

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SUIT NO:499 OF 2000

BETWEEN

(1) JUSTIN ELCOCK
(2) MARY TEPIE

Claimants

and

JN BAPTISTE AUGUSTE

Defendant

Appearances:

Mr. Dexter Theodore for the Claimants

Mr. Kenneth Foster QC for the Defendant

2003: June 17
June 20

JUDGMENT

- [1] Shanks J: Mr. Elcock (the first claimant) and Mr. Auguste (the defendant) are old friends. Mr. Auguste is a builder and developer. Sometime in 1996 Mr. Elcock and Mary Tepie (the second claimant) contracted to buy a three-bedroom house on a 5,000 square foot plot of land in the Morne Serpent Development at Grand Riviere in Gros-Islet from Mr. Auguste. The price was \$260,000 or \$265,000, but nothing turns on the difference. There is, however, a very live dispute as to whether there was ever an agreed date for completion. The Claimants say it was agreed that the house would be ready for Christmas 1996; the Defendant says no date was specifically agreed for completion.

- [2] By July 1999 Mr. Elcock and Mrs. Tepie had still not moved into their new house although they had paid a total of \$120,000 to Mr. Auguste by means of various payments made between November 1996 and March 1999 . They therefore retained the services of Mr. Theodore and of Peter Leonce, a valuer. Mr. Leonce produced a report dated 29 July 1999 which stated that the house still needed to have \$62,665 worth of work on it and that the plot and the existing structure were worth \$170,928. Mr. Elcock stated that he was willing to move into the house as it was and pay the difference between that valuation and \$120,000 (ie a further \$50,000) but Mr. Auguste would not have it.
- [3] In due course Mr. Auguste commissioned a report from Neville Trim which is dated 18 November 1999. Mr. Trim valued the house and the land at \$260,000 and stated that there were only some minor snagging items to resolve with the house. It appears that the claimants were not provided with this report and that communications had broken down before it was produced. As far as they are concerned the house has never been finished properly.
- [4] On 24th May 2000 they started a claim against Mr. Auguste seeking repayment of their \$120,000, damages and interest. Their damages claim was set out in paragraph 6 of the statement of claim which stated: "...the [claimants]...have lost the expense incurred by them in obtaining alternative rental accommodation and in constructing an apartment below certain premises belonging to the daughters of [Mrs. Tepie]...for the purpose of storing and securing their belongings..." and then gave particulars stating "...Rental accommodation \$550 per month from December 1996...\$22,000; Construction of

Apartment...\$15,000". Mr. Auguste filed a Defence in due course stating that the house was satisfactory and counterclaiming for specific performance of the sale agreement and \$140,000 being the balance of the agreed price.

[5] At a case management conference on 20th February 2002 attended by attorneys on both sides (though not Mr. Kenneth Foster QC) Pemberton J ordered that there be judgment for the Claimants for \$120,000 and that "the other claims in this matter are to be negotiated". I do not know the precise basis on which the judge made this order but, as I say, there were lawyers in attendance on both sides and there has been no appeal against it. Implicit in the judge's order is a finding that the Claimants were entitled to and had brought an end to the contract with Mr. Auguste at some stage between July 1999 and May 2000 and that they were accordingly entitled to the return of the money they had paid and Mr. Auguste was not entitled to specific performance or the balance of the purchase price. I must, I think, proceed on this basis in dealing, as I am asked to do, with the Claimant's "other claims".

[6] At a further hearing on 26th March 2002 directions were given by Pemberton J for the resolution of those claims, including a list of issues to be tried. In the light of my comments above and the state of the pleadings and evidence I have not decided each of the issues identified by Pemberton J but they have provided a useful guide to the matters requiring consideration.

[7] The first issue of fact which I must resolve is whether it was agreed that the house would be completed by Christmas 1996. It is always difficult to resolve an issue like this where

there are no documents and the parties are old friends. Based on their witness statements, their general demeanour, the inherent likelihood of the matter and the fact that Mr. Foster did not expressly suggest otherwise to either of the claimants in the course of his cross-examination, however, I have no hesitation in finding that the Claimants are right and that the agreed date for completion was Christmas 1996 so that, by July 1999, Mr. Auguste was seriously in breach of contract by reason of a very substantial delay.

[8] The next issue is whether the Claimants are entitled to the damages set out in paragraph 6 of the statement of claim as a consequence of that breach. There are a number of objections to those claims which mean in my view that the Claimants have not made out their case to such damages.

[9] The claim in respect of the expense of constructing the store area is not viable for the following reasons:

- (1) there was no evidence at all before the court as to the expense actually incurred in constructing this store area; since it was below an existing structure the figure of \$15,000 seems exaggerated on any basis;
- (2) in any event, by constructing the store area (or apartment as it was called for some unexplained reason in the statement of claim) Mrs Tepie must have improved the house (which in evidence she said was hers rather than her daughters') and she would need to give credit for this improvement;
- (3) it was common ground that Mr. Auguste had offered to store the furniture which arrived from England in mid 1998 but that the Claimants had turned down this offer; Mrs Tepie accepted in cross-examination that they had not even seen the

storage space on offer before turning it down so it seems to me they failed to mitigate their loss in this respect;

- (4) it is also not clear to me on the evidence when the store area was constructed and whether its construction could truly be said to result from the delay on Mr. Auguste's part; I understood Mr. Elcock's evidence to be that the furniture was still in a container in August 1999 at around the time that the contract with Mr. Auguste was abandoned; thereafter, Mr. Elcock acquired another plot of land and had a two storey house constructed on it, which presumably could accommodate the furniture thereafter.

[10] As to the claim for the cost of alternative rental accommodation:

- (1) there was no evidence at all that Mr. Elcock or Mrs. Tepie had incurred any expenditure on accommodation as a consequence of Mr. Auguste's delay or as to the amount thereof; and
- (2) as Mrs. Tepie testified in answer to questions by me, she was living in the house where the storage area was (which was hers, as I have already said) and Mr. Elcock sold a house in La Clery and came to live with her in that house during the period of the delay, so that it is clear that no-one in fact incurred any expenditure on rent.

[11] I therefore reject the outstanding claims by the Claimants for damages. Mr. Theodore also asked me to award interest on the \$120,000 ordered by Pemberton J under Art 1009A of the Civil Code. It seems to me that given that they were deprived of the money from the

dates of the payments and received nothing in exchange in the end, the Claimants must *prima facie* be entitled to interest on the amounts paid from the dates of the payments.

[12] Mr. Foster argued that the claim to interest was not covered by the “other claims” referred to in Pemberton J’s order of 20th February 2002. The prayer to the statement of claim expressly lists interest as one of the items claimed and paragraph 6 also pleads that the Claimants had lost the use of their \$120,000; it seems to me that in these circumstances I should interpret Pemberton J’s order as leaving over the question of interest on the \$120,000.

[13] Mr. Foster also said that the Claimants were the authors of their own misfortune because they had advanced the money voluntarily and had never made time of the essence while the Defendant had had to incur the expense of building the house for them and that they had later tried to high-jack the property by taking possession without consent. I think that in the light of my findings and Pemberton J’s order of 20th February 2002 none of this provides any answer to the claim for interest. The Claimants paid a total of \$120,000 under a contract which they were later entitled to terminate and under which they received nothing; in those circumstances I can see no reason why they should not be awarded interest on the \$120,000.

[14] I will therefore order that the Defendant pays interest to the Claimants at the rate of 6% on the following amounts from the dates shown:

20th November 1996 ...\$15,000

6th January 1997 ...\$39,000

21st August 1998 ...\$46,000

3rd March 1999 ...\$20,000

[15] I heard argument on costs having indicated the likely outcome of the case at the conclusion of the hearing. There was no real dissent from the proposition that the Claimants should receive 55% of the prescribed costs in respect of the \$120,000 and the interest I order to be paid. Further, since this hearing was almost entirely dedicated to the question of damages and on that part of the case Mr. Theodore was unsuccessful, I do not think he dissented from the proposition that Mr. Foster should receive the costs associated with it. Mr. Foster asked me to assess his costs at \$5,000; I think Mr. Theodore's figure of \$2,500 was more realistic and I assess the Defendant's costs at the latter figure.

[16] I direct under CPR 42.5(2) that Mr. Theodore file a draft order to reflect these decisions by 25th June 2003.

Murray Shanks
High Court Judge (Ag.)