IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1977/D064

BETWEEN	DEBBIE LYNNE LTD.	PLAINTIFF
AND	COLLIN HUSBANDS	DEFENDANT

R.N.A. Henriques, Q.C. and J. Leo Rhynie Q.C. for Plaintiff.

D. MUirhead Q.C. and Dr. Adolph Edwards for Defendant.

HEARD: November 23, 24, 25, 1981
June 7, 8, 9, 1982
January 31, June 13
October 13, 1983
March 5, 1984, February 4, 1985

Coram: WOLFE J.

The Plaintiff Company seeks, by way of an amended Statement of Claim dated January 16, 1981, to recover from the Defendant:

(a) The sum of $4,000.00 under the said Sale of Land Agreement.

(b) The sum of $62,913.62 as set out in the above statement.

(c) The sum of $1,475.00 as set out above.

(d) Such interest as this Court may be pleased to award on the $4,000.00 remaining owing under the said Building contract.

(e) Costs.

The Defendant by way of an amended defence dated the 7th day of May 1981 disputes the contract prices as contended by the Plaintiff and alleges that the Plaintiff is in breach of an agreement which subsists between Plaintiff and Defendant whereby the Plaintiff undertook to keep the premises purchased, continuously rented. The Defendant further alleges that as a result of the said breach he has experienced a loss of Nine Thousand Seven Hundred and Twenty Five Dollars ($9,725.00) which amount he is entitled to set off against the Plaintiff's claim. Most importantly the Defendant asserts that the contract price in respect of the shop is Twenty Thousand Five Hundred Dollars ($20,500.00) and not Thirty Thousand Five Hundred Dollars as claimed by the Plaintiff.

Counsel on both sides conceded that the issues which arise for determination are essentially issues of fact. The evidence is somewhat involved and it is therefore necessary to set it out in some detail in order to give a clear picture of the contention of each party.

The Plaintiff is a registered Company under the Companies Act of Jamaica and carries on the business of Developers of Real Estate at Central Avenue, Kingston 10 in the parish of Saint Andrew.

During the year 1975 the Plaintiff became involved in the development of land situated along Constant Spring Road in Saint Andrew. This development was designated the Southdale Plaza Project. The Plaintiff sold lots to purchasers and in agreement with such purchasers built shops on the said lots. A total of eleven shops were actually built but for purpose of this case we are concerned only with Lots No. 8 and 10.

In June 1975 the Defendant, a civil engineer, who had worked for the Plaintiff as a consultant engineer on development projects including the Southdale Plaza Project entered into an agreement with the Plaintiff to purchase a lot of land in the Southdale Plaza Project as is evidenced by Exhibit 2 at a price of Eight Thousand Dollars ($8,000.00). Sometime later in June 1975 the Defendant entered into a building contract with the Plaintiff in which the Plaintiff undertook to build a shop on the lot purchased by the Defendant at a cost of Thirty Thousand Five Hundred Dollars ($30,500.00) as is evidenced by Exhibit 3. It must be noted at this stage that both the number of the lot purchased and the cost of erecting the shop are vehemently disputed by the Defendant. The Plaintiff contended that the mention of Lot 8 in Exhibits 2 and 3 was a typographical error and that upon discovering the error the Defendant was contacted concerning the matter whereupon he agreed that both contracts should be

amended to rectify the error. In accordance with this agreement a document Exhibit 4 was prepared which was signed by Derrick Mahfood for and on behalf of the Plaintiff and also by the Defendant and duly witnessed by Miss Norma Simpson an employee of the Plaintiff. The authenticity of this document is also hotly disputed by the Defendant, who maintained at the trial that the signature appearing on the document and which purports to be his signature is in fact a forgery.

By letter dated the 15th November 1975 the Defendant was informed of the date of practical completion, to this letter was attached the architect's certificate of completion. Further thereto by letter dated the 14th January 1976 addressed to the Defendant he was notified as to the escalation costs as mentioned in clause 4 of Exhibit 3.

On the 15th November 1975 the Defendant took possession of the shop built on Lot 10 in keeping with Exhibit 4.

The Plaintiff testified that at the request of the Defendant it agreed to assist him with the rental of the shop.

The Defendant asserts on the other hand that he intended to and in fact purchased Lot No. 8 as is evidence by Exhibit 2, and that the mention of Lot No. 8 in Exhibit 2 is not a typographical error. He further asserts that the agreed price of erecting the shop was Twenty Thousand Five Hundred Dollars ($20,500.00) and not Thirty Thousand Five Hundred Dollars ($30,500.00) as mentioned at page 2 of Exhibit 3.

In about mid November 1975, so the Defendant contends, Derrick Mahfood approached him and requested him to take shop No. 10 instead of shop No. 8 because he Mahfood had a jeweller who was interested in renting shop No. 8. The Defendant testified that he discussed the matter with Mahfood and pointed out to him that shop No. 10 was next but one to the end of the development away from South Avenue and was nearer to the garbage disposal unit whereas

shop No. 8 was nearer to the practical centre of the development. This location was considered more advantageous than shop No. 10 as the pedestrian traffic would be denser and more regular in the area of the practical centre of the development.

The advantages of shop No. 8 having been pointed out to Mahfood, it is the contention of the Defendant that Mahfood agreed to manage the rental of shop No. 10 if the Defendant would agree to the exchange. From this evidence, if it is accepted, I understand the Defendant to be saying that the consideration offered for the exchange was the undertaking by Mahfood to manage the rental of shop No. 10 and that this undertaking places upon the Plaintiff an obligation to ensure that shop No. 10 was rented and that it was not a mere gratuitous act on the part of the Plaintiff.

What then are the issues which arise for determination from the facts as outlined? I find the issues to be as set out hereunder.

1. Is there any amount due and owing on the contract for the sale of land which is recoverable by the Plaintiff?
2. Did the Defendant purchase lot No. 8 or lot No. 10?
3. Was there a binding collateral agreement between the parties whereby the Plaintiff agreed with Defendant that the Plaintiff would at all times keep the Defendant's shop rented at a rental which exceeded the Defendant's liability to the Plaintiff.
4. What was the agreed contract price for erecting the shop?

Re 1. Is there any amount due and owing on the contract for the sale of land which is recoverable by the Plaintiff?

Exhibit 2 which is the contract for the sale of land states that the purchase price is Eight Thousand Dollars. The terms of payment are set out as follows:

> "$4,000.00 on signing this Agreement .
> Balance on completion".

The date of completion as provided for by the contract is "On delivery of Title to the Purchaser". The Plaintiff testified that

the land subject matter of the contract had not, up to the time of his giving evidence, been transferred to the Defendant because the Defendant had failed to pay the balance owing. Exhibit 17 dated March 2, 1978 advised the Defendant that title to shop No. 10 had been issued in the name of the Plaintiff and would be transferred to the Defendant as soon as the Defendant took steps to bring his interest payments up to date. It must be noted from Exhibit 17 that the Plaintiff was not demanding the payment of the balance of the purchase money as a pre-condition to the transfer being made to the Defendant. In any event Mr. Henriques for the Plaintiff conceded that the balance of the purchase price in respect of the land was payable upon the presentation of title but argues that the Defendant, having been informed that title was ready, was under an obligation to pay to complete. While the conveyancing practice is for purchasers to pay the balance of purchase money to be held in escrow pending the production of title it is my view that where the balance is payable upon completion, completion being upon the delivery of title, the amount cannot be said to be properly due and owing until title is ready for presentation to the purchaser. An action, therefore, to enforce the payment of the balance of the purchase money before the pre-condition is fulfilled is not maintainable by the Plaintiff.

2. Did the Defendant purchase Lot No. 8 or Lot. 10?

The Defendant asserts that he had agreed to a swop of shop No. 8 for shop No. 10 at the request of the Plaintiff and upon the Plaintiff's undertaking to manage the rental of shop No. 10. The Plaintiff on the other hand invites the Court to accept that the mention of Lot 8 in Exhibit 2 and 3 is a typographical error and that the parties contracted for the sale and purchase of Lot No. 10 hence the signing of Exhibit 4 by the Defendant when the error was pointed out to him.

It is settled law that where a party alleges fraud the

burden of establishing fraud is upon the party so alleging. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal Court even when considering a charge of a criminal nature, but it still does require a degree of probability which is commensurate with the occasion. "The more serious the allegation the higher the degree of probability that is required" per Denning L.J. in Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247 at p.258. The view of Denning L.J. was expressed thus by Ungoed - Thomas J. in Re Dellow's Will Trusts [1964] 1 W.L.R. 451 at pp 454 - 455.

> "The gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikehood of what is alleged and thus to prove it".

There can be no doubt that the allegation made by the Defendant is indeed a grave one. What are the circumstances to be considered by the Court?

It must be observed that the document exhibit is undated but it is witnessed by Norma Simpson now Norma Pinnock who was at the time employed to the Plaintiff. At the time of giving evidence her employment with the Plaintiff had ceased. Her evidence must in my view be viewed as that of a person with an interest to be served because if the evidence of the Defendant is accepted, that he did not sign exhibit 4, Norma Simpson would be a party to the perpetration of the fraud. In addition to the evidence of Derrick Mahfood and Norma Simpson there is the evidence of Lilieth Fletcher, also an ex employee of the Plaintiff, who testified that she was present and saw the Defendant sign Exhibit 4.

Whereas the evidence of Derrick Mahfood is supported by that of Norma Simpson and Lilieth Fletcher the evidence of the Defendant that he did not sign Exhibit 4 stands alone. One would have thought that in an effort to establish this very grave allegation the Defendant would have taken steps to have the questioned signature on Exhibit 4 examined by an expert in handwriting and compared with specimen signatures of the Defendant. This observation must be viewed, however, in the light of the Defendant's evidence that he was not privy to Exhibit 4 prior to the commencement of the case.

It is not disputed that the signature of the Defendant appearing on Exhibits 2, 3, 13 and 14 is the genuine signature of the Defendant. The observation that the signatures on the exhibits referred to above are similar to that on the questioned document Exhibit 4, is in my view an apposite one. However, let it be understood that I place no reliance upon this uniformed opinion of a layman in the field of the identification of handwriting.

Mr. Muirhead for the Defendant in support of the view that the Defendant purchased Lot 8 and not Lot 10 adverted to Exhibit 7 dated September 22, 1975 and urged that the reference to shop No. 8 therein is confirmatory of the Defendant's contention. This submission is not as meritorious as it is attractive. I say this because the letters Exhibits 5, 25 and 26 dated November 12, 1975, October 1, 1975, September 19, 1975 and October 24, 1975 respectively also make reference to Shop No. 8 at a time when the Defendant was being written to about taking possession of the shop which he had purchased. Further thereto it is undisputed that the Defendant took possession of shop No. 10 on the 15th November 1975.

It was further submitted on behalf of the Defendant that Exhibit 4 was prepared by the Plaintiff to avoid the consequences of the collateral oral agreement which placed an obligation on the

Plaintiff to manage the rental of shop No. 10 on behalf of the Defendant. The Defendant urged that if the Court were to accept that there was this collateral agreement between the parties then such a finding would have the effect of discrediting the authenticity of Exhibit 4. The question of the collateral agreement will be considered anon.

It is the Defendant's evidence that page 2 of the original contract signed by him was replaced to reflect a purchase price of Thirty Thousand Five Hundred Dollars ($30,500.00). If this is so why did the Plaintiff not replace page 1 of the contract to reflect that the lot purchased was Lot 10 and not Lot 8. This would have been such easier than to attempt to forge the Defendant's signature on Exhibit 4. Notwithstanding that the witnesses for the Plaintiff are all persons with an interest to serve I am confident that I can rely upon their evidence. Each of them, I am satisfied, is a witness of truth when they testified that the Defendant signed Exhibit 4.

I reject the Defendant's evidence that he became aware of Exhibit 4 for the first time during the trial. His evidence lacks the cogency which is required to discharge the burden which rests upon him to establish the allegation of fraud. Notwithstanding that Exhibit 4 is undated I find that it is an authentic document which was duly executed by the Defendant to regularize the error which had been made in Exhibits 2 and 3. Finally the question was asked why were Exhibits 2 and 3 not amended to correct the error instead of creating Exhibit 4. To my mind the method by which the error is corrected is of no consequence. In any event I take the view that the method used was more desirable than seeking to alter the original contracts.

On the basis of the foregoing I hold that the Defendant intended to and in fact purchased Lot 10 and that he entered into

possession of Lot 10 not by way of exchange for Lot 8.

3. Was there a binding collateral agreement between the parties whereby the Plaintiff agreed with Defendant that the Plaintiff would at all times keep the Defendant's shop rented at a rental which exceeded the Defendant's liability to the Plaintiff?

The basis of the collateral agreement, as stated by the Defendant, is that in consideration of the exchange of shop 8 for shop No. 10 the Plaintiff undertook to manage the rental of shop No. 10 for and on behalf of the Defendant. This is denied by the Plaintiff. In an attempt to establish the collateral agreement the Defendant called two witnesses in the persons of Mrs. Merlyn Collie and Mrs. Sonia Watson.

Mrs. Collie testified that sometime about January 1976 acting upon an advertisement in the newspaper she telephoned and spoke to Mrs. Fletcher and arranged an appointment to inspect shop No. 10 at the Southdale Plaza. Having inspected the shop along with Mrs. Fletcher she agreed to rent the shop and was advised by Mrs. Fletcher that the rent was Five Hundred Dollars ($500.00) per month and that a deposit of Fifteen Hundred Dollars ($1,500.00) would have to be made. The deposit was duly paid and she entered into possession. It was her understanding at the time she negotiated the rental of the premises that she was renting the shop from Mahfood. She first became aware of the Defendant's involvement in the shop in May 1976 when she decided to terminate the tenancy agreement. She strenuously denied that she had been interviewed by the Defendant prior to renting the shop.

Mrs. Sonia Watson testified that in 1977 following discussions with Mahfood she agreed to rent shop No. 10 at Southdale Plaza. Mahfood informed her that the shop was being rented at a rental of Five Hundred Dollars ($500.00) monthly and advised her to make the cheque payable to Debbie Lynne. She first discovered that

Defendant was the owner of the shop in April 1982. The witness denied that she had ever requested Mrs. Fletcher to obtain from Defendant a document authorising Mrs. Fletcher to collect the rent. Mrs. Watson met the Defendant for the first time on the 8th June, 1982.

I consider it important to set out certain extracts from the evidence of Mahfood and Mrs. Fletcher on the question of the arrangements concerning the rental of the shop.

(1) Mahfood

> "In January 1976 a tenant was found for Defendant's hop. I had nothing to do with tenant - rental was collected by Plaintiff Company and receipts issued accordingly".

This is in obvious reference to Mrs. Merlyn Collie who rented the shop in January 1976.Mrs. Collie's evidence it will be recalled is that she dealt with Mrs. Fletcher and not Mr. Mahfood although it was her understanding that she was renting the shop from Mahfood.

(2) Mahfood

> "I did not rent a shop to Mrs. Collie. I might have seen her during the transaction I believe she made a payment of $1,500.00 to cover three months rental and maintenance. The Plaintiff company did not rent the shop to Mrs. Collie. Never undertook to manage and rent shop".

(3) Mahfood

> "Company did rent shop after Mrs. Collie left. Rent was collected on instructions of Defendant never spoke to Defendant about rental of shop. Did tell him we wished a certain mix of business in the development".

It cannot be denied that there is some confusion in the evidence of Mahfood as can be seen from the extracts but the question which exercises my mind is this if Mahfood was under an obligation to manage and rent the shop why would he be discussing with the Defendant that a certain mix of business was desirable in the development. This would in my view be unnecessary as he Mahfood

would be able to ensure that this mix was achieved without any discussions with the Defendant.

(4) Lilieth Fletcher

> "In 1975 we advertised shops in Southdale Plaza for rent. Defendant came to me and asked if I could select a tenant as he had no money to advertise. Told him that Mr. Mahfood would have to make that decision. Defendant interviewed Mrs. Collie and accepted her as his tenant and instructed me to receive $1,500.00 from her. Defendant did ask me to select a tenant for his shop in 1975. On each occasion Defendant interviewed his own tenant".

This evidence is violently contradicted by Mrs. Collie and Mrs. Watson, as is already indicated, and I must confess that I accept the evidence of the defence witnesses in preference to that of Mrs. Fletcher on the question of the rental arrangements. However her evidence is supported in part by the evidence of Mahfood who said:

> "Defendant took possession of premises on 15th November 1975. Just about then we advertised to rent shops which had not been sold. Defendant came to my office and along with Mrs. Fletcher who migrated about three years ago and asked me to assist him in obtaining a tenant through the advertisements we were running as this would save him costs of advertising his shop for rental. I agreed and instructed Mrs. Fletcher that after she had rented our five shops she could pass on to him a suitable tenant".

It is clear from this bit of evidence that the shops were originally intended for sale and that it was only after the Plaintiff failed to dispose of all the shops by way of sale that it resorted to a rental system. I accept this as true. Against this background I am unable to accept that the Plaintiff would have undertaken to manage and rent shop No. 10. Further thereto why did Defendant execute Exhibit 14 on January 18, 1977 authorising the Plaintiff to collect rental from Mrs. Watson? and why would Mrs. Watson have requested that Mrs. Fletcher obtain a document from the Defendant authorising her, Mrs. Fletcher, to collect the rent bearing in mind the evidence of Mrs. Watson that she only became

aware that the Defendant was the owner of the shop in April 1982. I am unable to accept that it was Mrs. Fletcher who initiated the execution of Exhibit 14. I find that Exhibit 14 was executed because there was no obligation on the Plaintiff to rent the Defendant's shop. Finally, on this question, it is significant that when Mrs. Collie decided to terminate the tenancy the Defendant himself approached her and sought to have her change her mind about quitting. This ought not to have concerned him, if the Plaintiff was obliged to have the shop rented.

I turn now to the question of "what was the agreed contract price for erecting the shop"?

The Defendant states that Exhibit 3 the building contract has been tampered with by removing page 2 of the original contract and replacing same with another page to reflect $30,500.00 instead of $20,500.00.

As early as November 12, 1975 the Plaintiff addressed Exhibit 5 to the Defendant advising him that the shop had been completed and that there was an outstanding balance of twenty-nine thousand five hundred dollars ($29,500.00). Up to that time the Defendant had paid to the Plaintiff the undermentioned sums.

Receipt No. 011 dated 15th July 1975 $3,000.00 by way of first deposit.

Receipt No. 017 dated 24th September 1975 $104.69 by way of ½ cost of stamping lease.

Receipt No. 027 dated 30th October 1975 $6,000.00 by way of 2nd deposit on shop.

It is clear from the payments made as deposits and the balance claimed by the Plaintiffs in Exhibit 5 that the Defendant had notice that the Plaintiffs were contending that the total sum involved on both contracts was $38,900.00. It is the Defendant's evidence that when he received Exhibit 5 he spoke to Mahfood telling him that the balance should be $19,500.00 and not $29,500.00.

Notwithstanding this contest as to the contract price the Defendant paid to the Plaintiff interest at the rate of $399.00 monthly, computed on the sum of $38,900.00 and of which the Defendant was aware.

I cannot accept that a person of the Defendant's intelligence would have paid interest at a rate which was computed on the basis of a disputed amount. What I would have expected him to do is to pay interest on the balance he asserts was outstanding pending the settlement of the dispute. What is even more surprising is that the Defendant testified that Mahfood promised to make the necessary adjustments to the purchase price nevertheless he continued making interest payments on the basis of the disputed balance.

I reject the evidence of the Defendant that Exhibit 3 was tampered with and I find that Exhibit 3 as it now appears is the document which the Defendant signed. I further find that the Defendant paid interest at the rate stated earlier herein because he had no doubt in his mind that the contract price in respect of both contracts totalled $38,500.00.

On the question of interest I find as a fact that the interest was reduced by the Plaintiff at the request of the Defendant from 18% to 14% on condition that the Defendant made all monthly payments on the due date failing which the Defendant would be liable to pay interest at the rate of 18%. The Defendant having fallen into arrears with his payments the Plaintiff was entitled to revert to previous agreement.

However by Section 13 of the Money Lending Act the lender cannot properly exact an interest rate in excess of 12½%.

Accordingly there will be judgment for the Plaintiff for $34,212.00 with interest thereon at 12½% from 1st December 1975 to 4th February 1985 and in addition thereto for the sum of $1,475.00 which does not attract interest.

Costs to be taxed if not agreed.