

N.M.S

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 93/96

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (AG.)

BETWEEN	MAURICE FONG	1ST DEFENDANT/APPELLANT
	DULCIE FONG	2ND DEFENDANT/APPELLANT
AND	LLOYD BENT	PLAINTIFF/RESPONDENT

Owen S. Crosbie & Debayo Adedipe instructed by Robertson, Smith & Ledgister & Co for the Appellants.

Miss Carol Davis instructed by O. G. Harding & Co for the Respondent.

April 30, May 1, July 14 & September 30, 1997

RATTRAY, P.

This is an appeal from the judgment of Harris J, who denied the motion brought by the defendants/appellants Maurice Fong and Dulcie Fong, husband and wife, which sought to have dismissed the suit brought by the plaintiff, Lloyd Bent, on the ground that the contract for which specific performance was sought by the plaintiff had been terminated and replaced by a new contract for the sale and acquisition of the said property the subject matter of the suit.

The parties had contracted for the sale by the first defendant/appellant, Maurice Fong, to the plaintiff/respondent of certain lands with buildings thereon situated at Rhudds Corner in the parish of Manchester and registered at Volume 815 Folio 55 of

the Register Book of Titles, on terms stated in a written agreement. So far as is relevant to our present purposes the agreement called for a deposit and a vendor's mortgage for the balance of the purchase price. The plaintiff/respondent was put in possession of the premises and claims to have duly paid the deposit as well as making payments towards the mortgage. He further maintained that he had thereafter expended monies in effecting repairs and improvements to the property.

The first defendant had refused to complete the sale. The defence alleged inter alia a failure on the part of the plaintiff to meet his obligations under the contract, and challenged the enforceability of the contract and mortgage as well as the availability of the remedy of specific performance claimed on the basis that an option now existed for the sale of the property to a third party. It was further buttressed by a counter claim for damages, recovery of possession and mesne profits.

There has been a welter of amended pleadings including the addition of the second defendant/appellant, the wife of the first defendant/appellant, against whom an allegation of fraud has been made by the plaintiff/applicant. It is not necessary to follow the tributaries and amended pleadings into which this action has meandered from its source. In the course of these claims, counterclaims, defences and replies, the defendants/appellants through their attorneys-at-law by letter dated 7th February, 1995 approached the attorneys-at-law for the plaintiff in an endeavour to achieve a settlement of the suit. It was agreed that with respect to the mortgage, the vendor's mortgage would be replaced by the purchaser providing funding from other sources for the payment of the balance of the purchase price. No date had been determined by the parties for the payment of that balance. This agreement did not in any way however stem the flow of the proceedings in the litigation filed. As narrated in the judgment of the learned trial judge interlocutory matters before the court were as follows:

"The Plaintiff issued a summons for an interlocutory injunction on the 2nd August, 1994, which was heard and dismissed on the 27th September, 1994. An

appeal from the order of refusal of the injunction was allowed on the 27th February, 1995, when the Court granted an interlocutory injunction and issued directions for the reinstatement of a caveat which had been lodged by the Plaintiff."

Furthermore, despite the negotiations continuing during the currency of the suit, in the narrative of the judgment of the Learned Judge:

"Amended Writ of Summons and statement of claim were filed on the 3rd February, 1995. This was followed by the filing of an amended defence on the 16th February, 1995. A reply and defence to counterclaim was filed on the 24th March, 1995. Summons for directions was issued on the 17th July, 1995. This summons came on for hearing on the 28th September, 1995 but was adjourned sine die."

By Notice of Motion issued on the 4th July, 1995 the defendants sought to move the Supreme Court as follows:

"1. All Injunctions Relief/s and order/s, and directions/s to the Registrar of Titles granted touching and concerning lands registered at Volume 8155 Folio 55 of the Registrar Book of Titles or howsoever be described and being the lands subject of the action and/or made by the Court of Appeal with Special reference to Interim Order made and dated 7th December, 1994 in the following terms, 'that the Registrar of Supreme Court direct the Registrar of Titles to reinstate Caveat dated 11th February, 1993 connected with Certificate of Title registered at Volume 815 Folio 55 of the Registrar of Titles until further order so as to prevent any disposition or other dealings with the property;' and Interlocutory Injunction granted by the said Court December 8, 1994 as follows, 'The Defendant be restrained from dealing or disposing of lands registered at Volume 815 Folio 55 of the Registrar Book of Titles until the trial of this action or until further order', be discharged, suspended recalled or removed.

2. The action be dismissed for want of prosecution, or having been aborted or terminated, the contract subject of the action having been terminated, substituted for, and replaced by a new contract for the sale and acquisition of the said property registered at Volume 815 Folio 55 between the said Plaintiff, Lloyd Bent and the said Defendants, hereinbefore referred to, as Maurice Fong.

3. The Court makes such order/s and grant such relief/s as it seems fit, including entering judgment for

the Defendant/s granting permission for discontinuance or withdrawal of the Counter Claim."

It was this Motion which came on before Harris J, on the 15th and 16th February, 1996 and which was dismissed by the Learned Trial Judge and has resulted in the appeal before us. As to the first relief sought, the Learned Trial Judge quite correctly gave it very short shrift.

" 'It is trite law' she stated, that the decisions of an appellate Court are binding on a Court of inferior jurisdiction. This Court has no authority to amend, vary, alter, set aside or otherwise interfere with the orders of the Court of Appeal."

Mr. Crosbie, Counsel for the appellants, has urged us to hold that the new arrangements between the parties have resulted in a novation of the original contract and, therefore, the subject matter of the action, that is that the contract in respect of which specific performance has been sought by the plaintiff no longer exists, resulting in the determination of the action filed which should, therefore, be dismissed by the Court.

The Learned Trial Judge could find no basis to support the application to dismiss the action for want of prosecution. Indeed, the history of the matter established exactly to the contrary. The real assault by the defendant, therefore, lay against the Judge's dismissal of the Motion relating to her finding that:

"There are no circumstances cited by defendants which could at this stage of the proceedings be regarded sufficient to have terminated the original agreement as alleged by them."

With this finding I am in complete agreement. The parties on the initiative of the defendants were seeking to amend the original contract in one respect i.e. to remove the obligation of the vendor to provide a vendor's mortgage. The efforts in this regard did not achieve fruition.

The Learned Trial Judge further found that there are triable issues in the pleadings which can only be determined by the Court when the matter comes on for

trial. In this also she was patently correct. Consequently, she dismissed the Motion with costs to the plaintiff. Her assessment of the facts and her conclusions on the law are impeccable. The appeal is, therefore, dismissed with costs to the plaintiff/respondent.

BINGHAM, J.A.:

This appeal is from a judgment of Harris, J., dismissing a motion brought by the defendants/appellants in which they sought the following reliefs:

1. "All Injunctive Relief/s and order/s, and direction/s to the Registrar of Titles granted touching and concerning lands registered at Volume 815 Folio 55 of the Register Book of Titles or howsoever be described and being the lands subject of the action and/or made by the Court of Appeal with special reference to Interim Order made and dated 7th December, 1994 in the following terms, 'that the Registrar of Supreme Court direct the Registrar of Titles to reinstate Caveat dated 11th February, 1993 connected with Certificate of Title registered at Volume 815 Folio 55 of the Register Book of Titles until further order so as to prevent any disposition or other dealings with the property'; and Interlocutory Injunction granted by the said Court December 8, 1994 as follows, 'The Defendant be restrained from dealing or disposing of lands registered at Volume 815 Folio 55 of the Register Book of Titles until the trial of this action or until further order', be discharged, suspended recalled or removed.
2. The action be dismissed for want of prosecution, or having been aborted or terminated, the contract subject of the action having been terminated, substituted for and replaced by, a new contract for the sale and acquisition of the said property registered at Volume 815 Folio 55 between the said Plaintiff, Lloyd Bent and the said first Defendant, hereinbefore referred to as Maurice Fong.
3. The Court makes such order/s and grant such relief/s, as it seems fit, including entering judgement for the Defendant/s granting permission for discontinuance or withdrawal of the Counter Claim."

The facts have been clearly set out in the judgment of the learned President and do not therefore call for repetition on my part.

The motion resulted from a claim brought by the respondent for specific performance of a contract entered into by the parties on or about 1989 for the sale of a property situated at Rhudds Corner in the parish of Manchester and registered at Volume 875 Folio 55 of the Register Book of Titles, and for an injunction restraining the defendants from dealing with or disposing of the said property contrary to the plaintiff's interest.

There were also other consequential reliefs sought in the claim with respect to the said property.

In so far as the first paragraph of the motion sought to challenge an order of this court made on 7th December, 1994, whereby the court granted an interlocutory injunction and issued directions that the reinstatement of a caveat which had been lodged by the plaintiff "be discharged suspended recalled or removed", this was clearly outside of the jurisdiction of the court below as that court had no authority to enquire into the validity of such an order. The learned judge below rightly recognised this to be so and to her credit expressed this view at the outset in her reasons for judgment. She said:

"It is trite law that the decisions of an appellate Court are binding on a Court of inferior jurisdiction. This Court has no authority to amend, vary, alter, set aside or otherwise interfere with the orders of the Court of Appeal."

The arguments both below and before us turned on the question as to whether the pleadings raised serious issues fit to be tried. If this question could

be answered in the affirmative, then the matter was one which ought to be left to be determined by a trial court when the merits of the competing contentions of the parties to the suit could be gone into by a proper adjudication of the issues raised on the pleadings. When one looks at the history of the pleadings what emerges from an examination of the matter is that it was at the stage of the summons for directions being filed and an hearing date set down before the motion to dismiss was taken out. While such applications can be made at any stage before trial, the rules of practice recognise that it is usual to make it as soon as possible after service of a statement of the claim. Coming as it did long after the pleadings were closed, the application can be seen as being more in the nature of an afterthought on the part of the appellants.

The examination of the pleadings raised at least two important issues, viz.,

1. Whether the original agreement for sale had been extinguished and replaced by a new agreement for sale between the parties, or, whether such changes as were effected in the agreement amounted to a variation in the original agreement which did not materially affect the essential nature of the agreement as entered into by the parties.
2. Whether the documentary evidence in relation to the issues raised as to the balance of the purchase price was a matter which ought to be left for the interpretation by a trial court.

In advancing his arguments in this area, Mr. Crosbie for the appellants submitted that the original contract between the parties was substantially altered to the extent that it was terminated and replaced by a new contract.

As the statement of claim was founded on the original contract, which arguably was no longer in existence, it followed that it disclosed no reasonable cause of action and ought to have been struck out by the learned judge.

This submission was the same as that raised, albeit unsuccessfully, before the learned judge at the hearing of the motion.

Side by side with this question was that as to whether, in the absence of a completion date in the agreement for sale, the notice to the plaintiff fixing a time for completion of the contract and making time of the essence was reasonable in the circumstances.

The settled law and practice is that questions to be resolved coming within this category are not to be treated as though one was conducting a preliminary enquiry into some criminal cause or matter. The authorities establish that orders dismissing or striking out a claim at the interlocutory stage ought only to be resorted to "where on an examination of the claim or defence it is plain and obvious that the claim or answer is on the face of it obviously unsustainable", per dictum of Lord Lindley M.R. in *Hubbock v. Williams* (1895) 1 Q.B. 86, vide also in support *A. G. Duchy or Lancaster v. London and North Western Railway Co.* (1892) 8 Ch. 74.

As the learned judge below recognised, this was a case in which the issues raised on the pleadings called for a determination based on an examination of mostly documentary evidence including exchanges of correspondence between the attorneys acting for the parties at various stages of the contract the subject-matter of the suit. In this regard, the summary nature

of the proceedings at the interlocutory stage "cannot be exercised by a minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action", vide in support *Wenlock v. Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871 C.A.

Moreover, in applications of this nature, it is not permissible to try the issues raised on the pleadings on disputed affidavits. This is precisely what the submissions canvassed by the appellants have attempted to do. Far from lending support to the reliefs sought in the appellants' motion to dismiss, they have merely sought to reinforce the correctness of the conclusion reached by the learned judge. Having examined the pleadings and the documentary evidence, being the area circumscribing the limits of her enquiry, she concluded that:

"The statement of claim discloses a reasonable cause of action against the defendants. They have pleaded to the claim raised and have also filed a counterclaim to which the plaintiff has pleaded. The contents of the pleadings raise triable issues. Further, the question as to whether the contents of the correspondence which passed between the parties, or whether any transactions which had taken place between them since the date of the agreement in April, 1989 would have rendered that agreement invalid, or is such as to amount to a variation of that agreement, are crucial issues which must be resolved at a trial."

Given the material at hand, this conclusion arrived at was correct and ought not to be disturbed.

I would, therefore, dismiss the appeal and affirm the judgment of Harris, J. with costs to the respondent to be agreed or taxed.

WALKER, JA (Ag.)

This is an appeal from a judgment of Harris J. whereby she dismissed a motion seeking on behalf of Maurice and Dulcie Fong relief as follows:

1. All Injunctions Relief/s and order/s, and direction/s to the Registrar of Titles granted touching and concerning lands registered at Volume 8155 Folio 55 of the Registrar Book of Titles or howsoever be described and being the lands subject of the action and/or made by the Court of Appeal with special reference to Interim Order made and dated 7th December, 1994, in the following terms, 'that the Registrar of Supreme Court direct the Registrar of Titles to reinstate Caveat dated 11th February, 1993 connected with Certificate of Title registered at Volume 815 Folio 55 of the Registrar of Titles until further order so as to prevent any disposition or other dealings with the property;' and Interlocutory Injunction granted by the said Court December 8, 1994 as follows, 'The Defendant be restrained from dealing or disposing of lands registered at Volume 815 Folio 55 of the Registrar Book of Titles until the trial of this action or until further order', be discharged, suspended recalled or removed.

2. The action be dismissed for want of prosecution, or having been aborted or terminated, the contract subject of the action having been terminated, substituted for, and replaced by, a new contract for the sale and acquisition of the said property registered at Volume 815 Folio 55 between the said Plaintiff, Lloyd Bent and the said first Defendants, hereinbefore referred to, as Maurice Fong.

3. The court makes such order/s and grant such relief/s, as it seems fit, including entering judgment for the Defendant/s granting permission for discontinuance or withdrawal of the Counter Claim."

Of the grounds of appeal which were filed in support of this appeal two only were argued in substance by Mr. Crosbie for the appellants. The two relevant grounds read as follows:

1. That Her Ladyship was wrong in law in dismissing the Motion for dismissal of Suit No. C.L.B. 243/94 on the

basis that there was a new contract replacing the contract subject of that suit, and ordering costs against the Defendants for the following reasons inter alia:-

(a) The judgment was against the proven facts and the admission of the Plaintiff's Attorney that on the facts that there could have been (a new contract being the real question of controversy between the parties before the admission was made). In this context, all material Affidavits and exhibits point not just on a balance of probabilities, but conclusively to a new contract; and further although the Attorney appearing for the Plaintiff/Respondent conceded that there could have been a new contract from all the circumstances, and leading Counsel for the Defendants/Appellants rose and requested of Her Ladyship to note that the Plaintiff's/Respondent's Attorney conceded that there was a new contract and Her Ladyship stated that she noted that and that would form part of her judgment, her judgment was given in literal and wrongful contradiction deliberately and/or obviously without judicial consideration of the effect of the admission and/or conceding that there is a new contract.

2. That Her Ladyship's final oral reason for the dismissal of the Motion is that there is a triable issue is a serious and vital misdirection of the laws and facts material to ensure the determination of the merits of the real question of controversy between the parties. In this connection, although Her Ladyship stated that she would give her reasons in writing at a later date she did give quite emphatically the general oral reason that because there is a triable issue the motion would be denied in its entirety and stated that the trial should therefore proceed.

The facts of this case reveal that in or about March, 1989, Mr. Bent, the respondent herein, entered into a written agreement with Maurice Fong, the first appellant for the purchase of property at Rhudd's corner in the parish of Manchester at a price of \$900,000.00. A deposit of \$150,000.00 was paid by the respondent and accepted by the appellants although payment was made outside of the period stipulated in the contract. The sale was subject to a Vendors' mortgage and the

purchaser was let into possession after executing the mortgage deed, this notwithstanding the fact that that document had not up to then been executed by the Fongs. Thereafter it is conceded on both sides that certain events took place which in effect varied the contract between the parties.

The pith of Mr. Crosbie's submission has been that the original contract between the parties was varied to the extent that it terminated and was replaced by a new contract, that is, a novation of contract took place. As a consequence of this, Mr. Crosbie argues, the present suit which is brought by the respondent on the basis of the original contract (which no longer exists) discloses no reasonable cause of action and, for that reason, should have been struck out by the learned judge. It is the same argument which Mr. Crosbie advanced unsuccessfully before the learned judge.

Now there can be no doubt that a civil action may be dismissed on the ground that the suit discloses no reasonable cause of action. This is trite law. However, in the present case in seeking to avail themselves of such a remedy the appellants are faced with a dilemma. It is this. The reasons underlying their contention as to a novation of contract involve matters of fact as to which there is no consensus. If the variation of the parties' contract has effected a novation of contract, the original contract is extinguished and replaced by a new contract. If not, the original contract continues to exist, though in an altered form. Here, controversial issues of fact surround the nature and extent of the varied contract, and there are issues of fact which must necessarily be resolved upon a trial. Only then will it be possible to determine whether or not a novation of contract has, in fact, occurred in this case.

Indeed, the learned judge expressly found that the respondent's pleadings disclose a reasonable cause of action against the appellants. Also, the judge

recognised that those pleadings revealed serious issues of fact to be tried. In dismissing the motion before her, Harris J. said:

"The statement of claim discloses a reasonable cause of action against the defendants. They have pleaded to the claims raised and have also filed a counterclaim to which the plaintiff has pleaded. The contents of the pleadings raise triable issues. Further, the question as to whether the contents of the correspondence which passed between the parties, or whether any transactions which had taken place between them since the date of the agreement in April, 1989 would have rendered that agreement invalid, or is such as to amount to a variation of that agreement, are crucial issues which must be resolved at a trial."

In my opinion these findings of the judge are eminently correct. This dispute ought to be resolved upon a trial in the Supreme Court.

I would, therefore, dismiss this appeal with costs to the respondent to be agreed or taxed.