

**IN THE SUPREME COURT OF BELIZE, A.D. 2009**

**CLAIM NO. 418 of 2009**

**ELVIS USHER**

**CLAIMANT**

**AND**

**JACQUELINE TAM  
(also known as JACKY TAM)**

**DEFENDANT**

Hearings

2009

9<sup>th</sup> November

11<sup>th</sup> December

2010

13<sup>th</sup> January

14<sup>th</sup> January

22<sup>nd</sup> January

23<sup>rd</sup> February

Mr. Philip Zuniga S.C., O.B.E. for the Claimant  
Mr. Kareem Musa for the Defendant.

LEGALL J.

**JUDGMENT**

1. The defendant owns a parcel of land situate at Lot 227 Goomagarugoo Street, Dangriga Town, Stann Creek District. (the land). On 8<sup>th</sup> June, 2007, she signed a written document agreeing to

sell the land to the claimant, who also signed the document, for the price of BZ \$10,000. The purchaser made a down payment to the defendant of \$2,500. At the date of the sale, there was a mortgage on the land, dated 11<sup>th</sup> March, 2005 in favour of First Caribbean International Bank (Barbados) Limited; but the mortgage was not, at that time, brought to the attention of the claimant. By a title search, conducted about two years after the agreement dated 13<sup>th</sup> September, 2007, the mortgage was discovered by the claimant.

2. In pursuance of the agreement, the claimant made other payments to the defendant in the amount of BZ \$6,500 towards the purchase price, making a total payment of \$9,000, leaving a balance of \$1,000. After several letters from learned senior counsel to the defendant to perform the agreement failed to achieve their purpose, the claimant on 8<sup>th</sup> May, 2009 filed a claim against the defendant for specific performance of the written agreement and damages for breach of contract in lieu of or in addition to specific performance.
3. The claim was served personally on the defendant on 21<sup>st</sup> May, 2009 at #5607 Lizarraga Avenue, Belize City by Fitzgerald Joseph of 204 Lords Bank, Belize City. Mr. Joseph swore on the said 21<sup>st</sup> May, 2009 to an affidavit to this effect. The defendant failed to file an acknowledgment of service showing an intention to dispute the claim, and failed also to file a defence to the claim. The claimant therefore applied for default judgment under Part 12 of the Supreme Court (Civil Procedure) Rules 2005. The application came before me on

20<sup>th</sup> July, 2009 and I ordered that notices be sent to the defendant and the bank, since the land was encumbered by a mortgage.

4. The defendant and the attorney-at-law for the bank appeared in response to the notice, and the defendant indicated to the court that she was in the process of selling another property, her matrimonial home, in order to obtain enough finance to pay the bank and discharge the mortgage so that the claimant could obtain title for the land. After several failed attempts by her to get the matrimonial home sold to discharge the mortgage, a default judgment was entered on 9<sup>th</sup> November, 2009 against the defendant, not for specific performance, because of the encumbrance of the mortgage, but that the defendant pay damages for breach of contract. The court subsequently fixed a date for the assessment of damages.
5. The defendant filed a witness statement dated 21<sup>st</sup> January, 2010 and she stated therein that in December, 2009 she succeeded in receiving a deposit with respect to the sale of her matrimonial home. Since it was, according to her, enough to discharge the loan at the bank, she said she informed Mr. Zuniga SC that the bank had released the land and she was then in a position to transfer the land to the claimant. She stated that instead of receiving a favourable response from Mr. Zuniga, she was informed that the claimant, no longer wanted the land, but wanted damages for breach of contract.
6. Although the court did make a default order that the defendant pay damages for breach of contract, the case had not yet been completed,

as the assessment of damages remained to be done, and it seems to me that the court, with the consent of the claimant, could have made a consent order setting aside the default judgment and a further consent order for the specific performance during the further hearing of the case. The opportunity for specific performance of the contract was not taken by the claimant.

7. Both parties submitted skeleton arguments on the issue of assessment of damages. The claimant submitted that he was entitled to the \$9,000 he paid towards the purchase price, special damages of \$2,500; and interests. The defendant agrees to pay all of the above, amounting to BZ \$11,500 plus interest. But a dispute arose between the parties with respect to the claimant's claim for damages for loss of bargain in the amount of \$20,000.
  
8. Before considering the legal guidelines under which damages for loss of bargain could be granted, some relevant evidence must be considered. The defendant stated in her witness statement that her husband, before he died, conducted all the banking transactions; and that, at the date of the agreement to sell the land, she was unaware that the land was subject to a mortgage. She said that after failed attempts on her part to find the title for the land, she advised the claimant to see her then attorney-at-law, Mr. Zuniga to see whether he knew where the title was. She said she was later informed that the land was subject to a mortgage. Her evidence is that she did not sell the land knowing that it was subject to a mortgage. But the mortgage which was exhibited and dated March 11<sup>th</sup>, 2005, was signed by both the

defendant and her husband, Rene Tam. The defendant therefore must have known that the land was subject to the mortgage when she signed the agreement to sell the land to the claimant.

9. The main question still remains: is the claimant on the facts of this case entitled to damages for loss of bargain for breach of contract by the defendant? The views of the House of Lords in the celebrated *Bain v. Fothergill 1874 LR--HL 158* are a good starting point to answer this question. The facts of *Bain* were that a vendor sold leasehold interest in land without the consent of the lessors, which was required. The consent was not obtained at the time of the sale and the vendor knew this. The court held that this amounted to a defect in the vendors title, but the purchaser was not entitled to damages for loss of bargain. Lord Chelmsford said:

“.... I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract ...”

10. Lord Hatherley gave the reasons for the rule:

“Having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor, and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title.”

11. This rule came to be known as the Rule in **Bain v. Fothergill**. But as time passed, and the rule was subject to scrutiny, it was criticized and described as “anomalous” in several authorities, including *Day v. Singleton* 1899 2 Cl 320 at p 329 by Lindley MR; *Wroth v. Tyler* 1973 1 A.E.R. 897, at p 918 by Megarry J; and *Malhotra v. Cloudhury* 1979 1 A.E.R. 186 at page 197 by Stephenson LJ.
12. In *Day v. Singleton* a vendor agreed with a purchaser for the sale of a leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease. The purchaser paid a deposit on the purchase price. The defendant, a representative of the vendor who had died, induced the lessor to refuse his consent to the assignment, which the lessor accordingly did; and the purchaser lost his bargain. On a claim for damages and return of the deposit, the court held that the plaintiff was entitled, not only to the return of his deposit with

interest and the cost of investigating title, but also to damages he had sustained by the loss of his bargain through the omission of the defendant to obtain the lessor's consent.

13. The court held that a purchaser of leasehold property was entitled to damages for loss of his bargain by reason of the vendor's omission to do his best to procure such license or consent. Lindley MR said that if the defendant "had tried to obtain the lessors consent and had failed Day (the plaintiff) could have obtained no more damages than those he recovered" which was his deposit, interest and cost of investigating the title: see page 329 of *Day v. Singleton* above. His Lordship Sir Juene observed at page 334:

"I am of opinion that in the present case the vendor's representative distinctly failed in his duty to do his best to obtain the lessors' consent: indeed, he went further, and, as I think, prevented that consent from being given. I can see no reason why he is not liable to an action for this, and why in such an action damages should not be awarded to compensate the plaintiff."

14. The reasoning of the court seems to be that since on the evidence the vendor failed to do his best to procure the consent of the lessor, damages would be awarded to the purchaser for loss of bargain, in addition to other expenses, such as deposit, interest and cost of investigating title. But if the vendor had tried his best to obtain the consent of the lessor and had failed, the purchaser would have

- obtained limited damages under the rule In *Bain v. Fothergill*, that is to say, damages for expenses incurred in the sale such as deposits, interest and cost of investigating the title, but not for loss of bargain.
15. The requirement to prove that the vendor used his best endeavours to remove any defects in his title in order to prevent damages for loss of bargain came out in *Malhotra v. Choudhury 1979 1 A.E.R. 186*. “That was a case where one of two joint owners (who happened to be husband and wife) had entered into a contract for the sale of a house. When sued on his contract the husband claimed that he was unable to make title because his co-owner, his wife, would not agree to the sale. The Court of Appeal (Stephenson and Cumming-Bruce LJ) held that, where a vendor of real property sought to limit his liability for breach of contract under the rule in *Bain Fothergill*, he had a duty to show that he had used to his best endeavours to fulfil his contractual obligations, the onus being on him, both in the case of a defect of title and of conveyance. Since the defendant had given no evidence of an attempt by himself to obtain his wife’s consent to the sale, he had not discharged the burden of proof on him.”: see *Balcomb LJ Sharneyford Supplies Ltd. v. Edge 1987 1 A.E.R. 588 at p 595*:
16. Cummings Bruce LJ also made the point in *Malhotra* above at p 203:

For the reasons stated by Stephenson LJ, it is quite clear that on the ratio of *Day v. Singleton* the vendor who seeks to avail himself of the protection afforded by what is

described as the rule in *Bain v. Fothergill* must go to the length of satisfying the court that he has done all that he reasonably can to mitigate the effects of his breach of contract by trying to remove such fault on the title as appears.”.

17. Applying the legal principles above to the facts of this case, the further question arises: Did the defendant satisfy the court that she used her best endeavours to fulfill her contractual obligations, and had done all that she reasonably could have done to mitigate the effects of her breach of contract by trying to remove the encumbrance of the mortgage on the title to the land? If she did then damages for loss of bargain should not be granted.
  
18. Let us examine the facts again. The defendant, as I have held, knew at the time of the agreement to sell the land, of the mortgage. On several different occasions when this matter was called in court the defendant stated that she intended to sell a property in order to obtain finance to repay the loan to the bank. In spite of her fault in selling the land when she knew of the mortgage, it seems to me that she subsequently was trying her best to obtain finance to discharge the mortgage and transfer a clean title to the claimant. She eventually succeeded in receiving a deposit on the sale of her matrimonial home, which was enough to discharge the mortgage and transfer the land to the claimant but this did not find favour with the claimant.

19. It is true an order was made for assessment of damages, but as I mentioned above, consent orders could, in this case, have been made setting aside the default judgment and making a consent order for specific performance of the agreement. But I do not think that it could be reasonably denied, on the evidence of this case, that the defendant did not use her best endeavours to specifically perform the agreement to sell the land to the claimant. In that case damages against the defendant ought to be limited based on the rule in *Bain v. Fothergill* – that is to deposit, interest and the cost of investigating the title.
20. But should the defendant pay additional damages, perhaps nominal damages, for loss of bargain because she sold the property knowing that it was mortgaged, even though subsequently she tried to make amends by obtaining enough finance to remove the mortgage and transfer the land to the claimant. Megarry J suggested nominal damages in a particular circumstance: –

“Where the breach of contract is occasioned by the vendors inability, without his own fault to show a good title the purchaser is entitled to recover as damages his deposit, if any, with interest and his expenses incurred in connection with the agreement, but not more than nominal damages for the loss of his bargain.”: See *Wroth v. Tyler 1973 1 A.E.R. 897 at p 916*.

21. It seems to me that on agreeing to sell the land knowing that it was subject to a mortgage and not making this known to the purchaser at

the time amounted to bad faith on the part of the defendant and would seem to exclude the rule in *Bain*. In *Malhotra* above it was held that bad faith on the part of the vendor, was sufficient to exclude the rule. But I think the court should also at the same time consider the best endeavours and reasonable actions of the defendant to correct the basis of the bad faith by putting herself in a position to remove the encumbrance on the mortgage. In such a case the views of Megarry J in *Wroth* above stating that the purchaser is entitled to his deposits, interest, expenses and nominal damages should apply to a situation, as in this case, where a vendor acted in bad faith initially, but subsequently before the trial is completed tried her best endeavours to honour her contract. I think on the unique facts of this case, nominal damages for loss of bargain are appropriate and just.

22. I therefore make the following orders:

1. Defendant shall pay to the claimant the sum of \$11,500 being special damages claimed and the deposit paid to the defendant.
2. Defendant shall pay to the claimant nominal damages in the sum of \$4,000.
3. Defendant shall pay to the claimant interest on the sum of \$15,500 at the rate of 6% per annum from 8<sup>th</sup> May, 2009 until the sum is fully paid.

4. Each party to bear his own costs.

Oswell Legall  
JUDGE OF THE SUPREME COURT  
23<sup>rd</sup> February, 2010