



[2017] JMSC Civ. 51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV05056

BETWEEN	Marjorie Knight	CLAIMANT
AND	Lancelot Hume	DEFENDANT

Heron Dale and Mrs. Candice Dale instructed by H.S. Dale & Co for the claimant

Lawrence Haynes for the defendant

Heard: 8th March and 7th April, 2017.

Property law – Contract - Breach of contract - Contract for the sale of undeveloped land - Purchaser put in possession - Land improved - Specific performance - Whether claim statute-barred - Limitation of Actions Act ss. 3,25, 27, 28 & 30 - Local Improvements Act ss. 5 & 13.

EVAN BROWN, J

Introduction

[1] In her Fixed Date Claim Form (FDCF), filed on the 24th October, 2014, the claimant seeks specific performance of a written agreement for sale, dated 18th July, 1988, for one square of land located at Shrewsberry Fruitful Vale in the parish of Portland. By the same FDCF, a declaration is also sought that she has an equitable interest in the same lot of land for which she says the defendant was given possession. By the second declaration, the claimant seeks to have the defendant subdivide the land and provide the parent title to enable the claimant

to obtain a registered title. Lastly, the claimant seeks an order that the defendant signs the subdivision application and transfer, or to empower the Registrar to execute the same in the event of the defendant's failure to obey the order.

Case for the claimant

- [2]** In her affidavit in support of the FDCF, filed on the 24th October, 2014, the claimant said on the 18th July, 1988, she entered into an agreement with the defendant, her brother, to purchase the square of land for \$1,000.00. She paid the sum in full and was given possession. The receipt was exhibited.
- [3]** She erected a house on the land consisting of three bedrooms, living room, dining room, bathroom and kitchen. The house was completed in 1990. When the house was completed the claimant was living in the United States of America. She allowed her mother to reside in the house from 1990 until her death in 1999.
- [4]** The claimant said she attended her mother's funeral. After the funeral, and in the presence of other siblings, the defendant asked to be allowed to occupy the house as he was then living in rented premises. By their agreement, the claimant allowed the defendant to occupy the house on the condition that the front room was kept vacant for her use and occupation on her trips to Jamaica. Subsequently, the claimant visited Jamaica every year and stayed at the house.
- [5]** In 2011 the claimant came to the island with her ailing husband. She stored her furniture and personal belongings in the room (presumably the same front room). The defendant, the claimant said, sealed off the passage leading to the bathroom. She spoke to the defendant about that and he said he did not want her husband there. In the same year, the claimant commenced improvement of the existing structure by adding another bedroom, kitchen and bathroom. That phase of the construction was completed in 2014.
- [6]** In 2014 the claimant advised the defendant that she was adding another verandah. He abused and threatened her. She reported him to the police and

was advised to get a lawyer. Hence, apparently, the filing of this claim. The claimant was not cross-examined.

Case for the defence

- [7]** The defendant filed no affidavit in response to the claim. He, however, filed a defence on the 6th February, 2015. Although at the hearing the defendant placed reliance on only one of the six paragraphs, it is convenient to set out the defence in full. In paragraph one he denied that the claimant lived at the address given, it being identical to that of the disputed property. He averred that to the best of his knowledge the claimant lives abroad in the United States at an address unknown to him. In paragraph two he denied having sold the claimant any land or at all.
- [8]** In the third paragraph he denied paragraph three of her affidavit in support of the FDCF (entering into the agreement; signing the agreement as a receipt, that the sum was paid over in full.) He counter-averred that the claimant did not erect any house on the land and that it was not the claimant's right to give permission to him to live on his own land and in his own house.
- [9]** In paragraph four he asserted that he erected and completed the house on the land in question with the help of a "Build on Own" loan from the National Housing Trust. The claimant responded to this averment in an affidavit filed on the 11th September, 2015. At paragraph twelve she denied the assertion and countered that in her absence the defendant installed a bath in the bathroom which previously had only a shower, grilled the verandah and replaced the board windows with glass.
- [10]** In paragraph five, the one relied on before me, the defendant contended that the claim is statute-barred and, in paragraph six, said as a consequence the claimant is not entitled to any of the reliefs claimed in the FDCF.

Issues arising

[11] Having regard to how the defence was mounted, the substantive issue for my determination is whether the claim is statute-barred.

Submissions on behalf of the defendant

[12] Learned counsel for the defendant submitted time started to run against the claimant from the date of the agreement, namely 18th July, 1988. Since the claim was filed in 2014, it is outside of the limitation period of twelve years. That limitation period expired in the year 2000. Section 3 of the ***Limitation of Actions Act*** was cited.

[13] The only question then, it was submitted, is this, is there any evidence of postponement in the claimant's affidavits? That question admitted of a simple answer in the negative. He elaborated. There is no indication of any action taken or acknowledgement by the defendant. Since it is a written agreement that is being relied on, it would equally have to be a written acknowledgement from the defendant to interrupt the running of time. See ***Ruth Brown v St. Clair Perry*** 1 WLR [1991] 1297.

[14] The submission continued, time having expired, the claimant's rights are extinguished and even if there was an acknowledgement after the expiration of time, it would be to no avail because the contract would have been entirely extinguished and beyond resuscitation. That point notwithstanding, there is no averment in the evidence that there was any such attempt on the part of either the claimant or the defendant. See ***Sanders v Sanders*** (1881) 19 Ch.D. 373. In sum, the claimant cannot get out of the strictures of the ***Limitation of Actions Act*** because time has ran against her and there is nothing in fact or law to show that time was postponed. Therefore, counsel concluded, there is no ground for bringing the claim. There is no cause of action and the claim should be dismissed.

Submissions on behalf of the claimant

[15] Learned counsel Mr. Heron Dale disagreed that the claim was statute barred. He continued, for the **Limitation of Actions Act** to be applicable, the general principle is that the person must not be on the disputed property by force, permission or in secret. The evidence is that the claimant got possession, built a house on the land in which her mother lived and the claimant travelled back and forth every year. Her mother died in 1999 and upon her death the defendant asked and was allowed to occupy the house with one room being reserved for the use and occupation of the claimant whenever she visited. Therefore, the statute cannot be applicable. **Anson's Law of Contract** was cited in support. It was submitted that the learned authors are of the view that specific performance, as well as declarations, falls outside the **Limitation of Actions Act**. Reliance was also placed on **Green v The Administrator General of Jamaica** [2016] JMSC Civ. 161.

Analysis

[16] All contracts for the sale or transfer, or other disposition of an interest in land must be either in writing or evidenced in writing: sections 2 and 4 of the **Statute of Frauds 1677**. This writing or memorandum, must identify the parties by names or description and the capacity in which they contract. The memorandum must also speak to the material terms of the contract and signed by the party to be charged. (See **Treitel The Law of Contract** 12th ed. Para 5-015 to 5-019) The material terms of the contract include a description of the property to be purchased, the agreed price, the date for completion (if it was fixed), the stages of payment of the purchase price and payment of the deposit: **Commonwealth Caribbean Property Law** 2nd ed pp. 272-273.

[17] The contract to convey the legal estate in the land is called an estate contract: **Commonwealth Caribbean Land Law** p. 158. Upon conclusion of the contract, the purchaser acquires the equitable interest in the land, the legal estate

remaining with the vendor until the conveyance has been executed. Further, until completion the vendor holds the legal estate on trust for the purchaser: **Riverton City Ltd v Haddad** (1986) 40 WIR 236, 258-264. The vendor has a right to retain possession of the estate until the purchase money is paid, unless there is an expressed stipulation concerning the time for delivering possession.

- [18] Where the contract is breached by the vendor, the purchaser has rights both at common law and in equity. The purchaser may sue for damages. Damages, however, may not be an adequate remedy. In that event, the purchaser may seek a decree of specific performance, compelling the vendor to convey the legal estate to him; that is, to convey the land to him: **Commonwealth Caribbean Land Law** p.158.
- [19] That having been said, the right to bring a claim for a breach of contract may be extinguished by operation of the **Limitation of Actions Act**. Two reasons have been proffered for subjecting claims to a limitation period. Firstly, stale claims will in all probability rest upon stale evidence and stale evidence is most likely to be unreliable. Therefore, the greater the lapse of time between when the cause of action first arose and when the claim is brought, the greater the chances of it being founded on stale and unreliable evidence: **The Principles of Equity & Trusts** p. 558. Secondly, without any limitation period defendants could never be certain whether or not a claim will be brought against them. The limitation period, therefore, removes this uncertainty and the possible resultant hardship which it may precipitate: **The Principles of Equity & Trusts** *op.cit.* What, therefore, is the applicable limitation period?
- [20] According to the learned authors of **Cheshire, Fifoot and Furmston's Law of Contract** 12th ed at page 656, the time for bringing an action founded on a simple contract is limited to six years "from the date on which the cause of action accrued". Similarly, a claim arising from the breach of a contract under seal, or a specialty contract, must be brought before "the expiration of twelve years after the date on which the cause of action accrued".

[21] Section 3 of the **Limitation of Actions Act** provides that:

"no person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or bring such action or suit, shall have first accrued to some person through whom he claims, or if such right shall have not accrued to any such person through whom he claims, then within twelve years next after the time at which the right to make such entry, or bring such action or suit, shall have first accrued to the person making or bringing the same."

[22] At the expiration of the period limited for bringing the claim, "the right and title" of the person so barred "shall be extinguished". (See section 30 of the **Limitation of Actions Act**). That is the position at law.

[23] Attention is now turned to the position in equity. The limitation law originally applied only to courts of common law: **Snell's Equity** 31st ed para 5-16. Gradually, the reach of the limitation law was extended to equitable claims. In the learning of **Snell's Equity**, the **Real Property Limitation Act** 1833 enacted that "an action to recover land or rent in equity must be brought within the same time as if it were a legal claim". Similarly, "the **Trustee Act** 1888 limited the time within which an action must be commenced against a trustee for breach of trust". Subsequent changes in the law carried us to the present position.

[24] According to the learned editors of **Anson's Law of Contract** (cited by the claimant's counsel), under section 36(1) of the English **Limitation Act 1980** the statutory periods of limitation do not apply to claims for specific performance or other equitable relief, except in so far as the court may apply them by analogy. In the view of the learned authors, those analogical situations are relatively few. Generally, those situations include those in which there is 'correspondence' between the remedies concurrently available at law and in equity "and equity is providing a remedy analogous to that which would have been available at law".

[25] That sweeping statement of the law in **Anson's Law of Contract** is qualified in both **The Principles of Equity & Trusts**, *op.cit.* and **Spry's Equitable Remedies**, 7th ed (2007) at pp.416-423 (**Spry**). According to the author of the

former work, "there are specific statutory limitation periods that apply to certain types of equitable claim". For example, "claims brought by a beneficiary, or by a trustee on behalf of a beneficiary, to recover trust property or any breach of trust" must all be brought within six years from the time when the cause of action first accrued. **Spry** also cites claims by beneficiaries for breaches of trust by trustees as an example of express statutory provision limiting equitable rights.

[26] According to **Spry**, there are several other ways in which a statute of limitation may be raised when a claimant seeks an equitable remedy. Five ways are discussed in the work, including the last mentioned in the preceding paragraph. **Spry** agrees with Anson that a statute of limitation may be raised by analogy but limits it to equity's exclusive, rather than its auxiliary or concurrent, jurisdiction: *op.cit.* at p.419. The first step is to discover whether there is a special statutory provision which impacts directly the claimed equitable remedy, expressly or by implication. If that enquiry proves futile, "the court may decide that the material equitable right" and legal rights to which a limitation period applies are dissimilar and, therefore, the limitation period should be applied to the equitable right also: *op.cit.*

[27] Whereas in some instances the court proceeds by analogy to apply a statute of limitation to a claim for equitable relief, in others the court reaches the same destination by the route of acting in obedience to a statute. When the court does this it is said to be acting in its auxiliary jurisdiction, that is, where an equitable remedy is sought to protect a legal right. This is typically where the statute makes the legal right void or unenforceable. In the case of the former, the basis for the intervention of equity no longer exists.

[28] Likewise, an unenforceable legal right is treated as unenforceable in equity. This is achieved in one of two ways or both ways. Firstly, the relevant statutory provision may expressly or by necessary implication apply to all material remedies, wherever available, at law or in equity. Secondly, even if the provision

is concerned exclusively with the protection of a legal right, "it would be unconscionable to allow it to be circumvented by resort to other courts".

[29] From the foregoing, it may be apparent that it is not a correct statement of the law to say, as was submitted, that the **Limitation of Actions Act** has absolutely no application to a claim for specific performance. It clearly applies by analogy. So that, a claim for specific performance ought properly to be brought within the time allowed for the prosecution of claims for recovery of possession of land under section 3 of the **Limitation of Actions Act**.

[30] Even if that is incorrect, section 25 of the **Limitation of Actions Act** puts the matter beyond doubt. Section 25 is set out below:

"No person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained [twelve years under section 3] he might have made an entry, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity."

[31] Under section 25 the time for bringing the claim in equity is, therefore, limited to the same period of time within which to bring the action at law, namely, twelve years. It appears, however, that where there is concealed fraud the strict twelve years will not apply. By virtue of section 27 of the **Limitation of Actions Act**, the right to bring a suit for the recovery of land is "deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered". So that, although the twelve years may have expired when the fraud is discovered, or might have been discovered with reasonable diligence, that would not be a bar to bringing the claim.

[32] And even if that were not so, a claim for specific performance may yet be defeated by delay. The maxim "delay defeats equities" or "equity aids the vigilant and not the indolent" expressed under the compendium of "laches", may operate in bar of the claim. This much can be gleaned from section 28 of the **Limitation of Actions Act**. The jurisdiction of a court of equity to refuse relief on the ground

of "acquiescence, or otherwise, to any person whose right to bring suit may not be barred by virtue of this Part" is preserved.

- [33] Since counsel for the defendant expressly excluded laches from consideration (he specifically said he was not relying on it), nothing further will be said about it. Neither did counsel for the defendant take any issue with the sufficiency of the written receipt tendered into evidence as proof of the agreement between the parties for the purchase of the land. Indeed, it was not disputed that the claimant was put in possession by the defendant. Having led no evidence to support any of the averments in the defence, the defendant stands condemned by his failure so to do. It is therefore concluded the agreement both satisfies the **Statute of Frauds** and is evidenced by part performance. The upshot of that finding is that the claimant obtained an equitable interest in the disputed property.
- [34] So, the case for the defence amounts to this, I sold you a part of my land and placed you in possession. Having placed you in possession, you constructed a house upon the land which, after the passage of some years, you allowed me to occupy, reserving a room for yourself. To this house you made additions while I continued to enjoy occupancy. Our relationship soured resulting in a report to the police and the filing of this claim. To this claim my only defence is that your claim is stale dated. The claim is stale dated simply because the time within which you should have brought the claim accrued from the date of the receipt I issued (which I previously denied).
- [35] Critical to the operation of the limitation period is when the right to bring an "action or suit" first accrued. In other words, the pivotal consideration is when time starts to run against the person making the claim. Central to the understanding of the limitation law is the appreciation that there must be a trigger to set time in motion against the claimant. Practically, people are not moved to assert (or protect) their rights in the absence of a threat to those rights.

- [36]** The claimant was in possession and, pursuant to her contractual rights improved the land by the construction of the house. The land had not been subdivided and therefore title could not be given. There was apparently no time set for completion. Time was never made of the essence. Where time is not made of the essence, completion ought to be within a reasonable time. What is a reasonable time must bear directly upon the circumstances of the case. In this case, these sibling parties were co-existing amicably and there was apparently no urgency to complete. I dare say they may have continued merrily in that suspended legal state had their relationship not soured.
- [37]** From the FDCF and the claimant's affidavit filed on the 24th October, 2014, there is an acceptance that the defendant is the holder of the registered title to the property. There is, therefore, no contention that he cannot complete by conveying the property. Rather, his breach is the delay in making the conveyance. Is there any evidence that he did not intend to complete?
- [38]** Ground six of the FDCF is to the effect that "the defendant refused to provide the title or take steps to have the land surveyed and a subdivision done so that the Claimant can obtain title". That averment is repeated in the claimant's affidavit, filed on the 24th October, 2014. The defendant did not dispute this contention in the defence filed. The difficulty, however, is that the defendant's refusal is not given any temporal context.
- [39]** That notwithstanding, having regard to the defendant's averred denial of the fact of the agreement, which remains unsupported by evidence, and the falling out of the parties, it seems reasonable to infer that the refusal to survey, subdivide and otherwise facilitate title to the claimant came in the wake of their falling out. If that is acceptable, then the claimant's right to bring an action first accrued in 2014.
- [40]** If that is too generous an interpretation, then I would hold that the right to bring the action first accrued in 2011. The defendant by his act of sealing off the passage to the only bathroom in the house and objecting to the presence of the

claimant's husband at the premises signalled his intention not to complete. His intention not to complete was at least intimated as he was, by those acts, exercising acts of ownership over the property. Since he was exercising acts of ownership, it seems reasonable to assume that he had no intention to complete the sale. The sealing off of the passageway to the bathroom and objection to the presence of the claimant's husband were together the claimant's cue to spring into action.

[41] In any event, whichever year is accepted (2011 or 2014) as the time the claimant's right to bring this claim first accrued, it is pellucid that the claim was filed well within the limitation period. If 2011 is the operative date, the claim was filed only three years after and if it was in 2014, the claim was filed in that same year.

[42] Learned counsel for the defence, however, strenuously maintained that the operative date is that which the receipt bears, namely the 18th July, 1988. No authority was cited to support the position that time started to run from the date of the agreement. Respectfully, *Ruth Browne v St. Clair Perry*, *supra* and *Sanders v Sanders*, *supra*, both cited by learned counsel for the defence, do not assist as the question of acknowledgement does not arise for consideration.

Is specific performance available

[43] Since the claim is not statute-barred, the question becomes, can the claimant obtain a declaration for specific performance? The defendant sold the claimant land measuring approximately one square of the approximately five acres that he owns. The sale of approximately one square of the approximately five acres is deemed to be a subdivision of the land under section 5 (4) of the *Local Improvements Act*.

[44] The *Local Improvements Act*, section 5 (1), enjoined the defendant to seek subdivision approval prior to entering into the contract of sale which involve subdivision. The failure, however, to seek sub-division approval before contracting to

sell a portion of the land does not affect the validity of the contract: **Local Improvements Act**, section 13 (1). The contract so entered cannot "be executed by the transfer or conveyance of the land ... unless and until" subdivision approval has been obtained.

[45] So then, the defendant having failed to first obtain sub-division approval before the sale, has a contractual obligation to do so after making the contract. It is a condition precedent to the transfer or conveyance of the land. Having received the full purchase price and placed the claimant in possession, he is contractually bound to transfer the land to the claimant.

[46] The defendant's refusal to seek sub-division approval has come too late in the day to allow the claimant to exercise her right to withdraw from the contract. Under section 13 (2) of the **Local Improvements Act**, the claimant had the right to withdraw from the contract, if after the passage of a reasonable time, the defendant failed to obtain sub-division approval. The claimant would then have been entitled to the return of the purchase price, together with interest at the rate of seven *per centum* per annum.

[47] That option, however, has gone by the board because the subject of the claim is no longer an empty, unimproved lot. The claimant has, since being placed in possession, made what I appreciate to be considerable improvement to the land. While the value of the structure erected is not before the court, one bedroom, kitchen and bathroom were added to the original structure comprising three bedrooms, living, dining, bathroom and kitchen. Even without the improvements, the land itself would have appreciated in value since 1988, that is a space of twenty-nine years.

[48] That takes me to the question of damages in lieu of specific performance. The defendant's refusal to complete would have to be treated as a failure to complete. The normal measure of damages where the defendant fails to complete is the market value of the property at the contractual time for completion less the

contract price: *McGregor on Damages* 18th ed para 22-003. Whatever the monetary value of the land is, as improved, the court would have to be convinced that the defendant is in a position to pay. The means of the defendant is not before the court. Consequently, the court cannot say that damages would be an adequate remedy. In the circumstances, it appears that a decree of specific performance is what meets the justice of the case.

Conclusion

[49] The claimant obtained an equitable interest in the approximate one square of land when she paid the defendant the purchase in full and was put in possession. The defendant, by those acts, bound himself to complete the bargain by transferring or conveying the land to the claimant. The defendant is, therefore, contractually obligated to fulfil all conditions precedent to the claimant obtaining title to the approximate one square of land. The claimant is therefore entitled to the declarations sought.

[50] I therefore make the following orders:

1. Specific performance of the written agreement dated the 18th July, 1988 between the claimant and the defendant for a square of land located at Shrewberry Fruitful Vale in the parish of Portland which was sold to the claimant.
2. A declaration that the claimant has an equitable interest in one square of land situated at Shrewberry Fruitful Vale in the parish of Portland being a part of a bigger portion of land that was purchased by the claimant from the defendant on the 18th July, 1988 and for which the claimant was given possession.
3. A declaration that the defendant take steps by way of sub-division to enable the claimant to apply for a registered Certificate of Title for the said square of land located at Shrewberry Fruitful Vale in the parish of Portland and provide his Certificate of Title for same to be done within six months of the date of this judgment.

4. An order that the defendant signs the necessary sub-division application and transfer, failing which the Registrar of the Supreme Court is empowered to sign.

5. Costs to the claimant, to be taxed if not agreed.