

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCv 2009/ 0195

BETWEEN

MANUELA MORGANTI

Claimant

AND

[1] SILKINCREST INVESTMENT LTD (dba SILKENCREST LTD)

[2] ABI DEVELOPMENT COMPANY LIMITED

Defendants

Appearances:

Septimus Rhudd for the Claimant
Sharon M. Cort - Thibou for the First Defendant
C. Conliffe Clarke for the Second Defendant

2010: November 23, 24, 25
2011: May 17

JUDGMENT

INTRODUCTION

- [1] **REMY J.:** By a Claim Form and Statement of Claim filed on 7th April 2009, the Claimant claims against the Defendants damages for breach of contract, together with monies paid by way of deposit for the purchase of a property beneficially owned by the First Defendant and registered in the name of the Second Defendant (the property). The Claimant also claims special damages, costs and interest from the Defendants.

BACKGROUND FACTS

- [2] The factual contentions giving rise to this case are relatively straightforward. The Claimant, a retiree and a citizen of Italy, saw an advertisement for the sale of properties in a residential development called Weatherills situate in St. John's, Antigua (the Development). She contacted the Second Defendant, who was marketing the Development and subsequently entered into discussions with Mr. Maginley, a representative of the Second Defendant regarding the property. Mr. Maginley introduced the Claimant to a principal of the First Defendant, namely Jessica Dyett and her husband Norman Dyett who happened to be the builder of the property. On or around 26th June 2006, the Claimant entered into an agreement for the sale of the property with the First Defendant as a beneficial owner and the Second Defendant as the registered proprietor of the property.
- [3] The terms of the agreement for sale required the First Defendant to execute certain works to the property. The First Defendant agreed to allow the Claimant to take possession of the property prior to the completion of the works and upon payment of the Deposit, but prior to the Claimant completing payment of the same. The Claimant alleges that, on or around September 22nd 2006, whilst she was off island, the property burgled and a number of appliances and pieces of furniture belonging to her as well as the generator that had been loaned to her by the First Defendant were stolen.
- [4] The Claimant further alleges that, on or about September 25th 2006, Norman Dyett visited the office of the Claimant's Attorney at Law and verbally informed the Attorney of his intention to retrieve the generator and of the First Defendant's intention to terminate the Agreement. Norman Dyett was then informed of the burglary and the loss of the generator. That visit was followed by a telephone call from Norman Dyett on September 26th, 2006, in which he repeated the First Defendant's position in regarding the termination of the agreement. The Claimant treated the termination as a repudiation of the agreement, accepted the termination, and vacated the premises.

- [5] The Claimant subsequently requested the refund of the \$66,500.00 deposit which she had paid to the First Defendant, but that request was refused. The Claimant also seeks compensation from the Second Defendant for the misrepresentation by its representative that induced her to enter into the agreement with the Defendant.

THE PLEADINGS

- [6] In her Statement of Claim, the Claimant pleaded that sometime in April 2006, she contacted the Second Defendant regarding an advertisement for the sale of the property, and that shortly thereafter; she commenced discussions with one of its representatives, a Mr. Kirthey Maginley (Mr. Maginley), with a view to purchasing the same. The Claimant stated that through its agent Mr. Maginley, the Second Defendant represented to her that the properties in the development, including the property under negotiation were for sale with certain standard features and that there were also there were optional features.
- [7] The Claimant pleaded further that she opted for the property with the standard features. She stated that in or around May, 2006, Mr. Maginley arranged for her to view the property and introduced her to Mrs. Jessica Dyett and her husband Mr. Norman "Rocco" Dyett. The Claimant alleges that during the viewing, she was shown a number of areas of the property that required additional work and was advised that Norman Dyett would be responsible for completing the same. The Claimant in her pleadings contends that Mrs. Dyett expressly advised her that her husband Norman Dyett was "in charge of everything."
- [8] The Claimant pleaded that she understood and believed that Mr. Dyett was the agent of the First Defendant and was authorized to take decisions on behalf of the First Defendant regarding the property as well as the parties' relationship. She added that after being introduced to Mr. and Mrs. Dyett, she dealt exclusively with Norman Dyett and had no further communication with either Jessica Dyett or with Mr. Maginley regarding the property.

- [9] The Claimant pleaded that, in reliance on the representations of the Second Defendant and/or its agent, she executed an agreement with the Defendants on or around June 26th, 2006 (the Agreement). The Agreement provided, among other things for the payment of a 10% deposit and for payment of the balance of the purchase price in equal installments payable on the last day of 6 consecutive months. She pleaded that certain works were due to be completed on or before July 31st 2006.
- [10] The Claimant alleges that she paid the deposit to the firm of Cort & Cort, (the firm) as escrow agent, and later tendered a second payment to the firm. The Claimant's pleadings further allege that the Agreement also provided that certain works were due to be completed on or before July 31st 2006 and that in or around March of 2006, the Claimant, upon payment of the Deposit and with the consent of the First Defendant, went into possession of the Property. The Claimant contends that Norman Dyett provided her with a generator for the temporary provision of electrical power at the premises and for completion of the works. She alleges that by July 31st 2006, Mr. Dyett had failed and/or refused to complete several of the works as were required under the Agreement, as a result of which the Claimant engaged the services of Septimus Rhudd, Attorney at Law regarding the completion of the transaction for the purchase of the Property.
- [11] The Claimant further pleaded that on or about September 5th 2006, she traveled to Italy and that prior to her departure, she the Claimant notified Norman Dyett of her departure and expected date of return. The Claimant contends that she requested that the remaining work at the premises be completed prior to her return and that Norman Dyett remained in possession of keys to the premises to facilitate his completion of the works stipulated in the Agreement. The pleadings further allege that between the evening of Friday 22nd September 2006 and the morning of Saturday 23rd September 2006, the premises were burgled and all of the Claimant's kitchen appliances, several pieces of furniture and a generator were taken from the property.

[12] The Claimant further pleaded that on Monday 25th September 2008, Norman Dyett visited the chambers of her Attorneys at Law and verbally informed them that he would be removing the generator from the premises at Silkencrest and "was no longer prepared to complete the sale and wished to terminate the agreement." The pleadings state that Norman Dyett was immediately informed of the burglary and the disappearance of the generator and he was requested to supply particulars of the generator so that the same would be provided to the police for the purposes of investigation. The Claimant avers that the following day Norman Dyett telephoned the Claimant's Attorneys and repeated the First Defendant's position regarding the termination of the Agreement and demanded that he be compensated forthwith for the generator taken from the property. She alleges that Norman Dyett also demanded that the Claimant's belongings be removed from the house. The Claimant pleaded that her Attorneys reminded Norman Dyett that she was out of the State and suggested that the First Defendant defer its actions regarding the Claimant's demand to vacate the Property until her return the following month. The Claimant contends that Norman Dyett refused, and stated that "we "had another buyer and that the Agreement was "off".

[13] The Claimant pleaded that after being notified by her Attorneys of the First Defendant's decision to terminate the Agreement, the Claimant accepted The First Defendant's repudiation of the same. The Claimant pleaded that as at the date of the termination of the Agreement by the First Defendant, the works listed under Schedule 3 of the Agreement had not been completed and that on or about 29th September, 2006, the Claimant's Attorneys wrote to the Second Defendant and to the firm notifying them of the termination of the Agreement by the First Defendant and the Claimant's decision to treat the contract as repudiated.

[14] The Claimant further pleaded that by letter dated October 6, 2006 the firm wrote to the Claimant's Attorneys on behalf of the First Defendant denying that Norman Dyett was authorized to act for the First Defendant and also advising that the First Defendant denied any breach of contract on its part. The pleadings go on to state that on October

31, 2006, the firm tendered payment of the sum of \$99,750.00 to the Claimant's Attorneys and retained the deposit of \$66,500.00. The Claimant avers that despite her demand for the refund of the retained sum, the firm has failed and/or refused to repay the funds or any part thereof to her and that by the failure and/or refusal of the First Defendant and/or its agent to complete the works stipulated in the Agreement, the First Defendant breached its agreement with the Claimant and is liable in damages for the said breach. The Claimant also pleaded that The First Defendant also breached the agreement when it terminated the same.

[15] The Claimant avers that, by virtue of the misrepresentation made to her by the Second Defendant and/or its agent, and which induced her (the Claimant) to enter into the said agreement, the Second Defendant is jointly or severally liable to the Claimant for damages.

[16] The First Defendant in its Defence disputes the Claimant's claim and counterclaims against the Claimant for general damages for breach of contract, rent for the period that the Claimant occupied the property, the deposit sum of \$66,500.00, damages for the items missing from the property while the Claimant was in occupation thereof, interest, costs and further or other relief.

[17] The Second Defendant in its defence also disputes the Claimant's claim. The Second Defendant particularly pleaded that it made no representation upon which the Claimant could rely or which could have led the Claimant to enter the agreement. The Second Defendant contends that "outside of facilitating contact between the First Defendant and the Claimant and agreeing to sign an Instrument of Transfer if and when presented, it had no further involvement in the matter."

THE EVIDENCE

- [18] The Claimant gave evidence on her own behalf and called no witnesses. Jessica Dyett and Norman Dyett (also called Rocco) gave evidence for the First Defendant. Fredroy Jarvis and Kirthley Maginley gave evidence for the Second Defendant.

THE CLAIMANT'S EVIDENCE

- [19] The evidence of the Claimant as contained in her Witness Statement in large measure parallels what is contained in her Statement of Claim. She stated that sometime in April 2006, she contacted the Second Defendant regarding an advertisement for the sale of the property and entered into discussions with a representative, Mr. Kirthely Maginley, with a view to purchasing the same. She explained that Mr. Maginley informed her and she understood that he was the agent and/or employee of the Second Defendant and was authorized to deal with her on its behalf. The Claimant stated that during pre-contract negotiations, she was informed by Mr. Maginley that the property was beneficially owned by Mrs. Jessica Dyett and that the Second Defendant was the registered proprietor of the property. She claims that during her discussions with Mr. Maginley, he represented to her that the properties in the development, including the one under negotiation, were for sale with certain standard features and that there were also certain optional features. She stated that she subsequently opted for the property with the standard features.
- [20] The Claimant stated that sometime in May 2006, Mr. Maginley arranged for her to view the property and introduced her to Mr. Norman "Rocco" Dyett and Mrs. Jessica Dyett. She was further advised by Mr. Maginley that Mrs. Dyett was the beneficial owner of the First Defendant whilst her husband Norman Dyett was the contractor employed for the construction of the dwelling house situated on the property. The Claimant testified that during the viewing of the property she was shown a number of areas of the property that required additional work and was advised by both Mr. Maginley and Mrs. Dyett that Norman Dyett would be responsible for completing the same.

[21] The Claimant stated that, on or 26th June, 2006, she executed a written Agreement with the First and Second Defendants. She recalled that the Agreement provided, among other things, for her to pay a 10% deposit (the Deposit) and that the balance of the purchase price would be paid by six equal monthly installments. She further recalled that certain works were due to be completed on or before July 31, 2006. The Claimant explained that having paid the Deposit and having obtained the loan of a stand by generator from Norman Dyett, she took up occupation of the Property. She stated that she kept making several requests to Norman Dyett for the agreed works to be completed, but not only did Norman Dyett fail or refuse to execute the works, but became verbally abusive and threatened repeatedly to remove the generator from the property. The Claimant testified that sometime in early September 2006, during which time she had traveled back to Italy, the Property was burgled and several of her appliances and the generator were stolen.

[22] The Claimant stated that on the 25th September 2008, Norman Dyett visited and notified her Attorney Miss Gail Pero that he would be removing the generator from the premises as the First Defendant and that he was no longer prepared to complete the sale and as such wished to terminate the agreement. He further indicated that "they" would be making demands for rent for the period during which she (the Claimant) had occupied the premises. She stated that her Attorney accepted that Norman Dyett was in fact the agent for The First Defendant as he had represented the same during the course of his dealings with them. She added that Norman Dyett was immediately informed by Miss Pero of the burglary at the property as well as the removal of the generator. She claims that Miss Pero requested Norman Dyett to supply particulars of the generator so that the same could be provided to the police for investigation.

[23] The Claimant further testified that sometime in September 2006, her Attorneys wrote to the Second Defendant and to the firm notifying them of the termination of the Agreement by the First Defendant and of her decision to treat the contract as having been repudiated. The Claimant informed the court that by letter dated 6th October, 2006, the

Law firm of Cort & Cort wrote to her Attorneys on behalf of The First Defendant denying that Norman Dyett was authorized to act for the company and also denying any breach of contract by the company. The Claimant testified that the law firm of Cort & Cort subsequently tendered payment of the sum of EC \$ 99,750.00 to her (the Claimant's) attorneys and retained the deposit of EC \$ 66,500.00, which said deposit the firm failed and/or refused to refund, despite the Claimant's demand that it do so.

[24] The Claimant stated that by its failure and/or refusal to complete the works, the First Defendant and/or its agent breached its agreement with her and is liable in damages for the said breach. The Claimant added that by terminating the agreement the First Defendant and/or its agent caused her to suffer loss and damage.

[25] The Claimant also stated that by virtue of the misrepresentations made to her by the Second Defendant and/or its agent, and which induced her to enter into the Agreement, that the Second Defendant is jointly and severally liable to her for damages.

[26] The Claimant contended that, in reliance on the representations of the Second Defendant and/or its agent, she executed an agreement on about 26th June 2006 (the Agreement).

[27] Under a lengthy and vigorous cross-examination by Counsel for the First Defendant, the Claimant testified that during her initial meeting with Mr. Maginley, she was told by him that all the houses came with the certain features and that she was never told anything about "turn key". She testified that she was shown a map of the development and "how it had to become when it is finished"; and for that reason, she decided to buy the house as "it was to have everything inside." The Claimant stated that Mr. Maginley told her that most of the houses were already sold and that two (2) of them are "waiting to be sold". She said that she was then shown the two houses and decided on the smaller of the two houses, namely, the one that had two (2) bedrooms.

- [28] The Claimant testified that Mr. Maginley introduced her to the owner who told her to discuss it with him. She was emphatic that Jessica and Norman Dyett were introduced to her as the owners with Norman Dyett (Rocco) being also described as the builder. She admitted that her then lawyer, Vere Bird Jr. was present when she signed the Agreement, but added that when she asked him for time to review the document before signing, he assured her that he was her lawyer and that she could sign. She further added that on that assurance from her lawyer, she signed the document, even though she did not read everything in the Agreement.
- [29] The Claimant testified that the Second Schedule to the Agreement set out how she was to pay the Purchase Price and admitted that she had agreed to pay the said Purchase Price by installments.
- [30] The Claimant testified that she took possession of the property when she paid the initial deposit as she needed to leave items of clothing in the house. She admitted that she was loaned a generator by Norman Dyett as the house did not have electricity or water. She testified that she made several requests of Norman Dyett for him to complete the work; that the house needed steps and electricity, that there were missing windows and that there was a plugged drain hole in the bathroom. She testified that she had to employ a plumber, who also worked with Norman Dyett, to fix the problems. She testified that she had to employ an electrician as she was informed by the inspector from APUA that the electrical works were not properly done, and that she was required to get these corrected before APUA would connect the electricity.
- [31] The Claimant stated that Norman Dyett had until the 31st July 2006 to complete the works and that he was working on the Property during the period 26th June 2006 to July 31st 2006. When she was referred to the letter of 11th September 2006, the Claimant acknowledged that the letter stated that she was expected to continue to make payments in accordance with the Agreement. She testified that she was also aware that the letter stated that she would lose her deposit of \$66,500.00 if she did not proceed with

the transaction. She also acknowledged that she had made no further payments after the 31st July 2006.

[32] The Claimant denied that she was the one who wanted to “break the Agreement”. She testified that she only left the Property when she was asked by Norman Dyett to do so and that she believed that Norman Dyett “had the authority to bind the Company (Silkencrest).”

[33] During subsequent re-examination, the Claimant re-iterated that Mr. Maginley introduced Jessica and Norman Dyett as husband and wife. She stated that nobody ever asked her to pay rent for the Property.

[34] During further cross-examination by Counsel for the Second Defendant, the Claimant stated that she became aware of the property when she saw an advertisement by way of “a big sign in the street.” She explained that she went to the bank to ask whom she should speak with and then she was taken to see the property in May of 2006 and she signed the Agreement in June of 2006. She confirmed that the first time she met Mr. Maginley was at his office and he showed her the map of the development and also “a paper” listing the features of the houses. She further testified that Mr. Maginley explained that all the features would exist and that he explained “clear” to her that those were standard features. She stated that she informed Mr. Maginley that she was not interested in building her own house, but that she wanted a house that was already built. The Claimant explained why she decided to buy her house from the Second Defendant (ABI) which was a company and not an individual in these words, “when I decided to buy a house from ABI, I decide ABI instead of a single person to ensure that nobody try to take advantage of me. It means that ABI is a company, not a single person; it is more easy that they do a good job for sure; not something against the law. I wanted the security of dealing with a company.”

[35] The Claimant testified that she was told by “Mr. Maginley that all the features would exist” and that these “standard features” were standard. She stated that Mr. Maginley

never spoke to her about “turn key”; further that she “did not know what turn key means.” She stated that Mr. Maginley told her that there was also land in other places if she decided to buy land instead of a house, but that she was not interested in that. The Claimant testified that she was not interested in building her own house, but that she wanted a house that “was already built.”

- [36] The Claimant further testified that the paper containing the 24 standard features induced her to buy the house. She explained that she decided to buy the house from the Second Defendant (ABI) which was a company and not an individual as she expected the company “to do a good job.” She acknowledged that she did not read the Agreement completely as “four years ago my English was very bad.” She testified further that she received a copy of the Agreement only ten (10) minutes before signing it and got a copy “after maybe 15 days or more.” She stated that the original list was what she believed she should have received under the Agreement.

THE FIRST DEFENDANT’S EVIDENCE

JESSICA DYETT

- [37] The evidence in chief of Mrs. Dyett as contained in her Witness Statement was that, in her capacity as Director and Shareholder of the First Defendant, by a written agreement dated 26th June 2006 (the Agreement) she agreed to sell residential property (the Property) to the Claimant. The Property was beneficially owned by the First Defendant and the Second Defendant was the registered proprietor of the Property.
- [38] Mrs. Dyett stated that the Property included a dwelling house on a 0.40 acre plot of land. She disclosed that the dwelling house had been shown to the Claimant by Mr. Keithley Maginley, an agent of the Second Defendant, after which the Claimant decided to purchase the Property. She stated that “the dwelling house had been completed at the time that the Claimant viewed the Property”, but that the Claimant requested that “certain works be done to the Property at the expense of the First Defendant (Silkencrest)”.

[39] Mrs. Dyett stated that, at the Claimant's request, the keys to the Property were turned over to her upon the execution of the Agreement and payment of the Deposit and that "the dwelling house was completed when the Claimant agreed to purchase the Property." Mrs. Dyett stated that the Claimant was informed that her former husband Norman Dyett (Rocko) "was the builder who would be carrying out the above-mentioned works on the Property". She added that, on 24th August 2006, by which time the Claimant had been in occupation of the Property for about two months, a letter dated 21st August 2006 was delivered to the First Defendant's Attorneys from the Claimant's then Attorney Mr. Septimus Rhudd. This letter was a proposal by the Claimant to alter the Agreement and contained, among other things, a request to extend the completion date by a further 90 days to allow the Claimant to apply for a Non Citizen's Land Holding Licence (the Licence). She stated that the Claimant's proposal to alter the Agreement was rejected.

[40] Mrs. Dyett stated that upon the First Defendant's rejection of the Claimant's proposal to alter the Agreement, the Claimant stopped making payment of the purchase price in accordance with the Agreement, but continued to occupy the Property. She informed the court that by a letter dated 29th September 2006, the Claimant's Attorneys wrote to the First Defendant's Attorneys and indicated that the Claimant was treating the Agreement as repudiated. She stated that the Claimant alleged that Norman Dyett "had said that the First Defendant (Silkencrest) was terminating the Agreement." That letter, added Mrs. Dyett, was responded to by the First Defendant's Attorneys by a letter dated 6th October 2006.

[41] Mrs. Dyett stated that there was never any indication to the Claimant by the First Defendant or Norman Dyett "that Rocko (Norman Dyett) was anything other than the builder who was engaged by Silkencrest to carry out the agreed works on the Property." She further stated that the Claimant was "fully aware" that the First Defendant was represented by Attorneys Messrs Cort & Cort who had "ongoing written communication with the Claimant's Attorneys regarding the transaction."

- [42] Mrs. Dyett stated that the Claimant made no complaints about the Property to the First Defendant's Attorneys at the material time and only tried to change the Agreement. She further stated that it was only after the First Defendant indicated that it was not prepared to alter the Agreement that the Claimant started complaining about "various matters such as delays in the supply of utilities to the Property by APUA." She added that "it appeared that the Claimant wanted to get out of the agreement between the parties." She stated that the First Defendant's Attorneys received a further letter from the Claimant's Attorneys dated 24th October, 2006 " seeking to explain why the Claimant treated the agreement as repudiated and requesting that all the purchase monies paid over to the First Defendant's (Silkencrest's) Attorneys be returned to the Claimant. Mrs. Dyett testified that by a letter dated 31st October, 2006, the First Defendant's Attorneys replied to the letter and denied that the Claimant was entitled to treat the Agreement as repudiated. She added that the monies that the Claimant had paid towards the purchase price of the Property less the 10% deposit, was remitted to the Claimant along with the letter.
- [43] Mrs. Dyett stated that on 27th November 2006, the Claimant's Attorneys returned the keys to the Property to the First Defendant's Attorneys. She observed that further correspondence between the Claimant's and First Defendant's attorneys ensued about items missing from the Property after the Claimant's departure there from.
- [44] Under cross examination by the Claimant's Attorney, Mrs. Dyett testified that the Claimant was introduced to the First Defendant by the Second Defendant as a potential client and that the introduction was made by Mr. Kirthley Maginley. She noted that the initial meeting occurred at the Property.
- [45] Mrs. Dyett testified that the dwelling house was completed at the time the Claimant viewed it. She later testified that she would agree that there was a lot of work to be done at the end when the keys were handed over to the Claimant, particularly with water and electricity.

- [46] Mrs. Dyett testified that Norman Dyett's role "was simply that of builder." She added that she supplied him with a copy of the Third Schedule after the signing of the Agreement and told him that if the works were not completed by 31st July 2006, she would have to pay \$200.00 a day. She stated that Rocco was employed by the First Defendant at a monthly salary of \$5000.00 E.C.
- [47] Mrs. Dyett testified that she visited the site at least three times while the work was being done on the Property and went there between June 26th 2006 and July 31, 2006. She stated that Norman Dyett "was there on each of those occasions", but that she did not see the Claimant on any of these occasions. She stated further, that she never got a chance to speak to the Claimant about the state of the house which she would be handing to her. She added that she was aware that Norman Dyett would have been "interacting" with the Claimant on an almost daily basis. She stated that she was not aware that Rocco was "interacting" with the Claimant's lawyers and that the only "interaction" that she was aware of was with respect to the generator. She testified that the generator belonged to the First Defendant and that she was never aware that it had been loaned to the Claimant.
- [48] The Witness testified that she did not recall meeting with the Attorneys for the Second Defendant and that she did not see the drafts passing between the lawyers, but that she knew that the lawyers were in constant contact with each other. She stated that after the first meeting, she never met the Claimant again until the signing of the Agreement.
- [49] Under cross examination by the Second Defendant's attorney Mrs. Dyett testified that it was explained to the Claimant that she was the person to negotiate with and that Norman Dyett was the builder of the Property. She added that she did not believe that the Second Defendant's role was explained, except that Mr. Maginley brought the purchaser to the Property. She stated that the connection to APUA was part of the infrastructure of the development, and stated that the responsibility that the Second

Defendant had was to run the wires to the pole for APUA to come, but that they (the First Defendant) could not “make APUA come to the Property.”

NORMAN (ROCCO) DYETT

[50] The next witness to give evidence for the First Defendant was Norman Dyett. His evidence in chief as contained in his Witness Statement was that he was introduced to the Claimant by his former wife Jessica Dyett. He testified he is a builder and was approached by Jessica Dyett to undertake some construction work on the Property. Norman Dyett informed the court that he had “absolutely no interest” in the First Defendant and understood his role to be simply that of carrying out certain work to the dwelling house on the Property. He testified that he was introduced to the Claimant by Jessica as “the person responsible for the construction.”

[51] Norman Dyett stated that when he initially met the Claimant at the property, he explained to her that there was no electricity, water or telephone installed at the Property and that the responsibility of the infrastructure in the Development was that of the Second Defendant. He stated that the Claimant stated that she wanted to move into the dwelling house as she was paying for a hotel room. He testified that he was informed by Jessica that the Claimant was proceeding with the purchase of the Property and started to get it ready for the Claimant's occupation and also started to undertake the work that was set out in the Agreement. He disclosed that he loaned the Claimant a generator so that she could have a supply of electricity in the dwelling house, and that the Claimant agreed that the generator would be returned after the infrastructural works were completed, and in particular after APUA had run electricity and water to the Property.

[52] Norman Dyett stated that while the Claimant was in occupation of the Property, he completed all of the work that he was “contractually obligated to perform”. He stated that “there was never any specific time frame in which the works were to be completed”, but that the work was done within a reasonable time. He denied terminating the Agreement

and stated that he had no authority to do so, and further stated that the Claimant was "well aware" that he had no such authority.

[53] Under cross examination by Counsel for the Claimant, Norman Dyett testified that he has never built any houses for Mrs. Jessica Dyett. He stated that he was employed by the First Defendant and was to construct 2 houses at Weatherhill Estate. He was emphatic that he did not build 6 houses for the Second Defendant. He testified that he had seen the list of items stated in the Third Schedule to the Agreement, but did not recall who presented him with the list.

[54] Norman Dyett testified that he was not aware of any "deadline to finish the work", and further, that he did not know "about anyone having to pay any money if (he) missed the deadline", and that he was not told about any penalty in relation to the Claimant's house. He stated that he was paid a salary \$1100.00 per week and that the workmen who worked with him were paid by him.

[55] Norman Dyett testified that they had just completed about 95% of the house by the time the Claimant decided to purchase the Property. He stated that he was the builder and was "the boss on the job" and that Jessica Dyett did not come around to see what was needed to complete the house. He was emphatic that Jessica Dyett "did not have to come and check on the job" as he was "capable of doing the work." When told that Jessica's evidence was that she came to check on the job, he stated that if she did so, "he was not there" when she did. He stated that he could not recall his conversation which he had with the Claimant when he first met her. He stated that he spoke to her "about many things" but could not recall whether he spoke to her about electricity or water.

[56] Norman Dyett testified that he did not have much interaction with the Claimant. He stated that he got a report that the Claimant wanted some work to be done, so he asked the workmen to do the work. He further testified that he "hardly had any contact with the Claimant". He denied going to the lawyer's office and telling her that he was not selling

the place and also denied that he all along gave the impression that he was one of the owners.

- [57] During re-examination by Counsel for the Second Defendant, Norman Dyett re-iterated that there was no deadline to complete the eleven items specified in the Third Schedule to the Agreement.

THE SECOND DEFENDANT'S EVIDENCE

FREDROY JARVIS

- [58] Fredroy Jarvis was the first witness for the Second Defendant. He gave evidence in chief by way of his Witness Statement. He stated that he was the Chairman of the Second Defendant and that in or around June 2006, he was contacted by the Claimant's Attorney Mr. Vere Bird Jr. concerning the execution of an agreement for sale of the Property. He stated that he asked to be shown in advance a copy of the document before he agreed to sign on behalf of the Second Defendant as he wanted to ensure that the capacity in which the Second Defendant was acting was clearly set out.
- [59] Mr. Jarvis stated that he attended the office of the Claimant's Attorney on the 26th June 2006 to sign the Agreement. He stated that the Agreement was executed by all the parties. He stated that to the best of his information, at no point was the Claimant led to believe that the "standard features" were a part of the Agreement or that she was persuaded to enter the Agreement on the basis of any features which were presented to her at any meetings with the Second Defendant's agent.
- [60] Under cross-examination by Counsel for the Claimant, Mr. Jarvis testified that just one internal sales representative represented the Weatherhills Development and that person was Mr. Maginley. He further testified that there were two options available to the purchaser of the land and that "turn key" means that the purchaser asked them to build a home which he would have selected and they built it and gave them the key. If the

purchaser chose the first option, all it said was that the value of the house that the purchaser bought was to be no less than \$350,000.00. He informed that court that there was no brochure for the first option.

[61] Mr. Jarvis testified that he was not present when Mr. Maginley gave the brochures to the Claimant.

[62] Under cross-examination by Counsel for the First Defendant, Mr. Jarvis testified that the Second Defendant had one internal sales representative and several real estate agents marketing the Development. He acknowledged that a prospective buyer receiving the marketing materials could rely on those documents. Mr. Jarvis was not sure whether the Claimant read the Agreement before signing it. He stated that the First Defendant's representative was Jessica Dyett. He could not recall if any other representative of the First Defendant was present, but recalled that Attorney Sharon Cort was present.

KIRTHLEY MAGINLEY

[63] Kirthley Maginley followed Fredroy Jarvis as the next and final witness for the Second Defendant. His evidence in chief was by way of his Witness Statement was that he was employed "by contract" by the Second Defendant as a real estate representative and that one of his main tasks was to market and sell the lots within the Weatherhill's Residential Development (the Development).

[64] Mr. Maginley stated that there were two building options offered by the Second Defendant in the construction of homes. He explained that a purchaser could either design and construct his or her own house using his or her own building contractor within the limits of the restrictive covenants in place on the land, or else utilize a "turn key" concept whereby the Second Defendant would provide the purchaser with several building designs to choose from, and would then construct the house at a pre-determined cost. He noted that the "turn key" concept allowed the Purchaser to benefit from certain "Standard Features".

- [65] Mr. Maginley stated that in or around the early part of 2006, he met and interviewed the Claimant. He recalled that during his initial interview with the Claimant, he gave her "an overview" of the project, giving her all the brochures and promotional material which included the list with the standard features. He stated that he explained to the Claimant that all the lots were already sold, but that there were two houses within the complex which were for sale by the First Defendant's owners. He stated that he then visited the Development site with the Claimant and gave her a tour of both properties which though near completion, were still under construction.
- [66] Mr. Maginley stated that he explained to the Claimant "very thoroughly the facilitative role that ABI Development Company would play." He stated that in his "personal and professional view and to the best of his knowledge belief and information the Claimant understood very clearly what that role was" as "to the extent she requested a meeting with the owners of the two houses that were being sold." He stated that the Claimant decided on the two bedroom house and that he subsequently arranged for the Claimant to visit the site "and meet with the representatives of the owner of the property, Mrs. Jessica Dyett, and her husband, Mr. Norman "Rocko" Dyett, he being the builder of the houses." Mr. Maginley stated that during the first introductory meeting his "role as a coordinator for the sale was reiterated" and fully discussed with both parties.
- [67] He stated that he remembered clearly that he explained to the Claimant in his first meeting the concept of the "turn – key" construction and the related matter of the Standard Features. He added that the Claimant raised the matter of "Standard Features" with Jessica Dyett and her husband, and showed them the list of standard features that she had received from him. He stated that the Claimant "received the assurance" that they would make good on some of outstanding items, some of which were listed, but added that they never indicated that all the said features would be in place nor was it stated that her agreement to purchase was based on any list of items.

[68] Under cross-examination by Counsel for the Claimant, Mr. Maginley testified that the Claimant had come to his office in the early part of 2006 to inquire about making an investment in the Development. He stated that he conducted an "interview" with her and gave her some promotional literature. He stated that he explained the "standard features" to her. Although Mr. Maginley testified that the Claimant's English "was not that good," he later went on to state that he "got the impression that she could read and understand English properly."

[69] Under further cross-examination by Counsel for the First Defendant, Mr. Maginley stated that at the meeting which took place at the building site, Norman Dyett was "also introduced" as the husband of Mrs. Dyett and the builder." He stated that Norman Dyett was not introduced as an owner of the Property and did not make any indication that he was the owner. He confirmed that at the time that the Claimant met Jessica and Norman Dyett, no terms and conditions had been reached. He testified that the Property was 95% completed but that there were "a few things to make good"; that there was electricity to be installed, there was a water pump to be installed, and that other "odds and ends" had to be done to the Property to "make it liveable."

ISSUES

[70] The issues for determination by the Court are as follows:-

- i. Whether the Claimant breached the Agreement with the First Defendant by not complying with the condition to make payment in accordance with the Agreement.
- ii. Whether Norman Dyett represented himself to be an Agent of the First Defendant.
- iii. Whether the First Defendant is entitled to its counterclaim.

- iv. Whether the Second Defendant misrepresented the facts to the Claimant so as to induce her to enter the Agreement.
- v. Whether the Claimant is entitled to claim loss and damage against the Second Defendant.

LAW AND SUBMISSIONS OF COUNSEL

[71] I will now deal with each issue to be determined and will consider the law and submissions of Counsel as they apply to each issue.

ISSUE # 1 - WHETHER THE CLAIMANT BREACHED THE AGREEMENT.

[72] It is the submission of Counsel for the First Defendant that the Claimant breached the Agreement by failing to make payment in accordance with the Agreement.

Clause 4 of the Agreement deals with the method of payment and states as follows:-

"The purchase price shall be EC\$ 665,000.00 (hereinafter called "the Purchase Price") of which the sum of \$66,500.00 by way of deposit (hereinafter called "the Deposit") is now paid (the receipt whereof the Company hereby acknowledges) and the balance of EC\$ 598,000.00 shall be paid in equal installments of EC\$ 99,750.00 on the 30th of June 2006 and on the last day of each month thereafter on each of the six (6) consecutive months as agreed in the Second Schedule hereto."

[73] Clause 8 states in part that "the completion of the purchase and the payment of the balance of the Purchase Price in accordance with the Second Schedule hereto shall take place at the office of VERE C BIRD (JNR) AND CO. ZDK Building 2nd Floor, All Saints and Bird Roads, in Saint John's, Antigua on the Closing Date which shall be the 29th day of December, 2006..."

[74] Counsel for the First Defendant contends that it was "a fundamental term of the Agreement that the Claimant make payment of the Purchase Price in accordance with

the Second Schedule to the Agreement.” The Second Schedule of the Agreement states as follows:-

SECOND SCHEDULE

1. 31 st July 2006	EC\$ 99,750.00
2. 31 st August 2006	EC\$ 99,750.00
3. 29 th September 2006	EC\$ 99,750.00
4. 31 st October 2006	EC\$ 99,750.00
5. 30 th November 2006	EC\$ 99,750.00
6. 29 th December 2006	EC\$ 99,750.00

[75] The evidence before the Court is that, as stated in the letter of the Claimant's Attorney dated 21st August 2006, that as of “that date”, the Claimant had paid the sum of \$166,250.00, and that, as testified by the Claimant, she had “not made further payments after 31st July, 2006.”

[76] Counsel for the First Defendant submits that “the principal obligation of the Claimant under the Agreement was to make payment of the Purchase Price to the First Defendant as per the Agreement and the First Defendant's principal obligation was to facilitate the free and clear transfer of the Property to the Claimant upon receipt of the Purchase Price.”

[77] By letter to the First Defendant's Attorneys dated 24th October, 2006 the Claimant's Attorneys referred to their “correspondence dated September 4, 2006” in which they “requested evidence of the incorporation of the entity (Silkencrest Ltd.) and a Certificate of Good Standing.” The letter further states that, during their subsequent conversations, they (the Claimant's Attorneys) indicated their client's “concerns about the existence of the entity Silkencrest Ltd. in respect of the payment of the funds and the entities (sic) ability to contract with” the First Defendant. This, stated the Attorneys for the Claimant, “was the basis for the delay in tendering further payments under the Agreement.”

[78] It is the view of the Court that the above is neither an adequate reason nor sufficient justification for the Claimant's failure to make the necessary payments due under the Agreement, as, by letter dated 11th September 2006, the Claimant's Attorneys were advised by the First Defendant's Attorneys that "the Vendor, (Silkencrest Limited,) was incorporated through the Chambers of Clement Bird" and that "Mr. Bird's Chambers should be in possession of all corporate documents relating to the said company." Further, any questions or queries in respect of the standing or otherwise of the company (Silkencrest) should have been addressed prior to the Claimant's execution of the Agreement and her subsequent payment of the Deposit.

[79] Clause 10 of the Agreement states that,

"Should the Purchaser fail to complete the purchase within the period specified in Paragraphs 4 and 8 above in respect of which time shall be of the essence or to observe or comply with any of the stipulations on her part herein contained the Deposit shall be forfeited to the Company who may (without prejudice to any other remedy available to it) rescind the sale and resell the Property subject to such stipulations as it may think fit."

[80] Chitty on Contracts, Vol. 1, 30th edition, at paragraph 21-015 states as follows:-

"In determining the consequences of a stipulation that time is to be "of the essence" of an obligation, it is vital to distinguish between the case where both parties agree that time is to be of the essence of the obligation and the case where, following a breach of a non-essential term of the contract, the innocent party serves a notice on the other stating that time is to be of the essence. In the former case the effect of declaring time to be of the essence is to elevate the term to the status of a "condition" with the consequences that a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction").

[81] The Court finds therefore that the Claimant's failure to make payment in accordance with the Agreement is a fundamental breach of the Agreement.

ISSUE # 2 - WHETHER NORMAN DYETT represented himself to be an Agent of the First Defendant.

[82] It is the submission of Counsel for the Claimant that:-

"In respect of her dealings with the First Defendant, the Claimant was passed over to Rocco Dyett by his wife Jessica Dyett. She effectively left Rocco Dyett to deal with the Claimant. By her own evidence, she had no further interaction with the Claimant for the entire time. Rocco Dyett used this to his advantage. Using the fact of Jessica Dyett being his wife, he continuously gave the impression to the Claimant that he was one of the owners of the property and had absolute control and authorization to deal with the property and its purchase. The Claimant accepted that and dealt with Rocco Dyett in that capacity. Rocco Dyett, in his dealings with the Claimant's Lawyer, Miss Gail Pero, also conducted himself in a manner suggesting that he had unlimited authority to deal with the property and the agreement for sale however he wished. He acted throughout as one of the owners of the property and an authorized agent of the First Defendant ..."

[83] Counsel further contends that "when Rocco Dyett showed up at the Lawyer's Office and announced his intention to terminate the agreement, he was doing so against the background of the impression that had been created by him up to that point. The Claimant's Lawyer felt justified in treating his termination notice as a repudiation of the agreement as it was believed that he had the ostensible authority to do this."

[84] Counsel for the First Defendant on the other hand submits that "there was no basis for the Claimant to treat Norman "Rocco" Dyett as agent for the First Defendant in respect of the contractual obligations of the First Defendant under the Agreement." Counsel contends that:-

- a) Norman Dyett's evidence as well as Mrs. Dyett's evidence is that Norman Dyett was paid a salary by the First Defendant in respect of the construction of the Property and that his job was simply to build and complete the works at the Property.

- b) Even if the Claimant mistakenly considered Norman Dyett to have such authority as agent, she had actual written notice via the letter of 6th October, 2006 from the First Defendant's Attorneys that Norman Dyett had no such authority, so the Claimant was not legally entitled to rely on any actions of the said Norman Dyett to treat the Agreement as repudiated by the First Defendant.
- c) From the evidence before the Court, Norman Dyett was introduced to the Claimant as the builder responsible for carrying out the construction works on the property.
- d) That there is no evidence that Norman Dyett's dealings with the Claimant related to anything other than the building works or the loan of the generator to the Claimant, and the Claimant could not give any direct evidence... to the contrary.

[85] Counsel for the First Defendant further submits that, "insofar as all contractual matters had been dealt with between the Attorneys at Law for the Claimant and the First Defendant... the Claimant could not reasonably treat Mr. Dyett as having any greater authority than what he was introduced to her as (builder) without any express contrary indication." Counsel contends that the Claimant would have received "protest" via notice from the First Defendant's Attorney that Norman Dyett did not have the relevant authority attributed to him by the Claimant as "purported agent for the First Defendant." Counsel submits that "there was no ratification by the First Defendant of any acts purportedly done by Mr. Dyett as agent for the First Defendant."

[86] The law is settled that a principal is bound and entitled to the benefit of, the contract of his agent made on his behalf within the scope of such agent's actual authority. The principal may also be bound under the doctrines of apparent authority or in some cases under the general doctrine of estoppel.

- [87] Chitty on Contracts, Specific Contracts, Volume 11 , 30th edition at page 28, paragraph 31-042 defines apparent authority as follows:-

"Apparent, or ostensible, authority is "the authority of an agent as it appears to others": under the doctrine of apparent authority the principal may be bound to third parties because the agent appeared to have authority, though as between principal and agent there was in fact no such authority granted and the normal consequences of such authority did not arise... the basis of the doctrine of apparent authority is that a third party is entitled to assume that an agent has such authority as he appears to have or would normally have, whether or not the principal has in fact granted such authority..."

- [88] Bowstead and Reynolds on Agency, 19th edition at paragraph 8 – 013, define Apparent (or Ostensible) Authority as follows:-

"Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such person had the authority that he was represented to have, even though he had no such actual authority."

- [89] I agree with the submission of Counsel for the Claimant that Jessica Dyett, a Director of the First Defendant, "effectively left Rocco Dyett to deal with the Claimant". The evidence of Jessica Dyett herself is that, after her initial meeting with the Claimant, she had no further "interaction" with her. The evidence of the Claimant is that, "at the initial meeting, Jessica Dyett told her that Norman. Dyett "was in charge of everything." There is also no evidence that any representative of the First Defendant or that anyone other than Norman Dyett "interacted" with the Claimant or had any communication with her with respect to the work to be done on the Property. Jessica Dyett herself, by her own evidence, was unaware that Norman Dyett had loaned a generator to the Claimant. The First Defendant therefore permitted it to be represented that Norman Dyett had authority to deal with the Claimant.

- [90] It is also the submission of Counsel for the Claimant that in his dealings with Miss Gail Pero, the Claimant's lawyer, Rocco conducted himself in a manner suggesting that he had "unlimited authority to deal with the property and the agreement for sale however he

wished" and that he acted throughout as "one of the owners of the property and an authorized agent of the First Defendant."

[91] As explained by Diplock L.J. in the case of **Freeman v Buckhurst Park Properties** (1964) 1 All ER 630:-

"The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, viz., by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorized to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business..."

[92] Based on the law as stated above, and on the evidence adduced, I am of the view that the Claimant has proved, on a balance of probabilities, that Norman Dyett possessed ostensible authority to act on behalf of the First Defendant. However, that based on my findings in paragraph 81 above that the Claimant was in breach of the Agreement, that it is the Claimant who thereby repudiated the contract, which repudiation was accepted by Norman Dyett as Agent of the First Defendant. I find further that the First Defendant's return of the sum of E.C. \$ 99,750.00, representing monies paid by the Claimant less the forfeited deposit of E.C. \$ 66,500.00 was a further acceptance of the said repudiation by the First Defendant.

ISSUE # 3 - IS THE FIRST DEFENDANT ENTITLED TO THE RELIEF CLAIMED IN ITS COUNTERCLAIM

[93] In its Defence and Counterclaim, the First Defendant denies that it is liable in damages to the Claimant for any breach of the Agreement. Additionally, the First Defendant counterclaims for the following:-

- i. General damages for breach of contract.
- ii. Rent for the period of June to November 2006.
- iii. The deposit sum of \$66,500.00.
- iv. Damages in the amount of \$12,700.00.
- v. Interest.
- vi. Costs.
- vii. Further or other relief.

General Damages

[94] The classic statement of the general principle to be applied for breach of contract can be found in the judgment of Parke B in **Robinson v Harman** (1848) 1 Ex 850,855:

"The rule of the common law 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."

Rent

[95] The First Defendant has pleaded that "the Claimant occupied the First Defendant's said property from about June 2006 and gave up vacant possession to the First Defendant on 27th November, 2006 when the final set of keys were returned to the First Defendant's Attorneys. The First Defendant therefore claims an entitlement to rent at the then market rate for the said period of time." The First Defendant's Counter-claim includes a claim for "rent for the period of June to November 2006."

[96] In her Submissions, Counsel for the First Defendant contends that the First Defendant "would have lost the benefit of rental of the Property during the period it was occupied by the Claimant." Further, that "from the evidence of Mrs. Jessica Dyett, the Property was built as an investment by the First Defendant." Counsel further contends that "Mr. Maginley gave evidence that the property would have rented for \$2000.00 to \$2500.00 per month at the material time." No evidence was provided, however, by Mr. Maginley,

who incidentally is a witness for the Second Defendant, as to how the rental was determined. There is no evidence from the Witnesses for the First Defendant namely Jessica Dyett and Norman Dyett on the subject of the market value of the rent. There is also no evidence before the Court of any lease agreement between the First Defendant and any Third Party which would serve as an indication of the monthly rental. There is also no evidence from either Jessica Dyett or Norman Dyett that they ever requested of the Claimant that she paid rent for the Property during the time that she was in occupation thereof. The Claimant herself, during re-examination testified that "nobody ever asked her to pay rent for the Property."

[97] Clause 5 of the Agreement deals with the issue of possession of the Property by the Claimant and states as follows:-

"The Company (the First Defendant) agrees that on signing of this Agreement and the payment of the Deposit possession of the said property shall be delivered to the Purchaser (the Claimant) in its present state and condition without any obligation on the part of the Company at any time to carry out any works thereon and except for the work to be completed as listed in the Third Schedule. The Company warrants that the work listed in the Third Schedule shall be completed on or before 31st July 2006 failing which the Company shall pay to the Purchaser the sum of E.C. \$200.00 for every day beyond the day agreed for completion."

[98] Nowhere in the Agreement is there any mention of an obligation on the part of the Purchaser (Claimant) to pay rental while in occupation of the Property. Furthermore, the documentary evidence before the Court shows that subsequent to the letter from the Claimant's Solicitors dated 21st August 2006 to the Solicitors for the First Defendant, requesting among other things, an amendment to the Agreement, various letters were written to the Claimant's Solicitor by way of response. While these letters, particularly that of 11th September 2006 and 6th October 2006 specifically stated that in the event that the Claimant was "minded not to proceed with the transaction", that she would forfeit 10% of the Purchase Price and that she would be required to forthwith give vacant possession of the Property to the First Defendant, there was no mention that the Claimant was liable for rental while she was in occupation of the Property. In fact, by further letter dated 31st October, 2006, the Solicitor for the First Defendant

acknowledged delivery of the key to the Property and enclosed a cheque paid by the Claimant, but did not mention that the Claimant was liable for rental. Even the Solicitor's letter to the Claimant's Solicitor dated 14th November 2006 informing of the "several items missing from the premises" failed to make mention of any liability for rental.

[99] To ground her submission that the Claimant is liable for rental, Counsel for the First Defendant cites Barnsley's Conveyancing Law and Practice, second edition, page 266, that "under an open contract, when let into possession prior to completion, a purchaser is a tenant at will," and further, that "the act of taking possession is an implied agreement to pay interest irrespective of whether the purchaser derives any profit from his possession."

[100] Megarry and Wade in The Law of Real Property, 7th edition (supra) at page 737, paragraph 17 – 013, under the Rubric "THE RETURN TO EXCLUSIVE POSSESSION", state as follows:-

" In Street v Mountford, a decision that was much welcomed, the House of Lords restored the law to its former more principled position ...Although there could be no tenancy in the absence of exclusive possession, an occupier who had exclusive possession would not be a tenant in three circumstances:

- (i)
- (ii) If his occupation was referable to some other legal relationship, as where he was a freeholder, a trespasser, a purchaser in possession under a contract of sale, ..."
- (iii) ...

[101] Based on Clause 5 of the Agreement referred to above, the completion date for the works listed in the Third Schedule was 31st July 2006. The First Defendant's claim that it is entitled to rent for the period of June to November 2006 is therefore unsustainable, at least for the period of June and July 2006. Further, in the view of the Court, based on the above, the First Defendant has not proved its "entitlement" to a monthly rental of \$2000.00 to \$2500.00 or indeed any other sum.

The Deposit sum of \$66,500.00.

[102] It was a term of the Agreement that should the Purchaser (the Claimant) fail to complete the purchase, that the First Defendant was entitled to rescind the Agreement and the Claimant would forfeit the 10% Deposit paid.

[103] Counsel for the First Defendant cites Halsbury's Laws of England, Fourth edition, Volume 42, paragraph 234, which states that "...The Vendor is entitled, by virtue of the purpose of the deposit, to retain it as forfeited if the contract goes off due to the purchaser's default".

[104] The case of **Golfview Development Ltd. v St. Kitts Development Corp. and Michael Simanic**, Civil Appeal No 17 of 2004 provides further authority for the above principle. In that case, Rawlins J.A. as he then was, stated:

"It is sound legal principle, on the authority of *Howe v Smith*, that, generally, deposits paid to secure the performance of a contract are forfeitable where the purchaser breaches the agreement. This is so whether or not there is a forfeitable clause."

[105] The learning contained in Megarry and Wade's *The Law of Real Property*, 7th edition, at page 684, paragraph 15-107 on the subject is that :-

"A vendor may forfeit a deposit if the purchaser defaults even though the amount bears no reference to his loss. Deposits are therefore an anomalous exception to the rule that such payments are unlawful as penalties. A deposit that exceeds 10 per cent will be regarded as a penalty in the absence of special circumstances..."

In the case at bar, the deposit paid by the Claimant was ten per cent of the Purchase Price.

[106] Guided by the above authorities, on the evidence before the Court, and based on my finding in paragraph 81 above that the Claimant breached the Agreement, I find that the

Claimant is not entitled to recover her deposit of \$66,500.00 and that the First Defendant is entitled to retain the said deposit as forfeited.

Damages in the sum of \$12,700.00

[107] It is the submission of Counsel for the First Defendant that the First Defendant is entitled to damages in the amount of \$12,700.00 "in respect of the items missing from the Property when vacant possession of the Property was turned over to the First Defendant." That these items were stated in a letter from the Solicitors for the First Defendant to the Claimant's Solicitors, dated 20th November 2006. Paragraph 2 of that letter states as follows:-

"We are also instructed that subsequent to our letter of 14th instant, our client has discovered a further item missing from the premises. It appears that entry to the premises was not forced. This item is a pressure tank worth EC \$1,200.00. The value of the other items missing from the Property is as follows:-

Item	Value
- one generator	EC \$6,500.00
- one water pump	EC \$1,500.00
- one water heater	EC \$3,500.00"

[108] Counsel further submits that the First Defendant had a right to return of the Property with the items that were handed over to the Claimant with the Property. The burden of proving what items were handed over to the Claimant with the Property is therefore on the First Defendant. Jessica Dyett testified that she did not recall whether the water pump was installed at the time the Claimant viewed the Property or whether the water heater was installed. She testified further that at the time of signing the Agreement, she had not bothered to check whether the items in the Third Schedule to the Agreement had been done and that in June, she had not physically visited the property to check if those things had been done. She further testified that the keys were handed over to the

Claimant when the Agreement was signed, but that she did not make a check of the house at the time.

[109] Counsel quotes from Barnsley's Conveyancing Law and Practice, second edition, p. 263, paragraph (b) that, "as from the date of the contract the risk passes to the purchaser, subject to the vendor's duty to take reasonable care to maintain the property." Counsel goes on to submit that "it is therefore contended that the burden was on the Claimant who was in occupation of the Property to take adequate measures to ensure that the Property was secured in an attempt to prevent the loss and damage suffered by the First Defendant."

[110] In her Reply and Defence To Counterclaim of the First Defendant, the Claimant pleaded that, during her absence from the State in September 2006, the premises were burglarized sometime between September 22nd 2006 and September 23rd 2006 and that her furnishings, kitchen appliances, washing machine, utensils, linens and the 1st Defendant's generator, among other things were stolen. She further pleaded that because she was out of the State, she was not in a position to indicate the specific items that were stolen. In her Defence to the Counterclaim, the Claimant denied that she failed to adequately secure the premises during her occupation thereof and or that she was negligent in so doing. She pleaded that "every step was taken to secure the premises." She further pleaded that she installed interior shutters and bolted them before her departure to Italy and that she made attempts to have APUA supply electricity connected to the premises to facilitate the installation of a security system at the premises, but that due to the incomplete state of the electrical works, the application for connection was denied.

[111] The evidence of the Claimant as contained in her Witness Statement is that on the 25th September 2006, Norman Dyett visited the Chambers of Miss Gail Pero and notified her that he would be removing the generator. She testified that Norman Dyett was immediately informed by Miss Pero of the burglary at the premises and the removal of the generator and he was requested to supply particulars of the generator so that the

same could be provided to the police for their investigation. She stated Norman Dyett only provided this information sometime in October. This evidence was not challenged by the First Defendant.

[112] With the exception of the generator, the First Defendant has failed to prove that the items alleged to be missing were handed to the Claimant with the Property. Also significant is the fact that, in his Witness Statement, Norman Dyett stated that he made inquiries of the Claimant's Attorney as to the replacement of the generator, but that instead of the Claimant offering to do so, her Attorney suggested that if the First Defendant wanted the generator back, it would have to take the Claimant to Court. No mention is made in Norman Dyett's Witness Statement of any other missing items.

[113] With respect to the generator, the Claimant has acknowledged that this item was loaned to her but was stolen when the house was burgled. Jessica Dyett testified that she did not know that the generator had been loaned to the Claimant. Norman Dyett admitted that it belonged to the First Defendant but acknowledged that he made the claim for it when it was stolen as if it belonged to him. No evidence was adduced before the Court as to the cost of the generator. In the Court's view, the First Defendant has failed to prove, on a balance of probabilities, that the Claimant is liable for damages for the missing items as claimed in its Counterclaim.

[114] It is the view of the Court, therefore that, with respect to the relief claimed in its Counterclaim, the First Defendant is entitled to the deposit of \$66,500.00, together with interest and costs.

ISSUE # 4 - WHETHER THE SECOND DEFENDANT MISREPRESENTED THE FACTS TO THE CLAIMANT SO AS TO INDUCE HER TO ENTER THE AGREEMENT.

[115] It is the submission of Counsel for the Claimant that the Second Defendant made representations to the Claimant which induced her to enter the Agreement with the Defendants. Specifically, that " the representative Mr. Maginley, in his initial "interview"

with the Claimant, represented to her by words and through the promotional literature that he provided to her, that she would have been getting, at the very minimum, the features shown in the literature", and that the Claimant "relied on those representations."

[116] Counsel for the Claimant further submits that "those representations were false as he (Mr. Maginley) knew that, the nature of the purchase was such that she (the Claimant) would not have been receiving the "standard features" as contained in the promotional literature." Counsel contends that "the Claimant, being unfamiliar with the project, having just arrived in the country with a limited command of the English language, accepted what Kirthley Maginley was representing to her... She wanted to deal with a company rather than an individual as she felt more confident doing business that way. She relied entirely on what was represented to her by the Second Defendant. Those representations turned out to be false and the Claimant acted on it to her detriment."

[117] The law with respect to misrepresentation is settled. Halsbury's Laws of England, Fourth edition, Vol. 31, paragraph 703 states that:

"A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct."

At paragraph 701, a misrepresentation is described in the following terms:

"A misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person (the representor) makes a misrepresentation to another (the representee) which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally elect to regard the contract as rescinded."

[118] It is the submission of Counsel for the Claimant that "the Second Defendant ...falsely represented to the Claimant that she would have been getting a house of a particular standard. The Claimant was looking for a hassle-free purchase of a finished dwelling

with standard features and amenities. Kirthley Maginley represented to her that was what she was getting."

[119] Counsel for the Second Defendant submits that no statement or representation was made by the Second Defendant. Counsel contends among other things, that:-

- (a) No such statement was made to the Claimant;
- (b) That no such statements were made there could be no reliance on the same by the Claimant;
- (c) That in any event there was no reliance on the statement as the Claimant chose a particular path to property ownership which excluded the Second Defendant save and except to consent to the passage of title;
- (d) The Claimant was represented in negotiations with reference to the terms of a contract which she eventually signed in June of 2006;
- (e) That the said negotiations with reference to the terms of this contract took place between the Claimant and the First Defendant with the Claimant's lawyer having drafted the said contract signed in June;
- (f) That upon being introduced to the First Defendant the Claimant dealt with the First Defendant's representatives and by her own admittance had no further contact with the Second Defendant; and
- (g) That it was the Claimant's representative who presented the said contract to the Second Defendant for execution. The Second Defendant having been unaware until that point of the substance of the negotiations between the Claimant and the First Defendant.

[120] In order for the Claimant to succeed in her claim of misrepresentation against the Second Defendant, she must establish that:-

- (a) The Second Defendant made a representation to her
- (b) This representation was false
- (c) She was induced to act upon that representation
- (d) She acted upon that representation and suffered damage.

[121] Counsel for the Claimant submits that the Second Defendant's representative, Mr. Maginley, in his "initial interview" with the Claimant "represented to her by words and through the promotional literature that he provided to her, that she would have been getting, at the very minimum, the features shown in the literature." The Claimant's evidence is that, during her discussions with Mr. Maginley, he represented to her that the properties in the Weatherhills housing development (the Development), including the one under negotiation, were for sale with certain standard features. She testified that he represented that there were also certain optional features and that she subsequently opted for the property with the standard features. Under cross-examination, the Claimant testified that during the initial meeting with Mr. Maginley, she was told by him that all the houses came with certain features and that she was never told anything about "turn key". She stated that she was shown a map of the Development and "how it had to become when it was finished." She testified that, for that reason, she decided to buy the house as "it was to have everything inside." She testified that Mr. Maginley told her that most of the houses were already sold and that two (2) of them were "awaiting to be sold."

[122] Under cross-examination by Counsel for the Second Defendant, the Claimant testified that the first time that she met Mr. Maginley was at his office and he showed her a "map of the Development" and also a "paper listing the features of the house." She testified that Mr. Maginley explained that all the features would exist and that he "explained clear" to her that those were standard features. She testified that she informed Mr. Maginley

that she was not interested in building her own house, but that she wanted a house that was already built.

[123] The evidence of Mr. Maginley as to what transpired during that "initial interview" is that he gave the Claimant "an overview" of the project, giving her all the brochures and promotional material which included the list with the standard features. He stated that he explained to the Claimant that all the lots were already sold, but that there were two houses within the complex which were for sale by the owners of Silkencrest (the First Defendant.) He stated that he remembered clearly that he explained to the Claimant in his first meeting the concept of the "turn key" construction and "the related matter of the Standard Features". He stated that he then visited the Development site with the Claimant and gave her a tour of both properties, which "though near completion, but were still under construction." Mr. Maginley testified that at the meeting with himself, the Claimant and Mr. and Mrs. Dyett which took place at the Development site, the Claimant raised the matter of Standard Features with them, and showed them the list of standard features that she had received from him.

[124] Having perused the evidence in relation to the above, and having listened to the witnesses and in particular, having observed their demeanour, I prefer the evidence of the Claimant to that of Mr. Maginley. I believe the evidence of the Claimant that she was not told anything about "turn key". Mr. Maginley's own evidence is that he told the Claimant that all the lots within the Development were already sold, but that there were two houses within the complex which were for sale by the owners of Silkencrest. Mr. Fredroy Jarvis, the Chairman of the Second Defendant, confirmed in his evidence that there "was no more land available for sale within the project at the material time." Mr. Jarvis testified that there were two options available to a purchaser of the land. If the purchaser chose the first option, all it said was the value of the house that the purchaser built was to be no less than \$350,000.00. That "turn key" meant that the purchaser asked them to build a home which he would have selected and they built it and gave them the key. It would therefore not have been necessary to explain the turn key option

to the Claimant, since there was no more land within the Development on which the Second Defendant could build a house for the Claimant.

[125] By his own admission, Mr. Maginley explained the standard features to the Claimant and gave her the promotional material which included the list with the twenty four items which made up the standard features. Why then would he go through the bother of explaining these standard features to the Claimant if, as is submitted by Counsel for the Second Defendant, "the standard features ... was available only if she (the Claimant) had bought the property from the Second Defendant and even then only if she exercise the turn key option referred to in the Second Defendant Defence?" It is also significant that Mr. Jarvis testified that there was no brochure for the first option. Additionally, as stated above, there was no more available for sale within the Development. The logical answer and conclusion is that Mr. Maginley represented to the Claimant that the two houses which were available for sale would contain the standard features. Mr. Maginley also testified that the Claimant had that list with her at the meeting with Mr. and Mrs. Dyett which took place at the Development site and that the Claimant showed them the list of standard features that "she had received from him."

[126] Counsel for the Second Defendant has submitted, quite correctly, that the burden is on the Claimant to prove that the representation/statement was actually made by the Second Defendant and/or its agent. The Court finds on the evidence before it, that the Claimant has discharged this burden. The very "paper" with the list is telling. It states:-

"ABID> ABI Development Company Ltd.
Weatherhills Residential Project "

Standard Features
(with 24 items)

Optional Features
(with 7 items)"

The above document was given by Mr. Maginley to the Claimant as part of the promotional literature.

[127] The Claimant must also prove that the representation was false. As stated in paragraph 118 above, it is the submission of Counsel for the Claimant that the Second Defendant falsely represented to the Claimant that she would have been getting a house of a particular standard. The Claimant was looking for a hassle-free purchase of a finished dwelling with standard features and amenities. Kirthley Maginley represented to her that was what she was getting.

[128] Paragraph 12 of the Claimant's Reply to the Defence of the Second Defendant states that: "By virtue of its fraudulent representations, the 2nd Defendant is jointly and/or severally liable to the Claimant for damages." It is the submission of Counsel for the Claimant that the Second Defendant falsely represented to the Claimant that she would have been getting a house of a particular standard. Counsel further submitted that those representations were false as Mr. Maginley knew that, the nature of the purchase was such that she would not have been receiving the "standard features" as contained in the promotional literature.

[129] What amounts to fraud has been settled by the decision of the House of Lords in **Derry v Peek**, per Lord Herschell. Fraud is proved when it is shown that a false representation has been made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false.

[130] As stated in paragraph 118 above, the Court finds that Mr. Maginley represented to the Claimant that the house which she contemplated purchasing would contain the standard features. The Court finds further that based on the totality of the evidence when Mr. Maginley made the said representation he knew it to be untrue. Mr. Maginley knew that the Claimant would not be getting the standard features contained in the list which he gave to the Claimant, since the Claimant was not purchasing from the Second Defendant and since the Second Defendant was not building the dwelling house for

the Claimant under the "turn key " option. The Claimant's evidence is that she told Mr. Maginley that she was not interested in building her own house, but wanted a house that was already built. That evidence was not discredited by the Second Defendant.

[131] The Claimant must also prove that she was induced to act upon that representation. The Claimant claims that, in reliance on the representation of Mr. Maginley, the agent of the Second Defendant, she entered into a contract with the First Defendant and the Second Defendant.

[132] The law is clear that the representation must induce the contract, that is to say, that it must induce the Claimant to enter into the contract.

[133] According to Chitty on Contracts (supra) at paragraph 6 – 032, under the rubric "Inducement": "it is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew that it was false, he has no remedy." The misrepresentation need not be the sole inducement; it is sufficient that it was an inducement which was actively present to the representee's mind: - **Edgington v Edgington** (1885) 29 Ch D 459.

[134] It is the submission of Counsel for the Second Defendant that, among other things:-

- (i) That the Claimant admitted under cross examination that the terms of the agreement entered into were drafted by her lawyer upon her instructions.
- (ii) That the Claimant was represented and that her representative stands to represent her interest in negotiations with reference to any contract signed.

[135] According to Chitty on Contracts (supra) at paragraph 6-033 under the Rubric "Burden of Proof": "the burden of proving that the claimant had actual knowledge of the truth, and

therefore was not deceived by the misrepresentation, lies on the defendant; if established, knowledge on the part of the representee is of course a complete defence, because he is then unable to show that he was misled by the misrepresentation. It has also been held that a defence is made out if the truth was known to the agent of the claimant, at least where the facts had deliberately been communicated to the agent."

[136] The evidence before the Court is that the Claimant's Attorney was responsible for preparation of the Agreement between the parties. Further, that the Claimant gave the "list" which she received from Mr. Maginley to her Attorney so that the said Agreement could be executed. In light of these facts, the Court finds that the misrepresentation was not an inducement that was actively present to the Claimant's mind. Accordingly, the Claimant's claim that she was induced to enter the contract by the representation of the Second Defendant, must fail.

[137] The Claimant therefore cannot succeed in her claim against the Second Defendant for loss and damage.

CONCLUSION

[138] The Court finds that , based on the totality of the evidence the Claimant has failed to prove her case against the Defendants on a balance of probabilities.

ORDER

[139] The Court's Order is as follows:

1. The Claimant's claim against the First Defendant is dismissed.
2. The Claimant shall pay to the First Defendant in respect of its Counter-claim:-

- i. The Deposit sum of \$66,500.00 – which is presently held in a joint escrow account and which amount is to be released to the First Defendant.
 - ii. Interest on the sum of \$66,500.00 at the rate of 5% per annum from 7th April 2009 to 17th May 2011.
 - iii. Prescribed costs on the amounts in (i) and (ii) above in accordance with Rule 65.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR) 2000.
3. The Claimant's claim against the Second Defendant is dismissed.
4. The Claimant shall pay to the Second Defendant prescribed costs in accordance with Rule 65.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR) 2000.


JENNIFER REMY
High Court Judge