[2014] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 93/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN JAMALCO (CLARENDON ALUMINA WORKS) APPELLANT

AND LUNETTE DENNIE RESPONDENT

Emile Leiba and Miss Gillian Pottinger instructed by DunnCox for the appellant

Raphael Codlin and Miss Melissa Cunningham instructed by Raphael Codlin and Co for the respondent

5 November 2012 and 11 July 2014

PANTON P

[1] This matter came before us in the form of an application to discharge an order of McIntosh JA (Acting) (as she then was) made on 9 September 2010 whereby she had granted a stay of execution of the judgment of Anderson J delivered on 2 July 2010. During the hearing of the application, we thought it prudent to suggest to the parties that the circumstances pointed to the need for them to discuss a settlement. The

matter was adjourned to facilitate the process. However, the discussions proved fruitless so the hearing was resumed. At the suggestion of the parties we decided to hear the appeal itself.

[2] The judgment that has been appealed was delivered on 2 July 2010 by Anderson J (now retired). Notice of appeal was filed on 27 July 2010. A counter-notice of appeal was filed on 10 August 2010 and an amended counter-notice filed on 31 August 2012. At the commencement of the hearing of the appeal the counter-notice of appeal (as amended) was withdrawn.

[3] In the claim, the respondent and her late husband (Mr Dennie) sought the following:

(1) damages for breach of contract;

(2) specific performance of the said contract;

(3) interest on the said damages at a rate of 27%; and

(4) such further and other relief as the court deems fit.

The pleadings

[4] The particulars of the claim indicate that the respondent and Mr Dennie were owners of registered property at Whitney in Clarendon. On 17 September 1998, they agreed with the appellant to exchange their land with buildings thereon for other land to be provided by the appellant on the basis of:

(1) one acre for each acre of arable land; and

(2) half acre of arable land for each acre of rocky land.

[5] The respondent and Mr Dennie were to be compensated in cash for crops and mature fruit trees growing on the land, as well as for two pig pens and an unfurnished shed. In addition, the appellant was obligated to provide a dwelling house, an outside toilet, an outside kitchen, an outside bathroom and a coop. These were to be constructed by the appellant on the replacement land, and were to be of equal total area and size as those being exchanged.

[6] The appellant was to have the title made out in the names of the respondent and Mr Dennie.

[7] The respondent and Mr Dennie duly surrendered their property and were placed in what they described as "unsuitable temporary accommodation" at Denbigh, Crawle, Clarendon. Subsequently, they were offered "a resettlement house at McGilchrist Pen" which they claim was not in compliance with the terms of the agreement. Accordingly, they remained in the temporary accommodation. Among their complaints is the appellant's failure to provide the coop. There have been repeated demands by the respondent and Mr Dennie for the appellant to honour the terms of the agreement but they have failed to do so.

[8] In its defence, filed in April 2005, the appellant admitted to the terms of the agreement and acknowledged that the coop had not up to then been constructed. It admitted that the house at McGilchrist Pen was on less land than the exchanged house, but said that it had provided additional land at Lot 102 Rock Heights, to make up for the shortage at McGilchrist Pen.

[9] Notwithstanding the failure to construct the coop and its failure to provide a house and outhouses on the replacement land, the appellant denied that it was in breach of contract.

The evidence

[10] By the time the matter came up for trial before Anderson J, Mr Dennie had died and no legal representative had been appointed on his behalf. Evidence was heard from the respondent and her daughter, on the one hand, and Mr Michael Ferguson the appellant's lands department administrator, on the other hand. The evidence before the learned judge established the following:

- the agreement called for one parcel of land, not two;
- the appellant unilaterally decided to split the respondent's and Mr Dennie's holding into two;
- the house that has been constructed by the appellant for the Dennies is 40 square feet smaller than their former house;
- Mr Dennie had signed the floor plan of the new house stating that payment for the shortfall in square footage was acceptable to him;
- the respondent was not a party to Mr Dennie's indication of willingness to accept a smaller space in exchange for payment;
- up to the time of trial, no payment had been made in this regard by the appellant;
- payment has been made for the pig pen, the zinc shed and the crops and fruit trees; and

- there has been no consultation with the respondent in respect of the failure to erect the coop.

The judge's decision and the challenge to it

[11] The learned judge found that there had been a breach of contract by the appellant, and awarded general damages accordingly. He made separate awards for the failure to provide a replacement house of equal area, the failure to provide the appropriate acreage of land in one place, and for the failure to build the coop. In total, he awarded general damages of $3,000,000.00. The order of the learned judge and the grounds of appeal are stated fully in the judgment of my learned sister Phillips JA which follows. There is no need to repeat them here.

[12] There can be no valid complaint against the finding that the appellant is in breach of the contract. In fact, Mr Emile Leiba for the appellant said that "it was accepted that there was a shortfall in the square footage". Hence, there was little wonder that he also said, "the appeal is really as regards damages".

[13] In assessing the damages, the learned judge said that the focus had to be on the failure of the appellant to provide the respondent with the house to which she and Mr Dennie were entitled. His words were:

> "Research will indicate that if the claimant was to build on the additional forty square feet of the building to which it [sic] is entitled, it would cost somewhere in the region of six thousand dollars per square foot. But given that the structure is already in place, in order to accommodate the addition there may be need to re-configure the present structure, and this

> will incur additional costs. I would award a figure of one million two hundred and fifty thousand dollars for the failure to provide a building of the same total area as the one given up."

This statement was criticized by Mr Leiba who said that there was no evidential base for the figures that the learned judge used in his assessment. Mr Leiba referred to this court's decision in **Attorney-General of Jamaica v Tanya Clarke** (SCCA 109/2002 – delivered 20 December 2004) where Cooke JA reiterated that this court has "accepted as correct the principle enunciated by Lord Goddard CJ in **Bonham-Carter v Hyde Park Hotel Ltd** [1948] 64 TLR 177 at 178".

[14] Mr Leiba submitted that while the court has the power to extrapolate, there must be an evidential basis upon which this exercise can be carried out. This submission, he said, applied to all sums awarded by the learned judge. He said that the inconvenience suffered by the respondent "needed evidence so as to make an award". The respondent, he said, should have put forward "reasonable evidence". In response to a question from the court, he said that a nominal award should have been made and, in his estimation, that would have been no more than $100,000.00. He added that even if the sums awarded are deemed appropriate, they should have been discounted by 50%, on the basis that the contract was signed by two persons (the respondent and Mr Dennie) one of whom is now deceased. The surviving claimant, submitted Mr Leiba, cannot be entitled to full damages. On this score, Mr Codlin for the respondent said that the property was held as joint tenants and so the respondent inherited Mr Dennie's

share by right of survivorship. Mr Leiba, however, did not think that the right of survivorship is applicable in this situation.

[15] I am unable to accept Mr Leiba's submission that the respondent would be entitled to only 50% damages. The respondent and Mr Dennie signed a contract to deliver up their house to the appellant, and to receive in return a house of equal square footage. There was no arrangement for each to receive 50% of the value of a house. It defies proper reasoning, and is in my opinion repugnant to the principles of justice, to say that due to the death of Mr Dennie, the respondent is now in effect condemned to receiving the equivalent of half of a house. While Mr Dennie was alive, the respondent was entitled to the comfort and convenience of the entire house – not a half of it. Mr Dennie's death cannot therefore be used to the respondent's disadvantage. It is very disappointing that the appellant should be seeking to benefit in this way from the death of Mr Dennie.

[16] Mr Leiba said that it was unclear whether the damages related to the date of breach or the date of hearing; but that, in any event, there was no evidence to support the judge's reference to $6,000.00 per square foot to build a structure. He said that the appellant was not given the opportunity to provide evidence on the point or to challenge it. At the trial, Mr Michael Ferguson, the appellant's lands department administrator gave evidence as regards the rental costs for the Dennies, and the various payments made to them for their crops. He would have had at his disposal information as to the cost per square foot to build the structure that was built. There was nothing to prevent him giving such details in evidence.

The resolution

[17] Earlier, reference was made to the appellant's reliance on the principle stated in **Bonham-Carter v Hyde Park Hotel Ltd**. In that case, Lord Goddard said this:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."

The case before Lord Goddard was one in which a guest's room had been broken into and property stolen therefrom. The hotel keeper was held liable, and although the learned Chief Justice was unhappy with the state of the evidence as regards damages, he did award £275.00 to the plaintiff. In any event, I am of the view that the principle is more apt in respect of special damages. In the instant case, there has been a breach of contract and the challenge is in respect of the awards of general damages.

[18] In respect of the date to which the damages ought to relate, the case **Wroth and Anor v Tyler** [1974] 1 Ch 30, [1973] 1 All E R 897 provides some guidance. There, the defendant contracted to sell his bungalow (where he lived with his wife and adult daughter) to the plaintiffs with vacant possession for £6,000.00. His wife entered on the Land Register a notice of her rights of occupation thereby preventing the sale. The defendant informed the plaintiffs that he was unable to complete the sale and offered to pay damages. Given the wife's statutory right, Megarry J (as he then was) thought it best to award damages in substitution for decreeing specific performance. At

the time of the hearing the bungalow was worth £11,500.00. In determining the proper amount to award as damages, Megarry J said:

> "Now the principle that has long been accepted is that stated by Parke B in *Robinson v Harman* (1848) 1 Exch. 850, in which, incidentally, the rule in *Flureau v Thornhill,* 2 Wm. Bl. 1078 was considered. Parke B. said, at p. 855:
>
> > 'The rule of the common law is, that where a party sustains a 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'." [page 56 G-H]

Megarry J continued:

> "… on principle I would say simply that damages 'in substitution' for specific performance must be a substitute, giving as nearly as may be what specific performance would have given" [page 59 E].

Consequently, Megarry J reckoned that at the date of hearing the plaintiffs would have needed another £5,500.00 "to purchase an equivalent house". And so, he ordered that amount to be paid in lieu of specific performance.

[19] In answer to Mr Leiba's query, therefore, the damages are as of the date of the award.

[20] There is no doubt that in this matter, the respondent has been put to great inconvenience and hardship by the failure of the appellant to honour the bargain that it made with her and Mr Dennie. To have given up her residence and to have waited for the replacement house for so long, only to find that it is of less space than agreed has

caused much discomfort and unhappiness. This ought not to be viewed as of minor importance. Rural folk treasure their space and comfort. The learned judge had to do the best he could, with the evidence he had, to compensate the respondent for her loss.

[21] Mr Leiba's complaint that the judge extrapolated without any evidential base has to be viewed in the light of the obvious loss that the respondent has suffered, and is still suffering. In this situation, where the evidence does not enable precise quantification, the learned judge was correct to assess damages on the available evidence (**Tai Hing Cotton Mill v Kamsing Knitting Factory** [1979] AC 91). The learned judge erred in referring to research indicating that the cost of building the additional 40 sq ft being in the region of $6,000.00 per sq ft seeing that the evidence did not include the research. However, that is not a good reason to set aside the award. In looking at awards of this nature, this court should only set aside an award if it is either inordinately high or inordinately low: **Flint v Lovell** [1935] 1 KB 354. Taking into consideration matters relating to the currency, particularly its value, it would not be reasonable for the assessment in this case to be thought inordinately high.

[22] Earlier, reference was made to the case **Tai Hing Cotton Mill v Kamsing Knitting Factory**. There, the Privy Council dealt with the assessment of damages arising from a breach of contract. It was apparent that substantial loss had been suffered but the material to enable the loss to be precisely quantified was lacking. The Privy Council considered the possible courses that were open to it to resolved the

matter. These courses included ordering a retrial, restoring the figures fixed by the lower court, or fixing a new figure. Lord Keith of Kinkel said:

> "Their Lordships are not disposed to order a new trial. Amendment of the pleadings would be required and the delay, trouble and expense which would be involved in further proceedings do not appear to their Lordships to be consonant with the due administration of justice. The problem about the figure of damages fixed by Briggs C.J. is that it was plainly arrived at upon a wrong basis, and that is now common ground between the parties. In the result, their Lordships have come to the conclusion that the ends of justice would best be served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is."

[23] This matter has been before the court for a long time. Justice has been delayed for too long. There is no need to fix a new figure of damages, as was done in **Tai Hing Cotton Mill**. While acknowledging that Anderson J erred in the method by which he arrived at the figures he awarded, it cannot be said that the individual awards or the overall award of $3,000,000.00 are too high. In the circumstances, there is no basis for the awards to be disturbed. The appeal ought to be dismissed with costs to the respondent to be agreed or taxed.

HARRIS JA

[24] I have read the draft judgments of the learned president and my sister Phillips JA and agree with their reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[25] This matter has had the most unusual history through the courts and even before that. I agree with the statement of the learned trial judge, made when he commenced his oral judgment after the trial in 2010, that he was "deeply saddened by the facts of this case". He indicated that "the case was not unlike perhaps thousands of others which have been repeated time and time again all over the mining areas of Jamaica, as mining companies sought access to bauxite deposits situated on lands on which families had previously resided sometimes for many years. Resettlement of such families on alternative sites became a common feature of the mining industry". Unfortunately, the agreement between the appellant (Jamalco) and the respondent and her husband George Dennie (the Dennies) did not go well and an agreement which was entered into between the parties in 1998 has not yet been fulfilled.

[26] In this case, Jamalco wished to mine lands owned by the Dennies at Whitney in the parish of Clarendon. The parties entered into an option agreement to achieve that objective. The Dennies claimed that Jamalco had breached the agreement in several ways and filed a claim form on 29 July 2004, claiming damages for breach of contract, specific performance of the said contract, interest and costs. For whatever reason the litigation meandered through the courts, but was eventually tried on 28, 29 and 30 June and 2 July 2010. Mr Dennie died before the trial began and on the first day of trial as no order had been made appointing a representative to pursue his claim, his claim was struck out. Anderson J made certain orders, which resulted in an appeal being filed on behalf of Jamalco on 27 July 2010 and a counter notice of appeal on 10

August 2010 on behalf of Mrs Dennie. At the hearing of the appeal the latter was abandoned. Ultimately Jamalco's appeal was essentially one challenging the sums awarded by the court for damages. As a consequence the judgment will necessarily be concentrated on that.

[27] The option agreement set out certain matters which had been agreed between the parties, which matters were faithfully reproduced in the particulars of claim filed on behalf of the Dennies namely:

> "1. Land referred to on page one of this agreement will be surveyed to determine the exact amount.
>
> 2. Land will be exchanged on the basis of (a) one acre for each acre of arable land and (b) half acre of arable land for each acre of rocky land
>
> 3. Land given in exchange will be fenced with four strand barbed wire.
>
> 4. Land given in exchange will be identified at McGilchrist Pen.
>
> 5. Cash payment for crops totalling $ 681,222 will be made to the vendor.
>
> In addition, payment of 25% of the value of mature fruit trees paid for will be made to the vendor in lieu of replanting seedlings on resettlement land and easing them for four years.
>
> 6. Dwelling house, outside toilet, outside kitchen and outside bathroom will be measured and a house of equal total area constructed on the replacement land.
>
> 7. Fowl house on vendor's property will be measured and one of similar size constructed on replacement land.
>
> 8. Two pig pens on vendor's property will be valued and paid for.
>
> 9. One unfurnished shed on vendor's property will be valued and paid for.

10. Title for resettlement land will be made out in the names George Dennie and Lunette Dennie.

11. On signing of this agreement the company is allowed to take immediate possession and no further development should take place on the optioned property…"

[28] In the particulars of claim the Dennies pleaded that pursuant to the agreement Jamalco took possession of their property for its own use and benefit, but in breach of the agreement only provided the Dennies with unsuitable temporary accommodation at Denbigh, Crawle in the parish of Clarendon. They were promised their permanent residence by December 2000. However in further breach of the agreement the Dennies state that they were provided with a "resettlement house" which was not on land of the agreed acreage (that house was on ¾ acres and the house owned by the Dennie's was on 1½ acres of land). The resettlement house was also not of "equal total area" as agreed, and was of a "poor construction inferior design and quality". The Dennies therefore refused to take possession of the resettlement house and remained in the temporary accommodation at Denbigh, Crawle. It was also pleaded that in further breach of the agreement, "the fowl house" had not been constructed.

[29] The Dennies also complained that they had suffered loss and damage as they had lost the benefit of the agreement as they had been unable to reap and sell produce from the several trees which had been on their property. They also were unable to obtain funds from the sale of their chickens, namely approximately $60,000 every six weeks.

[30] In its defence, Jamalco agreed that temporary accommodation had initially been provided at Denbigh, Crawle, until the resettlement house was available at McGilchrist Pen. However, when the resettlement house was available, the Dennies refused to relocate there although the house had been built in accordance with the design and specifications as agreed. Jamalco agreed that the Dennies had remained in the temporary accommodation which had been provided at Denbigh, Crawle. Jamalco accepted that the resettlement house was not built on the same acreage of land (that is ¾ acre as against the 1½ acres as agreed), but pleaded that the Dennies had been given additional lands at Lot 102 Rock Heights to make up for the shortfall. Jamalco admitted that the fowl coop had not been constructed as agreed, but indicated that it would ensure that it was constructed. Jamalco specifically denied that the Dennies had suffered any loss from the sale of produce from fruit trees, or chickens and pleaded that a sum of $681,627.00 had been paid to them, "in full satisfaction of their entitlement to compensation for crops and fruit trees under the Agreement". Additionally, the Dennies had also been paid a further sum of $63,525.00, "in lieu of replanting seedlings on resettlement lands" in keeping with the terms of the agreement.

[31] Three witnesses gave evidence at the trial: Mrs Dennie, her daughter Hyacinth Dennie, on behalf of the respondents, and Mr Michael Antonio Ferguson on behalf of Jamalco.

[32] In her witness statement, Mrs Dennie confirmed the execution of the agreement, by herself and her husband, the basis for the agreement, and the fact that as they had been advised that mining was to commence within two weeks of signing the agreement

they "gave over" their home to Jamalco. She reiterated that the agreement had been breached as set out in the particulars of claim, but with greater detail in relation to the construction of the house, which she stated both her husband and herself had objected to as: "firstly, the rooms were too small and would not allow for the space and convenience that we had at our home. Secondly, the bathroom was built right next to the kitchen and both were located to the front of the house. Also, our home that we had handed over to the defendants allowed for easy addition, but with the replacement house we would have to tear down an entire wall in order to make additions". She maintained that with the failure of Jamalco to construct the fowl house, they had been prevented from rearing chickens which Jamalco knew or ought to have known was one of their sources of income. She further asserted that the several trees on their property was another source of income, and so the failure to provide the agreed acreage had resulted in loss to them. It was their contention that as their property had been a means of income for them, the agreement had been crafted to preserve all aspects of their farming, either by compensation or replacement for the future.

[33] Miss Hyacinth Dennie, in her witness statement, indicated that she had grown up on her parents' property in Whitney, Clarendon and the main source of income for the family had come from farming on one side of the property, where ground provisions and other crops were cultivated and chickens, pigs, goats and cattle were reared. Their home, she said, was on the other side of the land. She deposed that the farm earned approximately $60,000.00 every six weeks from the rearing of chickens, and $80,000.00 per month from the sale of ground provisions and fruits. Additionally, she

said that periodically the cows and goats would be sold and the income used to support the family. She confirmed that she was aware of the agreement between Jamalco and her parents, and also the breaches by Jamalco, particularly with regard to the smaller lot which had been provided, which she said would reduce the space for farming and in respect of the house, which she noticed even from foundation level was not in conformity with the agreement that her parents had with Jamalco. She referred to the temporary replacement home which had been provided, but which could not accommodate cultivation by her parents, and which in any event could not be used in that way as it did not belong to them. She also deposed to the losses suffered by her parents from the failure of Jamalco to construct the fowl house. She set out her parents' losses due to the failure of Jamalco to provide the replacement land as follows:

"(a)	From rearing chickens:	$60,000.00 per six weeks from June 2000 to December 2008 (102 months)	$4,080,000.00
(b)	From selling crops	$80,000.00 per month from June 2000 to December 2008 (102 months)	$ 8,160,000.00
Total losses from farming			**$12,240,000.00**"

[34] In the witness statement of Mr Michael Ferguson, filed on 18 September 2008 he stated that he had been employed to Jamalco for 22 years, and held the post of land administrator, for the past three years. He confirmed the option agreement between the parties, and the letter dated 21 June 2001, which had been sent by Jamalco to the

Dennies informing them that mining operations would commence within the next two weeks on the property which Jamalco had acquired from them and, directing their attention to Jamalco's mines management team if they had any concerns in respect of the operation.

[35] He also agreed that the Dennies had been temporarily located in Denbigh Crawle, but had refused to take possession of the resettlement house duly constructed in McGilchrest Pen pursuant to the agreement as they were dissatisfied with the same, and had remained in the temporary accommodation provided which he said, had been leased by Jamalco from a 3rd party. He maintained that the replacement house was in keeping with the agreement and referred to a floor plan which had been signed by Mr Dennie approving the same and witnessed by Hyacinth Dennie and one Mr Phillip Davidson. He accepted that the acreage agreed for the lot, had not been provided but indicated that the Dennies were to receive Lot 102 Rock Heights, Clarendon, to "compensate for the disparity between that which was agreed to by the parties…" He accepted also that the "fowl coop" had not been constructed as agreed but said that it would have been provided had the Dennies accepted the replacement house and moved there, but Jamalco remained he stated "ready, willing and able to provide the fowl coop upon the claimant taking possession of the resettlement premises". He referred to the sums which had been stated in the defence as having been paid to the Dennies as compensation in full and final settlement in respect of the fruit trees and in lieu of replanting seedlings on the resettlement lands. He concluded his statement thus:

"13 In the circumstances, the Defendant has discharged its obligation to the Claimant pursuant to the parties' Agreement and the Claimants' are therefore not entitled to the relief being sought by them."

[36] The witness statements were with some amplification in parts, accepted as examination in chief, and after extensive cross-examination of the witnesses by counsel respectively, and detailed submissions made, the learned trial judge gave an oral judgment and ordered as follows:

"1. General damages in the amount of $1,250,000.00 to the Claimant for Defendant's breach of contract in failing to provide a replacement house of equal total area

2. General damages in the amount of $1,250,000.00 to the Claimant for Defendant's breach of contract in failing to provide appropriate acreage of land.

3. General damages of $500,000.00 to the Claimant for Defendant's breach of contract in failing to rebuild chicken coop.

4. Interest on the sums awarded as General Damages at 6% per annum from August 4, 2004 to 21st June 2006 and 3% per annum from 22nd June 2006 to the date of judgment.

5. The Defendant is to allow the Claimant to remain at Denbigh Crawle until October 31, 2010.

6. The Claimant is to take up the resettlement premises at Lot 1 McGilchrist Pen.

7. The Defendant is to transfer Lot 9A McGilchrist Pen to the Claimant on or before October 31, 2010 or such further date as this Court may by order declare.

8. The Defendant is to construct the chicken house on the resettlement property at McGilchrist Pen within thirty

days after the Claimant takes possession of the resettlement house.

9. Costs of these proceedings to the Claimant to be taxed if not agreed.
10. Claim of the 1st Claimant is struck out
11. Liberty to apply."

The Appeal

[37] On 27 July 2010, Jamalco filed notice of appeal which contained several grounds of appeal as set out below.

Grounds of appeal

a. "The learned trial Judge erred in law, insofar as he made a determination that the Defendant was in breach of contract, insofar as the house built for the Second Claimant is forty (40) square feet smaller than the house should have been built, even though the Respondent/Second Claimant had, in her Particulars of Claim, not specified this as a basis for her claim for damages for breach of contract.

b. The learned trial Judge erred in law and wrongfully exercised his discretion when he awarded a sum in damages to the Second Claimant, which was manifestly excessive, insofar as he, used as his means of calculating a cost per square foot, information/material which was not derived from any evidence given in respect of the Claim and a sum in addition thereto, for the cost of adding the forty (40) square feet of space to the home built, which was not based on any evidence given in respect of the Claim, but rather, based on the learned trial Judge's 'personal checks'.

c. The learned trial Judge erred in law insofar as he did not, in assessing damages, seek to assess damages as at the date of the

respective breaches of contract as he found proven, but instead, assessed damages as at the date of the conclusion of the trial. In the circumstances, the damages awarded to the Respondent/Second Claimant, is manifestly excessive.

d. The learned trial Judge erred in law in assessing damages to be awarded to the Second Claimant from the breaches of contract which he found proven and awarded a manifestly excessive sum as damages to the Second Claimant. He failed to take into account that the first Claimant was deceased at the date of the trial and his Claim was therefore struck out by the Court. The Respondent/Second Claimant along with the First Claimant both entered into a contract with the Defendant, and as such, the Respondent/2nd Claimant was as a matter of law not entitled, in the absence of any evidence to allow the Court to decide otherwise, to any more than half share of the total sum which otherwise may have been awarded as damages to both Claimants, if the First Claimant had been alive at the date of the trial. No such evidence suggesting that the Respondent/Second Claimant should be entitled to more than half share of the total sum awarded as damages by the trial Judge was forthcoming at the trial. The learned Judge therefore gravely erred in having awarded to the Respondent/Second Claimant the full sum as damages which would have been due to both the First and Second Claimants, if the First Claimant had been alive and proven his claim at trial.

e. The leaned trial Judge erred in law and awarded a sum as damages to the Respondent/Second Claimant which was manifestly excessive, in respect of the claim for damages for loss of income from the sale of chickens, insofar as he awarded $500,000.00 for same, even though there was no evidence upon which an award of anything other than nominal damages could properly have been made for same.

f. The learned trial Judge erred in law and awarded a sum as damages to the Respondent/Second Claimant which was manifestly excessive insofar as he awarded the sum of $1,250,000.00 to the Respondent/Second Claimant for the inconvenience to the Second Claimant for travelling from Lot 1 to Lot 9A McGilchrist Pen, without

there having been any evidence provided to the Court by anyone as would serve to justify the making of such an award by the Court.

g. The learned trial Judge erred in law insofar as he failed to neither take into account nor apply the legal principles regarding mitigation of damages, in assessing the award to be made to the Respondent/Second Claimant and accordingly, awarded damages to the Respondent/Second Claimant which was manifestly excessive.

h. The learned trial Judge erred in law insofar as he awarded as interest to the Respondent/Second Claimant for General Damages, the interest rate which is applicable by virtue of Section 3 of the *Law Reform* (*Miscellaneous Provisions*) *Act*, to a claim for Special Damages.

i. The learned trial Judge erred in law, insofar as he awarded General Damages, a claim for loss of income from the sale of chickens which had been pleaded, by amendment at trial, as a Claim for Special Damages."

The appellant's submissions

Grounds of appeal (a) – (c)

[38] Counsel for the appellant, although initially submitting that there was no claim for damages pleaded in respect of the replacement house being 40 square foot less than agreed, conceded on appeal that the shortfall with regard to the total area of the house had been set out in the particulars of claim. Counsel also indicated that that fact had been accepted by Jamalco's witness, Mr Ferguson. Counsel however submitted that there was no evidence before the court to support the sums awarded in respect of the shortfall in the square footage, for example, there was no evidence in respect of a

price per square foot. Counsel relied on the age old adage that "he who asserts must prove," and submitted that the loss claimed ought to have been assessed as special damages and in the absence of evidence to that effect, should have been refused. Ideally, counsel submitted, there should have been expert evidence adduced to assist the court, failing that, there should have been no award. Counsel referred to the sum of $6,000.00 per square foot utilized by the learned trial judge and his reasoning in this regard and submitted that the reasoning was flawed. Counsel also challenged the award under this head of damages on the basis that it appeared that the learned judge had further erred when he assessed the damages at the date of trial and not at the date of breach of the contract, as he ought to have done and, then added interest to that sum.

Ground of appeal (d)

[39] Counsel submitted that as Mr Dennie had died by the time the matter came on for trial, and as there was no indication before the court that Mrs Dennie was entitled to any more than a one-half share, as both the Dennies had entered into the contract with Jamalco, any award to her without taking into consideration his death and the fact that his claim had been struck out, would have to be flawed. It was counsel's submission that Mr Dennie's estate could perhaps pursue a claim for his portion of the damages in respect of the breach of contract, but his claim in respect of the matter currently before the court, could not proceed without an order for a representative to act on his behalf and, that had been recognized on the first day of the trial in the court below. Counsel maintained this position, although recognizing that Jamalco had long ago

obtained the property owned by the Dennies and utilized the same for mining, the purpose of the transaction in the first place.

Grounds of appeal (e) and (i)

[40] Counsel submitted that the award of $500,000.00 was not based on any evidence. It had been given due to the fact that the fowl house had not been constructed, but if it was due to the loss of use of the fowl house, which counsel submitted had been claimed by way of an amendment at trial as special damages, then as there was no evidence to support such a claim, no award could have been made, and indeed he submitted, the court had rejected the pleaded claim for loss of chickens. However, he argued, the court ought not to have awarded a figure for general damages instead of special damages as even in the case of general damages, there must be some basis on which the court could extrapolate and arrive at a figure relevant to the loss. There was no basis for doing so in this case, he submitted, and the claim ought to have been rejected.

Ground of appeal (f)

[41] The second award of $1,250,000.00 was given to compensate the Dennies for the inconvenience of having to travel from Lot 1 to Lot 9A McGilchist Pen. Counsel maintained that this sum was manifestly excessive and in any event, there was no evidence to support it. There was, he said, no basis on which to quantify this claim. Counsel argued that Mrs Dennie should have led evidence to show that she had to expend funds to obtain watchmen to supervise Lot 9A, or to travel from one lot to the

other, in respect of their farming, as there were now two pieces of land instead of one. She should, counsel submitted, have put forward some reasonable evidence to support this alleged loss, failing that, he submitted, there should be an award for nominal damages in the amount of $100,000.00.

Grounds of appeal (g) and (h)

[42] Counsel submitted that Mrs Dennie had failed to mitigate her losses and that the rates of interest on the special and general damages, respectively had been wrongly applied.

[43] Counsel referred to a case out of this court **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** SCCA No 109/2002 delivered on 20 December 2004, to support his submissions that once there was a basis for the claim and the claimant had provided some starting point for the calculation of the sums claimed, the court was then in a position to extrapolate a sum that is reasonable in all the circumstances of the case, even though the sums arrived at may seem arbitrary. However, when there is no evidence as in that case in respect of the "invitro fertilization", regardless of the empathy or sincere regret of the court relative to the condition of the claimant due to the obvious negligence of the servants and or agents of the defendant, no award could be made in the absence of evidence, which, Forte P stated at the very beginning of his judgment, "was easily available".

The respondent's submissions

Grounds of appeal (a) - (c)

[44] Miss Cunningham, for the respondent, referred to one of the leading cases on this area of the law, namely **Flint v Lovell** [1935] 1 KB 786, for the principle that this court ought not to interfere with the damages assessed by the court below unless the court had proceeded on a wrong principle of law and or the damages assessed were either much "too high or too low". Counsel also referred to the leading text of McGregor on Damages, fifteenth edition, and argued that it was incumbent on the appellant to show that the learned judge had misdirected himself as to the law or had given insufficient weight to the evidence. Counsel submitted that Mrs Dennie had been out of her home for over nine years and had yet to obtain the replacement house which had been agreed between the parties. Counsel referred to the pleadings and witness statement of Mrs Dennie and submitted that it was clear that she would have suffered loss. Mrs Dennie had claimed specific performance of the contract, but the judge had awarded damages, so she stated the learned judge had to do the best that he could in the circumstances. The sum awarded was not only for the loss of the 40 square foot in the area of the house but also for the added inconvenience of readjusting the rest of the house to accommodate the additional square footage. Counsel submitted that the fact that it may be difficult to assess the damages suffered does not mean that nominal damages should be awarded (McGregor on Damages) and that the award by the trial judge was satisfactory in the circumstances.

Ground of appeal (d)

[45] Mr Codlin asserted that the submission that Mrs Dennie should only receive 50% of her damages due to the death of Mr Dennie was in law without any merit. He submitted that the property acquired by Jamalco from the Dennies was owned by them as joint tenants and the agreement that they had entered into required that the replacement title be placed in the names of Mr and Mrs Dennie. There was, he contended, no words of severance, and so on the death of Mr Dennie, based on the jus accrecendi, her right of survivorship, she would be entitled to all rights which flowed from the contract. The replacement property was held, he argued, by Jamalco in trust for the Dennies. Once Mr Dennie passed, his interest, he submitted, passed to Mrs Dennie by operation of law. She became the total owner, the entire corpus was vested in her as the owner of the legal and equitable estate. He submitted further that contrary to the position taken by the appellant, that each person had an equal right to enforce the contract, in the circumstances existing in this case, with the death of Mr Dennie, Mrs Dennie became the only other contracting party with Jamalco. Her right, he maintained, related to the entire land. He asked the question rhetorically, "could the appellant claim that they could give one-half of the certificate of title of the replacement property to Mrs Dennie?" He submitted they certainly could not, and this was particularly so, as 11 years had elapsed since the parties had entered into the contract.

Grounds of appeal (e) and (i)

[46] Miss Cunningham submitted that the learned judge's award of $500,000.00 for failing to construct the chicken house was not inconsistent with his making no award on the claim for lost wages in respect of the sale of chickens, that is $60,000.00 every six weeks from June 2004 and continuing. This he stated, had not been proved, as the award had been made in circumstances which were not disputed, which was that the chicken house had not been built in over nine years, so the award related to the loss of use of the chicken house over that period. The claim for special damages, she submitted, had failed, but the loss of use of the fowl house as general damages was payable and reasonable in all the circumstances. Counsel relied on the case of **Chaplin v Hicks** [1911] 2 KB 786, for the proposition that where it is clear that substantial loss has been incurred, the fact that assessment is difficult is no reason to award no damages or nominal damages. Counsel reiterated the facts of this case to emphasize that in the interest of justice sums were due to the Dennies who had given up their home, been offered a replacement which was not in keeping with the size or the specifications as agreed, and so they were only provided with temporary accommodation which situation had existed for over a period of nine years. The fact that substantial losses had occurred was obvious. The appellant, she argued, ought not to be permitted in those circumstances to claim that the respondent cannot prove her losses, and so any award in respect of the losses could only be nominal. Additionally, counsel argued, if the award on general damages was not excessive, then the award

should not be disturbed by this court. The learned judge's reasoning in this regard, she submitted, could not be faulted.

Ground of appeal (f)

[47] With regard to the award of $1,250,000.00 for failing to provide the appropriate acreage of land, counsel stated that it was difficult to arrive at a formula to assess damages relative thereto. It is clear, she argued, that the two separate pieces of land would have resulted in substantial inconvenience and dislocation. It was difficult, she said to see what evidence could have been brought to assist the court to calculate the physical inconvenience. Mrs Dennie was unaware, until trial, as to exactly where the second property was to be located. The award, counsel argued, was reasonable and, could even be regarded as low in the circumstances. In any event, there was substantial loss and nominal damages cannot arise.

[48] Counsel endeavoured to distinguish the **Tanya Clarke** case on the basis that in that case the evidential difficulty related to receipts in respect of doctors' visits which could easily have been provided. The case at bar, counsel maintained, is unique, as assessing damages in the situation of the two separate pieces of land was much more difficult than a mere mathematical calculation. So, in the circumstances, as previously indicated by counsel, she said that the judge was left with no alternative but to do the best that he could, which he had done, which this court should not disturb.

Ground of appeal (g)

[49] Counsel submitted that it was difficult to see how the respondent could have mitigated her losses when the replacement home had been given to someone else, she had to come to court to fight for the additional ¾ acre of land due to her, and was unaware until trial of the exact location of the additional piece of land that was to be allotted to her.

[50] In reply, counsel for the appellant challenged the law as stated by Mr Codlin in respect of ground of appeal (d) and said that the right of survivorship was totally inapplicable in the circumstances, as until the Dennies were registered on the replacement title, Mr Dennie only had a contractual right which did not pass to Mrs Dennie on his death, unless specifically stated in the contract which was not so in this case. He submitted the situation was completely different with regard to interests in land.

Discussion and analysis

[51] In my view there are essentially two main issues on this appeal:

I. Ought the learned trial judge to have made the following awards:

(a) General damages for breach of contract in the amount of $1,250,000.00 for failing to provide a replacement house of equal total area.

(b) General damages for breach of contract in the amount of $1,250,000.00 for failing to provide appropriate acreage of land.

(c) General damages for breach of contract in the amount of $500,000.00 for failing to rebuild chicken coop; or …

should the amounts ordered be varied in any way or refused entirely; and

II What is the effect of the death of Mr Dennie subsequent to the execution of the contract and the commencement of the claim, but before the completion of the contract, the commencement of the trial and the judgment?

Issue I

[52] The law with regard to the approach of the Court of Appeal to an award of damages made in the court below is well settled. Wolfe JA (Ag) (as he then was), on behalf of the court stated with clarity in **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 at 178 b-d that:

> "An appellate court, notwithstanding that an appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all the questions involved in the action including the question what damages ought to be awarded, will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the judges of appeal think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely

> erroneous estimate of the damage to which the plaintiff is entitled."

This statement of the law endorsed the dicta of the Court of Appeal in England in **Flint v Lovell** [1935] 1 KB 354 at 355.

[53] There have been several authorities over the years which have dealt with the issue of assessment of damages and the consideration that ought to be given to that question, particularly in respect of general damages when the quantification of the same is difficult. I will start with the leading text of McGregor on Damages, 15th edition. The general principle, stated by the author in para 343 is well known and recognised, namely that a plaintiff claiming damages must prove his case. As indicated in the oft-cited speech of Lord Goddard, CJ in **Bonham-Carter v Hyde Park Hotel Ltd** (1948) 64 TLR 177 at 178 when dealing with special damages;

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."

In that case the learned chief justice said that he found the evidence with regard to damages extremely unsatisfactory. However, the damages were nonetheless assessed and judgment given in the amount of £275.

[54] The learned author in McGregor goes on to state in the said paragraph, 343, that:

> "To justify an award of substantial damages he [the plaintiff] must satisfy the court both as to the fact of damage and as

> to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v Deveridge* [(1825) 2 C.&P 109], and *Twyman v Knowles*. [(1853) 13 C.B.222]."

[55] In **Twyman v Knowles** [1853] 13 CB 222, the plaintiff had sued for trespass, as he was in possession of the land, but he did not produce the lease which would have shown the extent of the term. The lessor had given the defendant a lease also. Since the plaintiff had failed to prove the extent of his interest in the land, he was only entitled to nominal damages. The lease which he could have produced and which was in writing, would have defined his interest. He was only able to proceed on an interest in the land based on bare possession. That case is distinguishable from the instant case where the respondent showed that there was a contract, which had been breached and which had resulted in substantial damage. Similarly in **Dixon v Deveridge** (1825) 2 C&P 109, where the defendant accepted that he owed a debt, but the plaintiff gave no evidence of the amount, the court took the view that the plaintiff was only entitled to a nominal amount of damages. That too is different from the instant case.

[56] The author of McGregor however, continues in para 344 and makes the qualification that:

> "On the other hand, where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in Chaplin v Hicks, the leading

> case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages". Indeed if absolute certainty were required as to the precise amount of loss that the plaintiff had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent loss. Of course, as Devlin J said in *Biggin v Permanite*: " Where precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can.."

[57] The standard of proof is therefore not one of certainty, but one of reasonable certainty, which only demands evidence in respect of which existence of damage can be reasonably inferred. The dictum of Bowen LJ in **Ratcliffe v Evans** [1892] 2 QB 524 at page 533 is clear on the point and instructive. He stated:

> "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

[58] In **Ashcroft v Curtin** [1971] 3 All ER 1208 Edmund-Davies LJ approached the difficult question from the viewpoint of the justice of the case. In that case, the plaintiff was a skilled engineer who carried on a successful one-man business as a limited company. He kept rudimentary accounts. He was severely injured in a motor car

accident by the negligence of the defendant, and sued for financial loss due to his inability, as a result of the accident, to manage his business. The trial judge awarded £10,500. It was decided on appeal that due to the unreliability of the accounts, the court could not quantify that financial loss, and so no award was made on it. The court found however that even though the risk of the plaintiff having to find work outside of the company was not great, the possibility did exist and justified therefore that some award be made in respect of him being thrown onto the labour market and being unable to find employment. Edmund-Davies LJ therefore proceeded thus; "Doing the best I can, and fully realising that I too am rendering myself liable to be attacked for simply "plucking a figure from the air", I think the proper compensation under this head is £2,500." The general damages in respect of financial loss was therefore reduced to that sum.

[59] In **Aerial Advertising Co v Batchelors Peas**, **Ltd (Manchester)** [1938] All ER (annotated) Vol 2, 788, Atkinson J made the point that damages for breach of contract ought not to be restricted to special damages which could be strictly proved. It was held that general damages were recoverable for pecuniary loss sustained in respect of the breach of contract. In this case the plaintiff, engaged to supply air advertising by flying over various towns and trailing behind the aeroplane words advising the public to buy the defendant's products, in this case peas. In breach of contract, the plaintiff failed to communicate the plans and schedules for the particular day in question and the pilot was seen flying over Manchester and Salford while the Armistice services were in progress, and over the main square of the town during the time when two minutes

silence was being observed, to the horror and indignation of thousands of persons gathered there. The result of that [negligent] flight was alarming as persons affronted by the insensitive actions of the plaintiff in droves decided to no longer purchase the defendant's products. In deciding how to assess the general damages in the light of the pecuniary loss which had been sustained and in addressing the argument that in those circumstances only special and not general damages were payable, the learned judge made these insightful comments at page 795 A - C:

> " … I fail myself to see any difference in principle between a claim for special damage and a claim for general damage. One, of course has to be proved as completely as does the other. The only difference is that, where one is claiming special damage, the circumstances are such that one is able to put one's finger on a particular item of loss and say, "I can prove that I lost so much there, so much there, and so much there", whereas a claim for general damage means this: "We cannot prove particular items, but we can prove beyond all possible doubt that there has been pecuniary loss." Once that has been proved, I cannot myself see any difference in principle between special damage and general damage. When one reads *Groom v Crocker*, one sees that, so far from saying that there is any difficulty in recovering general damages, to my mind it says precisely the opposite."

In ultimately deciding to award the defendants £300, he made a further comment on page 796 G - H. He stated:

> "I can only do the best I can, being very careful not to put it too high, and particularly for the reason that, although I appreciate the difficulty, I think that the defendants, if they had taken the trouble, could have given me more reliable figures."

[60] In summary, from the above authorities, I deduce the following considerations:

(1) The Court of Appeal is hesitant to interfere with an award of damages made in the lower court and will only do so in specific circumstances.

(2) A person claiming damage must be prepared to prove their damage.

(3) If the damage sustained is clear and substantial, but the assessment of the same is difficult, the court must do the best it can in the circumstances.

[61] In the light of all of the above, I will now examine, within the context of the pleadings and the evidence, the reasoning and decisions of the learned trial judge with regard to the respective awards of general damages.

(a) Failing to provide a house of equal total area

[62] It is very clear from the pleadings and the evidence that there was a substantial breach with regard to the size of the replacement house constructed for the Dennies by Jamalco. Although Jamalco had pleaded originally that the replacement house had been built in accordance with the design and specifications as agreed and Mr Ferguson had reiterated in his witness statement that the house had been duly constructed as agreed, under cross examination however, he stated that the house which Jamalco had obtained from the Dennies was "forty feet larger than the one that was constructed for the Dennies" and was therefore forced to admit that "it was not of equal total area then". He then attempted to say that both the Dennies had signed the floor plan which

had been put in evidence, indicating he said, that they "would have accepted payment for the shortage of forty square foot of house that was due at McGilchrist Pen". He also later accepted under cross-examination, that Mrs Dennie had not signed the floor plan. He endeavoured to say that the replacement house which had been constructed by Jamalco, was of a better quality than that of the Dennies as inter alia, the back and northern side of the Dennies house had not been rendered, though the front and eastern side of their house had been rendered and painted; the roof was constructed with round timber wood and zinc sheeting and the kitchen and bathroom were outside the house and were both constructed with round wood and old zinc sheeting.

[63] However, it was Mrs Dennie's evidence that the rooms which had been constructed in the replacement house were too small, and she was unhappy with the placement of the kitchen and the bathroom beside each other to the front of the house, but of real importance to her was that "our home…. allowed for easy addition, but with the replacement house we would have to tear down an entire wall in order to make additions".

[64] The learned trial judge decided that the evidence did not suggest that the Dennies, by instituting the action were treating the contract as having ended, and were suing for damages for the breaches thereof, but to the contrary. Mrs Dennie, as the survivor of the two claimants, in his judgment, wished to be compensated for the breaches of the agreement and "then put in a position where she can be made whole".

The learned trial judge stated that it was worth noting that on the floor plan which had been tendered into evidence there was writing "to the effect that the defendant acknowledged the fact that the proposed resettlement house was smaller and that the claimant was to be compensated for the "shortfall." However, Mr Ferguson in his evidence admitted that compensation had not been paid or even quantified.

[65] The learned trial judge therefore expressed serious concerns that despite the fact that Jamalco would have had a department dealing with resettlement matters and have had access to resources to effect the same and, also to legal advice, yet certain aspects of the agreement with the Dennies remained unfulfilled. With particular regard to this issue, his concern was that there had been:

> ".. B) a determination that it [Jamalco] would deal with the shortfall in the square footage of the house by agreeing to pay compensation, but which seven years after the house has been constructed has not been agreed or paid…"

[66] He decided that specific performance was inappropriate in the circumstances, based on two barriers, namely that specific performance is an equitable remedy and the court does not act in vain and there was no indication that there was any available land within Jamalco's portfolio to allow for the execution of the contract. The evidence was that the temporary residence given to the Dennies, although found to be comfortable, was rented premises and therefore not available as a permanent remedy. Secondly, the court is unwilling to embark upon a situation which would be requiring continuing oversight of the performance of the contract. The judge made the point however, that having found that there had been "a clear and egregious breach on the terms of the

option agreement, the Court would award damages to the claimants". The learned trial judge went on to say that, "[t]he quantification of these damages is not an easy task, but the difficulty of assessing these damages ought not to be a bar to the court making the award and doing so on a rational basis".

[67] The learned trial judge ultimately decided to award general damages for the shortfall in the total area of the house and explained the basis for so doing in this way:

> "It seems to me that the approach to the damages in this case must focus on the failure of the defendant to provide the claimant with the house to which they were entitled and the single plot of land in the inappropriate size. Research will indicate that if the claimant was to build on the additional forty square feet of the building to which it is entitled, it would cost somewhere in the region of six thousand dollars per square foot. But given that the structure is already in place, in order to accommodate the addition there may be need to re-configure the present structure, and this will incur additional costs. I would award a figure of one million two hundred and fifty thousand dollars for the failure to provide a building of the same total area as the one given up."

[68] In my view, in the circumstances of this case it was obvious what the trial judge was endeavouring to do. The Dennies had entered into a contract which required them to obtain a house with the same total area. They did not get that. Jamalco knew that there was a shortfall in the square footage, but continued to maintain to the contrary, right up to the trial. So that seven years later, in circumstances where Jamalco would have obtained within two weeks of the execution of the contract, the Dennies' land for mining, the Dennies were yet to be properly settled in a home suitable to them, and as agreed between the parties. This sum was therefore to compensate them for that loss

which was substantial. It was not a claim for special damages. It was also extremely difficult to quantify, especially in circumstances where the respondent only wanted specific performance of the terms of the agreement that she had agreed, so as a consequence, the information in respect of the quantification of damages before the court was minimal. The judge expanded on his understanding of Mrs Dennie's position in respect of any additions which may be made to the house (and also in my view, if she were to obtain that which was agreed) by way of explaining that the loss did not only relate to the mathematical calculation of the shortfall in the square footage, in respect of the building of the house. He said:

> "The point I was making there, is that depending on how the addition is made, if it is made, if you are doing an addition you have to reconfigure the rest of the house. It's not going to be the cost of building forty square feet of property. You may have to open up some walls, you might have to move some plumbing. So that is usually much more expensive than pure construction. So those are the factors that I have built into the thing."

[69] It is clear that Mrs Dennie could have assisted the court more with additional information perhaps with an expert report which could have been provided, but in the final analysis I am not able to say that the learned trial judge was wrong in principle in the manner in which he approached this difficult task. It is not for me to second guess his decision, or to say that if I had the task I would have done it differently. I cannot say that the damages assessed are too high in all the circumstances of the case. The learned trial judge was forced to do the best that he could and, I would therefore not disturb the award made by him in respect of this issue.

(b) Failing to provide appropriate acreage of land

[70] With regard to this issue, Jamalco accepted in their pleadings that the resettlement house had not been built on the same acreage of land, but pleaded that the Dennies had been given additional lands at Lot 102 Rock Heights to make up for the shortfall. Mrs Dennie's position was that the agreement had provided for the same acreage that they had before, as they farmed on the said lot which contained their home, and the farming was a source of income for them, which Jamalco knew as they had compensated them for their crops and trees. Mr Ferguson had identified those crops in the amplification of his witness statement as: for instance banana, pumpkin and cho-cho; and certain economic trees, such as breadfruit and ackee. Miss Hyacinth Dennie said that chickens, pigs, goats and cattle were also reared on one side of the property. What was of importance was that Mr Ferguson also stated in examination-in-chief, that the lot allocated to the Dennies in Rock Heights was done as "a unilateral decision of Jamalco". However, he said that the development which had been slated for Rock Heights had been abandoned. As a result, he claimed that Lot 9A McGilchrist Pen had been allocated instead to the Dennies. That lot however, he indicated, was also ¾ acre in size, but when compared to the lot in Rock Heights which was two miles away from Lot 1 where the resettlement house was located, Lot 9A, he stated, was only one hundred metres away. Unfortunately there was no other evidence to support this assertion and there was no evidence, documentary or otherwise, that this position had ever been communicated to the Dennies.

[71] In cross-examination, Mr Ferguson said that the allocations in respect of the lot at Rock Heights and Lot 9A McGilchrist Pen had not been made simultaneously and, in his view, the fact that there had not been any mention previously, that Lot 9A had replaced the lot at Rock Heights was "an oversight". He accepted however, that the agreement between Jamalco and the Dennies, stated that the Dennies were to get one piece of land and not two pieces of land.

[72] The learned trial judge expressed his concerns in relation to the breach of contract relating to this issue in this way. He found it difficult to understand how it was possible for there to have been:

> "A) a unilateral decision to give the claimants two separate pieces of land rather than one.
>
> B) …
>
> C) a decision to provide that one-half of the land would be at another separate location.
>
> D) a subsequent decision to change the location of the additional piece which it had decided to make available in Rock Heights to another lot at McGilchrist Pen, Phase two, and,
>
> E) no notification to the claimant of the decision to substitute another piece of land which is nearer to the resettlement home."

[73] As a consequence, he made this finding:

> "I gather from the evidence of Mr Ferguson that the defendant is prepared to provide a further three quarter acre of land to the claimant within the same McGilchrist Pen area where the resettlement house is located and at a distance of some one hundred metres from that building. Apart from Mr Ferguson's evidence, I have no independent verification of

> this assertion and I am obliged to treat it with some caution. Assuming that the distance from the resettlement property to the additional piece of land was within tolerable limits, there would still be the need to travel from the house to the other property, if it were to be used as the claimants had used their previous property. The claimants must be compensated not only for the fact of the division of their entitlement, but for the inconvenience of having to travel. I would accordingly also award as general damages a further figure of one million two hundred and fifty thousand dollars for general damages for this breach."

[74] The learned trial judge, it seems to me, acknowledged that Jamalco recognised that the Dennies were entitled to obtain one piece of land to live on and on which to conduct their farming. However, despite that, Jamalco decided unilaterally that the Dennies should have to trek a distance away to obtain the produce from their crops, to cut and reap from their trees, and the benefits from the rearing of cattle, goats and pigs. That remains a permanent situation, whether the lot is two miles or 100 metres away. This is clearly an inconvenience in respect of which damages must flow. Mr and Mrs Dennie also could have been reaping the rewards of their farm since the execution of the agreement in 1998, had they been provided with the 1½ acre of property to which they were entitled. Instead, as Miss Dennie testified they were unable to do so as they could not farm a property which was not theirs. In any event, it seems that Mrs Dennie would not have known the exact location of this additional lot, that is whether in Rock Heights or in McGilchrist Pen, in order to farm the same for her benefit and profit.

[75] In **Bailey v Bullock and Others** [1950 2 All ER 1167, Barry J found in circumstances where attorneys did not act timeously on the instructions from the client to obtain possession of the client's home and so the client was forced to live with his wife's parents with his wife and son aged six, in one bedroom for an interminable period of time under much discomfort, indignity and inconvenience, the learned judge held that whereas the court will not countenance an award of damages for annoyance and injury to feelings, there was a very real difference when one has suffered substantial physical inconvenience and discomfort, for in those circumstances, damages for breach of contract were recoverable.

[76] It is true that Mrs Dennie perhaps could have provided information relating to possible expenses in relation to travelling from the replacement lot to the second property. However, as the location of this second lot up until trial remained unclear, that may have been difficult. Also, I am not sure that that information would have been helpful in arriving at a sum for damages for the inconvenience in respect of the constant trips.

[77] In the light of the above, I find that I am similarly not in a position to disturb the amount awarded by the learned trial judge on this issue. I would merely be "plucking figures out of the air", which would be unhelpful. I am unable to say whether in the circumstances, and in keeping with the principles enunciated in **Murphy v Mills**, and **Flint v Lovell** with regard to the approach of this court to a review of an award

given in respect of general damages that the figure ascribed by the learned trial judge, for what was clearly a substantial breach, was too high.

(c) Failing to rebuild chicken coop

[78] It was not disputed that the Dennies reared chickens, that the parties had agreed that a fowl coop was to be constructed, and that Jamalco had failed to do so. Mrs Dennie said that in failing to construct the fowl coop she was prevented from rearing chickens which Jamalco knew was one other source of income for her. Jamalco's position through the evidence of Mr Ferguson was that it was ready and willing to construct the fowl coop but could not do so until the resettlement house had been accepted so that it could be constructed there, on premises which would be occupied, otherwise, he stated, it would be vandalized and deteriorate. It is true that Mrs Dennie failed to prove the special damages loss claimed in respect of the rearing of chickens at $60,000.00 per six weeks, but the learned trial judge was not prevented from assessing as general damages, the lost opportunity of utilizing the fowl coop to rear the chickens, over the intervening period of in excess of 10 years.

[79] Having referred to the reason set out above given by Jamalco for the failure to construct the "chicken house", the learned judge stated:

> "…Be that as it may, it was a clear admission of another breach of the option agreement."

He therefore ordered that the same be built on the resettlement property and that order, quite correctly, has not been appealed. He went on to say:

> "I have indicated that it was not possible to make an award for special damages based, inter alia, upon the evidence given in relation to the sales of chickens and crops, and the lack of details of expenditures. Nevertheless, given the evidence of Mr Ferguson, it seems clear that a chicken house could have been built on the resettlement property from which the claimants could have derived some benefit. I set the value of that benefit at five hundred thousand dollars and accordingly award that sum as general damages."

[80] In my view, the approach of the learned trial judge was the same with regard to this issue as those stated at (a) and (b) above, which is why I would not disturb this award of general damages either. The principles are the same. As a result of a clear breach of the agreement, there was substantial loss which was clear. The Dennies were without the entire use of the fowl coop, which was important to them for the rearing of chickens, for several years unnecessarily. Had the resettlement house and the acreage of the property been as agreed, the fowl coop would have been constructed and available for their use, as against what occurred, which was an absence of the fowl coop, for an extended period, resulting in financial loss to them.

[81] In **Chaplin v Hicks**, where the court was grappling with the lost opportunity of the plaintiff, due to the negligent actions of the defendant, to participate in a competition where the entrants had been reduced from thousands to 50, with a potential of winning 12 prizes, Vaughan Williams LJ who made it clear, that in spite of the arguments based on the fact that there was no assessable value of the lost opportunity, emphasized that because precision could not be arrived at did not mean that damages could not be assessed. He stated that:

> "in such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that the damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."

Fletcher Moulton LJ stated at page 795:

> "I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case."

Issue II

The impact of the death of Mr Dennie

[82] The contract made between George and Lunette Dennie and Jamalco was made with them as "vendor", owners of the property at Whitney, in the parish of Clarendon, containing 1½ acres of land. It was agreed that the resettlement land was to be conveyed into the names of George Dennie and Lunette Dennie. The authors EH Burn and J Cartwright of Cheshire and Burn's Modern Law of Real Property 17th edition, in chapter XIII on concurrent interests, state that:

> "a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares, or, to use technical language, without words of severance. If an estate is given for instance, to:
> A and B in fee simple, without the addition of any restrictive, elusive or explanatory words, the law feels bound to give effect to the whole of the grant, and this it can do only by creating an equal estate in them both. From the point of view of their interest in the land they are united in every

> respect. But if the grant contains words of severance showing an intention that A and B are to take separate and distinct interests, as for instance where there is a grant to:
> A and B equally, the result is the creation not of a joint tenancy, but of a tenancy in common."

[83] The learned authors go on to explain the importance of the concept of 'unity between joint tenants'. On page 454, they state:

> "There is, to use the language of Blackstone, a thorough and intimate union between joint tenants. Together they form one person. This unity is fourfold, consisting of unity of title, time, interest and possession. All the titles are derived from the same grant and become vested at the same time; all the interests are identical in size; and there is unity of possession, since each tenant [holds the whole yet holds nothing:] *totum tenet et nihil tenet.* Each, holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole.."

[84] The learned authors also make it clear that the other characteristic that distinguishes a joint tenancy is the right of survivorship or *jus accrescendi,* which is explained in this way:

> "if one joint tenant dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving tenants whose interests are correspondingly enlarged."

[85] It is indisputable in this case that Mr and Mrs Dennie owned their property in Whitney in the parish of Clarendon as joint tenants. There were no limiting words of severance stated in respect of their joint interest. However, a joint tenancy can be severed in three ways: (i) by an act of one of the owners creating a severance to that

share; (ii) it may be severed by mutual agreement; and (iii) by a course of dealing sufficient to intimate that the interests were mutually treated as constituting a tenancy in common. None of these occurred in this case. There are circumstances when a sale of the property can be considered a severance of the joint tenancy, but that depends on the intention of the parties. In this case the transfer of ownership of the property in Whitney, to the property at McGilchrist Pen given in exchange, was agreed to be effected on the same basis. There was no indication of any intended break in title, time, interest and possession. There was no statement, for instance that the proceeds of the sale were to be divided equally or any such words of an intention to separate the unity which exists between joint tenants.

[86] To the contrary, the Dennies as vendor, sold their home, were paid jointly for the crops and trees on the property and were awaiting the replacement house to their satisfaction as agreed. That did not happen and the Dennies sued to obtain the property in exchange. Up to the time of Mr Dennie's death there had been no severance of the joint tenancy, and had any monies been payable under the agreement, and been outstanding on his death, those funds would have been payable to Mrs Dennie by way of *jus accrescendi* as she would have been solely entitled to the same pursuant to her right of survivorship. Indeed, there has been, correctly in my view, no challenge to the order of Anderson J for the respondent to take up possession of the resettlement house at Lot 1, and for the transfer to Mrs Dennie of Lot 9A McGilchrist Pen. As a consequence, any sums payable due to the wrongful acts of

Jamalco to complete the contract of sale are all payable to her pursuant to the said *jus accrescendi* principle.

[87] I am fortified in my conclusion on this by the dicta in **Mischel Holdings Pty Ltd (in liq) v Mischel** [2013] VSCA 375 (17 December 2013) which though on different facts dealt with the sale of a property jointly held, and the court having canvassed several authorities upheld the finding of the court below that the mother who held jointly with her son's company, but who died before the completion of the sale of the property, could claim through her estate for one half of the proceeds only because the evidence in that case, with particular regard to the issue that the unity of exclusive possession was absent, supported the position that the "unity" of the parties was to be considered as tenants in common in equity. As indicated previously, in this case, there was no such evidence and the Dennies continued to preserve the unity between joint tenants up until the death of Mr Dennie.

[88] In my view therefore, the death of Mr Dennie, before the commencement of the trial and also the delivery of judgment would not affect in any way the orders made by Anderson J.

Conclusion

[89] In the light of all of the above, I would dismiss the appeal and affirm the orders of Anderson J, with costs to the respondent to be agreed or taxed.

PANTON P

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.