

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No.1726 of 1997

BETWEEN

DECOURSEY REDMAN

Plaintiff

AND

**COLONIAL HOMES AND COMMERCIAL
PROPERTIES (1994) LIMITED**

Defendant

Before the Honourable Mr. Justice Ventour

Appearances:

Ms. C. Moore for the Plaintiff

Mr. K. Wright for the Defendant

REASONS

This is a simple case of breach of contract allegedly committed by one party to the contract and the claim by the innocent party for damages accordingly.

Facts not in dispute:

- (1) The Plaintiff and the Defendant entered into a written agreement on 23rd April, 1996 wherein the Defendant, agreed to lease to the Plaintiff for a period of one hundred and ninety-nine (199) years, the premises described in the first schedule to the said agreement;
- (2) As part of the terms of the said agreement the Defendant agreed to construct a dwelling house on the said premises and in consideration thereof the Plaintiff agreed to pay to the Defendant a premium of one hundred and sixty thousand dollars (\$160,000.00) and a yearly rent of ten dollars (\$10.00) to be paid in advance and proportionately for any fraction of a year the first of such payments to be made on the execution of the said lease.
- (3) In accordance with Clause 4 of the agreement the Defendant agreed to complete the dwelling house in a proper and workman like manner as soon as possible and in any event not later than April 23, 1997. The proviso to Clause 4 states that the Defendant's failure to complete the dwelling house on the date fixed for completion could only be excused on the following basis:
 - a. non-availability of building materials;
 - b. labour dispute affecting workmen employed on the said works; or
 - c. from any other causes beyond the control of the Defendant.and in any such case the Defendant shall complete the said dwelling house as soon as after the said date precisable (sic).”

- (4) Clause 12 of the written agreement states that any notice under the agreement ought to be in writing and that any such notice to the Plaintiff shall be sufficiently served if addressed to the Plaintiff and delivered to him or left at his last known address.

The Plaintiff's evidence:

The evidence of the Plaintiff is that the dwelling house was to be constructed on lot 197 Phase 1 Bay View and that in accordance with the terms of the agreement he paid to the Defendant a deposit in the sum of \$16,000.00 and further sums of \$3,000.00 and \$700.00 on 23rd August, 1996 and 18th February, 1997 respectively. The Plaintiff testified that his mortgage arrangement was finalized on 3rd May, 1996.

He further testified that the bush on lot 197 was cleared in August 1996, land graded in September of 1996, foundation cast in January, 1997 and in April 1997 construction was fifty percent complete. He said that at the time when the Defendant was supposed to have completed the dwelling house the building was a shell with some of the walls plastered, no plumbing and no electrical work undertaken. The building, he said, was uninhabitable. More importantly, he said that in some cases there were houses which were completed in April 1997 although construction of those houses had begun sometime after his. He made enquiries but was given promises and the run around. He was not satisfied and eventually on April 30, 1997 he sought audience with a Mr. Ramjohn whom he said was the man responsible for the project.

He was never allowed to see Mr. Ramjohn. Instead he was allowed to see one Ms. Sharon Daniel, who was the Marketing Manager of the Defendant company. Ms. Daniel provided no satisfactory explanation for the delay in the construction of the house and

immediately he put pen to paper requesting the return of his initial deposit and other expenses relative thereto.

The Defendant responded by letter dated 5th May, 1997 (see Exhibits “DR 5” and DR 6”). The Plaintiff said further that he gave instructions to his Attorney at Law who again communicated with the Defendant requesting that the Defendant pay damages to the Plaintiff in the sum of \$23,354.00 with interest. The Defendant response was terse, referring the Plaintiff’s Attorney at Law to its earlier correspondence addressed to the Plaintiff. During cross-examination the Plaintiff denied that in December 1996 he was informed by the Defendant that the contractor was dismissed.

The evidence of the Defence:

Mr. Mungalsingh the Managing Director of the Defendant company testified on behalf of the Defendant. He said that it was only after the Plaintiff’s mortgage was approved that the Defendant issued a contract to one Hugh Hackett to construct the said unit. The contract was issued in September/October, 1996 but the contractor was dismissed in December 1996 because of his performance or lack thereof. He said that the Plaintiff was notified about the dismissal of the contractor and was told that the new date for completion would have been September 1997. He denied that the Defendant had delayed completion of the construction of the house. He said that by agreement time for the completion could be extended. Under cross-examination he said that the construction was actually completed in June 1997, that is, sometime before the estimated new completion date in September 1997. He admitted however that the Defendant did not notify the Plaintiff of the dismissal of the contractor in writing as stipulated in the written agreement.

The Court assesses the evidence:

In assessing the evidence of the Plaintiff and that of the Defendant this Court had no difficulty whatsoever in accepting the testimony of the Plaintiff generally, and in particular, as to how he was treated and given the “run around” by the servants and/or agents of the Defendant when he sought to enquire into the progress of the construction of the dwelling house which was the subject of the written agreement. The Plaintiff had paid the deposit upon execution of the agreement and had successfully concluded his mortgage arrangement. He had hoped that the Defendant would fulfill its part of the contract by completing the dwelling house on or before April 23, 1997. The Defendant failed to complete the contract as provided for in the agreement and argued that the dismissal of the contractor assigned to the construction of the unit gave rise to the delay in completing the construction within the terms of Clause 4 of the agreement. I do not agree. Clause 4 is quite specific. I am not prepared to hold on the language used in Clause 4 that the Defendant’s dismissal of the contractor gave rise to a cause which was beyond the control of the Defendant and therefore rendered the delay excusable. On the contrary the dismissal of the contractor and the hiring of a new contractor were matters well within the control of the Defendant. There is no evidence of non availability of materials for the construction of the unit, neither is there any evidence of labour dispute affecting the workmen employed on the construction of the unit. In my view therefore the Defendant is not entitled to say that the delay in completing the construction of the house is excused under the terms of the written agreement.

But even if the Court was wrong in so holding it seems that the new completion date was so fundamental a term of the agreement that in the absence of an expressed term the

Court would imply a term to the effect that the Plaintiff ought to have been notified of the delay, the reasons thereof and the new date for completion. Such notice ought to be in writing in accordance with Clause 12 of the Written Agreement. The Defendant admitted that the Plaintiff was notified orally but not in writing. The Plaintiff denied receiving any notice, whether oral or otherwise.

I have had great difficulty accepting the evidence from the Defendant that the Plaintiff was in fact notified of the dismissal of the contractor and the fact that completion of the construction of the unit was estimated to be in September 1997. If the Defendant's evidence is to be believed why then did the Defendant not refer to such an important matter when the Marketing Manager responded to the Plaintiff's request for the return of his deposit and other expenses by his letter of April 30, 1997. Why was no mention made of the alleged earlier notification to the Plaintiff of the contractor's dismissal in December 1996 and the fact that he (the Plaintiff) was aware of the new completion date in September 1997. More importantly in neither of the two pieces of correspondence from the Defendant was any attempt made to apologise to the Plaintiff for the delay in completing construction of the unit. Instead, the Defendant was quick to highlight its right to forfeit the Plaintiff's deposit or at best to refund the deposit less thirty percent. Indeed, it was surprising that the Plaintiff's procedure was emphasized in the Defendant's letter of 5th May, 1997 despite the fact that the written agreement makes no provision for the Defendant to apply any such procedure in the circumstances described above.

Again there was no reference of any notice to the Plaintiff concerning the dismissal of the contractor and a re-scheduled completion date of September 1997 when the

Defendant responded to the Plaintiff's Attorney by letter of 12th May, 1997. The only explanation this Court can offer for the absence of my reference in either of the Defendant's correspondence on the matters expressed to above is simply because there was no notification to the Plaintiff on those issues whether orally or in writing contrary to the testimony of the Defendant's witness.

This Court therefore found on the evidence that the Defendant acted quite independently of the Plaintiff when it dismissed the contractor responsible for the construction of the unit on lot 197 and unilaterally re-scheduled completion date for September 1997. The Plaintiff was not notified of any such development. The Defendant was therefore in fundamental breach of the contract when it failed and/or refused to complete the construction of the dwelling house on/or before 23rd April, 1997 in strict accordance with the terms of the written agreement entered into between the parties on 23rd April, 1996. As a consequence, the Plaintiff was lawfully entitled to rescind the contract and claim damages for its breach from the Defendant.

It is for the reasons referred to above that the Court made the following order:

- (1) Judgment for the Plaintiff in the sum of \$21,290.00 with interest at the rate of 6% per annum from 9th July, 1997 until judgment;
- (2) The Defendant to pay to the Plaintiff cost certified fit for advocate Attorney which costs are to be taxed in default of agreement.

Dated this 5th day of November, 2002

**Sebastian Ventour
Judge**

