IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1987/H005

BETWEEN	DESMOND HALSALL LEROY CRICHTON FREDERICK ALEXANDER	PLAINTIFFS
A N D	JASPER MARSHALLECK	DEFENDANT

Mr. Norman Davis for Plaintiffs

Mr. Manderson Jones for Defendant

HEARD: 3RD, 5TH, 17TH, 19TH FEBRUARY, 1993 AND 6TH JULY, 1994.

EDWARDS J.

In this action the Plaintiffs are asking the Court to

(1) grant specific performance of an agreement between the Plaintiffs and the Defendant under which the Plaintiffs agreed to purchase and the Defendant agreed to sell 158 acres of land part of Palmetto Grove, Crawle in the parish of St. Mary comprised in Certificate of Title registered at Volume 1101 Folio 164 of the Register Book of Titles.

(2) Damages for breach of contract in addition to specific performance .

The evidence shows that on the 30th May 1984 the parties to the agreement met at a Club at Constant Spring Road in the parish of St. Andrew and there entered into an agreement under which the Defendant would sell and and the Plaintiffs would buy the land in question for Two Hundred Thousand Dollars "sight unseen".

The Plaintiffs had not seen the land.

A lawyer Eric Desnoes was present. He acted for both parties and drafted in his own handwriting an agreement to give effect to their intention. The agreement was signed by the parties on the spot. Perhaps I should say he drafted "agreements" to give effect to their intention because two agreements were prepared. The consideration of

$200,000 was spilt in two and emerged as (i) an agreement for sale of the property for $100,000 and (ii) an agreement which stated that in consideration of being given the option to purchase the property at (i) the Plaintiffs would pay to the Defendant a sum of $100,000.00 on execution of the option agreement "in addition to all considerations mentioned in the other agreement of even date".

The binding effect of the agreement at (ii) is doubtful as the consideration for it could be classified as "past consideration" as it was predicated on the sale agreement having been concluded.

The $100,000.00 which was due on execution of the option agreement has not been paid and the Plaintiffs admit that that was a breach.

It should be noted too, that the agreements were expressed to be between three purchasers on the one hand and the Defendant on the other but the agreements have been executed by only two of the proposed purchasers and only one purchaser (Mr. Halsall) turned up to give evidence.

More importantly the Plaintiffs admit in evidence that the purpose of splitting the consideration was in effect to deprive the revenue. In the words of Mr. Halsall. The money i.e. the option payment of $100,000.00 "would have been paid to the seller without the stamp duty, transfer tax and any other fees being paid".

> "As I understand it the option money paid to the seller - transfer tax and stamp duty and other duties would not be paid on the option money".

Mr. Halsall said those were the instructions of Mr. Marshalleck to Mr. Desnoes while he was drafting the agreements but Mr. Marshalleck although denying this in his evidence before the Court admits in paragraph 4 of the Defence that the purpose of dividing the purchase price was to evade revenue.

Mr. Halshall further stated that "the otheragreement would attract all the duties"

The authorities show that a contract to defraud the revenue is properly to be termed illegal at common law on ground of public policy. (See page 356 of Law of Contract by Cheshire Fifoot and Furmiston 11th Edition.

> "There is a clear infringment of the doctrine of public policy if it is apparent, either directly from the terms of the contract or indirectly from other circumstances, that the design of one or both parties is to defraud the revenue.
>
> Any party to the agreement who had the unlawful intention is precluded from suing upon it ..... The action does not lie because the Court will not lend its help to such a Plaintiff."

The writ of summons seeking to enforce the agreement was taken out on the 7th January 1987 and the transfer tax in respect of each agreement was only paid some five years later on the 28th April 1992.

The sales agreement for the $100,000 required that the Plaintiffs would pay a deposit of $20,000 on signing and the balance on completion. Completion was stated to be on or before 31st August 1984.

On the 10th January 1985 the Plaintiff were advised by Eric Denoes and Company who was still acting for them that the "vendor is now in a position to provide them with Title and Registered Transfer" and he requested payment of $184.328.62 to complete. The letter stated that the vendor was insisting that the matter be settled "by no later than the 31st instant" i.e. 31st January 1985". This was not done.

On the 8th March 1985 Perkins, Tomlinson, Grant, Stewart and Company acting for the vendors served a Notice to complete on the purchasers and it made time of the essence and advised them that failure to complete within 14 days would result in forfeiture of the deposit. The Plaintiffs failed to complete.

The Plaintiffs told the Court that they failed to complete because they believed there were problems with the Title. Evidence called (by the Plaintiff) through Mr. Magnus an Attorney-at-Law who was involved in the transfer of the land from another party to the Defendant shows that the Defendant was in fact in a position to deliver Title.

The evidence and pleadings show that the agreement is tainted with illegality in that there was a common intention to defraud the revenue and the splitting of the consideration was designed to achieve this end. Specific Performance being an equitable remedy, he who comes to equity must come with clean hands. The Plaintiffs have not satisfied this test. But assuming the contracts to be exfacie lawful they have breached the terms by not making the payment called for by the contracts. Specific Performance of the agreement is therefore refused.

The Plaintiffs were let into possession and occupied the property for some years.

The Plaintiff are also claiming damages for breach of contract in lieu of or in addition to Specific Performance.

Since the contract on which the claim for damages is based is tainted with illegality the Court will not lend its aid to any claim based on that contract. The claim for damages is based on the illegal contracts which were part of a scheme designed to defraud the revenue and will not be entertained by the Court.

The Plaintiffs have claimed the sum of $140,000.00 to repair the land, fence,property, and plant crops but no documentary evidence in support of this expenditure was supplied.

The Defendant in his pleadings has denied that there was any such expenditure and in his evidence he states that there were no improvements by the Plaintiff "on the contrary they utterly destroyed the property".

In the light of the differing views as to this expediture and the absence of any documentary proof of the expenditure this claim must be refused.

To sum up -

(a) Specific Performance is refused

(b) There is no award of damages

No order as to costs.