IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. N 118 OF 1994.

BETWEEN	ERLINGTON NIELSSEN and LOVETTA NIELSSEN	PLAINTIFFS
AND	RIDGEWAY DEVELOPMENT LIMITED	DEFENDANT

Dr. Lloyd Barnett and Mrs. Priya Levers for the plaintiffs

David Henry and Miss Debra Newland, instructed by Miss Suzette Moss for the defendant.

Heard: April 18; May 27,28,29,30 and 31;
October 10 and 11, 1996; and June 3, 1997.

PANTON, J.

The plaintiffs claim that the defendant has caused inconvenience, loss and damages to them as a result of the defendant's breaches of a collateral agreement and a written agreement to which they are parties. The subject matter of the plaintiffs' distress is described in the written agreement as follows:

"All that parcel of land being the Lot numbered Two part of Barbican Heights in the parish of Saint Andrew being of the shape and dimensions and butting as appears by the Plan of lands part of Barbican Heights aforesaid prepared by Llewellyn Allen and Associates, Commissioned Land Surveyor and bearing Survey

Department Examination Number 227496 together with one undivided one-sixth share in the Lot numbered SEVEN shown on the said Plan and being a part of the lands comprised in Certificate of Title registered at Volume 1135 Folio 782 of the Register Book of Titles."

Notwithstanding the apparently vast number of words used to describe the property, I do not think any injustice would be done if it were to be stated that what was being sold was a townhouse. Nowhere in the description is it mentioned that a house is involved. The reason for that omission is no doubt the ancient definition of land as legally including 'all castles, houses and other buildings, and water'. However, the very experienced author of the agreement, Mr.Trevor DeLeon, attorney-at-law, conceded that it was not usual to refer to a 'lot' in the sale of a completed house.

The plaintiffs are seeking to have the defendant remedy defects that exist on the premises, and to construct and install missing items that should have been provided in keeping with their agreement. The money value of the plaintiffs' claim in May 1996 was $1,245,200. The defendant has counterclaimed that the plaintiffs, in breach of the written agreement, have failed to pay the balance of the purchase money or for the use and occupation of the premises for the four years that they have been in possession. In monetary terms , the defendant is seeking $1,623,581.75 plus interest.

THE PLEADINGS

There is no dispute that the first-named plaintiff is a sea captain and that the second-named plaintiff is his wife and a sales representative. Nor is it disputed that the defendant is a company that carries on the business of land development and building schemes.

The following are also agreed on the pleadings:

1. The parties entered into a written agreement for the sale and purchase of the property in question;
2. Although the agreement is dated April 22, 1993, there is correspondence that suggests that the contract was formed in March 1993;
3. The agreed price was $3.2 million, with an initial deposit of $480,000, a further deposit of $1.52 million, and the balance on delivery of a certificate of title and registrable transfer;
4. Possession was given to the plaintiffs on April 6, 1993;
5. The defendant is responsible for remedying structural defects of which written notice is given within ninety (90) days of the date of possession; and
6. The defendant undertook to complete the house and scheme in a workmanlike manner and with materials of good quality and or in keeping with high quality accommodation;

There is also no dispute that the balance of the purchase money is due.

The dispute so far as it appears on the pleadings relates to the following matters:

1. The existence of a collateral agreement in that, according to the plaintiffs, the defendant made promises and representations, and gave undertakings which induced the plaintiffs to enter into a contract to purchase the lot with the townhouse which was being constructed.

2. The existence in the said townhouse of what may be described as ordinary defects, as well as structural defects.

3. The non-provision of items agreed on, specifically a gym and a mini swimming pool.

4. Whether the house was sold as a completed house.

It is in relation to these areas of dispute that the determination of the Court is sought. The Court therefore has to ask itself these specific questions, among others:
Was there a collateral agreement? Was the house properly finished? Are there defects in the house?

In order to answer the necessary questions, the Court has to look at the evidence and make such findings of fact as are dictated by the evidence itself, bearing in mind the demeanour of the witnesses, the nature of expert evidence where applicable, the role of inferences, common sense and the law generally.

WAS THERE A COLLATERAL AGREEMENT?

In answering this question, the evidence of the second-named plaintiff and of the defence witness Victor Andrew Chang is most important. Both witnesses are at severe odds. The second-named plaintiff was clearly most anxious to purchase the premises. She had sold her former residence, and she had to consider the welfare of her two young children. The advertisement that beckoned her said simply, **"Townhouse with an elaborate 3,000 sq.ft. offering a grand view of the city, harbour, and environs...$3.3M."** There is absolutely no doubt in my mind that the second-named plaintiff, with her husband being away, would have been attempting to get possession of the premises as early as possible. She needed no persuasion. Instead, what she would have required is the assurance that work on the property would be completed as soon as possible. And, equally, I have no doubt that she was thus assured.

The written agreement makes no reference to a gym or a mini swimming pool. Mr. Chang said that the plan made no provision for such features. It is unthinkable, I find, that Mr. Chang - on behalf of the defendant - would have made such promises and inducements to the second-named plaintiff and then promptly proceed to reduce the price of the premises by $100,000. Why would he have done that when he had other persons seeking to purchase this unit? This project was the defendant's first commercial job. I find that the defendant would have been, and indeed was, most careful in relation to what it was offering and what it would receive in payment. The advertisement referred to above said it all; and, Mr. Chang never went beyond the advertisement and the implied term in the written agreement. The result is that I reject the contention

that there was a collateral agreement as advanced by the plaintiffs.

DEFECTS IN THE TOWNHOUSE

I accept the evidence of the second-named plaintiff that the townhouse was in an unfinished state when she viewed it and up to when she entered into possession. The defence, as mentioned earlier in dealing with the pleadings, accepts that there is an implied term that the defendant would complete the house and scheme in a workmanlike manner and with materials of good quality, and or in keeping with high quality accommodation.

Much argument was centered on whether there are defects, and if so whether any of them is structural. The Court is satisfied that the townhouse has numerous defects, and that some of them are structural. In arriving at this conclusion, the Court has considered the evidence of the experts as well as of the second-named plaintiff and Mr.Chang. I found particularly fascinating the evidence of Mr. Jeremy Millingen, architect. He described himself as "the architect on the project". However, in a report signed by him and one J.S.Thomson for Apec Consultants and dated 10th September, 1993, these words appear: **"It should be understood that neither Mr. Millingen nor APEC Consultants acted as supervising architect while the buildings were under construction, and they therefore have no continuing contractual relationship with either of the parties concerned."** I am therefore puzzled by Mr. Millingen's evidence that he was the architect on the project, that

he did the architectural drawings and ensured that the buildings were constructed as designed.

Mr. Millingen made periodic visits to the site, and was the architect who issued the practical completion certificate. He advised the Court that a practical completion certificate meant that the "building was habitable for its original intended use". That, he said, would include sewage, running water, electricity, roof, and that the premises can be secured. He said further that the townhouse had reached acceptable building standards save for the defects list. In answer to the Court, at first he could not remember if there was a defects list. Then he said he had made a defects list, and that it would have been somewhere in his file. To have issued a practical completion certificate, he would have had to walk through the house, see if it was habitable, and make a defects list as he walked through, he said.

Mr. Millingen never produced the defects list that he said he had in his file. Maybe, that is understandable as during cross-examination he said that his list had been a preliminary one and he never went back to make a final one.

In order to appreciate the state of the townhouse, it is my view that the list of defects made by Mr. Millingen and Mr. Thomson (Apec Consultants) is an appropriate starting point. Mr. Millingen was examined and cross-examined with this list in mind also. Without referring to all the details of the defects, an exercise that I consider unnecessary for that which I have to decide, it is sufficient for me to state that I have formed the firm view that

there were numerous defects which meant that the defendant had failed to complete the house in a workmanlike manner and with materials of good quality and or in keeping with high quality accommodation. It is clear that Mr. Millingen issued the practical completion certificate at a time when numerous defects existed.

The arrangements between Mr. Millingen and the defendant were extremely informal. That, to my mind, may have accounted for what seems to me to have been a sort of cavalier approach in the issuing of the practical completion certificate. I cannot say that the certificate was worth the paper it was written on. The evidence of Mr. Chang, it should be mentioned, indicates also that he was aware of the existence of defects.

There is one ordinary defect that I think requires special mention. It is the staircase. All the acceptable evidence points to the staircase being in need of remedial work. Uneven risers and other unacceptable characteristics seem to be the order of the day. Clearly, a staircase is a vital feature of a townhouse and a builder such as the defendant should do all that is required to ensure that this feature is fault-free. Mr. Millingen himself envisages a situation where it may even be necessary to completely rebuild a staircase in order to remedy unevenness in risers.

The position, therefore, is that so far as the ordinary defects are concerned the defendant is liable to make good. Although the report done by Mr. Millingen and Mr. Thomson of Apec Consultants is an appropriate starting point, it is not the end of the matter. Apec Consultants had submitted a list of defects to Messrs Mattis,

Demain, Beckford & Associates Ltd. consulting engineers, who examined the premises on behalf of the plaintiffs. I accept the report of Messrs Mattis, Demain, Beckford & Associates as a proper reference point for remedying the defects. That report is **Exhibit 6.** So far as the cost is concerned, I prefer to be guided by the report of Messrs Davidson & Hanna **(Exhibit 8).**

There was evidence that the defendant had begun to remedy some of the defects. However, the exact value of the work already done has not been given. This is a matter that will require some collaboration between the plaintiffs' engineers and the defendant's architect in order to ensure that work already done is not paid for a second time. It is expected that these professionals will display the maturity that the situation requires.

So far as defects are concerned, attention now has to be turned to those that are of a **structural** nature. Mr. Barrington Brown, consultant engineer to the defendant, testified that a structural defect is **"one which affects the competence of the building, and affects its ability to work in the manner designed to."** In his opinion, there was no structural defect in the townhouse. Mr. Brown had noticed a crack running diagonally across the northern wall of the master bedroom, seven to eight feet long; it started about five feet off the floor and went up about nine feet off the floor.

According to Mr. Brown, this crack runs approximately in the same plane as the roof on the adjoining balcony to the bedroom. This, he said, may be corrected by "chopping off the render - a band about

three inches wide along the crack; examine the wall for cracking; if the block wall is cracked, chase into the block, patch the chase with mortar, then render the wall to match the existing appearance." Whereas Mr. Brown did not think this was a structural matter, Mr. Oswald Canute Mattis, senior partner in the firm of Mattis, Demain, Beckford & Associates Ltd., consulting engineers, thought that it was such. **Mr. Mattis' credentials are impressive. His evidence and the manner in which he gave it have found favour with me. In addition, he has been practising as an engineer for almost four decades. In this situation, I prefer his opinion. Accordingly, I find that there are structural defects as listed on page two of Exhibit 6.**

THE COUNTERCLAIM

There is no dispute that the plaintiffs owe the defendant the balance of the purchase price, $678,581.75. There is also no dispute that the plaintiffs have had the use and occupation of the premises since April, 1993. It seems that to determine whether the defendant is due the sums claimed for use and occupation as well as maintenance expenses payable by owners, the proper approach is to look at the written agreement and the evidence.

Clause 8 of the agreement for sale and purchase reads thus:

" **MUTUAL AGREEMENTS**

It is hereby mutually agreed by and between the parties as follows:

(a) The purchasers shall take possession of the said Lot and the

vendor shall deliver possession thereof to them upon payment of the second deposit referred to in clause 6(A)(ii) hereof. The purchasers agree that **should any part of the balance of the purchase price or other sums due by them under clause 6(A)(ii) hereof remain unpaid after the 30th day of April, 1993, they will pay to the vendor an amount of $25,000 per month for the use and occupation of the said lot (calculated on a daily basis for the purpose of adjustment).**"

I have noted the evidence of the second-named plaintiff that the defendant, through Mr. Chang, had agreed to a sum of $10,000 instead of the $25,000 stated in the agreement. Here again, I see no reason why Mr. Chang would have made such a significant concession without there being a scrap of documentary evidence to support the concession. I cannot overlook the fact that both sides had taken the matter seriously enough to retain attorneys-at-law who were in regular contact with each other. It seems to me, and I so find, that the defendant is entitled to the rental stated in the written agreement from the first day of May, 1993, to the present. There is also an entitlement to interest thereon, as also on the balance of the purchase money.

As regards the claim by the defendant for maintenance expenses at $2,000 per month, it should be pointed out that there is nothing in the agreement to this effect; nor is there any evidence to substantiate it. Accordingly, that portion of the claim is disallowed.

At this stage, for completeness, I shall state that which ought to have become obvious by now. It is that I have rejected the contention of the defendant as contained in paragraph 13 of the amended defence and counterclaim. Specifically, I find that the conduct of the defendant was such that it is not entitled to treat the contract as being at an end. The existence of defects and the joint effort by both sides to have an amicable resolution of the matter created, in my view, a situation which left no room for the belief that there was a right to terminate the contract.

MITIGATION OF DAMAGES

The plaintiffs took possession of the house before all necessary work had been completed. While in occupation, they encountered problems with the defendant so far as remedying the defects and generally completing the job were concerned. They were aware that they were obliged, according to the written agreement, to pay an outstanding balance on the purchase price; failure to do so would result, according to the said agreement, in their being required to pay a sum of money for use and occupation. This latter sum would not have affected the obligation so far as the outstanding balance was concerned.

Given this situation, it seems to me that the plaintiffs ought to have done the following:

1. pay the outstanding balance of the purchase price;

2. attempt to correct the defects; and

3. recover the amount spent on the correction of the defects.

The professional persons who gave evidence on behalf of the plaintiffs at the trial would no doubt have been in a position to assist with item 2.

Having done this, the plaintiffs would have taken, it seems to me, all reasonable steps to mitigate the loss and inconvenience brought upon them by the defendant's failure to correct the defects. Having not done that which appeared reasonable, the plaintiffs have saddled themselves with the payment of interest on sums that are inescapably due to the defendant.

JUDGMENT

As already indicated, the plaintiffs have proven the existence of defects for which the defendant is liable. On the other hand, the defendant has established that certain sums are due to it by the plaintiffs.

On their claim, the plaintiffs are hereby awarded judgment for $545,200 plus costs to be agreed or taxed. This sum of $545,200 comprises the cost of remedying the cracks and other defects as set out in the amended statement of claim.

On the counterclaim, judgment is entered for the defendant as follows:

Use and occupation for 48 months @ $25,000 per month =$1,200,000
Balance of purchase price =$0,678,581.75
Total =$1,878,581.75

The defendant is to have its costs agreed or taxed.

So far as interest is concerned, the defendant is seeking an award in respect of both sums. As I see it, the interests of justice would not be served by making an award on both sums in the manner suggested by the defendant. Had the plaintiffs honoured their obligation under the written agreement, there would have been only one sum payable to the defendant -- the balance of the purchase price. It is that sum that the defendant has been primarily deprived of. In my judgment, it is that sum that ought to attract the commercial rate of interest. Accordingly, I award interest at the rate of 46% on the sum of $678,581.75 to be calculated from the 1st August, 1993. This rate is in keeping with the contents of Exhibit 10 and the submission of learned attorney-at-law for the defendant, Mr. David Henry. I have chosen the 1st August as it is the most convenient date following the defendant's ultimatum contained in the letter of the 19th July, 1993.

The clause relating to use and occupation was apparently designed to prevent a purchaser from living rent-free while the vendor was deprived of his sale price. Seeing that interest is awarded at the commercial rate on the purchase price, there is no justification as I see it for a similar rate to be applied to a sum that becomes due in default of the purchase price. Accordingly, I award interest at 10% on the amount of $1.2m due for use and occupation. That interest is to be calculated from the 1st May, 1993.