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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 47/83

BEFORE: The Hon. Mr. Justice Rowe, J.A.  
The Hon. Mr. Justice Ross, J.A.  
The Hon. Mr. Justice Campbell, J.A. (Ag.)

BETWEEN AINSWORTH LEOPOLD HOLNESS PLAINTIFF/APPELLANT  
A N D HERMINE VIOLET VAZ )  
NAOMI ROSALIND MORECROFT )  
MERVIS PEARL CROSWELL ) DEFENDANTS/RESPONDENTS

Carl Rattray Q.C., & Norman Wright for Appellant

Dennis Morrison for Respondents

October 22, 23, 24 & December 13, 1984

ROWE J.A.

On October 24 last, we allowed the appeal, set aside the judgment in the court below and ordered specific performance of the contract the subject matter of the action. At that time we promised to put our reasons in writing and we now honour the promise.

The respondents as joint owners of premises No. 39 Old Hope Road, Kingston 5, by a written agreement contracted to sell to the appellant the said premises for the sum of \$75,000.00. This agreement provided, inter alia, that:

- (a) the purchase money was payable by a deposit of \$7,500 on the signing of the agreement and the balance on completion;
- (b) the purchaser should be given vacant possession on completion; and
- (c) completion to be on or before June 30, 1981.

Two Special Conditions were included in the agreement and because of their importance, they are set out fully:

"(1) The Purchaser hereby acknowledges that he is aware that the property is occupied by Mr. Abraham Cushnie and it is hereby understood and agreed between the parties hereto that in the event that the property is not vacant by the date set for completion of the sale, then the vendors shall be entitled to rescind this contract and refund to the Purchaser the deposit paid herein without interest.

(2) Time is to be deemed to be of the essence of the contract."

Prior to the signing of the contract for sale sometime in mid- February 1981, instructions had been given by the vendors on January 28, 1981 to their attorney-at-law, Mrs. Fernandes of the legal firm of Myers, Fletcher & Gordon, Manton & Hart, to take proceedings to recover possession of 39 Old Hope Road from Mr. Cushnie who the vendors knew to be a difficult tenant. When therefore the vendors agreed to a completion date of June 30, 1981 and to give to the Purchaser vacant possession, they had in contemplation that there would be no problem in achieving this target. Although Mrs. Fernandes had the carriage of sale under the contract, it was one Mr. Howard Fraser, then a member of the same legal firm, who was entrusted with responsibility to take legal action to eject the tenant Mr. Cushnie.

In late March 1981 Mrs. Morecroft acting on behalf of all the respondents offered to convey the property to the appellant with the sitting tenant. The appellant after some consideration including consultation with his attorneys refused that offer. Both Mr. Wright, the attorney for the appellant, and Mrs. Morecroft were in touch with Mr. Fraser endeavouring to find out what progress was being made in the ejectment proceedings. Mr. Fraser's answers to Mr. Wright do not appear to have been frank. Mrs. Morecroft said she was constantly in touch with him and when asked "what was your

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state of mind as a result of those conversations concerning the business that Mr. Fraser was doing?" She answered: "I was wondering why he was taking so long. However, I continued to telephone."

Suit C.L.B. 010/81 was filed in the Supreme Court on June 24, 1981 seeking to recover from Cushnie possession of 39 Old Hope Road. This action was discontinued. On July 13, 1981 Plaintiff No. 362/81 was filed in the Resident Magistrates Court, Half-Way-Tree seeking a similar remedy. The Plaintiff was returnable for July 23 and by consent an Order for possession was made on July 31, 1981 to be effective on September 30, 1981. From the filing of the Plaintiff to the making of the Order of Possession was a mere 12 days.

June 30 arrived and no step was taken to effect completion. No Transfer had been sent to the appellant's attorney for his client's signature. Then on July 13, Mr. Wright wrote to Mrs. Fernandes stating, inter alia, that the appellant was unwilling to have the contract rescinded and asked that the date for completion be extended for a period of three months "so that the vendors may fulfil their obligation to use their best efforts to obtain an order for possession." There was no evidence as to how this letter of July 13 was transmitted to Mrs. Fernandes although there was evidence that earlier pieces of correspondence from Mr. Wright had been had-delivered on the same day of issue. Mrs. Fernandes wrote to Mr. Wright on July 17 and this letter/<sup>which</sup> was received by him on July 20 stated:

"Re: Sale of 39 Old Hope Road, Saint  
Andrew Hermine Vaz et al to  
A. Holness

"On instructions of our clients and in accordance with special condition No. 1 of the Agreement for Sale between Hermine Violet Vaz, Naomi Rosalind Morecroft, Mervis Pearl Crowell and Ainsworth Holness, we hereby notify you that our clients rescind the Agreement for Sale, and we accordingly enclose herein our cheque in the amount of \$7,500.00 being the deposit paid by Mr. Holness."

The instructions to which Mrs. Fernandes referred were contained in a letter dated June 30 and signed by Mrs. Morecroft. On June 30 Mrs. Morecroft attended at the office of Mrs. Fernandes, waited for some time as the Attorney was out of office, then left, consulted with the other respondents and as a result of the consultation wrote a letter dated June 30 and hand-delivered it on the same day to Mrs. Fernandes' Secretary. That letter read:

"Re: Hermine Vaz et al and sale of  
39 Old Hope Road

This is to advise that as the above sale contract with Mr. Ainsworth Holness expired 30th June, 1981 and under the terms of that agreement, we have been unable to deliver the premises as vacant possession, we hereby confirm that said sale agreement is now null and void. Also we wish to advise that you return to the purchaser, Mr. Holness, his deposit less expenses as agreed."

Mr. Wright's reaction to the letter of rescission was to enter a Caveat against the Title on July 26, 1981, to reject the purported rescission by letter of July 29, 1981 and in that letter to offer to accept the property "in its present condition i.e. subject to the tenant." The letter of August 10, 1981 was the prelude to the action because in that letter Mrs. Fernandes wrote to Mr. Wright advising that the respondents would not be proceeding with the sale of the premises. At the trial Mrs. Morecroft said that if the appellant had offered to take the premises with the sitting tenant on June 29 she would have sold him but she would definitely not have done so on July 1, as she would have said:

"I am sticking to my contract."

Precisely what did her contract entitle her to do?

Mr. Rattray submitted on appeal as he had done unsuccessfully in the Court below, that when there is a condition in the nature of Special Condition I, which gives to a vendor the right to rescind, that right must be exercised reasonably and not arbitrarily or capriciously. He said that he had found no precedent for Special Condition I but would not consider it dis-similar to conditions in

Sale of Land Contracts which contain conditions stipulating for requisitions. These conditions, he said, ex facie, appear to give a complete and exhaustive right to the vendor to rescind if requisitions are made by a purchaser and the vendor is unwilling or unable to meet those requisitions, yet the courts have decided that a vendor who seeks to terminate the contract must show that the right to terminate was exercised reasonably.

We were referred to the Second Edition of Voumard on the Sale of Land at page 236. Under the topic Rescission the learned author examines the right usually given in the conditions of the Sale to the vendor to rescind the contract in the event of the purchaser making or insisting upon a requisition which the vendor is unable or unwilling to comply with, and then he says:

"If the objection or requisition in question is covered by the words used, the second question arises, - will the court, in the circumstances of the particular case, permit the vendor to make use of the condition?" And he answered the question at page 241 thus:

"In dealing with the rights of a vendor under a rescission clause, the Court will always scan most carefully the conduct of the parties to the contract and the purpose for which the condition was inserted in the contract in order to determine whether in the circumstances of the particular case the vendor should be entitled to take advantage of it."

Stonham, Vendor and Purchaser at page 529, contains a passage to similar effect viz:

"1044. Notwithstanding that the stipulation is on its face quite unqualified, the Courts have added glosses to the clause and the vendor, in exercising his right under the clause, must act reasonably, and there must be no failure of duty on his part."

Mr. Rattray relied on the important and often quoted dictum of Isaacs J. in Gardiner v. Orchard (1910) 10 C.L.R. (Australia) 722 at 737 when he said:

"The other question is, has the vendor validly rescinded? ..... A rescission clause is of a very special nature and for a very special purpose and must always be construed accordingly. .... The observations of Sir John Romilly M.R. in Greaves v. Wilson (25 Beav. 290 at 293, 294) go to the heart of the matter. They are fundamental and lay down the principles which govern the construction of such a clause. Speaking of a vendor who has inserted a condition for rescission, the learned Master of the Rolls says:

"He is bound to perform the duties of a vendor as fully as he is able to do, subject to this exception, that it shall be reasonable, for it is always a question of the reasonableness of the thing required, for although it may be in his power to do it, it may involve him in so much expense and trouble as to make it unreasonable that he should be called upon to do it. .... Page v. Adams establish this:

That a vendor cannot make use of a condition to rescind a contract, for the purpose of getting rid of the duty which attaches to him, upon the rest of the contract, of making out the title."

Isaacs J., added his own summary of the law to be:

"In considering whether such a clause justifies a vendor in any given case in cancelling his contract, the Court must bear in mind three things:

First, the purpose of every such condition, which is a matter of law, and is stated in the passage quoted from Greaves v. Wilson; next, the necessity for bona fides on the part of the vendor in using his power for that purpose; this is a question of fact, and is admitted here. The third essential is that the cancellation must be reasonable. Reasonableness is a question of fact, dependent on the whole of the circumstances, though one of those circumstances consists always of the wording of the contract itself. It is manifest, therefore, that in order to determine how far the rescission clause operates in the present case, the rest of the contract must be looked at and considered."

A statement to the same effect is to be found in the Third Edition of Halsbury's Laws of England, Vol. 34 at para. 413, viz:

"Exercise of right of rescission. The vendor must exercise the right of rescission reasonably and in good faith and not arbitrarily or capriciously."

Of the many cases in English Law which turn upon the meaning to be attributed to a rescission clause in a contract for the sale of land, Mr. Rattray contented himself with a reference to only one Quinion v. Horne (1906) 1 Ch. 596. At page 603 Farwell J., said:

"Now it is said that a vendor is not to act capriciously. I rather prefer the word 'arbitrarily' which Mr. Upjohn suggested, and which I take to mean 'without any reasonable cause.' "

Counsel for the appellant conceded that there is an important distinction between a conveyancing system such as exists in England and Australia where standard conditions form part of the conveyancing procedure and the form of agreement for sale adopted in the instant case where Special Condition I was negotiated between the parties and agreed upon. Mr. Rattray nevertheless submitted that the principles enunciated in the cases exemplified by Gardiner v. Orchard supra, are applicable to cases where a power of rescission is given to a vendor in terms which on the face of it appears unqualified, but equity, he said, will not allow a vendor to exercise the condition in an unqualified way and equity has therefore superimposed certain principles which must govern the exercise of the power.

If as Mrs. Morecroft thought, the contract became null and void on June 30, 1981 because on that date the premises were still tenanted, or if as the learned trial judge found that this being a contract arrived at after negotiation at arm's length, it was not a matter for the intervention of equity, would there have been any obligation at all upon the respondents to take any steps to recover possession from the tenant? Put another way, even if there had been an order for possession and Mr. Cushnie was

required to vacate the premises on July 2, 1931, if Special Condition I gave an unqualified right to the respondents to terminate the contract according to the terms of the Special Condition, then they could do so on the morning of July 1, and the fact that within a few hours the place would be vacant would be of no relevance.

The contract has to be interpreted as a whole. A responsibility rested upon the respondents to act in a timely manner to evict the tenant. They had agreed to give vacant possession by a certain date and it was never suggested that this stipulation could be otherwise than for the benefit and protection of the purchaser. The respondents had made time of the essence which is an indication that they appreciated that if they were to meet their obligations under the contract, there was no room for sitting back supinely while time was running out. This was not the case of a person who was making a nuisance of himself by making requisitions which he could well do without; the appellant could not and indeed was not required to be active in the process of evicting the refractory tenant.

I am clearly of the view that in order to give any sensible meaning to Special Condition I in the context of the contract for sale in the instant case, the respondents were required to act in a reasonable manner in the exercise of the power of rescission. I would adopt the reasoning of Isaacs J., in Gardiner v. Orchard supra as apposite to this case. The mind-set of Mrs. Morecroft, that her contract was her contract, and that come June 30 she could tear up the scraps of paper and throw them to the winds, does not accord with the requirements of the law.

The respondents knew that the first positive act of their attorneys to take legal action against the tenant to secure vacant possession was not made until June 24. They ought to have consulted their attorneys to enquire as to the estimate of time that this



process was likely to last. They ought certainly to have sought legal advice as to the reasonableness of the proposal of the appellant to have the time for completion extended by three months. There was never a reply from their attorneys to this appellant's letter of July 13 containing the proposal and when the appellant wrote a letter on July 29 that he would accept the premises with the sitting tenant, the only reply he received was that the respondents would not be proceeding with the sale.

The facts indicate that the respondents acted precipitously in instructing their attorneys on June 30 that the contract was null and void and that the appellant's deposit should be returned. It is the respondents who had failed in their duty to effect vacant possession and to have claimed that "we have been unable to deliver the premises as vacant possession" was to say we can take a benefit from our inertia and from that of our attorneys.

The question as to whether the attorneys for the respondents were their agents was canvassed. Mr. Rattray submitted that where as in the instant case, a contracting party has an obligation to evict a tenant so as to give vacant possession by a certain time, if that contracting party employs attorneys-at law to act on his behalf in that regard, and there is negligence on the part of the attorneys, that negligence ought to be attributable to the contracting party who has the obligation. Having regard to the decision to which I have come, viz, that the action of the respondents in the purported exercise of the power of rescission was unreasonably exercised and consequently of no effect, it is unnecessary to decide this second question. However, the remarks of Lord Evershed M.R. in Baines v. Tweedle (1959) 1 Ch. 679 a 689: are of interest and I reproduce them hereunder:

"Assuming that the vendor was assured by his own solicitor who was acting for him in the sale, that all would be well, is that necessarily sufficient for the purpose of the condition? To put the matter in its strongest form, supposing that solicitor, though giving that assurance, was himself grossly reckless or (although it is not of course the case here) quite dishonest and the solicitor had not taken any steps at all about it or knew perfectly well that the building society would not join, what then is the position? If the matter were one in which the general law of principal and agent was in all respects applicable, there would obviously be a very strong case for saying that the vendor could not shelter behind his solicitor and that, if his solicitor is reckless then he as his solicitor's principal must be regarded as reckless also; ..... as I have said, the argument is a strong one for the view that the principal in this matter must be liable for any relevant defects in the acts of an agent in the performance of his duty. But the question here is whether this is a case where the general principles of agency must be applied. As I have said, we are here concerned with a condition which, on the face of it and according to its language, is quite unqualified. Given the facts, then the vendor may rescind the contract; no qualification whatever is expressed in the condition. But the Courts having put the qualification upon the condition which I have illustrated by my reference to In re: Jackson and Haden's Contract the true question, therefore is, how far does that qualification go? If in truth it be established that the vendor goes to a competent solicitor, a professional man and an officer of the Court, asks his advice, and on getting the advice that he honestly and reasonably believes that all is well, has he, the vendor, sufficiently cleared his conscience, so to speak, that he can then invoke, if he wishes, his powers under the condition."

The learned Master of the Rolls left the question unanswered whether the attorney was the agent of the client although on the facts of that case he held that the vendor was guilty of the shortcoming which could be labelled recklessness. I too will leave the question open but in passing will note that on the most favourable interpretation of the conduct of the respondents, they

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could not be said to have been acting on the advice of their attorneys as to the progress of the recovery of possession proceedings or as to the interpretation of Special Condition I of the contract or as to whether or not they were free to terminate the contract in the summary manner in which they did. In all these areas the respondents were their own counsellors.

ROSS J.A.

I agree.

CAMPBELL J.A. (AG.)

I agree.