

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 73/93

COR: THE HON. MR. JUSTICE RATTRAY, P  
THE HON. MR. JUSTICE WRIGHT, J.A.  
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	LLOYD HARRISON	1ST PLAINTIFF/APPELLANT
	AND	
	MARGARET HARRISON	2ND PLAINTIFF/APPELLANT
A N D	EDWARD DANZIGER	1ST DEFENDANT/RESPONDENT
	AND	
	AVERY DANZIGER	2ND DEFENDANT/RESPONDENT
	AND	
	WILLIAM SANTO	3RD DEFENDANT/RESPONDENT

Enos Grant for Plaintiffs/Appellants

D. A. Scharschmidt for Defendants/Respondents

May 24, 25 & October 24, 1994

RATTRAY P

On the 25th of May, 1994 we allowed this appeal and granted an interlocutory injunction to restrain the defendants/respondents or either of them from evicting the plaintiffs from the premises the subject of the suit and/or taking over the chattels thereon until the final determination of the action, on an undertaking being given by the plaintiffs/appellants or their Attorney-at-law on their behalf to pay such damages as may arise by virtue of this order in the event that the action is not finally determined in favour of the plaintiffs/appellants. We awarded costs of the appeal and the proceedings on the summons to the plaintiffs/appellants. We now give our reasons for allowing the appeal.

This appeal is from a decision of Theobalds J in which he dismissed a summons for interlocutory injunction brought by the plaintiffs/appellants against the defendants/respondents' application craving relief in terms of the order which we have just made on this appeal.

The plaintiffs/appellants, husband and wife had brought an action by writ of summons for a declaration that a partnership and/or joint venture existed between themselves and the first two defendants/respondents and that premises registered at Volume 590 Folio 41 and Volume 1135 Folio 546 of the Register Book of Titles and the chattels thereon formed part of the partnership and/or joint venture assets. They requested a further declaration that the said partnership and/or joint venture had been dissolved. As against the third named defendant/respondent who had purchased the premises they requested a declaration that he was not a bona fide purchaser for value without notice in relation to a purported purchase by him of the said premises and that therefore a purported transfer of the said premises by the first named defendant/respondent to the third defendant/respondent was null and void and of no effect. Various additional orders were claimed as follows for:

- (i) taking of accounts and inquiries in relation to the said partnership and/or joint ventures;
- (ii) appointment of a receiver/manager of the assets of the said partnership and/or joint ventures;
- (iii) specific performance of an option to purchase the said premises by the plaintiffs;
- (iv) damages in lieu of specific performance.

There is a further claim for damages for breach of contract and/or conspiracy and for an injunction in the terms to which I have already referred.

The statement of claim alleged that in or about December 1990, the first and second defendants who are citizens of the United States of America and resident in that country were the registered proprietors of a parcel of land known as Rock Cottage in the parish of St. Mary registered at Volume 590 Folio 41 and were also the beneficiaries under the will of their mother Mary Alice Danziger, deceased and as such absolutely

entitled to the adjoining premises registered at Volume 1135 Folio 546 owned by their deceased mother.

The plaintiffs who reside at Rock Cottage, Charles Town in the parish of St. Mary were approached by the first defendant and on his behalf as well as on behalf of the second defendant agreed to enter into a partnership with respect to the operation of villas on the properties. Until formal agreement had been signed the defendants would put up the premises as capital and the plaintiffs would provide the management and working capital. The plaintiffs would have the right of first refusal if the defendants were selling the said property. A copy of a revised agreement sent by facsimile by the defendants to the plaintiffs formed the basis of the said partnership or joint venture and contained the following:

"(1) TERMINATION SALE: Upon termination of the agreement as a result of the death of a party or for material breach, the non-defaulting (or surviving party may either:

- (a) Purchase the defaulting (or non-surviving) party's interest in the venture by paying 40% of the appraised value of the property less 50% of the outstanding liens and charges against the property as of the date of termination, at 8% interest in consecutive monthly instalments of Two Thousand Dollars (\$2,000.00) or the balance due, whichever is less, commencing thirty (30) days after termination until fully paid. Upon the commencement of this option, the defaulting party (or the estate of the non-surviving party) shall execute a deed conveying all ownership interests in the property to the non-defaulting party. The non-defaulting party shall contemporaneously deliver a deed of trust on the property to the defaulting party (or the personal representative of the non-surviving party) accruing the balance of the payments due to the defaulting party."

- " (b) Non-defaulting (or surviving party may place the property on the market for sale in the manner specified in paragraph XII (2), except he or she may sell the property at not less than 80% of its appraised value. On the sale of the said property the defaulting (or non-surviving) party shall be entitled to receive 40% of the net proceeds from the sale less 50% of all expenses (other than expenses incurred in connection with the sale) incurred by the non-defaulting or surviving party in connection with the venture including expenses paid by that party subsequent to default."

The revised written agreement was never signed. However, consequent upon it and in agreement with its terms, the plaintiffs claimed to have gone into possession of the property, expended monies, employed workmen, provided working capital and managed the joint venture partnership.

For their part the defendants gave the keys of the property to the plaintiffs, put them in possession, included the names of plaintiffs as signatories on their C.I.B.C. Account, in the Ocho Rios Branch and gave the plaintiffs the keys to their P.O. Box No. 57, Ocho Rios. The plaintiffs claimed to have expended monies totalling approximately \$100,000.00 in refurbishing the premises. In early November 1992, almost two years after the arrangements had been entered into and pursued the plaintiffs claimed to receive a letter from the defendants offering to sell them the property for U.S. \$150,000.00. This they maintained was in keeping with the terms of the joint venture partnership in relation to termination. In February 1993 they received for signature copies of an Agreement For Sale indicating the sale to them of premises registered at Volume 590 Folio 41 for U.S. \$90,000.00, and at Volume 1135 Folio 546 for U.S.\$5,600.00 and chattels for U.S.\$40,000.00, and they were requested to pay immediately a deposit of U.S.\$27,200.00.

The first plaintiff attended the offices of Abendana & Abendana, Attorneys-at-law for the defendants and gave them a letter of confirmation exercising the option to purchase the property. They were told by Mr. Marsh of that Firm that the deposit must be found by 3.00 p.m. that day. The plaintiffs immediately contacted the second defendant and the time was extended to February 15. On that day the first named plaintiff informed the Attorneys-at-law that they would pay the money in Jamaican Currency. He was told of their instructions not to accept Jamaican Currency and a dead line of 3 o'clock on that day was placed for the plaintiff to pay in U.S. dollars. The plaintiff was unable to meet this deadline. This led to a giving of notice to them to vacate the premises and the bringing of this action and the summons for the interlocutory injunction which was refused by Mr. Justice Theobalds.

Apart from disputing the facts, the defendants rely upon the absence of any memorandum in writing as required by the Statute of Frauds since the subject-matter concerns real property. The plaintiffs maintain that there was a partnership between themselves and the first and second-named defendants. Accordingly, the properties were part of the partnership assets and so the Statute of Frauds was not applicable. The concern of the Court, at this stage, is whether there is a triable issue between the parties. If there is a triable issue then the injunction should be granted. If there is not a triable issue then Mr. Justice Theobalds' judgment should stand. In our view the triable issue is whether there was a partnership between the plaintiffs and the first and second-named respondents as alleged by the plaintiffs and if so, whether the properties are part of the partnership assets. If this were so, in our view the Statute of Frauds requiring a memorandum in writing would not be applicable.

It is not the purpose of this Court at this stage to resolve the various conflicts between the affidavits of the appellants on one hand and those of the respondents on the other. That must await a trial.

We accept the principle that a valid partnership may be constituted without being in writing, and if that partnership comes into being, it may be shown by parole evidence that it consists of land.

In respect of the third defendant/respondent who now holds a registered title in his name for the property, the issue between himself and the plaintiffs is one of fraud. Did he as is alleged by the plaintiff well knowing of the partnership between the parties which consists of the land, the subject matter of the suit and the plaintiffs' option to purchase fraudulently proceed to purchase the property and have himself registered as the fee simple owner on the title to the land?

This issue cannot be determined at this stage but at the trial.

We therefore allowed the appeal and granted the injunction applied for in the terms stated.

**WRIGHT J A**

I agree.

**GORDON J A**

I agree.