



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 03624

BETWEEN	DUDLEY McFARLANE	CLAIMANTS
AND	KIMBERLEY NUGENT-McFARLANE	
AND	BERBEN PROPERTIES LIMITED	DEFENDANTS
AND	LA MORNE MORTGAGE LIMITED	

Mr. Jeffrey Daley for Claimants
Dr. Randolph Williams and Mrs. Andrea Bickhoff-Benjamin
for Defendants

15th April, 2011

CORAM: D.O. MCINTOSH, J

Introduction

[1] Before the court are two applications. The first in time filed 2nd November, 2009 for summary judgment brought by the Claimants. The second application brought by the Defendants is for the striking out of Claimants' case.

[2] The Claimants had filed a suit claiming:

- (1) A Declaration that the Defendants were in breach of the Agreement For Sale dated 30th August, 2007 entered into with Claimants.
- (2) A Declaration that the Defendants were in breach of their statutory duties as it relates to the completion of the subdivision.
- (3) Order for specific performance of the following –
 - (a) the installation of a water supply to the said land;

- (b) the installation of electricity supply to the said land;
- (c) the provision of Registered Title in the Claimants names.
- (4) A mandatory injunction to have water and electricity supplied by a court specified date.
- (5) Damages for breach of contract.
- (6) Costs
- (7) Interest

[3] Claimants attorney insisted that his application should be heard first as it was filed first.

Claimants Submissions

[4] He admitted that Claimants were now in possession and had been put in possession of the land in accordance with the agreement for sale. They had received water and electricity but had received no Registered Title.

[5] While there was a Registered Title this had not been accepted by the Claimants because it had encumbrances which had not been agreed to in the agreement for sale. **Jamaica Mutual Life v. Hillsborough and Others** 38 W.L.R. 1989 was referred to by the Claimants attorney.

[6] There was no indication in the sales agreement or transfer document that lands were part of a scheme.

[7] They had been promised title in 2001. It was only in 2003 that title was said to be ready and was refused because of the encumbrances thereon.

[8] The Claimants could not wait and so they built their house and were now in breach of the covenants on the new title.

[9] The new title was only brought to the Claimants attention within three months of their last court appearance. The title is not acceptable because of the encumbrances endorsed thereon.

Defendants Counter Claim

[10] The Defendants had gone to the Master on an Exparte Application and brought an Exparte Ancillary Claim. They claimed against the Claimants compensation for a piece of land at the southern tip of the property –

“That Claimants had taken in more land than Claimants had bought.”

The Claimants were saying that this slither of land, claimed by the Defendants had not been taken in by the Claimants.

Damages

[11] While Claimants sought to mitigate their damages over the years their house is still incomplete because they were precluded from obtaining financing on the security of the title. They were therefore unable to secure further financing. The fault for their not obtaining further financing must fall squarely at the Defendants feet.

[12] Claimants contend, that they should be compensated for the increase in buiding cost to complete their building. That figure ought to be arrived at an Assessment for Damages following the order for Summary Judgment.

Defendants Submissions

[13] The encumbrances on the title of Claimants do not raise any new obligations on them. These encumbrances were imposed by the KSAC in resolution dated 7th July, 1976 and are part of the Building Code and are still relevant today.

[14] The Defendants had no say in whether or not these encumbrances should be on title. Title registered at volume 1458 Folio 561 was issued on the 26th February 2010. The Claimants were invited to accept transfer of this title. They refused to do so. It is the Claimants who have refused to accept title.

[15] The agreement between Claimants and First Defendants makes references to encumbrances in paragraph 2 of the agreement for sale.

[16] The Claimants attorney was for the first time enunciating a reason for refusing to accept title. Formerly he had said he was not acting on behalf of Claimants in respect to the transfer. In the circumstances specific performance could not lie as Claimants has to date received all they had claimed for or needed.

[17] Further, they were aware at all times of the state of the Development. As an early investor they had got their land at a bargain price which was afforded them because the development was then incomplete.

[18] They had been put in possession from June of 2003, it is they who took the risk of building their house in an incomplete development. Their contract gave them the option to rescind but they chose to build thereon notwithstanding. Special Conditions at paragraph 5 giving power to rescind.

Counterclaim

[19] Defendants counter claim is for an encroachment by the Claimants on lands not bought by them. They built a boundary wall which encroaches on an adjacent road way. This encroachment is about 18 square meters and is exhibited on Defendants counter claim filed 17th March, 2010.

[20] The Claimants filed a defence to the counter claim and there is an application for the matter to be referred to mediation.

[21] The second Defendant is not a party to the sales agreement and should not have been made a Defendant in the claim. There is no privity of contract between the Claimant and the second Defendant.

Court

[22] Having given careful consideration to the submissions it is clear to this court that the Defendants have discharged their duty by providing all that Claimants sought in respect to specific performance of their contract. There was no indication from the Claimants that time was of the essence or that the title was necessary for the construction of that building. In any event they are the parties who have refused to accept the title which of itself shows a lack of sincerity of any claim for damages flowing therefrom.

1. Claimants Application for Summary Judgment is hereby refused.
2. Defendants application to strike out claim is granted.
3. No orders as to costs.
4. Leave to appeal is granted.