

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. 5083/88

BETWEEN	WILLIAM SPENCER JENNIFER SPENCER	PLAINTIFFS
A N D	CECIL SAMUEL FORBES	1st DEFENDANT
A N D	FARM LOTS DEVELOPMENT COMPANY LIMITED	2nd DEFENDANT

Arthur Williams and Ms. Deborah Newland
for Plaintiffs.

Bernard Marshall for Defendants.

Heard: July 18 and 19, November 13, 14, 15
and 20, 1995 and 8th May, 1998.

CHESTER ORR, J.

JUDGMENT

In this action the plaintiffs claim Specific Performance of an agreement for the sale to the plaintiffs of certain lands known as Lot 11 situated at Rhymesbury in the parish of Clarendon and registered at Volume 1146 Folio 946 of the Register Book of Titles.

- a. The plaintiffs also claim Delivery of the Duplicate Certificate of Title.
- b. In the alternative an Order that the Register of Titles cancel the Certificate of Title and issue a new certificate in the names of the plaintiffs.

In their Defence the defendants aver:

- (1) That the Agreement had been cancelled by the mutual consent of the plaintiffs and the defendants and also by the plaintiffs breach of the agreement which was their failure to pay the third deposit and the balance of the purchase price.
- (2) That time had been made the essence by notice for the payment of the purchase price.
- (3) That by a mistake known to the plaintiffs but not realised by the defendants the Title to Lot 11 was put in the names of the plaintiffs.
- (4) That despite several requests the plaintiffs refused from signing the transfer for the said lot to its owner - despite having agreed so to do.
- (5) Relying on this promise the defendants had leased the lot for a term of 15 years to a tenant who took possession and improved the land.

The defendants also averred negligence and fraud by the plaintiffs in executing a transfer of the estate in the land and counter-claimed for an order for reconveyance of the title for lot 11 to the first-named defendant and a Declaration that the Agreement was validly cancelled.

PLAINTIFFS' CASE

The plaintiffs are husband and wife. The first-named defendant is the registered owner of land situated at Rhymesbury, Osbourne Store in the parish of Clarendon, which land was being subdivided by the second-named defendant.

On or about the 25th April 1974, the second-named defendant acting as the agent for the first-named defendant, entered into an agreement with the second-named plaintiff, hereafter referred to as "Mrs. Spencer", to sell her a portion of the land known as Lot 11. The Agreement was signed for and on behalf of the second-named defendant by Attorney-at-law Sylvester C. Morris who was also the Attorney-at-law having carriage of the sale.

A copy of the Agreement was exhibited - see Exhibit 1(1). It is not signed by Mrs. Spencer but she stated that she had signed the original. The purchase price of the lot was \$8,000.00 and the terms of payment were as follows:

4.

1. \$1,000.00 down payment on signing of the contract.
2. \$1,000.00 three months after date of signing of contract.
3. \$1,000.00 six months after signing of contract.
4. \$5,000.00 when the Title is ready.
Completion - Within Eighteen months or earlier.

Mrs. Spencer made payments as follows:

- \$1,000.00 on signing of the contract.
- \$2,000.00 on 9th July, 1974
- \$1,000.00 on 23rd April, 1976.

On 23rd April 1976 she received a Statement of Account and a letter of possession (undated) - Exhibit 1, (2) - (6). She entered into possession and cultivated the lands with canes.

In 1976 the second-named plaintiff entered into an agreement to purchase lot no. 9 on the said subdivision. This agreement was not produced. The purchase price was \$8,000.00. Payments were made to a total of \$6,000.00.

In 1978 the second-named plaintiff William Spencer who then resided in the United States of America requested that the Title of Lot 9 be issued in the names of both plaintiffs as joint-tenants - see letter Exhibit 1 (15).

In 1978 the plaintiffs decided to build a house on Lot 9. Mrs Spencer applied to the Jamaica Development Bank for a loan of \$2,000.00. The bank requested a letter of undertaking pending transfer of the Title. She consulted Mr. Morris who told her the Title was ready. There was a balance of \$2,000.00 outstanding on Lot 9. Mr. Morris gave her permission to transfer the sum of \$2,000.00 from the amount paid on Lot 11 to complete payment on Lot 9. There was then an amount of \$6,000.00 paid on Lot 11. There was correspondence between Mr. Morris and the Bank which sent him the sum of \$2,000.00 see Exhibit 1 (2) and (8). By error Mr. Morris sent the Transfer of Lot 11 to the plaintiffs instead of that for lot 9. The plaintiffs signed the Transfer in ignorance of the error. Mr. Morris sent the Title for lot 11 to the Bank which advised the parties of the error.

Mrs. Spencer and Mr. Morris spoke about the error but he refused to send the correct Title, the Title for lot 9 to the Bank until the plaintiffs had transferred the Title for lot 11 to the second-named defendant.

In 1980 Mrs. Spencer applied to the bank, for a loan in respect of lot 11. She advised Mr. Morris that she had applied for a loan to complete the payments on lot 11. He told her he had changed his mind about selling lot 11. He wanted the land for his own use. He had cows in St. Thomas and needed the land for the purpose of rearing them. He further said that the lands had been sold too cheaply, that Mr. Forbes the first-named defendant, had lost money on the

deal and getting back the land was one way of trying to make good.. She told him that this was unethical. Shortly after she tendered the balance of the purchase price on lot 11 but Mr. Morris refused to accept it. She consulted her Attorneys who wrote to Mr. Morris but he refused to accept the balance of the purchase price for lot 11. He also refused to issue the Title for lot 9 - see letters Exhibit 1 (9) to (12). She reported the matter to the Disciplinary Committee of the Bar and attended a hearing in 1982 or 1983. As a result Mr. Morris sent the Title for Lot 9 to the Jamaica Development Bank.

She denied that she had agreed to cancel the Agreement for sale of lot 11. She was ready and willing to pay the balance of the purchase price. She had never received notices from Mr. Morris making time of the essence - see Exhibits 18 and 19. She had not voluntarily given up possession of lot 11. Mr. Morris had put his cows on the lot and they had eaten the canes which she had planted.

THE DEFENCE

Mr. Sylvester Morris, Attorney-At-Law testified that he was a Director of the second-named defendant company and legal advisor to the first named defendant who was the majority shareholder in the second-named defendant company and also the legal owner of land at Comfort which was being sub-divided.

In 1974 Mrs. Spencer entered into an Agreement to purchase Lot 11 - see Exhibit 1(1). She did not sign the agreement but payments towards the purchase price were accepted from her. In 1976 the first-named plaintiff William Spencer entered into an Agreement to purchase Lot 9. He requested that the Title be issued in the names of both plaintiffs and that the Title be sent to the Jamaica Development Bank whose name was subsequently changed to the Agricultural Credit Bank - see Exhibit 24.

The price of each lot was \$8,000.00. In 1978 the Titles to the lots were ready but there was an outstanding balance on the purchase price of each lot. Sometime during that year Mrs. Spencer told him that she had started to build a house on lot 9 and had built fish ponds. He had visited the land and had seen these buildings.

She stated that she was unable to pay for both lots. He threatened to cancel both agreements for sale but in tears she beseeched him not to do so. She suggested that since she was unable to pay for both lots he should cancel the Agreement in respect of lot 11 and transfer \$2,000.00 paid on lot 11 to payments on lot 9. He agreed to transfer the sum as requested but did not forfeit the deposits on lot 9 or 10.

There were various costs outstanding on both lots. He transferred the sum of \$2,000.00 from lot 11 to lot 9 making the total payments on lot 9 \$6,000.00.

Mrs. Spencer did not pay any costs in respect of lot 9. She said she was negotiating a loan for \$2,000.00 and requested a letter of undertaking for the Title of lot 9 to present to a financial institution. She would then be able to complete the payments on lot 9. He complied with her request and wrote to the Jamaica Development Bank by letter dated 18th September, 1978 Exhibit 1(7).

On 21st November 1978 he sent a notice by post to Mrs. Spencer - Exhibit 19 as follows:

Sylvester C. Morris

LL.B. (Hons.), LL.M. (King's, London)

*Chambers
1 Duke Street
Kingston, Jamaica*

Phone: 932-6180

21st Nov. 1978.


To:

Dear Sir/Madam,

Re: Lot Comfort Clarendon - bought from Form Lot Dev. Co. Ltd.
Sale price \$8000 Closing cost, Consisting of half
cost of procuring Title, and half Transfer cost \$500.00.

The Registered Title is now available, please let me have balance of purchase price, plus your cost as stated above within 14 days, Time is the essence.

Yours faithfully,



SYLVESTER C. MORRIS

The letter was not returned to him.

A transfer was prepared in his office for what should have been the Title to Lot 9. The original and duplicate were forwarded to the plaintiffs and were returned duly executed. The transfer and Title were lodged at the Titles office and the title was returned and forwarded to the bank.

The sum of \$2,000.00 transferred from lot 11 was utilised to pay for the costs of the Transfer. In September 1979 he received a cheque from the bank for \$2,000.00 to complete the purchase price on lot 9.

He had made time of the essence several times and the last occasion was by letter dated August 28, 1979. Exhibit 18. (Shown overleaf).

Mr. William F. Spencer,
4040 Murdock Avenue,
Bronx New York 10466,
U. S. A.

28th August, 1979,

Sir,

Re: Lots 9 and 11 Farm Clarendon
Purchasers Mr & Mrs. Spencer.

It is now one year since the title have been ready for the above Lots and the balance of the purchase price are still outstanding. I have been very patient and helpful in allowing yourself and wife enough time to find the balance of the purchase price.

To date the balance of the purchase price for both Lots are still outstanding in the circumstances; I am now giving you 2 weeks notice to pay into my office the balance of the purchase price for both lots. Plus the cost for each.

Unless the balances are paid on or before the 14th day of September, 1979, the contract of sale will be cancelled and after costs are deducted the balance will be refunded.
TIME IS THE ESSENCE OF THIS NOTICE.

Yours faithfully,

SYLVESTER C. MORRIS

SCM/mr

C/C Mrs. Jennifer Spencer.
P.O. Box 235
May Pen
Clarendon

Shortly after he had sent this letter Mrs. Spencer attended on him and requested that he cancel the Agreement in respect of Lot 11 because she had been living in rented premises and could not afford to lose her house on lot 9.

He cancelled the agreement. Mrs. Spencer reaped the canes she had planted on lot 11 and vacated the lot immediately after.

The second named defendant took possession of lot 11. He, Mr. Morris, transferred some of his cows from St. Thomas to lot 11.

The Title for Lot 9 was returned to him in November 1980 and he forwarded same to the bank. By letter dated 29 January 1981, Exhibit 1(8), the bank advised that he had sent the Title for lot 11 instead of lot 9. He then realised for the first time that an error had been made in his office. He advised Mrs. Spencer that the wrong title had been transferred and since the Agreement for the sale of lot 11 had been cancelled, she should re-transfer the Title for lot 11 to the first-named defendant. She refused to do so. He in turn refused to give her the Transfer for lot 9 until she had signed a Transfer for lot 11 to the first-named defendant. He received correspondence from the plaintiffs Attorneys. Mr. Williams sent a cheque for the balance of the purchase price for lot 11 which he returned. See Exhibit 1 (10-12).

He received correspondence from the Bar Council and Mrs. Spencer and himself attended a hearing by the Disciplinary

Committee. Without a formal hearing the Committee stated that it had no power to order Mrs. Spencer to do anything with regard to lot 11. However, in view of the fact that he had given an undertaking in respect of the Title for lot 9, the Committee suggested that he send the Title to the bank. He prepared the relevant documents, the transfer was executed by the plaintiffs and he sent the title for lot 9 to the bank in 1983. The plaintiffs did not pay the Stamp duty.

In 1984 or 1985 lot 11 was leased by the second-named defendant for a period of about 15 years. It transpired in cross-examination that the lessees are Cyril Davis and his daughter Yvonne Davis who has a child fathered by Mr. Morris.

The authorisation by Mrs. Spencer to transfer the sum of \$2,000.00 from lot 11 was put in writing. This was not produced at the trial.

A transfer for lot 9 was sent to the plaintiffs in 1981 and had been returned by Mrs. Spencer who stated that the Justice of the Peace had discovered an error in the folio number. As a consequence a proper transfer had been prepared and sent to Mrs. Spencer.

The value of lot 11 was now \$800,000.00.

He maintained that the agreement with respect to lot 11 had been cancelled either at the request of Mrs. Spencer or because of the failure to pay the balance of the purchase price.

FINDINGS

The first named plaintiff did not give evidence at the trial. It appears that he should not have been joined as a plaintiff. He is not a party to the agreement in respect of lot 11. His name appears on the Title through an error. There is no relief available to him.

It is common ground that the Title to lot 11 was issued in error. The error is twofold, firstly in relation to the description of the land and secondly in respect of the registered owners thereof.

The critical issue is whether the Agreement in respect of lot 11 was subsisting at the time the Title was issued.

Mrs. Spencer stated that she never received the notices making time of the essence of the contract. Mr. Morris states that she acknowledged receipt of them verbally.

The notices were not sent in registered letters as required by the Jamaican Bar Association's General Conditions of Sale paragraph 2(3). Mr. Morris states that she requested the cancellation of the agreement. This was the second such request and unlike the request to transfer the sum of \$2,000.00 from lot 11, was not committed to writing.

I do not accept his evidence that she made the request in the circumstances having regard to the dealing with lot 9.

I find that the plaintiffs did not act fraudulently or negligently when they signed the transfer. Although

Mr. Spencer did not give evidence, the reasonable inference is that he signed the transfer in the mistaken belief that it was a transfer for lot 9. He was not a party to the Agreement for lot 11 and had specifically requested that Mrs. Spencer's name be included in the Title for lot 9.

The question remains as to whether an Order for Specific Performance should be made. Mr. Marshall submitted that if an order was made, the plaintiffs should pay the difference between the purchase price and the current market price. I do not agree. The purchaser is entitled to any improvement in the property or any increase in its value - see The Law relating to the Sale of Land Voumard - third edition at page 94.

He also submitted that the plaintiffs were not entitled to the remedy because of delay on their part. He indicated a delay of six (6) years commencing from the date of the return by Mr. Morris of a cheque for the balance of the purchase price to the plaintiffs' Attorney Mr. Williams in 1982, until the filing of the Writ in 1988.

Mr. Williams submitted that although physical possession was in the vendor, the Title was in the name of the purchaser. There were ongoing proceedings and no undue delay.

The Title to lot 9 was dealt with by the Disciplinary Committee of the Bar Council in either 1982 or 1983. There is no evidence of any further activity by the plaintiff before the issue of the Writ in 1988. Adopting the most favourable

approach there was a delay of over five (5) years. No explanation has been advanced for this delay. However, delay in itself is not a bar to the award of Specific Performance. The learned authors of Halsburys Laws of England, 4th edition state in Volume 42 par. 259:

"Delay in itself is not a bar to the award of specific performance, the question is whether, in all the circumstances it would be unjust to defendant to grant the decree."

The defence contends that there is an encumbrance on the lot, namely a lease to Mr. Davis and his daughter. However in light of the relationship of the parties to Mr. Morris, the alter ego of the defendants, I do not consider that in all the circumstances of this case it would be unjust to the defendants to make the order.

There will therefore be judgment for the second-named plaintiff Jennifer Spencer on the Claim and Counter-claim as follows:

1. Order for Specific Performance of the Agreement - Exhibit 1 (1) on payment of all outstanding balances on the purchase price and costs.
2. Order that the Registrar of Titles do cancel the Duplicate Certificate of Title registered at Volume 1148 Folio 946 and issue a new Certificate of Title in the name of Jennifer Spencer.

3. Costs to this action to the second plaintiff Jennifer Spencer, such costs to be taxed and if not agreed.

Finally let me apologise profusely for the delay in the delivery of this judgment.