

IN THE SUPREME COURT OF JUDICTURE OF JAMAICA

CLAIM NO. 2005HCV1196

BETWEEN	FLORENCE JULIA BYFIELD	1 ST CLAIMANT
AND	ALFRED MARTIN THOMPSON	2 ND CLAIMANT
AND	PAULINE ANDREA PHILP	3 RD CLAIMANT
AND	VICTOR ALPHONSO BRODBER	1 ST DEFENDANT
AND	PAULA MARCIA BRODBER	2 ND DEFENDANT

Mrs. Lascine Wisdom Barnett instructed by Thomas & Thomas for the Claimants

Ms. Lilieth Deacon and Mrs. Nicola Earl Luther instructed by Taylor Deacon & James for the Defendants

Heard: October 5, 6, November 16, 2009 and January 6, 2010

Straw J

The claimants, Florence Byfield, Alfred Thompson and Pauline Philp are suing the defendants, Victor Brodber and Paula Brodber for specific performance of a contract entered into between the parties on the 15th day of October 2001, for the sale and purchase of property described as Lot 18, St. Johns Meadows in the parish of St. Catherine, registered at Volume 1132, Folio 619 of the Register Book of Titles.

Secondly, they are requesting that a declaration be made that they are entitled to an equitable interest in the said land by virtue of their having made a deposit on the land, which was paid to the defendants' attorneys-at-law.

Alternatively, they are requesting that the sum of \$450,000.00 deposited to the defendants' attorneys-at-law, Derrick Darby & Company be returned with interest as well as damages for breach of contract.

THE CHRONOLOGY OF EVENTS

1. On the 10th August 2001, the first claimant, Florence Byfield paid a deposit of \$450,000.00 to Mr. Derrick Darby, attorney-at-law in relation to the said property.

2. The Agreement for Sale dated 15th October 2001 is executed by all the parties. The claimants are described as the purchasers and the defendants as the vendors.

The attorney with Carriage of Sale is stated to be Derrick Darby. No attorney's name is listed on behalf of the purchasers.

Mr. Darby is described on the document to be the vendors' attorney. The total purchase price is \$2.7 million.

The completion date of the Agreement is stated to be on or before 90 days from the date of the Agreement.

The Agreement reflects that the initial payment of \$420,000.00 is to be apportioned with \$270,000.00 as the deposit and \$150,000.00 as account purchase price.

This is a discrepancy in relation to the amount of \$450,000.00 said to be deposited on August 10, 2001. It appears that the discrepancy may be due to the amount paid for the treatment of termites on the property. Special conditions 4 and 5 are relevant and important to the adjudication of this matter and are set out as follows:

“4. This Agreement is subject to the Purchasers presenting an irrevocable Letter of Mortgage Commitment from the Churches Co-op Credit Union for an amount not less than \$1,900,000.00 or any other financial institution on or

before 45 days to the Vendors' attorneys-at-law as to which time shall be of the essence of the contract, failing which either party shall be entitled to cancel this Agreement without notice and the initial payment refunded without interest less the sum of \$25,000.00 for attorneys' fee for professional services --- and the Purchasers hereby irrevocable authorize the Vendors to deduct the amount of such fee from the initial payment on termination of this Agreement."

"5. Unless previously rescinded as aforesaid, this contract shall be binding and unconditional on the Purchasers producing the said Letter of Commitment to the Vendors' attorneys-at-law."

3. A Transfer under the Registration of Titles Act in relation to the said property was signed by the second and third claimants and both defendants. It is undated and was never signed by the first claimant.

4. On the 29th July 2003, a letter was written by Mr. Derrick Darby to an attorney, Karl Thomas. The letter reads as follows:
"Re: Sale of premises – Lot 18 St. Johns Meadows, St. Catherine – Florence Byfield

I refer to our recent meeting regarding the above matter. I confirm my instructions from the purchasers' local agent to hand over the file to you.

I have also asked the real estate agent, Mr. Vernal Anderson, to recommend an attorney to represent the vendor.

I account for the deposit paid to me by Mrs. Byfield as follows:

Deposit received (10.08.2001)	-	\$450,000.00
Less (1) payment to termite treatment of premises	-	\$39,000.00
(2) Cost of preparation of Agreement for Sale	-	<u>12,500.00</u>
Balance due	-	\$398,500.00

I undertake to forward this sum to you on or before August 31, 2003. In the interim, I will hand over a copy of my file to the vendors' attorney who will take instructions from the vendor regarding re-signing of the Instrument of Transfer as well as other relevant matters."

5. Letter dated 15th August 2003 from Quantity Surveyors to Mr. Garfield Brown of Victoria Mutual Building Society.

It states that premises, Lot 18, St. Johns Avenue, St. Johns Meadows, St. Catherine was visited and a schedule of dilapidation prepared. The repairs are estimated to be completed in 4 weeks.

6. Letter dated 18th December 2003 from Faye Lowe, Manager of Victoria Mutual Building Society, Half Way Tree to Mr. Charles Berry, attorney-at-law, in relation to the said premises.

It confirms that VMBS had approved a loan of \$2,970,000.00 in relation to the property subject to it being secured by a first legal mortgage and certain conditions. The conditions are listed as follows:

- “(1) Repairs to be completed within three months after disbursement of loan and inspection by an officer of the Society.
- (2) Subject to an Undertaking from an attorney-at-law to apply to the Courts for modification of covenant # 617 within six months after disbursement of loan.”

The letter also states that payment of the loan will be made upon execution and registration of the mortgage.

7. Letter form VMBS to the first claimant on January 7, 2004 informing her that the mortgage of \$2,970,000.00 had been approved and also that VMBS had informed its attorneys (Mr. Paul Cooper of Livingston Alexander & Levy) to prepare the mortgage documents.

The first claimant was also instructed to visit the attorneys within 7 days and to take with her certain documentation. The letter further states that a deadline of 7th April 2004 had been set for completion, after which the loan would be automatically withdrawn unless an extension in writing was granted.

Attached to this letter is a copy of a letter to Mr. Paul Cooper of Livingston, Alexander & Levy, the attorney for VMBS in relation to the proposed mortgage. At the bottom of this letter is the following statement:

“Kindly contact Mr. Charles Berry, attorney-at-law,
of 25 King Street, Spanish Town, St. Catherine,
regarding the Duplicate Certificate of Title.”

Unfortunately, Mr. Charles Berry is also deceased and there is no documentary evidence as to his interest in the matter or by whom he was retained. The inference to be drawn is that he was retained by the defendants. The first claimant has also given evidence to this effect.

8. Agreement for Sale dated 20th December 2004 between the defendants as vendors and Tweedsmuir Anthony Bryan and Veronica Evadnie Bryan as purchasers for Lot 37, Bellevue

now called St. Johns Meadows registered at Volume 1132, Folio 619 of the Register Book of Titles. The purchase price is stated as \$2,800,000.00.

9. A transfer of land document dated the 26th of November 2004, in relation to the above-mentioned property and signed by the above-mentioned parties.

Summary of Documentary Evidence

Based on the chronology, the claimants entered into Agreement for Sale with the defendants on the 15th October 2001. Although the deposit was paid, a Letter of Commitment reflecting the balance remained outstanding until the 18th December 2003. The vendors entered into a second Agreement for Sale with new purchasers on the 20th December 2004. All the contractual obligations of this subsequent Agreement have been fulfilled except for the actual registration of the names of the new owners on the title. A caveat lodged on the 21st February 2005 by the claimants has prevented the completion of that process.

Issues for Determination

There are several issues for the court to determine. These are as follows:

1. Was Mr. Derrick Darby, the attorney for the vendors and stakeholder of the \$450,000.00 paid by the claimants on 10th August 2001?

The court takes judicial notice of the fact that Mr. Derrick Darby had been arrested, charged and placed before the court for misappropriation of various clients' funds. He was never tried and convicted as he absconded while on bail.

The court accepts that neither the defendants nor the new attorneys for the claimants received any of the above-mentioned sum of money from Mr. Darby.

2. When the claimants failed to complete the contractual terms in the time allotted, did the defendants waive their rights to rescind the Agreement?
3. If yes, did they at any time give notice to the claimants of their intention to retract or notify the claimants of their intention to again make 'time the essence' of the contract.
4. If no, what is the effect of the letter dated 18th December 2003, sent to Mr. Charles Berry?
5. What is the effect of the delay in completion up to December 2004 when the defendants signed the new Agreement for Sale?
6. If the claimants are successful in proving their case, should there be an order for specific performance, and if not, what should be the damages awarded?

Analysis of the Evidence

1. **Was Mr. Derrick Darby the attorney acting for the Vendors in relation to the payment of the deposit and the Agreement for Sale?**

The evidence of the first claimant is to the effect that Mr. Vernal Anderson, the real estate agent for the property, told her Mr. Darby was acting for the vendors and took her to Mr. Darby. She paid the deposit to him and he later drafted an Agreement for Sale which she gave to Mr. Brodber on his visit to Jamaica.

She further stated that herself and Mr. Brodber visited Mr. Darby's offices for discussions about details of the sale. Although her witness statement indicated that she

was unrepresented, she admitted while giving *via voce* evidence that Mr. Darby was also acting for her and that when she discovered that Mr. Darby was experiencing trouble with the law, she retained the services of Thomas & Thomas.

The first defendant, Mr. Brodber, has denied that Mr. Darby was retained by him. He states that the first claimant suggested that since they were in Jamaica, they would retain an attorney to draft the document and that “we would both utilize the services of the same attorney-at-law.”

He further stated that he signed documents representing Mr. Darby as the attorney for the vendors but he did not suppose it to be a problem as Mr. Darby was supposedly acting for both parties. He also admitted that Mr. Vernal Anderson was the real estate agent in relation to the said property and that the Agreement indicated that he would be paid a commission of 5% by the vendors on the completion of the Agreement.

This court is of the view that the evidence of the first claimant is more credible on this point for the following reasons:

- i. The documentary evidence clearly indicates that Mr. Derrick Darby was acting in the capacity as the attorney for the vendors.
- ii It would be illogical for the claimant to attend on a lawyer to pay a deposit in relation to property without some reference to the vendors.
- iii Mr. Anderson acted as the real estate agent for the vendors' property. It is only logical to infer that he must have had discussions on the matter with the defendants before attending on Mr. Darby with the first claimant.

iv It is preposterous for the first defendant, Mr. Brodber to put distance between himself and Mr. Darby at this stage. It was his property being sold and he acquiesced to the terms of the agreement even if it was prepared in his absence.

This court has therefore concluded that when Mr. Darby received the deposit and subsequently drafted the Agreement for Sale, he was acting as the attorney for the vendors. He would have received and retained the deposit on behalf of the vendors and as their agents. (See **Stephen Thompson vs. Alphonso Lewis**, 24 JLR, pg 47) Unfortunately, any loss in relation to the deposit would therefore have to be borne by the vendors.

However, the agreement also makes it clear that both parties would be solely liable for their attorney's fee. The evidence is that he acted for both parties in relation to the Agreement for Sale. The claimants would therefore be responsible for the purchasers' share of the attorney's cost of \$12,500.00 for the preparation of the documents.

2. Was the Contract rescinded by the failure of the Purchasers to complete after the expiration of 45 days?

The evidence is unchallenged that the purchasers/claimants failed to produce the balance of \$1,900,000.00 or to present a letter of mortgage commitment on or before 45 days after the signing of the Agreement to the vendors' attorney. Special condition 4 made time of the essence of the contract. The vendors would have been entitled to cancel the Agreement without any Notice to the purchasers.

According to the first claimant, she received a document from VMBS about the loan which she gave to Mr. Darby. The time is not made clear but she further stated that she received correspondence from the bank between 2001 to 2004 that the loan had been granted. However, the earliest documentary evidence of this was the letter to Mr. Charles Berry dated December 18, 2003.

One would have expected letters from VMBS to Mr. Darby to be produced. This court cannot draw any inference as requested by the claimants' attorney that there had been previous commitment letters or documents from any financial institution to Mr. Darby prior to 2003. There might have been difficulties experienced by Mrs. Byfield but her evidence does not speak specifically about anything prior to 2003.

According to her, she was in communication with Mr. Brodber up to 2003 by telephone. She said they spoke about Mr. Darby's troubles and that Mr. Brodber told her he no longer trusted lawyers, that he never got the deposit from Mr. Darby, neither any documentation and wanted her to repay him the deposit in cash and also that he wanted to continue the transaction in the United States of America (USA).

She further stated that she told him she preferred to use a lawyer and she instructed new counsel in the matter. She further states that she made copies of all documents from Mr. Darby and VMBS and these were delivered to Mr. Brodber at his home in Queens, New York by her brother-in-law and as far as she was concerned, the agreement was still in place in 2003 and she knew that Mr. Berry was now acting for Mr. Brodber.

Her evidence is that Mr. Brodber told her he had obtained Mr. Charles Berry as his new attorney. She further stated that Mr. Brodber never complained about any delay

neither did he tell her that the sale was cancelled. She said Mr. Anderson died around the time of Mr. Darby's troubles.

Mr. Brodber's evidence on the point is to the effect that he waited three (3) years and having not heard anything from the claimant or Mr. Darby, he agreed to sell the premises to Tweedsmuir and Veronica Bryan. He further stated that he signed an Agreement for Sale and completed a Transfer of Land document to that effect. He agreed that Mrs. Byfield did call him and spoke to him about Mr. Darby's troubles. He is not sure whether this was in 2003. He did not seek an attorney when he heard Mr. Darby was in trouble. He denied telling her he no longer wanted to deal with an attorney and that he wanted to continue the transaction in the United States. He denied knowing that Mr. Berry was acting on his behalf, neither is he aware of Mr. Anderson doing so. He said he never retained Mr. Berry.

He further stated that he never discussed the return of the deposit or stamped documents to her and the last time he spoke to her for a while would have been when she spoke to him about Mr. Darby. He further said he got no documents from her brother-in-law and that when he tried to make contact with her, he would hear her in the background saying, "Tell him, I am not here."

Counsel for the defendants, Mrs. Lilieth Deacon, has submitted that time was made the essence of the contract and the claimants failed to complete within the stipulated time. She has further submitted that since they failed to request an extension of time, the defendants were entitled to rescind the contract without notice. She also submitted that the defendants at no time breached the terms of the contract and took no steps to resell the property until over two (2) years later.

The authors of **Chitty on Contracts, General Principles**, Sweet & Maxwell, 1994 discusses 'time being of the essence' of the contract (paragraph 21 – 010, page 1030):

“Time is of the essence (1) where the parties have expressly stipulated in their contract that the time fixed for performance must be complied with, or that the time is to be of the essence.”

The authors discuss also the effect of consequences of time being 'of the essence' (paragraph 21-014, page 1033):

“---the effect of declaring time to be of the essence is to elevate the term to the status of a “condition” with the consequences that a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed and (b) to claim damages from the contract breaker on the basis that he has committed a fundamental breach of the contract --- depriving the innocent party of the benefit of the contract ---”

Based on the Agreement for Sale, the defendants were entitled to consider the agreement as rescinded without any notice to the purchasers within 45 days after the 15th October 2001.

However, if there was a waiver of their right to rescind by the defendants, then a valid Agreement for Sale would still be in existence.

In **Chitty**, (supra at paragraph 21 – 016, page 1035), the authors discuss other principles which affect the time fixed for performance:

“Apart from the rules considered in the preceding paragraphs, the time fixed for performance may be postponed by waiver or subsequent variation by agreement.”

In **Neville Constantine Smith vs. Delroye Salmon** SCCA no. 67/2004 delivered on the 29th November 2006, the Court of Appeal examined this issue of time being “of the essence.” Harrison J stated as follows (at page 12):

“If time is made the essence of a contract and the date has passed and the parties continue negotiating for the completion of the purchase, time is no longer of the essence of the contract – Webb v Hughes (1870) LR 10 Eq 281).

Where time is made of the essence and there is default, the party not in default may or may not rescind. Conduct consistent with the continued existence of the contract is an election not to rescind - Carr v Berriman Property Ltd (1953) 89 CLR 327. See also Buckland v Farmer et al (1978) 3 All ER 929 and Luck v White (1973) 26 PV CR 89.”

At paragraph 22-037, **Chitty on Contracts**, (supra), the authors state that a waiver may be oral or written or inferred from conduct, even though the provision waived is found in a contract required to be made in or evidenced in writing.

Counsel for the claimants, Mrs. Wisdom Barnett, has cited certain conduct by Mr. Brodber which indicated he had waived his right to rescind.

Firstly, he introduces Mrs. Byfield to neighbours as the new owners. Mr. Brodber has denied that he introduced Mrs. Byfield to the neighbours. However, even if he did, this was done contemporaneous with the signing of the Agreement for Sale and would not have taken place after the time set for completion had expired.

Secondly, the defendants signed the document of Transfer. The court is of the view that, as there is no evidence as to when this document was signed, it cannot assist in determining the point in question.

Thirdly, Mr. Brodber continues his dealings with Mrs. Byfield up until 2003 and fourthly, either directly or through his agent, obtains the services of another attorney.

The court finds that there is merit in grounds three and four. It is not contested, and the court accepts that both parties were in communication up to 2003, although the exact month is not stated. Mr. Brodber agrees that Mrs. Byfield and himself did speak about Mr. Darby's troubles. Mr Darby's letter was written in July 2003.

Although both parties disagree as to the details of the conversation, the court is of the view that Mrs. Byfield's evidence is more reliable. Bearing in mind what was happening with Mr. Darby, it is inconceivable that the parties would not have discussed contractual issues and the way forward. What is quite clear is that Mr. Brodber did not indicate to Mrs. Byfield that he considered the contract to be rescinded.

The court accepts that Mr. Brodber told her that he did not trust lawyers and wanted her to continue the transaction in the USA without lawyers and that she told him that she had contracted a new attorney.

The court also accepts that at sometime during their conversation in 2003, Mr. Brodber did tell her Mr. Charles Berry had been retained to act on his behalf. Mrs. Byfield could not have conjured up the name of Mr. Berry without any basis. The letter from VMBS was addressed to Mr. Charles Berry. The court accepts that Mr. Berry was retained to act on the defendants' behalf and that Mr. Brodber did complain to Mrs. Byfield that he had not received the deposit, "he and Mr. Berry" from Mr. Darby and wanted her to repay him the deposit in cash.

The court draws the inference that as unhappy as Mr. Brodber may have been about the state of affairs, he treated the contract as still continuing up to that point in

time. There was no complaint about delay. There was no notice to complete sent to Mrs. Byfield or her attorney. This is clear and compelling evidence of conduct by Mr. Brodber that he had waived the contractual term of time 'being of the essence.'

The effect of this waiver is that the contract remained valid up to the 18th December 2003 when VMBS sent the letter to Mr. Berry indicating that the loan had been approved. The terms of the contract stated that it would be binding and unconditional once the Letter of Commitment was sent to the vendors' attorney-at-law.

Should the Claimants be granted an Order for Specific Performance or any Award of Damages for Breach of Contract

The equitable maxim is that he who seeks equity must come with clean hands. Have the claimants come to this court with clean hands?

In this regard, the court considers both the silence of the first claimant and the delay in the completion of the contract since January 2004.

1. The first claimant received a letter from VMBS in January 2004 which stated that she was to take certain steps within seven (7) days in relation to the processing of the mortgage documents. There is no evidence that she did so.
2. She said that she spoke to Mr. Berry who kept in touch with her by phone. She gave evidence to the effect that Mr. Berry kept dragging the matter out but no evidence was presented as to what she meant by this statement. No evidence was put before the court as to what Mr. Berry failed to do.
3. The court also takes note that she said she stopped communicating with Mr. Brodber in 2003, yet she spoke of conversations with him about repairs to the property and that he told her she should get someone to repair the place.

She also said that he told her that the loans officer had discussions with him over the phone about repairs.

She further stated that he asked her to collect a cheque from VMBS for him and to lodge it to his account.

Mr. Brodber has denied all of this. Her evidence raises a lot of unanswered questions. When would these conversations have taken place? What cheque would she have been asked to collect on his behalf since a letter had been sent to his lawyer in December 2003 requesting a certain undertaking? If VMBS had a cheque for Mr. Brodber, one could infer that the mortgage would have been registered on the title but this was not the case.

4. At the time that the defendants entered into a second Agreement for Sale in December 2004, the loan offer from VMBS would have expired in April 2004.

The claimants have offered no credible evidence as to what transpired between January to April 2004 and between April to December 2004. In the context of the circumstances of this case, the court considers this unexplained delay as unreasonable and it is certainly a factor for the court's consideration (see **Graham v Pitkin** 1987 41 WIR, pg 233).

5. The court accepts that the first claimant was given permission by the first defendant to change the locks and take over the property some time after the Agreement for Sale was signed. It is incredible for Mr. Brodber to assert that she did this without his permission. However, there were no additions or improvements made to the property by the first claimant.

6. Although the defendants never exercised their right to rescind, the court considers that the defendants would still have not received the balance of the purchase price up to December 2004.

Unfortunately, both parties have suffered due to the conduct of Mr. Darby. However, based on all the circumstances, the court is of the opinion that the contract between the parties has been frustrated.

The vendors' have resold the property for \$2,800,000.00. The court will neither order specific performance nor award damages for breach of contract.

However, the deposit paid by the claimants is to be returned to them minus their share of the attorney's cost which is \$12,500.00. This sum is \$437,500.00. In light of all the circumstances the court declines to award any interest on this amount.

Costs of the proceedings awarded to the claimants to be agreed or taxed.