IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1991/S232

BETWEEN	THELMA SCOTT		PLAINTIFF
A N D	CEDRIC ALLEN	1st	DEFENDANT
A N D	GILBERT ALLEN	2nd	DEFENDANT
A N D	KINGSLAND DEVELOPMENT COMPANY LIMITED	3rd	DEFENDANT

Mr. P. Beswick instructed by
Ballentyne, Beswick & Company for plaintiffs.

Mr. H. Robinson instructed by
Patterson, Phillipson & Graham for defendants.

Heard: 12th December, 1994, 2nd and 30th April, 1995, 6th April, 1995, 12th and 16th February, 1996, 20th November, 1996, 22nd November, 1996, 12th, 14th, 24, and 25th November, 1997 and 9th January, 1998.

COOKE, J.

JUDGMENT

Kingsland Development Company (the Company) in, 1985 was involved in selling lots in Kingsland an area in relatively close proximity to Mandeville the capital of the parish of Manchester. On or about April 4, 1985 the plaintiff entered into an agreement to purchase a lot. The price was for $30,000 and she paid a deposit of $15,000. On the 1st December, 1988, a transfer of the same lot was registered in the office of the Registrar of Titles. It was not registered in the name of the plaintiff. The same lot had been sold to another for the price of $60,000. The company by its action had repudiated the contract pertaining to the sale of that lot. This repudiation was accepted by the plaintiff as through her attorneys-at-law she sought the return of her deposit and consequential damages for breach of contract. The deposit was returned to the plaintiff on the 27th November, 1989. The Writ of summons and statement of claim were filed on September 10, 1991. Service was effected on the defendants in early January of

1992. On the 13th of December 1993 an interlocutory judgment in default of appearance was entered. On May 6, 1995 there was an order on an amended summons to proceed to the assessment of damages. Finally an appearance was entered by the defendants on February 9, 1996. I have set out the chronology of events as they will be subsequently subject to comment.

The critical issue that confronts this court is to determine at what time should damages be assessed. Is it at the date of the breach or at the date of the assessment of damages? On behalf of the defendants it is contended that it is the breach date which it is all agreed is December 1, 1988. It will be recalled that on that date the lot was transferred for $60,000. Accordingly if that sum of $60,000 is taken as the market price then the loss to the plaintiff would be $30,000. This is the difference between the contracted purchase price and the market price at the time of the breach. The plaintiff asserts that she must now be put in the position she would now enjoy if the contract had not been broken. She should be compensated in terms of the present market value of the lot.

On her behalf evidence was given by Mr. David Delisser, the Managing Director of David Delisser and Associates Ltd; an established body of real estate agents, Valuators, Auctioneers and Consultants, that on a forced sale of the lot $1,875,000 should be realized. Mr. Fairbourne Maxwell called by the defendants is the chief Executive Officer of September Homes Limited a body of Appraisers and Valuation Surveyors that is based in Mandeville. His view was that the present market value of the lot was $950,678. For reasons which will emerge it is unnecessary for me to indulge in any critical assessment of the respective opinions. It is sufficient for me to say that I would be inclined to prefer the view of

Mr. Fairbourne Maxwell. He is immersed in the local knowledge of the real estate situation of Mandeville and its environs.

A number of cases were brought to the attention of the Court: **Wroth v Tyler [1933] 1 AER 897, Malhotra v Chondury [1978] 3 WLR 825** and **Grant v Dawkins** were the principal ones. All these were considered by the House of Lords in **Johnson and Another v Agnew [1979] 1 AER 883.** In his speech Lord Wilberforce with whom all the other Law Lords agreed said at p. 896,

> "The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of of the breach, a principe recognised and embodied in S51 of the Sale of Goods Act 1893. <u>But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.</u>
>
> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In Ogle v Earl Vane (1867) LR 2 QB 275; affd LR 3 QB272, the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in Hickman v Haynes (1875) LR 10 CP 598 at a reasonable time after the last request of the defendants (the buyers) to withhold delivery. In Radford v de roberville [1978] 1 All ER 33, [1977] 1 WLR 1262, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date." (emphasis mine)

I accept the principles stated above and will seek to be guided by them. In the instant case the plaintiff readily accepted the repudiation of the contract. Her thoughts

were for the return of her deposit and to receive damages for breach of contract. It was her view that the contract was lost. She went to live in Florida in the United States in 1989 and has resided there since that date. Perhaps she no longer wished to build a house in Jamaica. At any rate there are no factors which would indicate that the normal principle of the assessment of damages should not be at the date of the breach i.e. 1st December, 1988. As an arithmetical exercise the award should be $30,000. However, to award $30,000 would lead to injustice. This is because of the depreciation in the value of money which has taken place in Jamaica since 1989. An award of $30,000 would be of a benefit to the contract breaker. It was only in February of 1996 that the defendants entered an appearance. There was no defence to the suit. It is the view of this court that although the appropriate date for the assessment of damages is the date of the breach the award must be expressed in the "money of the day." Consequently, the award is $300,000. There will be interest of 3% per annum as of the date of the breach - December 1, 1988.

The plaintiff expended $5,406.00 in respect of the lot essentially planting fruit trees and fencing. She will receive this sum from the defendants with interest at 3% from December 1, 1988. Again the defendants held the plaintiff's deposit from 4th April, 1985 until 27th November 1989. It is right that she should receive interest on that sum at what I accept as the then prevailing bank rate of 18% per annum. She will thus receive $9,594. There will be costs to the plaintiff to be agreed or taxed.

Finally I wish to comment on the length of time that has elapsed before there has been an adjudication. This court is concerned. Delays of this sort is inevitably detrimental to both parties. As for the plaintiff she has been deprived of having an award in her hands. As for the defendants the period of having to pay interest has been greatly extended. We all need to correct this undesirable situation.