IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. S. 222 OF 2000

BETWEEN	DORRELL NEIL SMITH	CLAIMANT
A N D	LINNETT MAY CHIN	DEFENDANT

Mr. Lawrence Philpotts-Brown for the Claimant.

Mr. Lowell F. D. Smith and Mrs. Keva Hylton instructed by Keva M. Hylton for the Defendant.

The Defendant attended in Person.

SALE OF LAND - WHAT INTEREST RATE IS PAYABLE ON UNPAID PURCHASE MONEY?

Heard: February 22 & 27th, 2006

BROOKS, J.

This case is a success story for the relatively new Case Management system. When it came up for the hearing of the Pre-Trial Review, counsel, instead of attending with a view to requesting "the standard orders" as too many counsel now seem to do, were prepared, in the true spirit of case management, to attempt to resolve the matter, if at all possible.

An examination of the issues in dispute led them to agree to have an out of court meeting to attempt resolution. As a result of that meeting they returned to court asking for the court's adjudication on one issue only,

namely; "what rate of interest is properly payable on unpaid purchase money in the contract for sale of land signed between the parties".

I shall first introduce the parties, outline the background to their dispute and then address the issue to be resolved.

Parties and Background

The pleadings show that Leslie Keith Thelwell and Linett May Chin are registered on Transmission as the proprietors of premises situated at No. 11 Lyndhurst Road, Kingston 5, in the parish of Saint Andrew ("the premises"). The premises are comprised in a Certificate of Title registered at Volume 785 Folio 81 of the Register Book of Titles.

By an agreement for sale dated 4th April 1986, Mr. Thelwell contracted to sell the legal interest in the fee simple to Mr. Dorrell Neil Smith. I shall use Mr. Dorrell Smith's first and last names in order to avoid confusion with counsel leading for Ms. Chin. Mr. Dorrell Smith was placed in possession of the premises pursuant to the contract. The sale has not yet been completed, having been beset with disputes concerning the accounting for payments of the purchase price. Mr. Thelwell has since died, and there are now different attorneys representing the respective parties.

Mr. Dorrell Smith filed this claim seeking an order for specific performance of the contract. Ms. Chin (stepping into Mr. Thelwell's shoes)

filed a defence resisting the claim on the basis that a notice to complete which was sent to Mr. Dorrell Smith, was not complied with and the agreement was therefore terminated.

As I have already indicated, that issue has been happily resolved. The parties have now agreed that Mr. Dorrell Smith still owes the sum of $30,000.00 on the purchase price of $50,000.00. The period agreed for which the interest should be payable is from 17th September, 1987 to the date of judgment.

Is interest payable on this sum, and if so, at what rate?

The Submissions

Mr. Philpotts-Brown did not deny that interest is payable but submitted that Mr. Dorrell Smith should be required to pay no more than 12½% per annum interest. This, he submitted, is because the contract is subject to the Moneylending Act which, according to him, restricts interest rate to that figure. He cited in support, the unreported decision in the case of *Debbie Lynne Ltd. v. Collin Husbands* Suit No. C.L. 1977/D064 (delivered February 4, 1985).

Mr. Lowell Smith for Ms. Chin, argued, in response, that the rate of 21% per annum should be the appropriate rate. He did not seek to challenge the finding in the *Debbie Lynne* case. He sought, instead, to distinguish it on

the very slim ground that whereas *Debbie Lynne* concerned unpaid money on a building contract, the instant case concerned unpaid money on the sale of realty. He cited no authorities for his proposition. Mr. Lowell Smith failed to convince me that there was any material difference between the two for the purposes of the issue to be resolved.

The Law

Is Interest Payable?

It has long been established that an unpaid vendor is entitled to interest on the monies due to him. In *In re Pigott and the Great Western Railway Company* [1881] 18 Ch. D. 146 Jessel M. R. stated that the ordinary rule was that, "where the vendor has shewn his title, the purchaser pays interest from the time at which he might prudently have taken possession..." The learned authors of the 21st Edition of *Gibson's Conveyancing* (at p. 171) explain the rationale for the payment of interest in this way:

> "Equity looks on as done that which ought to be done. Therefore if completion does not take place on the contractual completion date, equitable principles require that the parties be put in the same position, so far as is possible, as if the contract had been performed on the due date. Thus if, on that date, the vendor does not receive the purchase money to which he is entitled under the contract, the purchaser is bound to pay interest on it in respect of the period between the contractual and the actual completion dates."

In the case of *Sale v. Allen* (1987) 36 W.I.R. 294, the Judicial Committee of the Privy Council, confirmed, in an appeal from this jurisdiction, that interest is payable by a purchaser in possession even where the delay in completion is due to the default of the vendor.

At What Rate is Interest Payable?

The rate at which interest is chargeable is therefore the next hurdle to be surmounted. The English authorities make it quite clear that the parties are at liberty to fix the rate of interest applicable to their peculiar situation and failing agreement the equitable rate will apply. In *Pigott,* mentioned above, the rate set by Equity was said to be 4% per annum, and in 1980 the learned authors of *Gibson's Conveyancing* (supra at p. 171) suggested that "if no other rate is fixed" by the parties, that 4% per annum, despite its inadequacy, still applies. One of the cases relied upon by the learned authors is *Esdaile v. Stephenson* (1822) 1 Sim. & St. 122 (Vol. 57 E.R. 49). In that case Sir John Leach V.C. said

> "Where there is no stipulation as to interest, the general rule of the Court is that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, and shall from thence pay interest at £4 per cent. taking the rents and profits."

The learned editors of Halsbury's Laws of England, (4th Ed. 1999 Reissue Vol. 32 at paras. 109 and 112) confirm the equitable right to interest

and the traditional rate of 4% being applicable to cases of unpaid purchase money on sale of land. They however go on to say, "but more realistic rates based on modern conditions are now awarded". The cases cited in support of the proposition are not cases involving the sale of land, but perhaps *Sale v. Allen* may be considered one such.

Having identified what is the rule, the *Sale* case needs to be revisited. In *Sale,* the facts were very similar to the instant case. Having ruled that interest was indeed payable by the purchaser, their Lordships, in the absence of a rate having been agreed by the parties, did not apply the equitable rate. Instead, they returned the case to the court of first instance for, among other things, "the ascertainment of the appropriate rate of interest on the unpaid balance of the purchase price" (p. 299 f). Lord Oliver of Aylmerton, on behalf of the Board said (at p. 299 c):

> "In their Lordship's opinion there should, in the working out of the decree of specific performance, be allowed to the appellant interest at such rate as may be fixed by the High Court of Jamaica on the unpaid balance of the purchase price..."

The issue was considered by Downer J. (as he then was) (*Noel Sale v. Sonia Allen* Suit C.L. S. 139 of 1981 delivered on June 30, 1989.) During that hearing Downer J. was provided with a letter by the Plaintiff's counsel, from Mutual Life Assurance Society, stipulating a range of interest rates. The learned judge selected the mean figure of 16% from the range. There

was no question, or discussion, either by their Lordships or Downer J. of there being a limit by virtue of the Moneylending Act or of the equitable rate being applicable to the situation. It seems to have been taken for granted that a more modern approach is the standard to be used.

The approach taken before Downer J. in *Sale* was also the approach taken before the court of Appeal in *Peter Williams and others v. United General Insurance Company Limited* (SCCA 82/97 - unreported judgment delivered November 30, 1998), and in *British Caribbean Insurance Co. Ltd. v. Perrier* (1996) 33 J.L.R. 119. In the latter case counsel cited before the judge at first instance, the relevant contents of the Statistical Digest published by the Bank of Jamaica. Carey J.A., on appeal said, on this point, in relation to commercial transactions:

> "It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award....I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate."

Based on the more modern decisions, and despite *Esdaile v. Stephenson,* I find that the court may properly apply a rate other than the equitable rate of 4%, even if the parties have not agreed on a specific rate. That is, provided that evidence is supplied to the court to support such other rate.

Application to this case

Though this is a transaction which would at first blush seem to attract interest at commercial rates, those rates have varied significantly over the period since this agreement was signed. I am of the view that I have no basis, for selecting any particular figure, other than that recognized by equity or by the parties. This is because Ms. Chin's counsel has not provided this court with any information, outside of the agreement, to assist it in determining an appropriate rate of interest.

What therefore have the parties agreed? The contract mentions interest only in the context of a vendor's mortgage. Paragraph (c) of the Special Conditions set out therein, states as follows:

> "The sum of Thirty Thousand Dollars ($30,000.00) to cover balance purchase price shall be secured by a first Mortgage of the said lands from the purchaser to the Vendor with interest payable thereon at the rate of $21.00 per centum per annum by monthly instalment for the period of 5 years"

In this Special Condition, the rate of 21% per annum is contemplated. That however is in the context of a mortgage. The mortgage was however never brought into effect. 21% would have been the rate applicable after completion of the sale and not before. It was however a rate which was contemplated by the parties to the agreement to be calculated on the very sum of $30,000.00 now agreed to be owed. Further to that is the fact that, in

anticipation of completion of the agreement Mr. Dorrell Smith had, some time ago, executed a mortgage instrument whereby he indicated a willingness to be bound by the interest rate of 21%.

In light of this contemplation by the parties, and particularly Mr. Dorrell Smith, I shall award the rate of 21% per annum as being the applicable rate to be used until the sum due is paid.

Applicability of the Moneylending Act

I will now consider the *Debbie Lynne* case cited by Mr. Philpotts-Brown. In that case the learned trial judge was asked, among other things, to award interest on a sum remaining unpaid under a building contract. After deciding the question of the sum which remained unpaid and recognizing that the agreement between the parties had stipulated a rate of interest of 18% on unpaid monies, the learned judge, in the penultimate paragraph of the judgment expressed himself thus:

> "However by Section 13 of the Money Lending Act the lender cannot properly exact an interest rate in excess of 12½%."

He then gave judgment for the Plaintiff and awarded interest at the rate of 12½% interest. There was no previous mention by the learned judge of the Moneylending Act, or any assessment of the issue of whether it applied to unpaid monies on the provision of a service. Were it not for the fact that the

interest rate was an important part of the award, the comment might almost be considered *obiter*.

I find, in light of the authorities cited above, that there was no lending transaction between Mr. Thelwell and Ms. Chin, on the one hand and Mr. Dorrell Smith on the other, to warrant an application of any of the provisions under the Moneylending Act. This was no loan by them to him. He owes a debt created by virtue of an agreement for sale by which he is to tender a particular amount as the purchase price. I therefore respectfully decline to follow the decision of the court in *Debbie Lynne,* on that issue.

In any event, the Moneylending Act was amended in 1997 (after *Debbie Lynne).* Pursuant to that amendment, the rate of 25% was prescribed by the Minister as the maximum rate for transactions exempted from the operation of the Act. (See regulation issued on August 27, 1997 (L.N. 101C/97)). This was instead of the previously applicable rate of 12½%. A charge of interest at the rate of 21% would therefore now be exempt from the provisions of the Moneylending Act. On these bases, I find that the rate of 12½% recommended by Mr. Philpotts-Brown is inapplicable to these proceedings.

Conclusion

There is no doubt that interest is payable on unpaid purchase monies by a purchaser in possession. The rate of interest that is payable by the purchaser if not agreed between the parties, is either the traditional equitable rate of 4 per centum per annum, or a more realistic rate based on modern mercantile experiences. In the latter case however evidence has to be provided to the court to assist it in determining the appropriate applicable figure.

In this case the parties contemplated in the agreement and the mortgage instrument prepared pursuant thereto, a rate of 21%. This rate does not smack of penalty and so will be applied by the court to the balance of the purchase money due from Mr. Dorrell Smith to Ms. Chin.

Before ending, let me express my thanks to counsel on both sides for the spirit of reconciliation with which they approached this matter.

The order is as follows:

1. The agreement for sale dated 4th April 1986 is to be completed within 21 days of the date hereof.
2. Completion shall be effected by Ms. Linnett May Chin delivering to the purchaser Dorrell Neil Smith a registrable instrument of transfer together with the duplicate certificate of title for premises No. 11

Lyndhurst Road, in the parish of Saint Andrew, being the title registered at Volume 785 Folio 81 of the Register Book of Titles, in exchange for the said Dorrell Neil Smith paying to her the sum of $30,000.00 together with interest thereon calculated at the rate of 21% per annum from the 17th September, 1987 to the date of payment.

3. Liberty to apply.