[2012] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 43/2006

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN **KEITH TENNANT** **APPELLANT**

AND **ALEX'S IMPORT LIMITED** **RESPONDENT**

Mrs Arlene Harrison and Jermaine Simms instructed by Miss Marlene Uter from Alton E. Morgan & Co, for the appellant

Jalil S. Dabdoub instructed by Dabdoub, Dabdoub & Co for the respondent

14, 15 July 2010 and 30 March 2012

PANTON P

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

MORRISON JA

[2] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

[3] This appeal arises from a conveyancing transaction which went very wrong. It required two different actions in court to complete the agreement for sale entered into between the parties and to assess the damages payable for breaches of the same. In this appeal, the appellant vendor, ("Keith Tennant") appeals the judgment of Daye J, delivered on 5 May 2006 in favour of the respondent purchaser (Alex's Import Limited) wherein he made the following orders:

> "1. Judgment for Claimant on the Claim and Counter-Claim
>
> 2. Special Damages in the sum of $1,241,363.63
>
> 3. Interest at 12 percent per annum from the date of service of the Writ to date of Judgment
>
> 4. General Damages in the sum of $5,000,000.00
>
> 5. Interest at 12 percent per annum from date of completion of Agreement of Sale to date of Judgment
>
> 6. Cost to Claimant to be agreed or taxed
>
> 7. Order that Registrar of Titles rectify the endorsement on Certificate of Title registered at Volume 1065 Folio 81 by inserting the words 'Limited' next after the words Alex's Import to read Alex's Import Ltd [sic]."

[4] In appealing the judgment of Daye J. he initially challenged the amount of $361,363.63 (being part of the $1,241,363.63, awarded for special damages). Daye J found, inter alia, that Mr Tennant had failed to deliver vacant possession of the premises as agreed and accordingly awarded special damages of $800,000.00, representing the cost of alternative rental from 17 July 1997 to 28 February 1998, and the legal fees for the recovery of possession of the property, in the amount of

$50,000.00. He also found that Mr Tennant had failed to produce title for 530 square feet, which was lost to Alex's Imports Limited as a result of an encroachment of the adjoining premises on 72 A Hagley Park Road. He therefore compensated Alex's Imports Limited for the value of the same, being $361,363.63 as at 7 February 1997, with interest at 12% from November 1999 to 5 May 2006. The appeal against that portion of the award for special damages was later abandoned and the only amount in the judgment appealed was the amount ordered in respect of general damages in the amount of $5,000,000.00 with interest at 12% from 17 July 1997 to 5 May 2006.

[5] Many issues arose for the consideration of the learned trial judge. However, based on the grounds of appeal filed, it appears to me that the real issue and questions to be decided by this court on this appeal are as set out below.

Issue

> Whether the learned trial judge was correct when he awarded the sum of $5,000,000.00 to the respondent as the true and correct measure of general damages for the loss incurred in the circumstances of this case, bearing in mind questions as to whether:-
>
> (a) the encroachment on the property, reflected on the certificate of title, resulted in the title being useless as a security in the purchase [of the same].
>
> (b) there was a diminution in the value of the property due to the defect in the title and was sufficient evidence adduced with regard to the reduced value as a result thereof;
>
> (c) the respondent was entitled to reduced damages having known of the defect in title before the

agreement was signed; and were other special circumstances proved and known;

(d) there was any evidence to support a finding of the rejection of a loan in the amount of $10,000,000.00 from the NCB, and the consequent subsequent removal of $10,000,000.00 from the business;

(e) there was any evidence prima facie or otherwise to support the loss of $10,000,000.00 or a portion thereof over the period of 2½ years; and

(f) there was any evidence that the respondent satisfied its duty to mitigate its loss.

The proceedings below

[6] It may be helpful to set out the history of the transaction, some details of the real controversy between the parties and the litigation which preceded this appeal.

(a) Keith Tennant entered into a written agreement for sale with Alex's Imports Limited on 7 February 1997 in respect of property comprised in certificate of title registered at Volume 1065 Folio 81 of the Register Book of Titles, known as 72 A Hagley Park Road, Kingston 10 in the parish of Saint Andrew. It was supposed to contain 22,078 square feet as appeared in the plan annexed to the title for the property. However, prior to the execution of the agreement for sale, the purchaser was aware that there was an encroachment by an adjoining owner resulting in the loss of 530 square feet. The following were some of the terms and conditions of the sale:

(i) the sale price was $15,000,000.00;

(ii) the purchaser was required to pay a deposit of $1,500,000.00 and an advance payment of $750,000.00 on the signing of the agreement, with the balance of the purchase price to be paid "on completion ninety (90) days thereafter".

(iii) completion was on or before the expiration of the 90 days from the payment of the deposit and the advance payment;

(iv) possession of the property was to be given vacant on completion;

(v) the property was to be free from incumbrances other than the restrictive covenants and easements endorsed on the certificate of title for the property and the easements were to be obvious and apparent;

(vi) the agreement was subject to Alex's Imports Limited obtaining a mortgage from a reputable financial institution acceptable to Mr Tennant for an amount not less than $12,750,000.00, with Alex's Imports Limited undertaking to obtain a letter of commitment for the loan, delivered to Mr Tennant's attorneys-at-law on or before 60 days from the date of the agreement;

(vii) liquidated damages, being a sum calculated at the rate of 40% per annum on all monies payable under the agreement but not paid at the stipulated time, were payable by Alex's Import Limited;

(viii) time was of the essence of the agreement and failure to complete in accordance with the terms and conditions agreed constituted a breach and the deposit would be forfeited without further notice to Alex's Import Limited;

(ix) Mr Tennant's Attorneys-at-law, Alton E Morgan & Company, had carriage of sale of the agreement;

(x) Charles Sinclair represented Alex's Import Limited.

(b) The deposit and advance payment were duly paid as required. Alex's Import Limited appears to have indicated that NCB would give an undertaking to pay $10,000,000.00 and accordingly it would pay the balance plus costs on completion. However, contrary to the terms of the executed agreement, Alex's Import Limited took possession of the property on 8 February 1997, prior to completion, with two tenants still in occupation of part of the property, as it needed the premises and could not wait for the completion date in the agreement.

(c) Several items of correspondence passed between the attorneys at law representing the parties relative to their respective rights in respect of the transaction, commencing on 3 January 1997, prior to the execution of the agreement for sale, and continuing up until the first action was filed in March 1998. I will attempt to summarize the same.

(i) On 27 January 1997, Mr Charles Sinclair confirmed to Mr Morgan that he was in receipt of the surveyor's identification report dated 8 September 1987, and that the defect in the boundary of the property disclosed therein remained the same. He requested that,

pursuant to the contract of sale, the defect be corrected, prior to completion.

(ii) On 30 January 1997, Mr Morgan confirmed that, "[t]he provision in the contract that the title shall be free from encumbrances and easements will oblige our client to ensure that the boundary defects are remedied. In view of the fact that they are long outstanding (over 10 years), our client will have the boundaries re-surveyed and the plan attached to the title re-registered. Your client may proceed to execute the Agreement with this understanding".

(iii) On 3 February 1997, Mr Morgan requested payment of the shortfall, in order for Alex's Import Limited to take possession of the property, and enclosed a licence agreement indicating a monthly payment of $84,000.00, which sum was requested.

(iv) By letter dated 19 February 1997, Mr Sinclair rejected the request for $84,000.00 and stated that the monthly sum agreed was $60,000.00, as his client had not obtained possession of the entire property, which was required not only for storage of the motor vehicles but for the sale of the same.

(v) On 21 February 1997, Mr Morgan advised that, on his instructions, the licence agreement had become redundant, as Alex's Import Limited had taken possession of the property and made extensive alterations to the same to suit their own purposes. As a consequence, his client intended to rely on the fact that Alex's Import Limited was a purchaser in possession, and was therefore obliged to pay interest on outstanding purchase money, (which was then $12,744,000.00,) at the rate of 12% per annum, and which would yield a monthly rate of $125,700.00. Mr Morgan indicated that his client would account for any rental income derived from the property since Alex's Import Limited had taken possession thereof.

(vi) On 26 February 1997, Mr Sinclair disagreed with the contention that his client was obliged to pay interest on outstanding purchase money when he had not been given full possession of the property. He therefore maintained that he would pay the $60,000.00, which he said was agreed, and requested information on the steps taken to correct the boundary and to evict the tenants.

(vii) By letter of 27 February 1997, Mr Morgan maintained that the significant physical alterations to the property were consistent with the status of a purchaser in possession. In reliance on the Privy Council case of **Noel Sale v Sonia Allen,** (36 WIR 294), he informed that in the absence of the licence agreement, the only relationship binding the parties was their contractual one, of vendor and purchaser and his client would be guided accordingly.

(viii) On 23 June 1997, Mr Sinclair acting as agent for Alex's Import Limited, had lodged a caveat against the certificate of title for the property, forbidding registration of any person as proprietor thereof, and any instrument affecting its interest, without prior notice, on the basis of the agreement for sale between Alex's Import Limited and Mr Tennant, claiming a beneficial interest in the property of $15,000,000.00. This caveat was withdrawn on 14 July 1997 for the sole purpose of effecting the registration of Alex's Import Limited as the registered proprietor.

(ix) On 24 April 1997 Mr Sinclair sent a cheque, representing the closing costs, and the executed transfer to Mr Morgan, and requested confirmation that the tenants had left the building, that the boundary had been corrected, and that the utility bills and the property taxes had been paid up. He also set out his instructions that his client had delivered and Mr Tennant had accepted, one Toyota Land Cruiser motor vehicle at an agreed price of $3,000,000.00, the value of which was to be credited to the purchase price.

(x) Additionally, on 24 April 1997, NCB gave a letter of undertaking on behalf of Alex's Import Limited to pay $10,000,000.00 to the appellant's attorneys, upon delivery of the certificate of title for the property by the appellant's attorneys, with the transfer to Alex's Import Limited endorsed thereon.

(xi) By way of letter dated 17 July 1997, Mr Morgan indicated that his instructions had been to accept the value of the motor car as $1,750,000.00 as part of the consideration of the purchase price, and he therefore, on behalf of his client, had offered to vary the sale agreement accordingly. This, however, he confirmed had not been accepted, and so he made it clear that he intended to rely on the terms of the agreement to insist on specific performance. He stated that his client had performed all his obligations under the agreement. He therefore intended to proceed to obtain the unsecured portion of the purchase money and to invoke to its full

extent, the provisions of special condition 4 of the agreement, that is, for payment of interest on monies paid late, and/or which were outstanding. On the same day, by way of transfer # 981130 Alex's Import Limited was duly registered on the certificate of title for the property without the registration of any mortgage.

(xii) On or about 31 July 1997, $10,000,000.00 was paid to Mr Morgan upon the delivery of the certificate of title for the property with the transfer to Alex's Import Limited endorsed thereon. The balance of $2,750,000.00 remained unpaid.

(d) That appeared to mark the end of the correspondence and activity between the parties prior to litigation, for on 2 March 1998 in suit no C.L.1998/T048 Mr Tenant sued Alex's Import Limited for damages for breach of the agreement for sale, in particular for (i) the failure to pay the balance purchase price of $12,750,000.00 on the completion date of 8 May 1997 or at all; (ii) for the late payment of the sum of $10,000,000.00; (iii) for failure to pay the liquidated sum in relation to the late payment of $754,520.55 and (iv) for failure to pay liquidated damages on the outstanding purchase price from the date of completion amounting to $638,904.11 and continuing at the rate of $3,103.70 per diem until paid. Alex's Import Limited filed a defence and counterclaim accepting the facts pertaining to the agreement, but maintained that the company had paid the full purchase price for the property as the remaining sums related to the 1994 Toyota Land Cruiser 4-wheel drive motor vehicle which had been sourced, acquired, imported and delivered to Mr Tennant, the value of which was $3,000,000.00 was to offset the payment of the purchase price. Alex's Import Limited claimed breach of contract, damages for breach and special damages.

(e) Theobalds J, on 17 September 1998 gave judgment in favour of Mr Tennant for the sum of:-

"(a) $754,520.55, being liquidated damages on the late payment of $10,000,000.00;

(b) $3,388,904.11, being liquidated damages on the balance purchase price of $2,750,000.00 plus interest up to 28 February 1998 amounting to $638,904.11 with interest continuing to accrue on the sum of $2,750,000.00 at the rate of $3,103.70 per diem until paid."

(f) The judgment debt was paid on 2 June 1999, subsequent to enforcement proceedings having been taken out against Alex's Import Limited.

(g) (i) On 1 October 1999, Alex's Import Limited filed proceedings CL 1999/A109 against Mr Tennant to recover damages for breach of the said agreement for sale. In this action, Alex's Import Limited pleaded in the statement of claim that under the agreement Mr Tennant was obliged to provide a title free from incumbrances, but although in receipt of the full purchase price, he had breached the agreement, as restrictive covenant number four had been breached, as there was a concrete wall and building on the said premises encroaching on the eastern boundary, the area of which was approximately 530 square feet. Alex's Import Limited claimed that Mr Tennant had failed and/or neglected to correct the encroachment and as a result, it had been severely inconvenienced in the operation of its business, had lost income, had been unable to treat with its premises to raise finances and had incurred and continued to incur other loss and expenses by reason of the existence of the said encroachment on its premises.

(ii) Alex's Import Limited also claimed that there was a breach of the term of the agreement requiring the delivery of the premises, "vacant on completion", as when the title was registered in its name there were still two tenants in occupation, who were evicted from the property through court proceedings undertaken solely by Alex's Import Limited. The tenants did not quit the premises until 31 January 1998 and 28 February 1998, respectively. Alex's Import Limited claimed special damages for the cost of alternative rental from 17 March 1997 to 28 February 1998 in the amount of $800,000.00 and the legal costs incurred in instituting and pursuing the recovery of possession of the property in the amount of $50,000.00; and damages for breach of contract in respect of the encroachment and in respect of the failure to give vacant possession with interest and general damages.

(iii) Mr Tennant pleaded that Alex's Import Limited took early possession of the property, as it claimed it needed the premises and could not wait for the completion date in the agreement. Further, if there was any breach of covenant, which was not admitted, Alex's Import Limited had waived the right to complain about it, having taken possession with knowledge of the same. Additionally, the purchaser was under a duty to conduct its own investigation of title. Mr Tennant counterclaimed for damages,

(including interest and penal charges due to an inability to pay loans) and special damages, not particularized.

Judgment of Daye J

[7] The learned judge identified several issues requiring resolution in the trial before him, namely, inter alia:

Issue 1 - Whether Alex's Import Limited was a licensee or a purchaser in possession. He found that Alex's Import Limited was put in possession of part of the premises at 72 A Hagley Park Road on or about 5 February 1997 and that at the time it entered into possession it was the contemplation of the parties that Alex's Import Limited ought to be a licensee. That, he said, was its status although there was no executed licence agreement, and none had been tendered into evidence.

Issue 2 - Did Alex's Import Limited obtain vacant possession on completion?

The learned judge found that when Alex's Import Limited took possession of the premises the tenants of Mr Tennant were still in occupation. Mr Tennant did not personally evict the tenants and did not give any instructions to his attorneys to do so. He also continued to collect rent from the tenants before their eviction.

Issue 3 - Was there an encroachment on the eastern boundary of the premises on 7 February 1997?

The learned judge found that there was a boundary encroachment on the premises, known to all the parties before the agreement for sale was signed in February 1997. He also found that this had not been corrected by Mr Tennant.

Issue 4 - Was Mr Tennant obliged to remedy any breach, covenant or title?

In answer to the question that the learned trial judge posed, as to whether Mr Tennant was obliged to remedy the breach, he found in the affirmative that he had a duty to do so. The actions by the purchaser, he said, including the lodging of the caveat did not relieve Mr Tennant of his obligations under the agreement. He was therefore in breach of the agreement, as he had not provided a title free from incumbrances.

Issue 5 - Did Alex's Import Limited's activities to enter into possession and to renovate the premises, amount to a waiver of the breach and the defect of the title in respect of the premises?

The judge concluded that an encroachment on the boundary of a property, although it does involve a physical incursion on the property, cannot be described as the physical condition of the property, to be captured by special condition 7 of the agreement. Special condition 7 speaks to the purchaser accepting the actual state and condition of the property, as at the date of purchase, which the judge concluded cannot derogate from the condition to provide a free title. Additionally, the learned judge found that part possession or physical occupancy of the property was not equivalent to taking possession of the entire premises, so as to waive its rights to have the defect in the title remedied by Mr Tennant. The renovation of the building and putting up a sign did not equate to modification of the premises so as to waive its rights to have the title remedied. The learned judge found too, that it could not be reasonably concluded that Alex's Import Limited intended to take the premises subject to any defect in the title. Further, this was not a case where the purchaser was taking possession of the property before completion with knowledge of irremovable defects. The boundary defect was

one over which Mr Tennant had control. It was not irremovable. There was no indication that Alex's Import Limited had waived its right to insist that Mr Tennant remedy the defect in title.

Issue 6 - If Mr Tennant had breached the agreement what was the quantum of damages to which Alex's Import Limited was entitled?

The learned judge was clear that special damages had been proved. He indicated that he did not accept that the discrepancy in the boundary was minimal and, ought not to be compensated. The real issue therefore related to the measure of general damages. The learned judge referred to the plea in the statement of claim, and to paragraph 21 of the affidavit of Mr Alexander Haber sworn to on 5 September 2005, with regard to the severe inconvenience in the operation of the business caused by the defect in the title, and the lost income. He however seemed particularly impressed with the oral evidence given at the trial by Mr Haber whom he described in the opening paragraphs of his judgment as "a young entrepreneur who is engaged in business as an authorized used car dealer and traded under the name Alex's Import Limited". He set out Mr Haber's evidence in this regard:

> "I have loss [sic] income. Even up to today the title is in the name "Alex Import" and not "Alex's Import Ltd". So the title has no use to me. I was obtaining a loan from [sic] Alex's Import Limited from N. C. B. to buy the property. The loan was rejected due to an encroachment on the title. So I had to take money out of my cash flow to buy the property cash. It cause [sic] me to loose [sic] business, i.e. income. I was an authorized car dealer. The cash I use to purchase cars. At that time car sales was very high, business was booming. I could purchase cars from Japan and turn that money five to six times per year and earn net profit of 20-30 percent per

> year. As a result of not getting the loan I had to take out $10 million from cash flow.
> I estimate I lost over $10 million to $25 million. It was over a one year period. At that time I was the largest car dealer in Montego Bay and I had business in Mandeville, Ocho Rios and Kingston. I had 400 cars at that time."

The judge indicated that this evidence was not challenged and he went on to take 20-30% of the $10,000,000.00 claimed to be lost, namely $2,000,000.00 - $3,000,000.00 per year, and held 2½ years loss of profit to be reasonable, namely $5,000,000.00, which he awarded with an average rate of interest of 12% (for the years 1997-1999) and not the average rate over a longer period, as, he said, the 20-30% loss of profit was a net figure, and was not money withheld from Alex's Import Limited. He applied the interest from the date of completion of the agreement for sale to the date of payment.

Issue 7 - Was Mr Tennant estopped from counter-claiming for damages for the breach of the agreement for sale from Alex's Import Limited having obtained damages for the liquidated sum under the agreement for sale in a prior suit of 1998?

The judge found that the claim by Mr Tennant for damages in respect of additional interest charges due to his inability to repay his loans, or because he had been classified as a delinquent debtor, and had suffered injuries to his creditworthiness, could all have been brought in the 1998 claim for specific performance. The claims were therefore barred, and Mr Tennant was estopped from raising them in his counter claim in the action below.

[8] Based on all of the above findings the learned trial judge made the orders as set out in paragraph [3] herein.

The appeal

[9] As indicated previously, Mr Tennant challenged the amount awarded for general damages in the sum of $5,000,000.00. His further amended notice of appeal contained 16 grounds of appeal. In my view, several of the grounds are not relevant to the issues on this appeal, as they claim that the learned judge erred in his findings relative to the interpretation of the special conditions relative to the obligation to deliver a certificate of title free from incumbrances; the effect of the registration of the caveat and its subsequent withdrawal on the findings of waiver on the part of Alex's Import Limited of a title free from defect; the effect of the finding that the boundary defect was not irremovable and so continued to be the obligation of Mr Tenant to correct it; that having failed to rescind the agreement Alex's Import Limited could no longer complain about the defect of the title, and had therefore accepted the title in the condition that it was at the time of entering into the agreement. As these grounds relate generally to the legal obligations under the agreement for sale and to the consequences attendant with the lodging and implementation of the caveat, but do not address the measure of general damages awarded by the court, I have distilled the grounds and set out only those which appear to do that in some way, namely grounds of appeal (vi), (vii), (viii), (ix), (xii), (xiii), (xiv), (xv) and (xvi). I have related those grounds to the issues I have

discerned were disclosed in the written and oral submissions made by counsel at the hearing of the appeal.

The Grounds of appeal

Ground (vi)

> The learned trial judge erred in not giving any or sufficient weight to the law and the evidence in relation to the fact that the Title with the encroachment had been accepted as proper security for three mortgages up to the time of its Transfer to the Respondent and the Respondent offered no evidence to rebut that fact in claiming that it was unable to use the title as proper security for a mortgage.

Ground (vii)

> The learned trial judge erred in law in failing to consider whether or not Special Condition 8 of the Agreement for Sale excluded the Appellant from any liability to the claim by the Respondent for compensation for the area of land lost of 530 square feet and the claim for loss of profit as damages for the alleged unsuitability of the title to secure a mortgage.

Ground (viii)

> The learned trial judge erred in law in not finding that the Respondent had failed to mitigate its loss within six months of becoming the registered proprietor on the title in July of 1997 by correcting the plan on the title pursuant to s.54 and 174 of the Registration of Titles Act to remedy the boundary defect.

Ground (ix)

> The learned trial judge failed to consider whether the appropriate measure of damages for the breach of a warranty is the diminution in the value of the property as a result of the encumbrance and in the context where there is no evidence on this whether the value of the 530 sq ft. would be adequate.

Ground (xii)

> The learned trial judge having found that there was a boundary encroachment on the premises and that this was known to all parties before the agreement of sale was signed in February 1997 failed it seems to assess damages, if any, in the context of this evidence.

Ground (xiii)

> The court having found that the vendor's title was defective (page 12) failed to apply the appropriate measure of damage.

Ground (xiv)

> The purchaser's knowledge prior to the signing of the contract as to the precise difficulty in relation to the title operates to deprive him of substantial damages.

Ground (xv)

> Having taken the transfer in its name the purchaser it seems cannot complain of loss and damages.

Ground (xvi)

> The learned trial judge erred in over estimating the quantum by awarding $5,000,000.00 for losses over 2 ½ years when the evidence supported loss over a 1 year period.

Submissions by counsel for the appellant

Grounds (vi) and (vii)

[10] It was the contention of counsel for Mr Tennant that on any review of the certificate of title in respect of 72 A Hagley Park Road, one would discover that the transfer no. 467940 registered on the title to Mr Tennant was effected pursuant to

power of sale under mortgage no. 404869. Since his purchase of the property in 1988, it was submitted, that three mortgages had been registered on the title, and prior to that five mortgages had been registered thereon. As a consequence, Mr Tennant had transferred a marketable and merchantable title to Alex's Import Limited, which the evidence suggested was unaffected by the encroachment of the building of adjacent premises. It was therefore further submitted that based on Mr Tennant's knowledge of the state of the title, and his own experience as a registered proprietor, he would not reasonably have contemplated that any commercial institution would have rejected a loan on the basis of the encroachment, as the mortgages had been registered in excess of a period of 10 years, and the survey diagram depicting the encroachment was done in 1987. Additionally, as stated in paragraphs 4 and 5 of the defence of Alex's Import Limited filed in suit no CL1999/T048, the National Commercial Bank had honoured the undertaking given on its behalf in respect of part of the balance purchase price, in the amount of $10,000,000.00 when the title was in that condition. It was therefore unlikely, argued counsel, that the title would not be accepted as a proper security for a mortgage.

[11] Counsel also argued that special condition 8 of the agreement provided that the agreement was subject to a mortgage, and that if the purchaser failed to obtain a mortgage, either party would be entitled to rescind the agreement within a stipulated time and obtain a refund of monies paid without interest, but failing that the agreement remained binding and absolute. Alex's Import Limited, had not obtained a mortgage, but had proceeded with the transaction, completing the same without any request for

an undertaking to correct the defect, or for an abatement in the purchase price. That conduct, it was submitted, raised the issue of promissory estoppel and the only damages payable would be those which could be obtained under the rule in **Bain and Others v Fothergill and Others** (1874-1880) All ER Rep 83, (1874) LR 7.

Grounds (viii) and (xii) to (xvi)

[12] With regard to the amount of $5,000,000.00 awarded by the learned trial judge for general damages, counsel submitted that the pleadings and the affidavit of Mr Alexander Haber were consistent, in that both documents only referred to the loss of income and expenses of the company as a result of the encroachment and the inconvenience caused to its operations. There was the promise of detailed information but it was never supplied. There was no allegation about not being able to access a loan from the bank, the rejection of the title by the bank, and/or the rejection of the loan as a consequence, or of the company having to take $10,000,000.00 cash out of the business, the loan having been rejected. Counsel complained that the oral evidence given to that effect was contrary to the pleading, and the affidavit sworn to by Mr Haber, was an afterthought if not a fabrication and, as it was entirely unsupported by any documentary or other evidence, should not have been accepted. Counsel also underscored the fact that there was no evidence in support of the claim for the loss of income in an amount of $10,000,000.00 - $25,000,000.00, or the failure to raise finances, other than the "mere say so" of Mr Haber. It was simply his opinion, and neither figure ought to have been accepted.

[13] Indeed, counsel submitted, in the first suit no. CL/1999/T048, the defence of Alex's Import Limited was that the balance of $2,750,000.00 on the purchase price had not been paid as that sum related to the value of the motor car which should have been credited to the same. No other excuse had been offered in the action, and certainly counsel submitted, none had previously been shared with Mr Tennant. He was only aware of vacant possession of the property being required to house the vehicles and for the sale of the vehicle, not that the certificate of the property was required to obtain loan financing, which information if true, would have to have been disclosed at the time of entering into the contract.

[14] Counsel vigorously challenged the method of assessment of the general damages awarded. Counsel argued that since there was no evidence of the "contemplated rejected loan", there was no specific evidence of a loan rate or the loan period. The only evidence adduced was that provided by Louise Brown, Economist and Director of Economic Information and Publications at the Bank of Jamaica, in respect of commercial bank rates generally. It was incumbent on Alex's Import Limited to prove its case, counsel argued, and if it could not prove its actual loss, then it was only entitled to nominal damages. Additionally, counsel submitted, Mr Haber had indicated that the company's loss had occurred over a one year period, yet the learned trial judge had assessed the losses over a period of 2½ years, which must be wrong. Counsel also queried the use by the judge of the figure of 20-30% net profit per year, as there was no documentary or other evidence to support it. It was just another opinion of Mr Haber. Further, what was even more important counsel pointed out, was the fact that

during the period of loss awarded by the court, Alex's Import Limited had not yet paid the full purchase price of the property. Indeed, the amount of $2,750,000.00 was not paid until 2 June 1999 just prior to the commencement of these proceedings.

[15] It was further argued that the court ought to have considered whether the appropriate measure of damages for the breach of warranty was the diminution of value of the property and since there was no evidence of that whatsoever, only nominal damages should have been awarded. It was also argued that as Alex's Import Limited had entered into the contract with full knowledge of the defect in the certificate of title and proceeded to completion thereof, it had waived its right to a clean title (**In re Gloag and Miller's Contract** (1883) 23 Ch. D. 320).

[16] Counsel, on the basis of submissions made above, insisted that since Mr Tennant did not know about the alleged special circumstances, that is the alleged loan, on which the loss was based, but only about the property being used to store and retail cars and car parts and, as the loss claimed did not refer to used car parts, which was the business activity contemplated by the parties at the time the transaction was entered into between them, but to the other special circumstances, then the loss was not reasonably foreseeable, the damages allegedly flowing there from, would be remote, and Mr Tennant should not be held liable for them (**Hadley v Baxendale** (1854) 9 Ex Ch 341). In any event the surveyor's identification report was available even before the agreement was signed and the title disclosed the mortgages endorsed thereon. Further NCB honoured the undertaking to pay the $10,000,000.00 further payment on account of the purchase price.

[17] Counsel also maintained that Alex's Import Limited had a duty to take all reasonable steps to mitigate their alleged loss consequent upon the alleged breach, and relied on **British Westinghouse Electric Co. Limited v Underground Electric Rys** [1912] AC 673. Counsel submitted that the learned judge should have taken into his consideration that there was undisputed evidence that the correction of the title could have been completed within a period of six months. Any computation of loss of profit over a 2½ year period would therefore be excessive, could not have taken the duty to mitigate into account, and would instead, serve to reward Alex's Import Limited, which the law would not countenance (**Liesbosch Dredger v Edison** [1933] A.C.449).

[18] Counsel responded to the cases cited in the written submissions of counsel for Alex's Import Limited which I shall refer to later in this judgment, either distinguishing the facts in those cases as against the facts in the case at bar, or submitting that the cases were inapplicable. Counsel submitted that to award substantial damages in the circumstances of this case would in effect be giving back to Alex's Import Limited, all the monies used to purchase the property, which would be entirely disproportionate, when considering the breach of contract in this case, which was recognized from the outset.

The submissions by counsel for the respondent

[19] Counsel for Alex's Import Limited specifically drew the court's attention to the fact that Mr Tennant had not appealed the award in respect of special damages. It was submitted that certain central issues were not in dispute: namely, that Mr Tennant had

failed to convey vacant possession of the property, and to deliver the certificate of title to the property free from defects, in accordance with the agreement for sale. Counsel submitted further, that on the basis of the undisputed facts, although Alex's Import Limited knew of the defects, it was the intention of the contract and of the parties, that a good clean title would be delivered and that it was the obligation of Mr Tennant to do so, "by re-surveying the boundaries and attaching the plan to the title re-registered". There was no question of a waiver by the purchaser not to receive a title free from defects (**In re Gloag and Miller's Contract** [1883] 23 Ch. D. 320). And, in any event, counsel submitted Mr Tennant had admitted in his witness statement that he had not fulfilled his obligations under the contract. Indeed, he had only commenced taking steps to rectify the boundary in 2006.

[20] The real complaint, he submitted, was that Mr Tennant had breached the contract, and in keeping with general principles, the aggrieved party should be entitled to recover, as damages, all losses which can fairly and reasonably be considered as arising from the breach, or such as may have been reasonably contemplated by the parties at the time of making the contract, as a possible result of the breach. On this basis, counsel submitted Alex's Import Limited would be entitled to special and general damages. He submitted further that the principles enunciated in **Bain v Fothergill** were inapplicable. He relied on **Malhotra v Choudhury** [1980] 1Ch D 52, where he said that the court held that it was incumbent on the vendor if he sought to limit his liability to show that he had used his best efforts to correct any defect in his title, failing that then the purchaser would be entitled to substantial damages. He relied on **Day v**

Singleton [1899] 2 Ch D 320, **Carol Johnson-Rehdi v Robert Martin** Suit No E 136/1999, and **Rajah Tewari v The Attorney General** SCCA No 67/1998 delivered 31 July 2000, to say that the refusal of the vendor to comply with his obligations to transfer the property as agreed took the matter out of the rule in **Bain v Fothergill**, and if there were any peculiar losses suffered occasioned by any breach, in circumstances when special circumstances were known then the purchaser would be entitled to those losses. He submitted also relying on **Curdella Rose v Lloyd Forsythe** SCCA No M5/1988 delivered 17 November 1988 that a party cannot hide behind his own default. Counsel argued that in the instant case Mr Tennant through his own fault had failed to correct the defects and was liable for the substantial damages awarded.

[21] Counsel reminded the court that this court has repeatedly held that it will not interfere with the damages awarded by a judge at first instance unless it can be shown that he had applied the wrong principles or that he had made an award that was either inordinately high or low as the case may be.

[22] Counsel indicated that the evidence on which the learned judge relied had come from Mr Haber, the managing director of Alex's Import Limited and it was good evidence. The judge was empowered (Part 29 of the CPR) to permit the affiant to expand on his evidence given in his affidavit in the witness box and entitled to act on it particularly, if there was no challenge to it, either by rebuttal evidence or by way of cross examination as occurred in this case. Mr Tennant, could, through his lawyers have asked for further information with regard to that stated in the statement of claim and in

his affidavit. Having not taken advantage of that option, they ought not to submit, at this stage, that there was no evidence, or that the evidence tendered was inadmissible.

[23] It was counsel's contention that, in this case, there were special circumstances which were known, namely that it was well within the contemplation of the parties that Alex's Import Limited was developing the land with the intention to make a profit. In failing to deliver vacant possession of the property and a clean title therefore, it could be assumed that damages would flow. It was not reasonable to assume that because there were three mortgages registered on the title, prior to the agreement, from the same financial institution that Alex's Import Limited would be able to obtain loan funds on the basis of a mortgage, as the title was defective. Further, the undisputed documentary evidence was that Alex's Import Limited did not get a mortgage from NCB.

[24] With regard to the method of computation of the losses, counsel submitted that the learned judge relied on unchallenged evidence, as he was entitled to do. He did not grant the full amount claimed. He adjusted for mitigation. He accepted the amount of the net profit stated by Mr Haber, concluded that the monies taken out of the company's cash had been earmarked to purchase cars as stock in trade, which the company could have turned over several times. In fact, he submitted, Mr Haber had said that the money could have been put in the bank and would have earned 40- 50% at that time. The judge, he said, used 2½ years instead of the eight years claimed, which indicated that he had taken into account the mitigation of damages.

[25] Counsel submitted that in the circumstances of this case, one does not have to show that the vendor purposefully did not carry out his obligations under the contract, only that he did not, and that it was in his control to do so, and it was through his own fault that he did not do so. Not acting, counsel argued, was enough. He submitted that Alex's Import Limited had not received what they had bargained for, and it would be a grave injustice for Mr Tennant to walk away from his responsibilities and breaches without any responsibility to compensate Alex's Import Limited for the same.

[26] In reply, counsel for Mr Tennant submitted that it was entirely wrong for counsel to say that Alex's Import Limited only received a proportion of what they contracted for, as they knew when they were entering into the contract that they would not obtain the portion of the property which bore the encroachment from adjacent premises, and having received the amount ordered for special damages, which included the abatement of the purchase price, in respect of the square footage of land, they had therefore received all they had bargained for.

Discussion and Analysis

[27] As earlier indicated, I had already distilled the grounds to nine dealing with the cause and the quantum in relation to the general damages awarded by Daye J. Having formulated what I considered to be the real issue on the appeal, I shall proceed with my analysis of the same based on the issue and questions previously set out herein.

The applicable legal principles

[28] I am cognizant of the position taken by this court in **Godfrey McLean v The Attorney General**, SCCA No. 43/1998, delivered 3 June 1999, endorsing the principles enunciated by Greer LJ in **Flint v Lovell** [1934] All ER (Reprint), 200 that;

> "In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small, as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage, to which the plaintiff is entitled."

However Panton JA (as he then was) in **The Attorney General v Derrick Pinnock**, SCCA No. 93/2004, delivered 10 November 2006 also made it clear:

> "... it goes without saying that the Court of Appeal, while giving due regard and respect to awards made by the judges of the Supreme Court, is not bound by such awards or their perceived pattern. The important point to be noted is that an award will not be disturbed by this Court unless it is either inordinately high or inordinately low, or there is a breach of some other principle of law."

[29] I am equally guided by the oft-cited dictum of Lord Goddard CJ in **Bonham-Carter v Hyde Park Hotel Limited** (1948) 64 TLR 177 at 178, namely;

> "Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it."

Additionally, Bernard CJ in **Grant v Motilal Moonan Limited and Another** (1988) 43 WIR 372 at 376-b said, "I quite agree that, since the burden of proof is on the injured party, a defendant is not under any compulsion to call evidence in rebuttal".

[30] So, for the appellant to succeed on this appeal, he must show that the learned trial judge proceeded on a wrong principle of law, that the amount awarded was entirely erroneous, and that the respondent merely threw figures at the court which remain unsubstantiated in any way whatsoever, thus calling for the intervention of this court by the reversal or adjustment of the judgment of the court below.

[31] In dealing with the assessment of damages on breach of contract, the general rule is that the injured party should be compensated for the full value of the loss of his bargain. He ought to be placed in the same position as far as money can do it, as if the contract had been performed (**Robinson v Harman** (1848) 1 Exch 850). There is however an exception in respect of a vendor who fails to perform by non production of the title, without fraud and through no fault of his own. In those circumstances, the purchaser is not entitled to recover compensation damages for the loss of his bargain. The authority of some antiquity, **Bain v Fothergill** laid down the principle, that in those circumstances, damages were limited to the costs which the purchaser has been put to in connection with the contract, and the investigation of the title. He cannot claim general damages. Lord Chelmsford observed:

> "... if a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of

> the contract: he can only obtain other damages by an action for deceit."

So, if the breach occurs due to the vendor's inability to show good title, but which is without his own fault, then the purchaser would be entitled to recover as damages his deposit, if any, with interest, his expenses incurred in connection with the agreement, but not more than nominal damages for the loss of his bargain. But the rule is limited to defect of the title as it does not excuse a vendor from doing his best to show good title.

[32] In **Malhotra v Choudbury**, where the principle of **Bain v Fothergill** was examined, in circumstances where the vendor refused to recognize an option in an agreement for sale which he had signed, and to adhere to it, and then fell back to rely on the further refusal of his wife to effect the transfer, without making any efforts to obtain her concurrence in the transfer, Stephenson LJ explained the exceptional application of the rule. In endorsing the general principle, that it is the duty of a vendor to make a good title for the purchaser if he can, and in eliminating the necessity to prove fraud in all cases, Stephenson LJ said this:

> "But in my judgment, unwillingness to use best endeavours to carry out a contractual promise is bad faith and for there to be bad faith which takes the case out of this exceptional rule, it is not necessary that there should be either a deliberate attempt to prevent title being made good or anything more than the unwillingness which I find it inevitable to infer in this case. If a man makes a promise and does not use his best endeavours to keep it, it cannot take much and, in my judgment, may not need more to make him guilty of bad faith and to entitle the victim of his bad faith to his full share of damages to compensate him for what he has lost by reason of that breach of contract and bad faith."

The court also found that the damages should be assessed as the difference between the contract price and the price of the land at the date of judgment.

[33] The law is clear that a vendor must do all that he is bound to do to complete the conveyance, and once it is a matter of conveyancing and not a matter of title, he must do all that he is able to do and compel others to concur in the conveyance in his interest and in their interest (**Engel v Fitch** (1968) LR 3QB 314). He must also not induce a breach of the contract. In **Day v Singleton**, the court held that a purchaser was entitled to the return of his deposit, and damages for the loss of his bargain as the vendor who was unable to complete, due to having not obtained a necessary assignment of a licence, died and thereafter, his representatives in an effort to release the estate from its obligations induced the lessors not to consent to the assignment of the licence.

[34] Jones J (Ag.) (as he then was), in this jurisdiction, examined these principles in **Rehdi v Martin** and duly found that, "the defendant gave no evidence, and therefore no reason as to why he transferred the property to a third party, despite, his contractual obligation to the plaintiff". The court found that as the burden was on the defendant to show why he could not transfer the title, the inescapable conclusion was that he had refused to discharge his obligations and that took the case out of the rule in **Bain v Fothergill**. The court also found that damages were to be assessed as the difference between the contract price and the market value of the property, as at the date of judgment.

[35] In arriving at the amount payable as damages, the court must ascertain the damages arising naturally in the normal course of things, from such breach of the contract, itself, or, such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Additionally, the court must examine whether the purchaser, if not in breach, would be entitled to any peculiar loss occasioned by the breach, if at the time of entering into the contract the purchaser had made it known to the vendor that he wanted the land for a specific purpose over and above the mere acquisition of the property. For if the party who is in breach is wholly unaware of the special circumstances, he can then only have had in his contemplation injury which could have arisen generally and not affected by those special circumstances (**Hadley v Baxendale**). This approach was adopted by this court in **Tewari v The Attorney General**, when Paul Harrison JA (as he then was) in delivering the judgment of the court, upheld the decision of the court below, disallowing damages for economic trees, on the basis that there was no evidence indicating that it was within the contemplation of the parties, at the time of entering into the contract, "that the plaintiff would reap economic trees and would undertake land development".

[36] It is also a clear principle of law that a party cannot hide behind his own fault. Wright JA stated in **Rose v Fosythe**, over two decades ago, that the principle needed no support from authority. In that case, the vendor having failed to apply for the modification of a covenant within the prescribed time under the contract, which was his obligation, claimed that the contract was therefore null and void. The purchaser fulfilled

the specific condition by procuring the said modification and, successfully obtained an order that the contract be specifically performed, which was upheld on appeal.

[37] There is also an obligation on a claimant, which is, as well, a principle of recognised antiquity, that there is the duty to mitigate one's losses. Viscount Haldane LC in **British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited** put it in this way at page 689:

> "... I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.
>
> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty 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. In the words of James L.J in **Dunkirk Colliery Co v Lever [(1878) 9 Ch D 20, at p 25]**, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business".
>
> As James L.J indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

[38] So, as Morrison JA summarized, in the **National Transport Co-operative Society Limited v The Attorney General of Jamaica** [2011] JMCA Civ 34, in delivering the judgment of this court on 30 September 2011:

> "The innocent party must therefore take all reasonable steps to mitigate the loss flowing from the defendant's wrong and he will not be allowed to recover damages in respect of any part of his loss which is really due not to the breach, but to his own failure to behave reasonably after the breach... The governing criterion is reasonableness, which is a question of fact dependent upon the particular circumstances of each case, not of law, and the burden of proving that a claimant failed to take reasonable steps in mitigation rests upon the defendant."

Application of the legal principles to the issues

[39] There is no doubt that the parties were aware of the condition of the certificate of title prior to entering into the agreement for sale. Before the execution of the agreement, the attorneys had discussed the surveyor's report dated 8 September 1987 which indicated that there was an encroachment of a building on no. 72 A Hagley Park Road. This situation was confirmed in writing between the attorneys for the parties and as stated by the appellant's attorneys in the letter of 30 January 1997, it was the obligation of the appellant to have the boundary defects remedied, which was understood by the parties at the time to mean that he would have, "the boundaries re-surveyed and the plan attached to the title re-registered". The Registration of Titles Act contains provisions for the re-registration of registered land by plan and diagram, by the production of the duplicate certificate of title, which would be cancelled and a

new certificate of title issued in lieu thereof, and on payment of the requisite fees. (sections 54 and 174).

[40] The agreement for sale was entered into on 7 February 1997, and contained condition 8, which stated that the agreement was subject to the purchaser obtaining a mortgage from a reputable financial institution in the sum of $12,750,000.00, and the purchaser undertook to secure and deliver a letter of commitment to that effect no later than 60 days from the date of the agreement. The purchaser was entitled to rescind the agreement if he failed to obtain the letter of commitment within 14 days of the time specified for its production, failing which the agreement was to remain "absolute and binding" on the parties. If the agreement was rescinded, then the purchaser was entitled to a refund of all sums paid save and except the sums set out as items 10 and 12 of the schedule to the agreement plus GCT. These sums were also payable in the event of a mutual cancellation of the agreement. In this case, there was no evidence of any steps taken to rescind the agreement.

[41] A perusal of the certificate of title for the property would also have disclosed that there were five mortgages registered on the title prior to Keith Tennant becoming the registered proprietor of the property, namely nos 138562(5/8/1959); 237952 (9/3 1972); 319814 (24/4/1978); 404869 (5/10/1982); and 421435 (20/11/1983). There were also three mortgages registered on the title subsequently, namely nos 479809 (18/3/1988); 480461 (8/4/1988) and 497656 in 1989, all prior to the 7 February 1997, the date of the agreement. Based on the dates of the surveyor reports, and the examination of the property for the production thereof, there were at least three

mortgages endorsed on the certificate of title for the property, subsequent to the existence of the encroachment of the wall on the same. Additionally, on 24 April 1997, NCB gave a letter of undertaking on behalf of Alex's Import Limited to pay $10,000,000.00 and, did pay the said sum on or about 31 July 1997, to the appellant's attorneys, upon delivery of the certificate of title for the property by the appellant's attorneys, with the transfer to Alex's Import endorsed thereon.

[42] In my view, it cannot therefore be reasonable for Alex's Import Limited to say that a certificate of title, "unsuitable to secure a mortgage" had been submitted without specific evidence indicating that that had in fact occurred, as the documentary evidential history relative to the certificate of title of the property states to the contrary.

[43] There was no evidence whatsoever of any diminution in the value of the property. There also did not seem to be any agreement between the parties for any reduction in the purchase price due to the fact that 530 square feet allegedly part of the consideration for the purchase could not be transferred. Daye J, ordered that payment of $361,363.63 be made to Alex's Import Limited as part of the special damages referable to the value of the 530 square feet, but which, as previously stated, is no longer on appeal and so I will say no more about it, save to say, that it would appear, that an amount representing the value of part of the property and, being a part of the consideration of the purchase, was ordered to be paid, and has been paid, by way of compensation.

[44] The agreement for sale required delivery of the property vacant on completion. The appellant did not do that. The tenants were eventually evicted through the efforts of Alex's Import Limited. The sum , however, of $800,000.00 representing the cost of alternative rental from 17 July 1997 to 28 February 1998, and the legal fees attendant with recovering the property, namely $50,000.00, have also been awarded by Daye J and have been paid as I understand it, and as stated, are not a part of this appeal. Alex's Import Limited put their claim in this way. In their pleadings in paragraph [9] it read thus: "Despite the Plaintiff's request, the Defendant has failed, neglected and or refused to correct the said encroachment and the Plaintiff has consequently been severely inconvenienced in the operation of its business, has lost income and has been unable to treat with its premises to raise finances and has incurred and continues to incur other loss and expenses by reason of the existence of the said encroachment on its premises". Then it reads (**Full *particulars hereunder will be provided in due course***). These "full particulars", however were neither asked for, nor provided, by way of any amended pleadings. The complaint as set out in the pleadings, and which was repeated *ipsissima verba* in the affidavit of Mr Haber was not particularized in the affidavit either, as promised.

[45] The details, such as they were, were given *ipse dixit* by Mr Haber in the witness box when he "expanded" on the information previously provided. This evidence however referred to "loss of profit" which is a completely different thing from being inconvenienced; the loss of use of property, and the effect that may have on the operation of the business, and other loss and expense which could have occurred due

to the encroachment on the premises, the subject of an agreement for sale. The expanded evidence referred to (i) loan from NCB, (ii) rejection of the loan due to the encroachment, (iii) taking money out of the business to pay for the property cash, (iv) loss of income, (v) loss of 20-30% net profit on car sales which cars could have been purchased with the $10,000,000.00 (vi) loss of $10,000,000.00 -$25,000,000.00 (vii) all over a one year period.

[46] This was the first intimation of this kind of loss in the case. Pursuant to the principles enunciated in **Hadley v Baxendale**, the only reasonable contemplation of damages by the parties based on information shared at the time of entering into the contract would have been the need for vacant possession of the property to warehouse cars and car parts, which was the raison d'être of the business of Alex's Import Limited, and any reasonable losses which could naturally flow from the late removal of the encroachment on the premises. No other information on the evidence was transmitted or known. In my view, the "loss of profit" claimed would have been a "peculiar loss" which if occasioned by the breach, the appellant would not have had within his contemplation. There was no information about using the premises to raise funds, or the specific turn over of funds in respect of the purchase of cars, which could potentially result in net loss of profit. In my view, one is expected to use one's common sense, together with the general experience of mankind, within the confines and the frame work of the communication between the parties, at the time of entering into the contract, to arrive at a conclusion as to what would have been the reasonable contemplation of loss, flowing naturally on a breach of the agreement.

[47] Additionally, the learned trial judge used the sum of $10,000,000.00 as a base figure in the computation of damages on the basis that the evidence given by Mr Haber in respect of the loss was "not challenged in cross examination". In my opinion however, that does not take away from the fundamental principle that the claimant must prove its loss, and must do so not by just throwing figures at the court (**Bonham Carter v Hyde Park Hotels Ltd**). This case is not about a small street vendor type operation and as stated previously there is no obligation on the defendant to provide evidence in rebuttal. Sums cannot be plucked out of the air, and no documentary evidence of the company was provided; for instance (i) there was no correspondence in respect of the loan and or its rejection by the bank; (ii) no financial statements to show that any profit had been earned to substantiate the five to six times turn over claimed amounting to 20-30% net profit per year. The finding of a loss therefore, of $2,000,000.00 per year was in my view extremely speculative and without any basis. Counsel for Alex's Import Limited in his written submissions stated that the $10,000,000.00 which had been taken out of the company to pay the balance purchase price for the property had been earmarked to purchase cars as "stock in trade". Also that Mr Haber had said that he could even had put the money in the bank and earned 40-50% on it. There is no indication that there was any such evidence adduced by Mr Haber.

[48] The period of two and one-half years, calculated by the learned trial judge as the time for which the loss of $10,000,000.00 was sustained, appears equally speculative. Mr Haber said that he estimated the loss of $10,000,000.00 over a period

of one year, not two and one-half years, but in any event, this was in relation to loss of profit, which I have already found was not in the contemplation of the parties. In any event, the company would have been obliged to take all reasonable steps to mitigate its loss (**British Westinghouse**); The trial judge accepted that Alex's Import Limited had a duty to do so. However, he stated that, "[a]lthough the defect in title is not corrected, he cannot fairly expect loss of profit for 8 years from 1997 to 2005", and found, having taken the duty to mitigate into account that two and one-half years was reasonable in all the circumstances, covering the period 7 May 1997, the completion date of the agreement to the date of service of the writ. What is of interest though and of some significance, is that based on the documentary evidence before us, and the submissions of counsel for the appellant, the final payment of $2,750,000.00 on the purchase price was not paid until 2 June 1999, which would have been over two years after the date of registration of Alex's Import Limited on the certificate of title, so it does not seem clear to me, how a period of loss could have been allotted which covers a time when the full purchase price had not yet even been paid. I can find no basis for that finding, and as no clear reasoning has been given, it seems that the learned judge erred in making the award.

[49] In any event, there does not seem to be any basis on which Alex's Import Limited could claim that efforts had been taken to mitigate their loss, because the real difficulty was the encroachment on the property, and there was no evidence that the application to re-register the boundary to correct the defect in the title under the ROTA, would have taken two and one-half years to complete.

[50] In the final analysis therefore in my opinion, the learned trial judge erred when he awarded general damages to Alex's Import Limited when those damages had plainly not been proved. I wish to make it clear that this is not a case where Alex's Import Limited would only have been entitled to the costs in connection with the agreement and the investigation of title pursuant to the principles of **Bain v Fothergill**. This was a case where the vendor knew that he could not perform the agreement, to the extent that he could not produce certificate of title for 530 square feet. Although, that was not his fault and was out of his control, and was in fact known by the purchaser, it was within the vendor's control to correct the defect in the title and, even before entering into the agreement, he had promised to do so. In those circumstances, I would conclude that Alex's Import Limited would have been entitled to compensation damages for the loss of their bargain and, having obtained $1,241,363.63 with interest, (inclusive of the amount representing the value of 530 sq ft) and the boundary having been eventually corrected so that the defect in the title no longer exists, Alex's Import Limited would have obtained all that they had bargained for, only later than they had originally contemplated, which the award of interest addresses.

Conclusion

[51] In conclusion therefore, I am convinced that the learned trial judge erred. He utilized the wrong principles of law and made an award for general damages which was not based on any proper or acceptable evidence, so the award in this regard was erroneous, and in my opinion this court ought to interfere. I would therefore allow the appeal and set aside the award for general damages, with costs to the appellant.

PANTON P

ORDER

Appeal allowed. Award for general damages set aside. Costs to the appellant to be taxed if not agreed.