IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. 324 OF 1996

BETWEEN	**ARLENE WILSON**	**PLAINTIFF**
A N D	**TREVAND MANUFACTURING COMPANY LIMITED**	**DEFENDANT**

Garth Lyttle instructed by Garth Lyttle & Company for plaintiff.

Miss Daniella Gentles instructed by Livingston, Alexander & Levy for defendant.

Heard: September 16,17,24,30 & October 29, 1999.

Judgment

HARRIS, J.

The plaintiff's claim against the defendant is couched in the following terms: -

> "The plaintiff's claim is against the Defendant to recover the sum of One Hundred and Forty One Thousand One Hundred and Fifty Three Hundred Dollars and Ninety One Cents ($141,153.91) being interest accruing on unpaid balance of purchase money demanded by the Defendant on the 20th February, 1996 and paid by the Plaintiff on premises 15 Crotona Mews, Kingston 10 in the parish of Saint Andrew and Four (4)

months mortgage money amounting to One Hundred and and Sixteen Thousand Dollars ($116,000.00) paid by the Plaintiff when the said premises was not fit and ready for occupation. As a consequence whereof the Plaintiff suffered loss and damage and put to expense."

On the 22nd August 1995 the plaintiff entered into an agreement with the defendant to purchase property known as 15 Crotona Mews in the parish of Saint Andrew, registered at Volume 1274 Folio 117 for the sum of $2,550,000.00. It was a term of the agreement that the plaintiff pay a deposit of $255,000.00 on execution and a further payment of $127,500.00 on account of the sale price within 5 days of the execution of the agreement. Certain payments were made on account of the purchase price but a balance of $1,000,000.00 was left outstanding.

A further term of the agreement required the balance purchase money to be paid within 90 days of the date of execution or that an irrevocable undertaking from a reputable financial institution for the payment of the balance purchase money be furnished within 90 days of the execution of the agreement. The contractual date of completion was stipulated as on or before the expiration of ninety days from the date of the agreement.

Under Clause 13 (15) of the special conditions outlined in the contract the plaintiff was required to pay interest on the balance purchase money. That clause is expressed as follows: -

15. "Notwithstanding that the balance purchase price is payable within ninety (90) days of the date of this Agreement, the Vendor may allow the Purchaser an additional thirty (30) days to pay the balance purchase price **provided however** that in the event of such an extension,, the Purchaser shall pay to the Vendor interest on the balance purchase price at the rate of interest from time to time charged to the Vendor by **Horizon Merchant Bank Ltd.** on the outstanding loan in respect of Crotona Mews, I Crotona Terrace, St. Andrew. Interest shall be computed as of the ninety-first day of this Agreement until completion or cancellation of this Agreement. The purchaser shall not be entitled to physical possession of the premises until all interest due has been paid."

A mortgage for $1,000,000.00 was obtained by the plaintiff from the Scotia Building Society to cover the balance purchase money, on the security of the premises 15 Crotona Mews. The proceeds of the mortgage were remitted to the defendant's attorney-at-law on the 26th January 1996. A

letter of possession, among other things, were transmitted to the plaintiff on the 29th January, 1996.

Interest on the balance purchase money was not fully paid until 10th June, 1996. The keys to the property were delivered to the plaintiff on that date.

The plaintiff contended that there was an implied condition in the agreement that, on completion, the defendant would hand over the property in a good and habitable condition. It was also her complaint that on the delivery of the keys and upon inspection of the property she discovered that tiles in the living room and bedroom floors had lifted.

She testified that she had first become aware of a defect in September 1995 when she observed that the tiles felt loose when she walked on them. She had carried out inspections at various times up to January 1996 and found tiles to have been in the same condition. Her witness John Muir asserted that he also visited the premises between September 1995 and January 1996 and found that the tiles were loose. They both stated that this was brought to the attention of Ms. Andrea Donegal, one of the directors of the defendant company.

Evidence for the Defendant Company was given by Mrs. Andrea Donegal. She denied that either the plaintiff or Mr. Muir had ever reported

to her that the tiles were loose. She disclosed that she visited the property on at least five occasions between the signing of the agreement and June 1996 and on each visit prior to June she saw no defects. She said at the time fixed for completion the defendant company was ready, able and willing to complete the sale.

I will now give consideration as to whether liability for refund of the interest paid by the plaintiff ought to be ascribed to the defendant. In order to do so it will first be necessary to ascertain the date of completion of the sale. What constitutes completion? In ***Killner v France - 1946 - 2 ALL ER 83*** it was held that the word completion in a contract had its usual meaning that is "the complete conveyance of the estate and final settlement of business".

In *Re* Alkins Wills *Trust National Westminister Bank Ltd. v* Atkins *& Om 1974 2 ALL ER 1, Pennycuick* V-C at page 5, in construing the expression at the date of completion of sale, declared: -

> **"It seems to me that those words are themselves quite unambiguous and can only denote the date at which the sale of Church Farm is completed; in accordance with the ordinary meaning of that word in the language of conveyancing, namely, the execution of a conveyance and payment of purchase price."**

Clause 6 of the Agreement for sale records the completion date as 90 days of the date of the agreement. The agreement was executed on the 21st August 1995 and if the purchase money had been paid on the 21st November, 1995, that would have been the date of completion. The purchase money, however was not paid on that date, nor is there any evidence that an irrevocable undertaking from a reputable financial institution for the payment of the balance purchase money had been submitted to the defendant within the prescribed 90 days.

A transfer of the property had been executed and registered on the 13th December, 1995 as shown by the certificate of title registered at Volume 1274 Folio, 117 which had been exhibited. Although a conveyance had been executed, the sale had not been completed, as the balance purchase money had not been paid up to December, 1995, notwithstanding the defendant had given the plaintiff an extension of 30 days within which to make payment. Payment of the balance purchase money was made on the 29th January 1996 on which date the sale would have been deemed to have been completed.

Although the sale is taken to have been completed on 29th January 1996 and a letter of possession was given to the plaintiff on 31st January 1996 the further questions as to whether she was obliged to pay interest on

the balance purchase money and whether she was entitled to physical possession until the interest was paid remains to be answered.

There was delay on the part of the plaintiff in remitting the balance purchase money within the time stipulated in the agreement. The plaintiff being dilatory in meeting her obligation to pay the purchase money on time would be as a matter of law under a duty to pay interest on the outstanding purchase money.

Various authors have given support to the foregoing proposition of law. In ***4th Edition Halsbury's Laws of England Vol. 42, paragraph 201*** it is expressed in the following context: -

> **"If the purchaser is let into possession, either immediately at the date of the contract or subsequently, interest begins to run on the unpaid purchase money from the time of possession, unless otherwise agreed. If he is already in possession as tenant, it runs from the date of the contract, and he is from that date entitled to the rents and profits."**

The learned author of ***VOUMARD The sale of land in Victoria at page 475*** enunciated the principle as follows: -

> **"In the absence of any express provision to the contrary, if there is a delay in completion beyond the time when completion should have taken place, the general rule is that if the vendor has shown a good title the purchaser is considered as in possession from the proper**

date for completion. He must pay interest on the purchase money then payable, from that date to the date of actual completion, but he will be entitled to be credited with any rents or profits derived from the property as from that date, these being brought into account when actual completion takes place."

It is shown therefore, that a purchaser who delays is under a duty to pay interest on outstanding purchase money, in the absence of an agreement to the contrary, whether or not he actually entered into possession. If however, the delay is due to the willful default of the vendor the court will not enforce payment.

In the New Zealand case of ***Brake v Boote 1991 2 NZLR 157*** it was held that where there is a delay in the completion of an agreement for sale and the delay is not due to the willful default of the vendor the purchaser will be liable for the payment of interest on the purchase money from the date due for completion irrespective of whether he had been placed in possession.

Turning to the present case, the delay in completion is attributable to the plaintiff. She admitted that she could not pay the interest as she could not have afforded it. She stated that she had hoped that the defendant would have waived same. Eventually she paid it and did so in two parts. Both payments were made in June 1996, the last being on the 10th June 1996.

There is no evidence to demonstrate any willful default on the part of the defendant in completion of the sale.

Further, Clause 13 (15) of the contract of sale expressly provides for the payment of interest on the balance purchase money if same was not paid within 90 days of the date of the agreement or an irrevocable undertaking to make payment given. The plaintiff admitted she was aware of the clause. There was also communication between her attorneys-at-law and the defendant's attorneys-at-law with respect to the payment of the interest as evidenced in letters between Messrs. Livingston Alexander and Levy and Messrs. Garth Lyttle & Company. A letter dated 28th March 1996 from Livingston Alexander & Levy to Garth Lyttle and Company requested that the interest be remitted. Mr. Lyttle's response by his letter of 25th March 1996 indicated that the plaintiff had no money to pay interest. The plaintiff was represented by an attorney-at-law throughout the transaction. She is an intelligent lady, there is absolutely no doubt that she understood what she was signing when she executed the agreement and must be taken to have agreed to the terms of contract on execution thereof.

There remains the matter as to whether she was entitled to physical possession of the property on the date of completion. If she was so entitled, then she would only be obliged to have paid interest up to January 1996.

Paragraph (13) of the special condition of the Agreement expressly states that the purchaser shall not be entitled to physical possession of the premises until all interest due has been paid." She is clearly bound by this provision and could not possibly qualify for the refund of the interest she paid."

An additional matter to be addressed is whether at the date fixed for completion or the date of actual completion the property was in a habitable state. Mrs. Donegal stated that the tiles were laid by professional persons. A Certificate of practical completion dated 9th November, 1995 was issued by Ainsley Bell, a Quantity Surveyor, and tendered in evidence, showed that the apartments were practically completed and ready for occupation. This was based on a site inspection carried out on 7th January, 1995. There is no dispute that on the 21st August 1995 when the agreement was signed there were no defects in the tiles. Defects subsequently arose. The plaintiff states defects were seen in September 1995. The defendant states these occurred in June 1996.

Clause 13 (3) of the special conditions of the Agreement reads as follows: -

> "The premises will be sold as the same shall stand at the day of sale without reference to extent or condition respectively and if any error, mis-statement, miscalculation or omission shall arise the same shall

not annul the sale nor entitle the Purchaser to be discharged from her purchase nor shall any compensation be payable or allowed in respect thereof."

In construing the foregoing clause, it is necessary to determine the day of sale. "Sale" is co-relative to "purchase" per Channel J in ***West London Syndicate v Inland Revenue Commissioners [1898] 2 QBD 507*** and prima facie , means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing" per Buckley J in Rosenbaum v Belson {1900] 2 Ch. 267. The day of sale must therefore be interpreted to mean the date on which the agreement of sale was executed by the parties. Clause 13(3) expressly excludes the vendor from liability as of the day of sale with reference to the condition of the property, inter alia. On the day of the sale, that is, 25th August, 1995 the tiles were intact. Under Clause 13(3), the defendant would therefore be exonerated from blame for any defect or fault in the tiles.

Clause 13(4) states however that risk in the premises remained with vendor until completion. Was the property in a habitable state on the date fixed for completion and on the date of completion? The plaintiff and her witness

testified that they had visited the property between September 1995 and January 1996 and experienced that the tiles felt loose as they traversed them. The defendant stated that up to that time the tiles were in a proper state of repair. Accepting that the tiles felt loose when the plaintiff and her witness walked across them, this defect is minor and could not have rendered the house uninhabitable. There is no evidence that before the date of completion the tiles had lifted. The plaintiff's evidence shows that she only became aware that they had lifted when she visited the premises in June 1996 after she had paid the interest and the keys were delivered to her.

Having found the date of completion to be the 29th January, 1996, it follows that after that date the risks would have been transferred to the plaintiff. On the date of completion she received substantially that for which she had contracted. She would therefore be liable to carry out repairs to any defects in the property which manifest themselves after 26th January 1996.

The plaintiff's complaint is unjustifiable. She was not entitled to possession of the property until the outstanding interest on the balance purchase money was paid. It is patently clear that this sum remained unpaid not as a result of any fault of the defendant but due to her own delinquency.

I will now turn to the plaintiff's claim with respect to the recovery of the sum of $116,000.000, which she remitted to the Scotia Building Society with respect to her mortgage payments. A plaintiff must bring his claim under a recognised head of liability and not rely on any sweeping generalisation. The claim as pleaded in this case cannot be considered within the ambit of a breach of contract. The Court may however, in applying the relevant principles within the constraints of the law of restitution, will not allow an unjust enrichment of the defendant at the plaintiff's expense.

In the present case, there is a contractual obligation between Scotia Building Society and the plaintiff by which she should make monthly mortgage payments and this she is required to do. There is nothing to show that the defendant s had in anyway been unjustly enriched as a result of the payments the plaintiff had made to Scotia Building Society between 10th January and 29th June 1996. Her claim cannot be recognised as a valid restititutionary one, consequently, the law of restitution cannot avail her.

The plaintiff is obliged by operation of the law and by contract to pay interest on the balance purchase money. Restitution is not available to the plaintiff, in the circumstances of her claim, for refund of mortgage payments made by her. Her claims for recovery of interest accruing on the balance

purchase money and for recovery of mortgage payments to Scotia Building Society therefore fail.

Judgment for the defendant. Costs to the defendant to be agreed or taxed.