

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. J-060 OF 1985

| | | |
|---------|----------------------|------------|
| BETWEEN | ROY ANTHONY JONES | PLAINTIFFS |
| A N D | ROY ANDREW JONES | |
| A N D | JOHN MITCHELL DEPASS | DEFENDANTS |
| A N D | JUDITH DAWN DEPASS | |

Dr. Lloyd Barnett for plaintiffs.

Mr. Clinton Hines for defendants.

HEARD: JUNE 27, JULY 2 & 8, 1991;
JUNE 3, 1992

PANTON, J.

In their Statement of Claim, the plaintiffs rely on an Agreement for Sale dated 29th October, 1981, between themselves and the defendants in respect of "all that parcel of land part of Kilmurley part of numbers one and two Ravina Road, in the parish of St. Andrew being the lot numbered thirty-seven of the plan of number 1 and number 2 Ravina Road, ... and being part of the land comprised in Certificate of Title registered at Volume 1113 Folio 427 of the Register Book of Titles".

The agreement provided for a sale price of Eighty Five Thousand Dollars (\$85,000.00) to be paid as follows:-

- (a) a deposit of Twenty Thousand Dollars (\$20,000.00) on the signing of the agreement; and
- (b) the balance on completion.

The time for completion was on or before January 31, 1982 and it was further provided that possession was to be given to the plaintiffs on payment of the deposit.

There were two noteworthy special conditions:-

- (1) If at the date of possession the balance was not paid to the vendors, the purchasers were required to pay rental at the existing rate;
- (2) The agreement was subject to the purchasers' obtaining a mortgage of Sixty Thousand Dollars (\$60,000.00). If

the mortgage was not obtained, the agreement should be rescinded and the deposit would be refundable.

The plaintiffs claim that they have complied with the terms of the agreement and allege that the defendants have wrongfully failed to complete the sale. On the basis of this failure on the part of the defendants, the plaintiffs are seeking specific performance of the agreement and or damages for breach of contract.

The defendants allege that all their estate or interest in the property had prior to the agreement for sale been sold to Mr. Percy Robotham and his wife. They boldly state that the agreement on which the plaintiffs are relying was only a device to facilitate the sale by the Robothams to the plaintiffs. They say in the defence filed that they had no interest in the matter, only to execute the transfer at the request of the Robothams.

The defendants deny the existence of any agreement between them and the plaintiffs. They are mere trustees holding the legal estate upon trust for the Robothams. This is a position that they have adopted in the alternative. In any event, they are saying that the plaintiffs are in breach of the agreement so far as time and the payment of rental are concerned and these breaches resulted in the termination of the agreement on November 1, 1982.

Due to the alleged breaches by the plaintiffs, there is a counterclaim for rental as well as for recovery of possession.

The evidence

Two witnesses gave evidence before me. There was the unusual situation of both witnesses being attorneys-at-law. It was necessary for me to assess their credibility in the usual way, and this I did.

One of the plaintiffs, Roy Anthony Jones, is a magistrate in the Bahamas. He once practised law with Robotham, Bishop and Co. He said that during this period of association with Percy Robotham of this law firm, Robotham informed him that he had the property in question for sale. He said he was shown the title which he copied and that he drew up an Agreement for Sale. He paid the deposit and

took possession about a month after.

He was referred to a letter dated March 17, 1982 to him from Mrssrs. Robotham, Bishop and Co., signed by Percy Robotham, stating that up to then he had not heard anything from anyone in connection with a mortgage or completion. This silence, according to the letter, had left the writer in an "ackward possession" (sic). There was a threat to cancel the agreement if the institution that was prepared to grant a mortgage to the plaintiffs did not communicate with the writer by March 31, 1982.

The witness testified that he duly presented to the writer of the letter on March 31, 1982, a letter from the Mortgage Manager of the Jamaica National Building Society. That letter advised Messrs. Robotham, Bishop and Co. that a mortgage had been approved for the relevant amount and that as soon as indemnity cover was obtained, the Jamaica National Building Society would issue a formal letter of commitment and would instruct the attorneys to have the mortgage prepared. The witness presented to Percy Robotham, along with this letter, a cheque for Five Thousand Dollars (\$5,000.00). He (the witness) paid - he said - the outstanding amount due for rental and then placed a standing order at the Royal Bank for monthly deductions to be made from his account and sent to Robotham.

Under cross-examination, the witness stated that he did not understand that Robotham had previously bought the property. His understanding, he said, was that Robotham was an agent for the owners. He denied that he had been occupying the house before the agreement. He said further while being cross-examined that there was a long history of friendship between Robotham and the plaintiffs and that because of that he never regarded the date for completion as a firm one. In any event, he said, he was in a position to complete the purchase on November 1, 1982.

The defendants did not testify. They reside abroad. However, Robotham testified. He said that the older plaintiff was his 'fraternal brother' and very good friend. As a result, he did not treat the transaction in the ordinary way. According to him, the

younger plaintiff had occupied the house for several months before the sale. Incidentally, he the witness had purchased the house from the registered proprietors prior to the sale to the plaintiffs. He is unable to find the document evidencing the transfer from the defendants to himself; nor is he able to locate the Agreement for Sale between himself and the defendants. He paid the defendants in cash at his home. He paid no stamp duty on the transaction and he thinks that he bought the premises for Thirty Five Thousand Dollars (\$35,000.00). In all his dealings with the plaintiffs in this matter, he wrote no letter on behalf of the defendants with the exception of the letter of the 1st November, 1982, cancelling the contract. His evidence was that he had not received any rental for several years. However, he has received cheques from the bank referred to by the plaintiff witness but he does not know what the cheques are for and he has not inquired.

The documentary evidence was agreed. There are letters tracing the dealings between the parties from the signing of the agreement to the 21st February, 1983, when Robotham signed a letter informing the younger plaintiff that the owners had decided to return to reside in Jamaica and required their house for their own use as soon as it became vacant --- the same house that he testified that he had bought from the defendants.

The next document of note was a letter from Messrs. Thwaites, Fairclough, Watson and Co. to Messrs. Robotham, Bishop and Co. informing them that they had been instructed to endorse a mortgage of Sixty Thousand Dollars (\$60,000.00) on the Certificate of Title for the property in question and making reference to the party Anthony Jones. The letter requested the addressee to hand over the duplicate Certificate of Title on the undertaking of the said attorneys, Thwaites, Fairclough, Watson and Co. to pay the full proceeds of the mortgage to Messrs. Robotham, Bishop and Co. on registration of the mortgage. This letter was copied to the Jamaica National Building Society.

Another letter from Messrs. Thwaites, Fairclough, Watson and

Co. to one of the plaintiffs indicated that Messrs. Robotham, Bishop and Co. were withholding the Certificate of Title on the basis that the plaintiffs had not paid fees and interest on the unpaid purchase money. This letter was dated September 29, 1982.

On the 11th October, 1982, Messrs. Robotham, Bishop and Co. wrote to one of the plaintiffs seeking the return of the instrument of transfer duly signed. That letter complained that the document had been taken elsewhere by the plaintiffs for stamping. The letter pointed out that six months' rental were in arrears and sought payment within fourteen (14) days.

There was a discussion on the following day between the attorneys-at-law, and then on the 13th October, 1982, the instrument of transfer was sent by Messrs. Thwaites, Fairclough, Watson and Co. to Messrs. Robotham, Bishop and Co.

The next event was the letter dated November 1, 1982, from Messrs. Robotham, Bishop and Co. to the plaintiff Roy Jones stating that the defendants regarded the contract as having been broken and, purportedly, enclosing a cheque for Twenty Two Thousand Nine Hundred Dollars (\$22,900.00). The fact is that no cheque was sent, and another letter dated December 17, 1982, made the same erroneous statement that a cheque was enclosed. Indeed, no cheque was sent until December 27, 1982. In the meantime, on December 20, 1982, the plaintiffs' attorneys-at-law wrote to Messrs. Robotham, Bishop and Co. requesting the instrument of transfer together with title and discharge with instructions to proceed with registration; there was also an undertaking to pay the proceeds of the mortgage upon registration. Finally, so far as documentary evidence is concerned, the plaintiffs returned the cheque on the 11th February, 1983.

Matters for determination

In view of the pleadings, it is necessary for the Court to determine the following questions:

- (1) Did the defendants sell all their estate and interest in the property to Robotham and his wife?
- (2) Are the defendants mere trustees holding the legal

estate upon trust for the Robothams?

- (3) Is there an agreement between the plaintiffs and the defendants?
- (4) was time of the essence?

FINDINGS

As I said earlier, it was necessary for me to assess the credibility of the witnesses. I was, and still am, very concerned about the credibility of the witness Robotham. Here is an attorney-at-law who wishes the Court to accept that he purchased the property from the defendants, yet he is unable to produce any of the essential documents that an attorney-at-law would have insisted on as a matter of course. It cannot be overlooked that he has been in private practice since 1964. He ought not to be regarded as a novice in any sense of the word. Notwithstanding his long standing at the Bar, his evidence is that he paid no stamp duty on this transaction. Furthermore, and this I found to be quite "telling", he did not seem to be too sure of the price that he paid for this property. This is how he responded to a question: "I think I bought premises for Thirty Five Thousand Dollars (\$35,000.00)". Surely, if he were speaking the truth he would have been more positive and precise! Alarming, he went on to say that he paid the defendants in cash at his house. Not even the most naive law student would have recommended such a procedure. One may ask: not even a receipt? Well, he did not say and there is not even a hint of that in the agreed bundle of documents. I refuse to believe that an attorney-at-law of such longstanding would have indulged in a transaction involving the sale of land in such a surreptitious manner, leaving no documentary trace or trail behind.

As must be now quite obvious, I was left with very negative feeling of this witness. I thought it extremely unwise to accept his testimony unless it was supported by a credible source. This is most unfortunate but it was an unavoidable conclusion if the truth is what is being sought.

There is another strange feature of Robotham's behaviour.

In the letter in which he purports to cancel the contract, he also purports to be returning payments made by the plaintiffs. It took him two further letters to actually return the money.

I find that there was no sale of the property to the Robothams so there is no question of the defendants being mere trustees holding the legal estate upon trust for the Robothams. In this regard, I take some comfort from that letter dated February 21, 1983, from Robotnam to the younger plaintiff saying that the owners had decided to return to reside in Jamaica and required their house for their own use.

Whereas I found the witness Robotham unworthy and incapable of belief, I was - on the other hand - satisfied that the witness Roy Jones was truthful. Accordingly, I have no difficulty in finding that -

1. Robotham was acting as agent of the defendants, and the plaintiffs dealt with him as such;
2. the plaintiffs never occupied the house before the signing of the agreement; and
3. the plaintiffs have been paying rental on a regular basis to Robotham by means of a standing order at a commercial bank;

The defendants' denial of the existence of a contract between them and the plaintiffs is a mere ploy. It is a barefaced move on the part of the defendants, considering the overwhelming documentary evidence against that position; added to that is the evidence of Roy Jones.

I now come to the final point in the case: was time of the essence of the contract?

Robotham testified that the only letter he was authorised to write on behalf of the defendants was that dated November 1, 1982. It is to be implied therefore that the defendants did not authorise the letter dated March 17, 1983. The latter letter had threatened cancellation of the agreement if the plaintiffs did not act in a certain way by March 31, 1983.

I find that although that letter was unauthorised the plaintiffs, nevertheless, complied with it. Specifically, the plaintiffs secured the necessary commitment from Jamaica National Building Society and communicated it to the witness Robotham in his capacity as agent for the defendants.

The letter dated November 1, 1982, reads thus:

"As you have failed to complete the contract for sale and purchase of the above named property dated 29th October, 1981 within the time specified in our Notice dated 17th day of March 1982 by which time the completion was made a material term of the said contract, we hereby notify you that our Clients regard the said contract as having been broken by you and we hereby notify you that we repudiate the contract and enclose here with our cheque in the sum of TWENTY TWO THOUSAND NINE HUNDRED DOLLARS (\$22,900.00) that is \$25,000.00 less \$2,100.00 due for rent owing for 6 months.

Yours Truly,

Copy

Robotham, Bishop & Co.,
Per F.J. Robotham."

The defendants have therefore put forward as the reason for the purported repudiation of the contract, the plaintiffs' alleged failure to complete the contract within the time specified in the unauthorised letter of March 17, 1982.

Time is of the essence if -

1. the parties expressly state that stipulations as to time are to be treated as being of the essence; or it may be implied from the surrounding circumstances that the parties have agreed that time is of the essence; or
2. time was made of the essence by subsequent notice; or
3. delay has been so great as to be evidence of an abandonment of the contract, although delay has no such effect if waived by the conduct of the parties.

In the instant case, number (1) above is inapplicable. In relation to number (2), as I have already noted, the letter which purported to make time of the essence was unauthorised. In any event, the terms of that unauthorised letter were complied with.

Finally, it should be noted that the plaintiffs' attorneys-at-law had been in regular contact with the defendants' attorneys-at-law in relation to the completion of the transaction. The matter

recent contact being the letter dated October 13, 1982, enclosing the instrument of transfer.

In my view, there was no delay that was so great as to be evidence of an abandonment of the contract.

Time was clearly not of the essence of this contract.

In view of the findings that I have made, and considering the state of the law, it is my judgment that there was no proper termination of the contract by the defendants.

The plaintiffs have established the existence of a contract between themselves and the defendants. They have paid monies on the contract, and are able and willing to perform all their obligations thereunder. The defendants' refusal to perform their obligations is the only obstacle to completion.

I accordingly make an order for specific performance as sought by the plaintiffs.

The counterclaim by the defendants is dismissed as the evidence shows that monies for rental were paid to the defendants' agent who has failed to negotiate the cheques. The plaintiffs have done all that was required. Considering that the cheques may be stale dated, it will be necessary for an account to be taken and for the plaintiffs to substitute a cheque for the outstanding amount of rental. The account may be taken on the initiative of the parties. Failing that, the Registrar is hereby empowered to do do.

The plaintiffs, having succeeded in their claim, are to have the costs of these proceedings, such costs to be agreed or taxed.