IN THE SUPREME COURT OF JUDICATURE OF JAMAICA Judgment Book

IN COMMON LAW

SUIT NO. F-010 OF 1998

BETWEEN JEFFREY FINELL PLAINTIFFS
FRANK FEINSTEIN
(Administrators for the Estate of Irwin Finell)

A N D MICHAEL DOLS DEFENDANTS
PATRICIA DOLS

Mr. Patrick Foster for Plaintiffs.

Mr. Winston Spaulding for Defendants.

HEARD: 8th, 15th April, 1999 and 27th September, 1999

F.A. SMITH, J.

This is an application for summary judgment against the first Defendant pursuant to S.79(1) of the Judicature (Civil Procedure Code) Act. (The Court was told that the second Defendant is dead).

The Plaintiffs seek judgment against the first Defendant for possession of land situate at West End Negril in the parish of Westmoreland.

The Plaintiffs are Administrators of the estate of Irwin Finell, who died on the 5th April, 1995. Letters of Administration in the said estate were

granted to the Plaintiffs on the 18th April, 1997. This action is brought on behalf of the estate of Irwin Finell.

In the Statement of Claim the Plaintiffs state that:

By an Agreement in writing dated 1st June, 1994 and made between the deceased Irwin Finell and Michael Dols and Patricia Dols the deceased agreed to sell and the Defendants agreed to purchase all that parcel of land known as West End situate in Negril in the parish of Westmoreland more particularly described in Certificate of Title registered at Volume 1004 Folio 380 of the Register Book of Titles at a price of US$1,000,000.00 with completion of the said Agreement to be on or before the 1st July, 1998.

It was a term of the said Agreement that the purchase price be payable in the following manner:-

(a) A payment of U.S.$85,000.00 on the signing of the Agreement;

(b) U.S.$15,000.00 six (6) months after the Purchasers were placed in possession and the said sum was not to be paid later than the 1st January, 1995;

(c) Balance purchase price of U.S.$900,000.00 should have been paid as follows:

(1) U.S.$150,000.00 on or before July 1,

1995;

(2) U.S.$200,000.00 on or before July 1, 1996;

(3) U.S.$250,000.00 on or before July 1, 1997;

(4) U.S.$300,000.00 on or before July 1, 1998;

4. In accordance with the said Agreement the Defendants paid the deposit of U.S.$85,000.00 on or about the 1st June, 1994 and another payment of US$15,000.00 was made on or about December, 1994 and a further

payment of U.S.$5,000.00 made on or about January, 1995.

5. In accordance with Special Condition Number 6 the Defendant gave Notice to the Plaintiff and entered into possession of the said property on or about 1st July, 1994 as a licensee and as stipulated in the said Special Condition from the date of entering into possession until actual completion, the Defendants became liable to pay interest on the unpaid purchase price at the rate of 9% per annum payable monthly in advance on the 1st day of each month commencing 6 months after the date of possession. Further, the Defendants were required to pay all outgoings in respect of the said property and to keep all the buildings insured during the period of possession.

6. By agreement in writing dated 4th November, 1994 the

Plaintiff and Defendants agreed to vary the Agreement dated the 1st June, 1994 in relation to the terms of paymemt sum of U.S.$150,000.00 which was payable on or about 1st July, 1995 by providing that the said sum and sum should now be paid in the following manner:-

(a)	January 1, 1995	U.S.$.5,000.00
(b)	February 1, 1995	U.S.$30,000.00
(c)	March 1, 1995	U.S.$30,000.00
(d)	April 1, 1995	U.S.$40,000.00
(e)	May 1, 1995	U.S.$15,000.00
(f)	June 1, 1995	U.S.$15,000.00
(g)	July 1, 1995	U.S.$15,000.00
	Total	U.S.$150,000.00

7. The Defendants despite being put in possession on or about 1st July, 1994 have refused and or failed to pay the following sums:-

(1) US$150,000.00 payable in accordance with the Terms of the Agreement as varied in writing On the 4th November, 1994;

(2) US$200,000.00 due and payable on or before July 1, 1996;

(3) Outgoings and insurance in relation to the said property;

(4) Interest of 9% on the balance purchase price of US$895,000.00 from 1st of January, 1995;

8. The Defendant purported to pay a portion of interest payments referred to in paragraph 6 (4) hereof in the amount of US$33,750.00 by way of cheques the particulars in relation to which are provided hereunder

Date of Cheque	**Amount**
4th May, 1995	US$6,750.00
1st July, 1995	US$6,750.00
7th July, 1995	US$6,750.00
1st August, 1995	US$6,750.00
8th May, 1995	US$6,750.00
Total	US$33,750.00

The abovementioned cheques which were tendered by the Defendants were all returned and dishonoured because of insufficient funds in the relevant account.

9. The Plaintiff by his Attorneys-at-Law served on the Defendant a Notice to Complete the Purchase of the said property and Making Time of the Essence dated the 28th day of April, 1997 requiring the completion of the sale within 10 days and to pay the balance purchase price of US$895,000.00 along with other charges outstanding under the said Agreement for Sale.

10. That notwithstanding the said Notice being served on the Defendants they have refused and/or failed to make any arrangements to pay the balance purchase price or any portion thereof.

11. That the Plaintiff by his said Attorneys-at-law notified the Defendant by letter dated 2nd June, 1997 that the said Agreement was terminated for failure to make any payments when due under the Agreement since on or about April, 1995 and the said letter also required the Defendants to give up possession of the property which they occupied as licensees under and by virtue of the said Agreement.

12. The Defendants have failed to give up possession of the said property to the Plaintiff either in accordance with the terms of the Agreement or at all which they had up to the date of termination thereof had occupied as licensees.

The First Defendant's Defence and Counterclaim is prolix. The first three paragraphs deal with the "legitimacy or regularity of the Status" of the plaintiffs as Administrators of the estate of the deceased.

I agree with Mr. Foster that once the Letters of Administration are granted by the court they are presumed to be valid and are binding upon this and every court unless and until they are recalled by the court. I also hold that the first defendant does not have the locus standi to challenge the validity of the

Letters of Administration – see **Mohamidu Hadjiur v. Pitchey** (1894) A.C. 437 and **Haukin v. Turner** (1979) 10 Ch. 372.

In paragraphs 4 to 15 the defendant addresses the plaintiff's claim at paragraphs 2-8 of Statement of Claim seriatim. Paragraphs 16 to 21 deal with the notice of demand for payment. Paragraphs 22 to 33 more or less concern the defendant's claim that the Agreement for Sale is unlawful. The Counterclaim is set out in paragraphs 34 to 42.

Mr. Spaulding took a preliminary point that the original agreement for sale was unstamped and therefore inadmissible in evidence. He referred to section 36 of the Stamp Act which provides as follows:

> "No instrument not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

A contract for the sale of land is included in the list of documents which attract stamp duty. Mr. Foster submitted that if the Plaintiffs cannot rely on the unstamped document neither can the defendant. He contended that there is evidence in the affidavits that clearly show that the Administrators (the Plaintiffs) have a right to possession. He submitted that the plaintiff can establish its case for possession without reliance on the contract for sale.

It seems to me that I have no choice but to rule that the unstamped document of agreement for sale is inadmissible. It is the settled practice to allow an unstamped document to be received in evidence upon an undertaking to stamp it and to produce it so stamped. In England it is regarded as unprofessional for counsel other than in Revenue cases to object to the admissibility of any document upon the ground that it is not stamped – See **Sergeant on Stamp Duties and Companies Capital Duty** Sixth Edition at p. 5 (under Notes on "Undertaking to Stamp').

No such undertaking was forthcoming and therefore I may not look at the contents of the agreement.

Having decided that the document viz Agreement for Sale was inadmissible the court asked both counsel to address three questions. This was an attempt to avoid the multiplicity of objections which threatened to prolong the hearing unnecessarily.

The first is: What is the effect on these proceedings of such a ruling?

The second: May the defendant be permitted by extrinsic evidence to establish that the said inadmissible Agreement was intended to be performed illegally?

The Third: May the defendant refer to any of the contents of the said agreement with a view to establishing the alleged

illegality or any other ground of defence or any other reasons which entitle him to defend the action generally?

Mr. Foster for the Plaintiffs submitted that the effect of the court's ruling is to prevent the Plaintiffs and the Defendants from adducing any evidence relating to the contents of the Agreement for Sale. The only evidence that can be tendered in relation to the Agreement for Sale is to establish the fact of its existence and nothing more, he said. This ruling, he argued, would not adversely affect the plaintiff's claim for summary judgment.

He contended that the plaintiffs as the personal representatives of the deceased owner of the property in question are prima facie entitled to possession.

The first Defendant having been asked by the plaintiffs to vacate possession of the property, he submitted, must justify or explain his possession of the property other than by reliance on the Agreement for Sale. He relied on **Doed Tomes v. Chamberlaine** 151 E.R. (Exchequer Division) and **Doed Counsell and Parker v. Caperton** 173 E.R. (Exchequer Division) 763.

In the former the defendant, in an ejectment matter, was let into possession of land by the plaintiff under an agreement of purchase by which it was stipulated that the defendant should be let into possession forthwith, paying interest at the rate of 5 percent per annum on the amount of the purchase price until the completion of the purchase.

The defendant remained in possession of and built upon this land, no evidence was given to show that any conveyance had been tendered to him or that the plaintiff had taken any steps to enforce the completion of the purchase. The defendant having failed to pay the interest punctually the ejectment was brought no notice to quit having been given.

It was held that the defendant had nothing more than an estate at will and judgment was given for the plaintiff.

In the latter case where similar issues arose it was held that the plaintiff was entitled to obtain an Order for ejectment notwithstanding that the proceedings were brought 25 years after the purchaser took possession.

It appears from the report that these cases were decided in a court of law and not a court of equity.

This is gleaned from the statement of Lord Abinger C.B. :

> "If this were a case in a court of equity, it is clear that court would not allow the vendor to take back the estate, unless he

> were in a condition to fulfil the contract on his part. But in a court of law we can only look at the legal title."

If I might venture an excursion into legal history I think at the time of these decisions the equitable jurisdiction of the Court of Exchequer was transferred to the Court of Chancery. The decisions might be different today in light of the provisions of S.48 of the Judicature (Supreme Court) Act regulating the concurrent administration of law and equity in the Supreme Court.

Mr. Spaulding Q.C., for the Defendant was very full in his reply.

He referred to S.79 of the C.P.C. and submitted that the plaintiff must on affidavit made by himself or any other person verify the cause of action. It is only after the plaintiffs have made out a prima facie case and show that their proceedings are in order that the onus shifts to the defendant, he contended.

He argued that the Agreement for Sale is the basis of the Plaintiffs' claim for possession and since the Agreement has been excluded there is no factual basis in the affidavit to support the pleadings in the Statement of Claim.

The Court could not reasonably be asked to give summary judgment on the Statement of Claim since the Statement cannot be verified by the affidavit evidence before the court.

He describes as wholly spurious and without foundation in law Mr. Foster's submission that the exclusion of the Agreement makes irrelevant all legal issues that relate to the Agreement for Sale. He based himself on **Coppock v. Bower** 1838 Ex. 4 MEE and W627 at 630-631 and submitted that the object of statute and common law would be defeated, if a contract void, in itself, could not be impeached because the written evidence of it is unstamped, and therefore inadmissible.

In **Coppock v. Bower** a petition was presented to the House of Commons against the return of a member on the ground of bribery. The petitioner entered into a written agreement in consideration of a sum of money and upon other terms not to proceed further with the petition.

It was held that the agreement was illegal. It was also held that the unstamped written agreement was admissible in evidence for the purpose of insisting on the illegality of the transaction in answer to an action for the sum so agreed to be paid.

Mr. Spaulding also submitted that the mere fact of ownership does not entitle a person to possession.

It seems to me that the court cannot close its eyes to the fact that the plaintiffs have pleaded that the defendant acquired his possessory title and right under an Agreement for Sale for valuable consideration.

The plaintiffs claim for recovery of possession is based on the allegation that the defendant has persistently refused to pay monies due and owing under the Agreement for Sale and the consequent termination of the Agreement with a request that the defendant vacate possession.

The defence filed by the first Defendant is to the effect that the Agreement was illegal and unenforceable at the instance of the vendor who designed the illegal scheme or his successors.

In his affidavit the first Defendant claims that he is not a mere licensee but a licensee with an interest in the property in that he has spent considerable funds on the premises.

Further in his Defence and Counterclaim (paragraph 37) he states that the plaintiffs in breach of the contract made demands for sums under the contract not due until in 1998.

Having considered the submissions of both counsel and the authorities referred to therein I am of the view that the inadmissibility of the Agreement of Sale by virtue of Section 36 of the Stamp Act will only affect the proceedings in so far as it is necessary to refer to the Agreement for its

contents. In other words the court may act on facts that on the pleadings are not in dispute that is to say facts that have been admitted or have not been traversed.

Where there is no dispute as to facts then there is no need to adduce evidence in proof of those facts. It is also my view that on the authorities cited, the defendant is entitled to seek to establish by extrinsic evidence his allegation that the agreement was intended to be performed illegally.

I will now set out the undisputed facts as they appear on the pleadings:

1. By an Agreement in writing dated 1st June, 1994 and made between the deceased Irwin Finell and Michael Dols and Patricia Dols the deceased agreed to purchase all that parcel of land known as West End situate in Negril in the parish of Westmoreland and more particularly described in Certificate of Title registered at Volume 1004 Folio 380 of the Register Book of Titles at a price of U.S.$1,000,000.00 with completion of the said Agreement to be on or before the 1st July, 1998.

2. It was a term of the said Agreement that the purchase

price be payable in the following manner:

(a) U.S.$15,000 six (6) months after the Purchasers were placed in possession and the said sum was not to be paid later than the 1st January, 1995.

(b) Balance purchase price of U.S.$900,000.00 should have been paid as follows:

(1) U.S.$150,000.00 on or before July 1, 1995.

(2) U.S.$200,000.00 on or before July 1, 1996.

(3) U.S.$250,000.00 on or before July 1, 1997.

(4) U.S.$300,000.00 on or before July 1, 1998.

3. In accordance with the said Agreement the Defendants paid the deposit of U.S.$85,000.00 on or about the 1st June, 1994 and another payment of U.S.$15,000.00 was made on or about December, 1994 and a further payment of U.S.$5,000.00 made on or about January, 1995.

4. In accordance with Special Condition Number 6 the Defendant gave Notice to the Plaintiff and entered into possession of the said property on or about 1st July, 1994

as a licensee and as stipulated in the said Special Conditions from the date of entering into possession until actual completion, the Defendant became liable to pay interest on the unpaid purchase price at the rate of 9% per annum payable monthly in advance on the 1st day of each month commencing 6 months after the date of possession.

5. By agreement in writing dated 4th November, 1994 the Plaintiff and Defendants agreed to vary the Agreement dated 1st June, 1994 in relation to the terms of payment sum of $150,000 which was payable on or about 1st July, 1995 by providing that the said sum should now be paid in the following manner:

(a)	January 1, 1995	U.S.$5,000.00
(b)	February 1, 1995	U.S.$30,000.00
(c)	March 1, 1995	U.S.$30,000.00
(d)	April 1, 1995	U.S.$40,000.00
(e)	May 1, 1995	U.S.$15,000.00
(f)	June 1, 1995	U.S.$15,000.00
(g)	July 1, 1995	U.S.$15,000.00
	Total	U.S.$150,000.00

6. The first Defendant does not deny that he was put in possession on or about 1st July, 1994.

In his defence the first Defendant "denies that he owed the sum of U.S.$150,000.00 in accordance with the terms of the Agreement as varied in writing on the 4th November, 1994 as set out in paragraph 7(1) of the Statement of Claim." Further the defendant claims that the amounts claimed do not represent the sums due.

As said before the Defendant is also claiming that "the Agreement for Sale has been tainted by the illegality of the vendor Finell in structuring the arrangement as he did, not stamping the document as was required by law and intending to have the plaintiff execute a new document or insert a false date in the signed documents to defraud the Revenue and effectively understate the consideration he would receive."

Accordingly , the Defendant states that the contract is illegal, contrary to public policy and void or voidable.

In my opinion this alleged illegality is no defence to the action to recover possession. It is difficult to see how this "arrangement" would be "structured" without the defendant being privy to it. In any event how can this illegality, avail the defendant in a claim for recovery of possession?

I cannot escape the conclusion that there is something suspicious in the defendant's defence of illegality. Now that the vendor is dead the defendant argues that the Agreement was intended to be performed illegally. As Lord Mansfield said:

> "The objection that a contract is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant."

However, "if any defence, however demonstrably false it may be, has been served, it is essential that the affidavit in support (of the application for summary judgment) adverts to this and then goes on to depose that notwithstanding such defence the deponent believes that there is no defence and explains why this, is so" - See The Supreme Court Practice 1995 Volume 1, 14/1/5 at p.147.

In the instant case Mr. Frank Feinstein's affidavit in support of his application was sworn to on the 13th May, 1998 and filed on the 15th May, 1998. The defendant's Defence is dated the 14th May, 1998 and filed on the 15th May, 1998 . His affidavit in response to the plaintiff's Summons for Summary Judgment was sworn to on the 11th June, 1998.

The plaintiffs have not adverted to the defence. They have not addressed the defendant's claim that the amounts demanded do not represent

the sums due and the defence that the defendant has an equitable interest in the property having spent considerable sums on the property.

A complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial - See **The Supreme Court Practice 1995 Volume 1 p. 156**.

Although I entertain a real doubt about the defendant's good faith, on the evidence and the pleadings I cannot reasonably say that I am satisfied that there is no fairly arguable point to be tried.

Conditional Leave

It was held in **International Asset Control Ltd. (trading as 1AC Films) v. Films Sans Frontiers SARL** Times Law Report October 26, 1998 that where there is a powerful argument that the plaintiff would recover a substantial sum by way of general damages, it was open to the court to grant conditional leave to defend or to require the defendant to put up security. The decision in **Associated Bulk Carriers Ltd. v. Koch Shipping Inc., (1978)** 2 All E.R. 254 was considered.

In the instant case it is my view that the plaintiffs have a powerful argument that they should recover possession or in the alternative recover

substantial damages. Indeed the defendant in his defence and affidavit is not denying that he owes money to the plaintiffs.

I am therefore of the view that the defendant should be given conditional leave to defend.

In light of the pleadings I have concluded that the interests of justice demand that the defendant pay into court the sum of U.S.$500,000.00.

Accordingly the defendant is hereby given leave to defend on condition that the pays into court U.S.$500,000.00 on or before the 5th November, 1999.

Costs to be costs in the cause.

Leave to appeal granted to both parties.