IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C137 of 1993

BETWEEN	DELROY COWAN	PLAINTIFF
A N D	WINSTON FRANKSON	DEFENDANT

David Henry instructed by Miss Winsome Marsh of Nunes, Scholefield, DeLeon & Co. for the plaintiff

Barry Frankson, Maurice Frankson and Mrs. Caroline Doyen-Fitchett instructed by Gaynair & Fraser for the defendant

Heard: April 29, 30; May 1, 4, 5, 6, 7, 8 and July 31, 1998

CLARKE, J.

This is a purchaser's action for specific performance of a contract for the sale of land. The following facts are not in dispute:

(a) By an agreement in writing dated 24th November, 1986 the defendant vendor, Mr. Winston Barrington Frankson, an attorney-at-law, agreed to sell to the plaintiff purchaser, Mr. Delroy Cowan, a businessman, registered land, Lot 69 part of Mammee Bay, St. Ann, for $190,000.00, completion to take place on 27th February, 1987.

(b) The purchaser duly paid a deposit of $40,000.00 in accordance with the agreement, the following term being the special condition thereof:

> "Vendor will execute Transfer on firm written undertaking being given by Purchaser's Bankers or other lending institution to pay balance of purchase money and half costs of Agreement of Sale and of Transfer."

(c) The purchaser was issued with a letter of possession dated 4th February, 1987 by the vendor's attorney-at-law Gaynair & Fraser. That letter is in the following terms:

> "As Attorneys-at-law for and on behalf of Winston Barrington Frankson we hereby give you possession of Lot No. 69 part of Mammee Bay in the parish of St. Ann registered at Volume 1022 Folio 207 of the Register Book of Titles, which you have contracted to purchase from him, pending completion of the Agreement of Sale dated 24th November, 1986."

(d) By letter dated 5th September, 1991 the purchaser's attorneys-at-law, Nunes, Scholefield, Deleon & Co., wrote to the vendor requesting the relevant documents for the sale to be completed and undetertaking 'not to deal or part with the documents in any prejudicial to your interest and to let you have in exchange for the [said documents] the balance required to complete this matter'. In response, the vendor's attorneys-at-law, by letter dated 29th October, 1991 returned the deposit with interest and contended thus:

> "Our Client has instructed us that the land is still encumbered as it was at the tiem fo [sic] the agreement and it does not appear that there is any prospect of it being released from such encumbrance in the near future.
>
> In the circumstances, our Client cannot perform his obligations under the contract and withdraws from same."

(e) On 18th November, 1991 the purchaser's attorneys-at-law returned the deposit and interest and on the same day served on the vendor a notice to complete the sale.

So much for the undisputed facts.

Particular findings of fact

Now, the purchaser gave evidence but the vendor did not. Having assessed the demeanour and credibility of the witnesses the court finds on the evidence the following facts:

(i) Messrs. Gaynair & Fraser, who had the carriage of sale, represented both parties in the transaction. Mrs. Ruby Walcott, a friend of the purchaser and an attoreny-at-law, was authorised by the purchaser to sign the agreement for sale on his behalf and did do so. She never represented him in the transaction qua attorney-at-law. Unbeknown to the purchaser, there was then a subsisting mortgage over the land created by the vendor.

(ii) Within a couple of weeks of the signing of the agreement for sale, the purchaser informed the vendor that he was ready with the balance of money to complete the sale. The vendor thereupon told him that he could not complete on 27th February, 1987 because, according to him, the title was mislaid and that he, the vendor, would have to apply for a new title.

(iii) At that stage, upon the purchaser raising concerns about the length of time that it might take to get a new title, the vendor put the purchaser in possession of the said land, as per the letter of possession dated 4th February, 1987.

(iv) A few months later, and therefore subsequent to the date fixed for completion, the purchaser renewed his enquiry of the vendor about completion. However, after the vendor repeatedly told him over several years that the title was

being worked on and would soon be ready, the purchaser sought and obtained legal assistance from Nunes, Scholefield, Deleon & Co., his present attorneys-at-law.

(v) The delay was caused solely by the vendor's default and by his inability to complete by reason of his admitted failure to have a mortgage over the property discharged.

Effect of vendor's failure to give valid notice to complete and question of waiver

Time is not of the essence of a contract for the sale of land in the absence of an express stipulation to that effect, or unless it should be so implied from the circumstances; see **Stickney v. Keeble** [1915] A.C. 386. The date fixed for completion of the sale herein, viz, 27th February, 1987, has not been made of the essence because (a) there is no express stipulation to that effect and (b) there is no evidence from which the court may imply that the parties intended that the date fixed for completion should be of the essence. I am unable, therefore, to agree with Mr. Barry Frankson that the special condition contained in the contract had to be fulfilled by 27th February, 1987. Failure to complete on the stipulated date for completion where such a date has not been made of the essence is in general a breach of contract. It does not however, entitle the innocent party immediately to terminate the contract but justifies him giving immediately a notice to the defaulter to complete; see **Raineri v Miles** [1980] 2 All E.R. 145 at 153j per Lord Edmund Davis.

Even if in this context the vendor were the innocent party (which in the result he was not) he failed to give a notice to complete. Nor did he complain of delay; see **Graham v Pitkin** [1992] 41 W.I.R. 233. Rather the delay throughout was, as I have found, the vendor's fault. Nevertheless the conduct of the parties and the **viva voce** and documentary evidence adduced confirm that the parties treated the contract as subsisting beyond the date fixed for completion.

The letter of 29th October, 1991 from the vendor's attorneys-at-law confirms that the contract between the parties subsisted and sets out the reason why the sale was not by then concluded. As Mr. Henry submitted, the reason for the vendor purporting to withdraw from the sale had absolutely nothing to do with any failure of the purchaser to fulfil his obligations under the contract but on the vendor's failure to have the mortgage over the property discharged.

So, in the absence of a valid notice to complete the vendor could not, in the circumstances, rescind the contract. And in the October 29th letter he finally, in my judgment waived his right to rely on (a) any breach the purchaser may have committed and on (b) strict compliance with the special condition, if in fact he had not already done so. The waiver having been effected and the vendor having defaulted in his obligation to complete, the purchaser elected on 18th November 1991 to give notice to the vendor to complete the transaction.

Question of the undertaking

The purchaser's attorneys-at-law, Nunes, Scholefield, Deleon & Co. gave the notice to complete making time of the essence after they had through Mr. Trevor Deleon, a senior partner of that firm, given an undertaking to pay the balance of the purchase money and half cost of agreement for sale and transfer. Prior to the filing and delivery of the defence the vendor or his attorneys-at-law took no issue regarding the suffciency or adequacy of the undertaking given by the purchaser's attorneys-at-law. Indeed, the letter of 29th October demonstrated that it was a non issue and that it mattered not where the balance of the purchase price came from.

Mr. Barry Frankson, nevertheless, submitted that the undertaking given by the purchaser's attorneys-at-law did not, and could not, amount to performance or substantial performance of the special condition because:

(1) The undertaking was no substitute for a banker's undertaking or an undertaking from a lending institution.

(2) It was not a solicitor's undertaking as the evidence revealed that when the undertaking was given there was no money held in trust by the attorneys-at-law on behalf the purchaser.

(3) The undertaking was not given to the attorneys-at-law with the carriage of sale.

(4) It came much too late in the day, some 4 years and 7 months after the date fixed for completion.

So what, first of all, is the nature of the undertaking signed by Mr. Trevor Deleon? Mr. Henry submitted that the undertaking is in law a solicitor's undertaking and was not given in Mr. Deleon's personal capacity. That submission is, in my view, well founded. The case of **Silver & Drake v. Baines** [1971] 1 Q.B. 396; [1971] 1 All E.R. 473, C.A., relied on by Mr. Barry Frankson, is very different from the case before me. Mr. Deleon's firm is not resiling from the undertaking signed by him. It was otherwise in the **Silver & Drake** case in regard to the undertaking given by a solicitor in the firm of that defendant. There, the issue before the court was whether it was appropriate for the judge at first instance by way of summary procedure to have held that an undertaking given by a solicitor in the defendant's firm to repay money lent, was binding on the defendant, who knew nothing about the loan. It was simply an undertaking to repay a debt contracted by the solicitor in question. As Widgery L.J. trenchantly pointed out in that case, if a solicitor borrows money personally and incurs a personal obligation in that regard, his promise to repay is not a promise in his capacity as a solicitor.

In the present case there is no question of any undertaking to repay money lent. It is an undertaking to pay over to the other side in exchange for the documents listed in the letter of 5th September, 1991, the full amount required to complete the transaction. Plainly, it is an undertaking given by Mr. Deleon in his capacity as an attorney-at-law. It is true that when the undertaking was given no money was held in trust by the attorneys-at-law on behalf of the purchaser. But that fact is, in my opinion, immaterial. The **Silver & Drake** case is, contrary to Mr. Barry Frankson's contention, no authority for saying that unless an attorney-at-law has money in his hand on trust he cannot give an undertaking in his professional capacity. In that case Lord Denning was merely indicating the usual circumstances in which an undertaking may be given without adumbrating all of the circumstances in which it may be given. Mr. Deleon himself correctly gave under cross examination two instances as follows where an undertaking may properly be given by an attorney-at-law in his professional capacity as was in fact given by him in this case:

> "One would be where the client being represented is of long standing and or of high repute. Another instance would be where the firm is representing a client such as this in other transactions whereby it is anticipated that funds will be flowing to the firm on behalf of the client.
>
> ...I was representing Mr. Cowan in respect of other transactions. Yes, I anticipated that funds would come to my hands in respect of other transactions.
>
> Yes, it was based on that anticipation that I issued my letter of undertaking but it was based also on the fact that I regarded Mr. Cowan as a responsible, reliable and good client."

As Lord Diplock said in one case, "[t]he main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claims against one another by the parties to the contract of sale."; see **Damodaran v Choe Kuan Him** [1979]

3 W.L.R. 383 at 387F. Breach of an undertaking is equivalent to professional misconduct. And an attorney may be committed for breach of an undertaking given by him in his capacity as an officer of the court, even though the undertaking is not given in connection with any legal proceeding; see **Re A Solicitor, ex parte Hales** [1907] 2 K.B. 538. Furthermore, Mr. Deleon put the matter aptly in his evidence under cross examination thus:

> "Yes, in essence a letter of undertaking is a guarantee. The word is a very sacred word in the profession and the canons of our profession speak to such undertakings. Yes, an undertaking gives business efficacy to the contract."

Then too, the vendor cannot properly rely on the fact that the undertaking was given some 4 years and 7 months after the date fixed for completion. The evidence makes it plain that the protracted delay was effectively caused by the vendor's default and by his inability to complete by reason of his admitted failure to have the mortgage over the property discharged. Some 3 weeks after the letter of 29th October, 1991 from the vendor's attorneys-at-law purporting to withdraw from the contract, the purchaser elected to give a notice to the vendor to complete. And at the same time he suggested through his attorneys-at-law as per their letter of 18th November, 1991 that the necessary steps be taken to obtain a partial discharge of the mortgage from the mortgagee by paying to the mortgagee the net proceeds from the sale of the lot and any additional sum which may be required by the mortgagee for the partial discharge. Despite this reasonable suggestion the vendor took no steps to discharge the mortgage.

What it comes to is this: the letter of 5th September, 1991 was given in, and amounted to, substantial performance of the special condition, the precise terms of which, were waived by the vendor. There is, of course, no merit in the submission - which has no foundation in the pleadings - that

the undertaking was ineffectual on the ground that it was not given to the attorneys-at-law with the carriage of sale, Gaynair & Fraser. It is also to be noted that although the letter containing the undertaking was addressed to the vendor, by their letter of 29th October, 1991 Gaynair & Fraser acknowledged receipt of same.

Conclusion and Order

The purchaser has, in all the circumstances, demonstrated that at all material times he has been ready, willing and able to complete. Although the vendor's purported termination of the contract amounted to a breach of contract, the purchaser refused to treat the contract at an end even in the face of the vendor's culpable delay. He gave the vendor a valid notice to complete after substantially performing the special condition, the precise terms of which were, in any case, waived by the vendor. Furthermore, there is nothing in the purchaser's conduct that would render it inequitable for specific performance to be granted. To refuse the decree would be effectively to punish the purchaser for his forbearance and patience in the matter.

There is, nevertheless, one matter concerning the effect of restrictive covenant No. 1 endorsed on the certificate of title for the land. That covenant provides as follows:

> "The land shall not at any time be sold, let, demised, alienated, disposed of or the possession thereof parted therewith save in its entirety as one lot and together with the sale and transfer of all the shares of Mammee Bay Club Limited held by the Transferor."

The vendor contends that on that basis the agreement is unenforceable because: (1) the covenant placed an obligation on the parties that there should be in existence an agreement for sale of the defendant's shares in Mammee Bay Club Limited; (2) it was a condition precedent to the agree-

ment coming into effect that the parties should contemporaneously enter into a collateral contract for the sale of the defendant's shares in Mammee Bay Club Limited as required by the said covenant; (3) the agreement for sale is incomplete in that it omits the sale or transfer of the defendant's shares in the said company; (4) by reason of the aforesaid factors the plaintiff's interest, if any, is incapable of being vested and/or registered.

The vendor's contention can be disposed of shortly. As the purchaser contends, there was cast upon the vendor an obligation to sell any shares he had in the company to the purchaser, such obligation being incidental to the sale of the land. I find that the vendor failed or neglected to inform the purchaser of any shares he may have held and also failed to offer to the purchaser any such shares as he may have held. The vendor is therefore estopped by his conduct from asserting that the sale of the shares in question was a precondition to the agreement for sale coming into existence. Finally on this aspect of the matter, I agree with the purchaser that having regard to the facts and circumstances of the case it was, in any case, an implied term of the agreement for sale that the consideration included the cost of the shares held by the vendor in Mammee Bay Club Limited.

So, in accordance with the prayer for relief at paragraph 17(a)(i) and (ii) of the statement of claim the court grants an order for specific performance of the agreement for sale and orders as follows:

(i) That the purchaser pay into court the sum of $150,000.00 being the balance of purchase price due to the vendor under the agreement for sale;

(ii) That upon service on the Registrar of Titles of the receipt from the Accountant General being evidence of payment of the said sum of $150,000.00 and upon payment to the Registrar of Titles of $381.00 or other requisite registration fee, the Registrar of Titles, pursuant to section 158(2) of the Registration of Titles Act, do cancel certificate of title registered at Volume 1222 Folio 430 of the Register Book of Titles and issue a new certificate of title, and a duplicate thereof, for the lands comprised in the former title in the name of the purchaser or his nominee.

The court also orders that the defendant/vendor transfer all the shares in Mammee Bay Club Limited held by him by reason of being the registered-proprietor of the said land registered at Volume 1222 Folio 430 of the Register Book of Titles within 30 days of the date hereof.

The plaintiff/purchaser must have his costs which are to be taxed, if not agreed.

Liberty to apply.