

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-01135

BETWEEN

ERNEST TROTMAN
CAMILLE RICHARDS TROTMAN

Claimants

AND

TECU CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

Defendant

Before: Master Alexander

Appearances:

For the Claimants: Mr Kevin Ratiram

No appearances for the Defendant

DECISION

1. This is an assessment of damages arising out of a judgment in favour of the claimants in default of appearance against the defendant entered on the 28th June 2010.
2. The claimants are husband and wife and commenced proceedings by statement of case filed on 25th March 2010 against the defendant, a credit union, which was engaged at all material times in the business of lending money. In or around early 2005, the claimants applied to the defendant for a loan to purchase a parcel of land situate in the ward of Naparima in the island of Trinidad comprising four hundred and sixty eight square metres (hereinafter called “the said land”). Upon consideration of said application, the defendant informed the claimants that it would have a title search executed on the said land by its servant and/or agent, to ensure that there were no encumbrances or defects in title on the said land. The

claimants agreed to this and entered into a contract with the defendant, whereby they paid to the defendant a sum of money and, in return, the defendant undertook to have the said search executed by its servant and/or agent (hereinafter “the said contract”). The claimants claim that it was an implied term of the said contract that the defendant would employ the services of a sufficiently skilled and/or knowledgeable servant and/or agent to execute the said search.

3. Further to the agreement, the defendant informed the claimants that the search revealed no defect in title, and no encumbrances on the said land. The claimants stated that they relied upon this assurance and acted to their detriment by purchasing the said land, at a cost of \$82,000.00. The claimants obtained a loan from the defendant to purchase same, in the form of a mortgage over the said land.
4. Around August 2006, the claimants wished to obtain monies to construct a house (consisting of apartments) on the said land, and consequently, applied to the defendant for a second mortgage on the said land. They claimed that they intended to rent the house at a cost of \$8,000.00 per month. The defendant then informed the claimants that there was a defect in title with respect to the said land, dating back to pre-2005.
5. It is the claimants’ case that the defendant breached the contract by misrepresenting to them that there was no defect in title in 2005. The claimants further pled that, in the alternative, the defendant was negligent in respect of the execution of the said search. The following particulars of negligence were stated in the statement of case:
 - i. Failing to ensure that the said search was properly and/or thoroughly executed.
 - ii. Failing to ensure that the said search was executed by a sufficiently skilled and/or knowledgeable individual.
6. This resulted in the claimants being unable to secure a second mortgage on the said land and to construct the aforementioned house on same. Therefore, the claimants claimed to have suffered loss and damage and have been put to loss and expense.

LAW ON DAMAGES FOR BREACH OF CONTRACT

7. The claimants claim damages for breach of contract or alternatively, negligence. For damages for negligence, the claimants must show that he was injured by a negligent act or omission for which the defendant was responsible. This involves the proof of some duty owed by the defendant to the claimants, a breach of that duty, and an injury to the claimants as a result of that breach. In contract, the action for damages is available as of right once breach is shown and, even where no loss is proven, nominal damages are awarded.

8. With respect to the assessment of damages in cases of this nature, it matters not whether the defendant is liable on contract or tort. See *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp*¹. Further, Razack J in *Narine v Ramdass*² noted, “[I]n my view Ramdass acted without proper care in perusing the report on title. If he had done so he would I am sure have advised Sooklal that the title was not good. It matters not whether he is liable on contract or tort. He was retained to prepare a deed of conveyance to Sooklal in respect of Lot 10. He was a barrister at law and was competent to do so. He acted negligently.” The measure of damages in this particular case is in my view the same under contract and tort and it is that the defendant must compensate the claimants to the extent that such sum of money will put the claimants in the same position as they would have been if they had not suffered the wrong for which they are now getting compensation. The defendant told the claimants that the title was good and presented them with a deed which was duly executed and registered. The claimants relied on the skill and expertise of the servant and/or agent of the defendant and they were entitled to deal with the said land as if they were the true owners.

9. Due to the compensatory function of damages, the measure of damages is the loss truly suffered by the promisee. The rule is that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. See *Robinson v Harman*³.

¹ *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1972 G. No. 2267]

² *Narine v Ramdass* HC1811/1986

³ *Robinson v Harman* (1848) 1 Exch 850

10. Money awards made in actions for breach of contract may safeguard one or more of three interests of the innocent party, namely:

- (i) **The expectation interest** – the law aims to put an innocent party in the same financial position as if the contract had been performed. The damages claimed must be reasonable: *Ruxley Electronics & Construction Ltd v Forsyth*⁴. Under this head of interest also is consequential loss, such as loss of profits.
- (ii) **The reliance interest** – the law seeks to protect the interest of the innocent party by compensating him for expenses incurred and losses suffered in reliance of the contract. Reliance losses are essentially retrospective; they look back to the position which the innocent party occupied prior to the contractual promise.
- (iii) **The restitutionary interest** – this concerns the right deriving from the general law of restitution where the unjust enrichment of the party in breach is reversed.

See generally *Surrey County Council v Bredero Homes Ltd*⁵.

11. It was noted in *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd*⁶ that an innocent party cannot ordinarily recover both expectation loss (such as loss of profit) and reliance loss (such as wasted capital expenditure). A claim for both involves double counting. *Cullinane v British 'Rema' Manufacturing Co Ltd*⁷ noted that an innocent party cannot recover both his reliance expenditure and his expected gain under the broken contract, at least where the former must have been incurred in order to gain the latter, this would give the overall result of duplicating the damages to which the party is entitled.

12. In order to establish a claim to damages resulting from a breach of contract, the claimants must show that the loss is not too remote. The test for remoteness is to be found in *Hadley v Baxendale*⁸:

⁴ *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344

⁵ *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705

⁶ *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1963-1964] 37 ALJR 289 at 293

⁷ *Cullinane v British 'Rema' Manufacturing Co. Ltd.* [1954] 1 QB 292

⁸ *Hadley v Baxendale* (1854) 9 Exch 341

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of 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.

13. These principles in Hadley (supra) were restated in ***Victoria Laundry (Windsor) Ltd v Newman Industries***⁹ thus, “[A] type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach.” The court’s task is, therefore, to decide what loss is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract. See ***Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd***.¹⁰

APPLICATION OF LAW

14. It is now for this court to determine the best way to make the claimants whole again, or put them in the same position they would have been, had the contract been properly performed. In the present case, the claimants are still in possession of the property. It is stated in the statement of case that they cannot secure any further mortgage or sell the said land due to the defect in title. The claimants were under an obligation to mitigate their loss which arose under a breach of contract or in respect to the tort of negligence. It is only logical that the claimants now need to take steps to bring the said land under the Real Property Act to cure the defective title thereto. This would necessarily lead to further expenses. At this point, I refer to ***Narine v Ramdass***¹¹ which noted that it was **not necessary** for the claimant to take steps to bring the land under the provisions of the Real Property Ordinance Chapter 27 No 11 to satisfy the requirement of mitigation.

⁹ *Victoria Laundry (Windsor) Ltd v Newman Industries* [1949] 2 KB 528, 537-538

¹⁰ *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd per Scarman LJ*

¹¹ *Narine v Ramdass* HC1811/1986

15. In the present case, the claimants claim special damages, stating the following particulars:

Cost of search, legal fees and disbursements for preparation and registration of Deed of Conveyance	\$10,000.00
Loss of profit from being unable to construct and rent house from Jan 2007 to present and continuing	\$8,000.00 per month

16. Although this claim was specifically pleaded, I have not found any evidence in support of the sums claimed. Receipts with respect to the search and legal fees for the preparation of the deed should have been provided to the court in support of this claim. They were not provided.

17. Further, with respect to the claim for loss of profit, the claimants argued that it would have been within the defendant's contemplation that they would have constructed a house upon the said land for rental purposes. It was submitted that it must have been within the defendant's contemplation that if it were later discovered that title was defective, it would be reasonable for the claimants to abandon their building plans and thereby suffer loss of profits from being unable to rent. No evidence was before this court with respect to the claimants' real intention to rent out the house to be constructed on the said land. There was also a marked dearth of evidence as to the likely sums recoverable in rent in that area save the word of the claimants on the issue. To my mind, the recovery of this damage is too remote and, therefore, I am constrained not to make an award for these sums.

18. The first claimant stated that, as at the date of his witness statement, he and the second claimant paid the defendant the sum of \$25,000.00 in total for the said land. The claimants stated that had they known that the title was defective in 2005, they would not have purchased the said land. Consequently, they argued that these sums would not have been expended by them and are, therefore, also recoverable. This court notes that this sum is neither pleaded in the particulars of special damages nor proved by any documentary evidence, or otherwise, before the court.

19. It is noted also that the only evidence brought by the claimants was the deed of conveyance between themselves and the vendors (not the defendant). No documents evidencing the mortgage agreement between the claimants and the defendant were annexed to either the statement of case or the witness statement. No documentary evidence in the form of receipts, bills, valuation reports, bank deductions or deductions from source showing mortgage payments or any other form of evidence was provided. Further, the claimants were the only witnesses in the case. Although this is an uncontested matter, this does not remove the burden on them to sufficiently prove their case. In identical words used in their witness statements, the claimants stated, “[W]e had intentions of semi-furnishing each of the four apartments, and renting each for the sum of \$2,000.00. I knew a lot of people who lived in rented apartments similar to the type we intended to build, in the same area, at the time (January 2007). They (sic) paid a monthly rent of between \$2,000.00 to \$2,500.00 for a semi-furnished apartment. Since then, the average rent has not decreased. If anything, it has increased.” None of these people were called to give evidence on behalf of the claimants. In addition, there was no evidence of the \$25,000.00 paid to date for the said land.

20. The claimants should have provided the court with the mortgage agreement, receipts, bills, bank statements or salary deductions showing that monthly mortgage payments were debited from their account or some other document to prove to the court that there was in fact a mortgagor/mortgagee relationship between the defendant and the claimants. Further, no one was brought to establish the average rent being paid by tenants in that area or to corroborate the claimants’ evidence nor was there any form of documentary evidence from persons with properties for rent in the area, attesting to the receipt of such monthly sums in rents. It is to be noted that it is the claimants’ evidence that they “*knew a lot of people who lived in rented apartments*” in the area yet they neglected to supply the requisite corroborating evidence. In the circumstances, these special damages claimed cannot be allowed.

21. General damage is such damage as the law presumes to result from the infringement of a legal right. It is the natural and probable consequence of the breach. The plaintiff is required only to assert that such damage has been suffered but need not be strictly quantified: ***Chitty on Contracts Vol. 1, para 1552***. I bear in mind the principle that in measuring the

innocent party's loss, the damages awarded should be reasonable and should not be out of all proportion to the benefits to be derived from awarding them. Further, as noted in *Rodocanachi, Sons & Co v Milburn Bros*¹² per Lindley LJ, exactitude in assessment of loss may be an unattainable goal, but the mere difficulty of quantifying loss does not relieve the court of the task. Thus, whilst it is the responsibility of this court to ensure that the claimants receive reasonable and adequate compensatory damages, in the absence of the requisite evidence, I am unable to presume what are their losses or assess just compensation. In the circumstances, it falls to me to determine a just award of general damages.

22. I bear in mind that in the case at bar, despite the lack of exactitude by the claimants in calculating and proving their loss consequent on the breach, it was the defendant who was the wrong doer and so was fully responsible. The failure of the claimants to prove the extent of compensation due to them does not exempt the defendant from its responsibility nor justify any steps other than that taken to fairly assess damages. The court acknowledges that the claimant did suffer a loss as a result of the breach of contract by the defendant and are entitled to compensation. In this regard, an award of general damages may be made. Such an award is made, not to punish the party in breach, or to confer a windfall on the innocent party, but to simply compensate the innocent party for the loss. Thus, the sum awarded must be guided by the principles of reasonableness.

23. I bear in mind also and do accept that the claimants would have expended monies on the execution of a search by the defendant and/or his agent as well as on the preparation of the deed of conveyance; the claimants cannot pursue their building plans on the said land and are now burdened with the task of resolving the resultant problems from the breach of contract by the defendant and as such, the claimants are entitled to some measure of compensation for this. Nevertheless, given the insufficiency of the evidence before me as regards the proof of their loss, general damages will be awarded in an attempt to place the claimants in the position they would have been in had the contract been properly performed.

¹² *Rodocanachi, Sons & Co v Milburn Bros* (1886) 18 QBD 67 at 78, CA

CONCLUSION

24. Having regard to the lack of evidence, particularly the documentary evidence of the mortgagor/mortgagee relationship or any payment towards a mortgage, I found that the claimants have not sufficiently proven their claim to the sum of special damages. The claimants were unable to show the amounts paid as mortgage installments to the defendants or to provide any sufficient documentary evidence of their loss. Bearing in mind the principles of reasonableness and the nature of the loss, the court considers the sum of \$50,000.00 a reasonable sum for damages for breach of contract and awards such as well as costs in the sum of \$7,200.00.

Dated 29th June, 2012

Martha Alexander
Master (Ag)

Judicial Research Assistant: **Kimberly Romany**