IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 66/84, E 195/86

BETWEEM	MILTON LaLOO	PLAINTIFF
A N D	MELVIN KING	1ST DEFENDANT
A N D	BARBARA ARCHIBALD	2ND DEFENDANT
A N D	SHIRLEY BROWN	3RD DEFENDANT

B.J. Scott, Q.C. for the Plaintiff

Allan Wood instructed by Levy, Hanna & Company for 1st Defendant.

W.B. Frankson, Q.C. for the 2nd and 3rd Defendants.

HEARD: 3rd, 4th and 5th July, 9th and 10th October & 12th December, 1989.

RECKORD, J.

These actions were consolidated by an order of the Master.

The Plaintiff seeks as against the 1st defendant specific performance of an agreement in writing dated 5th September, 1973, between the plaintiff and the 1st defendant, whereby the 1st defendant agreed to sell to the plaintiff Lot 3, Sterling Castle, St. Andrew, registered by Certificate of Title at Volume 1112 Folic 95 in the Register Book of Titles for $34,000.00. In lieu of specific performance or in addition, he also seeks damages.

As against the 2nd and 3rd defendants who subsequently bought the said Lot from the 1st defendant in 1978, the plaintiff asks the Court for a declaration that they fraudulently obtained title and accordingly the entry in the Register Book of Titles in relation to the transfer of the property to them should be cancelled.

I will deal firstly with the case against the 2nd and 3rd defendants. From the very outset they denied knowing anything of the transaction between the plaintiff and the 1st defendant. As set out at paragraph 3 of their defence, they were bona fide purchasers for value from the 1st defendant who was registered owner of an estate in fee simple in possession without notice of any other interest. Accordingly, relying on Section 68, 69 and 71 of the Registration of Titles Act, their Title was indefeasible.

The Plaintiff having alleged fraud against the three defendants is required to adduce evidence in proof thereof. None was forthcoming. At the end of the case for the plaintiff, his Attorney-at-law said that although he had called no direct evidence on this point he was relying on the law as set out in two cases.

The first was Assets Company Limited v. Mere Roihi (1905) A/C 176. Mr. Scott submitted that if circumstances of fraud is known to the agent of a person, such person was liable for the consequences of the fraud. The legal firm of Livingston Alexander and Levy was aware of the agreement for sale between the plaintiff and the 1st defendant. They had the carriage of sale. They also had the carriage of sale between the 1st defendant and the 2nd and 3rd defendant.

It is to be noted here that in the 'Assets' case, fraud was held to mean actual fraud, not constructive or equitable fraud.

The second case relied on was Atterbury v wallace -49 English Reports -Chaneery page 465.

In this case it was held that if the solicitor acting for one of the parties knew of the fraud, then the knowledge that he had is imputed to the party for whom he acts - Mr. Scott further submitted that the suspicions Livingston Alexander and Levy ought to have been aroused - they also directly concerned will the mortgage to the 2nd and 3rd defendants. The fraudulent conduct of the 1st defendant being known to his Attorney's - the selling of this same piece of land twice - this fraudulant conduct is attributable to the 2nd and 3rd defendants for whom they were acting in the carriage of sale.

In a preliminary objection taken before the evidence began, the Court was referred to the case of Enid Timoll Uylett vs. George Timoll - S.C.C.A. No 28/76, where Kerr J.A. said at page 5 of the Judgement. "It is clear from the decided cases dealing with the interpretation of "fraud" in similar legislation, that the word does not embrace what is sometimes called "equitable fraud." He referred to the "Assets" case where the Privy Council held that "by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called, constructive or equitable fraud...."

The 2nd and 3rd defendants never gave evidence, neither did they call any witnesses. Mr. Franks:n submitted that there was no evidence pointing to

to any dealings between this plaintiff and the 2nd and 3rd defendant and that joining them in this suit was a misconception.

Mr. Wood submitted that it was the 1st defendants' case that he thought that the plaintiff was no longer interested in the performance of the contract - he was asking back for his deposit - if this is accepted as true then his selling to the 2nd and 3rd defendants would not be fraudulent. If the 1st defendant was not fraudulent then the second and third defendants could not be fraudulent. There was no evidence that Livingston Alexander & Levy were Attorneys for the second and third defendants - they were Attorneys for the first defendant and had the carriage of sale - It does not follow that knowledge of contract is knowledge of fraud. It was wholly untenable to argue that Livingston Alexander & Levy would have known of the continued existence of the agreement of sale to the plaintiff.

Upon what basis, therefore, is the plaintiff asking the court to impute fraud to the second and third defendants? I can find none. Save and except that they bought from the first defendant, there is no evidence that they knew the plaintiff or knew of any agreement for sale of this property by the first defendant to the plaintiff, or indeed to anyone else. No knowledge can be imputed to them through any agent or Attorney as they had none.

The plaintiff having failed to prove any fraud whatever, there will be judgement for the second and third defendants against the plaintiff with costs, to be agreed or taxed. Money paid into Court by the plaintiff as security for costs to be paid to the Attorney-at-law for the second and third defendants.

Turning now to the case against the first defendant, at the end of the plaintiffs' case, the Attorney-at-law for the first defendant abandoned the amended defence that it was the plaintiff who breached the agreement. He also abandoned the allegation that exhibit 4 - the letter from the 1st defendant to the plaintiff dated 9th March, 1984, was as a result of any coercion.

Having made the finding that I have in relation to the second and third defendants, that has effectively disposed of the plaintiff's claim for specific performance. The first defendant has admitted that he is in breach of contract. Damages, therefore, is the only remedy left open to the plaintiff. His Attorney has submitted that the plaintiff is entitled to damages under three heads:-

(i) Damages provided for in the contract itself.

(ii) Damages for delay in performance if Court found slae to second and third defendants fraudulent.

(iii) Damages for loss of bargain.

Special condition 4 of the contract, provides that:-

> "If the house shall not have been completed by the 15th October, 1973, then the vendor agrees to pay to the purchaser interest on the deposit of $7,000.00 at the rate of 10% accruing from day to day until the house on land hereby sold is completed".

This contract can be said to have came to an end on the 11th of August, 1978, when the first defendant transfered the property to the second and third defendants. If interest is calculated at the rate of 10% per annum i.e. $700 per annum or $7,000.00 for 5 years - this would amount to $11,273.50 If calculated @ 10% or $700.00 per day as the item seem to suggest, this would amounts to the staggering sum of $1,277,500.00, a sum which neither party if they considered it would have contemplated.

On the question of the loss of bargain Mr. Scott submitted that this should be the difference between the present value of $500,000.00 and the agreed purchase price of $34,000.00, that is $466,000.00.

The general rule is that damages is assessed as at the date of breach unless exceptional circumstances are shown - see Johnson v. Agnew (1979) 1 AER 883. No exceptional circumstances have been shown in this case and I will therefore abide by the gen ral rule.

There is no direct evidence as to the value of land in that area in June, 1977, when the first defendant said that plaintiff demanded the return of his money. However, in August, 1978, the property was sold for $28,000.00. The first defendant had suffered a loss of $6,000.00 . The Court takes judicial notice that the value of land fell drastically in Jamaica in the late 1970's. If this sum is relied upon as the true market value, it follows that the plaintiff suffered no loss of bargain.

I accept the evidence of the first defendant that he met the plaintiff in March, 1984, that the plaintiff told him that he heard that he was offering to pay $13,000.00 for deposit and interest which he was refusing, that plaintiff said he would accept $20,000 00, that the first defendant said that although

this would be difficult they should meet at his Attorney's office the following morning, where he would receive the $13,000.00 and that arrangement would be made for the balance of $7,000.00. That on the 9th of March, 1984, the parties met instead at the office of the plaintiff's Attorney where the letter, exhibit 4, was prepared and signed by first defendant offering to settle the plaintiff's claim for $20,000.00.

This offer was subsequently refused and on the 22nd of March, 1984, Suit E. 66/84 was filed.

On the totality of the evidence, what is the damages the plaintiff entitled to? Not for loss of bargain as none is proved. Not for delay in performance as no fraud proved. It appears he is only entitled to the damages provided in the contract itself.

If the date of breach is in June, 1977 when the plaintiff asked for his money or August, 1978 when the first defendant sold the land, the plaintiff would be entitled to a sum between $11,000.00 and $13,000.00.

I find that the sum of $20,000.00 asked for by the plaintiff was an amount which he thought was sufficient to compensate him for the first defendant's breaching of the contract. This sum must have been discussed with his Attorney who finding favour with it had the letter Exhibit 4 prepared which the first defendant signed. This sum the Court finds was reasonable in the circumstances and was intended to bring to an end this long outstanding conflict.

Accordingly, judgement is entered for the plaintiff against the first defendant in the sum of $80,000.00 with interest at 8% from the 9th of March, 1984, to date of judgement 12th December, 1989.

Costs to the plaintiff against the first defendant to be agreed or taxed.

Cases referred to
(1) Assets Company Limited v Mere Roihi [1905] A.C. 176
(2) Attorney v Wallace 49 ER p465
(3) Enid Timoll Wyatt v George Timoll — S.C.C.A. No 28/76
(4) Johnson v Agnew [1979] 1 ALL ER 883