Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L049 OF 1988

BETWEEN	HOWARD LAMB MAXINE LAMB	PLAINTIFFS
A N D	HELEN COULTHARD	DEFENDANT

David Henry instructed by Nunes, Scholefield DeLeon & Company for Plaintiffs.
Chester Stamp for Defendant.

HEARD: July 13, 14, 16, 22, 23 and 24, 1992

PITTER, J.

This action arose out of a contract between the parties for the sale of land known as 9 Oaklawn Drive, Kingston 8 with the plaintiffs as purchasers and the defendant as vendor. By written agreement for the sale dated 18th March, 1986 the defendant agreed to sell and the plaintiffs agreed to purchase the said premises for $140,000.00. An agreed deposit of $18,731.00 was paid by the plaintiffs with completion date fixed at June 30, 1986. The defendant has failed to complete owing to a defect in Title. The plaintiffs allege that the defendant falsely represented herself then as being the sole owner of the said property well knowing that there was a joint tenancy in herself and her daughter. On reliance of the false representation they were induced to enter into the agreement. As such the plaintiffs are seeking:-

1. Specific performance of the said agreement for sale.

2. Alternatively an order that the defendant transfer her half-share (as tenants in common equity) of the said premises to the plaintiffs for one-half of the said purchase price.

3. Damages for Breach of Contract and for Breach of warrant of Authority.

4. Such further or other relief as may be just.

The defence to the action is that the agreement was subject to a condition precedent which has not materialised. The defendant contended that the plaintiffs well knew of the existence of her daughter's name on the registered title and that completion of sale was subject to consent by her daughter or by an Order of the Court. Further, that in any event, the purchasers should be regarded as having constructive notice of the defect in the title, it being a registered title.

The issue to be resolved is whether the plaintiffs knew of the existence of the joint tenancy and whether there was in existence a condition precedent. The particular type of relief to the plaintiff, if any, is dependent on the resolution of the issue.

The defendant has admitted to the agreement for sale (which makes no mention of the existence of a joint tenancy nor the condition precedent upon which she relies on as part of her defence). She has denied she is a joint owner but that her daughter Ann-Marie Sandra Coulthard is a mere trustee of half share of the property. She based this assumption on the premise that she having bought the property without any contribution from her daughter Ann-Marie towards the purchase, notwithstanding her name on the title, she the said defendant is solely entitled. On the advice from Mr. Sylvester Morris, an Attorney-at-Law who had carriage of sale of the said property, the defendant effected a suit against her daughter Ann-Marie in the Supreme Court for a Declaration that she is the sole owner of the premises in question and the daughter a mere trustee. This matter came up before the Court on several occasions but has not been heard up to the time of hearing this action.

The plaintiffs who are husband and wife contended that at no time prior to the signing of the agreement did the defendant tell them there was another person's name on the title. They denied that there was any oral or other condition precedent to the said agreement and further denied that there was any term of the agreement other than those set out in the written document.

Prior to entering the written agreement, the defendant sought the assistance of Mrs. Violet Lee a realtor. The defendant's premises was up for sale by auction and Mrs. Lee advised her that it would be better to sell other than by auction as she would realise more from the proceeds. It was then that Mrs. Lee arranged with the plaintiffs to purchase the property. To halt the auction, the plaintiffs paid the outstanding debt of $18,731.00 which later represented the deposit on the purchase price of 9 Oaklawn Drive. I find that Mrs. Lee became a central figure in the transaction. The defendant and the plaintiffs never bargained together, all this was done between Mrs. Lee and the defendant. The purchase price, deposit and terms of the contract were all arrived at between Mrs. Lee and the defendant. It was Mrs. Lee who dictated the wording and contents of the agreement and it was she who arranged with Mr. Morris to have carriage of

sale. It was she who later brought about a meeting of the parties.

Mr. Lamb admitted that he never had any discussions with the defendant regarding ownership of the premises. He said that he was never told that the defendant was authorised by her daughter to sell the premises.

Mrs. Lee did not tell him that defendant was not the sole owner of the premises and that her daughter's consent was necessary. The plaintiffs did not contract to purchase the premises subject to the defendant succeeding in the claim against her daughter. Mr. Lamb became aware of the daughter's name on the title only after he had been told so by Mr. Morris. Mr. Lamb admitted that he went with the defendant to Motor Owners Mutual Insurance Association Ltd. to pay off the balance and was shown defendant's mortgage card and was told that defendant gave trouble in making her payments. Mr. Lamb did not make any enquires as to defendant's status regarding ownership of the property nor had he enquired for

asked to see the title. Mrs. Lee was present - she too did not ask to see the title. Mrs. Lee said she did not consider it important to check the title as she took defendant's word for it that she was the sole owner. I would have thought that Mrs. Lee being an experienced realtor, would have investigated the title to see that it was in good order before preparing the contract. She herself had gone with the parties to the mortgagees and had made no enquiries regarding the status of the title. This leads me to ask the question was it because of the good bargain why this was not done? The urgency at which the contract was completed would seem to suggest this.

Mr. Morris saw the parties on the 18th March, two (2) days after the agreement was signed, and then and there advised Mr. Lamb of the defect in title and what had to be done. In this regard Mr. Lamb advanced $7,500.00 towards legal fees as the defendant was unable to do so.

The evidence regarding disclosures, lead me to believe on a balance of probabilities that this was never discussed before the agreement was signed. I am of the view that neither did the defendant tell Mrs. Lee on several occasions that she was the sole owner of the premises, nor did the defendant tell the plaintiffs that her daughter's name was on the title. I do not believe that the defendant told the plaintiffs nor Mrs. Lee that she was authorised by her daughter to sell the property. I do not believe that a condition precedent existed

prior to the signing of the contract.

It is against this background that the plaintiffs seek the relief asked for. Mr. Stamp contended that the plaintiffs knew or ought to have known that the property was held in joint tenancy before the agreement was signed. This he said could easily have been discovered as there was a registered title in existence and the plaintiffs as well as Mrs. Lee had ample opportunity in discovering any defect in it when they went to Motor Owners Mutual Insurance Ltd. to pay off the mortgage debt. He argued that if Mrs. Lee is to be believed, then she must have had some doubts, sufficient to put her on enquiry as to the ownership of the property for her to be asking the defendant several times if she was the owner of the property. He argued further that Mr. Lamb could not have been relying on the integrity of the defendant when he had not known her before, and had been told by Motor Owners Mutual Life Insurance Ltd. that she had been giving trouble in making mortgage payments. He urged the Court to find that the defendant is not in breach as she could not carry out her obligations until the condition precedent had matured. The remedy therefore, he said, is a return to the plaintiff the deposit with interest.

Mr. Henry on the other hand refuted the contention that there was a condition precedent to the written Agreement for Sale, and suggested that the Court should reject this. If there was acondition precedent, he continued, this should have been in writing and the Court should be guided by the principle that extrinsic evidence should not be allowed to vary or add to the terms of the Agreement for Sale, and that the general exceptions would not be applicable. He said further, that the defendant held herself out to the plaintiffs that she was the sole owner of the property, and as such, capable to passing the title. He maintained that the defendant failed to disclose to the plaintiffs that she held the property in joint ownership and that when she signed the agreement, she warranted to the plaintiffs that:-

(a) She was fully authorsied by her daughter the registered joint tenant of the said premises, to sign the said agreement; or

(b) There was only one registered proprietor of e the said premises; or

(c) If there was another registered proprietor of

> the said premises, that person had no legal or beneficial interest in the said premises; or
>
> (d) She could procure for the plaintiffs a good title under the Registration of Titles Act, a and for a registrable transfer in respect of the said premises signed by the registered proprietor thereof.

Mr. Henry further submitted that the defendant made no effort to complete the sale, by not taking steps to conclude the pending court action nor to settle with her daughter. He argued that the rule in Bain v. Fothergill (1874) LR7HL 158, did not apply to the instant case. In this event, he said, the remedy to the plaintiffs should not be limited to a return of the deposit with interest, but damages for loss of bargain. In support he relied on the cases of Worth and another v. Tyler (1973) 1 AER 897, and Malhoutra v. Choudbury (1979) 1 AER 186. In both of these cases, the rule in Bain v. Fothergill was excluded.

The general rule for damages in contract is to put the plaintiff in the same position as if contract had been performed, which makes him entitled to the benefit of his bargain. A most important exception to this rule is to be found in the case of Flureau and Thornhill (1776) 2WM Bl 1078 which decided that, where a vendor of land failed to complete the contract through a defect of title, damages in respect of this bargain, in the absence of fraud, were not recoverable by the purchaser. The House of Lords confirmed this decision in the case of Bain v. Fotherfill (Supra) which stated the principle that:-

> "If a person enters upon a contract for the sale of real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred for the breach of the contract".

The smallest defect in title is sufficient to let in the rule. However, what constitutes a defect in title was given a narrow interpretation in Wroth v. Tyler (1973) 1 AER 897. Here, the seller's inability to convey was attributable to the right of his wife, under the Matrimonial Homes Act 1967, not to be evicted from the matrimonial home which he alone owned. Such a right requires registration to be protected against third parties, and the wife had only effected registration the day after her husband had contracted to sell the matrimonial home. Megarry J, held that the mere existence of the wife's charge without registration, did not create a defect within the meaning of the rule and that the wife's

registration immediately after the contract made no difference. It would appear here that he regarded only defects in title at the time of contracting as relevant to bring in the rule. Megarry J, congently stated the rationale of the rule as being as:-

'A rule laid down for defects in title which lay concealed in title deeds which were often, in the phrase attributed to Lord Wesbury, difficult to read, disgusting to touch and impossible to understand', which seems singularly inapposite to the effect of a modern statute upon registered land with its aseptic certainty and clarity of title. It is quite clear that the rule can and does apply where the seller is perfectly aware that his title is defective; all that is asked of him is that he should not have acted fraudulently or in bad faith.

The clearest situation for the application of the rule in Bain v. Fothergill is where the seller contracts in the belief, which subsequently is discovered to be mistaken, that he has a completely good title to convey. This was so in the case of Flureau v. Thornhill (supra). That the seller's mistake is one of law is immaterial, as in Ponsett v. Fuller (1856) 17 CB 660 where the seller, with the equitable title in an incorporeal heridatment, believed that he had full title to it, not knowing that the legal title could only have been conveyed to him by deed. The rule applies even where the seller knew at the time of contracting, although without fraud or bad faith, that his title was defective - this was the great point decided in Bain v. Fothergill. A vendor might well know that he has a defective title at the time of contracting and yet be acting with perfect bona fides if he expected that the defect would be removed by the time the contract was due for completion; the normal case in where a transfer of the property by him required the consent or concurrence of a third party which when the time came the third party refused, as is the situation in the instant case. Here the vendor acted not under a mistake of fact or law, but a mistake of expectation. Thus where the sale was an assignment of a leasehold interest that required the consent of the lessor which the lessee had expected to be forthcoming at the time of the assignment, and the lessor's consent was then refused, the rule applied; this was the position in Bain v. Fothergill itself. So too - where the land was owned by the vendor jointly with his brother as partners, and he expected, and did his best, to persuade his brother to give his consent to the

completion of the sale, the rule was applied in Keen v. Mear (1920) 2Ch. 574. Cases falling outside the rule in Bain v. Fothergill (supra) are (a) fraud and (b) bad faith.

If a vendor has induced a purchaser to contract by means of a fraudulent misrepresentation, he may be sued in tort for deceit. If the vendor believes or knows at the time of contracting that he has no sufficient title and no hope of obtaining one before due completion then this would amount to a fraudulent misrepresentation giving rise to an action in deceit. Damages for loss of bargain cannot be recovered in an action for deceit. Such an action is in tort, and in tort, the means of compensation is to put the plaintiff in the position he would have been had the tort never been committed. This measure will not compensate the purchaser for the loss of bargain.

Bad faith where the defendant has taken no steps to obtain the consent of the third party, necessary for the perfection of the title which, had it been requested, might have been given, would fall outside the rule in Bain v. Fothergill and the defendant would be liable to the ordinary measure of damages for breach of contract. This was established in the case of Day v. Singleton (1899) 2Ch. 330 CA. It was later followed in Malhoutra v. Choudbury (supra) where the Court of Appeal held that the rule in Bain v. Fothergill was excluded because the defendant showed a marked lack of enthusiasm in perfecting the title. To obtain the benefit of the rule, the vendor was required to prove that he had used his best endeavours to make a good title. Bad faith on his part, even without actual fraud, was sufficient to exclude the rule and unwillingness to use his best endeavours to make a good title constituted bad faith: The onus in on the defendant to show that if consent has been asked for, it would have been refused; in the absence of such evidence, the defendant would be liable in damages for the loss of bargain.

In the instant case, the defendant requested the consent from her daughter in order to perfect the transfer of the title to the plaintiffs, which she refused. On advise from her attorney-at-Law Mr. Morris, in a continued effort to perfect the title, the plaintiff filed an Originating Summons in the Supreme Court seeking a declaration that she is the sole owner of the premises, and that her daughter's

name be removed from the title. Is Mr. Henry's contention that the defendant made no effort to complete the sale, by not taking steps to conclude the pending court action nor to settle with her daughter valied? I hold not. Not only had she sought the consent of her daughter, but she also prayed in aid the intervention of the Courts. I do not find that she deliberately refused to bring her case to a finality.

In response to the first limb of Mr. Stamp's submissions, Mr. Henry argued that because the contract between the parties was done in great haste there was no obligation on the plaintiffs to investigate the title, and further that there was no requirement in law for a purchaser to investigate before he signs. I do not here agree with Mr. Henry. Purchasers should enquire about equitable interest with no less diligence than legal interests which they would ignore at their own peril. The motto in English conveyancing is "caveat emptor" and which is applicable here in Jamaica. The risk of incumbrance is on the purchaser, who should satisfy himself by full investigation before completing his purchase. A purchaser has constructive notice of a fact:

(1) If he omitted by carelessness or for any other reason to make inquiry which a purchaser acting on skilled advice ought to make and which would have revealed the incumbrance or;
(2) Deliberately abstained from inquiry in an attempt to avoid having notice.

A purchaser has constructive notice of all rights which he would have discovered had he investigated the vendor's title to the land. Investigation of title means the examination of documents relating to transaction in the land immediately prior to the purchase.

If a purchaser employs an agent, any actual or constructive notice which the agent receives is imputed to the purchaser. A man who empowers an agent to act for him is not allowed to plead ignorance of his agent's dealings. Where the same agent acts for both parties, any notice he acquires is ordinarily imputed to both parties.

The evidence does not lead me to believe that the defendant's claim that she is the "sole" owner of the property is based on a mistake of Law. I do not find that she made any false representations to the plaintiffs nor that she warranted to the plaintiffs that she had the authority of her daughter to

sell the said property or transfer a registered title, or give registiable transfer in respect of the said property. I do not find that she made any false representation to the plaintiffs within the meaning of deceit in Derry v. Peek (1889) 14AC 337.

I find that the plaintiffs and their agent Mrs. Lee were grossly negligent in not investigating the Title. It was there for them to discover its defect had there been any deligence on their part. The title being a Registered Title is notice to the whole world and the plaintiffs will not be allowed to say they had no notice of the defect. They are deemed to have constructive notice of the contents of the title.

The remedy in this case does not lend itself to a decree of specific performance. It does not appear as if there are any means of compelling the third party, that is to say, the defendant's daughter to concur.

As alluded to in Wroth v. Tyler (supra) the modern doctrine seems to be stated in the 6th edition of Fry's Specific Performance at page 466 & 467.

> "As the consent of a third party is or may be, a thing impossible to procure, a defendant who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be precurred, be decreed to obtain it, and thus perform an impossibility".

Persuasion having failed, I think that the court should be slow to grant a decree of specific performance that would require the concurrance of an unwilling party, that is, the defendants' daughter.

I now turn to the alternative claim of the plaintiffs' which is damages. Albeit that the rule in Bain v. Fothergill is anamalous, I find that the defendant's position is justified by the plaintiff's failure to investigate the title before entering into the Agreement for Sale. The defendant not being able to perfect the title, the extent of the relief sought by the plaintiffs will be limited to a return of their deposit with interest thereon.

There will therefore be judgment for the plaintiffs in the sum of $18,731. I will also allow the sum of $7,500 advanced by the plaintiffs to the defendant to assist in costs and a further sum of $4,888 for half cost for sale of the premises. In fine judgment for the plaintiffs in the sum of $31,129 with interest at the rate of 10% per annum from the 18th March,1986 to the 29th January,1993. I hold that an award of 10% interest is justified in the special circumstances of this case.

Costs to the plaintiff to be agreed or taxed.