

*U.S.A. purchaser resident in U.S.A and perhaps Jamaica; vendors authority to attorney  
to enter into contract - whether authority only to enter into contract for  
purchaser to pay in U.S. dollars; whether contract in breach of Exchange Control  
it - whether unlawful. APPEAL against judgment of Court of ADVANCE COPY Appeal  
that contract unlawful allowed. Privy Council Appeal No. 54 of 1992 No case referred to.*

Caroline Friend

Appellant

v.

Florence Mae Tulloch

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
27TH JANUARY 1994

Present at the hearing:-

LORD TEMPLEMAN  
LORD BRIDGE OF HARWICH  
LORD GOFF OF CHIEVELEY  
LORD LLOYD OF BERWICK  
LORD NOLAN

(Delivered by Lord Templeman)

• CONVEYANCING

• STATUS

• LEGAL DRAFTING  
and INTERPRETATION

Early in the year 1988, the respondent vendor Mrs. Tulloch left Jamaica for Miami telling Mr. Frankson, whom she had known for more than 30 years, that she was very ill and that her nephew had come to Jamaica from Miami to take her back to the United States of America for medical attention and to reside in Miami. At all material times thereafter the vendor was resident in Miami and she was not resident in Jamaica although she owned a house in Jamaica. That house was let to the appellant purchaser, Miss Friend, and was occupied by Miss Friend's mother. At all material times Miss Friend was resident in New York but may have been also resident in Jamaica.

By a letter dated 11th August 1988 the vendor's attorney-at-law, Mr. W.B. Frankson, a Queen's Counsel practising as a solicitor and barrister in Jamaica, wrote to the vendor asking for her firm instructions with regard to the sale of her house in Jamaica. He reported that Miss Friend was willing to buy and to pay in United States currency. In reply the vendor said that she was ready to sell the property for US\$20,000 and that she wanted American dollars for her hospital expenses: "so do your best for me". The trial Judge, Theobalds J. and the Court of Appeal, (Carey President (Ag.), Wright J.A. and Bingham J.A. (Ag.)) found that the letter from the

vendor was sufficient authority for Mr. Frankson to enter into a contract for the sale of the property on behalf of the vendor. Their Lordships agree. Reversing the trial judge, the Court of Appeal held that the letter only authorised Mr. Frankson to enter into a contract which made time of the essence and which required the purchaser to pay the price in United States dollars. Their Lordships are unable to agree. The vendor was keen to get the money and she was keen to receive American dollars to provide for her hospital expenses but she fixed no date for contract or completion and did not forbid Mr. Frankson to enter into a contract for the Jamaican dollar equivalent of US\$20,000. Mr. Frankson knew that by reason of the Exchange Control Act no money could be sent out of Jamaica to the vendor without the permission of the Bank of Jamaica acting on behalf of the Minister of Finance. Permission was more likely to be granted if and to the extent that Miss Friend paid over American dollars on completion in Jamaica.

Miss Friend who was living in New York instructed an attorney in New York to act for her and a contract was entered into on 5th April 1989 between Miss Friend and Mr. Frankson as agent for the vendor. The price was J\$137,500 that being the equivalent of US\$25,000. The purchaser paid a deposit of \$20,625.00 in Jamaican currency to Mr. Frankson in Jamaica.

The vendor refused to complete and Miss Friend sought specific performance. The trial judge held that Mr. Frankson had authority to enter into the contract on behalf of the vendor, that the Exchange Control Act of Jamaica did not apply because both vendor and the purchaser were resident in Jamaica; the judge granted specific performance. Their Lordships agree with the Court of Appeal that there were no grounds on which the trial judge could reasonably have found that the vendor was resident in Jamaica at the material time. It follows that the Exchange Control Act falls to be considered. The Court of Appeal held that the Act had the effect of debarring the purchaser from specific performance and dismissed her action.

By section 7 of the Exchange Control Act, except with the permission of the Minister, no person shall *inter alia* make any payment to or for the credit of a person resident outside Jamaica. By section 33 of the Act it was not lawful for land in Jamaica to be sold or purchased without the consent of the Minister if the vendor was resident outside Jamaica. Section 36 of the Act, however, provided as follows:-

"(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

Provided that this sub-section shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason."

Accordingly there was an implied condition in the contract of sale between the vendor and Miss Friend that the contract should not be completed without first obtaining the consent of the Minister. Miss Friend's counsel said that consent of the Minister was not required or sought because down to the date of the hearing by the Court of Appeal Miss Friend took the view, and it was supported by the trial judge, that both the vendor and Miss Friend were resident in Jamaica and that exchange control consent was not required. Mr. Frankson gave evidence that on completion he proposed to obtain the consent of the Bank of Jamaica acting for the Minister to the payment of the purchase price or part of the purchase price to the vendor in the United States of America. Mr. Frankson gave evidence that he asked Miss Friend if she would on completion pay the whole or part of the purchase price in American dollars. Permission to transfer currency abroad to the vendor would have been more likely to be obtained if American currency had been paid into Jamaica.

The Court of Appeal held that the contract and completion were unlawful and that there was no implied condition making them lawful, if and when the consent of the Minister was obtained, because in terms of the proviso to section 36 the vendor and Miss Friend contemplated completing "in despite of the provisions of this Act". This was a finding which, if upheld, would mean that the vendor and Miss Friend were engaged in evading the provisions of the Exchange Control Act and that Mr. Frankson was party to a conspiracy for that purpose. It is true that the vendor wished to be paid American dollars and that Mr. Frankson wished Miss Friend to complete wholly or partly with American dollars but there was no secret about the contract, the vendor was represented by Queen's Counsel practising in Jamaica, Miss Friend was represented by American attorneys, the deposit had been paid in Jamaican dollars in Jamaica and in these circumstances their Lordships are not satisfied that the parties were acting in contemplation of breaches of the Act. The contract was lawful but could not be completed until the consent of the Minister was given or ceased to be necessary.

The Exchange Control Act was repealed by the Exchange Control (Repeal) Act 1992 after the Court of Appeal had delivered judgment. The consent of the Minister was as from the date of repeal no longer required to enable the contract to be lawfully completed. The condition implied in the contract by section 36 of the Act was satisfied and therefore Miss Friend's contract was

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specific performance. Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed. In view of the fact that the Minister's consent was necessary until the repeal of the Exchange Control Act, the order for costs made by the Court of Appeal will stand but the vendor must pay Miss Friend the costs of the appeal to the Board.