

11/11/92

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN EQUITY**

**SUIT NO. E 187 OF 1992**

BETWEEN            RAYMOND COOPER                            1<sup>ST</sup> PLAINTIFF  
AND                    CECILE COOPER                                2<sup>ND</sup> PLAINTIFF  
AND                    CUPREZ COX                                    1<sup>ST</sup> DEFENDANT  
AND                    ELIZABETH STOCKHAUSER                    2<sup>ND</sup> DEFENDANT

Mr. Samuel Harrison instructed by Messrs Dunn, Cox, Orrett and Ashenheim for the plaintiff

Mrs. Janet-Kaye Stanbury instructed by Stanbury and Company for the first defendant

The second defendant was not represented.

**JAMES G.G. J.**

**Heard:** 22<sup>nd</sup> & 25<sup>th</sup> February, 1999, 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> & 5<sup>th</sup> March, 1999,  
14<sup>th</sup> 15<sup>th</sup> 16<sup>th</sup> 19<sup>th</sup> & 27<sup>th</sup> April, 1999, 11<sup>th</sup> & 19<sup>th</sup> October, 1999  
and 14<sup>th</sup> November, 2001.

In this action the plaintiffs seek the following remedies :-

- (1) Specific Performance of an Agreement for the sale of  
5 Wainwright Avenue, Kingston 8;
- (2) A declaration that the defendants have no further right  
of occupation of the said premises;

- (3) Damages for breach of contract; and
- (4) Specifically, against the first defendant, damages for breach of warranty of authority.

The property which forms the subject matter of this action is situated at 5 Wainwright Avenue, Kingston 8. It is registered at Volume 942 Folio 215 of the Register Book of Titles and is hereinafter referred to as 'the property'. It is owned by the defendants as joint tenants.

The plaintiffs are husband and wife and this action concerns two written agreements, one is for the sale of land, the other is a Supplemental Agreement for the sale of certain chattels and fixtures in and affixed to the house on the property.

Mr. Duprez Cox, the first defendant, lives within the jurisdiction and the second defendant, who is first defendants' daughter, resides out of the jurisdiction.

### **The Plaintiffs' Case**

It is the case for the plaintiffs that there exists two valid Agreements for Sale of land and chattels. Each agreement is dated 30<sup>th</sup> July, 1991.

Mr. Cox ( the first defendant) was desirous of selling the property and in pursuance of this desire he placed an advertisement in the Daily Gleaner,

that was in May or June, 1991. Having read the advertisement both plaintiffs visited Mr. Cox at his home. The couple was shown around the property by Mr. Cox and they were encouraged to make the purchase according to Mr. Cox, 'it was a good buy'. The parties agreed orally that the land together with certain chattels thereon would be bought at a price of J\$1.2 million. It was agreed that the parties would visit Mr. Cox's lawyer, Mr. Maurice Long, a few days later. They did. During this visit Mr. Cox explained to the plaintiffs that the property was jointly owned by himself and his daughter. He said that he himself had bought the property, he placed his daughter's name on the title 'in case anything should happen to him'. Once he decided to sell the property his daughter would agree as he had full authority to sell.

Draft agreements were prepared followed by final agreements which were signed by the first defendant on his own behalf and also by himself on behalf of the second defendant 'as her agent'. The agreements were duly signed by the plaintiffs.

Mr. Maurice Long, attorney at law, was called as a witness for the plaintiffs, he acted on behalf of the first defendant in the transaction. It was he who prepared the agreements for sale. In giving evidence Mr. Long said that he received clear instructions from the first defendant and that the

transaction proceeded normally. He further said that he was never placed in a position to complete the transaction despite the fact that the plaintiffs did their part in an attempt to finalise the matter.

The price of the property was agreed at one million and thirty thousand dollars (\$1,030,000.00) and the chattels were to be sold for two hundred and fifty thousand dollars (\$250,000.00). A deposit of one hundred and ninety two thousand dollars (\$192,000) was paid in respect of these two transactions. Financing would be forthcoming through Jamaica National Building Society and Pelican Investments. The second plaintiff said in evidence that the difference between the balance and the Jamaica National Building Society loan was paid over to the plaintiffs' attorneys in order to complete the transaction.

It is the contention of the plaintiffs that defendants' failure to facilitate completion of the contract has resulted in severe hardships and inconvenience. The plaintiffs have tried to acquire another home, they purchased land towards this effort but are unable to afford the cost of building thereon. The plaintiffs' deposit on the sale has been eroded by devaluation and loss of interest. They have been deprived of the use of their money and of rates applicable to deposits at commercial banks. Mr. Cooper (first plaintiff) said that up to April, 1999 he had spent at least \$700,000 in

rent in excess of the anticipated monthly mortgage payments as well as \$21,025 per month in excess since May 1999.

**Case for the Defence**

The Defence falls under three heads, namely :-

- (i) the first defendant lacked the legal capacity by reason of mental incapacity to comprehend the nature of the contract, thereby rendering him incapable of binding himself to the contract;
- (ii) lack of authority so that the first defendant could not bind the second defendant in contract; and
- (iii) the agreements are illegal.

The evidence presented to support the claim of mental incapacity is contained primarily in the testimony of three medical doctors.

Dr. Shillingford's evidence is that the first defendant had been under medical care since 1989 and from that time his patient (first defendant) had 'early signs of dementure'. This condition results in a whole spectrum of symptoms including defective memory, lack of concentration and depression. In 1991 Dr. Shillingford diagnosed Mr. Cox as exhibiting symptoms of being confused in his mind.

Dr. Jerome Stern concluded that the first defendant was suffering from pre senile dementia and that this condition resulted in amnesia, forgetfulness, confusion and that the patient was easily distracted. The doctor referred his patient to Dr. Theziger, that was in 1992.

Dr. Charles Theziger said in evidence that he formed the opinion that the first defendant was suffering from organic impairment of the brain. This is a permanent and progressive disability. The patient complained that he was despondent, forgetful and was unable to concentrate properly. He was under Dr. Theisger's supervision from August, 1992 until September, 1993 and during this period the doctor saw him at regular intervals. The patient's condition was steadily deteriorating. According to Dr. Theziger, at the time he saw Mr. Cox, 'there may be times when he might be able to understand a document but because of the impairment he would not have been able to reason properly and therefore not be able to appreciate what is implied in the document'. The doctor saw Mr. Cox in July and December, 1998 and concluded that Mr. Cox would not be in a position to ably represent himself in Court.

The Defence contends that there was lack of authority (whether express or implied) whereby the first defendant could bind the second defendant to the contract. In order to bind the second defendant to the

contract some note or memorandum in writing signed by her with reference to the sale of the property must have been in existence. Accordingly, the first defendant cannot in law be held to have been acting on behalf of the second defendant by an oral authority or otherwise by implication.

It was further contended for the Defence that in any event the first defendant suffered from a mental disorder whereby he was incapable of understanding the nature of the transaction and so he could not represent the interest of the second defendant.

On the question of agency between the second defendant and her father (the first defendant) the onus is on the plaintiffs to prove that the second defendant acted in such a manner as to lead the plaintiffs to believe that the first defendant was authorized to act on her behalf. According to the Defence, there is no evidence of 'holding out' by the second defendant. Furthermore, there is no evidence that the second defendant ratified the act of the purported agent. Ratification has to be evidenced by clear adoptive acts or by acts equivalent thereto.

In 1983 the second defendant gave a Power of Attorney to her mother, Faith Cuorreosa. Both the second defendant and Faith Cuorreosa said in evidence that this Power of Attorney did not relate to the sale of the property. In any event, the defence contends that there is no evidence that

Faith Correoso signed the Contract of Sale or that she signed a document purporting to authorize the first defendant to sign this contract on behalf of the second defendant.

On the allegation of illegality, it is contended for the Defence that the 'chattels and fixtures' referred to in the 'personality contract' do not have the value set out therein and that the said contract was prepared primarily to avoid payment of Transfer Tax and Stamp Duty. By virtue of this illegality the entire contracts were void ab initio or voidable at the instance of the plaintiffs or the defendants.

### **Findings and Conclusion**

The evidence shows quite clearly that the first defendant comprehended the nature of the contract and was capable of binding himself thereto. It was he who advertised the property for sale. He told the plaintiffs that the site next door was slated for development, thereby indicating the economic potential of the property. During the course of the negotiations, first defendant decided to increase the price of the property, when he was asked the reason therefore he said 'the price of things go up every day'.

So far as the evidence of the first defendant's mental state is concerned I am not satisfied that he suffered from mental incapacity whereby he was unable to comprehend the nature of the contract. Dr.



Jerome Stern did not treat him for any mental illness prior to 1992 which was after time was made of the essence of the contract. Dr. Conrod Shillingford, whose field is mainly hypertension, described the patient as a hypochondriac. Dr. Charles Thesiger did not see the first defendant until August, 1992.

The Defence raised the issue of the first defendant's lack of authority so that he could not bind the second defendant in contract. At all times the first defendant held himself out as agent of the second defendant. It was his contention that although the property was jointly held he had his daughter's authority to sell because he bought it and it was his. The first defendant convinced his own attorney. (Mr. Long) that he was authorized to sign on behalf of his daughter saying that he had purchased the property and he included his daughter's name merely for convenience.

Faith Correoso, second defendant's mother had a Power of Attorney (Exhibit 12) from the second defendant which was presented to the first defendant's attorney. Mrs. Correoso participated in the establishment of the contract.

The Defence raises the issue of illegality of the transaction. This defence cannot be successfully raised by a defendant who merely pleads his

own complicity without evidence to show mala fides –Odessa Tramways Co. v Mendel (1878) 8 Ch. D. 235.

In conclusion, I order Specific Performance of the Agreements for Sale of 5 Wainwright Avenue, Kingston 8 registered at Volume 942 Folio 215 of the Register Book of Titles as well as the Agreement for Sale of chattels thereon both dated 30<sup>th</sup> July 1991. I order that the property be sold to the first and second plaintiffs on the terms and conditions contained in the ‘Agreements for Sale and Purchase’ dated July 30, 1991. I further order that the Registrar of the Supreme Court is authorized to supervise this transaction and to sign any documents where necessary to effect the transfer to the plaintiffs in the event of defendant’s failure to duly execute such instruments of transfer within thirty days (30) of the payment of the balance of purchase price and costs of transfer being paid over to defendant’s attorney-at-law.

Costs to the plaintiffs to be taxed if not agreed.