



[2020] Civ 224

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02700

BETWEEN	DENISE STEVENS	CLAIMANT
AND	EVADENE ADINA HARRISON-MADU	1st DEFENDANT
AND	FITZROY ALPHANSO STEVENS	2nd DEFENDANT
AND	NORMAN WASHINGTON STEVENS	3rd DEFENDANT

Ms. Verleta Green for the Applicant/3rd Defendant

Mr. Franz. Jobson for the Claimant instructed by Wadsworth, Jobson and
and Mr Lawrence Phillpots Brown

Heard: June 18, 2020 and November 13, 2020

**Application for Striking Out – Relevant Considerations and Guidelines- Summary
Judgment – Ex turpi causa non oritur actio – Should Court enforce an illegal
contract – Is illegality of a contract a bar to seeking redress**

Hutchinson, J

INTRODUCTION

[1] The Claimant was the purchaser of a parcel of land known as Lot No.4, part of Longwood, Santa Cruz in the parish of Saint Elizabeth. The 1st and 2nd Defendants were the owners/vendors. By an Agreement (called "Contract for Purchase") dated

the 23rd day of May, 2004 made between the Claimant and the 1st and 2nd defendants, they agreed to sell the property to the Claimant for the sum of Eighty Thousand US Dollars (US\$80,000.00).

- [2]** Pursuant to the agreement, the Claimant paid a deposit of Ten Thousand US Dollars (US\$ 10,000.00) on the signing of the Agreement. She was allowed into possession of the property and permitted to effect repairs on same. The cost of the repairs amounted to United States Five Thousand Dollars (US \$5,000.00) and the parties agreed that this would be a further payment towards the purchase price.
- [3]** It was agreed that the balance of Sixty-Five Thousand US Dollars (US \$65,000.00) was to be paid in monthly instalments of US Five Hundred and Forty-One Dollars and Sixty-Seven Cents (US \$541.67) over a period of One Hundred and Twenty (120) months at 0.0% interest with the last payment to be made on July 1st, 2014. The parties also agreed “that starting July 1, 2004 all rent collected from the tenants will be given to the buyer”.
- [4]** In 2009 the first defendant advised the Claimant that she wanted the balance of the purchase price of over USD \$50,000 to be paid by lump sum. She also demanded US\$12,300 which she stated was due as rental income. The Claimant then sought a mortgage from the Jamaica National Building Society to pay the balance of the purchase price. In the course of applying for the mortgage loan the Claimant contracted Thomas, Forbes and Associates to provide an appraisal of the said property. It was discovered that the defendants were not in a position to transfer ownership of the said property to the Claimant as their names were not yet on the Certificate of Title and they needed to effect registration based on a transmission application. This was subsequently done on the 19th of December 2011.
- [5]** In 2011, the second defendant indicated that he was no longer interested in selling the said property to the Claimant. This impasse was eventually addressed in 2014 when the Claimant retained Counsel to assist her in completing this transaction.

The Defendants also secured representation. It was agreed between the parties that in order to complete the sale, the Purchaser would obtain a mortgage in the sum of US\$110,000 and she would assume responsibility for the payment of any duty over and above what would be due on the US\$80,000 purchase price which had originally been agreed. It was also agreed between the Parties that in addition to the Agreement for Sale a separate agreement would be drawn up acknowledging that only USD\$50,000 was due to the Vendors at this stage and the balance from the payment of the mortgage proceeds would be paid over to the Claimant after the additional taxes were deducted. These terms were reflected respectively in the Agreement for Sale which was executed in March 2015 and the separate agreement which was executed by the parties in December 2014.

- [6] In May 2015, the Vendors sought to cancel the agreement on the basis that they were not able to pay any of the taxes. The Claimant agreed to pay the full sum assessed but requested time to amass this amount. It was agreed between the parties that the monies should be paid within 90 days which would be by or before the 3rd of September 2015. In correspondence dated June 2015 it was communicated to the Claimants attorney that the Vendors were prepared to remain in the sale on this basis, but if the full amount payable for all duties and taxes was not in hand by that date the Claimant would have to vacate the premises. The correspondence made no reference to the letter of commitment or undertaking neither did it speak to the balance of the purchase price being disbursed by the same date.
- [7] On the 11th of September 2015 the Claimant's Attorney indicated that she was in possession of funds from the Claimant but was seeking to have it transferred to her Jamaican account. She also indicated that there had been a challenge experienced hence the late indication. On the 17th of September 2015, the Defendants Attorney were advised that the funds were now available to be disbursed. The Defendants indicated that the sale was at an end as the deadline had passed. The Claimant was asked to vacate the premises and on June 13th,

2016 the property was transferred to the 3rd defendant, the Claimant's uncle, by way of gift.

[8] The Claimant brought an action seeking the following orders;

- a. Specific Performance of an Agreement for Sale dated the 18th day of March, 2015 between the Claimant and the first and second defendants for the sale by the first and second defendants to the Claimant of land known as Lot No. 4, Longwood, Santa Cruz in the parish of St. Elizabeth comprised in Certificate of Title formerly registered at Volume 1219 Folio 956 and now registered at Volume 1490 Folio 66 of the Register Book of Titles.
- b. Damages for breach of contract in lieu of or in addition to Specific Performance.
- c. An Injunction restraining the first and second defendants, whether by themselves, their servants or agents from selling, transferring or disposing of all that parcel of land known as Lot No. 4, Longwood, Santa Cruz in the parish of St. Elizabeth comprised in Certificate of Title formerly registered at Volume 1219 Folio 956 and now registered at Volume 1490 Folio 66.
- d. An Injunction restraining the first and second defendants, whether by themselves, their servants or agents or otherwise howsoever from interfering with the Claimant's access to and from premises known as Lot No. 4 Longwood, Santa Cruz in the parish of St. Elizabeth.
- e. An Order that the first and second defendants permit the Claimant to have access to premises known as Lot No. 4 Longwood, Santa Cruz in the parish of St. Elizabeth. Damages for trespass to the premises known as Lot No. 4 Longwood, Santa Cruz in the parish of St. Elizabeth.
- f. Damages against the first defendant and/or second defendant and/or third defendant jointly and/or severally for trespass to and or conversion of the furniture, fixtures, clothes, shoes and chattels of the Claimant which were

at the premises known as Lot No. 4 Longwood, Santa Cruz in the parish of St. Elizabeth.

- g. A Declaration that Transfer No. 1985586 by way of gift registered on the 13th day of June, 2016 to the third defendant, Norman Washington Stevens registered on Certificate of Title registered at Volume 1490 Folio 66 was fraudulently obtained and the third defendant is not a bona fide purchaser for value without notice of the Claimant's equitable interest.
- h. An Order that the Registrar of Titles rectify Certificate of Title registered at Volume 1490 Folio 66 by cancelling Transfer No. 1985586 by way of gift to the third defendant, Norman Washington Stevens.
- i. An Injunction restraining the third defendant from interfering with the Claimant's access, use and/or occupation of land at Lot 4 Longwood, Santa Cruz, St. Elizabeth registered at Volume 1490 Folio 66.
- j. An Injunction restraining the third defendant, whether by himself, his servants and/or agents from selling, transferring and/or disposing of all that parcel of land as Lot 4 Longwood, Santa Cruz, St. Elizabeth comprised in Certificate of Title registered at Volume 1490 Folio 66.
- k. An Injunction restraining the third defendant, whether by himself, his servants and/or agents from doing any further construction work on the said land at Lot 4 Longwood, Santa Cruz, St. Elizabeth comprised in Certificate of Title registered at Volume 1490 Folio 66.
- l. Interest at such rate and for such period as this Honourable Court deems fit.
- m. Further or other reliefs.
- n. Costs

- [9] The 1st and 2nd Defendants filed an amended defence and counterclaim on the 19th of June 2017 seeking mesne profits, damage for breach of contract, interests and costs.
- [10] On the 29th of November 2017, the Applicant/3rd Defendants filed a Notice of Application to strike out the Further Amended Claim and the Particulars of Claim against the 3rd Defendant. He also seeks costs and such further and other relief as the Court deems just.
- [11] The grounds on which the Third-named Defendant is seeking the orders are as follows:
- a. The Agreement for Sale has stated an inflated purchase price for mortgage purposes and ought not to be enforced by the Court.
 - b. The time for delivery of the Letter of Commitment had expired.
 - c. Further extension granted by the Vendors had expired.
 - d. The Third-named Defendant is registered as the proprietor of the property and no actual dishonesty on his part has been shown by the pleadings.
 - e. The Claimant has no reasonable prospect of success.

ANALYSIS AND DISCUSSION

- [12] The court's power to strike out a statement of case is pursuant to Rule 26.3 of the Civil Procedure Rules, 2002 which provides:

26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

- [13]** It was submitted by Ms Green on behalf of the Applicant that the claim should be struck out as it is based on an illegal contract. She contended that the Claimant inflated the purchase price of the property in question in order to deceive the financial institution as to the true purchase price agreed between her and the 1st and 2nd Defendant. She argued that this was done to assist the Claimant in obtaining a mortgage for a larger sum than was owed and in those circumstances there is no reasonable grounds for bringing this claim and the Court should not be used to enforce an illegal contract.
- [14]** Counsel also asserted that the letter of commitment had expired as well as the additional time allowed by the 1st and 2nd Defendants for securing funding all of which would cause the agreement for sale to be of no effect. She submitted that in those circumstances, the claim should be struck out and summary judgment entered for the Defendants.
- [15]** Ms Green also submitted that in respect of the Applicant's position, no fraud has been shown on his part or on the part of the other defendants in respect of the transfer to him, neither do the pleadings disclose any fraudulent conduct and as such there is no basis on which the transfer could be set aside.
- [16]** In his submissions made on behalf of the Respondent Mr Jobson stated that the circumstances of the instant case require that the matter should be properly ventilated before the appropriate tribunal in order for justice to be done. He argued that the draconian sanction of striking out the Claimant's claim ought not be

implemented in this matter since the Court has other tools in its arsenal to enforce compliance.

[17] In support of the Applicants position, Ms Green referred the Court to the decision of **Viola Miller and Paul Miller v Marilyn Stewart [2013] JMSC Civ.138** which involved an application for striking out a claim. In that case there were two promissory notes/agreements in respect of the sale of property by the defendants to the claimants. The second agreement made no mention of the first. Under the later agreement, the relevant taxes were paid and the property was duly transferred to the defendant. A statement of account issued by the attorney-at-law for the Claimants showed that the defendant owed \$119,945.00. The issue before the court was whether there was in fact a mutual consideration for the promise made by the Defendant to pay to the Claimants the additional sum of \$500,000.00 in addition to the purchase price of \$3,500,000 reflected in the sale agreement as stated in the first promissory note.

[18] In handing down the decision, the Court stated;

[30] It is evident that even if the promissory note is of evidential value all that it would accomplish is proof that there was a promise by the Defendant to the claimant to pay a certain sum by a certain date to the latter. But the promissory note, being rank, offends the Statute of Frauds. Significantly, it also marks another offence it being vitiated by illegality. As such no court will aid an illegality by allowing a party to rely on or benefit from that persons illegal transaction. Whether the illegality is pleaded or not such a person will have to prove the claim without recourse to the illegal transaction.

[31] The legal maxim of ex turpi causa non oritur action summarizes the doctrine. It comes to this. No court ought to be called upon to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him (emphasis supplied).

[19] Ms. Green argued that the **Viola Miller** case is similar to the current matter as the Instrument of Transfer exhibited as “K” of the Statutory Declaration sets out the consideration for the sale of the property as US\$110,000.00 while email correspondence between the parties stated the purchase price was US\$80,000 and a balance of just over US \$50,000 was what remained to be paid on the

transaction and the Claimant was to receive the remainder once the US\$110,000 was disbursed by the Mortgage Company. She stated that this was a deception against the Mortgage company in respect of the true purchase price and the Court should not aid such a transaction.

[20] In response to this assertion, Mr Jobson submitted that the law has undergone a transformation as the position outlined in *Tingsley v Millingan [1994] 1 AC 340* which he submitted was followed in *Viola Miller* has evolved and he relied on the decision of *Patel v Mirza [2016] UKSC 42* in support of this position. Mr Jobson contended that the legal position in respect of claims where *ex turpi causa* may be raised is no longer determined simply on the basis that an illegality may have been contemplated or has occurred as the Courts now consider whether there is merit in allowing the claim to proceed.

[21] The facts in *Patel v Mirza* are that Mr. Patel paid £620,000 to Mr. Mirza pursuant to an agreement under which Mr. Mirza would bet on the price of some shares in Royal Bank of Scotland, on the basis of insider information Mr. Mirza had from his contacts at the bank about a pending government announcement. Using advance insider information to profit from trading in securities is an offence under section 52 of the Criminal Justice Act 1993. The scheme did not come to fruition as the expected insider information was mistaken, and Mr. Mirza did not return the funds to Mr. Patel as promised. Thereafter, Mr. Patel brought a claim based on contract and unjust enrichment for the return of £620,000. Mr. Mirza argued that no such obligation could be enforced because the whole contract was illegal, and any claim would be precluded by the principle of *ex turpi causa non oritur actio*.

[22] The UK Supreme Court held unanimously that Mr Patel could recover the money, and that the formal test in *Tinsley v Milligan* was no longer representative of the law. The Court found that a person who satisfies the ordinary requirements for a claim in unjust enrichment should be entitled to the return of his property; he should not *prima facie* be debarred from recovering his property because the consideration which had failed was an unlawful consideration. It was decided that

Mr Patel's claim should be allowed since it would have the effect of returning the parties to their positions prior to the conclusion of the illegal contract, as well as prevent Mr Mirza from being unjustly enriched.

[23] Lord Toulson considered the state of the law concerning illegality and stated as follows at page 99;

Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left-hand what it takes with the right hand.

[24] The Learned Judges found that the prior test in ***Tinsley v Milligan*** is inconsistent with the coherence and integrity of the legal system. Instead, the Court should consider whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account:

1. the purpose of the prohibition which has been transgressed, and whether the purpose would be enhanced by the denial of the claim;
2. any other relevant public policy on which the denial of the claim may have an impact; and
3. whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

[25] In considering the submissions made on behalf of the Parties and applying the principles extracted from the case law cited the Court would have to consider the evidence in respect of the contract between the parties to determine whether any illegality was involved and the effect of this illegality. On a close examination of the documents referred to it is clear that although the agreement between the parties

referred to a purchase price of US\$80,000 the purchase price of US\$110,000 or JMD \$11,440,000 are stated in both the Agreement for Sale and the Instrument of Transfer prepared by Counsel, these are the figures that any taxes payable would have been assessed on and as such, the Tax Administration would not have been deprived of revenue to which it would have been entitled.

- [26] In relation to the mortgage sought, the valuation which was done reveals that the property in question was worth over JMD \$13 million a sum which is far in excess of the sum being borrowed. Had the Claimant completed the purchase with the assistance of this loan a lien on such a property would have been value for the Mortgage Company's money. If the Claimant failed to pay her mortgage payments once the funds were disbursed the mortgage company would have suffered no loss if they moved to foreclose. In those circumstances, it is arguable as to whether any deceit was committed against the mortgage company which could have the effect of rendering the contract an illegal one.
- [27] Additionally, it may be argued that it is not unheard for an individual to obtain a loan for a higher sum in order to meet other obligations such as improvements to a property or even to pay taxes as was the stated intention in the instant matter. The question as to whether this action is illegal would largely turn on the evidence at trial and in this way it is evident that the *Viola Miller* case can be distinguished as the clear intention of those parties was to have the taxes for the property assessed at a lower rate than would have been due on the actual purchase price.
- [28] It was also noted that no defence has yet been filed by the 3rd Defendant, to whom the property in question has since been transferred, a situation which raises a concern as to whether the Court could properly strike out the claim on his application and enter summary judgment in circumstances where he was not party to the original agreement or intention and not all the evidence is in.
- [29] Additionally, while the 3rd Defendant has argued that the conduct alleged is not fraudulent, there is nothing for the Court to review on his part to properly determine

this issue. The Claimant on the other hand has referred to his actions in taking possession in circumstances where he was fully aware of her efforts, from as far back as 2011, to purchase the property in question as well as the fact that she had paid monies towards this purchase and expended a substantial sum in refurbishing same. I am satisfied on a review of the evidence provided that the Claimant has a reasonable ground for bringing this claim. The issue as to the merit of her assertions of fraud would fall to be determined by a tribunal of fact on a full hearing of the matter.

- [30] In relation to the submission that the Agreement had come to an end as the deadline provided had expired, it is my view that a Court would have to consider all the evidence to determine if the Vendors had in fact made time of the essence for the completion of the agreement for sale and the Claimant had simply failed to comply. In light of the foregoing factors, I am not persuaded that this is an appropriate matter to be disposed of by the striking out of the Claim, accordingly, the 3rd Defendants application is denied.
- [31] It was submitted that in addition to or in the alternative to the request for orders striking out the claim form and particulars, the Court should enter summary judgment in the favour of the Applicant. The power of the Court to make a summary order is contained in Rule 15.2(a) of the CPR which provides that the court may give summary judgment on the claim or on a particular issue if it considers that a Claimant or Defendant has no real prospect of succeeding on the claim or the issue. Where a Party makes such an application it is their burden to establish that there is no prospect of success.
- [32] In the locus classicus of **Swain v Hillman et al 2001 1 All ER 91** the learned judge highlighted that when assessing the prospects of success of a party's claim the Court ought not to embark on a mini-trial. It was also emphasised that if the case is based on a point of law which is bound to fail then summary judgment may be granted. If, however there are arguable points of law then summary judgment ought not to be granted. Accordingly, in light of the legal principles which have

been outlined in the *Viola Miller* and *Patel* decisions and the evidence which would have to be examined by the appropriate tribunal, I find that there are arguable points of law which should be considered by the appropriate tribunal. Accordingly, the application for summary judgment is also doomed to fail.

CONCLUSION

[33] For the reasons discussed above, the following Orders are made:

- i) The Application by the 3rd Defendant for the Claimant's Further Amended Claim and Particulars to be struck out against the third defendant is denied.
- ii) Costs to the Claimant to be taxed if not agreed.