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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 87/97

**COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A
THE HON. MR. JUSTICE GORDON, J.A.**

**BETWEEN ERLINGTON NIELSSEN
 LOVETTA NIELSSEN APPELLANTS**

**AND RIDGEWAY DEVELOPMENT
 LTD RESPONDENT**

Dr. Lloyd Barnett & Priya Levers for the appellants

**David Henry & Winsome Marsh instructed by Nunes, Scholefield, DeLeon &
Co., for respondents**

29th, 30th June & 18th December, 1998

RATTRAY, P.

This appeal arises out of an agreement between the appellants and the respondent in respect of the sale of a townhouse in a housing development known as "The Terraces" Barbican Heights in the parish of Saint Andrew. The secondnamed appellant the wife of the firstnamed appellant negotiated with the agent of the respondent one Victor Chang for the purchase of the townhouse, one of several being constructed in the development by the respondent company. At the time of the negotiations construction of the particular townhouse had not yet been completed. There were certain obvious defects and certain missing fixtures but the house was urgently needed by the wife/appellant with her two children. The husband/appellant

was abroad and she had sold their own home in which they resided prior to that time. A price of \$3.2m was agreed between Mrs. Nielssen and Mr. Chang which was \$100,000.00 less than the advertised price. According to Mrs. Nielssen, Mr. Chang promised to remedy the defects which were obvious to her. On her evidence also there existed a verbal collateral agreement that she should pay the sum of \$10,000.00 per month for use and occupation of the property until the full purchase price was paid. She also maintained that Mr. Chang had represented to her that the development would include a gym and a swimming pool. Her claim in the Supreme Court against the respondent rested on the failure of the respondent despite notice to: (i) complete the townhouse in good order; (ii) remedy the defects in the construction and finishing so that the townhouse could be completed in a workmanlike manner with materials of good quality and in keeping with high quality residential accommodation; (iii) supply missing items from the townhouse; (iv) complete the development with the inclusion of the gym and the swimming pool.

Panton, J on the evidence rejected her claim in respect of the gym and the swimming pool.

The respondent denied the appellant's allegations and filed a counterclaim for use and occupation of the premises and for the balance of the purchase price due with such interest under the both headings as the Court would deem fit.

The trial judge made certain clear findings of fact which may be summarised as follows:

1. That the agreement in writing between the parties dated 22nd of April, 1993 constituted the full agreement between the parties and that there was no collateral agreement as claimed by the plaintiff/appellant.
2. This written agreement required the purchaser (the Nielssens) to pay to the vendor an amount of \$25,000.00 per month for the use and occupation of the townhouse should any part of the balance of the purchase price remain unpaid after the 20th of April,

1993. The allegation therefore by the plaintiff/appellant of an agreement to pay \$10,000.00 per month in this regard was rejected. Likewise rejected was the plaintiff/appellant claim that the townhouse development was to have included a gym and a swimming pool. No mention of this appeared in the agreement for sale.

3. That the townhouse had serious defects and that some of them as was listed on page 2 of exhibit 6 were structural.

4. That there is an implied term in the agreement: that the defendant would have completed the dwelling house in a workmanlike manner and with materials of good quality and/or in keeping with high quality accommodation.

Consequently, he awarded the sum of \$545,200.00 to the plaintiff/appellant as the cost of remedying the cracks and other defects as set out in the amended Statement of Claim.

On the counterclaim the trial judge found for the defendant/respondent that he was entitled to:

(a) The payment of \$25,000.00 per month for rental as stated in the agreement from the 1st of May, 1993 to date of judgment. This was calculated to be \$1.2m.

(b) Interest on this sum from the 1st of May 1993 calculated at the rate of 10% per annum.

(c) Interest also on a sum of \$678,581.75 representing the balance of the purchase money which remained unpaid. The rate of interest ordered on this sum was 46% per annum.

Re: Mitigation of Damages:

The trial judge found as follows:

"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."

Later in his judgment he continued:

"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."

The judgment has left both sides dissatisfied. The defendant/respondent has filed a Respondent's Notice challenging the judge's findings in respect of (a) the presence of structural defects in the building, (b) the award of interest at only 10% on the sum awarded on the counterclaim for use and occupation.

What then are the issues which the Court of Appeal is required to determine? The finding of fact challenged by the appellants was the judge's conclusion that there was no collateral agreement as advanced by them at the trial. The trial judge accepted the evidence of the respondent that the Agreement for Sale in writing constituted the full agreement between the parties. In our view there was sufficient evidence upon which he could properly so find including the existence of the written contract which the trial judge found constituted the full agreement between the parties.

In respect to the grounds of appeal based upon law, these relate to:

1. The judge's award of interest on the balance of the purchase price as well as compensation for use and occupation.
2. The judge's finding that the appellant should have mitigated their loss by attempting to correct the defects, paying the outstanding balance of the purchase price and recovering the amount spent in correcting the defects.
3. The judge's award of two sets of interest that is on the balance of the purchase price as well as the sum due for use and occupation over a period in which the appellants had to live in the townhouse in an unfit condition and undesirable circumstances.

On the respondent's denial with regard to the question of structural defects, the trial judge examined the evidence of the experts called on both sides and accepted the evidence of Mr. Oswald Canute Mattis, senior partner in the firm of Mattis, Damain, Beckford and Associates Ltd Consulting Engineers and his findings of structural defects as listed in exhibit 6. We can find no reason to disturb the judge's findings of fact particularly as he had the benefit of seeing the witnesses and at first hand assessing their evidence.

We therefore have to consider the issues under the following heads:

Did the learned trial judge err in law in -

- a) Awarding interest on the counterclaim on both the claim for rental due/or use and occupation under the agreement as well as the claim for interest on balance of the purchase price?
- (b) Only awarding interest at 10% on the claim for use and occupation?
- (c) Relying upon a failure to mitigate on the part of the plaintiffs/appellants as the foundation for determination that interest was payable by the plaintiffs/appellants on both sums to wit the balance of the purchase price and the sum owing for use and occupation?

Re: Mitigation

In his judgment the trial judge used the principle of mitigation and the plaintiffs/appellant's failure to mitigate his loss by having remedial work done and claiming against the respondent for the costs incurred, as a basis for awarding interest on the remainder of the purchase price outstanding. In so doing he erred in failing to recognize that the relevant duty imposed on the plaintiff in this case in this regard was that "of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." [Emphasis added] See *British Lighthouse Electric Co Ltd v. Underground Electric Railways* [1912] A.C. 673; *Macrae v Swindells (Trading as West View Garage Co)*. [1954] 1 W.L.R. 597. The failure to mitigate by the plaintiff/appellant cannot be the basis for an award of interest to the respondent. In any event in the face of a dispute existing up to the time of litigation and indeed up to the appeal, between the plaintiff and the respondent as to the existence of structural defects which the respondent refused to remedy and which the learned trial judge found did in fact exist, it could not be reasonably expected that the plaintiff would proceed on the basis of a duty to mitigate to employ other persons to remedy these defects. A failure to mitigate could not harness the plaintiffs with any liability to the defendant/respondent.

Interest on balance of purchase price

On the facts the plaintiffs/appellants had paid almost 80% of the purchase price to the respondent. The trial judge found that the \$25,000.00 per month was rightly payable under the contract for use and occupation whilst any part of the balance of the purchase price remained unpaid. The question is whether having agreed on a specific sum for use and occupation the respondent was still entitled to interest on the balance of the purchase price.

In my view the sum of \$25,000.00 per month must reflect a pre-estimate agreed by the parties of what the respondent would lose by virtue of being kept out of the use of the sum representing the balance of the purchase price to which as vendor the respondent would be entitled. A further award of interest on the balance of the purchase price would reward the respondent doubly for being deprived of the outstanding amount. The respondent would then be paid the monthly sum of \$25,000.00 calculated for use and occupation as well as interest on the balance of the purchase price, which would amount to a double compensation for the same deprivation. The learned trial judge therefore in my view erred in awarding interest on the balance of the purchase price in the face of his award correctly made in relation to the sum due and owing for use and occupation.

With respect to interest on the sum due for use and occupation, counsel for the respondent has submitted that the rate of 10% per annum was too low. He has urged us to vary the judge's award of 10% interest on the sum due for use and occupation and to substitute therefor an award in keeping with commercial rates. He relies for support of his submission on *Tate & Lyle Food and Distribution Ltd v. Greater London Council and another* [1981] 3 All E.R. 716 at page 724 in which the trial judge Forbes, J. stated as follows:

"The award of interest in these cases is a discretionary matter and, in approaching the task of deciding on such an award, I think judges are entitled to and do, adopt a very broad approach."

The award of 10% per annum calculated as ordered by the trial judge from 1st May, 1993 to date of judgment June 3, 1997 results in interest accruing on the full figure of \$1.2m at 10% per annum for the entire 48 months even though the respondent was not kept out of the total sum for that period. That figure represents a final total on varying sums owing under this head which would have been on 31/5/93, a sum of \$25,000 and would have accrued monthly at that rate, until eventually at date of judgment June 3, 1997 it accumulated to \$1.2m.

In our view in the circumstances of this case the award of 10% per annum, though generous to the respondent was reasonable in all the circumstances and should not be increased.

The appeal is therefore allowed and by a majority ** the judgment of the trial judge varied as follows:

Judgment for the plaintiff/appellant in the sum of \$545.200 with costs to be taxed or agreed.

Judgment for the respondent in the following sums:

(a) \$1.2m at 10% interest per annum from 1st May, 1993 to date of payment.

(b) \$678,581.95 representing the balance of purchase price.

With costs to be taxed or agreed.

The appellants are awarded the costs of the appeal to be agreed or taxed.

Downer, J.A.

I agree.

**** Footnote:**

The majority arises because regrettably Gordon, J.A. a member of the panel died without intimating his agreement or disagreement with the Judgment.