

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT #E114 OF 1989

BETWEEN	HENRICH FITZ-GORDON	PLAINTIFF
AND	BERNET SPENCE	1ST DEFENDANT
AND	LANA SPENCE	2ND DEFENDANT
AND	CERIS WINT-McCAULSKY	3RD DEFENDANT

Frank Williams instructed by Dunn, Cox, Orrett and Ashenheim for the plaintiff.

Walter Scott and Leighton Pusey instructed by Perkins, Grant, Stewart, Phillips and Company for first defendant.

Mrs. Janet Stanbury instructed by Stanbury and Company for second defendant.

Heard on March 11,12,13,14,15,21 and April 26, 1996

Harris, J:

This action commenced by way of originating summons. By an order of the 17th October, 1989, this summons was treated as a writ of summons, the plaintiff was granted leave to amend, file and serve the writ of summons and to file and serve a statement of claim. Appearances were entered and defences were filed by the first and second defendants. The third defendant who was joined by virtue of the order, did not appear, nor did she file a defence. During the course of the trial, the plaintiff was granted leave to amend his statement of

claim and the first and second defendants were allowed to amend their defences accordingly.

The plaintiff's claim against the defendants is outlined as follows:

1. On a proper construction of a lease agreement a valid option to purchase premises 83½ Shortwood Road in the parish of St. Andrew was created by the said lease agreement and granted to the plaintiff.
2. The plaintiff has validly exercised the said option to purchase the aforesaid premises and by virtue thereof is now the equitable owner of the said premises.
3. The third defendant who signed the lease agreement on behalf of the first and second defendants was duly authorised for all purposes of and in connection with the said lease agreement and the leasing of the premises and the granting of the option to purchase.
4. The first and second defendants are in breach of contract by virtue of their failure to transfer the land to the plaintiff.
5. If, which is denied, the third defendant had no authority to execute the said lease agreement granting the option to purchase to the plaintiff, she is in breach of her warranty of authority.
6. If, which is denied, the first defendant had no authority from the second defendant to grant the said lease with the option to purchase, he is in breach of his warranty of authority.

There is also an alternative claim by the plaintiff that an oral contract was made on or about the 17th June, 1982, between

the plaintiff and the defendants of which there have been several acts of part performance and of which there is some evidence in writing.

The first and second defendants are the joint registered proprietors of premises known as 83½ Shortwood Road in the parish of St. Andrew. They were husband and wife up to April, 1995. They have been resident in the United States of America since June or July, 1981. The third defendant was an agent for the first and second defendants.

The plaintiff's evidence was that on the 17th June, 1982, an agreement for lease was made between Telepro Data Systems Limited acting on his behalf, and the third defendant acting, for the first and second defendants, by virtue of which, the first and second defendants agreed to lease premises 83½ Shortwood Road to the plaintiff for a period of one year commencing on the 1st August, 1982. The agreement also contained a term which conferred on him an option to purchase the premises for a sum not exceeding one hundred and eighty thousand dollars (\$180,000) at any time between the 1st August, 1982, and the 1st August, 1983. The purchase price was fixed by him and the agreement was prepared by him. This agreement was signed by one Roderick Heaven and himself on behalf of Telepro Data Systems and by the third defendant, the agent of the first and second defendants.

The plaintiff further stated that some time in 1982 he had a telephone conversation with the first defendant, which revolved around the option to purchase 83½ Shortwood Road. During this discussion, he explained to the first defendant the basis on which he had determined the purchase price of \$180,000. The defendant questioned the quantum.

In their testimony, the first and second defendants denied that the third defendant was agent for the sale of the property as her agency was restricted to the rental of the premises. The first defendant stated that no valid option was granted to the plaintiff by him, or his agent for the purchase of 83½ Shortwood Road. The plaintiff was fully aware that the agent had no authority to grant such an option. He further related that no oral agreement existed between himself and the plaintiff for an option to purchase the premises.

The second defendant declared that she authorised the first defendant to rent the premises and it was immaterial whether he had done so himself, or had resorted to the use of an agent. She also stated that the third defendant's agency was limited to administration of leases and rent. She denied entering into any contract, written or oral, with respect to an option for the sale of the property. She further reported that the agent was not clothed with authority from her, to grant an option, nor to sign any agreement for the sale of the premises.

The first matter which falls for consideration, relates to the declaration sought by the plaintiff as to the construction of a lease agreement, in support of his contention with reference to the creation of a valid option for him to purchase 83½ Shortwood Road under that agreement. He attempted to tender into evidence a photocopy of a document, subsequent to his having properly accounted for the absence of the original. Objections were raised by the attorneys-at-law for the first and second defendants, that the document sought to be tendered had not been stamped in accordance with provisions of the Stamp Duty Act and, therefore, inadmissible in evidence.

The Act makes it mandatory for certain instruments to be stamped. Leases of land and contracts for sale of land are included in the list of documents which attract stamp duty. An agreement for option to purchase land ranks as a contract of sale of land and is also governed by the Act. Non compliance with the requirement of stamping renders such documents inadmissible in evidence by section 36 of the Stamp Duty Act, which provides as follows:

"36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

Mr. Williams submitted, however, that notwithstanding that there is a breach of the Act, regard must be had to section 32 of the Act, which reads:

"32(1) Save where other express provision is by law made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty, without penalty, provided that this is done before the expiration of fourteen days after the instrument is first executed; if fourteen days have so expired there shall be a penalty of ten dollars, and also by way of further penalty, where the unpaid duty exceeds ten dollars, of interest on such duty, at the rate of five per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty."

This section permits the stamping of documents, on payment of unpaid duty, within fourteen days after its first execution. After the expiration of fourteen days, the instrument attracts a penalty, as well as interest where the unpaid duty is in excess of ten dollars.

He further urged that this defect can be remedied by the application of the provisions of sections 43 and 44.

Section 43 of the Act is expressed as follows:

"43. Upon the tender in evidence of any instrument, other than inland and foreign bills of exchange and promissory notes, coastwise receipts, and bills of lading, it shall be the duty of the officer of the court, before reading such instrument, to call the attention of the judge to any omission or insufficiency of the stamp; and the instrument if unstamped, or insufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency

on the stamp duty, to be determined by the judge, and the penalty required by the Act, together with an additional penalty of two dollars, shall have been paid."

In my opinion, this section of the Act contemplates, the stamping of an original document after it has been tendered into evidence. On perusal of that document, the officer of the court (the registrar in attendance) if observing that it has been unstamped or inadequately stamped, is under a duty to bring this deficiency to the attention of the judge. The judge then determines the duty payable together with the penalty required by the Act, and directs the payment thereof together with an additional penalty of two dollars.

The pertinent provision of section 44 for the purpose of the matter under consideration, reads as follows:

"Such officer of the court shall, upon payment to him of the duty payable upon such instrument, and of the penalties imposed by this act, endorse on the instrument a memorandum of the payment of such duty and penalties, stating the amounts thereof, respectively, with the date of such payment, and the name of the cause and the court in which paid; and thereupon such instrument shall be admissible in evidence, saving all just exceptions on other grounds..."

Section 44 dictates that on payment of requisite duties and penalties, an endorsement of the payment is made on the

document and it may thereafter become admissible in evidence. It was advocated by Mr. Williams that the original was not available and could not be stamped but the copy could be stamped. In my view, proceeding on the premise that the copy of the document could be stamped, it must be shown that the plaintiff can be aided by sections 43 and 44. The Act clearly demonstrates that the procedure with respect to the stamping and admissibility of an unstamped or insufficiently stamped document can only be adopted subsequent to the tendering of the document in evidence. The objections were raised by Mr. Scott and Mrs. Stanbury prior to the document being tendered in evidence. This being so, the plaintiff is precluded from availing himself of the provisions of sections 43 and 44 of the Act. The matter of admissibility of the document in evidence would fall within the parameter of section 36. The unstamped document is, therefore, inadmissible. As a consequence, there is no document before the court which could form the subject-matter of construction.

It is necessary at this stage for reference to be made to the plaintiff's declaration that Mrs. Winst-McCaulsky was the agent of the first and second defendants with respect to all transactions relative to premises 83½ Shortwood Road. The first defendant related that her appointment as agent extended only to renting of the property. The second defendant admitted that she had consented to her then husband renting the property



and it was immaterial whether this had been done by him personally, or through an agent. He also asserted that authorisation to rent the property was given by him, in writing, to Mrs. Wint-McCaulsky. The document to which he referred was admitted in evidence as exhibit "3", the contents of which is as follows:

"I, BERNET SPENCE, HEREBY APPOINTS Miss Certis Wint of 20 Duke Street, Kingston as the sole agent with regards to the administration of leases and rents concerning my property at 83½ Shortwood Road, Kingston 8 in the parish of Saint Andrew as of the 1st January 1981. She is endowed with all legal authority concerning the responsibilities spelt out above. Examples of entitlement: Rent collections, issuing of receipts, termination of contracts, preparing and entering into new contracts etc.

Bernet Spence."

The important question which emerges, is whether the scope of this agency is restricted to rental and leasing of the property, or whether it expressly or impliedly empowered Mrs. Wint-McCaulsky to enter into a contract granting an option for sale of the premises. It is evident from this document that Ceris Wint (as she then was) had been designated agent with respect to the leasing and rental of 83½ Shortwood Road. The document, in reciting that she is "endowed with all legal authority concerning the responsibilities spelt out above," demonstrates that the agency is restricted to leases

and rental of the property. In continuation of the authorisation, the first defendant cited examples of the machinery to which she could resort in the execution of her functions. It is unmistakably patent that the effect of this document is to bestow on her a right to rent and lease the premises, and nothing more. It follows, therefore, that the only comprehensible interpretation which could be placed on the contents of this document is that it created an agency limited exclusively to matters concerning the rental and leasing of the premises.

I will now examine the statement of the plaintiff that by a stipulation contained in a lease agreement, he had a valid option to purchase premises and is now the equitable owner thereof. He also contended that the purchase price of such property was for a price not in excess of \$180,000, and that such purchase should have taken place any time after the 1st August, 1982 and before the 1st August, 1983.

It is trite law that a landlord's interest in demised premises may be purchased by a tenant in exercise of an option to purchase such land. An option to purchase land is tantamount to an agreement for the sale of the land, and the plaintiff claiming an entitlement to an interest in his landlord's property must establish that he did acquire an interest in property through an enforceable agreement. To be enforceable by action, any such agreement must meet the requirement of the Statute of Frauds. The statute demands that actions for the contract for sale or disposition of land or other interest in land must be

evidenced by a written note or memorandum, signed by the party to be charged. No written note or memorandum substantiating the plaintiff's allegations of an agreement in writing has been admitted in evidence to satisfy the statutory requisition. The constituents of any agreement which might have been made in respect of any alleged option to purchase 33½ Shortwood Road is inoperable and the plaintiff's claim with reference to any option to purchase the premises, contained in any document, fails.

I will, at this juncture, allude to the alternative declaration of the plaintiff that an oral contract was made on or about 17th June, 1982, between the defendants and himself, of which there were acts of part performance and evidenced in writing. There is no evidence that the plaintiff spoke to the first or second defendants on the 17th June, 1982. By his own admission, the plaintiff declared that he did not know the second defendant. The first defendant stated that up to that date he had neither met nor spoken to the plaintiff and this was not denied by him. The plaintiff stated, however, that sometime in 1982, he had a telephone conversation with the first defendant which "centered around a particular option in a lease agreement". He further reported that during the discussion, the defendant raised a query as to the purchase

price, that amount being \$180,000. In addition, he informed the first defendant that within seven months of having taken possession, he would made a decision as to whether or not he would remain in Jamaica and if he decided not to stay, he would vacate the premises on the expiry of the lease.

The salient issue here is whether there are in fact acts of part performance on the part of the plaintiff referable to a contract for an option to purchase the property. Where there is in existence an oral contract, followed by acts of part performance, equity will exclude the operation of the Statute of Frauds. In the leading case of **Maddison v. Alderson** (1883) 8 App. Cas. 467, Lord Selbourne declared that no act done in furtherance of an agreement will satisfy the legal requirements of part performance, unless it is one which unequivocally and on its own nature demonstrates that some contract in relation to land had been made.

The principles relating to part performance were also considered in **Steadman v. Steadman** [1976] AC 536, in which Lord Reid stated:

"I am aware that it has often been said that the acts relied on must necessarily or unequivocally indicate the existence of a contract. It may well be that we should consider whether any prudent reasonable man would have done those acts if there had not been a contract but many people are neither prudent or reasonable and they might often spend

money or prejudice their position not in reliance on a contract but in the optimistic expectation that a contract would follow. So if there were a rule that acts relied on as part performance must of their own nature unequivocally show that there was a contract, it would be only in the rarest case that all other possible explanation could be excluded.

In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shewn to be more probable than not."

It is incumbent on the plaintiff to show that there were events which caused him to act to his detriment, or there were acts which refer to the formation of a contract, or are referable to a contract, which unequivocally prove the existence of a contract and or consistent with the alleged contract for an option to purchase 83½ Shortwood Road. The crucial question, therefore, is whether there are any acts done by the plaintiff which ought to be recognized as acts which would fall within the arena of the prescribed principles relating to part performance.

The plaintiff has neither pleaded nor proved that he had carried out any acts which were detrimental to him. He has, however, placed reliance on his entry into possession of the

property and the payment of rent as part performance of a contract with the first and second defendants for the option to purchase the property. Can the plaintiff's entry into possession be regarded as referable to some contract or possibly referable to the contract alleged? The authority granted to the defendants' agent related solely to the rental and leasing of the property, a consequence of which the plaintiff had been let into possession. The only reasonable conclusion that can be drawn is that the plaintiff's possession of the property was in the capacity of a tenant and not in pursuance of a contract for option for the sale of the property to him.

His assertion that his payment of \$1,300 monthly covered rent and the option seems mystifying. If this sum was inclusive of rental and deposit for an option to purchase, this surely would have eliminated the necessity for his attorneys-at-law to write to Mrs. Mint-McCaulsky on the 12th July, 1983, stating, among other things, the following:

"Would You be so kind as to indicate to us the price at which your principal is prepared to sell same (not to exceed one hundred and eighty thousand dollars [US\$180,000.00]) and also send to us an appropriate agreement for sale for execution by our client and return to your attorneys-at-law along with the deposit of 10% of the purchase price. We would expect that the usual conditions re costs of transfer be inserted in the Sales Agreement, and further that a completion date of say two months time would be reasonable."

There was also a follow-up letter dated 8th September, 1983, in which his attorneys-at-law extended an invitation to Mrs. Wint-McCauley to consent to a joint submission of the matter to arbitration.

The contents of these letters clearly indicate that if there was some agreement, such agreement was shadowed by a dark cloud of uncertainty surrounding the terms of the alleged agreement. By letter of the 12th July, 1983, the plaintiff's attorneys-at-law was making investigations as to the price. It was the plaintiff who had fixed a price, not any of the defendants. It is interesting also to note that the price had been questioned by the first defendant. Logic dictates that no price had been agreed. This leads me to the conclusion that the plaintiff's evidence, that the thirteen hundred dollars (\$1,300) per month paid by him was partly applicable to the option, is untrue and must be rejected.

His possession of the premises and payment of rent is consistent with his tenancy and is sufficient to be deemed acts of part performance referable to a concluded contract or a possibly alleged contract to purchase 83½ Shortwood Road.

I will now advert to the plaintiff's assertion that Mrs. Ceris Wint-McCauley warranted that she was authorised by the first and second defendants to execute a lease agreement on

their behalf, thereby binding them and if she had no such authority she is in breach of the warranty in holding out that she had. No evidence has been adduced to establish any terms and conditions of any lease agreement from which it could be inferred that Mrs. Wint-McCaulsky warranted that she was authorised to execute the same on behalf of the first and second defendants. Equally, there is no evidence that Mrs. Wint-McCaulsky held herself out to the plaintiff that she had such authority.

It is also essential to refer to the statement of the plaintiff that the first defendant was in breach of his warranty of authority in holding out to him that he had the consent of, or was authorised by the second defendant to make and execute a lease agreement and grant an option to purchase. The plaintiff has not proffered any evidence to prove that there was an agreement which granted an option to him to purchase the property, as there is no executed agreement before the court. Further, the first defendant emphatically repudiated that he entered into any oral contract for the sale of his property to the plaintiff or had given anyone permission to sell.

The plaintiff has failed to sustain any item of his claim. He is thereby precluded from procuring any of the reliefs solicited. Judgment is accordingly entered for the first and second defendants with cost to the first and second defendants to be agreed or taxed.