

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. CD – 0005 OF 2004

BETWEEN	PAULINE ELOISE HALL	1 ST CLAIMANT
AND	JEANETTE SMITH (next friend of Pauline Eloise Hall)	2 ND CLAIMANT
AND	FERDINAND LORENZO ORR	1 ST DEFENDANT
AND	RICHARD RANDOLPH ORR	2 ND DEFENDANT

Franklyn Jackson instructed by John L. Jackson and Company for Claimants.

Keith Bishop instructed by Bishop and Fullerton for Defendants.

Heard: September 18, 19 and 25, 2006

Rattray J.

1. The circumstances which led to this action being filed have not only brought untold emotional distress and anguish to the litigants together with uncalled for delay, but have also caused them to incur unnecessary expense as a result of the actions of an unscrupulous third party, regrettably an Attorney at Law.
2. The facts of this case to a large extent are not in issue. Pauline Hall was the owner of premises at 17 Maureen Crescent in the parish of St.

Catherine registered at Volume 1080 Folio 423 of the Register Book of Titles. In her twilight years, she was affiliated with the dreaded Alzheimer's disease and now resides in a nursing home where she is provided with the requisite care and medical attention. The cost of such care and attention is, as is to be expected, a mounting and continuing expense.

3. By an Agreement for Sale dated the 31st July, 2002, Pauline Hall, through her sister and duly appointed Attorney Carmen Jolly, contracted to sell her said property to Ferdinand Orr and Richard Orr for the sum of \$3,150,000.00. It was a term of the Agreement that a deposit of \$475,000.00 would be paid on signing, surety of payment would be provided within 45 days thereafter and completion would take place 75 days from the signing of the Agreement.
4. The Attorneys at Law for Pauline Hall, John L. Jackson and Company had Carriage of Sale of the transaction and the Purchasers' Attorney at Law was identified as Mr. Paul Miller, a legal practitioner known to Ferdinand Orr, one of the purchasers, for a number of years. Clause 10 of the Agreement provided as follows:-

“That written 45 days of the signing hereof the Purchasers shall provide surety of payment of the balance of Purchase Price by way of a commitment from a Financial Institution or an irrevocable letter of undertaking from an Attorney-at-Law, before the Vendor

shall be obligated to register the Purchasers' names on the Certificate of Titles (sic)"

5. The deposit as required was paid over to the Vendor's Attorneys at Law and by letter dated the 27th August, 2002, the Purchasers' Attorney at Law gave an undertaking to the Vendor's Attorneys at Law in the following terms:

"I hereby give to you my irrevocable undertaking to pay to your firm the balance of the Purchase Price together with relevant fees and costs as soon as notified that the Purchasers names are registered on the Certificate of Title"

In the fulfillment of the Vendor's obligations under the Agreement for Sale, the Vendor's Attorneys at Law took the necessary steps and the Purchasers were endorsed as registered proprietors of the said land on the 1st day of May, 2003. The Purchasers also paid over the balance due under the said Agreement to their Attorney at Law, but this sum was not forwarded to the Vendor's Attorneys at Law.

6. This unfortunate incident was reported to the Fraud Squad. However the whereabouts of Purchasers' Attorney at Law, Paul Miller could not be ascertained and the balance of the purchase price in the sale transaction was never paid over to the Vendor or her Attorneys at Law. This led to the filing of the present action against the Defendants, and Jeanette Smith was added as next friend on behalf of

Pauline Hall, due to the state of her health, in her claim for an Order for:-

- (a) Specific Performance of the Contract.
- (b) Interest on the sum outstanding at 30% per annum or in the alternative.
- (c) Sale of the property at Public Auction with the Claimant's equity deducted from the sale price or in the alternative.
- (d) Re Transfer (sic) of the property to the Claimant who will leave the nursing home and reside there with a relative.
- (e) All costs of transfer and litigation to be borne by the Defendants.
- (f) Any other relief the Court deems fit.

7. Separate Defences were filed by each Defendant which in effect were

identical. Their case as pleaded is that they paid the full purchase price to their Attorney at Law Paul Miller and gave him written instructions to pay over that sum to the Vendor's Attorneys at Law. They further allege in their pleadings that their Attorney at Law gave an irrevocable undertaking to pay the balance of the purchase price, which undertaking was accepted by the Vendor's Attorneys at Law. In their Defence, they admit to agreeing that the purchase price be reduced by \$120,000.00 in light of a breach of covenant affecting the title to this land. However, they deny that the Vendor is entitled to any of the reliefs claimed.

8. Counsel for the Defendants Mr. Bishop in his initial submissions focused on the undertaking dated the 27th August, 2002. One of the

contentions of the Defendants in this matter is that the undertaking given by their Attorney at Law, Mr. Paul Miller was a personal undertaking, which was accepted by the Vendor's Attorneys at Law. In such circumstances, Counsel argued that as his clients had paid over the monies due under the Sale Agreement to their Attorney at Law, there was no further act to be performed by them. He further argued that the acceptance by the Vendor's Attorneys at Law of the undertaking of Paul Miller constituted a contract by virtue of which Paul Miller was liable to pay over the sums identified in that undertaking to the Vendor. Mr. Bishop contended in his written submissions that:

“...the Defendants should be relieved of any further obligations under the contract and the Defendants' Attorney at Law should be the proper party that redress should be sought against.”

9. I find these submissions to be devoid of merit both in law and on the facts. The Vendor has sued the Purchasers for Specific Performance of a contract for the sale of land. The Vendor has transferred the property into the names of the Purchasers based on an undertaking given by their Attorney at Law to pay over the balance of the purchase price, once his clients' names were registered on the title. The payment by the Purchasers of the purchase price to their Attorney at

Law is a payment to their own agent. That money never reached the hands of the Vendor or her Attorneys at Law. While the undertaking may have given rise to a cause of action by the Vendor against the Purchasers' Attorney at Law, this in no way releases the Purchasers from their obligations under the Agreement for Sale of Land.

10. Neither Vendor nor Purchasers sought to join the Attorney at Law as a party to these proceedings. From a practical point of view, he having absconded with the proceeds of sale to parts unknown, it is unlikely that such joinder would bring about any useful result. The acceptance by the Vendor of the undertaking of Paul Miller does not preclude her from proceeding with a claim against the Purchasers, nor does it extinguish any further obligations of the Purchasers under the Contract. Interestingly enough, in the case of **Damodaran vs Choe Kuan Him** 1979 W.L.R 383, a Privy Council decision on appeal from the Federal Court of Malaysia, which was cited by Mr. Bishop, Lord Diplock at page 387 stated:

“The main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claim against one another by the parties to the contract of sale.”

Counsel Mr. Bishop asserted in his written submissions that the central question is whether the Vendor has a case against the

Purchasers or against the Purchasers' former Attorney at Law. The answer to that question is that she has a case against both. This action however concerns only the Purchasers. I do not therefore agree with Counsel's submission that the acceptance of the Attorney's undertaking, whether personal or professional, discharges the Purchasers from their agreement to pay the Vendor the balance of the purchase price.

11. Mr. Bishop also raised in his submissions queries as to whether any agency was created at the time when the undertaking was given and whether the Purchasers' Attorney at Law had express authority from his clients to proceed with the intended activity, that is, to give the undertaking. These points were never raised by the Purchasers or either of them in the Defences filed on their behalf. The sole issue relied on by the Purchasers in their respective Defences was that having paid the full purchase price to their Attorney at Law, neither was liable to the Vendor, as her Attorneys at Law had accepted the undertaking from Paul Miller to pay over to them the balance of the purchase price. It would appear that it can never be emphasized sufficiently that this is a Court of Pleadings. At no time was any application made to amend the Defences to raise those other matters. In any event, had those matters been pleaded, I am of the view that on

the evidence before me the outcome would remain the same. The issue before this Court concerned the liability of the Purchasers under an Agreement for Sale, and not who would be liable with respect to the undertaking given.

12. Counsel for the Purchasers stated that the Court ought to consider whether the Vendor was entitled to the equitable remedy of Specific Performance in the circumstances of the present case. He cited two (2) instances which he submitted would preclude the Court from granting that remedy:

- (i) Inequitable Conduct
- (ii) Where there was a defective title.

13. Inequitable Conduct

Mr. Bishop referred the Court to the letter of the 6th October, 2003 from the Purchasers addressed to their Attorney at Law Paul I. Miller. This letter which was tendered as Exhibit 1(g) instructed him to pay over the sum of \$2,673,795.00 to the Vendor's Attorneys at Law in exchange for:

- (1) The duplicate Certificate of Title for the said premises registered in the names of the Purchasers
- (2) Letter of possession
- (3) Letters to the utility companies and

(4) The Certificate of Payment of Taxes.

That letter also instructed their Attorney at Law that the Purchasers were willing to accept the property with the breached restrictive covenant and that the sum of \$100,000.00 was to be retained as they intended to instruct another Attorney to rectify the breached covenant.

14. Counsel sought to contend that the Vendor's Attorney at Law, Mr. Jackson acted improperly in assisting in the preparation of the said letter and that the Court should consider whether his actions amounted to a breach of ethics. The evidence before the Court is that that letter was prepared for the Purchasers by an Attorney at Law Mrs. Skyers. The testimony of Mr. Ferdinand Orr is that he went to Mrs. Skyers for her to draft the letter and that Mr. Jackson spoke to him about the contents of the letter in Mrs. Skyer's presence. Although Counsel Mr. Bishop continually urged the Court to consider whether the circumstances gave rise to any question of a breach of ethics, no specific breach was highlighted nor was any particular conduct of the Vendor's Attorney alleged to amount to such a breach.
15. After carefully examining the evidence of Ferdinand Orr and in particular the cross examination by the Claimants' Attorney at Law, I am not satisfied that there is any action or behaviour on the part of the

Vendor's Attorney sufficient to amount to a breach of ethics which would lead to a finding of inequitable conduct.

16. Defective Title

The evidence before the Court is that the Purchasers agreed to accept the title with the restrictive covenant that was breached and that the purchase price would be reduced by a sum that would enable the Purchasers to apply to remedy the said breach. This allegation was also set out in the Claimants' Particulars of Claim and admitted by the Defendants in their Defences. It is difficult to see how, in light of that admission and on the evidence, the Purchasers can now be heard to raise this objection as a ground for the refusal of the grant of an Order for Specific Performance.

17. I therefore find on the evidence before this Court that the Claimants are entitled to an Order that the Defendants specifically perform the Agreement for Sale dated the 31st July, 2002, by paying to the Claimants the balance of the purchase price in the sum of \$2,673,795.00.

18. On the question of interest, Mr. Bishop stated that no evidence has been advanced by the Claimants' Attorney at Law to support a claim for interest to be awarded at the rate of 30% per annum. He further stated that in the absence of such evidence, the Vendor would be

entitled to 12% per annum. I accept this submission. No evidence whatsoever was led by Counsel for the Claimants as to the applicable rate of interest to be awarded in this matter. I agree with Mr. Bishop's contention that the appropriate rate of interest to be applied is 12% per annum.

19. It is the Judgment of the Court that:

- (1) The Defendants specifically perform the Agreement for Sale dated 31st July, 2002, by paying to the Claimants the sum of \$2,673,795.00 being the balance of the purchase price.
- (2) Interest is awarded on the sum of \$2,673,795.00 at the rate of 12% per annum from the 1st day of November 2003 until payment.
- (3) Costs to the Claimants to be taxed if not agreed.