

BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1497 of 2001

BETWEEN

THELMA BAYNE

PLAINTIFF

AND

SAMUEL WINFIELD PHILLIPS

DEFENDANT

Before The Hon. Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2006: July 03, 04, 18, 20.

2008: April 09.

Mr. Michael Yearwood and Tracelyn Rollock for the Plaintiff.

Miss Sharon Parris and Miss Michelle Russell for the Defendant.

JUDGMENT

Introduction

[1] This Plaintiff in this case, Miss Thelma Bayne claims damages from the Respondent, Samuel Phillips, a building contractor, for losses she suffered as a result of his defective construction of a house which she purchased from him. The matter was heard on October 28, 2003 and on July 6th 2005 Justice Lionel Greenidge, delivered judgment for Miss Bayne, finding Mr. Phillips liable to Ms Bayne in the tort of negligence.

[2] Justice Greenidge stated in his judgment that he would hear arguments in respect of loss and damage with regard to the house, but retired from the bench before this could be done. In the interim, the house which is the subject of these proceedings was sold by the mortgagee exercising its powers under the Property Act. The hearing of the application for assessment of damages was heard before this Court on July 03, 04th and 18th and 20th 2006, and that is the sole issue before the Court, liability having already been established.

Facts:

- [3] During September 2000, Miss Bayne saw a house which was at the time being built by the Defendant at Lot 32 Callenders Christ Church. She liked it, wanted to purchase it, and contacted the Defendant who agreed to sell the house. An agreement for sale was concluded between Mr. Phillips and Miss Bayne on November 10th, 2000. Clause 13 of the Agreement stated: *"The Purchaser having inspected everything agreed to be sold shall take the same in the state in which the same is on the date hereof (normal wear and tear excepted) and no warrant or representation on the part of the vendor is given or to be implied as to the state quality or fitness of anything whatsoever which is the subject of this agreement."*
- [4] On 6th December 2000, Mr. Phillips conveyed the property to Miss Bayne for \$235,000.00, and she subsequently borrowed \$185,000.00 from Scotia Bank using the property as security.
- [5] Miss Bayne went into occupation on 7th December 2000 and Justice Greenidge found that *"Within a matter of a few weeks defects began to appear. They got progressively worse. Eventually she had to move out of the premises."* Miss Bayne gave evidence at this hearing that she called Mr. Phillips and he told her that he was going to come to see the problems she outlined, but he never came nor did he send the mason or carpenter he promised. She then consulted a structural engineer, Glyne Barker, now deceased. He did a report, and after his demise she retained George Reifer who has also given evidence here, who also did a report. On August 31, 2001 Miss Bayne, as she said "hired a lawyer and left", never to return to the property. She put her possessions into storage and moved into rented accommodation. None of these facts is in dispute.
- [6] Miss. Bayne had stopped paying the mortgage in June 2001. Unsurprisingly, four years later, her account being in arrears, the Bank sold the property.
- [7] On July 12, 2001 Miss Bayne filed an action in the High Court against Mr. Phillips for breach of contract, negligent construction of and defective workmanship in constructing the property and claimed the sum of \$268,509.48 and damages for various other matters.

The Judgment of Greenidge J

- [8] On July 6, 2005 the matter came before Mr. Lionel Greenidge Judge of the High Court. Although Miss Bayne commenced her action in contact, Greenidge J gave judgment for her under the tortious principles of **Donaghue v Stevenson [1932] A.C. 562**, and held that the Defendant was liable to the Plaintiff in negligence.
- [9] Paragraph 6 of his judgment stated in part: *"Was Mr. Phillips under a duty of care when constructing the house according to Donoghue v Stevenson. He knew he was constructing a house to sell to a possible purchaser. Did he owe a duty to such person in constructing the house; was he in breach of that duty and did that duty cause damage? I would answer all these questions in the affirmative and I would think that this responsibility did not disappear by the inclusion of clause 13."*
- [10] In paragraph 7 of his judgment he stated: *"On the facts of this case Ms Bayne did not contract with Mr. Phillips to build a house for her. But when he agreed to sell her the house he was then having constructed and involved her in the selection of the tiles for the house it seems to me inescapable that he was preparing a house for sale to her and under the Donoghue v Stevenson principle he owed her a duty of care to see that the house he delivered was fit for habitation and that he had used all reasonable care and skill in its construction. To have sought to exclude this duty by clause 13 was in my view inequitable."*
- [11] Paragraph 8 of his judgment stated: *"The engineer's report by Mr. Reifer is the only professional evidence offered about the construction. It condemned the building. The roof was not properly secured there was little evidence of the use of reinforcing steel and walls were not of alignment. All this led him to the conclusion that the substructure was not properly constructed. To shift responsibility for these defects upon Ms Bayne as clause 13 of the agreement seeks to do is inequitable and to the detriment of Ms Bayne."*
- [12] He concluded that the liability for the poor structure rested squarely on Mr. Phillips, and that the house was "unfit for habitation". It should be noted that in the evidence at this hearing was that the property was sold by the Bank of Nova Scotia by the mortgagee under the Property Act Cap 236 part VII, s. 110 on March 24, 2006 for \$140,000.00.

The Evidence at this Hearing

- [13] At this hearing Ms Bayne repeated much of the evidence she gave before Justice Greenidge. She explained that she no longer resided in the property and that she moved out on 31st August 2001. She gave evidence of her rental accommodation since then and her expense therefrom, as well as her expenses for the house insurance from Insurance Corporation of Barbados and life insurance premiums she paid from Mutual Life.
- [14] Some aspects of her evidence bear mentioning however. On cross-examination by Miss Parris, Miss Bayne revealed that "I made a decision to leave in 2001, August and I left. When I left, I never intended to return there to live." She went on, "I hired a lawyer and left. I did not hire a carpenter or mason, I did nothing. After I left I did not return at any time". She gave evidence also that she stopped paying the mortgage, did not contact the bank any further, nor did she receive any communication from them. She states that she did not know when the property was sold, and has received no letters letting her know that she owes the Bank money. It is clear from her evidence that when Miss Bayne left the premises, she essentially shook the dust off that ill-fated edifice from her feet.
- [15] Mr. George Reifer gave evidence for Miss Bayne. He is a civil engineer who was treated as an expert for the purposes of this case. The gravamen of his evidence is that the property "appeared" to be poorly constructed with lots of structural defects. Greenidge J has already found that the house was unfit for habitation, so it is his evidence as to whether the house could have been rebuilt or repaired that is of

interest. His evidence was that “The cost of carrying out the repairs was so high that it would be more economical to push the building down and rebuild”. He gave evidence that the total demolition and digging out of the foundation including the carting away would cost \$25,000.00 and the reconstruction of the house to the same specification and design would cost “probably” \$185,000.00 inclusive of labour materials and supervision.

- [16] David Folkes gave evidence for Mr. Phillips. He too is a civil engineer and was also tendered and accepted as an expert. Contrary to Mr. Reifer’s evidence he states that the defects in the house were not foundational and therefore repairable “but one would need to tie walls at the top to prevent future movement by action of the roof.” He gave a costing of \$70,000.00 to do the repairs, and gave further evidence that the cost had risen by 15% since then. On cross examination however, he gave a number of theoretical scenarios and the potential costs. For example he says that if the building were unfit for habitation the cost to rebuild would be \$175,000 in today’s market plus another \$50,000.00 to demolish and grub out foundation, a total of \$225,000.00. He says he “thought” the problem had more to do with walls being tied and roofed than foundation but hedges, saying “you would have to verify this”. In cross examination he was very difficult to pin down; he says he would not know whether or not it was a foundation problem without further tests.
- [17] While the evidence of neither of the experts is entirely satisfactory, since neither of them did all the tests possible, I am satisfied with the evidence of Mr. Reifer that the house could not have been repaired and that it would make more sense to demolish it and rebuild.
- [18] Miss Bayne’s claim as she says is for “her investment’ in the house to be returned to her. On the amended statement of claim that investment is expressed in the prayer for special and general damages as follows:

Purchase prior (sic) of the house	\$235,000.00
Cost of addition, bath enclosure and gate	\$ 1,295.00
Legal fees and expense thrown away	\$ 11,866.52
Mortgage interest	\$ 11,245.00
Transportation of House effects	\$ 625.00
Engineer’s report	\$ 2,037.00
Valuation fees	\$ 400.00
Negotiation fees	\$ 922.00
Insurance on house	\$ 1,175.00
Life insurance in connection with house	\$ 1,554.00
Purchaser’s proportion land tax	\$ 82.40
Stamp duty on mortgage	\$ 1,107.00
Recording mortgage	\$ 56.00
Recording conveyance	<u>\$ 24.00</u>
	\$268,509.48

No evidence was tendered for some of these items of special damage, such as negotiation fees and recording the mortgage and the Court assumes they have been abandoned. Since Greenidge J found the Defendant liable in negligence, only some of the claims in the prayer are relevant, namely damages for negligence, further damages for distress and inconvenience, further interest on all sums awarded. It should be noted here that Plaintiff also claimed rescission of the contract although the point was not explored by the Plaintiff’s attorneys in addressing the Court. Clearly rescission would not be possible since the house was sold by the mortgagees.

The issues

- [19] What then is the measure of tortious damages in the present case, where the plaintiff purchases a house which is later found to be unfit for human habitation, and later abandons that house with no intention of returning without expending any funds on its repair, and who no longer owns that property, it having been sold in its damaged state by the mortgagee? Is the measure of damages that of reinstatement, or that of diminution in the value of the house?
- [20] Counsel for Defendant argue on the basis of the old case of **Jones v Goody** (1841) 8.M. & W. 146 that the normal measure of damages in this case should be the amount of diminution in the value of land, and that it is only in exceptional or unique circumstances the court will award a plaintiff the cost of reinstatement rather than diminution in the value of the land. This case, they say, is not one of them.
- [21] Counsel for Plaintiff disagree. They say the measure of damages in this instance should be the cost to replace the house, and not to repair it, that is, the cost of reinstatement. According to the evidence of Mr. Reifer, that amount would be the sum of \$210,000.00. They rely on the case of **Murphy v Brentwood DC** (1991) 1A.C. 398 and **Ann’s v Merton London Borough Council** [1978] A.C. 728, and

state that in order to determine the methodology for the assessment of damages in the instant case, it becomes necessary to determine from the evidence whether the building is capable of repair or whether the building can be seen to be destroyed for all intents and purposes. The attorneys for the Plaintiffs urge the Court to accept that, since on the evidence of Mr. Reifer that the house could not be repaired and was unfit for habitation; the correct methodology to be applied is that of replacement.

- [22] The Court agrees with the Defendant. The arguments for the Plaintiff do not offer any real assistance in the quantification of damages in this case because the Plaintiff in her evidence stated that when she moved out of the property in August 2001 she "Never intended to return."

In the words of Miss Russell, the Attorney-at-Law for the Defendant: "*It is therefore correct to say that Ms Bayne had no intention of rebuilding the house nor was the house of particular value to her. She therefore cannot be awarded damages based on reinstatement value. The correct assessment would be based on diminution value.*" The Court agrees, and draws support from the case of **Ward v Cannock Chase District Council** [1986] Ch 546, which established that reinstatement was a remedy for extraordinary circumstances. In that case the plaintiff was obliged to move out of her premises by the negligence of the defendant, after which the property quickly deteriorated and soon came beyond repair so that demolition was ordered by the court. The plaintiff was held to be entitled to the cost of rebuilding, rather than diminution, since he could establish that he intended to rebuild and that this was an exceptional case. The Court made the point that the plaintiff could only be entitled to the reinstatement value if he could legally rebuild the property. Clearly, this could not occur in this case, as the mortgagee has already sold the property.

- [23] Further in **C.R Taylor (Wholesale) Ltd. v Hepworth Ltd. (1977) 1 W.L.R. 659**, the Court held that "*The true principle is that the owner of a building is entitled to the diminution value between the building as it was before the wrong and after it, unless he establishes that he intends to or has reasonably rebuilt the structure damaged or destroyed.*" The Court does not consider that this is an exceptional case, and it is clear that Miss Bayne did not intend to rebuild, nor did she claim, upon the authority of **Hollebone v Kidhurst & Fernhurst Builders Ltd [1968]** that the house was so unique that reinstatement should be ordered. Thus the fundamental in **Dodd Properties Ltd v Another v Canterbury Council and others [1980] 1 W.C.R. 433** is, in my mind satisfied, that the measure of damages is the sum of money which would put the injured party into the same position as that in which she would have been if she had not sustained the injury.

- [24] What then is the rate and period during which diminution is to be calculated? There has been no evidence as to any rate of diminution, except insofar as the house was sold in 2006 for \$140,000. Mr. Ffolkes gave evidence that there would have been diminution in the value of the house between 2001 and 2005, but did not give any rate, percentage or figures. In the absence of such evidence, the Court can only come to the conclusion that the correct measure must be the diminution in value between the cost of the house i.e. the January 2001 purchase price, and the price at which the house was sold by the mortgagee in July 2006, even though it is likely that this was not the market value of the house. The figure is \$235,000.00 less \$140,000.00, a figure of \$95,000, the rate of diminution therefore being approximately \$1440.00 per month or \$17,273.00 per year. It is not disputed that the house was sold for \$140,000.00 and these are the only figures available to the court.

Foreseeability & Mitigation of Damages

- [25] It is trite law that a defendant must compensate a plaintiff for losses that are reasonably foreseeable as a result of his tort. Was it foreseeable that upon the defendant's tort, Miss Bayne would abandon the house, never to return and stop paying the mortgage thereby enabling the mortgagee to exercise its power of sale? The Court finds that it was not unreasonable for Miss Bayne to move out of the house after it was certified by Mr. Reifer as being unfit for habitation. It was however, unreasonable to abandon the house without making any further attempts to prevent further damage. But, while it is clear to this Court that Miss Bayne had a duty to keep the house in reasonable repair and not to let it fall into any further disrepair after she moved out, there is no evidence whatsoever from the defendant as to what proportion of the diminution cost would be attributable to the plaintiff and the Court is not prepared to guess these figures, or conjure them from the air.

- [26] With regard to the sale of the house, it was not argued before this Court that Miss Bayne was entitled to the significant costs which she is liable to pay when the Bank sold the premises, as being a reasonable foreseeable consequence of the tort of the defendant. This is both surprising and very unfortunate. These costs may include bank charges, interest, and collection fees charged by the bank in selling the property. While Miss Bayne claims damages, no evidence of her losses in this regard have been canvassed. If they had been, it might have been difficult to resist, but they were not. In fact, Miss Bayne stated in her evidence that she had received no correspondence from the bank advising her that she owes money.

- [27] The damages for diminution will be reduced if the plaintiff should have, but did not mitigate her losses. Every plaintiff has a duty to mitigate her losses. As we stated in **Payzu v Saunders [1919] 2 K.B. 581**, whether loss is avoidable by reasonable action on the part of the claimant is a question of fact for the trial judge to decide. However, this refers to whether a claimant required to take all reasonable steps to mitigate his loss if he is to recover for that loss has or has not failed to do so. Whether there is in the particular circumstances a need to mitigate in the first place will be a question of law. Counsel for Mr. Phillips argues that it was reasonable for Miss Bayne to mitigate her losses by selling the house at least by 2002. Her Counsel contend that there is no principle in law that states that Miss Bayne ought to repair the property at the date of the breach where the issue of liability is not clear cut and the Defendant does not admit liability. I am satisfied that it was not reasonable for Miss Bayne to attempt to repair the house, given the report of the engineer, but upon her decision to leave the house never to return, it was reasonable for her to attempt to sell the property and thus mitigate her loss. Reliance is placed on **Patel v Hooper & Jackson [1991] 1 WLR 1792**. In that case, on a claim for damages for negligent advice of a surveyor, the plaintiff was saddled with a house which was uninhabitable. They declined to move in and took rented rooms. The Court of Appeal held that the plaintiffs acted reasonably in not putting the house up for sale while negotiations were underway as to settlement, but after examining their conduct subsequent to the completion of the purchase, that they ought to have mitigated their loss by putting the house up for sale when the negotiations broke down. The Court made it clear that the plaintiffs had a duty to minimize the period during which the defendant would be liable to compensate them for costs of alternative accommodation.

- [28] The duty was expressed thus: "... *the plaintiff's duty was to act reasonably in attempting to mitigate their loss, sooner or later they ought to have sold the house, not just in order to avoid the risk of further depreciation in its value but also to put a term on the period during which the defendants would be liable to compensate them for the costs of alternative accommodation. In this context I emphasize that it had not been suggested that the house was unsaleable in the sense that if, put up for sale by public auction it would not have sold at any price.*"
- [29] The evidence does not reveal that any negotiations were ever entered into between the parties with a view to settling this matter. Following the reasoning in **Patel**, I have examined the conduct of Miss Bayne after she moved out of the house in order to decide whether it was reasonable and if so for how long, for her to put the property up for sale, either by private treaty or public auction. Miss Bayne took no action whatsoever. Thus I find that it would have been reasonable to sell or at least attempt to sell the house within twenty-four months of vacating it, and that it would have taken at least another six months before any sale could have been concluded. This brings us to December 2003. Miss Bayne was apparently, according to her evidence labouring under the misapprehension that she was not able to sell the house because she had a mortgage. She should have taken advice on this, and certainly she had counsel by early 2001 when she was advised, she says to stop paying the mortgage. Clearly the house was saleable. In fact it was sold by the mortgagee in 2006, and she would most likely have obtained a better price for it than the mortgagee obtained. Her clear evidence is that she never returned, never looked back at the house. This failure to mitigate thus reduces the damages in respect of the diminution of the property to **\$51,840.00**, since by December 2003 the property would have diminished in value at a rate of \$1440.00 per month for 36 months.
- [30] Now I turn to the Plaintiff's claim for consequential losses. The Plaintiff has given evidence of the various items of expenditure which she claims and I shall deal with them seriatim.
- [31] **Cost of Valuation and Engineer's Report.** The cost of the reports of Mr. Barker and Mr. Reifer are recoverable. The parties may agree on this figure and advise the court after judgment.
- [32] **Moving and rental expenses.** The moving expenses of \$275.00 are allowable in accordance with **Ward v Cannock** (supra). With regard to the rental expenses, it is clear, on the authority of **Patel** that the cost of alternative rental accommodation is allowable in these circumstances. The issue here is the period of rental to be allowed. In **Patel**, the period was held to be from the date of the breach until such time as the house was sold. Note that in that case the house was not actually sold so the court had to decide upon what date they ought reasonably to have sold it. As I noted before I am satisfied that she should have attempted to sell the house by December 2003. By that time it should have been apparent to her that Mr. Phillips intended to take no action on the repair of the premises, and that the house would only diminish in value. Her damages here would be the cost of the alternative accommodation: (6 weeks @ \$1000.00 = \$1000.00 + (one year @ \$1000.00 = \$12,000) + (18 months at \$1100 = \$19,800) a total of **\$33,300.00**.
- [33] **Legal Fees, Mortgage Interest, Insurance (property and life) and Land Tax:** In **Hayes v James & Charles Dodd [1990] 2 ALLER 815**, an action for damages for breach of contract against their solicitors, the plaintiffs were able to claim capital expenditure thrown away in the purchase of a business, the expenses incurred included bank interest up to the time of the sale of a maisonette. The plaintiff has been incorrectly advised by his solicitors that the maisonette had a right of way, and they were unable to carry on their business without that right. In **Patel**, Nurse KLJ felt himself bound by the decision, but distinguished it on the ground that, whereas in **Hayes**, if properly advised, the plaintiffs would not have purchased an alternate property, in **Patel**, the plaintiffs would have purchased alternate piece of property and obtained a similar mortgage and expenses. It seems to me that this latter approach is the correct one in this case. Miss Bayne gave evidence that she "was looking for a property", and the Court is satisfied that had she not purchased this property she would have purchased another with similar outlay. The legal fees and the expenses on the mortgage are therefore not attributable to the tort of the defendant. In any event no evidence on expenses of mortgage has been given. The land tax expense is part of her liability as a landowner, and therefore not recoverable. However, I consider the mortgage payments made from January to July recoverable, the sum of \$9,258.00 to be recoverable.
- [34] **Solar water heater, wrought iron gate, lighting fixtures, bath enclosure:** these expenses are not related to or consequential upon the tort and therefore not recoverable.
- [35] **General damages for distress and inconvenience:** The Plaintiff also asks the Court to award her some sum for distress and inconvenience. Cases such as **Watts v Morrow [1991] 1 WLR 1421 CA** and **Hayes** (supra) have taken a strict approach, denying that in the case of a breach of contract resulting in the plaintiffs living in less than amenable premises would give rise to a claim for damages for the Plaintiff's injured feelings and inconvenience, especially where the contract was a purely commercial one. Although the liability here is tortious, it is clear that in **Ward v Cannock** (supra) there has been recovery for the discomfort of living in damaged property. In **Patel** the court allowed a modest sum for the inconvenience the plaintiffs suffered by living in "relative" discomfort, i.e. rented accommodation rather than the property they purchased. The defendants argue that Miss Bayne suffered no distress as her rented accommodation was by and large comfortable. I am satisfied that, no matter how comfortable the rented accommodation might be, Miss Bayne has suffered the inconvenience and distress of having to move from pillar to post when
- she expected to live in a perfectly decent house finished to her specifications and in a neighbourhood she chose. Like the recorder in **Patel**, I have much sympathy for Miss Bayne's predicament here, and in line with that case I award the sum of \$7,500.00 for her inconvenience and distress.
- [36] **Interest on Damages:** Attorneys-at-Law for Mr. Phillips concede that the Plaintiff is entitled to interest on damages, but only up to the date of the first trial, since it was their fault that the matter was not heard then. There is no evidence that this is the case, therefore interest will run down the date of judgment.

[36] **Summary and Conclusion:** In summary the damages are as follows:

General damages for diminution of property	44,320.00
Damages for inconvenience and distress	5,000.00
Rents	33,300.00
Mortgage payments	<u>9,258.00</u>
TOTAL:	91,878.00

The parties will agree the cost of the reports, and interest will run up to the date of judgment, that is 8% on general damages, 4% on proven special damages until date of payment with costs for two counsel to be taxed or agreed.

Judge of the High Court