IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE No. 101 of 2015

BETWEEN:

(1) CONSTANTINO ANGGAWAY AYDOC

(2) ANALYN FEBRERO AYDOC

Plaintiffs

-and-

LORIMAR DEVELOPMENT LIMITED

Defendant

IN CHAMBERS

Appearances: Mr. Prahmod Joshi of Brady Law, for the Plaintiffs
Mr. John Meghoo, Attorney-at-Law for the Defendant

Before: **The Hon. Justice Marlene Carter (Actg.)**

Heard: **22 January 2020**

Submissions: **10 February 2020**

Ruling Delivered: **30 April 2020**

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JUDGMENT

ASSESSMENT OF DAMAGES

1. The Plaintiffs' action for breach of contract against the Defendant, a development company, related specifically to faulty tiling work in the home which the Plaintiffs purchased from the Defendant in 2012. On the 4th September 2019, the Court of Appeal remitted the matter to this court for the assessment of the Plaintiff's damages on their claim, the Court of Appeal having allowed the Plaintiffs' appeal and awarded the Plaintiffs judgment against the Defendant. The Plaintiffs were awarded their costs in the Court of Appeal and at trial, such costs to be taxed if not sooner agreed.

2. This matter was set for hearing before this court on the 22nd of January 2020. The Plaintiffs rely on submissions on quantum which formed part of the Plaintiffs' closing submissions at trial dated 21st November 2017. Notably, the Defendant made no corresponding submissions on the issue of quantum of damages in closing submissions after trial. At the hearing of the assessment of damages, although the Defendant had filed outline submissions for that hearing, counsel for the Defendant requested further time in which to present further submissions on the question of damages, indicating to the court that the Defendant had not had a proper opportunity to give a full response to the Plaintiffs' submissions.

3. This court allowed the Defendant further time and also allowed the Plaintiffs to reply. This court has considered all of those submissions as well as the evidence given at trial.

4. The Plaintiffs' writ of summons claimed the following:

1. CI$18,980.00 to remove and replace the tiling.
2. CI$25.00 on materials purchased for the bathroom tile.
3. Filing fee in the sum of CI$250 dollars
4. Accommodation while work proceeds with costs to be assessed.
5. Storage costs for furniture with costs to be assessed.
6. General damages to be assessed/
7. Legal costs of CI$1600.00 to date of filing.

Costs associated with replacing the defective tiles and reseating the leaking toilet.

5. The Defendant in his written submissions of the 3rd of February 2020, stated that: "*the demolition of the entire house's floor was unnecessary and is an affront to the principle that a Plaintiff should mitigate its damages*". The Defendant did not offer any evidence or submission on how the Plaintiff should have mitigated their damages in this instance.

6. On this issue of mitigation, the Court of Appeal summarized the Plaintiffs' actions once the tiles began to pop up in the master bedroom:

> "23. *In May 2014, two years and one month after moving in, the Aydocs heard a 'popping' sound in the master bedroom. As it turned out, several floor tiles had popped up from their base. When contacted by Mr. Aydoc about this*

development, Lorimar arranged for the delivery of 12 replacement tiles to the house, with a promise to send workmen to lay them. However, this was not done.

24 *The following month, the Aydocs discovered that a further 16-20 tiles had popped up in the kitchen area and that some of them were broken. Lorimar again arranged for the delivery of replacement tiles to the house. This time, Lorimar also gave the Aydocs the sum of $100.00 with the instructions that they should arrange for someone to lay the new tiles. However, when the Aydocs attempted to do this work in the kitchen area, other tiles from surrounding areas also popped up, with the result that all the tiles in the kitchen and dining room area had to be removed. The sum of $100 turned out to be insufficient to do the work required to rectify the problem and, despite further discussions, no agreement was reached on the increased figure. One result of this, the Aydocs alleged, was that they were left 'having to sleep in a house full of dust and debris due to the work done'."*

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7. From the above it appears that the Plaintiffs engaged with the Defendant when the problem was first observed. After further tiles popped up they again alerted the Defendant. They attempted to lay the replacement tiles themselves and further engaged with the Defendant with a view to reaching agreement on the installation of the replacement tiles without success. It is difficult to understand what further measures the Plaintiff should have taken to mitigate the damage done in these circumstances.

8. The Plaintiffs presented the court with a quote from Kozaily Designs Limited in the amount of $18, 980.00. In an updating affidavit before the court at the time of trial the figure was set at CI$24,820.25. This figure was not substantially challenged by the Defendant at trial although counsel for the Defendant raised with the Complainant whether there were cheaper quotes available. The Plaintiff gave evidence of having obtained a slightly cheaper alternative quote at trial but there was no updated figure presented apart from that of Kozaily Designs Limited. However, the important factor for this court is that no alternative quote was presented by the Defendant to the court for its consideration on the matter of the cost of the replacement tiles and the reseating of the leaking toilet at trial or at the hearing for the assessment of damages.

9. In the further submissions filed by the Defendant it was submitted as follows:

"6. *In any event, the Defendant asks the Court to Order restoration on its behalf of the flooring, or to pay what is says it would cost them to restore the floor at a slightly higher level of floor tiling, which is CI$6,000.00.*

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7. *The Defendant accepts that the Plaintiff has filed a money claim, but the Court is asked to take a practical, problem solving approach to the matter, and implement what is indeed a settlement offer which would restore the damages suffered by the Defendant.*"

10. However, there was no support for how this figure had been arrived at and for this reason it is difficult for this court to rely on this figure.

11. The Defendant took issue at trial with the choice of company that the Plaintiffs sought to engage to replace the tiles. This court is satisfied that Kozaily Designs Ltd is a reputable company and there is no reason to doubt that their assessment is proper. The appropriate measure of damage for breach of contract to which the Plaintiffs are entitled is the amount that places them in the same position as if the contract had been performed. The award for replacement of the defective tiles and the reseating is set at CI$24,820.25 as claimed.

Costs of rehousing whilst remedial works are done

12. The Plaintiffs presented figures with estimates of 14 days for the remedial works to be completed. Counsel for the Plaintiffs submitted that due to the nature of the work that the Plaintiffs would need to be out of the home during this time. The Defendant submitted that there was no evidence that the remedial works would necessitate relocation. However, the nature and extent of the rectification work which would need to take place in the kitchen, dining room and master bedroom indicates that this position is not unreasonable in all the circumstances. The Plaintiffs provided estimates from various hotels ranging from CI$200.00 per night to CI$1000.00 per night, acknowledging that the latter figure would be the estimate during the high season for Cayman Islands hotels and guest houses. I find that reasonable accommodation for two persons is at a rate of CI$350.00 per night. The Plaintiffs are awarded the sum of CI$350.00 per night for 14 days totaling $4900.00 for the costs of accommodation.

Other heads of loss claimed by the Plaintiffs

13. The Plaintiffs invite the court to consider that the Defendant has essentially failed to challenge other heads of loss. There was no challenge to the nominal amount for material purchased by the Plaintiffs to make temporary repairs to the toilet. This amount is not unreasonable and the court awards, as claimed, a nominal amount of CI$25 for materials purchased to make good temporary repairs to the toilet. The Plaintiffs are awarded the sum claimed of $250.00 for filing fees. The

Plaintiffs abandoned their claim to storage costs for furniture during the period of restoration of the tiles at the property at this hearing.

General damages

14. The first Plaintiff testified at trial that the 2nd Plaintiff had suffered "*breathing problems caused by the dust in the home due to the problem with the tiles*". The first Plaintiff agreed that the 2nd Plaintiff did have pre-existing health problems, however his evidence was that the dust at the home, caused by faulty tile work, significantly aggravated her condition to the extent that she had to leave the Island to travel overseas in order to treat this condition. Counsel for the Plaintiffs submitted that the court could use the Guidelines for the Assessment of General Damages in Personal Injury Cases[1], in arriving at an appropriate award under this head of damages.

15. The Defendant submitted that there was no medical evidence to support an injury claim and further that the court should not undertake a quantum assessment as if it were a personal injury claim. Counsel for the Plaintiff accepts that the claim for general damages does not equate to a personal injury claim and it was not pursued on that basis. The Plaintiffs do however state that the impact on the 2nd Plaintiff's health, the impact on the Plaintiffs' home life, as well as the distress and inconvenience experienced by the Plaintiffs do invite an award in this case.

16. It is accepted that a court may award damages for such matters on a claim for breach of contract. In ***Calabar Properties Ltd. V Stitcher***[2] the landlords of a block of flats were responsible for its outside repairs. The defendant and her husband took possession of the top floor flat and soon thereafter found that due to defects on the outside wall, water was coming through causing dampness and damage. The defendant filed a counterclaim for damages for breach of the plaintiffs' repairing covenant. During the course of the proceedings the defendant and her husband moved out of the flat owing to the husband's ill health caused by the dampness in the flat and found alternative accommodation.

17. The Court of Appeal found as follows:

> "*Damages in a case such as the present should include the cost of the redecoration, a sum to compensate for the discomfort, loss of enjoyment and health involved in*

[1] Fourteenth Edition by the Judicial College, 2020
[2] [1984] 1 WLR 287

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living in the damp and deteriorating flat and any reasonable sum spent on providing alternative accommodation after the flat became uninhabitable."[3]

18. In this case counsel for the Plaintiffs submitted that the court should award each Plaintiff a sum equivalent to CI$100.00 per month from the date of complaint to the date of trial. I consider that a lump sum award to cover distress, inconvenience, loss of enjoyment of the new home and any associated health problems may be more appropriate in all the circumstances. The Plaintiffs are awarded the sum of CI$2500.00.

Costs

19. The Court of Appeal has awarded the Plaintiffs their costs in the Court of Appeal and below. Such costs are to be taxed if not agreed. The Plaintiffs are also awarded their costs on this assessment also to be taxed if not agreed.

THE HON. JUSTICE MARLENE CARTER
ACTING JUDGE OF THE GRAND COURT

[3] At page 299. See also Elmcroft Developments Ltd v Tankersley-Sawyer, [1984] 1 EGLR 47; Watts and another v Morrow [1991] 4 All ER 937