Judgment 1 Bar

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E 182/91

BETWEEN	DAVID Mc HUGH	PLAINTIFF
AND	DUDLEY GRANT	DEFENDANT

Mr. Garth McBean and Miss N. Whitely instructed by Dunn Cox Orrett and Ashenheim for the Plaintiff.

Mr. D. Scharschmidt Q.C and Mr. I Wilkinson instructed by Ian Wilkinson & Co for the Defendant.

Heard : February 3, 4, 5, May 18, 1999

HARRISON J.
On the 5th February, 1999 I completed trial of this matter, reserved judgment and promised to deliver same early. I do apologise for the delay and now seek to fulfil this promise.

The Plaintiff's case

The plaintiff who is a Minister of Religion for the past 20 years and pastor of the Lighthouse (Apostolic) Church in Spanish Town has brought this action against the defendant for breach of contract. On the 26th September, 1986 the parties signed a sale agreement (referred to as "The Agreement") relating to land with a partially constructed Church thereon, known as 128 Brunswick Avenue, Spanish Town, St. Catherine part of land registered at Volume 1143 Folio 80 of the Register Book of Titles at a price of $230,000.00. The deposit of One Hundred Thousand Dollars ($100,000.00) was duly paid to the defendant and other terms and conditions of sale are set out in the Agreement . He was put in possession of the land; he started using the building as a Church since the 30th September, 1986 and substantial improvements were carried out on it.

Under and by virtue of the said Agreement, it was further agreed between the parties that the plaintiff was entitled to a right of first refusal of the balance of the said land registered on the certificate of title.

Shortly before the first instalment became due for payment, the plaintiff made a proposal to vary the contractual term in relation to payment of the balance of the purchase price. A letter dated 16th February, 1990, written by his Attorneys was sent to the defendant wherein the plaintiff proposed that he would pay:

1. $70,000.00 by the 31st March 1990 and

2. The balance of $60,000.00 on completion by the defendant producing a registered title in the plaintiff's name.

He contends that the defendant had accepted his proposal in a letter dated 22nd February, 1990 wherein it was stated inter alia :

> Milholland, Ashenheim and Stone
> Attorneys at Law & Notaries Public
> 32 Duke Street
> Kingston
> .....
>
> "Thank you for your letter of 16th February, 1990 which came to hand today. This serves to convey my favourable response to your proposal of a two part payment of the balance of One Hundred and Thirty Thousand Dollars ($130,000.00) which is now owing to me....."
>
> Sgd. Dudley C. Grant.

Despite further letters to the defendant, the plaintiff claims that he has wrongfully failed, neglected and/or refused to complete the said sale or to take necessary steps towards completion. Furthermore, despite his offers to exercise the right of first refusal, the defendant refused to negotiate and/or agree a purchase price for the remainder of the land . He therefore, claims specific performance of the agreement for sale, damages for breach of contract in lieu of or in addition to specific performance, a declaration, that under the said sale agreement he is entitled to a right of first refusal for the balance of the said land and other consequential orders.

The Defence and Counter - Claim

The defendant did not give evidence nor called any witness on his behalf. He relied however, upon his submissions at the close of the plaintiff's case.

The Defence admits that there was an agreement for sale of the land with the partially constructed Church and that the required deposit was paid. It alleges that the provision in the Agreement with respect to the balance of the property did not amount to an option and in any event it was not a legally enforceable right since there was no consideration therefor. It is also alleged that the option was void for uncertainty as no price or other material terms had been agreed. He further alleged that in breach of the said Agreement, the plaintiff failed and/or refused to pay the sum of $70,000.00 which was due on the 31st March 1990. He paid no further sums towards the purchase price and accordingly, the defendant's obligation to complete never arose. He contended that the terms of the

Agreement were never varied and that the parties' obligations remained as provided in the said Agreement for Sale.

He contended that he was entitled to rescind the said agreement and to forfeit the deposit. He has sought damages or judgment for mesne profits for use and occupation of the premises and a set-off of such sums or damages owing, or payable, to him by the plaintiff against any sum owing or payable by him to the plaintiff.

The agreement for sale

Let me now turn to the Sale Agreement. It states inter alia:

> ".....the decision was taken to sell the portion of the premises on which the Church building is being constructed for $230,000.00. A down payment of $100,000.00 is required. However, to conform with your request we have agreed to accept the down payment in two parts as follows : $80,000.00 which is to be paid by the 25th instant and $20,000.00 is to be paid six months from the date of the first down-payment....
>
> The portion of the premises on which is the three section shed has a frontage of approximately 60 ft. This portion is not for sale at the present time. But, I can assure you that whenever I am ready to dispose of same, if you desire, you will be given first preference.It will be officially valued and sold to you - "The Church" at a price to be negotiated.
>
> Whenever you have made the first down payment you may start to occupy the premises in accordance with the terms of the agreement.
>
> After thirty-six months of the final down payment of Twenty Thousand Dollars $20,000.00) you should then start paying to the writer, his wife or his daughter Elaine Jones the balance which will be in the form of monthly instalments. This payment will cover a period of seven years
>
> If you desire to close the deal before the prescribe periods a rebate of interest will be given in accordance with that obtained from Commercial Banks and similar lending agencies. It must also be bourne in mind that after the first down payment is made if you failed(sic) to pay the final down payment of Twenty Thousand Dollars ($20,000.00) within the prescribe six months period, without

consultation and agreement, fifty percent (50%) of the first down payment will be regarded as being forfeited, and the whole transaction will become null and void. In such a situation, if you have carried out any improvement on the building, satisfaction would be obtained as stated in the other section of this Agreement.

Please continue to be reminded that the section of the premises on which is the Church building was officially valued at Two Hundred and Seventy Thousand Dollars ($270,000.00) and, it must be remembered that the amount which will be accepted for the portion of the premises represents a very great reduction of that which it is worth, and must be regarded as my extra contribution towards the establishing of the Church on site.

It must also be bourne in mind that the fees for the Government, Attorney et al must not be part of the amount which is to be paid to me. You having obtained the premises so cheaply such fees are really infinitesimal indeed. If (sic) is a legal demand that the vendor must pay the fees himself upward adjustment will have to be made to the selling price of the premises to suit the situation.

If at the expiration of the thirty-six months period, plus three months, you fail, without consultation and agreement, to start paying the instalment, the amount of One Hundred Thousand Dollars ($100,000.00) which you deposited as down payment will be regarded as being forfeited. Also, the transaction will be considered forfeited if after you have started to pay the monthly installment you, without consultation and agreement fail to continue to do so for a continuous period of three months or an aggregate of six months.....

.....

The new title will be prepared for you to coincide with the completion of payment"

Sgd. Vendor
Sgd. Purchaser

The agreed bundle of documents

The agreed bundle of documents is comprised of numerous correspondence between the parties. The documents were agreed with a view to shorten the proceedings.

Submissions, assessment of the evidence and findings

The issues in this case are identified as follows:

1. Whether or not the defendant had refused to accept his responsibility to complete the sale.

2.Whether or not the Agreement was varied in respect of the term regarding payment of the balance of the purchase price.

3. Whether the plaintiff was ready, willing and able to perform his obligations under the Agreement.

4. Whether the defendant was entitled to rescind the contract.

5. Whether time was of the essence in the performance of the contract.

6.Whether there was a right of first refusal in respect of the smaller portion of land.

The land with the Church

Let me deal firstly, with the land on which the Church was constructed. No issue was joined as to the validity of the Agreement concerning this portion of land. The parties seemed to have sat down and drafted their own terms and conditions for this Agreement. What is in issue, is whether the defendant has refused to accept his responsibility to complete the sale.

The Agreement discloses that the defendant had agreed that a new title would be prepared for the plaintiff in order to coincide with the completion of payment. His letter of the 9th December 1987, states as well, "...in the letter of the agreement it has been stated quite clearly when his title will be given him". The foregoing evidence suggest to me, that the defendant was quite aware of his responsibility in providing title.

I turn next to the proposal for variation. Was there an offer made by the plaintiff to vary the terms of the Agreement and was it accepted by the defendant?

The undermentioned correspondence between the parties must be examined in order to determine this issue:

1. The letter of the 16th February 1990 (Exhibit 2) states inter alia:

> "We refer to the above Agreement for Sale made on the 26th September, 1986, whereby it was agreed as follows:
>
> > "After 36 months of the final down payment of $20,000.00 (the purchaser) should then start paying to (the vendor), his wife or his

daughter Elaine Jones, the balance which will be in the form of monthly instalments."

As you know, 36 months after the final down payment will be the end of March 1990. However, Mr. Mc Hugh hereby proposes that the said Agreement be varied so that instead of payment of the balance of $130,000.00 being dragged out over a period of 7 years, such payment be made by two (2) lump sum payments as follows:

1. The sum of $70,000.00 to be paid to you on or before the 31st March, 1990.

2. The balance of $60,000.00 to be paid on completion, that is on your production of a registered title for the land in question with the purchaser's name endorsed thereon as registered proprietor.

If these terms are agreeable to you, kindly let us have your written acceptance as soon as possible....."

Sgd. Joanne E. Wood

2. The defendant's response (Exhibit 3), states inter alia:

February 22, 1990

Milholland, Ashenheim & Stone

.....

Attention: Miss Joanne E. Wood

.....

.....

"Thank you for your letter of 16th February, 1990 which came to hand today. This serves to convey my favourable response to your proposal of a two part payment of the balance of $130,000.00 which is now owing to me. However, it is the responsibility of Mr. McHugh your client to pay for all costs to satisfy the transfer of the title which will be signed by me as soon as the final payment is realised.

With regards to your letter of 16th February, 1990 I am expecting the payment of Seventy Thousand Dollars ($70,000.00) in March next.

Upon payment of the whole balance of One Hundred and Thirty Thousand Dollars ($130,000.00) and acknowledgement of same by the writer, the ownership of the portion of the premises in question will undoubtedly be to your client, Mr. Mc Hugh.

You could then at your own leisure prepare the title document for my signature.

If the final payment, according to your letter of February 16, 1990, is not made before the time prescribed in the agreement, which dealt with monthly payment, that which is stated in the agreement will hold good still. And, the amount and condition of monthly payment will be as stated in same.

In such an eventuality you could then, reasonably, according to the agreement, work out in equal payment the balance of Sixty Thousand Dollars ($60,000.00) and have same forwarded to me....."

Sgd. D. Grant

3.The plaintiff's Attorneys at Law followed up with a letter dated March 26th 1990 which reads inter alia:

" Thank you for yours of February 22, 1990.

We have discussed the points raised in your letter with our client, and regret to advise that he is unable to complete the sale as proposed in our previous letter at this time, unless and until you agree and undertake to comply with the following.

Firstly, there is nothing in the Agreement for Sale which suggests that it is the Purchaser's obligation to pay all the costs "to satisfy the transfer of the Title". As a matter of fact, whereas it is accepted practice that the vendor and the Purchaser share equally, the cost of stamp duty, registration fee and the cost of the Attorney having carriage of sale, we must hasten to advise you that under the Transfer Tax Act, it is your responsibility solely as the vendor to pay transfer tax on the purchase price.

Likewise, it is your obligation as the owner and vendor of the land to provide the Purchaser with a separate title for the land in question, which will involve a subdivision of the existing title. As we have stated in our letter of the 16th February, the final balance payable on completion will only be paid in exchange for your delivery of a registered title for 128A Brunswick Avenue with our client's name endorsed thereon as the registered proprietor.

Naturally, a sale of the premises in its entirety will obviate the necessity for subdivision. Kindly allow us this opportunity to remind you that our client's offer to purchase the whole lot remains open to you....."

Sgd. Joanne E. Wood.

4. The defendant failed to respond so the letter dated May 16, 1990 (Exhibit 5) was sent to him. It

states inter alia:

> " We refer to previous correspondence ending with ours of March 26, 1990, to which we have had no response.
>
> As such, we wish to remind you that if you are willing to comply with the terms set out in our letters of February 16 and March 26, 1990, we are in a position to let you have our cheque in the sum of Seventy Thousand Dollars ($70,000.00) as soon as we have your letter (sic) undertaking to that effect.
>
> We hope to hear from you soon."
>
> Sgd. Joanne E. Wood

The defendant made no further personal response thereafter, but his Attorneys at Law wrote to the effect that if there was dispute regarding the payment of costs, then the contract price ought to be adjusted upwards having regards to the condition set out in the Agreement. New offers of sale were made but the plaintiff would have none of this and he thereafter commenced suit.

Mr. Mc Bean submitted that for a contract to be varied, there must be a binding agreement between the parties to the variation supported by consideration. He expressed some concern however, regarding the words, " However, it is the responsibility of Mr. McHugh your client to pay for all costs to satisfy the transfer of the title which will be signed by me as soon as the final payment is realised". These words were used by the defendant in his response of the 22nd February, 1990. He queried whether those words had qualified or made subject to a condition the defendant's unequivocal agreement to the proposal he favourably responded to. He submitted that these words had nothing to do with the proposed terms of payment of the balance but was a separate matter being raised. He therefore submitted that on the facts of the case, the defendant had accepted the proposed variation and that the consideration given by the plaintiff was the promise of earlier payment or the surrender of the plaintiff's rights to pay the balance of the purchase price over a seven (7) year period.

The defendant took alternative positions on the issue of variation. Firstly, Mr. Scharschmidt submitted that for a variation of the agreement to be valid, there must be an absolute, unconditional, and unqualified acceptance of the terms of the offer; that is to say, it must be an unequivocal acceptance of the terms proposed, without the introduction of a new or different term - See Stoneham - The Law of Vendor and Purchaser (1964) p.11 para 16. According to Mr. Scharschmidt, the 2nd term proposed by the Plaintiff indicated that the balance of $60,000.00 was to be paid on completion, that is on Mr. Grant's production of a registered title for the land in question with the purchaser's name endorsed thereon as registered proprietor. He argued that the reply of 22nd February, 1990, contrary to being a final and unqualified acceptance of the proposed variation, was a rejection of the second term proposed; moreover a counter-offer was proposed as to how the payment was to be made in the event that the final payment was not made.

Mr. Scharschmidt also submitted that there was no obligation in law for the defendant to provide the registered title before payment of the final sum of $60,000.00 - **Enid Phang Sang v Sudeall and Sudeall** (1988) 25 J. L. R 226. Secondly, and in the alternative, he submitted that even if it is accepted that the contract was varied, the plaintiff was obliged to pay the sum of $70,000.00 by the 31st March 1990 and to pay the balance of $60,000.00 before the plaintiff became entitled to be registered as proprietor. He further submitted that on the facts in the case, the plaintiff had failed to make any payment and was therefore in breach of the contract as varied.

I will now examine the circumstances concerning the proposal for variation. The offer to vary was contained in the letter of the 16th February, 1990 (Exhibit 2). The proposal seeks to vary the initial term which provided for payment of the $130,000.00 in instalments and which would commence on or about 1st April 1990 for a period of seven (7) years. Was this offer accepted by the defendant in his letter of the 22nd February, 1990, (Exhibit 3) or in any other subsequent correspondence between the parties?

The defendant's response in Exhibit 3, is as follows:

> " This serves to convey my favourable response to your proposal of a two part payment of the balance of $130,000.00 which is now owing to me."

But, he went on to state:

> " However, it is the responsibility of Mr. Mc Hugh your client to pay for all costs to satisfy the transfer of the title which will be signed by me as soon as the final payment is realized."

Did the latter statement (supra) amount to a rejection of the plaintiff's offer and/or did it qualify the statement he made regarding his favourable response to the proposal? It seems to me that he was simply reminding the plaintiff and his Attorneys at Law of the initial contractual provision regarding payment of the costs of transfer. I accept the submission made by Mr. Mc Bean that the statement regarding payment of costs had nothing to do with the proposed terms of payment of the balance of the purchase price. As a matter of fact, the defendant did state that he was "expecting" the payment of $70,000.00 in March, 1990. Neither did he state in any later correspondence that he had disagreed with the proposal for an early payment. I find that the response by the defendant in his letter of the 22nd February 1990, constituted an un-equivocal acceptance of the offer made by the plaintiff.

Was there consideration given by the plaintiff in respect of the offer? I readily accept the submission that the consideration given was the promise of earlier payment and the surrender of the plaintiff's right to pay the balance over a seven (7) year period. In either situation, the defendant would benefit from the early payment or the promise thereof.

I therefore reject the argument that the defendant's letter of the 22nd February was a rejection of the

proposal made by the plaintiff. I also reject the submission that a counter-offer was proposed by the defendant as to how payment should take place in the event the $60,000.00 was not paid.

Was the plaintiff ready, willing and able to perform his obligations under the contract? The Agreement provided that after thirty-six months of the final down payment the plaintiff should commence paying the balance of the purchase price. Payments should therefore commence at the end of March or early April 1990. The proposed sum of $70,000.00 should have been paid by the 31st March 1990 but this was not done due to the dialogue between the parties concerning the payment of the costs of transfer and the provision of a registered title in the plaintiff's name before final payment was made. I also bear in mind that the required deposit of $100,000.00 was paid within the stated period and the monthly instalments under the Agreement were to commence on or about March 31st 1990. I further bear in mind the position taken by the plaintiff's Attorneys at Law in their letter of the 16th May, 1990 (Exhibit 5) that they were in a position to let the defendant have the $70,000.00 provided he complied with the terms set out in the letters of the 16th February 1990 and the 26th March 1990.

Were there good reasons for the defendant to have rescinded the contract? Mr. Scharschmidt submitted that having regards to the stringent provisions relating to forfeiture in the Agreement, it showed how serious the parties considered that time ought to be of the essence. The Court should conclude therefore, that time was of the essence. Mr. Mc Bean on the other hand, submitted that no Notice was filed making time of the essence. Neither did the defendant complain of delay, so he was not entitled to rescind the contract.

Meagher, Gummow and Lehane, authors of the text book "Equity" Doctrines and Remedies, state inter alia at page 72:

> "Equity usually treats the failure to complete a contract on the appointed day as not of the essence of the contract, but as a failure in a collateral matter.....But equity would regard time of the essence when the intention of the parties as well as the form of the instrument they had executed showed it to be of the essence...."

It is a fact that the parties to the Agreement had set out the timetable for payment and the consequences which would flow if this condition was not adhered to. It is my view however, that although this timetable is set, the defendant ought to have filed the relevant Notice making time of the essence having regard to the intervention of the proposal for the variation of the Agreement, and the correspondence which followed. Furthermore, the defendant was looking forward to the first of the two parts of payment during March 1990, so when the dialogue commenced between the parties, he ought to have made time of the essence.

It was also submitted by Mr. Scharschmidt that in order to determine why the contract was not performed the Court must ask and answer the question whether the parties agreed on how the 'fees for the Government and the Attorney' were to be dealt with. He argued that the contract was not

performed because the plaintiff insisted that the costs were to be bourne by the defendant and in fact the letter of 13th September 1990, from Milholland. Ashenheim and Stone supports this. He submitted that the argument put forward by Mr McBean that the transaction is exempt from Transfer Tax and Stamp duty, was a mere tabula in naufragio and should not have been advanced having regard to the letter of the 13th September 1990 (supra) which had indicated to the defendant's Attorneys that the plaintiff's Attorneys may be able to convince the Stamp Commissioner to waive the penalty in respect of the transfer tax..

A perusal of the Agreement, reveals where it was provided that:

> "the fees for the Government, Attorney et al must not be part of the amount which is to be paid to me. You having obtained the premises so cheaply such fees are really infinitesimal indeed. If is a legal demand that the vendor must pay the fees himself upward adjustment will have to be made to the selling price of the premises to suit the situation."

The letter of the 26th March 1990 from the plaintiff's Attorneys at Law had pointed out to the defendant that the plaintiff was unable to complete the sale as proposed in the letter of the 22nd February, 1990 "unless and until" he agreed and undertook to comply with the following:

> "Firstly, there is nothing in the Agreement for Sale which suggests that it is the Purchaser's obligation to pay all the costs "to satisfy the transfer of the Title". As a matter of fact, whereas it is accepted practice that the vendor and the Purchaser share equally, the cost of stamp duty, registration fee and the cost of the Attorney having carriage of sale, we must hasten to advise you that under the Transfer Tax Act, it is your responsibility solely as the vendor to pay transfer tax on the purchase price.
>
> Likewise, it is your obligation as the owner and vendor of the land to provide the Purchaser with a separate title for the land in question, which will involve a subdivision of the existing title. As we have stated in our letter of the 16th February, the final balance payable on completion will only be paid in exchange for your delivery of a registered title for 128A Brunswick Avenue with our client's name endorsed thereon as the registered proprietor....."

The position taken by the plaintiff's Attorneys on the question of costs has been explained in the first paragraph of the abovementioned letter. Mr. Mc Bean argued that there was express provision in the Agreement with regards to the second paragraph of the letter (supra). In the Agreement, it was stated that " the new title will be prepared for you to coincide with completion of payment." He therefore submitted that on the facts of this case, Phang's case (supra) was distinguishable from the instant case. Consequently, no payment was made on the 31st March 1990 either in respect of the varied agreement or under the initial agreement until the defendant complied with his obligations.

Although it was likely that stamp duty would not be paid on this transaction(being a sale concerning land for the construction of a Church) it does seem to me that the Attorneys for the plaintiff failed to take into consideration the other costs involved and the agreement which was made by the parties.

Mr. Mc Bean submitted, that even if the plaintiff had repudiated the contract, a Court of Equity may disregard a purported rescission by the injured party in order to grant specific performance to the party in breach and if necessary to prevent the defendant from relying on the effect of rescission. He said that even if the plaintiff failed to pay over the balance in these circumstances, this Court may grant specific performance. He also submitted that if the plaintiff and his Attorneys were mistaken in their interpretation of the term relating to transfer costs, this would not preclude the plaintiff obtaining a decree of specific performance. He prayed in aid the cases of Mortenson v Macpherson - Grant and Anor. (1975) 26 WIR 43 and Berners v Flemming (1925) All E.R 557 where the Courts held that parties who were mistaken in their interpretation of terms in contracts and who insisted on performance of these terms were nevertheless entitled to specific performance.

I have considered the submissions and the arguments put forward on behalf of the parties as well as the evidence presented. It is my considered view, that although a defendant was not obliged in law to provide title with the plaintiff's name registered thereon before final payment was made the parties in this case had provided for it in the Agreement. Enid Phang Sang v Sudeall (supra) is therefore distinguished. It is further my view that the defendant's letter of the 22nd February, 1990 showed an unwillingness to fulfil his obligations as to title before any of the balance became payable.

I hold therefore, that although the plaintiff was pointing out how the costs should be paid, he had otherwise shown that he was ready to perform his obligations under the contract. I remind myself of the sage words in Hasham v Zenat [1960] A. C 316 that, "In equity all that is required, is to show circumstances which will justify the intervention by a court of equity" (at page 329). I do believe that this is a case which justifies such an intervention. In the circumstances, it is my considered view that the defendant ought not to have rescinded the contract.

The right of first refusal

Mr. Scharschmidt submitted that the alleged right of first refusal lacked consideration and was no more than a gratuitous promise or nuctum pactum.

The law is clear that a right of first refusal arises where the owner of land contracts that in the event he decides to sell the land, he will first offer it to the other contracting party in preference to any other buyer. Mr. Mc Bean had submitted that this right of first refusal differed from an option to purchase which was an offer that imposed an obligation to sell whereas the former was not an offer to sell and imposed no obligation on the owner to sell since he may do so if he wishes.

Initially, the statement of claim had pleaded :

> "3. Under and by virtue of the said agreement it was further agreed between the plaintiff and the defendant that the plaintiff would be entitled to a first option to

> purchase the balance of the land.....in the event of the defendant deciding to sell same and further that the purchase price for the balance of the said land would be based on an official valuation"

In response to the above allegation the defendant pleaded:

> "2. The defendant denies paragraph 3 of the Statement of Claim and says that the provision in the Agreement with respect to the balance of the property in question does not amount to an option, and in any event is not a legally enforceable right in that, there is no consideration therefor and it is void for uncertainty, no price or other material terms having been agreed."

The amended Statement of Claim deleted the words " first option to purchase" in paragraph 3 and inserted therefor the words " a right of first refusal". The defence was amended to meet this new allegation. The words "an option" were deleted and replaced with the words "right of first refusal."

In **Smith v Morgan** [1971] 2 All E.R 1500 the headnote reads as follows:

> The vendor sold to the purchaser certain land, retaining adjoining land. By the conveyance the vendor covenanted with the purchaser for the benefit and protection of the property conveyed 'Not for a period of five years...to sell the [adjoining] land....and ....at any later date [thereafter] should the vendor wish to sell the same the first option of purchasing the [adjoining] land ...shall be given to the Purchaser at a figure to be agreed upon' within a specified period from the date of the offer of sale. Desiring to escape from that obligation the vendor sought the determination of the court whether she was legally bound by the covenant to offer the adjoining land for first sale to the purchaser and if so how the price to be paid was to be determined. The vendor contended that the covenant was not binding on her on the ground that no agreement had been made as to the price at which the offer was to be made or the machinery by which the price was to be determined.
>
> **Held** - 1. The absence of the settled price did not vitiate the covenant, for agreement on the price was no part of the offer which the vendor was bound to make; the covenant was not an agreement to agree but an obligation imposed on the vendor alone to make an offer for sale; the figure to be agreed on was not the price at which the offer was to be made, for an offer represented the will of one party and not the consensus of both; accordingly the words 'a figure to be agreed upon' related to the ultimate contract of purchase, should there be one; the obligation on the vendor was to make an offer to the purchaser at the price at which she was willing to sell.
>
> 2. In settling the price at which the offer was to be made the vendor was bound to act bona fide; thus if she was intending to sell by auction the offer would be at the intended auction reserve or, if she was intending to sell by private treaty, the price to

> be named in the advertisement of sale or the lower price to which the vendor was prepared to descend.

I do agree with Mr. Mc Bean that there is a distinction between an "option to purchase" and "the right of first refusal". The provision in the instant case regarding this right is stated as follows:

> " But I can assure you that whenever I am ready to dispose of same if you so desire you will be given first preference. It will be officially valued and sold to you the Church at a price to be negotiated."

I hold that the above clause in the Sale Agreement is indeed a right of first refusal. It does not impose an obligation to sell the land. Rather, it says that whenever the defendant is ready to dispose of same the plaintiff will be given first preference. I further hold that the fact that the price is to be negotiated after a valuation does not invalidate this right of first refusal. The parties had contemplated in the contract that the price at which the offer should be made should be determined by or after a valuation. It means therefore, that the price to be set must be based on the valuation or very close to the valuation. Brightman J had said in Smith v Morgan (supra) that, "the vendor must, of course act bona fide in defining the price to be included in the offer. This is a matter of fact." I would say, that those words are quite apt on the facts of this case. The evidence has revealed that the plaintiff obtained a valuation from valuators and that the defendant had offered to sell this portion of the land to the plaintiff between $68,000.00 and $100,000.00. No valuation report was submitted in evidence however.

The plaintiff also gave evidence that on one occasion he saw the defendant on the street and he told him that the second piece of land was sold. He then said to him: "I don't see how you could sell the place on which we have a signed agreement."The defendant said: " the place is sold but no money has passed yet." The plaintiff also testified that the defendant also told him that he would have preferred if he bought the place but for a new offer of $80,000.00 that he had from someone. The plaintiff told him that he would have a meeting and return and after he got back to him he said he accepted the offer but he did not get anything in writing. I accept this evidence given by the plaintiff and I further accept his evidence that the defendant did tell him to raise the $80,000.00 in the equivalent of U. S dollars.

Although I do agree that the evidence shows that there have been valuations done at the request of the plaintiff, I do not agree with Mr. Mc Bean that the Court could infer that the sums offered by the defendant were far in excess of the valuation. I do agree with him however, that as a consequence of the defendant's conduct, he did deprive the plaintiff of the opportunity to exercise his right of first refusal.

Improvements to the land

The plaintiff's evidence was that he had spent over $1.4 M in improving the Church building and a fence. Of this sum , he said he had paid the contractor, Mr. George Morris in excess of $800,000.00. He maintained that the balance of $600,000.00 was incurred in respect of purchasing

materials, welding and electrical work. It was agreed however, during the course of the trial that the sum charged by Mr. Morris amounted to $275,300.00. Apart from the mere "say so" of the plaintiff, no documentary evidence was adduced in respect of the cost of materials and other labour. In any event, since the Court is satisfied that the contract ought to be performed there would be no need to make any award in respect of the improvements.

The Counter-claim

So far as the defendant's counter claim is concerned, I accept the submission that this claim has not been proved. The defendant gave no evidence in respect of the items claimed and neither did he bring any witness to support the counter claim. He has failed to discharge the burden which falls upon him in respect of the counter claim.

Conclusion

Having regards to the foregoing, it is my considered view, and I so hold, that the plaintiff has satisfied me on a preponderance of probabilities that the defendant has breached the contract of sale entered into between them on the 26th day of September 1986. Accordingly, there shall be judgment for the plaintiff on the claim and counterclaim as set out hereunder:

1. There shall be specific performance by the Defendant of the said Agreement for Sale in respect of land known as 128 Brunswick Avenue, Spanish Town, St. Catherine purchased at Two Hundred and Thirty Thousand Dollars ($230,000.00) and being part of land registered at Volume 1143 Folio 80 of the Register Book of Titles.

2. It is hereby declared that under and by virtue of the said Agreement for Sale, the Plaintiff is entitled to a right of first refusal for the balance of the said land situate at 128 Brunswick Avenue aforesaid.

3. There shall be costs to the plaintiff on both claim and counterclaim, to be taxed if not agreed.