34% respectively. **British Caribbean Insurance Company Ltd v Perrier** (*supra*), is authority for acting on the documentary evidence provided. *Obiter*, Carey J.A. said "I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate."

(19) The court accepts the respective percentages as the rates of interest to calculate the increased financing cost faced by the Claimant as result of the Defendant's action. In June 2008, the interest charges at 21.46% would have amounted to $9,162,006.67 the new interest charges would be $11,076,989.77. That yields a difference of $1,914,983.09.

(20) Attention is now adverted to the third head of damage, loss of interest on the proceeds of sale. In respect of Lot 7, there was an agreement for sale of the land between the Claimants and David Mc Bean from June 2005. David Mc Bean also entered into a construction agreement with KES Development Company Limited to construct a townhouse on the said lot. Upon the failure of KES to complete the project, David Mc Bean obtained a partial refund of his deposit. Subsequent to the removal of the caveat, David Mc Bean "has agreed to purchase unit 7 for a total of $55,000,000.00". There is no buyer for unit 8.

(21) Learned Queen's Counsel submitted that but for the caveat, the construction of the townhouses (7&8) would have resumed twelve (12) months earlier and 'presumably' moved to completion in identical time. Upon those presumptions rests the premise that Claimants would equally have had the interest returns on the proceeds of sale twelve (12) months earlier.

(22) On the other hand, learned counsel Mr. Mc Bean submitted that the Defendant's caveat had no bearing on either lot. In respect of lot 7, counsel's submission was that David Mc Bean withdrew from the sale before the caveat was registered. Further, the agreement for sale was not signed until seven (7) months after the caveat was lifted.

(23) The Claimants' evidence relating to the status of David Mc Bean vis-à-vis lot 7 is more than a trifle puzzling. If it is that by 'partial refund' is meant that only so much was retained as was forfeited by the terms of the agreement, then the contractual relationship was

thereby severed. And if that was the case, David Mc Bean would have had no subsisting interest in lot 7 during the currency of the caveat. However, if 'partial refund' means that funds were retained to represent consideration under the contract, the position may be otherwise.

(24) Without an interpretation of the terms of agreement, the position cannot be ascertained with absolute certainty. However, the court is driven to accept the submission of counsel Mr. Mc Bean. The court feels so constrained by the language of the Claimants' affidavit. That is, they deponed that after the lifting of the caveat David Mc Bean "has agreed to purchase unit 7". That position is fortified by the signing of the agreement for sale in November, 2009.

(25) Since there was no agreement for sale in place in respect of either lot 7 or 8, immediately before or during the life of the caveat, it cannot be maintained that the lodgement of the caveat caused the Claimants' any actual loss. That is, there was no proposed sale which had to be deferred upon discovery of the caveat. Was it then a foreseeable loss? Or was it too remote?

(26) Foreseeability is not a mystical concept floating in metaphysical space to be plucked by the hand of the mystic seeker; it must attach itself to objective circumstances. So, what were the objective circumstances obtaining in 2009 when the project would have been completed but for the lodging of the caveat? In other words, what were the objective circumstances which would have seized the mind of the reasonable man in the position of the Defendant. For example, in the context of the all-embracing global economic decline, was there a slump or an upturn in the local real estate market? Were townhouses being sold like hot bread so that a reasonable man in the position of the Defendant could be fixed with foresight of the consequences. In short, without that kind of data, it does not appear just nor

possible to say that there was a probability that lots 7 and 8 would have been sold one year earlier. Without such relevant information, it cannot be said the circumstances were such that the sale of the townhouses within the temporal limits claimed was foreseeable.

(27) Lastly, the Claimants say the unreasonable lodgement of the caveat caused them to incur one additional year of property tax expenditure of $79,880.00, valuation cost $236,087.25 and quantity surveyors' fee of $116,645.63. That is a total of $432,612.88. These flow directly from having to restart the project because of the caveat. In any event, the Defendant has not taken issue with this head of damage.

The Award

(28) The loss occasioned by the lodgement of the caveat is therefore assessed as $5,270,775.95. In my judgment it is deemed just that the Claimants' should be compensated in this sum. In summary, the claim is allowed save for loss of interest on the proceeds of sale for the reasons herein. Costs to the Claimants to be taxed if not agreed.