

N.M.S.

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEALS NO. 94/98 & 109/98**

**SUIT. NO: C.L.F 144/1996**

**COR. THE HON. MR. JUSTICE FORTE, P.  
THE HON. MR. JUSTICE WALKER, J.A.  
THE HON. MR. JUSTICE LANGRIN, J.A.**

<b>(1) BETWEEN</b>	<b>SHARON FRANCIS</b>	<b>PLAINTIFF/APPELLANT</b>
<b>A N D</b>	<b>LUCIANA HINES</b>	<b>DEFENDANT/RESPONDENT</b>
<b>(2) BETWEEN</b>	<b>LUCIANA HINES</b>	<b>DEFENDANT/APPELLANT</b>
<b>A N D</b>	<b>SHARON FRANCIS</b>	<b>PLAINTIFF/RESPONDENT</b>

**Earl Witter** instructed by Gaynair & Fraser  
for Sharon Francis  
**Miss Carol Malcolm** for Luciana Hines

**12<sup>TH</sup>, 14<sup>TH</sup>, 15<sup>TH</sup> February, and 6<sup>TH</sup> April, 2001**

**FORTE, P:**

Having had the opportunity to read in draft, the judgment of Langrin J.A. I need only state that I agree with the reasons and conclusions therein. I would make the order stated at the end of the judgment.

**WALKER, J.A.:**

I have had the advantage of reading in draft the judgment of Langrin, J.A. I agree entirely with it and would dispose of this appeal accordingly.

**LANGRIN, J.A:**

This is a consolidated appeal against the order of Clarke J made on the 25<sup>th</sup> day of July, 1998 dismissing the plaintiff's summons to strike out the defence and to enter judgment for the plaintiff for Recovery of Possession of land situated at Mary's Bay, Westmoreland. The defendant sought to amend her defence by an averment that she had obtained a receipt for \$8000.00 when she purchased the said land. The defendant has appealed against the dismissal by, Clarke J on the 28<sup>th</sup> July 1998 of a summons to amend her defence.

The relevant facts are that on the 18<sup>th</sup> November, 1978 the plaintiff and Annie Campbell entered into a written agreement for the sale of the said parcel of land. It was an expressed term of the said agreement that the vendor, Annie Campbell, would tender a registered Certificate of Title for the said land in consideration of the purchase price of \$5000.00. When the vendor failed to furnish her with the Certificate of Title, she instituted legal proceedings to obtain Specific Performance of the agreement. On the 12<sup>th</sup> March, 1987, Orr J. made the following order:

"UPON MOTION this day made unto this Court by Mr. B.E. Frankson, Attorney-at-law instructed by Messrs B.E. Frankson & Company, Attorneys-at-Law for the Plaintiff and the Defendant not appearing or being represented and upon reading the affidavit of the plaintiff and the Writ of Summons and Statement of Claim filed herein on the 18<sup>th</sup> day of March, 1986 this Court DOTH ORDER AND ADJUDGED that Judgment be and is hereby entered for the Plaintiff against the Defendant ANNIE CAMPBELL and it is further Ordered that there be Specific Performance of the Contract dated the 16<sup>th</sup> day of November 1978

whereby the Defendant ANNIE CAMPBELL agreed to sell and the Plaintiff SHARON FRANCIS agreed to purchase all that parcel of land situate at Mary's Bay in the Parish of Westmoreland butting and bounding on the North by the main road leading to Light House, Easterly on the Parochial road leading to Westland Mountain, Southerly on land belonging to Amos Hines and on the West by lands owned by or in the possession of Lazarous Reynolds and Maggie Donaldson".

Subsequent to the above order, the vendor died before the plaintiff obtained specific performance of the agreement. Efforts were made, without success, to find the personal representatives of the estate.

On the 16<sup>th</sup> November, 1978 when the agreement for sale of the land was executed the plaintiff entered into possession and remained in undisturbed possession until 1985 when she returned to live in the parish of St. Ann. At that time she left the defendant Luciana Hines in occupation of the land as a bare licensee. In 1990 the plaintiff terminated the possession she had given to the defendant and requested her to give up possession of the land. It is upon her refusal that the plaintiff instructed her lawyers to institute legal proceedings against the defendant in order to recover possession of the said land. A specifically endorsed writ of summons was filed on the 5<sup>th</sup> December, 1996 seeking recovery of possession.

On the 3<sup>rd</sup> March, 1997 the defendant filed her defence averring that she is the legal owner of the said property having purchased same from Annie Campbell in the year 1978 without notice of the plaintiff's claim. On the 17<sup>th</sup> March 1997, the plaintiff sought further and better particulars with regard to the defendant's claim. The latter stated that:

"The Defendant purchased the land in question pursuant to an oral agreement and as a consequence is unable to recall the exact time in 1978 that the purchase was effected".

In her defence, the defendant denied the trespass complained of by the plaintiff and said that the said land, the subject of the proceedings, was her sole property. She said she has been paying the taxes for the land and the plaintiff became her tenant in 1981 when she sought and obtained the defendant's permission to erect her dwelling house on the said parcel of land.

By summons dated 15<sup>th</sup> December, 1997 the plaintiff sought an order striking out the defence on the following grounds: The said defence discloses no reasonable answer to the plaintiff's claim. It is frivolous and vexatious and an abuse of the process of the Court.

On the 28<sup>th</sup> May, 1998 the defendant by summons sought leave to amend her defence and to dispense with the service of the amended defence upon the plaintiff.

The learned judge after dismissing both summonses did not put his reasons in writing so it is impossible to say precisely what influenced his decision.

Mr. Earl Witter, counsel for the plaintiff made the following submissions:

- (1) The oral agreement referred to by the defendant and Annie Campbell is unenforceable as same does not satisfy the requirements of section 4 of the Statute of Frauds 1677. There is no contract or any memorandum in writing prior to the issue of the writ as is required by the aforesaid statute.

- (2) The issue as to the ownership of the land was determined by the order for specific performance referred to in Suit No. C. L. F. 033 of 1986. In the circumstance the legal estate vested in Annie Campbell has been effectively transferred to the plaintiff and the said judgment remains intact and still in force. Hence, the defendant cannot now pursue a claim to the legal and/or equitable estate in the said parcel of land having regard to the said judgment.
- (3) The defendant's alleged receipt has never been exhibited in the interlocutory proceedings.

It must be observed that the defendant is saying that she is in possession of the land having purchased the said land in pursuance of a verbal agreement in which she obtained a receipt for \$8000.00. Even though the verbal agreement would be unenforceable as not complying with the formalities as required by the Statute of Frauds, this entry into possession coupled with the receipt for payment may be sufficient acts of part performance, if proved. This could take the case out of the Statute of Frauds, and effectively pass the equitable interest in the land from Annie Campbell to the defendant.

Where a vendor fails to comply with an order for specific performance, enforcement is usually comparatively simple as the court may order execution of the necessary conveyance on her behalf. Where it is initially awarded but later turns out to be unworkable, damages can be awarded.

If a decree of specific performance is not complied with, or becomes unenforceable, the plaintiff can return to the court and ask the court to terminate the contract and award damages for breach of contract. The remedy of specific performance cannot, by itself, transfer a legal interest in land.

Section 238 of the Judicature (Civil Procedure ) Code Law which governs the striking out of pleadings provides:

"The Court or a judge may order any pleadings to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

The question therefore arises as to whether the pleadings disclose any reasonable defence. As long as the defence discloses some question fit to be decided by the court, whether it be a question of law, or of fact, or of mixed fact and law, the action should be allowed to proceed to trial. It is irrelevant that the case may be weak. Provided that there is an arguable point the defence should not be struck out. In **Nagle v Fieldon** (1966) 2 W.L.R. 1027 it was held that, although there was no contractual relationship between the parties, the plaintiff had an arguable case for claiming the relief sought on the ground that the practice of refusing a trainer's licence to a woman might be void as being contrary to public policy.

Where there is an allegation, as the one made by the defendant in the instant case, of rights having been created by money being paid and possession taken in pursuance of an oral contract which the Statute of Frauds renders unenforceable, the owner of the right, payee or person in possession may prove and rely upon such contract to justify and protect his position as against a plaintiff seeking to establish a contrary claim. In such a case, the defendant seeks to use the unenforceable contract as a shield and not as a sword.

The learned judge was therefore correct when he refused to strike out the defence as disclosing no reasonable answer.

Turning to the question of whether the amendment sought was necessary for determining the issues between the parties, Miss Malcolm, counsel for the defendant, argued that a receipt for the purchase price paid for land could qualify as a sufficient memorandum in writing. This could provide proof of a verbal or oral contract for the sale of land in compliance with the Statute of Frauds. Further, she argued, that the original receipt for the purchase of the land was not exhibited to the Affidavit in support of an application for leave to amend the defence because it was not available. However, she maintained that the unavailability of the original was not a sufficient basis upon which to refuse leave. This court finds favour with these submissions.

The Court of Appeal will not usually interfere with the discretion of the judge in allowing or refusing an amendment of pleadings, however, it will do so in a proper case. Here the amendment sought is, in my view, necessary for determining the issues between the parties. Accordingly, the application for the amendment ought to have been granted.

**CONCLUSION:**

- (i) The appeal to strike out defence for failure to disclose a reasonable answer and to enter judgment is dismissed.
- (ii) The appeal to amend the defence in terms of the summons is allowed.

Costs awarded to the defendant to be agreed or taxed.