JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42 OF 1999

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**KENNETH WALKER**	**1ST APPELLANT**
A N D	**KENNETH WALKER DEVELOPMENT CO. LTD.**	**2ND APPELLANT**
A N D	**HAROLD ANDERSON**	**1ST RESPONDENT**
A N D	**INEZ THERESA ANDERSON**	**2ND RESPONDENT**

Garth Lyttle for the appellants

Rudolph Francis and Norman Harrison for the respondents

February 7, 8, 9 and October 23, 2000

FORTE, P.:

Having read in draft of the judgment of Harrison, J.A., I agree entirely and have nothing further to add.

HARRISON, J.A.:

This is an appeal from the judgment of Miss Gloria Smith, J., on February 12, 1999, that the appellants pay to the respondents for breach of contract the sum of $1,836,938 with interest at 25% from January 8, 1996 to February 12, 1999 and costs to be agreed or taxed.

The relevant facts are that Mr. and Mrs. Harold Anderson, the respondents, residents of the United Kingdom, came to Jamaica in May 1994 in order to buy a house, intending to return to Jamaica in retirement. The respondent Harold Anderson was taken to a housing development named Abyssinia Court, Bull Bay, in the parish of St. Andrew, where he saw several houses under various stages of construction. Both respondents there met the first appellant, Kenneth Walker, the "owner of the property". The respondents subsequently selected a house, a part of a duplex, intending to purchase it. This house was partially constructed. It consisted of concrete with two floors, to comprise, when completed, three bedrooms and three bathrooms. The ground floor was already tiled, and consisted of a kitchenette, a sitting room, one bedroom and a bathroom. The window frames to the front facing the sea, to the back and to the side towards the garage were all constructed, but had no glass yet installed. The door-frames were complete, without doors. The upper floor was reached by way of a staircase; no rooms were then in existence, but were merely marked out on the floor – made of plywood board. Marked out also were two bedrooms and two bathrooms and walk-in closets. Asked about the said plywood flooring, appellant Walker stated that he would take it up and "put pine flooring as it would match the ceiling." The ceiling was of varnished pine with open rafters. The joists, the foundation on which the flooring boards were laid, were too wide apart, being at intervals of 30 inches. On being so advised, the appellant Walker promised to pull them up and adjust them. A canopy, being the roof of the building over the verandah upstairs, was held up by a wooden beam four inches by four inches, from the said roof to a railing resting on a concrete column from the ground floor. The first respondent Anderson, pointed out that that "little thing" could not hold up the canopy; the first appellant agreed to "fix it." Asked the price of the house when completed, the said appellant stated "three million Jamaican dollars." The following day, either October 12 or 13, the first appellant took the respondents from their home to

the office of his attorney-at-law, Mr. Garth Lyttle. The said appellant, in the presence of the attorney-at-law, told the first respondent that he should give him $1,800,000, then a further $500,000 by the end of December 1994, when the house should be finished and he the appellant would give the first respondent "a free vendor's loan for $500,000." The first respondent was instructed by Garth Lyttle to make the cheque for $1,800,000 payable to "Kenneth Walker Development Company", the second appellant, and he Lyttle would obtain a copy of the title as "you want to see what you are buying." The following day, either October 14 or 15, the appellant took the first respondent to Victoria Mutual Building Society, Half Way Tree Road, where he obtained a banker's draft for the said $1.8M. The respondent was then taken to the office of the said attorney-at-law. The appellant gave the cheque to Mr. Lyttle who photocopied it, wrote on the photocopy a receipt for it which document he gave to the respondent. Mr. Lyttle, prepared the agreement for sale of the said premises, and it was signed by the respondents and the appellant. The agreement, exhibit 3, is dated October 14, 1994. The first respondent paid on October 15, 1994, $4,000 to Mr. Lyttle his portion of the cost of preparing the agreement. Between October 15, 1994, and November 9, 1994, the respondent made frequent requests for a copy of the title as promised by Mr. Lyttle "...everyday except Saturdays and Sundays...", but did not receive it. No work was done on the house during this latter period, except that painting was commenced to the ceiling of the ground floor. The first respondent stopped the painter and complained to the appellant that this was the area of plywood flooring to be replaced. The appellant stated that he had omitted to tell the painter that those boards were to be replaced. During the last week in October 1994 when the respondent visited the premises some of the plywood board flooring, "the ballast boards", had been removed. The appellant then told the respondent that he was going to Miami, USA, to buy building

materials. One week later, the appellant misleadingly told the respondent that "the lumber is at the wharf to be cleared", and a few days later that "the lumber...is still in Miami..."

Despairingly, the respondent complained to Mr. Lyttle who reassured him that "everything is above board", and that he "would never do anything to damage his professional career." On November 9, 1994, the first respondent left Jamaica and returned to England. Before leaving on that day, Mr. Lyttle told him he would get the copy title in England. The appellant told the first respondent that he should pay the amount of the money of $500,000 into an account in a bank in Miami in United States currency and he gave him a blank cheque leaf with the account number. The appellant was thereby introducing a new term of the contract that was not reflected in the written agreement.

On either November 12 or 13, 1994, the first respondent telephoned the appellant from England enquiring whether or not he could purchase instead one of the cheaper houses for $1,500,000 because of the fact that a son of his had spent from his current account his and his wife's pension monies. The appellant replied in the negative, for the reason that he had "taken up the flooring." The respondent accepted that. On January 30, 1995, the respondent transferred the sum of £11,000 ($500,000 Jamaican) from his account at North Westminister Bank, Luton, England, to his account at Victoria Mutual Building Society, Half Way Tree Road, to cover the further payment to the appellant.

The appellant contacted the first respondent on about January 30, 1995. Consequently, the respondent came to Jamaica on about February 10, 1995, and visited the said premises on the following morning. He observed that:

(1) Both floors of the house were "flooded with water".

(2) The joists of the upper flooring were still thirty inches apart, unadjusted.

(3) The joints in the partition wall of the main bathroom on the upper floor were separated, in that one could see into the said bathroom from outside.

(4) Watermarks were on the walls downstairs, indicating dampness from the floor coming up on the walls, inside and outside.

(5) The garage roof was on, but there was no flashing nor gutter where the roof adjoins the wall of the house, therefore the water was not led off from the roof but ran down onto the wall creating damage and watermarks.

(6) The kitchenette downstairs had no "soak away"; the water was led off onto the lawn.

(7) The drawers of the kitchenette were of sub-standard material, "box board", were ill-fitted and the bottoms were falling out.

(8) The three windows on the lower floor were out of line and ill-fitting, and when closed one could see spaces between the frames and the concrete area surrounding each.

(9) The entire floor upstairs was swinging, "when I walked on it felt like a swinging bridge (rocking)...because it did not have sufficient support beams (joists)...the beams were too far apart..."

(10) One of the bathrooms upstairs was flooded - water was coming out through the wall.

(11) There was no waste vent from the bathroom to lead off gases which would build up.

The first respondent spoke to the appellant, then across the street from the house, enquiring why he incorrectly told him that the house was finished and it was not. The appellant replied that he was "waiting on the rest of the money for foreign exchange." This was a further new term of a contract, sought to be introduced by the appellant.

Consequently, the respondent went to the office of the appellant's attorney Mr. Garth Lyttle and complained of the sub-standard work and told him that he was rescinding the agreement. Mr. Lyttle replied that he was "on his way to Court" and that the respondent

should make an appointment to see him. After several futile attempts to speak to Mr. Lyttle, and the consequent intervention of the Ministry of Foreign Affairs, the respondent saw and spoke to Mr. Lyttle on February 13, 1995, and repeated his complaints of the breaches and his decision to rescind the agreement. In response, Mr. Lyttle "wrote a note" and instructed him to sign. The note was then typed out; the respondent refused to sign because besides the names of the respondents, it included the name of his son who he maintained was not a party to the agreement. The respondent thereafter consulted his attorney and the action herein was subsequently filed.

The respondents' witness, one Delroy Hoskins, a carpenter by trade, experienced in working with contractors on buildings, confirmed the existence of the several construction breaches. On his first visit with the respondent in February 1995, he observed the absence of the soakaway pit, and the "four inches by four inches" wooden plank supporting the canopied roof on the upper floor – he would have used concrete, as used downstairs, instead of the said wooden plank. He observed also the spaces around the window frames on the lower floor. He did not enter the house. On a second visit with the respondent on May 3, 1998, the witness observed that the upper flooring had "a sink in the middle" and was "going up and down" when walked on, because the joists were too far apart. The flooring around the bath upstairs was rotting and the partition between the bathroom and the bedroom upstairs had separated, at its base, from the flooring which had sunken. A foul smell issued from the bathroom upstairs, due to the absence of a vent. The waste water from the kitchen emptied into the yard, instead of a basin. There was "green morass" on the wall, about one foot high off the ground due to the water running at the side of the house.

Mr. Lyttle for the appellants argued as his grounds of appeal that the learned trial judge erred in not holding that there was part-performance on the part of the appellants

and in failing to consider that the many structural changes required by the respondents made the sale of the half-finished house a sale by description. She erred in ordering the refund of the sum of $1,800,000 which it was agreed was paid to be used to complete the said house and was so expended. The attempt to rescind the contract was refused by the appellants who were in the process of performing the oral contract of work requested by the respondent. There was no non-performance by the appellants who used the said "$1,800,000 as prescribed by the Plaintiffs/Respondents to build the garage and change the upper floor of the subject property", which work was not a part of the oral agreement. The fault in the said flooring was due to the change of material ordered and received by the respondents.

Mr. Francis for the respondents submitted that defects detailed by the first respondent and his witness reveal substantial breaches of the agreement and the appellant cannot therefore be regarded as having finished the house to the appropriate standard. The appellant not having performed under the agreement, the respondent was entitled to repudiate it. There was an entire obligation on the part of the appellant to sell a house, when completed, and the land for $3,000,000. The respondents were purchasing a house not as is in 1994, but a house when completed and as well as the land. The learned trial judge's finding and judgment should not be disturbed.

At common law, the rule *caveat emptor* applies to the sale of land. There is no implied warranty that land agreed to be sold or that a house completed before sale is of any particular quality or that it is safe. However, where land and a house in the course of erection is sold by the builder there is an implied warranty that the house will be completed in a proper and workmanlike manner and will be reasonably fit for human habitation – ***Miller v. Cannon Hill Estates Ltd.*** [1931] 2 K.B. 113. In that case, the defendants entered into an agreement to sell a plot of land to the plaintiff and a house thereon in the

course of construction on a building estate. The agreement stipulated that the interior of the house would be built "to the purchaser's reasonable satisfaction" and the house would be hander over "on completion...fit for habitation." The purchase was completed in August 1928. The plaintiff and his wife went into occupation in September 1928 and lived there until February 1930. Because of the wet weather, a serious damp penetrated the house and, on medical advice, the plaintiff left the house as being unfit to live in. He sued for damages and obtained judgment against the defendant builders. The appeal against judgment was dismissed. The headnote reads on page 113:

> "In a contract with builders or with the owners of a building estate for the purchase of a house to be erected or in course of erection, there is an implied warranty by the vendors that the house shall be built in an efficient and workmanlike manner and of proper materials, and that it shall be fit for habitation.
>
> ***Lawrence v. Cassel*** [1930] 2 K.B. 83 followed."

The Court of Appeal in ***Hancock et al v. Brazier (Anerley)*** [1966] 2 All E.R. 901 re-affirmed the principle of the implied warranty which exists in respect of the obligation of a builder of the partially completed house to the purchaser. In that case the builders sold a house in the course of construction to a purchaser. The foundation, laid before the contract was signed, contained material which, not apparent to the builders, was dangerous and subsequently caused the flooring to crack and resulted in damage to the house. A contract had been signed, completion was in May 1959 and the purchaser went into occupation. Two to three years later the floors started cracking up. The purchaser sued the builders for damages for breach of contract to erect the house in a proper and workmanlike manner. The trial judge ruled that the defendants were in breach of the implied warranties and gave judgment for the plaintiff. In dismissing the appeal, Lord Denning, M.R., said at page 903:

> "It is quite clear from **Lawrence v. Cassel** (supra) and **Miller v. Cannon Hill Estates, Ltd.** (supra), that when a purchaser buys a house from a builder who contracts to build it, there is a threefold

> implication: that the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation."

It is noteworthy that in the cases of ***Lawrence v. Cassell*** (supra), ***Miller v. Cannon Hill Estates*** (supra) and ***Hancock et al v. Brazier*** (supra), the implied warranties were enforceable by action for damages even after completion and the purchasers were in occupation. In ordinary circumstances, an agreement for sale merges with a subsequent conveyance or transfer of title. No such merger is recognized where the implied warranty arises between builder and purchaser. In ***Hancock et al v. Brazier*** (supra), in emphasizing this distinction, Lord Denning, M.R., said at page 904:

> "Counsel for the builders next relied on the doctrine of merger. He said that the contract to build the houses was merged in the conveyance and did not continue afterwards. He urged that it was all a matter of the intention of the parties, and the intention here was that the contact should be replaced by the completed conveyance. I cannot accept this view. The case is governed by the decision of this court in ***Lawrence v. Cassel*** (supra). <u>The contract continued, even after the conveyance.</u>" [Emphasis added]

In the instant case, a *fortiori*, there has been no transfer. Therefore, at its lowest, the appellant builder who signed the contract with the respondent purchasers of the partially constructed house at Abyssinia Court, is clearly subject to the implied warranty which exists in the respondents' favour in respect of the construction breaches found by the learned trial judge.

The learned trial judge identified the main issues as:

> **(1)** "Were there non-performance of obligations under the contract between the parties,
>
> **(2)** If so, were these obligations of such importance that they would operate to discharge the other party from further performance of his obligation."

The question that arises, therefore, is whether or not the learned trial judge was correct in finding that there was a valid discharge of the contract, in the circumstances of the case, entitling the respondent, in view of the finding of the learned trial judge, of the breaches by the appellants, to a return of monies expended under the contract.

One accepted method of determining whether or not the particular breach entitles the innocent party to treat the contract as discharged is to categorise the act as a breach of a condition. The Sale of Goods Act 1893 recited this distinction between warranties and conditions, treating the innocent party to a breach of contract as entitled to damages only in the former, but entitled to treat the contract as at an end in the latter. However, in ***Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*** [1962] 2 K.B. 26; [1962] 1 All E.R. 474, the Court of Appeal upheld the decision of the trial judge who found that the defendants were not entitled to treat a charter as discharged for reason of breach of contract that the plaintiffs' ship was held up for approximately five months of a twenty-four months' charter, due to unseaworthiness from engine trouble, and awarded the plaintiffs damages for wrongful repudiation. Although the classification of warranty or condition may still be helpful to determine the effect of the breach, the ***Hong Kong*** (supra) case reveals that the court should examine the nature of the breach, its effect on the transaction between the parties and the consequences rather than the terminology to determine the issue. The authors in the ***Law of Contract by Cheshire Fifoot and Furmston***, 11th edition, commenting on the classification, said at page 149:

> "In making his decision the judge will sometimes find it helpful to concentrate primarily on the broken term, in others primarily on the extent of the breach. In some contracts, such as sale, it has historically been normal to use the first approach, while, in others, such as building contracts, it has been common to use the second but even in a contract of sale it is open to a court to hold that an obligation which has not been stamped either by statute or previous decisions as a 'condition', is an intermediate

> obligation, the effect of whose breach depends on whether it goes to the root of the contract." [Emphasis added]

To describe the breach as going to the "root of the contract" is another way of saying that the guilty party has committed such a fundamental breach of the contract, that the parties will not be able to realize their original goals, and consequently the innocent party being disadvantaged, is entitled to treat the contract as discharged or, in other words, rescinded. The case of ***Ellen v. Topp*** (1851) 6 Exch. 424 provides a good example of the nature of a fundamental breach. A contract of apprenticeship required a master to teach his three trades to an infant. The master abandoned one of the trades during the currency of the contract as a result of which the infant treated it as discharged. The master sued for breach of contract, contending that he could still, despite his retirement, teach the infant the theory of the abandoned trade. The court found for the infant, contending that the object of the contract was for service of the master by the infant in the three trades as an apprentice to a master not "as instructor and pupil." The said authors in the ***Law of Contract, Cheshire Fifoot and Furmston*** (supra), commenting on the case, said at page 528:

> "...the master had wilfully made it impossible for the essential object or the substantial benefit of the contract to be attained."

In the instant case, the agreement for sale dated October 14, 1994, referred to "all that parcel of land more particularly described", and the description of land is recited as:

> "Lot No. 14 on the Plan of Abyssinia Strata Plan No. 500 being part of land comprised in Certificate of Title registered at Volume 1230 Folio 273."

The agreement continues:

"PURCHASE PRICE	THREE MILLION DOLLARS ($3,000,000)
HOW PAYABLE	A deposit of $1,800,000.00 on the signing hereof.

> A second payment of $500,000.00 on or about the 30th day of December 1994.
>
> Balance on Mortgage."

The fact that the contract between the parties comprised also the sale of a house in the course of construction is not reflected in the said written agreement; it was the subject of the oral agreement between the parties. This fact is reflected in the statement of claim in paragraph 5 which reads:

> "**5.** On or about the 14th day of October, 1994 the Plaintiffs entered into an agreement with the Firstnamed Defendant for the sale of LOT No. 14 on the Plan of Abyssinia Cottage – Strata Plan No. 500 being part of the Land comprised in Certificate of Title registered at Volume 1230 Folio 273 of The Register Book of Titles to the Plaintiffs with partially completed dwelling house thereon for the sum of Three Million Dollars ($3,000,000.00)." [Emphasis added]

The learned trial judge found that the agreement between the parties was partly written and partly oral. This finding was not in dispute.

Furthermore, the respondents' object in entering into the said contract was to acquire a house built in a workmanlike manner, of good quality and relative comfort, in which they could reside with some satisfaction and ease in their retirement years. Where a builder, therefore, provides to a purchaser a building in which the entire upper floor swings like a bridge, the walls in certain sections contained water, the windows and doors were ill-fitting showing spaces around the frames, the bathroom was flooded and foul-smelling, the plumbing was defective, the canopied roof was ill-supported by timber instead of concrete and the garage roof was badly attached, this is substantially less than a purchaser would have expected to receive. Cumulatively, these defects are in breach of the obligation of a builder to provide to a purchaser a house of an acceptable standard of workmanship, materials and fitness for dwelling. The "completed" structure was far removed from the

basic requirements of the construction of a dwelling house. The defects amount to a fundamental breach by the appellant builder.

It is less than ingenious for the appellant to argue that the appellant used "the $1,800,000.00 as prescribed by the Plaintiffs/Respondents to build the garage and change the upper floor of the subject property" and that "the learned trial judge misdirected herself in holding that the building of the garage was a part of the oral agreement..." The said agreement for sale recites the said sum as the deposit on the sale of the land. The deposit cannot be considered as attributable to the construction of the garage and upper floor in contradiction of the written document. There was no sale by description as argued by the appellant. On the evidence, the learned trial judge was correct in her said finding. Furthermore, the appellant sought to rely on the equitable doctrine of part-performance as recited in ***Rawlinson v. Ames*** [1925] 1 Ch. 96 to ground his counterclaim for specific performance of the said agreement. In view of the clear terms of the documentary evidence, the numerous breaches committed by the appellant, and the finding as to the terms of the oral agreement, the plea of part-performance cannot stand. The learned trial judge was correct in so finding.

In all the circumstances, the respondents were entitled to treat the contract as discharged. The appellant had undertaken to complete the house to a professionally accepted standard. He did not do so. The respondents' witness Hoskins confirms this. On the evidence which was unchallenged, the first respondent, when he returned to Jamaica in February 1995 and saw the defects had said to the first appellant, "How is it you said on (the) phone that this building is finished and when I come it is not finished?" and the appellant replied that "he was waiting on the rest of the money for foreign exchange." This conduct of the first appellant amounts to an admission of a misrepresentation on his part, not only as to the stage of completion of the house but also that it was done in an

acceptable professional manner. In addition, the appellant was seeking to introduce a new term of the contract; he was not entitled so to do.

The first respondent properly rescinded the contract and communicated his rescission to the appellants' attorney-at-law, Mr. Lyttle, on February 2, 1995. There was evidence that the rescission was acknowledged and accepted by Mr. Lyttle. His response was to draft a document for the signature of the respondent and his wife. The respondent declined to sign because of the inclusion by Mr. Lyttle of the respondents' son's name "Andrew Anderson" on the document and "...my son Andrew Anderson was not a part of the agreement to buy the house." The respondent was correct, because, curiously, whereas the said agreement for sale does recite the son's name as "purchaser", he was not a signatory to the agreement.

Where a builder makes a misrepresentation of the quality of the house in circumstances where the builder knows it is material to the purchaser, a purchaser who is so misled may rescind the contract. In ***Strangways v. Bishop*** (1857) 29 L.T.O.S. 120, reported in English & Empire Digest Vol. 40 paragraph 326 page 51, a suit by the vendor for the specific performance of a contract failed. It was held that the contract could not be enforced because the purchaser, having told the vendor that because of his ill-health he could not live in a damp house, had signed the contract on the assurance by the vendor that the house was not damp, whereas it was permanently so. Such a misdescription or misrepresentation entitled the purchaser to rescind the contract.

In the instant case, the learned trial judge found that "...the house was in fact in a deplorable condition and certainly not of the standard expected as contemplated by the contract." This finding cannot be faulted. Almost every section of this house was the subject of deficient work, namely, the walls, the doors, the windows, the canopied roof, the bathroom, the floor, the plumbing and the dampness. Few areas escaped criticism of sub-

standard work. The implied warranty applies both to the period before and after the contract was signed, as it relates to both materials and labour (***Hancock et al v. Brazier*** [supra]). The principle of substantial performance as applied in ***Bolton v. Mahadeva*** [1972] 1 W.L.R. 1009 is unhelpful to the appellants. In any event, this transaction cannot be classified as a "lump sum contract." This contract may not be enforced. The parties did contemplate the existence of circumstances giving rise to rescission and the consequences thereof. Clause 8 of the agreement, inter alia, reads:

> "In the event of the Agreement being rescinded all monies paid hereunder by the Purchasers shall be refunded without interest and free from deductions SAVE AND EXCEPT that the Purchasers hereby agrees to pay the Vendor's Attorneys-at-Law fees in the sum of $6,000.00 for Professional Services rendered in respect of work incidental hereto AND any other loss which the Vendor suffers that can be reasonable construe as attributable to the Purchasers not fulfilling the conditions of payment herein. AND the Purchasers hereby irrevocably authorised the Vendor to deduct the amount of such fees from deposit paid to the Vendor and pay the same to the Vendor's Attorneys-at-Law on termination of this Agreement."

In all the circumstances, the respondents were entitled to rescind the contract.

No interest would have been payable had the deposit been refunded when requested by the respondent in 1995. No such refund was made. The order of the learned trial judge for payment of interest from 1996 is appropriate.

The appeal should be dismissed with costs to the respondents to be agreed or taxed.

LANGRIN, J.A.:

I have read the judgment of Harrison, J.A., and I agree with his reasoning and conclusion.