

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 13 OF 1979

IN THE MATTER OF CONTRACT OF
SALE FOR PREMISES NO. 10
GLENDON DRIVE; TRAFALGAR PARK
BETWEEN VENORA THOMAS AND
JOHN TREVOR SCARLETT AND
CILMA SCARLETT

A N D

IN THE MATTER OF THE VENDORS AND
PURCHASERS ACT.

Mrs. P. Benka-Coker, instructed by Messrs Messado, Woodham & Pickersgill
for Purchaser/Applicant

Mr. B.J. Scott, Q.C., instructed by Scott and Gayle for Respondents

Heard: 20th and 21st October, 1981 and 4th November, 1981.

Ellis J. Actg:

In this matter three Summonses were before me. One dated
22nd July, 1981 by the Applicant Venora Thomas seeking to have the
following orders made:-

- (a) that the Registrar of the Supreme Court be given the authority to sign the Transfer in relation to premises 10 Glendon Drive, Trafalgar Park, St. Andrew which said premises by Contract of Sale dated 22nd November, 1977 the defendants agreed to sell to the Plaintiff;
- (b) for an order that the Victoria Mutual Building Society do release the relevant duplicate Certificate of Title to the Purchaser's Attorneys with whatever conditions this Honourable Court may deem fit to attach to such an order;
- (c) for an order that the Purchaser's Attorneys, Messrs Messado, Woodham and Pickersgill of No. 31 Duke Street be empowered to prepare all relevant documents and do effect all acts necessary for the completion of the sale;
- (d) any other or further relief that this Honourable Court may deem just;
- (e) that the defendants be condemned in costs of the proceedings.

The other dated 24th September, 1981 by the respondents seeking

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a declaration that a Contract for the sale of land dated 22nd November, 1977 and made between the Applicant and the Respondents has been lawfully rescinded as of the 14th of September, 1981.

The third Summons dated 25th September, 1981 by the Applicant sought to have the Respondents' summons struck out for being

- (a) frivolous and vexatious
- (b) an abuse of the process of the Court

In support of the Summonses the parties filed affidavits and exhibited certain documents.

At the outset Mr. Scott contended that the Judge in Chambers had no jurisdiction to hear the Applicant's Summons and to make the orders claimed therein. He contended that:-

- (i) the Plaintiff should have sought Specific Performance of the Contract by issuing a Writ.
- (ii) that the jurisdiction of a Court vide Section 7 of the Vendors and Purchasers Act is limited and the orders sought in the Summons are outside those set out in the 3rd Edition of Halsbury Law at paragraphs 530-534 and 535-536.

In relation to the Summons brought by the Respondents, Mr. Scott argued that they were, in the circumstances, competent to make time of the essence and could rescind if Purchaser failed to complete within that time.

Mrs. Benka-Coker for the Applicant argued that the Court had jurisdiction to hear the Summons and to make the orders sought therein and placed reliance on Section 67 of the Registration of Titles Act and Section 7 of the Vendors and Purchasers Act. The Applicant also argued that it became necessary to proceed by Summons because of the continued obstruction on Respondents' part against completion.

In her argument she referred to a paragraph in Respondents' Affidavit which stated that a transfer was signed by the Parties. That paragraph in the circumstances she argued must have been put forward to negate any contention of obstruction on Respondents' part. The Transfer was challenged on the ground that it was not a registrable document in

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that it was signed out of the jurisdiction and not in conformity on the Section 152 of the Exchange Control Act.

In support of the Applicant's Summons to strike out the one brought by the Respondents, the Applicant relied on Order 18 of the Supreme Court Practice and the cases cited in Rule 19/10 thereof.

In order to deal with the contentions of the parties it is necessary to briefly state the history of the case.

On the 22nd of November, 1977, a contract of sale of premises 10 Glendon Drive was entered into by the parties.

Apparently, nothing was done by either party to effect completion until in 1978 when the Purchaser intimated by letter to the Vendors her willingness and readiness to complete. The Vendors subsequently purported to terminate the contract and to forfeit the Purchasers' deposit.

The Purchaser applied by summons for a declaration that the contract was still subsisting. The declaration was made on the 25th January, 1980 by McKain J. and affirmed on appeal by the Vendors, by the Court of Appeal on the 28th April, 1981.

Two days after the Appellate Court's decision, the Purchaser requested certain documents from the Vendors' Attorneys which she contended would go towards facilitating completion (see letter dated 30th April, 1981 Ex "B" - Plaintiff's affidavit.) The Vendors did not respond and the Purchaser by Summons dated 22nd July, 1981 sought to have the orders referred to above.

On the 24th August, 1981 the Vendors Attorney wrote to the Purchasers' Attorney acknowledging receipt of the Summons and sought to make time of the essence of the contract by demanding payment of the balance of the Purchase price for 10 Glendon Drive and the half costs of transfer within three weeks - otherwise the contract to sell would be rescinded.

In the light of the above history of the matter, the following questions are to be answered:-

- (a) Is the Purchaser in the circumstances competent to proceed vide a Vendor and Purchaser Summons?

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- (b) Is the Vendor in the circumstances competent to make time of the essence and to rescind if completion is not effected within that time?
- (c) Is the Court competent to make the orders sought in the Applicant's summons?

In Jamaica, by virtue of Section 7 of the Vendors and Purchasers Act, "A Vendor or Purchaser of real or leasehold estate in this Island or their respective representatives may at any time or times and from time to time apply, in a summary way to a Judge of the Supreme Court, in Chambers in respect of any requisitions or objections or any objection or any claim for compensation, or any other question arising out of or connected with the Contract (not being a question affecting the existence or validity of the Contract) and the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid." Section 49 of the English Law of Property Act 1925 is couched in similar language as the Jamaican statute and therefore the English decisions on the point are relevant to a construction of the Jamaican Act.

In Williams on "Vendor and Purchaser" 3rd Edition Vol. II page 1076 the following passage appears:-

" Whatever could be done in Chambers upon a reference as to title under a decree for specific performance, when the contract was established can be done upon proceedings under this enactment. It enables the parties to put themselves in Chambers in exactly the same position in which they would have been with all the rights which they would have had under the old form of decree. Evidence by affidavit may therefore be given and deponents may be cross-examined."

Then at page 1077 there are set out the principal questions properly to be determined on a Vendor and Purchaser summons with this statement:-

" In fact as a general rule, all questions may be so decided which may arise between the parties on the assumption that there is an unimpeachable contract of sale between them, and which must be cleared up before the parties can proceed to completion."

So too in Halsbury's Laws of England 3rd Edition Vol. 34 at page 314 paragraph 531 one finds the statement that:-

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" Whatever could be done in Chambers upon a reference as to title under such a judgment, where the contract has been established can be done on a Vendor and Purchaser summons. The procedure was not, however, intended to enable the Court to try summarily disputed questions of fact and a vendor and purchaser summons cannot be treated as if it were an action for Specific Performance or for recession or for any other purpose."

It is my opinion from a close look at the two quoted passages that any question which arises between a vendor and purchaser may be decided by a Court on a Vendor and Purchaser summons, except any question which goes to a consideration of the validity of a contract or which would result in an order being made for Specific Performance.

The case of Re Hargreaves and Thompson's Contract, Vol. 32 Chancery Division (1886) page 454 fortifies the above opinion. In that case, the Purchaser issued a Vendor and Purchaser summons seeking declarations that the vendor had not answered certain requisitions and did not make out a good title. At first instance the summons was dismissed. On appeal, that decision was reversed and the declarations were granted. In addition, the Court of Appeal ordered the return of the deposit with interest.

At page 456 Cotton L.J. accepted a Courts limited statutory jurisdiction to determine questions on a Vendor and Purchaser Summons and warned himself that a Vendor and Purchaser Summons ought not to be treated as an action for Specific Performance. The learned Lord Justice however went on to say that the Court had jurisdiction on a Vendor and Purchaser Summons to, inter alia, determine any question save one which goes to the validity of a contract.

Lord Justice Lindley at page 459 was of the similar opinion and the Court made the declaration sought by the Purchaser and ordered the return of the deposit with interest.

In the cited case, one question was whether a requisition was answered by the Vendor. In the case under review there was a requisition for the production of a duplicate certificate of title and I am therefore of the opinion that the Hargreaves case is ^{here} applicable. I therefore hold that the Summons has been properly brought and the answer to the first question is in the affirmative.

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The second question which questions the competency of the Vendor in the circumstances to make time of the essence is answered in the negative.

I base that answer on a consideration of Re BARR'S Contract [1956] 2 All E.R. 853 at pp. 856-7. Beginning at letter G at page 856 Mr. Justice Dankwerts listed three conditions which must be present, before a Vendor can make time of the essence and I paraphrase:-

- (i) The Vendor's willingness, readiness and ability to proceed.
- (ii) The Purchaser must be guilty of such delay or default as entitles Vendor to rescind.
- (iii) The Notice to rescind must allow a reasonable time for payment of Purchase Price.

In the light of the objection taken to the purported signed transfer that it does not satisfy the Exchange Control Act I hold that the first condition is not present in this case.

The fact that two days after the Court of Appeal delivered its decision as to the validity of the contract the Purchaser sought to complete is not any delay or default which entitled the Vendor to serve notice of rescission. In any case, the Vendors did not give notice until after the Purchaser's Summons was served. In the circumstances, if there was delay both parties are guilty.

I hold that the second condition laid down in BARR'S was not present.

A period of three weeks to raise \$35,000 in the circumstances of this case was not a reasonable time within which to complete the contract.

I hold that the 3rd condition is absent in this case also. The answer to question (b) is negative. At this point I also dismiss the Vendors Summons and refuse the declaration sought therein.

I am now left to deal with question (c).

Mrs. Benka-Coker invited me to make the order (a) on the Summons under the authority of Section 67 of the Registration of Titles Act. On a close scrutiny of the section and considering the circumstances of this case I am not convinced that this case comes within the contemplation of Section 67 of the Registration of Titles Act. Accordingly the prayer for that order is refused.

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The prayer for the second order has been with frankness abandoned. It appears to me that the third order could only be made on a grant of the first order. That having been refused makes the third order sought redundant.

The Applicant/Purchaser has an omnibus prayer at (d) for any other or further relief that the Court may deem just. The Jamaican legislation and the English legislation allow such a prayer or request. And the competence of a Court to make such order is eloquently reflected in the Hargreaves' case referred to above.

In the circumstances of this case I find:-

- (a) the purchaser is willing to complete the contract and requires the duplicate Certificate of Title towards that end,
- (b) the vendors refusal to deliver that document is unreasonable and is stultifying of Purchaser's desire to complete the Contract;
- (c) the Vendor is not yet in a position to furnish a registrable transfer of Title.

To my mind the above findings are matters which demand relief to the Purchaser under the fourth prayer.

Accordingly I make the following order:-

- (i) that the Vendor within two weeks hereof deliver to Purchaser's Attorneys the duplicate Certificate of Title for premises 10 Glendon Drive;
- (ii) that the Vendor within three weeks hereof do produce to the Purchaser's Attorneys a duly executed and stamped transfer of Land;
- (iii) that the costs of these proceedings be paid to the Applicant by the Vendor. Such costs to be agreed or taxed.