IIN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E226 OF 1992

BETWEEN	MYRTLE JOHNSON	PLAINTIFF
AND	CHESTER FRASER	DEFENDANT

Mr. Marlon Gordon of the Kingston Legal Aid Clinic for Plaintiff.
Miss D. Lightbourne and Mr. Herbert Hamilton for Defendant.

Heard: May 6, 7, 8, 11, 12,14, September 25, 1998

HARRISON J

Introduction

Legal proceedings commenced some six (6) years ago in this matter and approximately six years prior to the date of filing the Writ, the parties to the action were signatories to a contract concerning the sale of land.The records indicate that this is the third trial date fixed and no explanation was offered for the length of time this matter took before it got to the trial stage. The records reveal however, that there has been a constant change of Attorneys over the years.

The plaintiff is the owner of land situtate at Lot 477 Golden Acres, St. Catherine registered at Volume 1059 Folio 451 of the Register Book of Titles. In May 1984 the property was put up for sale and a Mrs. Ivy Blair was appointed agent for the Plaintiff as she was then residing out of the jurisdiction.

The evidence at the trial reveal that two contracts of sale were made and executed by the parties. The first contract was drawn up by an Attorney at Law who acted for both vendor and

purchaser whereas, the second contract was prepared and signed by the parties without consulting their respective Attorneys.

The First Contract

By a written Agreement made on the 1st day of May 1984 the plaintiff agreed to sell to the defendant the aforesaid property. The agreed selling price was Thirty Thousand Dollars ($30,000.00) with Three Thousand Dollars ($3,000.00) paid as a first deposit and the balance to be paid on completion of the sale. The contract contained special conditions which state respectively:

> "(a) This Agreement is subject to the Purchaser providing the Vendor's Attorney at Law not later than July 31, 1984 with an undertaking from a reputable financial institution for the payment of Twenty seven Thousand Dollars ($27,000) on transfer of the registered Title into the name of the Purchaser. Failing the above, the Agreement shall be cancelled. The Vendor shall refund to the Purchaser the deposit and all other monies paid herein less the Purchaser's half cost for the preparation of this Agreement and all other fees incurred.
>
> (b) This Agreement is subject to the Vendor removing from the Title the Mortgage Number 343433 which is presently endorsed on the Title by July 31, 1984. Failing the above the Agreement shall be cancelled and the Vendors shall refund to the Purchasers the deposit and all other monies paid herein less the Purchaser's half cost for the preparation of this Agreement and all other fees incurred in relation thereto."

There was no express provision in this contract making time of the essence.

The Second Contract

The parties made another agreement on the 10th March 1986, whereby the new contract price for the premises was set at Forty Thousand Dollars ($40,000.00). This agreement is exhibited as 1C and it states as follows:

"An agreement between Myrtle Jarrett and Chester Fraser agreed on sale of house and land situate at 20 Park Square, lot 477 Golden Acres for the sum of forty thousand dollars ($40,000) plus total cost of Lawyer fee three thousand four hundred and forty dollars ($3,440.00)."

Sgd. Myrtle Jarrett — Sgd. Chester Fraser

10th March 1986. — 10th March 1986

Witness Walter Blair

Witness T. ?

Endorsed on this agreement are the words "$3000 dep paid 17.4.84 to be the deposit on this."

A receipt Exhibit 1D, which was issued in relation to legal fees states as follows:

No._____ 3. 18. 1986

"RECEIVED FROM Mr. Chester Frazier the sum of One Thousand 900 Dollars Towards cost of Lawyer's fee. Bal. $1540 due 3. 31. 86 situated at.....due.....19... from Mr. Chester Frazier to Mrs. W Blair."

Per: Sgd. Myrtle Jarrett."

The Plaintiff's case

The plaintiff claims that she was unable to have the mortgage removed from the title.She contended that she had tried to locate the mortgagee in order to have the mortgage discharged but all her efforts had proved unsuccessful. She further contended that since there was failure of special condition (b) (supra) she was entitled to rescind the contract. Accordingly, on May 2, 1985 the plaintiff through her Attorney at Law wrote to the defendant cancelling the agreement. This is what the letter states:

May 2, 1985

Mr. Chester Fraser
4 Central Road, Central Village
St. Catherine.

Dear Sir:

Re Lot 477 Golden Acres Spanish Town - Myrtle Jarrett

Following on Mrs. Jarrett's visit to Jamaica I here confirm to you that she has given me instructions to cancel the Agreement of Sale of the premises herein to you as we have not been able to obtain the release of the mortgage as per this Agreement for Sale herein.

Yours faithfully,
Sgd. Jacqueline Samuels-Brown

P.S In any event please desist from collecting any further rental and should any be paid to you please remit same to myself or Mrs. Blair for Mrs. Jarrett.

In a further letter dated May 8, 1985 the Plaintiff's Attorney returned the sum of Two Thousand Nine Hundred Dollars ($2,900.00) which represented the purchase price less One Hundred Dollars ($100.00) which was the defendant's cost of the sale agreement. Several letters passed between the Attorneys and on May 14, 1991 the plaintiff served the defendant a Notice to Quit.

The plaintiff also claimed mesne profits for the continued use and occupation of the premises as the defendant is said to have been in occupation since May of 1986 and has rented the property thereby making a profit off the land.

The Plaintiff seeks now to move this Court for a declaration that she was entitled to terminate the Agreement and return the deposit to the defendant on the premise that the said Agreement was at an end. In addition to a claim for mesne profits she is also seeking an order for recovery of possession of the premises.

The defendant's case

The Defendant on the other hand has contended that the plaintiff was in breach of the agreement for sale as she failed to follow the statutory procedure provided by section 123 of the Registration of Titles Act or pursue to finality other legal remedies available to remove the said mortgage.

He maintained that he was given possession of the premises by the plaintiff's agent, Mrs. Blair and that he had effected substantial repairs to the building on the premises.

In relation to the claim for use and occupation the plaintiff alleged at paragraph 10 of the statement of claimas follows:

> "10. In or about the year 1985, the defendant agreed to pay to the plaintiff the sum of J$250 per month effective May 1986 for the use and occupation of the said premises, but paid nothing to the defendant on account."

In response to this allegation the defendant pleaded:

> "10. The defendant denies paragraph 10 of the statement of claim. The defendnat states that he was given possession of the premises by the Plaintiff's agent, Mrs. Blair, on signing the agreement. The parties further agreed that the defendant would take steps to terminate the existing tenancies, and that pending completion the defendant would

as a purchaser in possession meet the outgoings and undertake improvement and/or repairs of the said premises.

11. That in pursuant to the said oral agreement the defendant entered into possession of the said lands and expended the sum of $100,000 on effecting repairs to the said premises."

A letter from the defendant's Attorney reveals otherwise however, that there was agreement between the parties for the payment of $250 per month for his use and occupation. The letter states as follows:

June 26, 1991

Attention Mrs. Jacqueline Samuels-Brown

" Mr. Fraser has instructed us to send you the sum of $4000.00 as payment on account for his use and occupation of the above premises. Accordingly our cheque in this sum is enclosed. This payment is in accordance with an agreement between the parties for the payment of $250.00 per month for his use and occupation of the premises pending completion of the sale.

Mr. Fraser maintains that there is a valid agreement of sale with your client. We are taking further instructions from him with regard to your letter of the 7th June 1991 and ask that you take no steps in furtherance of the Notice to Quit dated 2nd May 1991 before first informing us....."

Yours faithfully
Sgd. Norma Von Cork.

The defendant further maintained that on the 10th March 1986 the plaintiff and himself by a

written agreement agreed to a variation of the terms of the agreement. According to him, the agreed variations were:

(i) that the purchase price of the land should now be $40,000 and
(ii) that he should pay the Attorney's fees amounting to $3,440.00.

He claims that he has remained in open and un-disturbed possession and occupation of the said premises pending completion and in or about May of 1991 he received a Notice to Quit from the Plaintiff' Attorney.

In fulfilment of special condition (a) the evidence revealed that the defendant was able to secure a mortgage form The Jamaica National Building Society in the sum of Twenty Seven Thousand Dollars and in a letter dated May 2, 1985 the Plaintiff's Attorney was duly informed of this. In this letter the defendant also pointed out that despite repeated requests the plaintiff has neglected or refused to complete the transaction. On June 7, 1985, the defendant indicated to the vendor that he was willing and ready to complete the transaction and requested of the vendor the instrument of transfer.

At the close of the case for the defendant an applicaion was made to amend the Defence and Counterclaim as follows:

1. "Further and in the alternative the parties by a written agreement dated 10th March 1986 entered into a new agreement for sale of the said land whereby the sale price was fixed at $40,000.00 and Attorneys' fees at $3440."

2. To delete the figure of $365,000 (loss of bargain) and to substitute therefor $2, 126, 968.75.

The Plaintiff's Attorney objected to the application on the ground that the amendment would create

an injustice to the plaintiff. The application to amend was refused.

Submissions

Mr. Hamilton submitted that for rescision to take place the plaintiff must satisfy the Court that she had taken all practical steps in order to complete the contract. He further submitted that the plaintiff having defaulted on her fundamental obligation to provide the defendant with a title free from all incumbrances, having put him in possession of the premises and allowed him to carry out substantial repairs which transformed the premises more habitable and valuable and having secured before the filing of the action, an order of the Court which allows for the discharge of the mortgage the plaintiff by invoking the contractual right to rescind seeks to benefit from the transformation of those premises by merely repaying the defendant's deposit. To allow this he said, would be a travesty.

He contended that the mortgage was discharged by the plaintiff yet no mention of it had been made in the pleadings. He further contended that in the answer to Further and Better Particulars the plaintiff when asked to state the particular efforts made to discover from the mortgagee or any other source the amounts owed in respect of either principal or interest, no response was forthcoming.

The issue then for determination according to Mr. Hamilton, is whether the plaintiff who has defaulted in performing the fundamental obligation of the contract i.e providing the defendant with the property free from all incumbrances and varied by agreement of the 10th March 1986 is entitled to rely upon the contractual right to rescind. He quoted and adopted excerpts from the undermentioned judgments:

1. In Re Jackson and Haden's Contract 1906 1 Ch 412.
2. Baines v Tweddle 1959 2 All E. R 724
3. In re Wiston and Thomas's Contract 1907 1 Ch. D 244
4. Bowman v Hyland 1877 8 Ch D. 588
5. Smith v Wallace 1 Ch. D 385
6. Tanner v Smith (1840) 10 SIM 673

7. Graham v Pitkin Privy Council Appeal 21/90 delivered 9th March 1992.

8. Wroth v Tyler 1973 1 AER 897

9. Selkirk v Romar Investments Ltd. 1963 3 AER 994

10. Plasticmoda (1952) 1 Lloyd's Law Report 527

Mr. Hamilton invited the Court to examine the conduct of the plaintiff in relation to this sale. He submitted that her conduct must be viewed in its entirety, that is, from the time of the agreement up to the date of filing the writ in June 1992. He asked the court to assess her conduct from the various documents exhibited in the agreed bundle as well as from her evidence given at the trial. He submitted that :

1.There was no evidence in relation to the mortgage agreement, that the plaintiff had obtained the prior written consent of the mortgagee before agreeing to sell or part with possession of the mortgaged premises as required by para 2H (1) of that Agreement.

2. The letter of the 2nd May 1985 speaks of no effort being made to obtain a release of the mortgage. Rather, all it spoke of was an act to rescind, based on instructions from the plaintiff. According to Mr. Hamilton, when that letter was written repudiating the agreement, the plaintiff had not taken all legal and practical steps to remove the mortgage. There was no application under section 123 of the Registration of Titles Act, no proof of any correspondence with the company and no evidence of any effort to contact Mr. Donald Chang although the Plaintiff knew where his office was, having gone there sometime in 1981. He said that even if the court were to find that the plaintiff had taken all practical and legal steps to remove the mortgage, it must then go on to consider the time she took to do so, because a delay of ten months after the completion date constituted a waiver of that condition.

3.The reference to a positive response in letter of the 8th May 1985 suggested that there was some type of response which was not disclosed.

4. The letter of the 21st June 1985 did not reveal any evidence as to the several attempts made to contact Mr. Chang. According to Mr. Hamilton that assertion should be viewed against the evidence given by Miss Barrett of the Registrar of Companies Office who testified that the Company's registered office was transferred to May Pen and it was still on the Register of Companies. Mr. Chang had testified that his office was established in May Pen since 1978 and it was always fully operational and that he had received no letters from the vendor's Attorney at Law nor was he aware of the suit pending in 1985 (that is, Suit E J 43/85 in which the plaintiff was seeking an order to have the mortgage discharged.) The letter of the 21st June states inter alia, as follows:

June 21, 1985

Messrs Karl Von Cork & Co.

.....

"I am in receipt of your letter of the 5th June 1985 and have since then heard from my client Mrs. Myrtle Jarrett.

Firstly, in relation to your aforementioned letter I must reiterate that it is my view that as regards special condition (b) my client is entitled to act on this provision. Subsequent to the signing of the Agreement for Sale, and even prior to that, we have made several attempts by registered mail and otherwise to contact Donald Chang Realty Limited to no avail.

We have had to take the step of filing an action in court against him which is presently pending. This information is being provided to you in order to demonstrate the fact that an effort has been made to discharge the mortgage. We have not been able to obtain same within the required time and are therefore relying on special condition (b)

for the very purpose for which it was included in the Agreement....."

Yours faithfully,

Sgd. Jacqueline Samuels-Brown

5. The agreement of the 10th March 1986, had varied the agreement of the 1st May 1984 and in any view constituted a waiver of the condition to rescind because that condition was a condition which ought to have operated from the 31st July 1984 or a reasonable time thereafter. This second contract had taken place after the purported rescission of the contract on May 2, 1985 hence this agreement could be viewed not as a variation but a rectification between the parties.

6. The receipt dated 18th March 1986 was evidence that the signature on it was that of the plaintiff. This receipt was given on the 18th March and was subsequent to the agreement of the 10th March 1986. The plaintiff's evidence was that, she was intimidated into entering that agreement but since the receipt was written and signed by the plaintiff some eight days after, Mr Hamilton contended that it must be taken as confirmation of her total acquiescence in the agreement of the 10th March.

7. The letter of the 7th June 1991 represented another attempt to re-negotiate the contract as varied. He contended that paragraph 3 would not be true since it was now known that the plaintiff had in her possession an order of the Court dated 3rd April 1991 which would have facilitated the discharge. That order was in respect of suit EJ 43/85. This is what that letter states:

June 7, 1991

Mrs. Norma Von Cork

.....

"Further to previous correspondence herein, and in an effort to expedite this matter we now write to you as follows:

1. The vendor stand by her instructions to cancel the agreement having regard to special condition (b) of the Agreement dated May 1, 1984. A Notice to Quit effective June 30, 1991 has been served on Mr. Fraser.

2. The vendor may be persuaded to re-negotiate the agreement if (a) Mr. Fraser pays up the sum of Twenty Three Thousand and Four Hundred Dollars ($23,400) due and owing for his use and occupation of the premises from and since May 1986 at the average rate of Three Hundred and Ninety Dollars ($390.00) per month - Two Hundred and Fifty Dollars ($250.00) per month of 1986, Three Hundred Dollars ($300.00) per month for 1987, Four Hundred Dollars ($400.00) per month for 1988, Four Hundred and Fifty Dollars ($450.00) per month for 1989, Five Hundred Dollars ($500.00) per month for 1990-91 and (b) if he is prepared to agree to a purchase price of One Hundred and Seventy Seven Thousand ($177,000.00).

We could settle on the round figure of Two Hundred Thousand and Four Hundred Dollars ($200,400.00) incorporating (a) and (b) as above.

We think that you will agree that this is well below today's prices. A lot in that area without any building thereon now goes for One Hundred and Twenty Thousand Dollars ($120,000.00).

3. We have been forced to adopt this course as despite our best efforts we have not been able to locate the mortgager (sic) or to otherwise have the mortgage discharged. The following have been our efforts:

   a. Since 1983 we had written several letters to Donald Chang Realty Limited indicating our readiness and willingness to complete but received no reply.

b. In that same year we filed Suit E.J 174 of 1983 JARRETT V CHANG with a view to having mortgage discharged. Messrs Daley, Walker and Lee Hing at first entered an appearance but subsequently removed their name from the record. There was never any direct intervention by the Defendant or anyone else on its behalf.

c. In 1985 we decided to strenghten our suit which we could have done either by amending the then E. J 174/83 or discontinuing it and filing a substitute one. We opted for the latter course as this was simpler, and file E. J 43 0f 1985.

d. Despite several notices and service of various documents on the address of the registered office of Donald Chang Realty there has never been any intervention by or on behalf of that Company to our suit.

e. Our searches and enquiries at the Registry of Companies reveal that that Company is in fact defunct.

f. As a consequence of the above on May 2, 1985 on behalf of the vendor we confirmed to the purchaser the cancellation of the agreement for sale herein.

g. Our researches into the relevant law confirm that the contract must in the circumstances be treated as an end and that the purchaser is entitled to a refund of his deposit. We offered the return in May 1985. This was refused and we still stand ready

and willing to return same...

.....

Please let us have your client's response to the above on or before the 30th of June, 1991 when the Notice referred to in 1 above expires as we have instructions to take ever (sic) appropriate step to recover possession....."

Yours faithfully
Sgd. Jacqueline Samuels Brown.

Mr. Hamilton also submitted that when the above facts are taken into consideration, the plaintiff's conduct fell within the ambit of the principles distilled from the cases cited by him in which rescission has been refused. He argued that the Plaintiff was reckless in not formally seeking the consent of the mortgagee before selling or parting with possession of the property and in not pursuing the statutory remedy under section 123 of the Registration of Titles Act. By varying the terms of the agreement and seeking to re-negotiate the agreement on the 7th June, 1991 she again waived the right to rescind. Her bona fides was also an issue, since by letter of the 7th June 1991 she asserted that despite her best efforts they were not able to locate the mortgagee or to otherwise have the mortgage discharged at a time when she had in her possession a Court order dated 3rd April 1991which allowed her to do so.

Further, the date of the Writ, the date of the Originating summons EJ 43/85 which was filed on the 27th February 1985, that is, prior to the date of rescission of the agreement on the 2nd May 1985 again raised the question of bona fides. The plaintiff ought to have waited on the outcome of that suit. The defendant was entitled therefore to the benefit of the Court order since it resulted from suit EJ 43/85 which the plaintiff consistently presented to the defendant as part of her efforts to secure the discharge of the mortgage pursuant to her obligation under the agreement.

He further invited the court to look at the demeanour of the plaintiff who clearly took the view that the contract was not binding until the mortgage was removed as she could use the rescission clause to negotiate increases in the purchase price, conduct not unlike the vendor in Smith v Wallace and when faced with the agreement she signed on the 10th March 1986 she pleaded duress and intimidation. He submitted that the Court should reject her attempt at manipulating condition (b) and find that the plaintiff had not discharged the onus which rested upon her to show that she was entitled to rescind.

The defendant on the other hand in his view, had complied fully in all his obligations under the agreement. Equity and fairness demanded therefore, that he received the benefit of the agreement. He submitted that the Rule in Bain v Fothergill was not appropriate in cases of registered land where the title is not shrouded with uncertainty. (See Watkis v Simmons SCCA 55/92 delivered 27th July, 1994; Wroth v Taylor 1973 1 All E. R 897). In relation to the claim for mesne profits, he submitted that there was no agreement for interest or mesne profit in the agreements signed and since the delay in completing was caused by delay of the plaintiff she was not entitled to interest or mesne profit.

Finally, Mr. Hamilton submitted that the plaintiff is not entitled to an order for recovery of possession. He contended that the defendant was a purchaser in possession, he had an equitable interest in the property and cannot be treated like a tenant and be served a notice to quit. In all the circumstances, the defendant was entitled to the relief of specific performance. Furthermore, he was a purchaser in possession with the vendor's consent so this would constitute an act of part performance. He had expressed his willingness to perform by serving a Notice to Complete dated 7th June 1985 and being a purchaser in possession damages would never really be a satisfactory remedy.

Mr Gordon submitted on the other hand, that the rule in Bain v Fothergill applied to this case. This meant that the vendor was only liable to pay nominal damages, that is the return of the deposit and she would not be liable for any loss of bargain. He contended that the plaintiff had denied putting the defendant in possession of the property but by allowing her some room that she lived outside of the jurisdiction it was possible with regards to the issue of possession that her Agent may not have

carried out the instructions in exact accordance with Plaintiff's intentions.

He further submitted that it was at the purchaser's own risk that he carried out alterations and that the order granted in suit EJ 43/85 was immaterial to the plaintiff's right to rescind.

Discharge of the Mortgage

One of the issues for determination is whether the plaintiff who has defaulted in performing the fundamental obligation of the contract, that is, providing the property free from incumbrances is entitled to rely upon the contractual right to rescind.

Now, a fundamental principle in the law of mortgages is the right to redemption and section 123 of the Registration of Titles Act seeks to protect the mortgagor's right to redemption. It provides:

> " In case a mortgagee or his transferee is dead or absent from Jamaica or cannot be found and no person is known by the mortgagor to be authorised to give a receipt for the mortgage money at or after the date appointed for payment thereof, it shall be lawful for the mortgagor to pay such mortgage money, with all arrears of interest due thereon to the Accountant General, in trust for the mortgagee or other person entitled thereto, and thereupon the interest upon such mortgage shall cease to run or accrue; and the Registrar shall, upon production of the receipt of the Accountant General for the amount of the mortgage money and interest, make an entry in the Register Book discharging the land from such mortgage, stating the time at which such entry was made; and such entry shall be a valid discharge from such mortgage, and the Registrar shall make a corresponding entry on the duplicate grant or certificate of title when produced for that purpose."

Between April 1984 and June 1992 when the Writ of Summons was filed, the plaintiff's Attorney claimed that all efforts to locate the motgagee in order to have the mortgage discharged proved futile. She has even indicated that suit was filed against the mortgage company in order to get the mortgage discharged. It was stated that the company could not be located and that further checks revealed that the company was defunct. However, checks by the defendant indicate that the company was still functioning. Indeed, Simone Barrett, head of the business entities at the Registrar of Companies testified in this trial on behalf of the defendant, that the company was still on the register of companies and that the company had trnasferred its registered office to 2 Donalds Avenue, May Pen, Clarendon.

In **Re Jackson and Haden's Contract** [1906] 1 Ch 412, Collins M.R said at page 419:

> "....in dealing with the right to rescind, the learned judges have always criticised most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is, in the circumstances of the particular case, a condition that ought to be applied for the benefit of the person who has introduced it."

Likewise in **Holness v Vaz** (1984) 21 J.L.R 382 at 385 Rowe J.A in commenting on a rescision clause opined that "notwithstanding that the stipulation is on its face quite unqualified, the Courts have added glosses to the clause and the vendor, in exercising his right under the clause, must act reasonably, and there must be no failure on his part." Sir John Romily M.R in **Greaves v Wilson** said of a vendor who has inserted a condition for rescision:

> "He is bound to perform the duties of a vendor as fully as he is able to do, subject to this exception, that it shall be reasonable, for it is always a question of the reasonableness of the thing required, and although it may be in his power to do it, it may involve him in so much expense and trouble as to make it unreasonable that he should be called upon

> to do it. Page v Adams establish this: That a vendor cannot make use of a condition to rescind a contract, for the purpose of getting rid of the duty which attaches to him, upon the rest of the contract, of making out the title."

Paragraph 5 of the Statement of Claim alleged that the plaintiff had taken every step, both practical and legal to remove the incumbrances. The law provides under section 123 of the Registration of Titles Act that the mortgage can be discharged by a specific procedure. Why then did'nt the plaintiff follow this procedure before the purported rescision? Was her Attorney ignorant of this provision? The evidence revealed however, that she had received an order of the court (albeit in another suit) before the Writ was filed in this matter, for the discharge of the mortgage under section 123 of the Registration of Titles Act. Why then, did'nt the plaintiff perform her contractual duties? It seems to me that she was the least concerned since the completion date had passed and the mortgage was not discharged.

The plaintiff has alleged in her statement of cliam that based on the rule in **Bain v Fothergill** the defendant was only entitled to the return of his deposit. In **Wroth v Tyler** [1973] 1 All E.R 897 it was pointed out that in Bain v Fothergill a distinction must be made between matters of conveyancig and matters of title. In that case Lord Hatherley said:

> "Whenever it is a matter of conveyancing and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyancing."

It is abundantly clear that there was no defect in the title of the plaintiff in the instant case so, it is my considered view that the plaintiff cannot rely upon the rule in Bain v Fothergill. A major problem associated with the earlier cases was that of proving title. In **Anthony Simmons v Bertram Watkis et al** a Supreme Court Judgment in E 111 of 1982, Ellis J quoting from **Engel v Fitch** (1869) L.R

40 said that :

> " the rule in Bain v Fothergill was founded entirely on the difficulty that a vendor often finds in making a title to real estate, not from any default on his part, but from his ignorance of the strict legal state of his title."

He added that the rule was founded on the need to mitigate the harshness against a defendant who defaulted from ignorance. In my view the rule is inappropriate in cases of registered land where title is not shrouded in uncertainty. Here was a case in which there was no problem regarding ownership of the land as it was registered in the name of the plaintiff. Thus it seems to me that the rule in Bain v Fothergill would not avail the plaintiff.

In considering the second contract a distinction need to be drawn between variation and rescision. In variation the contract continues to exist in an altered form while in rescision the contract is extinguished. The decision on this point will certainly depend on the intention of the parties upon an examination of the terms of the subsequent agreement and from all surrounding circumstances. If the changes did not go to the very root of the contract it can be considered as a variation. In the second contract the purchase price had changed; there was agreement that the deposit on the first contract was to remain and the defendant was called upon to pay additional legal fees. No other terms were set out so it could reasonably be inferred based on the original contract that the parties would still expect to fulfil conditions relating to mortgage financing and discharge. No date was set for the fulfilment of the second contract but it would be expected that it should be completed within a reasonable time. The evidence revealed that the purchaser/defendant had always been ready and willing to perform the contract from May 1985 and had been waiting on the plaintiff to fulfil her part of the contract by getting the mortgage discharged from the title.

In **Rose v Forsythe** (1988) 25 J. L. R 437, there was a contract for sale of land with a special condition which stated that if the applicant failed to obtain subdivision approval and modification of

a covenant on his title by June 30, 1984 the contract would be null and void and the purchaser would be refunded the purchase money and would give up possession forthwith. The purchaser paid the purchase money in full and went into occupation. The vendor obtained the necesssary subdivision approval before the date stated in the condition but took no steps to have the covenant discharged. However, subsequent to the date stipulated in the special condition he forwarded the instrument of transfer to the respondent. The respondent sought and obtained the discharge of the covenant and later requested the applicant to forward the duplicate certificate of title with the instrument of transfer in registrable form so that the contract could be completed. The vendor refused and the purchaser sought summary judgment. The court granted summary judgment in favour of the purchaser and refused leave to the vendor to defend. In an appeal against this decision, the applicant claimed that his non-performance as required by the special condition in the contract automatically brought the agreement to an end and accordingly he should have been granted leave to defend the action. The Court found that the failure of the applicant to apply for the modification of the restrictive covenant was a breach of contract and he was disentitled from relying on his own breach to avoid the contract, The court also found that in all the circumstances the conduct of the applicant indicated that even though the date in the special condition had passed the contract should subsist and continue. Morgan J. A opined that a purchaser cannot be penalised because the vendor has failed to do what he must do within a stated time in the contract. In such a case it was the purchaser who had the option of avoiding the contract.

The plaintiff in the present case could have discharged the mortgage in my view even before the original contract had expired. The fact that she got an order from the court to discharge the contract before the Writ was issued and still made no effort to honour her contract indicated that she had no intention of performing her contractual obligations.

Occupation and repairs done to the premises

Let me now turn to the issue of the repairs being carried out by the defendant. The plaintiff's Attorney pointed out in a letter to the defendant that he was doing repairs at his own risk. There are discrepancies with regard to the state of the premises when the defendant took possession. The

witness called by the defendant supports the defendant however, when he said that the premises were in a deplorable state when the defendant went into possession. In paragraph 10 of the Statement of Claim the plaintiff alleged that the defendant had agreed to pay for use and occupation of the premises. It could reasonably be expected therefore, that if the premises were in such a poor state that the defendant would have to make the place habitable before entering into occupation. The value of the property has no doubt improved tremendously and part of this was due to the repairs carried out by the defendant. However, the plaintiff is claiming that the defendant had done the repairs at his own risk and he ought not to be allowed a lien or an equitable charge on the property.

In **Worthington v Warrington** 8 C. B 133, the plaintiff was a tenant with an option to purchase and had without the permission of the defendant commenced making extensive alterations and improvements. It was said:

> "....everyone who purchases land knows that difficulties may exist as to the making of a title, which were not anticipated at the time of entering into the contract. But, if the purchaser thinks proper to enter into possession, and to incur expenses in alterations, before title is ascertained, he does so at his own risk....the plaintiff should have taken care to ascertain that the title was good before he proceeded to lay out money upon the premises..."

That case can be distinguished from the present however. Here, the defendant was not a tenant but he was a purchaser and who expected, based on the contract with the plaintiff, that he would have the title to the land as soon as the mortgage was discharged. I do agree with Mr. Hamilton that the defendant was a purchaser in possession with the vendor's consent and therefore had an equitable interest in the property. I hold that the plaintiff has not established on a balance of probabilities that she is entitled to mesne profits. Neither on these facts would she be entitled to an order for recovery of possession. The defendant could not in my view, avoid paying for the use and occupation of the premises from the date he took possession.

Assessment of the evidence given by the parties and their demeanour

I have had the benefit of assessing the demeanour of the parties. So far as the plaintiff is concerned, I must say that I was not impressed at all with her performance in the witness box as she gave her evidence. At times she was quite evasive in answering questions and the Court had to remind her of her responsibilities to the Court and to Counsel. At one stage of the proceedings she was saying that she was intimidated by the defendant when the second contract was signed. She would have caused the Court to believe that she did not sign the agreement but when she was confronted with the document and was shown her signature she resiled from her former position. I do agree with Mr. Hamilton that since the receipt, Exhibit 1D, was signed by her some eight days after the agreement to the second contract, this must be taken as confirmation of her total acquiescence in the agreement of the 10th March 1986. This, to my mind, would certainly nullify any contention by her that she had signed under duress on the 10th day of March 1986. I find that she had not taken all practical steps in order to complete this contract. It is my considered view, that by varying the terms of the agreement and seeking to re-negotiate the agreement again on the 7th June, 1991, she would have waived her right to rescind.

The defendant on the other hand was quite straighforward in his account of what transpired between himself and the plaintiff. He was also quite frank in his answers under cross-examination and I was quite impressed with him. I regard him as an honest and truthful witness.

Conclusion

From the evidence in this case it is evident that the plaintiff had delayed in completing the contract with the hope of obtaining a higher price for the property. This is obvious from the fact that the original sale price was increased from $30,000 to $40,000 and in 1991 she was asking a new price of $177,000.

There had also been an inordinately long period of delay on her part before she wrote cancelling the agreement for sale. **Graham v Pitkin** Privy Council Appeal 21/90 delivered on the 9th day of March 1992 shows that if a vendor delays in invoking the right to rescind he will be taken to

have waived that condition. In the present case the plaintiff took some ten (10) months after the date of completion to invoke the clause dealing with rescision. This delay to rescind to my mind, would be fatal.

The evidence further revealed that the defendant had always been willing and ready to complete the contract having done all that was required of him to be done. Considering all the circumstances of the case and the submissions of both Counsel, it is obvious that the conduct of the plaintiff was most unsatisfactory. She could not have expected to move a Court of Equity on her behalf. Equity and fairness demand on the other hand , that the defendant receives the benefit of the agreement.

In fine there shall be judgment for the Plaintiff on the claim in respect of the defendant's use and occupation of the premises with costs to be taxed if not agreed and there shall be judgment for the Defendant on the Counterclaim with costs to be taxed if not agreed. The Court hereby declares:

1. That a valid and enforceable contract of purchase and sale of the said premises for a price of $40,000.00, exists between the Plaintiff and the Defendant.

2. There be specific performance of the contract dated March 10th 1986 in relation to the abovementioned sale agreement.

3. The defendant is hereby ordered to pay the sum of $37,000 being the balance of the agreed purchase price.

4. The defendant pays the sum of $250 per month for use and occupation of the premises from May 1986 up to the time of this judgment.