Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.289 OF 1995

BETWEEN	DESMOND ANTHONY CAMPBELL	FIRST PLAINTIFF
A N D	SONIA THOMAS	SECOND PLAINTIFF
A N D	AUBREY ROBINSON	DEFENDANT

Alvin Mundell for Plaintiffs.

Dr. Lloyd Barnett and Miss L. Parker for Defendant.

HEARD: 5th and 6th November, 1997
and 29th January, 1998.

SMITH, J.

By Writ of Summons dated 19th day of July, 1995 the plaintiffs claim an Order for Specific Performance of Agreement for Sale dated 22nd October, 1992.

The first plaintiff is a trucker and the second plaintiff a pharmacist. They are husband and wife but not now living together.

On the pleadings it is agreed that at the time of entering into the Agreement for Sale the defendant was the sole registered proprietor of an estate in fee simple of land known as Lot 52A St. Jago Heights, Spanish Town in the parish of St. Catherine registered at Volume 1219 Folio 315. By consent a 'Consent Order' dated the 4th May, 1995 vesting the said property in the defendant's wife was received in evidence as Exhibit 4.

The defendant admits that on or about the 22nd day of October, 1992 he entered into an Agreement to sell the said property to the plaintiffs for a consideration of One Million Four Hundred Thousand Dollars ($1.4M) and signed a transfer to the plaintiffs of the said property.

In their statement of claim the plaintiffs aver that they have been willing and able to complete this purchase but to date through no fault of theirs the title has not been transferred.

In response the defendant in his defence claims that it was a term of the said Agreement that the completion date would be "on or about the 15th day of November, 1992" and that to date the plaintiffs

have not completed and as a result he was entitled to treat the contract as at an end. Thus the issue is clear.

The second plaintiff gave evidence and called Mr. Smart Bryan, attorney-at-law who had the carriage of sale, as a witness. The defendant did not give evidence and did not call any witness.

Miss Sonia Thomas, the second plaintiff testified that after the defendant agreed to sell the plaintiffs the said property, the defendant introduced them to Mr. Smart Bryan his attorney-at-law. The defendant took the second plaintiff to Mr. Bryan's office and they decided that Mr. Bryan would act for both vendor and purchasers.

Miss Thomas gave evidence that she paid Mr. Bryan $210,000.00 as 15% deposit on the purchase price. Mr. Bryan prepared the Sale Agreement and requested the parties to sign. The balance of $1,190,000 was to be paid on completion. Miss Thomas went to The Victoria Mutual Building Society.

By letter dated the 17th August, 1992 the Victoria Mutual Building Society wrote Mr. Smart Bryan confirming that the Society has approved a loan of $1,000,000 on the said property, subject to certain conditions. Mrs. Thomas said she told Mr. Bryan that she had the balance of $190,000 in cash.

In response to Dr. Barnett she said she sold a motor car and a one-bed-room apartment house to realise this sum. Mr. Bryan subsequently prepared and Instrument of Transfer. This Instrument was signed by the plaintiffs and the defendant.

The second plaintiff, Miss Thomas, swore that she visited Mr. Bryam on several occasions to enquire what was holding up the completion. She was told by Mr. Bryan that there were three encroachments on the land and because of these the title could not be transferred. She said she waited for about two months and was told the same thing. After waiting for a long time she was advised to see another attorney. She went to Mr. Mundell who had discussions with Mr. Bryan. On the 28th June, 1995 Mr. Mundell wrote Mr. Bryan demanding that the property be transferred to the purchasers (the plaintiffs) forthwith. That was not done consequently the Writ of Summons was filed.

Mr. Smart Bryan in his evidence stated that he met the plaintiffs through the defendant Mr. Aubrey Robinson. He was instructed to do a conveyance of the land from Mr. Robinson to Miss Thomas and Mr. Desmond Campbell. He testified that the property was not transferred because a series of problems developed starting with breaches of restrictive covenants on at least three sides of the property.

There were two variations. The vendor he said had taken in part of his neighbour's land. Mr. Robinson (the defendant) had contracted to purchase the parcel of land from his neighbour. The other variation he said relates to a fence which could be easily removed.

The Consent Order

This Order is the result of a matrimonial property dispute which ended in vesting of the property in the wife of the defendant.

The Agreement of Sale is dated 22nd October, 1992. The Consent Order is dated 4th May, 1995. Dr. Barnett submitted that the plaintiffs having only filed the writ on the 19th July, 1995 their laches deprived them of the court's discretion for the decree of the equitable remedy of specific performance, therefore the plaintiffs have no further equitable or legal interest in the land. The only question he submitted, is whether they have any valid contractual claim to damages.

Mr. Mundell on the other hand submitted that the delay was on the part of the defendant as testified to by Mr. Bryan. The defendant voluntarily transferred the property to his wife and Equity does not aid a volunteer. He argued that the defendant got another attorney-at-law to deal with the transfer of the property to his wife and there is no evidence that Mr. Bryan was consulted with a view to ascertaining the status of the Agreement for Sale.

If the agreement for sale is enforeceable then equity looks upon that as done which has been agreed to be done. It would follow therefore that if the agreement is enforceable at the instance of the plaintiffs then the defendant would have had no title in the property to pass to his wife on the 4th May, 1995. This principle has been expressed as follows:

> "Upon the signing of a valid and enforceable contract for the sale of land the vendor becomes in equity (and so long as the contract is specifically enforceable he continues to be) a trustee of the land for the purchaser, and the beneficial ownership passes to the latter subject to his paying the purchase money."

See 'The Law relating to the Sale of Land' by L. Voumard 2nd Edition at page 97. This position will however change if either party is unable to obtain a decree for specific performance by reason of delay or of the existence of some ground for setting the contract aside. A defective title will be no bar to specific performance.

LACHES

The undisputed evidence of Miss Thomas, the second plaintiff, is that after the letter from Victoria Mutual Building Society (Exhibit 3) was obtained she told Mr. Bryan that she had the balance of $190,000 and was ready to complete. Mr. Bryan told her that a wall which constituted an encroachment on the land had to be demolished in order for the title to be used. She was not told that the defendant was claiming that she was in breach of the contract or that the defendant was unwilling to complete the Agreement. Hence there was no reason for her to take any action.

There is no evidence that the plaintiffs knew of the Consent Order or that the defendant acted contrary to their interests.

On the 28th June, 1995, Mr. Mundell, on behalf of the plainttiffs wrote Mr. Smart Bryan and asked that the title be transferred to the plaintiffs forthwith. This letter was sent about seven weeks after the 'Consent Order' was made. The Writ was filed on the 19th July, 1995.

I agree with Mr. Mundell that the plaintiffs were not guilty of any delay. Indeed if there was any delay it was on the part of the defendant and/or Mr. Bryan. This is a classic example of the undesirability of joint representation.

In my view it would be manifestly inequitable in the circumstances of this case to deny the plaintiffs the remedy of specific performance where clearly, the delay, if any, in filing suit or otherwise was that of the attorney-at-law who, up to the time when

Mr. Mundell was contacted by the plaintiffs, represented both parties (the plaintiffs and the defendant). Moreover there is no evidence of the existence of any circumstance which would make it inequitable to enforce the Agreement.

Are there grounds for setting Agreement aside?

The next important question then is whether or not the agreement for sale made on the 22nd October, 1992 is specifically enforceable by the plaintiffs.

Dr. Barnett for the defendant referred to special conditions Nos. 6 and 7 which state:

> 6. The purchaser hereby agree to have a recognised lending institution give a letter of undertaking for the payment of the balance of the purchase price within six weeks from the date of signing of this agreement.
>
> 7. Time is the essence of the contract in this agreement.

He submitted that the purchaser was in breach of these conditions. He contended that the letter from V.M.B.S. dated 17th August, 1992 (Exhibit 3) was issued before the agreement and is not in the form of an undertaking but a conditional commitment. Further he argued that there is no evidence that the conditions were fulfilled.

The plaintiff he submitted was also in breach of condition 7 as the balance of the purchase price was not deposited with Mr. Smart Bryan before the date fixed for completion or any any other time.

Condition 6

The plaintiffs' evidence is that the letter from V.M.B.S. was delivered to Mr. Bryan. The second plaintiff also testified that the conditions attached to Exhibit 3 were fulfilled. Her evidence is uncontradicted.

It is clear on the evidence before me that the letter from V.M.B.S. was accepted by Mr. Bryan who had the carriage of sale, as being in compliance with special condition 6 of the Agreement. I cannot accept Dr. Barnett's submission that the plaintiffs were in default in this respect.

It is true that Exhibit 3, the letter from V.M.B.S., appears to predate the Agreement for Sale. To discover the reason for this we must look at the history of the parties' conduct and the pleadings.

From the second plaintiff's evidence and the documents included in the Agreed Judge's Bundle the following scenario emerges.

The parties had discussions concerning the sale of the defendant's property to the plaintiffs. The defendant took the plaintiffs to Mr. Smart Bryan's office. An agreement was reached for the plaintiffs to purchase the defendant's property.

On the 22nd July, 1992 the plaintiffs paid a deposit of $210,000. On the 17th August, 1992 the V.M.B.S. wrote to Mr. Bryan confirming that the Scoiety had approved a loan of $1,000,000. It is important to note that if the date on the Agreement is correct then at that stage the parties had not yet signed the Agreement for Sale. Miss Thomas said that she informed Mr. Smart Bryan and the defendant that the plaintiffs would be in a position to pay the total balance of $1,190,000.

On the 22nd October, 1992 the parties entered into the Agreement for Sale. This is not in issue (see the pleadings). Thus the Agrement for Sale was entered into long after the deposit was made and after the letter from V.M.B.S. was obtained.

The Instrument of Transfer purports to have been signed by the parties on the same day. Transfer tax was paid on the 23rd October, 1992 (see stamped copy Agreement).

However the 'Sales Agreement' in the agreed Judge's Bundle which was identified by the second plaintiff has the completion date as the 15th day of October, 1992. When this was brought to the attention of the court, the stamped copy Agreemnt was produced and received in evidence as Exhibit 6 at the request of Dr. Barnett. The date for completion on the stamped copy Agreement is 15th day of November, 1992. Even, a man on a galloping horse, would observe that the month originally there was whited over or obliterated and the word 'November' superimposed. This 'alteration' or "correction" was not initialled by the parties. Of course if the parties signed the Agreement on the 22nd of October then to have the 15th October,

1992 as the completion date would make no sense.

Paragraph 3 of the Statement of Claim states that "consequent on the signing of this Agreement the plaintiff deposited the total sum of Two Hundred and Ten Thousand Dollars ($210,000.00) and the defendant has signed a transfer to the plaintiffs of the said property."

This is admitted by the Defence and it is not disputed that the deposit was made on the 21st July, 1992 (see receipt Exhibit 1).

If the deposit was made on the 22nd July, 1992 it would follow that the Agreement was signed on or about the 21st July, 1992 that is before the deposit was made and not on the 22nd October, 1992. Thus we have a situation where the parties by their pleadings and the agreed documents are in agreement in respect of averments and evidence which lead to two diametrically opposed conclusions as to when the Agreement for Sale was signed.

On the one hand they agreed that the Agreement for Sale was signed after the deposit was made and also after the letter from V.M.B.S. was obtained. On the other hand they are at one in respect to statements which lead to the conclusion that the Agreement was signed before the deposit was made and before the letter from V.M.B.S. was obtained. The fact that the letter from V.M.B.S. appears to predate the Agreement is no doubt a result of this confusion.

To add to this confusion a close examination of the stamped copy Agreement will show that the date of the Agreement was written in after the document was photocopied. Whatever the explanation might be it is not for this court to speculate. I must state nonetheless that on the balance of probabilities I cannot conlude that the parties had expressly agreed that completion should be on or before the 15th November, 1992.

However even if the parties had expressly agreed that the date for completion should be the 15th November, 1992, there is no evidence that the plaintiffs were in breach.

As said before the second plaintiff's evidence is that she told Mr. Bryan she was ready to pay the balance of the purchase price. She said Mr. Bryan kept telling her that the title could not be trnasferred because there were problems relating to the boundaries.

Mr. Bryan supports this. There is no evidence to the contrary. Mr. Bryan did not assign any blame to the plaintiffs. The plaintiffs' readiness to perform is in my view equivalent to performance. The defendant therefore is not entitled to treat the contract as at an end.

Dr. Barnett in his usually helpful way cited many authorities on the effect of a clause making time of performance essential and on conditional contracts. However because I have concluded that on the evidence before me I cannot find that the plaintiffs have failed to perform their part and have found that delay in completing lay fairly and squarely at the feet of the defendant and his attorney-at-law, it is not necessary for me to make reference to those cases.

Joint Representation

The long period of delay is in my view partly attributable to the fact that one attorney-at-law was retained to act for both the vendor and the purchasers in the transfer of the property.

In **William Johnson v. Kenneth Thomas** et al S.C.C.A. No. 77/88 delivered 5th March, 1991 at p.6 the then President of the Court of Appeal said:

> "Although we were not addressed in any length as to the practice in Jamaica whereby one attorney acts for both vendor and purchaser in the transfer of registered land we did express the view that in an effort to avoid conflicts this practice should be adopted as seldom as possible."

During the cross-examination of Mr. Bryan by Dr. Barnett it became demonstrably clear that it was undesireable for Mr. Bryan to jointly represent the parties. Because of the possible conflict of interests which might have arisen it would have been prudent for Mr. Smart Bryan to have advised one of his clients to retain another attorney-at-law to effect the transfer.

Conclusion

Judgment is entered for the plaintiffs. Application for Decree for Specific Performance of the agreement granted. Costs to the plaintiffs to be taxed if not agreed.

Liberty to apply.