[2015] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 8/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEN	**THEOPHILUS MCLEOD**	**APPELLANT**
AND	**JOSEPH RICHARDS**	**RESPONDENT**

Ms Audré Reynolds instructed by Bailey, Terrelonge and Allen for the appellant

Miss Danielle Archer instructed by Kinghorn and Kinghorn for the respondent

8 May 2014 and 31 July 2015

MORRISON JA

[1] I have had the advantage of reading in draft the judgment prepared by my learned sister, Lawrence-Beswick JA (Ag). I agree with her reasoning and conclusions and there is nothing that I can usefully add.

MCINTOSH JA

[2] I have read the draft judgment of my sister Lawrence-Beswick JA (Ag) and agree with her reasoning and conclusions.

LAWRENCE-BESWICK JA (AG)

[3] On 15 December 2011, the learned trial judge Simmons J entered judgment for the respondent, Mr Joseph Richards, thereby refusing the claim of the appellant, Mr Theophilus McLeod, to be paid mesne profits from January 2006 to September 2008 with interest at a commercial rate, and to a detailed accounting of rental collected on property at 54 East Street Old Harbour, Saint Catherine. This is an appeal from that judgment.

Background

[4] By an agreement for sale dated 6 January 2006, Mr Theophilus McLeod agreed to purchase a parcel of land at 54 East Street, Old Harbour from Mr Joseph Richards for the price of $3,500,000.00. There were, however, special conditions attached to the agreement. The conditions relevant to this appeal were:

> "3. In the event of the Agreement being rescined [sic] all monies paid hereunder by the Purchaser shall be refunded without interest and free from deductions SAVE & EXPECT [sic] that the Purchaser hereby agree [sic] to pay to the Vendor's Agent to deduct the said sum from the Deposit paid herein [sic].
>
> 4. The sale is subject to the Approval of the Sub-Division Plan."

These conditions meant that the sale was conditional on Mr Richards obtaining approval for sub-division of the land and that any money refunded should be free of interest.

[5] The agreement was that on payment of $2,500,000.00 Mr McLeod would be entitled to vacant possession of the property. At the time of the agreement there were two tenants on the property paying a total rental of $27,000.00 per month.

[6] On 3 February 2006, after paying $2,500,000.00, Mr McLeod arranged for Mr Richards to pay the rentals collected from the tenants to his agent. During the following months, Mr Richards received some rentals and paid them over, as arranged.

[7] In March 2006, one month after having received the $2,500,000.00 deposit, Mr Richards asked Mr McLeod to vary the agreement concerning the final payment and to pay him immediately rather than when the subdivision approval would have been obtained. He promised that he would still obtain the sub-division approval and splinter title for Mr McLeod's portion of the land. Mr McLeod agreed to the variation and paid the final balance of $1,000,000.00 on 3 March 2006.

[8] The subdivision approval was refused in December 2006. The appeal of that decision was refused by the relevant minister in February 2008. The parties thereafter appear to have recognised the agreement as having come to an end and Mr McLeod requested the return of the purchase money. Mr Richards informed Mr McLeod that he had no money to repay the purchase price. Mr McLeod then offered to purchase the remaining portion of land, thereby purchasing the whole lot and thus removing the necessity for subdivision. Mr Richards refused that offer which had been based on an independent valuation and in September 2008 Mr McLeod filed suit for specific performance of the agreement or alternatively for the payment of mesne profits and the detailed accounting of rental monies paid and commercial interest, inter alia.

[9] In the defence to the suit Mr Richards stated that he did not have the funds to repay Mr McLeod and that he was trying to sell the property to obtain the money to do so.

He, however, admitted that he was to provide Mr McLeod with some rental amounts from the tenants. He had given Mr McLeod only some of those payments, until January 2008.

[10] Mr McLeod therefore filed an application for summary judgment on 2 October 2008. Before the matter came up for hearing, Mr McLeod paid the entire cost for a 2nd valuation of the property by a different valuator and in March 2009 when that report was submitted, he offered to purchase the land for the new increased value indicated on that second valuation. Again, Mr Richards rejected the offer.

[11] On 4 March 2010, one year after rejecting the offer, attorneys-at-law for Mr Richards indicated to Mr McLeod's attorney-at-law that they had $3,400,000.00 available to pay to Mr McLeod and they invited discussions concerning any interest payment on the outstanding purchase price and on the rental monies which had been paid to Mr McLeod. This proposed payment was rejected by Mr McLeod as being based on what was described as being "a grossly inaccurate presumption concerning deductions".

[12] Almost nine months had passed before the application for summary judgment was before the court on 22 November 2010. On this occasion Mr Richards' attorneys-at-law undertook to pay to Mr McLeod the sum of $3,400,000.00 and in December 2010 they honoured that undertaking.

[13] Yet another year passed and an amended claim was tried on 15 December 2011 by Ms Justice Simmons. The claim had been amended to include, inter alia, a claim for damages.

[14] It has not been challenged that at the trial, counsel for the appellant stated that she would only pursue paragraphs g, h, and j of the amended claim, namely, claims for:

> "g) An Order that the Claimant is entitled to payment of mesne profits on the said property from January 2006 to September 2008, (being 2 years and 8 months @ $27,000.00 per month) totalling $864,000.00, and continuing to the date of the hearing in this matter.
>
> h) An Order that the Defendant provide a detailed accounting of all rental collected for the said property from January 2006 to the date of hearing of this matter.
>
> ...
>
> j) Interest at the commercial rate of 2 percent above the Bank of Jamaica rate for the period, pursuant to section 3 of the Law Reform Miscellaneous Provision Act."

This reduction in the reliefs sought was no doubt due in no small part to the fact that Mr McLeod was by then in receipt of the refund of $3,400,000.00 of the purchase money. However, in her written submissions to the court below, despite her indication that her claim was limited as detailed above, counsel for the appellant included submissions for the recovery of $100,000.00 purportedly withheld by the respondent for a survey diagram.

Grounds of appeal

[15] The appellant filed the following grounds of appeal:

> "(a) The Learned Judge having correctly found that the Agreement for Sale between the parties came to an end on February 4, 2008 when the term for sub-division could not be carried out, erred and/or misdirected herself in failing to rule that the term for non-payment of interest contained in the said Agreement for Sale also came to an end and the Claimant was then entitled to repayment of the full sum of $3,500,000.00 paid by him.

(b) The Learned Judge erred and/or misdirected herself in finding that the Claimant had 'failed in his bid to establish his claim for interest.' [Paragraphs 29 - 30 of the Judgment]

(c) The Learned Judge erred and/or misdirected herself in ruling that the Claimant's evidence in paragraph 46 of his witness statement was hearsay, and striking out same.

(d) Having done so, the Learned Judge prejudiced the Claimant's entitlement to interest at the commercial rate which caused the Claimant to suffer a grave injustice.

(e) The Learned Judge erred and/or misdirected herself in granting the Defendant's no case submission finding that 'in order for the Claim for mesne profits to succeed the Claimant would have had to prove that he was still entitled to possession after February 2008 and that the defendant had either trespassed or had kept him out of possession'; when the Claimant's claim for mesne profits was for the period January 2006 to February 2008. The uncontroverted evidence before the Court was that during this period, the Claimant was entitled to possession and therefore rental under the Agreement for Sale. The Claimant's evidence that he was only paid a portion of the rental for this period was also uncontroverted by the Defendant who did not give evidence at the trial. The Court should therefore have found that the Claimant was entitled to mesne profits in the sum of $298,100.00 claimed and erred and/or misdirected herself in failing to so find.

(f) The Learned Judge failed to consider and/or to properly consider all the submissions made on behalf of the Claimant.

(g) The Appellant reserves the right to amend/delete or add to his Grounds of Appeal."

The orders sought were:

> "(1) An order setting aside the said orders granted by the Honourable Ms. Justice N. Simmons handed down on the 15th December 2011.
>
> (2) That the Appellant/Claimant is entitled to mesne profits in the sum of $298,100.00 for the period of January 2006 to February 2008.
>
> (3) Alternatively, that the Claimant is entitled to damages in the sum of $298,100.00 - being the outstanding rental for the period January 2006 to February 2008.
>
> (4) That the Appellant/Claimant is entitled to interest at the commercial rate on the sum of $3,500,000.00 and the said outstanding mesne profits and/or damages at the rate of 16% per annum, from February 2008 until the date of payment.
>
> (5) Costs to the Appellant.
>
> (6) Such further and/or other relief as this Honourable Court may deem fit."

Appellant's submissions

[16] Counsel for the appellant submitted that the appellant had been put into possession before completion and therefore was entitled to the rents and profits from the time of taking possession (Halsbury's Laws of England Vol 42, para 196). Counsel argued that between January 2006 and February 2008, Mr McLeod was a purchaser in possession as it was not until February 2008 that the subdivision approval was not granted and therefore it was not until then that the agreement for sale had been terminated. This meant that from January 2006 to February 2008 the appellant was entitled to possession and therefore would be entitled to the rental from the property under the agreement. Counsel argued

further that from January 2006 to February 2008, rental of $648,000.00 had been collected. Mr Richards had paid $204,000.00 to Mr McLeod and the balance of $444,000.00 remained outstanding. Further, the respondent had not testified at the trial and therefore Mr McLeod's evidence that he had only been paid a portion of the rental due for that period was unchallenged.

[17] As it concerned mesne profits, counsel continued that the claim was for mesne profits only from January 2006 to February 2008 and the learned trial judge had erred in upholding the submission of the respondent that the appellant was not entitled to mesne profits after February 2008 as there had been no claim for that period. The learned trial judge had therefore erred in finding that the appellant was not entitled to the mesne profits claimed in the amount of $298,100.00.

[18] Ms Reynolds, for the appellant, also submitted that the learned trial judge erred and/or misdirected herself in finding that the appellant had failed in his bid to establish his claim for interest. Counsel submitted that the agreement was that no interest would be paid on the refunded money but that when the agreement came to an end, so too did that portion of it. Further, the argument continued, an implied term of the agreement for sale would be that the payment of the refund would be in a reasonable time and the period of more than two years which had passed here, was not reasonable.

[19] Counsel argued that the law provided that where a contract does not expressly or by necessary implication fix a time for the performance of a contractual obligation, the implication, is that it should be performed within a reasonable time (The Interpretation of

Contracts, 2nd ed by Kim Lewison - Time for Performance). She submitted that if there arose a need to fix the time, the court would imply a reasonable time and would do so from the contract itself and the circumstances under which it was entered into. In the circumstances of this matter, the parties themselves understood that interest would be payable. Counsel submitted alternatively, that the interest should be paid to achieve business efficacy.

[20] As it concerns the actual rate of interest payable, counsel argued that it was clear that the property was commercial and was being purchased for investment purposes and therefore the only applicable interest rate was the commercial rate of interest. Counsel relied on the affidavit from the application for summary judgment in this matter, as providing evidence of the applicable rate being 16% per annum. Counsel submitted that the court should have awarded interest on $3,400,000.00 at 16% per annum from February 2008 to December 2010 and argued that the learned trial judge had further erred in striking out the additional evidence in the appellant's witness statement concerning the rate of interest as being hearsay.

[21] The final submission by Ms Reynolds on behalf of the appellant was that in the circumstances of this case, the learned trial judge ought to have awarded costs to Mr McLeod, or alternatively, should have made no order as to costs because it was not until after Mr McLeod had filed suit in this matter that Mr Richards eventually refunded the purchase price and even then, it was only consequent upon an order of the court.

Respondent's submissions

[22] Counsel for the respondent argued that the agreement provided that monies paid should be returned without interest. Further, she submitted that the appellant had not provided any legal or evidential bases for the claim of interest because (1) the agreement was that in the event that the purchase price is refunded interest is not payable and (2) there was no evidence that the transaction was commercial in nature and (3) the only evidence on the rate of interest was hearsay. She submitted further that it would be inappropriate to determine the interest rate by considering the contents in an affidavit filed in an interlocutory application in the matter. Counsel continued that, in any event, the claim had been for "2 percent above the Bank of Jamaica rate for the period" and that such a claim had no meaning.

[23] The submission was therefore that the court had not been provided with sufficient evidence to properly assess commercial interest rate. For this submission, counsel relied on the case **Lilia Neuman v Delroye Salmon** SCCA No 39/2000, delivered 23 June 2003.

[24] Further, counsel argued, one of the grounds of appeal was that the court should have found that the appellant was entitled to mesne profits of $298,100.00. She described that claim as puzzling for three reasons. Firstly, she submitted that as of February 2008, the agreement had been at an end and there was thus no basis to recover mesne profits. Secondly, the appellant had not proved that the respondent had trespassed on the property so as to entitle him to mesne profits. Thirdly, the appellant had not provided evidence as to how he assessed the mesne profits which he claimed. The submission was

therefore that the learned trial judge had correctly found that the claim of mesne profits was not proved.

[25] Counsel also submitted that the appellant had abandoned his claim for damages in the lower court and could not now restore it. His claim for the accounting which he had described as a claim under the head of damages could therefore not be properly considered by the learned trial judge, as she had correctly found.

Analysis and discussion

Mesne Profits Ground (e)

[26] One of the reliefs sought in the amended notice of appeal filed 26 January 2012 is for this court to determine that the appellant is entitled to mesne profits in the sum of $298,100.00 for the period of January 2006 to February 2008. Alternatively, the relief sought was that the appellant is entitled to damages in the sum of $298,100.00 - being the outstanding rental for the period January 2006 to February 2008. Counsel's submissions in this court also concerned this period of January 2006 to February 2008. However, the amended claim form which was before the court below sought the order for mesne profits to September 2008, not February 2008. The learned trial judge found that the claim for mesne profits for the period January 2006 to February 2008 and after could not succeed.

[27] Counsel for the appellant argued that since the claim was for the mesne profits for January 2006 to February 2008, the learned trial judge had erred in upholding the submission of the respondent that the appellant was not entitled to mesne profits after February 2008 in view of the fact that there was never any such claim.

[28] However the amended claim did, in fact, seek an order for mesne profits up to September 2008 para (g) and the learned trial judge was obliged to consider that time period.

[29] Halsbury's Laws of England 4th edition, volume 27(1) refers to the action for mesne profits as being an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. One question which had to be determined by the learned trial judge was whether the appellant owned the property or at least was entitled to possession of the property for the period of January 2006 to February 2008 and after.

[30] The sale agreement provided that possession would be vacant on the signing of the agreement for sale and the first payment. This occurred in January 2006 and marked the time when the appellant could lawfully be in possession as a purchaser. On 4 February 2008, it became obvious that one of the conditions of the agreement, that is subdivision approval, could not be met. The contract therefore came to an end on that day. The appellant, was thereafter not entitled to possession.

[31] The learned trial judge correctly found that the appellant was entitled to possession during the period between January 2006 and February 2008 in accordance with the sale agreement. The issue of the respondent being liable to pay mesne profits to the appellant for that period between January 2006 and February 2008 would only arise if there were evidence that the respondent had been in unlawful possession of the property during that

period. There was no such evidence. Indeed, the evidence is of tenants occupying the property and of the respondent collecting some of the rentals and forwarding them to the appellant.

[32] According to the learned trial judge, having not proved that the respondent had either trespassed on the land or had kept him out of possession of the land, the appellant could not succeed on the claim for mesne profits up to February 2008 and after. Her reasoning and conclusion in that regard cannot be faulted in view of the fact that there was no evidence of the respondent being wrongly in possession of the property at any time.

Account of rent collected Ground (f)

[33] The appellant's argument was that this court should set aside the orders granted by the learned trial judge. One such was her refusal to order the respondent to account for the rent collected for the period specified.

[34] In the amended claim form the appellant had sought an order for "a detailed accounting of all rental collected for the said property from January 2006 to the date of hearing of this matter". However, the reference to accounting on the amended particulars of claim was to a specified amount of rental per month, namely "rental collected from tenants from February 2006 – April 2010 @ $27,000.00 per month and continuing "under the heading "Special Damage" [sic].

[35] The learned trial judge commented that the claim for the accounting was made under the heading "Special Damages" in the amended particulars of claim and stated that

it was her view that, that claim "must be considered in the context of Miss Reynold's [sic] clear indication that the claimant was not pursuing his claim for damages" (para 23 of the judgment.)

[36] There has been no denial that counsel for the appellant indicated at the trial that she would not be pursuing a claim for damages. The learned trial judge reasoned that since the claim for damages was not being pursued then an order for the respondent to account for the rent collected for the period claimed could not be properly made since it had been claimed as special damages (para 26 of the judgment).

[37] The written submissions in the court below do not include any reference to the claim for accounting although it was one of the paragraphs of the amended statement of claim which counsel had specifically stated at the trial that she would be pursuing. However the judgment makes it clear that counsel referred to accounting in oral submissions. At para 32 the learned judge said,

> "Miss Reynolds sought to persuade the court that an award [for special damages] could be made under paragraph (j) which speaks to '*such further or other orders*'. I am not convinced that having withdrawn the claim for damages the claimant should be allowed to recover same by another route. That is not the case that the defendant was prepared to meet. In my opinion, any orders made under that paragraph must be incidental to the substantive claim and/or are necessary for the proper working out of any orders in relation to that claim."

[38] In her judgment the learned trial judge stated at para 26 that

> "In this matter where the claim for damages is not being pursued, it is my view that the court has no basis on which to make an order for the defendant to account for the rent collected for the period claimed."

[39] This reasoning is correct in circumstances where an exact figure for rental had been sought as special damages at the trial but the claim for damages was not pursued. It would be outside the jurisdiction of the learned trial judge to make an award for damages in the pleaded and proven precise amount when counsel had specifically stated that she was not pursuing a claim for damages.

[40] The learned trial judge was correct in determining that there would be no accounting in the form of an award for damages, to the appellant in the amount of rentals for the period in which he had possession of the property and continuing.

[41] The parties had chosen not to consult an attorney-at-law to prepare the agreement for sale, relying instead on the drafting skills of a person described simply as "a man". That agreement did not address the situation where the subdivision approval was not obtained save to say that the purchase price was to be refunded without interest and the purchaser was to pay the vendor's agent a particular sum. There was no mention of what was to become of any rentals received by the purchaser in the event of a refund or of any expenditure done on the premises by the purchaser.

[42] In any event, the termination of the contract rendered the contract void. In the absence of any other agreement, all rights which the appellant might have enjoyed as a

purchaser in possession would thereafter cease to exist, including the right to any further rentals and profits.

[43] It cannot be overlooked that counsel for the appellant appeared to have given two meanings to "accounting" in accordance with the manner in which the pleadings were drafted. In the amended statement of claim she sought "a detailed accounting of all rental collected for the said property from January 2006 to the date of hearing of this matter". There was no reference to payment of a specified amount. However, in the amended particulars of claim the claim is for accounting by way of payment of a specified sum as special damages.

[44] A claim for an accounting is not normally regarded as being special damages. Special damages arise where the claimant seeks payment of a definite sum of money allegedly expended or lost as a result of the injury or loss suffered by the claimant because of the action or inaction of the defendant.

[45] The claim for the accounting in this matter was, rather, a request for the respondent to state the amount of monies which he had received on behalf of the appellant and to state how he had disposed of them. Such an accounting would allow the appellant to determine an amount, if any, which the respondent should repay for restitution of monies had and received on behalf of the appellant.

[46] The learned trial judge correctly opined that a "claim for an account in an action such as this may be necessary where a claimant is unsure of how much money has been

collected by the defendant on his behalf" (para 25). She erred however, in her conclusion that no account would be necessary here, as the claim for damages was not being pursued. Her view was that the accounting exercise was for the purpose of assisting the court to make a determination on the issue of damages and since there was no claim for damages, she made no order for accounting.

[47] The learned trial judge was misled by the pleadings which were in error in part and which error was perpetuated throughout the trial. It was however clear that the parties recognized that the remedy being sought was for an account, as in an account for monies had and received on behalf of the appellant.

[48] The parties were agreed that the respondent had collected some rental on behalf of the appellant and had not paid it over to him. The claim for accounting therefore was to require the respondent to provide a statement accounting for the monies had and received as rental. The account would not therefore fall within the category of damages which counsel for the appellant had stated she would not be pursuing.

[49] The learned trial judge fell into error in not recognizing that the claim for accounting was not a claim for special damages. She erroneously concluded that accounting would only be ordered to assist in the computation of damages. However, the appellant was entitled to all rentals and profits while he was lawfully in possession of the property from January 2006 to February 2008. I would therefore order that the respondent should account to the appellant for the monies had and received on behalf of the appellant for that period within 30 days of today's date.

Interest - Grounds (b), (c) and (d)

[50] The learned trial judge found that the appellant was not entitled to a payment for interest on the purchase price because the sale agreement expressly excluded such a payment and he had failed to establish a claim for interest.

[51] It is true that special condition (1) of the agreement specified that:

> "In the event of the Agreement being rescined [sic] all monies paid hereunder by the Purchaser shall be refunded without interest and free from deductions SAVE & EXPECT [sic] that the Purchaser hereby agree [sic] to pay to the Vendor's Agent to deduct the said sum from the Deposit paid herein [sic]."

[52] However, the intention of the parties must be construed to have been that the refund of the purchase monies would be made to the appellant within a reasonable time, moreso that there were tenants on the property from whom rentals were being collected. Although the contract did not make provision for the time within which the refund should be made, counsel's argument that it should be within a reasonable time was correct.

[53] It is a long-established principle of law that where the language of a contract does not expressly, or by necessary implication fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time (**Hick v Raymond and Reid** [1893] AC 22 at 32).

[54] The contract came to an end when subdivision approval was refused in February 2008. The refund of $3,400,000.00 was paid on 7 December 2010. This period of almost

three years before the repayment of the monies is not, in my opinion, a reasonable time to await the refund of purchase monies. The situation was exacerbated when viewed against the unchallenged facts that the respondent had stated that he wished to sell another portion of the property to obtain money to repay the appellant and that the appellant had made offers to the respondent to purchase the entire unsubdivided portion of land, for a price greater than those of two independent valuations.

[55] The learned trial judge appeared to have paid no regard to those facts in determining the issue of whether or not interest should be paid to the appellant. She did not refer to the unchallenged evidence that years had elapsed before repayment of the purchase price and that the respondent had been given several opportunities to pay the amount but had not done so until almost three years had elapsed. The learned trial judge thus fell into error in failing to award interest on the amount which had not been refunded within a reasonable period of time after the contract was terminated and the refund had become due and payable.

[56] Because of her conclusion that no interest was payable, the learned trial judge did not determine any matters consequential to the payment of interest, which would include the type and rate of interest which should be applied to the monies to be paid, nor the period for which it should be applied. It now falls to this court to make those determinations.

[57] The evidence of the property being used in a commercial manner was not challenged. The property was being rented to commercial entities and at one stage the

respondent was the vehicle by which the rentals were collected and transmitted to the appellant. The transaction by which the property was to be purchased should, in my view, be properly regarded as being commercial in nature. The interest payable under the agreement would therefore be at the commercial rate. There was however, no viva voce evidence of what the rate was.

[58] In **Lilia Neuman,** this court refused to award a commercial interest rate when there was no evidence provided as to what the rate was. There the plaintiff and defendant had entered into an agreement for the plaintiff to sell to the defendant certain premises. The plaintiff let the defendant into possession of the property. Subsequently, the defendant sought to resist a claim for recovery of possession. She contended that the plaintiff was acting in contravention of the law as she, the defendant, had a foreign address and the plaintiff had not sought the permission or consent of the minister which was required under the then existing law for the performance of the contract. The defendant remained in possession and the plaintiff claimed also for mesne profits with interest at a commercial rate. However, there was no evidence of that rate of interest. Judgment was entered for the plaintiff. In disallowing the claim for interest at a commercial rate and instead awarding interest at the statutory rate, the learned trial judge had stated:

> "'The plaintiff claims interest at commercial rate. The plaintiff had not proffered evidence (in light of the fluctuation of the commercial interest rates over the years) which would enable the court to properly assess interest at commercial rate. Interest will be awarded at the statutory rate."

This court (by majority) upheld that decision.

[59] In the instant matter the learned trial judge struck out the paragraph of the appellant's witness statement as being hearsay where reference had been made to information which his attorney-at-law had given to him as to the applicable commercial rate of interest. There was no viva voce evidence of any interest rate.

[60] This court was faced with a similar absence of viva voce evidence in **British Caribbean Insurance Company Ltd v Delbert Perrier** SCCA No 114/1994, delivered 20 May 1996. There, in delivering the judgment of the court, Carey JA stated

> "The judge, in my view, should be provided with evidence to enable him to make that realistic award. … I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judge to enable him to ascertain and assess an appropriate rate."

The contents of the statistical digest published by the Bank of Jamaica had been placed as evidence before the learned trial judge.

[61] In the instant appeal, in an affidavit which had been filed on 14 January 2011, the appellant had exhibited printouts of the Bank of Jamaica Economic Data website. This is an official Government website readily accessible to the public and which displays interest rates on bank transactions including commercial transactions. That information would be documentary material which would assist to enable a realistic award to be made.

[62] On that website the rates of interest for commercial credit for the period February 2008 to January 2010 range from 12.49% to 13.89% per annum. I would use the average of these rates, that is 13.19%, to represent the appropriate rate of interest.

[63] It also falls to this court to determine the period which should be regarded as being reasonable for awarding commercial interest. It is undisputed that when the appellant was faced with the respondent's cry that he was without money. The appellant paid over the balance of the purchase monies prematurely and in addition bore the cost of two valuations himself. It is also undisputed that the appellant expressed his willingness and ability to pay for the entire parcel of land which would obviate the need for any subdivision approval. The respondent rebuffed the offer whilst simultaneously stating that he was seeking a purchaser for the said land in order to repay the purchase price. Yet the respondent had allowed three years to pass before repayment. In these circumstances, in my opinion, it would be reasonable to allow a period of 30 days from the termination of the contract for refund of the monies before applying interest to outstanding sums.

[64] I would therefore award interest on the sum of $3,400,000.00 which was refunded, at the rate of 13.19% per annum commencing from 30 days from the date the contract was terminated which was on 4 February 2008 until the date of payment on 7 December 2010.

<u>$100,000 for survey diagram-Ground (a)</u>

[65] In my opinion, the learned judge correctly found that the appellant was not entitled to a repayment of $100,000.00 which he had deducted from the purchase price to pay for

the survey diagram. Counsel for the appellant at the outset of the trial had limited the issues which she sought to be determined and they did not include the issue of whether there should be this payment. Understandably, the respondent had therefore, not addressed that issue at the trial. The learned trial judge could therefore not properly make a determination in the face of the clear indication of counsel for the appellant at the start of the trial, that she was not making that claim. Counsel for the respondent, also, had not addressed the issue.

[66] Interestingly, in his witness statement of 28 September 2011, the respondent Mr Richards stated that he had instructed his attorneys-at-law to repay to Mr McLeod the sum of $100,000.00 which had been deducted from the refund of the purchase price because, according to him, he was not entitled to deduct any sum from the amount which he owed to Mr McLeod. There is no reference as to whether his attorneys-at-law honoured his instructions.

Conclusion

[67] The learned trial judge correctly determined that the appellant was not entitled to mesne profits for the period of 2006 to 2008 or after. However, the learned trial judge fell into error in failing to make an order for the respondent to provide an account being a statement of the amounts he received on behalf of the appellant and their disposal. The learned trial judge also erred in failing to make an award for interest.

[68] I would therefore dismiss the appeal in part and would allow it in part. I would order the respondent to pay half the costs of the appellant here and in the court below.

MORRISON JA

ORDER

1. The appeal is allowed in part.

2. Within 30 days of the date of this judgment, the respondent shall provide an account to the appellant of all monies received by him on behalf of the respondent by way of rentals or profits in respect of the property at 54 East Street, Old Harbour, Saint Catherine, during the period January 2006 – February 2008.

3. The respondent is to pay to the appellant interest on the sum of $3,400,000.00 at the rate of 13.19% per annum from 6 March 2008 to 7 December 2010.

4. Half costs of the appeal and in the court below to the appellant to be taxed, if not agreed.