

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 63 OF 1981

BETWEEN	WILFRED CALU	PLAINTIFFS
AND	CLARICE CALU	
AND	LORIS WYNTER	
AND	MAXWELL WYNTER	DEFENDANTS

Mrs. Pamela Benka-Coker instructed by Mrs. Jennifer Messado of Jennifer Messado and Co. for Plaintiff.

Dr. Lloyd Barnett and Dr. Adolph Edwards for Defendants.

Heard: April 15, 16, 17, 1985 and December 19, 1985

WOLFE J.

The Plaintiffs and the Defendants entered into a written agreement dated the 15th day of January, 1981 whereby the Defendants agreed to sell and the Plaintiffs to purchase certain freehold property situate at 41 Stilwell Road in the parish of Saint Andrew. The Agreement for Sale Exhibit 1 is set out hereunder:

MEMORANDUM OF AGREEMENT made this 15th day of January 1981 BETWEEN MR. MAXWELL WYNTER MRS. LORIS WYNTER 12E Strathmore Kingston 8 (hereinafter called the Vendor) of the ONE PART and Mr. Wilfred Calu Mrs. Clarite Calu 16 Cling Cling Avenue Kingston 11 (hereinafter called the Purchaser) of the OTHER PART WHEREAS IT IS AGREED that the Vendor will sell and the Purchaser buy the premises described in the schedule hereto at the price and on the terms and conditions as herein set forth.

SCHEDULE

PREMISES: 41 Stilwell Rd.
 PRICE \$90000.00
 TITLE: Registered
 PAYMENTS: \$9000.00 deposit (Nine Thousand 10% deposit)
 COMPLETION: On or before the 30th March 1981
 POSSESSION: On completion
 COSTS OF TRANSFER: To be borne equally by both parties.
 CARRIAGE OF SALE: Judah Desnoes & Co.
 Govt. Tax 5%
 to be paid by Vendor

WATER RATES,) to be adjusted
TAXES AND	
INSURANCE	
COMMISSION:) 5% payable by Vendors to B.K. Frankson & Associates.

SPECIAL CONDITIONS: Subject to Mortgage
 MAXWELL WYNTER
 Loris Wynter
 Signed by the Vendor in the presence of:
 W.R. Calu C. Calu
 Signed by the Purchaser in the presence of: B.K. Frankson"

A letter dated the 26th March 1981 under the hand

of Mrs. Jennifer Messado of Messado, Woodham and Pickersgill, Attorneys-at-Law acting for the Plaintiffs at that point in time was addressed to the second named Defendant Maxwell Wynter the contents of which are very material and consequently is set out herein.

Mr. Wynter responded to the above letter by a letter dated March 27, 1981 set out herein:

"Messrs. Messado Woodham and Pickersgill
Attorneys-at-Law
31 Duke Street
Kingston

Dear Sirs

Re: Sale No. 41 Stilwell Road, St. Andrew,
Wynter to Calu

I acknowledge and thank you for your letter dated March, 26, 1981 delivered by Mrs. Calu.

I cannot recall having given Mrs. Calu any assurance that the price quoted in the contract for the above premises would be reduced as this can only be done in consultation with the second person whose name appear on the Title as this would have to be a decision by both of us, and no discussion was held up to the time that Mrs. Calu brought your letter.

In view of the apparent difficulty of the Calu's being able to raise the loan to close the sale I am prepared to refund the amount held in escrow on deposit.

Please advise as to whom I should intruct my Attorneys to refund the deposit.

Thanking you
Yours truly,
M. Wynter
Max T. Wynter."

Upon receipt of the letter referred to above the Plaintiffs' attorneys-at-Law addressed a letter dated 2nd April 1981 to the Defendants as set out below:

"Mr. & Mrs. Loris Wynter,
8 East Strathmore,
Kingston 8,

Dear Sir/Madam:
Re: 41 Stilwell Road - You to Calu

We have your letter in respect of the above premises.

We confirm that our clients are willing to proceed with the sale of the above premises at the previously agreed price of \$90,000.00.

They are obtaining a Mortgage Loan of \$44,000.00 to complete the purchase and have in hand the difference in purchase money.

Accordingly kindly grant an extension of time to the 30th April, 1981 to submit proof of obtaining the Mortgage Loan.

Yours faithfully,
Messado, Woodham & Pickersgill,
Per:
Jennifer Messado"

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By letter dated the 7th April 1981 addressed to Messado Woodham and Pickersgill attorneys-at-Law the Victoria Mutual Building Society advised that a mortgage loan of \$44,200.00 in favour of the Plaintiffs had been approved by the said society.

"Messado, Woodham, & Pickersgill
Attorneys-at-Law,
31 Duke Street,
Kingston.

Attention: Mrs. Messado

Dear Sirs,

Subject: 41 Stilwell Road, St. Andrew
WILFRED R. CALU ET UX

At the request of Mr. and Mrs. Calu we confirm that a loan of \$44,200.00 has been approved on the abovementioned premises.

Payment of the loan will be made on execution and registration of the mortgage.


Yours faithfully,

for V. McGregor. (Mrs.)
MORTGAGE OPERATIONS MANAGER"

It is worthy of note that the date of completion had now passed.

The deposit paid by the Plaintiffs in keeping with the Agreement was returned to the Plaintiffs' attorneys-at-Law by letter dated April 22, 1981.

"Messrs. Messado Woodham & Pickersgill
Attorneys-at-Law
31 Duke Street
Kingston

 Mrs. Jennifer Messado

Please find enclosed cheque for \$9,000.00 (nine thousand dollars) deposited by Mr. & Mrs. Wilfred Calu re 41 Stilwell Road. I refer to your letter of the 26th March, 1981 to which letter I had replied. As a result I enclose my cheque payable to the Calu's in your care.

Yours truly,
M.T. Wynter
Max T. Wynter "

This action on the part of the Defendants was met by the response which appears in the letter dated 27th April 1981 and which is set out herein.

"Mr. Max T. Wynter,
12 East Strathmore,
Kingston 8.

Dear Mr. Wynter:

Re: 41 Stilwell Road

We are in receipt of your letter dated the 22nd April, 1981 enclosing cheque for refund of deposit of \$9,000.00 paid herein to Wilfred and Clarice Calu.

We must bring to your attention immediately copy of our letter dated the 8th April, 1981 to Messrs. Judah, Desnoes, Lake, Nunes, Scholefield & Co, your Attorneys herein the original of which was first sent to you on the 26th March, 1981 and you refused to accept same and advised us to contact your attorneys directly with this information.

In this letter we forwarded to you the necessary proof that the mortgage loan of \$44,200.00 from Victoria Mutual Building Society was granted to complete the Contract of Sale and that we had in hand the difference in purchase money and therefore we had complied with the Purchasers obligations to complete the Contract of Sale.

You are not in a position therefore to cancel the Contract of Sale on the 23rd April, 1981 three weeks after the date of completion has expired after you have been notified that the purchasers are ready and willing to complete.

Accordingly, we return cheque to you purporting to refund deposit paid herein and immediately advise you on behalf of the Purchasers that we have taken the following steps:-

1. Place a Caveat on behalf of the Purchasers, placing on same their equitable interest as purchasers against the said duplicate Certificate of Title.
2. Preparing the necessary documents to file in the Supreme Court originating Summons and Affidavit in Support under the Vendor and Purchasers Law for a declaration that the Contract is valid and subsisting and for specific performance of same.

We enclose herewith copy of offer of finance to the Purchasers from Victoria Mutual Building Society where instructions have been given to their Attorneys for the preparation of the documents.

Please therefore arrange with your Attorneys immediately

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- 1. To send us duplicate Certificate of Title for these premises on loan.
- 2. Registrable Instrument of Transfer in favour of the Purchasers as joint tenants.

We undertake not to part with same or use same in anyway prejudicial to your interest and to make payment of the balance purchase money and half costs transfer herein.

Yours faithfully,
MESSADO, WOODHAM & PICKERSGILL,

Per
JENNIFER MESSADO "

The deposit of Nine Thousand Dollars which had been returned by the Defendants was sent back to the Defendants by letter dated the 18th May, 1981.

"Messrs. Max & Loris Wynter
12 Eastrathmore,
Kingston 8.

Dear Sir/Madam:

We have been instructed by Wilfred & Clarice Calu to return the enclosed cheque for \$9,000.00 being payment of deposit of premises 41 Stilwell Road in the parish of Saint Andrew.

Please sign the attached copy letter in acknowledgement of receipt.

Yours faithfully,
MESSADO, WOODHAM & PICKERSGILL

Per
JENNIFER MESSADO"

The Plaintiffs commenced these proceedings by Writ of Summons dated 11th May 1981 and sought the following reliefs:

- 1. Specific Performance
- 2. All necessary and consequential accounts, directions and injuries.
- 3. Damages for breach of contract in lieu of or in addition to specific performance.
- 4. Further or other relief.

I consider it important to set out the defence and Counter-Claim verbatim.

" DEFENCE

1. Save that the Defendants say that the said Agreement was subject to a condition precedent which read "subject to mortgage" paragraph 1 of the Statement of Claim is admitted. The Defendants will further refer at the trial of this action to the said Agreement for its full terms and true effect.

2. Paragraph 2 of the Statement of Claim is admitted.

3. The Defendants further state that the said Agreement was void for uncertainty as the aforesaid special condition relating to mortgage did not specify the term, amount, or rate of interest of the said mortgage.

4. Further or alternatively, the Plaintiffs were never at any material time ready, willing or able to perform all their obligations under the said agreement.

5. In particular, the Plaintiffs in a letter from their Attorneys-at-Law dated March 26, 1981, repudiated the said agreement by indicating that they would not be prepared to complete it in the sums for which it provided but at a lower purchase price. Thereafter the Defendants treated the said agreement as at an end and by letter dated March 22, 1981 returned the deposit which the Plaintiffs had paid.

6. Further or alternatively, the said condition precedent was not fulfilled by the date fixed for completion or at all in that no mortgage or no mortgage reasonably necessary to enable completion of the agreement in accordance with its terms was raised by the Plaintiffs on or before the date fixed for its completion.

7. Further or alternatively, the Plaintiffs have failed to pay or to provide for the balance of the purchase price by the date fixed for completion or at all.

8. By reason of the premises the Plaintiffs are not entitled to the relief claimed or any relief.

COUNTER-CLAIM

9. The Defendants repeat paragraphs 1 - 7 of the Defence.

10. The Plaintiffs have in alleged protection of their purported rights under the said Agreement lodged on the 1st day of May 1981 a Caveat against the Plaintiffs' title to the said property.

11. By reason of the premises, the sum of \$9,000 which was paid as a deposit is forfeited by the Defendants.

AND THE DEFENDANTS CLAIM:

- (1) A declaration that they are entitled to retain the said sum of \$9,000.
- (2) An Order for the removal of the said Caveat
- (3) Damages for the unlawful lodging of the said Caveat."

In the light of the pleadings and the evidence adduced I concluded that the issues which fall to be resolved by me are

- 1. Is the Agreement dated the 15th January 1981 a conditional or binding Agreement i.e. is the subject to mortgage clause a condition precedent or subsequent?
- 2. What is the effect of the non fulfillment of the special condition?
- 3. Is the special condition clause "subject to mortgage" so vague as to make the Agreement void for uncertainty.

Issue No. I

Mrs. Benka-Coker for the Plaintiffs submitted that even if the court were to hold that the subject to mortgage clause is a condition precedent the condition **related** to the performance of the contract and not to the formation. It was a conditional agreement as to performance.

Dr. Barnett for the Defendant in response to the above submission urged that the subject to mortgage clause having been made a special condition to the Agreement for Sale and since the subject matter of the Agreement is a specific property nothing can survive if the special condition is not fulfilled. It was further urged that where the entire agreement is subject to a special condition of this nature without any qualification then it is a condition precedent to the formation of an agreement.

In deciding whether the special condition is a

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condition precedent to the formation of an agreement or a condition precedent to the performance of the contract one must ask the question whether either of the parties could unilaterally rescind from the agreement before the date fixed for completion.

In Smith v Butler [1900] 1 Q.B. 694. The Plaintiff agreed to purchase from the defendant the lease of a public-house on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount of money remaining on mortgage as was then due. A date was fixed for completion and a deposit paid, which was to be forfeited if the sale went off through the default of the Plaintiff. At an interview between the Plaintiff, the Defendant, and the mortgagee, the latter would only agree to a lesser amount remaining on mortgage. The Plaintiff thereupon treated the contract as at an end subsequently, and before the date fixed for completion, the Defendant obtained the consent of the mortgagee to the full amount of the mortgage debt remaining on mortgage but the Plaintiff refused to proceed with the purchase. Held: that in the absence of circumstances which would justify the Plaintiff in treating the refusal of the mortgagee as final, or of an agreement express or implied that it should be so treated, the Defendant had until the date fixed for the completion of the contract in which to perform the condition by obtaining the consent of the mortgage; that the contract had therefore gone off through the default of the Plaintiff and that he could not recover the deposit. (emphasis mine)

The Learned Author of Anson's Law of Contract 25th Edition at page 132 relied on Smith v Butler supra, as authority for the following proposition

"Secondly, one party may assume an immediate unilateral obligation, say, to sell land to or buy goods from the other, but subject

to a condition. In this case, there is a contract from the start imposing a unilateral obligation from which one party cannot withdraw, but no unilateral contract of sale binding on both parties, comes into existence until the condition is fulfilled".

In Smallman and Smallman [1971] 3 A.E.R. 717.

"Her marriage having broken down the wife took out a summons under S 17 of the Married Women's Property Act 1882 to determine the property in the house, the former matrimonial home, and of the furniture whilst that application was pending, the solicitors acting for the husband and wife explored the possibility of reaching an overall settlement between them. An agreement regarding the sale of the house, in which the parties were to have half shares, the children's maintenance and the divorce was reached "subject to the approval in due course of the court. The husband was prepared to co-operate on the basis of an overall settlement provided the wife and the co-respondent made statements to agents on which a petition for divorce could be based. After those statements had been duly made the husband changed his mind about the agreement and sought to rescind from it. He regretted that he had not taken proceedings asking for a variation of the title of the house as being a post nuptial settlement, feeling that in the light of the wife's conduct the court might not have given her a half share in it. He contended that the agreement was not binding on him since it had not yet received the court's approval".

Lord Denning MR at p.720 said:

"In my opinion, if the parties have reached an agreement on all essential matters, then the clause subject to the approval of the court does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But pending the application to the court it remains a binding agreement which neither party can disavow".

In the instant case the parties have agreed all the important terms of the contract but by way of special condition state that the agreement shall be "subject to mortgage". As I understand it the parties are thereby saying that a binding

contract is in force but it is defeasible in the event of the purchaser not being able to procure mortgage financing. I am constrained to this view because neither party could have resiled from the agreement without there being a failure of the special condition. The purchasers could not have sat idly by and do nothing about obtaining a mortgage and at the expiration of time demand their money back and say the contract is at an end. They were obliged to make every effort to avail themselves of a mortgage on such terms as would be considered reasonable. In the event of the purchasers failing to make efforts to obtain a mortgage the vendor could treat the failure so to do as a breach of the contract and sue for damages as well as forfeit any deposit paid under the contract. In the event of the purchaser not being able to obtain a mortgage within the time allowed the purchaser would be entitled to treat the contract as at an end or to cause the contract to come to an end, but there is implied in the condition 'subject to mortgage a requirement that the purchaser shall take all reasonable steps on his part to obtain the mortgage see *Zieme v. Gregory* (1963) V.R. 214 at pp222 and 223.

In *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1959] 3 W.L.R. 1011 at p1016 - 1017 a clause in an agreement which provided that "the purchase is conditional on the vendor obtaining at the vendor's expense a renewal of the seven (7) leases described in the schedule hereto so as to be in a position to transfer the same to the purchaser and if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made under clause 2 hereof notwithstanding anything contained in clause 10 hereof" was held to be a condition precedent. The situation in ^{In} *Aberfoyle's* case is readily distinguishable from the instant case. ~~Aberfoyle~~ at the time of the agreement the vendor had no assignable interest in the subject matter of the seven leases and therefore until he had obtained renewal of the leases no contract could

have come into being. The condition was a condition as to the formation of a binding contract i.e. a condition precedent.

In re Sandwell Park Colliery Company Field v. The Company [1929] 1 Ch p277 at p280 - 281 Maugham J. held that a clause in an agreement which stipulated "that the contract was subject to its being approved and sanctioned by the court, and in the event of its not being so approved it was to become void and the purchasers were to be entitled to be repaid their deposit" was a condition precedent. The reason for the ruling is patently clear as the contract was entered into by the receiver not as agents for the owners but as an officer of the court and therefore by a person who had himself no title to the property whatever . The condition would therefore have to be satisfied before a binding contract for sale was created. Finally in Scott v. Rania [1966] NZLR 527 the Court of Appeal of Wellington by a majority held that a clause which stated "The offer was subject to the respondent arranging mortgage financing of £2000 on the property within 14 days of the acceptance of the offer was a condition precedent". At page 531 North P said:

"The starting point is to determine the nature of the condition. With great respect for the view entertained by the Learned Chief Justice, I am of the opinion that this condition is a condition precedent and not a condition subsequent. Which character it bears depends not merely on technical words but on the plain intention of the parties to be determined from the whole instrument. Here the offer was made subject to the condition that the offeror was able to arrange the necessary finance and it was accepted subject to that condition. Just as was the case in Aberfoyle Plantations Ltd. v. Cheng [1960] A.C. 115, 128, [1959] 3 All E.R. 910, 916 the appellants obligation, to sell and the respondent's obligation to buy were expressed to be subject to the condition in clause 3 and, this being so, then, as Lord Jenkins said in that case: "It was thus made

plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend".

McCarthy J. at page 533 agreed with the view expressed by the Learned President Hardie.Boys J. (dissenting) held that the condition was a condition precedent not to the formation of the contract but merely to the obligations of the respondent thereunder with the appellant fully bound. With deference to the majority the reasoning of Hardie Boys J at pp. 537 - 541 commends itself to me and I would be prepared to follow Hardie Boys J. in preference to the Majority save and except that I would prefer to say that the condition in the agreement under consideration is a condition subsequent as opposed to the term used by Hardie Boys J. viz

"Condition precedent to the obligations of the respondent".

I therefore hold that the "subject to mortgage" clause is a condition subsequent.

Re Issue No 2.

Having held that the "subject to mortgage" clause was a condition subsequent it therefore means that both parties had bound themselves to complete the contract by the date stated therein, namely the 30th March 1981. It follows therefore that the special condition had to be fulfilled before 30th March 1981, the date of completion. Failure to fulfill the condition in the stipulated time renders the contract voidable only as opposed to void.

It is common ground that the mortgage financing was not obtained until sometime after the 30th March 1981. It was therefore open to the vendor to say to the purchaser you have failed to fulfill the condition in the stipulated time the contract is now at end your deposit is herewith returned.

Did the vendor take steps to avoid the contract? By letter dated the 22nd April 1981 the vendor purported to return the deposit but his reasons for so doing was based on the letter dated 26th March 1981 where the Attorneys-at-Law for the purchasers sought a reduction in the purchase price.

It must be noted that I am of the view that the attempt to have the price reduced would not have entitled the vendor to terminate the contract before the date set for completion. Hence the letter dated 27th March 1981 is of no significance in resolving the issue.

The letter dated 8th April 1981 unequivocally stated that up to that time the Plaintiff had not obtained the required mortgage to complete the contract and requested an extension of time to complete. It is evident from this request that the Plaintiffs' Attorneys-at-Law appreciated that the special condition had to be fulfilled by the 30th March 1981.

An earlier application for extension of time had been made on the 2nd of April 1981. There is no evidence from which I could properly find that the Defendant had acquiesced to any of these applications.

I take the view that where there is a special condition in an agreement, as in the instant case, the condition must be strictly fulfilled. I have been led to this view because until the condition is fulfilled the rights of the parties thereunder remain suspended. In the same way that the purchaser would have been entitled to say to the Plaintiff I have made all reasonable efforts to obtain a mortgage without success and therefore the agreement is at end so in my view the vendor is entitled to say to the purchaser you have failed to fulfil the condition in the time allowed the contract is at an end. There is no obligation on the vendor in such circumstances to make time of the essence of the contract.

See Scott v. Rania supra p.532-533 per North P.

The observations of Hardie Boys J. (ibid 541) are pertinent

"Again in Sultor v. Gundowda Proprietary Ltd. /1950/ 81 C.L.R. 418 the condition required the consent of the treasurer (a Government Officer) to be obtained within two months or such extended time as the parties agreed upon. This was treated as a condition subsequent in that non receipt of it did not effect an automatic cancellation of the contract because the clause should be construed as making the contract not void but voidable the question of who avoid it depending on what happens".

"The single judgment of the High Court (Latham C.J., Williams and Fullagan JJ) contains this passage. The question of who may avoid it depends on what happens. If one part has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on either side, then either party may avoid the contract. But neither need do so, and if one party having a right to avoid it does not clearly exercise that right the other party may enforce the contract against him". (ibid 441).

It is indisputable that the Plaintiff was in default, the date of completion having passed without the special condition being fulfilled. The Defendant was therefore entitled to end the contract. Did the Defendant clearly exercise that right? The refusal of the Defendant to respond to the Plaintiffs' applications for extension of time ought clearly to have indicated to the Plaintiffs that the Defendants would be insisting upon the strict performance of the contract. Coupled with that the deposit was returned on the 22nd day of April 1981 before the Defendants had any knowledge that the mortgage had been granted.

The letter of the 27th April 1981, in the agreed bundle of documents, at paragraph 2 asserts that the Defendant had been informed of the grant of the mortgage in a letter dated 26th March 1981 but this could not be so as the

not the mortgage was/granted until the 7th April 1981. In any event up to/ 8th April 1981 the Plaintiffs' Attorneys-at-Law were seeking "an extension of time to the 30th April 1981 to submit proof of obtaining the morgage loan".

For the aforementioned reasons I hold that the Defendant had effectively terminated the contract dated the 15th January 1981.

In the light of my finding it seems that the third issue is now academic but I shall nevertheless address my mind thereto abundante cautela.

Dr. Barnett submitted that the "subject to mortgage clause" was so vague that it made the agreement void for uncertainty. In my view the submission is untenable. All the essential terms of the agreement have been decided by the parties. The purchase price has been fixed and a deposit paid. The word "subject to mortgage" must therefore be interpreted in the context of the agreement. In that context it can only mean that the Purchaser is to obtain a mortgage in an amount sufficient to pay the balance of the purchase price. The real test must be:

"does the clause embody such uncertainty of concept as to make it void or unascertainable by anyone genuinely seeking to discover its meaning".

See Brown v. Gould And Others [1972] 1 Ch 53.

I hold that subject to mortgage clause is not so vague as to make the agreement void for uncertainty.

On the basis of the conclusions arrived at herein the reliefs sought by the Plaintiffs are refused. There will therefore be Judgment for the Defendants on the Claim.

With respect to the Counter Claim. There will be Judgment for the Defendants save that the reliefs sought at

paragraphs 1 and 3 are refused.

The Plaintiff having in my view taken reasonable steps to procure a mortgage, albeit without success at the time set for completion, the Defendant is not entitled to forfeit the deposit. This is the very mischief which the subject to mortgage clause is designed to prevent.

The Defendant has failed to adduce any evidence as to damages suffered as a result of the lodging of the Caveat.

It is hereby ordered that the deposit of \$9000.00 paid by the Plaintiffs to the Defendants be returned to the Plaintiffs within seven (7) days of the Plaintiffs' notifying the Defendants that the caveat lodged against the subject matter of this action has been removed. Caveat to be removed within twenty-one (21) days of the date hereof and the cost thereof to be borne by the Plaintiffs.

Costs to the Defendants on the Claim and Counter Claim to be taxed if not agreed.