Privy Council Appeal No. 21 of 1990

Kelsie Graham *Appellant*

v.

Lurline Eugenie Pitkin *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD ROSKILL
LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by **Lord Templeman**]*

This is a purchaser's action for specific performance; the vendor claims to have rescinded the contract.

By an agreement dated 20th April 1978 the appellant vendor, Mrs. Kelsie Graham, and her husband agreed to sell to the respondent purchaser, Mrs. Lurline Eugenie Pitkin, the registered property 33 Morningside Drive, Kingston for $38,000, completion to take place on or before 31st May 1978 "subject to the purchaser obtaining a mortgage from VMBS of $19,000 for 10 years". Both parties employed the same solicitor. The purchaser paid a deposit of $5,700. The VMBS, the Victoria Mutual Building Society, offered to advance $16,000 subject to survey and title. In 1978 the vendor's husband died. On 6th September 1980 the vendor wrote from Florida to the purchaser complaining about the solicitor. On 24th September 1980 the solicitor wrote to the VMBS saying that he was ready to register the death of the vendor's husband on the title and in the same month the purchaser executed a transfer. On 2nd December 1980 the purchaser paid a further $10,000 towards the purchase price and $912.13 being her share of the solicitor's costs. The VMBS then discovered that there had been breaches of restrictive covenant registered against the property and declined to proceed until the breaches were condoned or rectified. On 20th March 1981 the solicitor wrote to the purchaser and others saying that the vendor was

not prepared to take the steps necessary to rectify the breaches of covenant and continuing:-

> "You must therefore make up your minds whether you will take the premises as they are or whether you wish to treat the Contract as rescinded by mutual consent and in the latter event the deposit paid by you will be returned to you.
>
> We would be very grateful if you could give this matter your consideration and let us have your further instructions."

On 28th April 1981 the solicitor reported to the vendor that the purchaser had called on him in response to his letter dated 20th March 1981 and that the purchaser's:-

> "... problem is that the Mortgage Society will not lend the Mortgage in the present state of the Covenants. However, she is anxious to acquire the premises and will let us know in about 7 days if she can arrange to buy for cash and avoid taking a Mortgage."

On 9th July 1981 the solicitor wrote to the purchaser saying that:-

> "We have now been instructed by Mrs. Graham to advise that it is clear from your conduct that you do not wish to complete the Contract and that by so doing the Contract has been rescinded and is at an end."

The purchaser's retort was a letter dated 23rd July 1981 from other solicitors saying that the purchaser had always been and was then still willing to complete the sale and requiring completion within fourteen days. This litigation ensued. The trial judge, Reckord J., made an order for specific performance and his decision was upheld by the Court of Appeal (Kerr, Campbell and Forte JJ.A.). The vendor now appeals.

On behalf of the vendor, Mr. Engelman first submitted that the condition in the contract that the VMBS would grant a mortgage of $19,000 for ten years was a condition precedent that had not been fulfilled before the vendor rescinded. Their Lordships consider that the condition solely benefited the purchaser and could be waived by her; it did not matter to the vendor where the money came from so long as she received $38,000. See *Heron Garage Properties Ltd. v. Moss and Another* [1974] 1 W.L.R. 148. In any event the vendor had never insisted on the fulfilment of the condition and, in the instructions which she gave for the letter dated 20th March 1981, finally waived the condition if she had not already done so.

Mr. Engelman relied on the judgment of Goulding J. in *Lee-Parker and Another v. Izzet and Others* (No. 2) [1972] 1 W.L.R. 775. In that case the sale was subject

to the purchaser obtaining a satisfactory mortgage. Goulding J. held at page 779 that the vendor's obligation to sell and the purchaser's obligation to buy were dependent on the obtaining of a satisfactory mortgage and that until the condition was fulfilled there was to be no binding contract for sale. In that case the vendor was bankrupt and the purchaser had no money so there were a number of reasons, mentioned by Goulding J., justifying his decision that the purchaser could not resist the claim of a subsequent mortgagee to possession. But since the purchaser, if he had the money, could always have declared that a mortgage of £10.00 from his brother-in-law was "satisfactory" their Lordships doubt the finding that there was no contract.

Mr. Engelman next submitted that the contract had been rescinded by the consent of both parties. But the purchaser never consented to anything and the solicitor reported to the vendor on 28th April 1981 that the purchaser was anxious to acquire the property.

Next, Mr. Engelman submitted that the vendor was entitled to treat the contract as having been repudiated by unreasonable delay on the part of the purchaser. It is common ground that time is not of the essence of a contract for the sale of land in the absence of an express term to that effect or in circumstances which imply that time is of the essence; see *Stickney v. Keeble and Another* [1915] A.C. 386. If a vendor serves a valid notice requiring completion within a reasonable time and the purchaser fails to complete in accordance with the notice, the failure can be treated by the vendor as a repudiatory breach which the vendor is entitled to accept by rescission; *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 per Lord Simon of Glaisdale at page 946. In the absence of a valid notice to complete a purchaser is entitled to specific performance unless his conduct has been such as to render it inequitable for specific performance to be granted. In the present case the silence or delay of the purchaser after 28th April 1981, when she intimated that she would try and find the balance of the purchase price and would report back in about seven days, did not constitute conduct which entitled the vendor to rescind on 9th July 1981.

Mr. Engelman submitted that the purchaser had been in default since the date fixed for completion; but in the circumstances of the present case this would not entitle the vendor to rescind without serving a notice to complete. Mr. Engelman relied on the statement attributed to Sargant J. in *Farrant v. Olver* (1922) 91 LJ Ch. 758 at page 759 that "It is not necessary that time should be made of the essence of the contract when the defendant has so persistently and for so long refused to perform the contract". In that case the contract was dated 31st January 1920, the date fixed for completion was 25th March 1920, the vendor issued a

twenty-eight day notice to complete in December 1920 and sued for specific performance or in the alternative rescission and forfeiture of the deposit. The purchaser put in a defence but withdrew it before the trial. The vendor sought rescission and forfeiture of the deposit. The sole query was whether he must take a decree of specific performance and come back for rescission and forfeiture of the deposit if the purchaser did not comply with the order for specific performance. Sargant J. decided that enough was enough and that the vendor was entitled immediately to an order for rescission and forfeiture of the deposit. The dictum of Sargant J. at p. 759 is not authority for the statement in Emmet on Title (19th Edition) para. 7.043 that if delay has been unreasonable no notice to complete need be given, albeit that the statement was approved by Goff J. in *Accuba Ltd. v. Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 at page 1564. Delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract. But in the present case the original delay appears to have been the fault of the solicitor. The vendor never complained about the purchaser or served a notice to complete. On 2nd December 1980 the purchaser paid and the vendor accepted $10,000 in reduction of the purchase price and as late as 28th April 1981 the purchaser affirmed that she wished to purchase the property. There was no evidence of repudiation by the purchaser in the absence of a notice to complete.

Finally Mr. Engelman endeavoured to conjure up a notice to complete out of the solicitor's letter dated 20th March 1981 and the solicitor's interview with the purchaser reported in the letter dated 28th April 1981. This submission is hopeless. There was no notice to complete.

Their Lordships will humbly advise Her Majesty that this appeal must be dismissed; the appellant must pay the costs of the respondent before the Board.