738

Judg. 682

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1981/J157

BETWEEN J & J ENTERPRISES LTD PLAINTIFF

AND BEVERLEY PAULINE SLOLEY DEFENDANT

St. Michael Hylton & Miss Barbara Alexander instructed by Messrs Myers, Fletcher & Gordon, Manton & Hart for Plaintiff.

Terence Ballantyne instructed by Miss Karen Chin Que of Messrs Thwaites, Fairclough, Watson & Company for Defendant.

HEARD: 13th July, 1982
30th July, 1982

JUDGMENT

HARRISON, J. (Actg):

In this action the plaintiff company seeks to recover from the defendant possession of premises 1 Hillman Road, Kingston 8 in the parish of St. Andrew, as well as arrears of rental therefor and mesne profits. The defendant admits the tenancy and the arrears of rental owing and "counterclaims damages and an order for Specific Performance of the said contract" which was entered into by the plaintiff company and the defendant for the sale of the said premises at 1 Hillman Road by the plaintiff company to the defendant.

The plaintiff company's Statement of Claim is a straightforward one. It recites that the plaintiff company is the owner of the said premises registered at Vol. 1121 Folio 987 of the Register Book of Titles, and that on the 6th day of August, 1980, the defendant went into possession of the said premises as a monthly tenant at a rental of $300.00 per month, that by a notice to quit dated the 23rd day of January, 1981, the plaintiff company terminated the said tenancy as at the 5th day of March, 1981, that the defendant has failed and or refused to give up possession and has failed to pay rental due from the

6th day of December, 1980 to the 5th day of February, 1981 or any payment for her continued occupation and that the plaintiff company claims $1200 from the defendant. The defendant in her defence and counter-claim admits these aspects of the plaintiff company's claim. The said claim of $1200 is particularised as arrears of rental from December, 1980 to February 1981 inclusive, three months at $300.00 per month plus $300.00 mense profits for the month of March 1981 "(and continuing)".

Mr. Hylton for the plaintiff company applied to amend the Statement of Claim to add, after the formal recital of the claim for:-

a) possession

b) the sum of $1200.00 and

c) costs,

the words "mesne profits in the sum of $300 per month or in such other sum as the Court shall consider the monthly value of the said premises". Mr. Ballantyne for the defendant did not object; the application for amendment was granted.

In her defence and counter-claim filed, the defendant, makes the said admissions already referred to, and states further that by an agreement in writing made on 29th April, 1980 the plaintiff company as vendor and the defendant as purchaser agreed that the defendant would purchase land known as Town House #6, Village Green in the parish of St. Andrew for $45,000, that the defendant on the said date paid a deposit of $4,500 with the balance payable on 31st July, 1980 - the date for completion. By a letter dated the 11th November, 1 1980 the plaintiff company gave defendant notice that "time was of the essence of the contract" and requested that the defendant pay the balance of the purchase money within fourteen (14) days, namely, by the 25th November, 1980. The defendant wrote a letter to the plaintiff company's attorneys-at-law on 14th November, 1980 offering to pay on 29th November, 1980 the said amount due "to complete the sale". The Court notes

that the amount due was $3,428.60 being $1,725, shortfall after the mortgage committment of $38,250, plus the legal charges.

The defendant further admits that on 22nd December, 1980 the plaintiff company's attorneys-at-law accepted from the denendant a cheque for $3,479 to cover the balance of the purchase money, which cheque was subsequently dishonoured, and states that, by accepting the cheque the plaintiff company had by its agents waived the stipulation making time of the essence of the contract, thereby making the said contract one by which the defendant company would be allowed a reasonable time to complete. The counter-claim continues that the plaintiff company forfeited the deposit by letter dated 23rd January, 1981, returned a cheque for the balance of purchase money paid on 2nd February, 1981 and that the defendant "is ready, willing and able to complete the said contract."

The plaintiff company in its defence to counter-claim admits the existence and terms of the contract, the balance of purchase money due and the notice making time of the essence, denied that by accepting the cheque on 22nd December, 1980 it was thereby waiving the stipulation making time of the essence of the contract, and continues, -

> "5 ..... the acceptance of the ..... cheque was conditional upon being honoured by the bank.
>
> 6. Alternatively if the Plaintiff's Attorneys said action amounted to an unconditional acceptance, which is not admitted, the said acceptance operated only as an extension of the time, limited, in the notice making time of the essence, to the said December 22, 1980 and not a waiver of the said notice.
>
> 7. In the further alternative if the said action of the Plaintiff's Attorneys rendered the contract one by which the Defendant would be allowed a reasonable time in which to complete, which is not admitted, that Plaintiff says that the Defendant failed to complete within a reasonable time thereafter.
>
> 8. .....

"9. The Plaintiff's Attorney wrote to the Defendant on January 15, 1981, advising her that her abovementioned cheque had been dishonoured, and demanding that it be replaced (emphasis mine) by January 16.

10. On January 23, 1981, having received no reply to their aforesaid letter the Plaintiff's Attorneys wrote to the Defendant advising her that the Agreement for Sale had been terminated as a result of her breach and that her deposit had been forfeited."

The plaintiff company further pleads that a cheque for $3,479 received by the plaintiff company by letter dated 9th February, 1981 was not accepted but returned, and in the circumstances the agreement was terminated, the deposit forfeited and that the defendant is not entitled to the relief of specific performance nor any other relief.

The Court heard evidence from Mr. Robert Jumpp, a co-director of the plaintiff company and from Mrs Beverley Sloley, the defendant.

Mr. Hylton, for the plaintiff company, submitted that time having been made the essence of the contract by the letter dated 11th November, 1980, the acceptance of the cheque on 22nd December, 1980 by the plaintiff company after the date payment was due -

1. amounted to a conditional acceptance only; that is, conditional on being honoured by the bank,
   a) if dishonoured, there was no acceptance and so,
   b) there was nothing to amount to a waiver, and the plaintiff company reserved its right to rescind,

or

2. if acceptance was not conditional, it operated as a mere extension of time and not as a waiver.

He submitted further that the plaintiff company's inaction from December, 1980 to the 15th January, 1981 when athe letter was written to the defendant stating -

> " your cheque .... has been returned..... with the notation 'refer to drawer' .... Kindly therefore let us have the sum of $3,428.60 in cash,"

did not amount to a lapse of time ereating a waiver, but that the plaintiff company was merely "standing by awaiting events", that time was still of the essence of the contract, and that the plaintiff company correctly rescinded the contract by letter dated 23rd January, 1981.

Mr. Ballantyne for the defendant while questioning whether the notice of 11th November, 1980 for fourteen (14) days making time of the essence was reasonable, argued that when the plaintiff company's right to rescind arose on 25th November, 1980, and it was not then enforced, the plaintiff company thereby waived its said right, and by accepting the cheque on 22nd December, 1980 was unconditionally saying that it was not insisting that time was of the essence.

He argued further that the plaintiff company, having discovered that the cheque was dishonoured, if by writing to the defendant on 15th January, 1981 it was giving the defendant an extension of time having been made of the essence, the giving of one day to 16th January, 1981 was unreasonable in the circumstances. He concluded that the conduct of the plaintiff company was of such that it led the defendant to believe that it would not enforce its strict rights under the contract, to rescind, giving the defendant the impression that the contract was still existing, and thereby the plaintiff company was estopped from rescinding the contract without giving prior reasonable notice again making time of the essence.

The relationship of landlord and tenant existing between the plaintiff company and the defendant was not in dispute.

The Court therefore had to decide the questions of the effect of, -

1. the letter dated 11th November, 1980 on behalf of the plaintiff company making time of the essence of the contract - was it reasonable?

2. the defendant's letter dated 14th November, 1980 to pay "... on 29th November, 1980" -

3. the plaintiff company's non-action on the expiry of the notice of 11th November, 1980, on 25th November, 1980. Was this, -
   a) acquiescence in defendant's request for extension to 29th November, 1980, or
   b) a waiver of his right to rescind thereby regarding time as no longer of the essence?

4. the plaintiff company's conduct, on the receipt of the cheque on 22nd December, 1980. Was this
   a) a conditional accpetance, conditional on the cheque being honoured, but reserving its right to rescind, or
   b) a unequivocal act, portraying that it had waived its right to rescind, thereby treating time as no longer of the essence?

5. the letter dated 15th January, 1981 from the plaintiff company's attorney advising defendant of the dishonoured cheque and requesting the balance of the purchase money "...$3,428.60 in cash.... not later than Friday, 16th January, 1981"

6. the letter dated 23rd January, 1981 to the defendant advising her that the deposit had been forfeited and, consequently, the contract rescinded.

Where time is not originally of the essence of the contract, it may become so, where there is unreasonable delay, by a notice from the party not in default giving a reasonable time for the performance of the outstanding obligations - Halsbury's Laws of England, 3rd Edtn Vol. 34 p. 257. See also Stickney v Keeble /1915/ A. C. 386 (H.L.)

Where time is, or is by notice made, of the essence of the contract then subject to any question as to waiver, a failure to perform an obligation precisely within the time stipulated will be deemed to be a breach going to the root or essence of the contract and will confer on the party not in default, the right to rescind at once. Either party may by conduct or by words waive the benefit of a provision that time is of the essence of the contract; in this event the provision ceases entirely to be applicable in favour of the party and the jurisdiction of equity to give its peculiar remedies to the other party, even though he be in default, is revived.

In the case of Head v Swan /1920/ 28 C.L.R. 258, the respondents sold land to the appellant under a contract by which a deposit of 15% of the purchase money was to be paid at once, 15% eighteen (18) months after the date of the contract and the balance by six equal half-yearly installments. The contract also provided that time should be of the essence of the contract (clause 21). The appellant paid the deposit but failed to pay the first installment on the due date. The respondents having subsequent to the failure of the appellant to pay the first installment, resold the land; the appellant brought a n action against them to recover damages for breach of the contract, and a verdict was given in his favour by the jury. It was held, on appeal, that the respondents were entitled to determine the contract but there should be a new trial, because upon the evidence, the question as to whether prior to the resale the respondents had elected either to determine the contract or to

treat it as still subsisting, should have been left to the Jury.

Isaacs, J, in delivering the judgment of the Court, the High Court of Australia, said at page 263 -

> " The respondents ..... clearly had the right to terminate the contract if they had chosen to do so. They had the right of choice and, whichever course they took, they not only bound the appellant but they necessarily bound themselves. Waiver of such an express stipulation as clause 21 reattaches the jurisdiction of equity to give its remedies, for in that event the stipulation as to time ceases to be applicable. And similarly at law, where the party having the right to terminate the contract so acts as to insist on its performance - and he may do so if he thinks it more advantageous to him to hold the defaulting party to his full undertaking - he cannot afterwards fall back on his freedom to elect. The evidence given at the trial as to the conduct of the parties and the negotations between them after the plaintiff had made default was such as to make it proper to leave to the jury the question whether the defendants had elected, prior to the resale, to determine the contract or to treat it as subsisting or whether up to that time they had made no election."

As to waiver, in L. Voumard's Sale of Land, 2nd Edtn, p. 367, the author said,-

> " Any unequivocal act indicating an intention to forego the right to rescind will constitute a waiver. For example, insistence on the performance of a contract, or continuance of negotiations for completion in accordance with the terms of the contract other than those relating to time of performance after default has been made, may each constitute a waiver."

In Barclay v Messenger 1873 - 1874 22 Weekly Reports 522, the defendants who were bound by the obligation of a building lease, sold their interest to the plaintiffs who paid £1000 forthwith and were to commence building and pay the balance of £1000 -

> " on the 31st day of July, or such deferred date as the parties might agree upon. "

The plaintiffs defaulted, no deferred date was agreed upon. On the 16th August, the defendants wrote the plaintiffs a letter (emphasis mine) stating that unless the works were commenced

on the following Monday, the £1000 must be paid within one week from the following Tuesday - i.e. by the 26th August. The plaintiffs defaulted. On 2nd October the defendants gave the plaintiffs notice that the agreement had become void. Jessel, Master of the Rolls, in dismissing a bill by the plaintiffs for specific performance, held that, time was of the essence of the contract, that the letter of the 16th August was

> " but a qualified waiver .... a waiver if the terms were complied with "

and said further,

> " a mere extension of time, and nothing more is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time. "

In the instant case, both attorneys-at-law cited this case, Mr. Ballantyne for the defendant, stating that time should be reasonable, Mr. Hylton for the plaintiff company, in support of the proposition that an agreement to accept the balance of purchase price was conditional only and of no effect as a waiver, that it was a mere extension of time and in those circumstances time need not be reasonable.

It should be noted that in the instant case, the plaintiff company, J & J Enterprises Ltd., through its attorneys-at-law on receiving the cheque on 22nd December, 1980 did not serve on the defendant notice that it was extending time having been made of the essence nor indicate that it was reserving its right to rescind. It was a simple act of receival by the vendors, consistent with an intention to complete, thereby regarding the contract as still subsisting, and inconsistent with a view that the contractwas at an end - or would as a consequence be brought to an end. A prompt return of the cheque on 22nd December, 1980, on tender, would be consistent with the latter view.

There is no principle of a tacit extension of time having been made of the essence or a tacit reservation of a right to rescind; both should be manifest by conduct.

A good example of conduct of the parties which was regarded as amounting to a waiver of time having been made of the essence is found in the case of Luck v White (1973) 26 P & CR 89. The facts are as follows. By an agreement in writing dated 30th April, 1971 the vendors agreed to sell a house to the purchaser, completion date fixed for 14th May, 1971; the purchaser was let into possession at once. Completion did not take place, the purchaser not having had approval from the building society from whom he hoped to get an advance. Correspondence for requisitions passed between the building society, the vendors' solicitors and the purchaser's solicitors. On 10th June, 1971 the vendors' solicitors asked for a firm date for completion, not having got it, they pressed for recovery of possession, without success. . . On 16th August, 1971 the vendors' solicitors by notice made time of the essence, and failing completion they would forfeit the deposit and either rescind or resell the property. The notice expired on the 6th September. On 7th September, the vendors' solicitors asked the purchaser's solicitors -

"whether they were then in a position to complete or had instructions to accept service of a writ."

On 5th October the vendors' solicitors again pressed for completion, negotations continued and an appointment for completion arranged for 16th November. A dispute arose between vendors and purchaser in respect of interest on the unpaid balance of purchase money; no completion took place on the said 16th November. On 19th November the vendors' solicitor by letter stated that the contract was rescinded, that they intended to sell elsewhere and required possession. The purchaser issued a writ seeking specific performance of the contract.

Golding J., in granting the decree for specific performance held that on the 16th November time was not of the essence of the contract as regards that date because the notice to complete expired in early September and the vendors neither rescinded the contract nor resold the property as they threatened but continued to discuss the probabilities of completion and ultimately agreed to November 16.

He said further at page 96 -

> " If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances."

This latter decision was cited with approval in Buckland v. Farmer et al /1978/ 3 A.E.R. 929. In the instant case, the attorneys-at-law for the plaintiff company relied on the Buckland case in support of his point that the actions of the plaintiff company after the 25th November, 1980 did not amount to a waiver - it (the plaintiff company)

"was merely standing by awaiting events"

reserving its right to rescind.

In the Buckland case, the plaintiffs/purchasers failing to complete a contract for the sale of property, were on 2nd November, 1973 served notice by the vendors making time of the essence to expire on 1st December, 1973. The plaintiffs failed to complete and on 7th February, 1974 the vendors' solicitors wrote the defendants, the plaintiffs' solicitors, to "formally rescind" the contract. Previously, on 20th November, 1973, the plaintiffs had been introduced to a third party by the vendors' solicitors for the third party to take over the plaintiffs contract; plaintiffs and the third party negotiated; there was no further negotiation between the plaintiffs and the vendors. There were numerous meetings and extensions of time

> " that fixed by the contract. The basic assumption was not that the contract was alive but that the vendor was not bound by it. "

In the case of Luck v. White et al, Buckland v Farmeret al and Petrie v Dwyer, the case of Webb v Hughes /1870/ L.R. 10 Eq.281 was considered. In the latter case Malins, V.C. said,

> " If time be made the essence of the contract that may be waived by the conduct of the purchaser, and if the time is once allowed to pass and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract."

In the Buckland case, negotations were continued, but with a third party, indicating that the contract with the plaintiff was at an end. In Petrie v Dwyer negotations were continued and time extended "on condition of receiveing £200 over and above the contract price", this was a new term, demonstrating that the former contract had been set aside - at an end. These are two cases/therefore distinguishable from the instant case.

In the instant case, this Court is of the view that when time was made the essence of the contract by the letter to the defendant dated 11th November, 1980, in terms,

> " If you fail to comply .... within fourteen (14) days ..... deposit ..... will be forfeited to J & J Enterprises ..... who will either rescind or.. resell the property..... "

such time was reasonable.

The defendant's letter dated 14th November, 1980 to the plaintiff company's attorneys-at-law stating that the balance of the purchaser money "... will be paid on 29th November, 1980" was not replied to by the plaintiff company's attorneys-at-law and on the authority of Richards Ltd v Oppenheimer /1950/ 1 A.E.R. 420 failure to reply did not amount to a waiver. However, the subsequent conduct of the plaintiff company could well attract a contrary reasoning.

The date for completion, 25th November, 1980, having passed, the plaintiff company failed "... either to rescind the contract or resell the property ....."; it had a choice to elect to rescind the contract or treat the contract as still subsisting. The plaintiff company did not rescind the contract.

On 22nd December, 1980 the plaintiff company received from the defendant a cheque for $3,479 representing the balance of the purchase money. Instead of promptly returning the said cheque to the defendant, an act which would have shown a continuing course of conduct consistent with rescission, it accepted the cheque and negotiated it at the bank. This was an act inconsistent with the idea that the party still intended to rely on the strict letter of the contract - (Petrie v Dwyer, supra).

The acceptance of the cheque by the plaintiff company was an unequivocal act indicative of the fact that it regarded the contract as still subsisting, that it still wished to complete and had thereby shown its election to forego the right to rescind; time was no longer of the essence.

The plaintiff company's attorneys-at-law argued that the acceptance of the cheque was a conditional acceptance with the plaintiff company reserving its right to rescind; that payment by cheque or negotiable instrument being a conditional payment only - Cohen v Hale (1878) 3 Q.B. 371 - the plaintiff company was saying "provided it is honoured, I will regard you as having completed on 22nd December, 1980." This argument is less than sound.

The means of payment adopted by the defendant i.e. a cheque, by its very nature created a conditional acceptance on the part of the plaintiff company. However, the plaintiff company's state of mind revealed an intention to complete a contract, thereby treating it as still subsisting, which latter intention was inconsistent with an intention to rescind, whereby the contract would have been regarded as at an end;

on the authorities both postures cannot co-exist.

The cheque having being dishonoured, the plaintiff company's attorneys-at-law wrote a letter to the defendant on 15th January, 1981 advising her of that fact and requesting "the sum of $3,428.60 in cash, as set out in our statement to you dated 2nd October 1980, not later than Friday, 16th January, 1981." The pleading of the plaintiff company is even stronger. Paragraph 9 of the defence to counter-claim reads -

> " The Plaintiff's Attorneys wrote to the Defendant on January 15, 1981 advising her that her above-mentioned cheque had been dishonoured and demanding that it be replaced ..."

(emphasis mine).

This is evidence of the conduct of the plaintiff company treating the contract as still subsisting - time was no longer of the essence.

By the tenor of the letter dated 15th January, 1981 the plaintiff company was seeking to again make time of the essence to 16th January, 1981. The Court holds that the giving of one day to complete was quite unreasonable in the circumstances.

The purported rescission of the plaintiff company by the letter from their attorneys-at-law dated 23rd January, 1981, referring to the dishonoured cheque received on 22nd December, 1980 is therefore of no effect; the plaintif company could not then properly rescind, having previously waived its right to rescind the contract.

Mr. Ballantyne for the defendant submitted, citing the cases of Hughes v Meter Building Company (1876 - 77) 2 A.C. 439 and Penoutsos v. Raymond Hadley Corp. of New York (1917) 2 K.B. 473, that the plaintiff company is estopped from denying that it had waived its right to rescind having led the defendant to believe that its strict rights under the contract would not be enforced.

This Court is of the view that the conduct of the plaintiff company does attract this equitable principle of estoppe elucidated by Denning, J. (as he then was) in Central London Property Trust Ltd. v High Trees House Ltd (1947) 1 K.B. 130.

The defendant has stated that she is ready, willing and able to complete the said contract; she is entitled so to do.

The plaintiff company has not proved any amount due in excess of $300 per month for mesne profits; it has admitted receiving from the defendant the sum of $2400 since filing of this suit.

On the claim it shall be judgment for plaintiff for $6000 (being rental and mesne profits due and owing from 6th December, 1980 to 5th July, 1982) less $2400 paid, with costs to be agreed or taxed, application for recovery of possession of the said premises refused.

On the counter-claim - the defendant may not obtain damages - it is hereby ordered that the plaintiff company specifically perform the said contract dated 29th April, 1980 between itself and the defendant, costs to be agreed or taxed.

P.T. HARRISON
J. (Actg)