JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 67 OF 1998

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

BETWEEN **RAJAH TEWARI** **PLAINTIFF/APPELLANT**

A N D **THE ATTORNEY GENERAL** **DEFENDANT/RESPONDENT**

Maurice Frankson, instructed by Gaynair & Fraser, for the appellant

Miss Nicole Foster, instructed by the Director of State Proceedings, for the Attorney General

June 14, 15, 16 and July 31, 2000

HARRISON, J.A.:

This is an appeal by the plaintiff from the judgment of Mrs. McCalla, J., assessing damages at $1,215,000 and costs to the plaintiff to be agreed or taxed. We dismissed the appeal. These are our reasons in writing.

Interlocutory judgment had been entered by leave against the respondent in default of defence on July 12, 1990.

The grounds of appeal, summarised, are that the learned trial judge:

(1) incorrectly assessed the quantum of damages to which the appellant was entitled, by applying the wrong principle of law;

(2) misapplied and incorrectly regarded the evidence of the market value of the land at the date of assessment;

(3) wrongly failed to make an award of damages to the appellant of loss of economic tree.

The relevant facts are: On June 2, 1970, the appellant entered into a written agreement with the Commissioner of Lands, in respect of whom the respondent is sued, to purchase Lot Nos. 224 and 282 of the Bel-Air Land Settlement, St. Andrew, for $877.03 and $496.65 respectively. These lots were allotted to the appellant by notices dated October 8, 1970 and April 30, 1971 respectively.

The appellant at the time of entering into the agreement did not view the lots. He selected them from a diagram. These lots were a part of a Government land settlement project. Titles were to have been issued on completion of payments for the said lots. Payments were made by the appellant by installments and the final payments for the said lots were made on January 12, 1983. In addition, the appellant paid the taxes on the said lots up to 1983 and his name was placed on the tax roll.

Despite repeated requests by the appellant no Titles were issued to him by the said Commissioner of Lands, nor was the appellant put in possession of these lots.

As a consequence, the appellant filed his writ on November 13, 1989. By writ he claimed declarations that he was the owner of the said lots, and therefore the Commissioner of Lands was obliged to issue registered titles to him and put him in possession of the said lots. In addition, he claimed mesne profits. He pleaded in his statement of claim that the Commissioner of Lands had since

leased the land comprising the said lots to the Forest Industry Development Company ("FIDCO") for land development.

On December 13, 1994, the appellant filed a notice of claim for special damages totalling $80,343,000, comprising the value of the said two lots; the value of trees growing on the said lots, and also the rental, due to the loss of the said lots.

Mr. Frankson argued that the appellant was entitled to the said sum as damages being the measure due to loss of bargain, because the Commissioner of Lands could not identify the said lots, and so the appellant was deprived of them; it was in the parties' contemplation at the time of the agreement that the appellant would harvest and reap pine trees growing on the land as an economic venture, and that the learned trial judge wrongly failed to properly assess the relevant evidence given in support of these issues.

Miss Foster argued that the damages should not be increased, the lots were never located nor identified by the plaintiff's witnesses, and in particular the plaintiff's witnesses were discredited in part.

The measure of damages for breach of contract is based on the principle of *restitutio in integrum*, restoring the plaintiff to the position he would have been in if the contract had been performed (***Engell v. Fitch*** (1869) L.R. 4 Q.B. at page 666). In the case of breach of contract involving the sale of land where the seller can give title to the purchaser but fails or refuses to do so, the quantum of damages is the loss of bargain. In those circumstances, the breach-date rule would not apply. This loss is the difference between the contract price and the price of the land at the date of judgment. (***Malhotra v. Choudhury*** [1979] 1

All E.R. 186). These would be the damages arising naturally in the normal course of things (***Hadley v. Baxendale*** (1854) 9 Exch. 341). The rule in ***Bain v. Fothergill*** (1874) L.R. 7 HL 158, would not apply in such circumstances.

In addition, the purchaser, not in breach, would be entitled to any peculiar loss occasioned by the breach, in circumstances where at the time of making the contract, the purchaser had made it known to the vendor that he wanted the land for a specific purpose over and above the mere acquisition (***Diamond v. Campbell-Jones and ors.*** [1960] 1 All E.R. 583 following ***Hadley v. Baxendale***, supra).

In the instant case, the Bel-Air land settlement comprising 2500 acres had thereon growing Caribbean pine trees. However, only a portion of the said lands had such trees.

The appellant's lots Nos. 224 and 282 comprising approximately 15½ acres and 11½ acres, respectively, were never specifically identified to him. He said in evidence:

> "August 1970 ...I went to Bel-Air land settlement with a lands officer ...to show us the lots. He was unable to do so as no roads linking the different lots in the subdivision."

He did observe "...a lot of Caribbean pines trees growing on the land ...chest height down to seedlings."

He returned to the area in 1977 with a lands officer who again was not able to point out the said lots to him and he again observed the growing pine trees. He again returned in "1989-1990" with a surveyor and lands officers. The lots were not identified by the surveyor nor the lands officers.

In August 1993 Mervyn Down, a valuator of real estate, a witness for the appellant, accompanied the appellant to the said area. Down valued the lands then at $65,000 per acre – "the undeveloped potential." He said in evidence at the trial that he estimated the value of the lands to be $150,000 per acre "as of June 1994", and in 1995 it would be 10% to 15% higher. He had visited the general area on the Bel-Air lands. He had observed the pine trees, agreed that a different valuation would arise considering the said trees, that the valuation price would decrease due to inaccessibility, lack of infrastructure and absence of sub-division approval and if no permission was given by the Commissioner of Lands to cut the said pine trees. Dr. Thomas, consultant in agriculture, visited the area in 1983, saw the dense population of pine trees, valued the land at $4,000,000 plus $25,000 per acre. Albert McKenzie, a director of forest, another witness for the appellant, valued a mature pine tree at $10,000 per tree and stated that there was "extensive planting of trees in the forest reserve since 1974."

The defence witness Vincent Haldane, a lands officer, worked on the land for twelve years. He visited the area of lots 224 and 282 – he could not drive the entire way directly to Lot 224. After parking his vehicle, he then had to walk a distance of over two miles. He said the pines grew at a density of 40 trees to the acre but the area was overgrown - in ruinate.

Danny Simpson, operations manager from FIDCO, for the defence, stated that he visited Lot 224, saw the pines growing at a density of 50 trees per acre and stated that a mature tree was worth $7,280. Harvesting of the pines, he said, would be uneconomical because of inaccessibility, infestation with bamboo, and due to the costs of reaping, including a cable system. The value of the trees

he saw was approximately $80,000. Another defence witness Miss Susan Lyon, Assistant Commissioner of Lands, valued Lot 224 at $5,000 per acre.

The learned trial judge analysed the evidence of all these witnesses as well as the documents tendered. She found that:

> "On the question of the measure of damages, having regard to the evidence adduced I cannot accept the submissions of Plaintiff's Counsel that it must have been within the contemplation of the parties at the time of the contract that the Plaintiff would reap economic trees and would undertake land development."

Here the learned trial judge correctly stated the ***Hadley v. Baxendale*** (supra) principles on which she should rely in assessing the appropriate damages. This court notes that when the statement of claim was filed on November 13, 1989, no claim was being made in relation to special damages for the loss of reaping economic trees. Furthermore, in his affidavit dated November 1, 1991, in support of notice of judgment, the appellant stated in paragraph 12:

> "...I intended at the time of purchase of these (both) lots and still so intend to plant coffee on these lands which are located in prime coffee producing areas and are classified as 'A' grade coffee lands."

Therefore, as late as 1991, his stated intention was to use the lots for coffee cultivation. Furthermore, in 1970 when the appellant visited the area, not having identified the lots, he could not definitely discern whether or not the pine trees, "chest high or seedlings", were on his lots, to cause him to have any intention to harvest pine trees.

The learned trial judge was correct in finding that at the time of entering into the contract the plaintiff did not contemplate the reaping of economic trees. He could not therefore have so communicated that intention to the vendor of the

lots. We note that the claim for special damages involving the loss of economic trees was not filed until December 13, 1994.

The learned trial judge correctly rejected this claim as not having been supported by evidence. She quite rightly accepted the more probable evidence of the appellant's witness Down of the valuation of $65,000 per acre in 1983, reduced because of accessibility difficulty to the lot by 25% to 30%, taking into consideration also the 25% to 100% increase in land values between 1993 and 1995, but not in agricultural land. The learned trial judge found that the fair value for lots 224 and 282 totalling 27 acres was $45,000 per acre, in the circumstances and correctly assessed damages at $1,215,000. I agree with the assessment of the learned trial judge.

For the above reasons, we dismissed the appeal with costs to the respondent to be agreed or taxed.

PANTON, J.A.:

I agree and have nothing to add.

COOKE, J.A. (Ag.):

I agree.