JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 123/2000

BEFORE: **THE HON MR. JUSTICE FORTE, P.**
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE PANTON, J.A.

BETWEEN:	**DUDLEY C. GRANT**	**DEFENDANT/APPELLANT**
AND	**DAVID L. McHUGH**	**PLAINTIFF/RESPONDENT**

Dr Lloyd Barnett and Ian G. Wilkinson for the appellant

Garth McBean instructed by DunnCox, for the respondent

October 10 &11 2002 & September 29, 2003

BINGHAM, J.A:

On the aforementioned dates this Court heard submissions in respect of this appeal at the end of which we allowed the appeal and set aside the judgment entered below. We entered judgment for the appellant and ordered costs both here and below to him, such costs to be taxed if not agreed.

At the time of handing down our decision we promised to put our reasons in writing. This is a fulfillment of that promise.

we have agreed to accept the down payment in two parts as follows: Eighty Thousand Dollars ($80,000.00) which is to be paid by the 25th instant and Twenty Thousand Dollars ($20,000.00) is to be paid six months from the date of the first down payment. The frontage of this portion of the premises is approximately 83 ft wide, n. side 200 ft and s. side approximately 190 ft. And the church building is 41x105 ft., including office, rest rooms, prayer room, etc.

The portion of the premises on which is the three section shed has a frontage of approximately 60ft. This portion is not for sale at the present time. But I can assure you that whenever I am ready to dispose of same, if you so desire, you will be given first preference. It will be officially valued and sold to you – "The Church" at a price to be negotiated.

Whenever you have made the first down payment you may start to occupy the premises in accordance with the terms of the Agreement.

After thirty-six months of the final down payment of Twenty Thousand Dollars (J$20,000.00) you should then start paying to the writer, his wife or his daughter Elaine Jones the balance which will be in the form of monthly installments. This payment will cover a period of seven years and conform to the then current mortgage rate of interest, less five percent (5%) given by commercial banks and other similar lending agencies.

If you so desire to close the deal before the prescribed periods a rebate of interest will be given in accordance with that obtained from commercial banks and similar lending agencies. It must also be borne in mind that after the first down payment is made if you failed to pay the final down payment of Twenty Thousand Dollars (J$20,000.00) within the prescribed six months period, without consultation and agreement, fifty

on the premises, bearing in mind the improvement that you have made to same over the period, with a view of having it sold to a suitable organism, and reparation made proportionately to all parties concerned, and so bring the matter to satisfaction. Reparation will not be a part of any down payment which will have already been forfeited.

It should be noted that the sale of the church premises does not include any of the material in and outside of the shed, nor any metal, excluding reinforcing steel bars, in and outside of the church building. All material used as decking will be on loan to the purchaser until the slab is casted.

However, the floor tiles – about 1,500 of them, 6" building blocks – about 500 of them and eight sheets of ½" ply board are included in the sale, also all windows similar to those already installed in the rear section of the church building. It might be necessary for me to inform you that I have title and diagram for the premises; registered at Volume 1143 Folio 80 and it has no encumbrances. The new title will be prepared for you to coincide with the completion of payment.

Signed D.C. Grant
Vendor

Witness

Signed D.L. McHugh
Purchaser

Witness."

The Agreement for Sale was not one drawn up by an attorney-at-law versed and skilled in the art of Conveyancing Law and executed after consultation and negotiation between the parties and their legal advisers.

of the letter, indicating acceptance of the vendor's offer to purchase the land in question for $70,000.00. If the offer was accepted, the purchaser was required to pay the entire amount within two months of October 7, 1987.

The response of the purchaser was to make a counter offer in a letter dated October 30, 1987. He now offered to purchase that portion of the property for $60,000.00.

It was following this exchange of correspondence that the purchaser consulted their attorneys-at-law, Milholland Ashenheim & Stone, and by letter dated November 26, 1987 they wrote to the vendor (appellant) a memorandum couched in the following terms:

> "Mr. D.C. Grant
> 22 Alexander Place, Highfield
> Spanish Town 2
>
> Dear Sir,
>
> Re: 128 & 128A Brunswick Avenue, Spanish Town
>
> We act for Mr. D.L. McHugh and have been instructed to represent our client in connection with the purchase of the abovementioned premises
>
> We would be grateful if you would let us have a copy of the title or titles relating to both portions of the premises and the sub-division approval with all attached conditions, if any.
>
> With regard to the purchase of the portion of the premises not containing the church

As the offer by the vendor (appellant) was one made in keeping with the terms and conditions laid down in the written Agreement for Sale dated September 26, 1986 the effect of this refusal by the respondent meant that the vendor was entitled as a result to regard the right to first refusal as determined, and, to look to other interested parties to acquire the remaining portion of the property.

The attorneys-at-law for the purchaser (respondent) by letter dated June 8 1989, (Milholland Ashenheim & Stone to W.A. Rhoden), to the attorney-at-law for the vendor, made a subsequent offer of $75,000.00 for the remaining part of the property.

The response of Mr. Rhoden in a letter dated August 10 1989, indicated that this offer was not accepted. The reasons for the refusal of the offer as set out in the letter were to this effect:

> "As was pointed out in mine to you dated the 17th April 1989, my client is now obtaining an official valuation on his behalf upon the receipt of which you will be advised of the price he is asking, for the premises to be sold."
> (Emphasis added)

As can be seen the terms on which the vendor (appellant) undertook to sell the remaining portion of the property to the purchaser (respondent) were expressly set out in the agreement of sale. It was on the basis of a price fixed on an official valuation done at the vendor's request. The consideration price was not one, given the tenor of the correspondence passing from the purchaser and his attorneys-at-law for

(4) The learned trial judge erred in law, in that he misinterpreted the case, ***Enid Phang Sang v Sudeall & Sudeall*** (1988) 25 J.L.R. 226 (CA.; Jam) in respect of its application to the facts of the instant case.

(5) The learned trial judge erred in finding that on a construction of exhibit 2 (letter dated 16th February 1990, from plaintiff's attorneys-at-law to defendant) and exhibit 3 (letter dated 22nd February from defendant to plaintiff's attorneys-at-law) there was an unequivocal acceptance of the offer made by the plaintiff (p. 27 of the Record of Appeal).

(6) The learned judge erred in law in finding that time was not of the essence of the contract in respect of the payments which were to have been made thereunder by the purchaser.

(7) The learned judge erred in law in ruling that the case ***Enid Phang Sang v Sudeall & Sudeall*** (1988) 25J.L.R. 226 (C.A., Jam.) was distinguishable from the facts of the instant case.

(8) The learned judge erred in law in misinterpreting and/or misunderstanding the case, ***Smith v Morgan*** [1975] 2 All E.R. 1500, particularly regarding its application to the instant case.

(9) The learned judge erred in law in finding that on the evidence, the appellant/defendant deprived the plaintiff of the opportunity to exercise his right of first refusal.

(10) The learned trial judge erred in law in declaring that under and by virtue of the said Agreement for Sale the plaintiff was entitled to a right of first refusal for the balance of the said land as no such relief was claimed in the Writ of Summons."

The remainder of the purchase price of $130,000.00 was due to be paid over seven years, commencing as from April 1, 1990.

Dr Barnett argued that the dispute arose over the conflicting views of the provisions in the agreement. These related to (1) the timetable in relation to the payment for costs of abstracting title (2) the responsibility for the same and (3) the terms in the agreement providing for an upward adjustment in the purchase price should the vendor be called upon to bear his half cost of obtaining title. The vendor contended that there was never any variation of the contractual terms.

The purchaser's contention was that there was a variation of the contractual terms in so far as there was an offer of earlier payment of the balance of the purchase price. Dr Barnett drew the court's attention to the following:

1. A letter dated February 12 1988 (Grant to McHugh) (at pages 19 to 20 of a supplemental bundle).

2. A letter dated February 16 1990 written by the purchaser's attorneys (exhibit 3) at pages 9 to 10 supplemental bundle.

This letter is treated as amounting to an offer or proposal of an earlier payment of the purchase price by the purchaser.

Dr Barnett submitted that this is not so in law as the proposal did not take into account the original agreement that a vendor would receive

to the balance of the purchase price, this would have to be answered in the negative.

Counsel argued that in this case time was made of the essence of the contract as the parties had by their agreement, so indicated by setting out a timetable for payment of the purchase price. The learned trial judge by concluding therefore that the purchaser was entitled to treat the contract as rescinded, as no "time of the essence notice" was served on him, misses the point, given the schedule of payments laid down in the Agreement for Sale. This made a failure to comply with that schedule, a breach of an essential term of the contract thereby entitling the vendor to rescind the contract.

The learned trial judge's finding, [which amounted to an acceptance of the submissions of learned counsel for the plaintiff (purchaser)] as to no time of the essence notice being served on him, was founded on an erroneous premise. It completely overlooked:

1. The timetable for payment and the sanctions laid down in the agreement which could only be interpreted as calling for strict compliance with its terms.

2. Notices making time of the essence are part of the Law Society's Conditions of Sale in England. Such a condition may be imported into Agreements for Sale in Jamaica drafted by parties to contracts for sale of land. In this case, however, these conditions were not incorporated into the terms of the Agreement.

between the parties. Unless one were to strike out the provision in the agreement relative to "price to be negotiated" there is no mechanism for fixing the price. Counsel submitted that there would be the need therefore, for some negotiation before fixing the price by way of valuation.

Dr Barnett submitted that the order made by the learned judge does not reflect such a state of affairs. Since price is an enforceable part of any Agreement for Sale of land, a declaration of rights can only be enforceable if it is related to the enforceability of such rights.

He relied in support on ***Smith v Morgan*** [1971] 2 All E.R. 1500 and ***Brown v Gould et al*** [1971] 2 All E.R. 1505.

In the earlier case in the absence of machinery to fix the selling price, the vendor's obligation to negotiate in good faith and to state the price which he is willing to accept was a matter to be considered. In the latter case, there was a lease with an option to purchase the said property.

In the instant case there is no uncertainty as to what the parties intended but there was uncertainty as to how the price was to be fixed. There first had to be some negotiations between the parties with a view to arriving at an agreed price. The court's attention was directed to pages 8 to 9 of the notes of evidence. Counsel agreed that from an examination of the evidence contained therein it would not be correct to say that the

there was always a failure on his part to arrive at an acceptable purchase price.

2. All the negotiations over a period of 2 years failed to come up with a price acceptable to both parties. Added to this, there was nothing in the evidence indicating any bad faith on the part of the vendor.

He submitted that the basis reached by the learned trial judge, therefore, for ordering the declaration sought, was fundamentally flawed.

Dr Barnett contended that it is clear that the dispute which arose in the case was over terms in the agreement and the price. He relied in support on ***Australian Hardwoods Property Ltd. v Commissioner for Railways*** [1961] 1 All E.R. 731.

In the instant case, the respondent not having paid the balance of the purchase price could not show that he was ready, willing and able to complete the Agreement for Sale. He cited in support ***Enid Phang Sang v Conley Sudeall et al*** [1988] 25 J.L.R. 226.

Dr Barnett submitted that on the basis of the reasoning of the court in that case, the respondents in the instant case were not entitled to the order for specific performance. In the result he argued that the appeal be allowed with the requisite order for costs as follows the event.

Mr McBean for the purchaser (respondent) in responding argued that the learned trial judge made a finding that the appellant had repudiated the contract before the time had expired for the payment of the balance of the purchase price. He submitted that there was no issue

> prescribed in the agreement, which dealt with monthly payment, that which is stated in the agreement will hold good still. And the amount and conditions of monthly payment will be as stated in same.
>
> In such an eventuality you could then, reasonably, according to the agreement, work out in equal payment the balance of Sixty Thousand Dollars ($60,000.00) and have same forwarded to me.

Sgd. D. Grant."

This letter was written in response to one sent to the vendor by the purchaser's attorneys-at-law dated 16th February 1990.

By the letter of February 16, 1990 Milholland, Ashenheim & Stone acting for the purchaser (respondent) wrote to the vendor (appellant) proposing a variation of the terms of the Agreement for Sale with a view to shortening the period for payment of the balance of the purchase price. This called for:

> **"(1)** The sum of $70,000.00 to be paid to the vendor on or before March 31 1990.
>
> **(2)** The balance of $60,000.00 to be paid on the completion, that is on your production of a Registered Title for the land in question with the purchaser's name endorsed thereon as the registered proprietor.
>
> If these terms are agreeable to you kindly let us have your written acceptance as soon as possible". (Emphasis added)

This letter which on first reading would have seemed to be proposing to vary the terms as to payment of the balance of the

1990, from Dudley Grant to Milholland, Ashenheim & Stone (exhibit 4) (at pages 11 to 12) (supplemental record of documents,) read inter alia:

> "You could then at your own leisure prepare the title documents for my signature."

Counsel argued that the terms and conditions as to the costs of obtaining title in the purchaser's name, sought to place the responsibility for preparing title on the purchaser.

He then submitted that it was on this letter that the learned trial judge based his finding that it indicated an unwillingness on the part of the vendor to reach a concluded agreement which resulted in the order for specific performance.

From the submissions advanced before us by learned counsel for the parties, it is clear that the outcome of the appeal turned on the construction to be placed upon the Agreement for Sale drawn up by two lay persons in which they have clearly set out the terms and conditions by which they both have agreed to be bound.

In Jamaica unlike England there are no standard form contracts for sale of land which the parties to the contract must follow to govern the contract. The law which applies to written as distinct from parol contracts, whether drafted by an attorney-at-law or lay persons is that where the contracting parties (as in this case) have set out in writing the terms and conditions by which they have agreed to be bound, in the absence of any ambiguity or where a collateral term may be found to exist in the

2. The purchaser was thereby in breach of an essential term in the contract.

In either case the vendor would be entitled to accept the purchaser's breach as putting an end to the contract or to treat the contract as still subsisting and claim against the purchaser for specific performance or in damages for breach of contract.

What has occurred in this case is that the purchaser was put into possession of the property to be sold on the payment of the deposit. He has not sought to tender the balance of the purchase price thereby exhibiting that he is ready, willing and able to complete the purchase of the said property. Nevertheless he has been able to bring an action against the vendor claiming specific performance and succeed. The success of such a claim would require the purchaser to exhibit to the court that he had done all that was necessary on his part to fulfil the terms of the agreement. This he has failed to do.

It is now necessary at this stage to look at the judgment of the learned trial judge in order to determine the circumstances that may have led him to the conclusion to which he came. In approaching the matter, one needs to first examine the manner in which the learned trial judge dealt with the Agreement for Sale as it related to the church property and following this the provision in the agreement as it touched and concerned the matter of the granting of the right of first refusal to the purchaser (the respondent) in relation to the remainder of the property.

Being church property it is common ground that there could be a waiver granted by the statutory authority in respect of the Stamp Duty and Transfer Tax . The only legal costs remaining to be met by the parties would be borne 50/50, that is, if the purchaser persisted in requiring the vendor bearing his share of the costs. In that event, if such was the case then the vendor could invoke the term in the Agreement for Sale which provided for an upward adjustment in the purchase price.

The learned trial judge in accepting the submissions of learned counsel, Mr McBean, came to the conclusion that the appellant's response to the letter from the respondent's attorney-at-law of 16th February 1990, amounted to an unqualified acceptance of their proposal not only as to a variation of the existing terms in the contract as to payment, but also as it related to the making of title in the respondent's name before the receipt of the full balance of the purchase price, and the incidental costs for making title.

On a careful examination of the appellant's letter, with the utmost respect to the attorneys-at-law for the purchaser, and the learned trial judge, it cannot be interpreted as having any such meaning. While accepting the proposal as to earlier payment of the purchase price, the writer went on to state categorically that:

> "However, it is the responsibility of Mr McHugh your client to pay for all costs to satisfy the transfer of the title which will be signed by me as soon as final payment is realised."

case in which the facts were not too dissimilar to the instant case had this to say: (pp. 231 (i) – 232 (a-c).

> "There is a certain ambiguity in the trial judge's findings in this case, that the vendor's duty was "to provide a registered title in exchange for the purchase money." In whose name was the title to be registered? It seems clear however that what was being laid down was that a vendor of the registered land must go to the trouble and expense of registering the purchaser's name on the title before he is paid any money.
>
> What if the money never materialises? Yet the land has been transferred? It is not without interest to see, that apart from providing that the purchaser's money is to be paid to his own attorney-at-law the order eventually made by Wolfe, J. provides that the purchaser's attorneys-at-law on receiving the purchase money is to notify the vendor's attorney-at-law where upon the vendor will take the necessary steps to get the title in the name of the purchaser. The learned judge himself in his order seems to make the payment or the provisions of the purchase money and costs of transfer conditions precedent to the vendor's duty with respect of getting the title registered in the name of the purchaser. To summarise as I understand it unless the contract specifically so requires, it is not the duty of the vendor of registered land to secure the registration of the purchaser's name on the title to the land being sold before and as a condition precedent to receiving or collecting the purchase price". (Emphasis supplied)

Later on the learned Judge of Appeal at page 247 (b-c) cited with approval the dictum of Viscount Simons L.C. in **British Movietown News, London and District Cinemas** [1952] 1 A.C. 166 at 183 a decision of the House of Lords where the Lord Chancellor had this to say:

aid of a Court of Equity for a grant of specific performance, would in our considered opinion disentitle the purchaser to the relief sought.

The remainder of the property and
the question of the right to first refusal

Given the findings in relation to the Agreement for Sale in relation to the church property, this question as to the right to first refusal would appear to be of passing interest. As it falls to be considered in the realm of a collateral contract however, and because of the findings of the learned trial judge that it was the vendor's unreasonable conduct which led to there being no concluded agreement reached, it will now be examined.

The Agreement for Sale had stipulated that any sale of the remainder of the property 128 Brunswick Avenue, would be subject to a price fixed by the vendor following an official valuation of the property. What it did not state was that such a valuation was to be one undertaken at the request of the purchaser. Despite this, various stages throughout this period saw the purchaser initially, and later, his attorneys-at-law (vide letter to Winston Rhoden dated June 8 1989), seeking to vary the terms of the Agreement for Sale by seeking to fix the consideration for the purchase of this portion of the property.

It was this conduct on the part of the purchaser from the outcome of the negotiations and later by his attorneys-at-law, which no doubt

the sum being offered was a fair market price or not, was of no moment. What is clear is that it was not in compliance with the essential terms of the Agreement whereby the vendor was prepared to dispose of the property. Neither the purchaser nor his attorneys-at-law were fixed with the authority to circumvent the clear terms laid down in the Agreement for Sale in this regard.

In the result, the effect of what took place could not lead one to determine that there was a concluded contract. In the circumstances, the Court could not properly come to a determination in favour of the purchaser as it would not be in accordance with the clear terms of the written Agreement. In short the Court could not re-write a contract for the parties.

Assuming that the terms in the Agreement for Sale gave to the purchaser "a right of first refusal" to purchase the remainder of the land at 128 Brunswick Avenue, on a proper construction of the term in the Agreement, a purchase if it resulted from an offer, had to be at a price acceptable to both parties. On the evidence all attempts by the vendor between June 1987 and February 1989, to make an offer acceptable to the purchaser failed. On somewhat similar facts Brightman, J. (as he then was) in ***Smith v Morgan*** [1971] 2 All E.R. 1500 at 1504(E) in construing a similar term in a conveyance said:

> "Paragraph 1 of Sch. 2 of the conveyance states nothing whatever about market price and

The learned trial judge also found that the offers made to the purchaser by the vendor were not far in excess of the valuation price obtained by the purchaser. There was accordingly, no logical or reasonable basis therefore for the learned trial judge to conclude either that there was a lack of bona fides on the vendor's part in making the offers he did, or for that matter to conclude that he had acted in a manner which deprived the purchaser of the opportunity to exercise the right of first refusal.

Conclusion

This was a matter the outcome of which turned on a proper construction of the Agreement for Sale executed by the parties on September 26, 1986. It contained provisions which related originally to the land on which the unfinished church building was situated. The purchase price in respect of this portion was $230,000.00 of which a deposit of $100,000.00 was made. The balance of $130,000.00 was to be paid in monthly instalments commencing from April 1, 1990.

The purchaser, through his attorneys-at-law sought to vary the terms of payment in a written memorandum offering to pay the amount of $130,000.00 in two instalments of $70,000.00 and $60,000.00. They sought to make the second payment conditional on the vendor making title in the purchaser's name before the receipt of the balance of $60,000.00

If on the other hand two titles were requested, again, given the existence of an approved sub-division in respect of the entire property all that would be required was for an application to be submitted to the Registrar of Titles for a cancellation of the common title and the issuance of the separate titles with the diagrams in respect of each portion. In either case, therefore, it could not be said that the vendor had not shown that he could make title for the entire parcel of land or for two separate parcels. The mechanism for achieving this objective was already in place.

As the evidence on an examination of the correspondence showed, it was the purchaser at the outset who by his own conduct and later his attorneys'-at-law by seeking to introduce new terms into the Agreement relating to the conditions as to the manner in which the vendor had agreed to sell the property, that eventually led to there being no concluded contract.

The learned trial judge found that it was the vendor who by his conduct, had demonstrated an unwillingness to arrive at a concluded agreement in relation to the remainder of the property. In our considered opinion however, that finding was untenable as:

1. It was not borne out by a proper examination of the correspondence passing between the parties.

2. In any event the vendor's offer to the purchaser of $70,000.00 for the exercise of the right was not