

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E134 OF 1991

IN THE MATTER of an Application of  
EDNA MAY WALTERS for a declaration of  
certain rights over land situated at  
4 Whittingham Avenue, Kingston 8 in  
the parish of Saint Andrew comprised  
in Certificate of Title registered  
at Volume 1071 Folio 306 of the  
Register Book of Titles.

A N D

IN THE MATTER of the Married Women's  
Property Act.

BETWEEN EDNA MAY WALTERS APPLICANT

A N D CONRAD DALKEITH ST. AUBYN WALTERS RESPONDENT

Miss C. Davis for Applicant

Mr. D. Schardsmidt Q.C. for Respondent

HEARD: June, 28, 29, 30, September, 27, 1993 and July 1, 1994.

EDWARDS J.

In this matter the applicant Edna May Walters is asking  
the Court for:-

- "(a) A Declaration that on payment of such  
sums found to be due from the Applicant  
to the Respondent pursuant to the agreement  
between the parties, the Applicant is entitled  
to a 100 % interest in the matrimonial property  
known as 4 Whittingham Avenue, Kingston 8, in  
the parish of Saint Andrew comprised in Certifi-  
cate of Title registered at Volume 1071 Folio  
306 of the Register Book of Titles and such  
appropriate order for the transfer thereof."

The Contract for Sale was signed by the applicant and the  
respondent and the transfer was signed by the respondent but  
there is no evidence that the transfer was signed by the  
applicant as requested.

The deposit was not paid. On the 20th October 1989 i.e. more than 3 months after the contract of sale was signed, Thwaites Fairclough Watson & Daly per Miss Delrose Campbell sent a letter to Miss Sonia Jones advising that:

"Our client is securing a loan through Century National Bank to complete the purchase of your clients' share in 4 Whittingham Avenue, St. Andrew. All indications are that the loan was approved and that the deposit as well as a letter of commitment for the balance of the purchase money will be forwarded to you shortly by the bank."

On the 31st October 1989 Century National Merchant Bank and Trust Company wrote to Miss Sonia Jones referring to the sale of the land to the applicant and stating that we would appreciate your accepting this letter as our undertaking to pay \$140,000 upon receipt of the relative Certificate of Title registered in her name, free of encumbrances save and except the restrictive covenants endorsed herein."

These were new terms. Nothing is said about the deposit. The attorney-at-law who represented the applicant in the transaction was clearly of the view that the agreement called for (i) payment of a deposit and (ii) a letter of commitment for the balance and she stated this in her letter of the 20th October, 1989 to Miss Jones.

On the 20th February 1991 Miss Jones who had carriage of sale advised Miss Delrose Campbell that failure of the applicant to pay the deposit as required by the Contract amounted to a breach and that "the said breach discharged Mr. Walters from any obligation under the contract".

Strictly speaking it should have said discharged the vendors since the vendors were Conrad Dalkeith St. Aubyn Walters and Edna May Walters. But if one of the vendors elected to treat the contract as discharged the other could not go through with it.

It was argued for the applicant that the letter of commitment for the full purchase price was tantamount to full cash payment and consequently the applicant had fulfilled her obligation under the contract.

A letter of commitment is not however the equivalent of a cash deposit which the vendor is usually free to use immediately it is received without having to satisfy conditions precedent such as those stated by the Bank in the letter of commitment.

The parties were not living together in amity when the contract of sale was executed and the agreement was clearly intended to create legal relations.

The vendor had stipulated the amount of the deposit which was required and when. This was the bargain. Up to now the deposit has not been paid.

Unlike a mere payment a deposit is intended to be security for performance by the purchaser and to be forfeited if he makes default. "Everybody knows what a deposit is ..... it is a guarantee that the purchaser means business".

Soper v Arnold (1889) 14 App. Case 429 at 435 per Lord Macnaghten

"In the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee."

Howe v Smith (1884) 27 Ch. D. 89 at 101 per Fry L.J.

In the instant case the land is jointly owned by the parties so that it cannot be transferred without the signature of both parties to the transfer. The applicant has not only not paid the deposit, but she has also not signed the transfer so that the respondent would be powerless on his own to give the title contemplated by the bank as a condition precedent to payment of the purchase price.

Action by the respondent in treating the contract as discharged after more than 18 months of failure to pay the deposit could hardly be regarded as unreasonable. But it was argued that the action was not being brought in contract.

It was argued that a trust of some sort was created in favour of the wife/applicant by the agreement and that she is entitled to have the property transferred to her for the price stated in the Contract of Sale.

I am unable to follow that argument in which it has been suggested that section 16 of the Married Women's Property Act placed contracts between husband and wife in a special category, different from those under the ordinary law of contract and that it gives the Court what might be considered discretionary powers to settle in an equitable manner disputes between husband and wife as to property and that in the situation outlined in the instant case a trust would be created in favour of the wife.

In Merrit v Merrit 1970 2 A.E.R. at p.761/2 Lord Denning drew a distinction between domestic arrangements entered into when the parties are living together in amity.

"In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations."

In that particular case Counsel for the husband sought to rely on section 17 of the United Kingdom Married Women's Property Act 1882 (the equivalent of our section 16). Lord Denning dealt with it in this manner.

"Finally Counsel for the husband said that under section 17 of the Married Women's Property Act 1882 this house would be owned by the husband and wife jointly, and that even if this house were transferred to the wife, she should hold it on trust for them both jointly. There is nothing in this point either. The paper which the husband signed dealt with beneficial ownership of the house. It was intended to belong entirely to the wife."

In the instant case the parties were in the middle of divorce proceedings and the agreement which the parties signed stipulated that a deposit of \$21,000 should be paid on the signing of the agreement. This was not done and the non-payment of the deposit was treated by the respondent as a breach which discharged him from his obligations under the contract.

As to the declarations which I am asked to make under the amended Originating Summons:

- (a) I hold that the agreement was discharged by the failure of the respondent to pay the required deposit. The agreement having been discharged, and the applicant not having paid any monies under it, nothing is now due from the applicant to the respondent under the Contract of Sale.
- (b) I was also asked in the alternative for a declaration as to the interest of the applicant and the respondent in the premises and to make such order as to sale, partition or possession thereof as may be reasonable and just.

As regards (b) the position remains as it was immediately before the contract of sale was executed viz that property is held by the applicant and the respondent as joint tenants.

The Contract of Sale shows that what was being sold was a one half share in the property of 4 Whittingham Avenue, Kingston 8 and it was being sold to the applicant. The inference is that it was the respondent's one half share that was being sold. This taken together with the transfer signed by the respondent under which the

entire property would be transferred to the applicant on payment of the purchase price for one-half indicates that the respondent accepted that he owned one half share in the property and the applicant the other half. The applicant and the respondent each therefore in my view owns a 50% interest in the property at 4 Whittingham Avenue, Kingston 8.

The arguments and affidavit evidence were given primarily in respect of the declaration sought at paragraph (a) of the amended Originating Summons and I am therefore unable at this stage to make a declaration as to the sale or partition of the premises.

To sum up the declaration sought at paragraph (a) of the amended Originating Summons dated 26th April 1991 is refused. As regards paragraph (b) of the Summons I hold that the applicant and the respondent own the premises as joint tenants with each holding a 50% undivided share in the premises.

No order as to costs.

Leave to appeal granted.