

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT E 353 of 1990

BETWEEN	NEVILLE LEE	PLAINTIFF
A N D	LEOPOLD WILLIAMS	1st DEFENDANT
A N D	DELIA FEARON	2nd DEFENDANT

Mr. J. Graham instructed by
Messrs. Patterson, Phillipson and Graham for Plaintiff.

Mr. B. Samuels instructed by
Messrs. Knight, Pickersgill and Dowding for Defendant.

Heard: 19th, 20th, 23rd, 24th June, 1997
and 26th June, 1998.

MARSH, J

JUDGMENT

The delay in handing down this judgment is greatly regretted.

In an agreement for sale the Defendants Leopold Williams
and Delia(h) Primrose Fearon agreed to sell to Plaintiff Neville
Lee -

"All that parcel of land part of Surbiton
known as 11 Surbiton Road in the parish of
St. Andrew being the Strata lot numbered
2 on Strata plan numbered Three Hundred
and Thirty one A and five undivided 1/100th
shares in the common property therein and
being all of the land comprised in
Certificate of Title registered at Volume
1116 Folio 104 now registered at Volume
1193 Folio 98."

The purchase price was Two Hundred and Twenty Thousand dollars
(\$220,000.00), payable as follows:

"A deposit of \$50,000.00 on the signing of
the Agreement hereof to be paid to the
Attorneys-at-Law having carriage of Sale
herein on the execution hereof."

Balance was to have been paid on or before the 21st day of September 1990.

In a letter dated September 18, 1990, Plaintiffs Attorney returned to then Attorneys for Defendants, Scott, Bhoorasingh and Bonnick a Transfer duty signed, with Gordon Ian Lee, as transferee. This was received by Scott, Bhoorasingh and Bonnick on the same 18th day of September 1990. This letter read:

September 18, 1990

BY HAND

Scott, Bhoorasingh & Bonnick
Attorneys-at-Law
2 Duke Street
Kingston.

Attention: Mrs. Nicola Scott-Bonnick

Dear Sirs:

Re: Sale of property situate at
No. 11 Surbiton Road, Saint Andrew -
Leopold Williams et ux to Gordon Ian Lee.

Our client has requested that we return the enclosed Transfer duly executed by Gordon Ian Lee.

As you will notice, we have taken the liberty to amend the Transfer.

We look forward to hearing from you.

Yours faithfully,
Broderick & Graham

Per: John Graham

By letter, dated October 1, 1990, from Scott, Bhoorasingh and Bonnick, 2nd Defendant Deliah Fearon indicated that "She is no longer willing to sell this property." She therefore instructed her Attorneys to "return your deposit in this matter." This letter was addressed to Mr. John Graham of the firm Broderick and Graham and read as follows:

October 1, 1990

Messrs. Broderick & Graham
Attorneys-at-Law
25 Dominica Drive
Kingston 5.

Attention: Mr. John Graham

Dear Sir:

Re: Property situate at 11 Surbiton Road,
Saint Andrew - LEOPOLD WILLIAMS ET UX
TO GORDON IAN LEE Volume 1192 Folio 285.

We wish to advise that my client has instructed me to return your deposit in this matter. She indicates she is no longer willing to sell this property.

I feel obliged to comply with her instructions particularly because we do not have a signed Transfer.

Kindly acknowledge receipt of the enclosure by signing copy letter enclosed.

Yours faithfully,
SCOTT, BHOORASINGH & BONNICK

Per: Nicola Scott-Bonnick

On 9th October 1990, Plaintiff caused to be lodged with the Registrar of Titles, a Caveat against the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest unless such instrument be expressed to be subject to his claim.

Contemporaneous with the Sale Agreement referred to earlier, there was also an agreement between the parties for Sale of Chattels, namely furniture, fixtures and fittings mentioned on a schedule attached to the said agreement.

Subsequently, Neville Lee sought the assistance of the Court by way of Summons for Interlocutory Judgment supported by affidavit dated 19th December 1990 and later Summons for Summary Judgment supported by affidavit dated 3rd April, 1991.

By Writ of Summons dated 5th December 1990, the said Neville Lee, claimed against Leopold Williams and Delia(h) Fearon, the following reliefs:

1. Specific performance of agreements in writing made between Plaintiff and Defendants, for sale by Defendants to the Plaintiff of certain freehold property known as 11 Surbiton Road, in the parish of St. Andrew, being the Strata lot numbered 2 as well as the equipment, fixtures and fittings, situate thereon.
2. Damages for breach of contract in lieu of or in addition to Specific performance.
3. All other necessary and consequential accounts, directions and enquiries.
4. Further or other receipts as may be just.
5. Costs.

The statement of claim read as follows:-

1. The defendants were and are at all material times the registered owners of certain freehold property known as 11 Surbiton Road in the parish of Saint Andrew, being the Strata lot numbered Two (2) in the Strata Plan number 331 and being all the property comprised in Certificate of Title registered at volume 1193 Folio 98 of the Register Book of Titles, as well as the owners of the equipment, fixtures and fittings situate thereon and referred to in one of the Agreement for Sale hereinafter mentioned.
2. By two (2) agreements in writing made between the Plaintiff and the Defendants on or about the 6th day of July 1990, the Defendants agreed to sell and the Plaintiff agreed to buy the freehold property and the aforesaid chattels for the sums of \$220,000.00 and \$130,000.00 respectively. At the trial of this action, the Plaintiff will refer to the Agreements for their terms and full effect.

3. The Agreement for Sale of the realty provided for the payment of a deposit of \$50,000.00 and for completion within three (3) months from the date of the agreement and payment in full of all fees and costs incidental to the sale, in exchange for the duplicate Certificate of Title and a duly executed and registerable transfer in favour of the purchaser, and that vacant possession of the property would be given to the Plaintiff.
4. The plaintiff paid the sum of \$50,000.00 by way of deposit to the Defendants in accordance with the terms of the Agreement for Sale of the Realty on or about the 3rd day of July 1990.
5. The Defendant's Attorney-at-Law, Scott, Bhoorasingh & Bonnick, returned an executed copy of the Agreement for Sale to the Plaintiff's Attorney-at-Law Broderick & Graham, on or about the 6th of July 1990.
6. That on or around the 24th day of September 1990, the Plaintiff forwarded the Defendant's aforesaid Attorneys-at-Law, a letter of commitment in the sum of \$308,472.65 obtained from the Jamaica Citizens Bank Limited to Broderick & Graham and by that letter gave their own commitment to pay the sum of \$308,472.00.
7. That the sum of \$308,472.65 represented the total balance payable by the Plaintiff in respect of the aforesaid agreements.
8. In breach of the said agreements, the Defendants have wrongfully failed and refused to complete the said agreements or take any steps towards such completion and formally communicated their intention not to complete the agreements by a letter dated the 1st day of October 1990 from

- their aforementioned Attorneys-at-Law,
8. The Plaintiff is and has at all material times been ready, willing and able to complete the agreement and to fulfil his obligations thereunder.

Paragraph 4 of the Defence dated 29th July, 1992 embodies the gravamen of the defence. It reads as inter alia as follows:-

"..... the deposit was returned to the Plaintiff's Attorney by letter dated the 1st of October, 1990 indicating the Defendants intention not to continue with the sale of the premises, the deposit was accepted unconditionally by the Plaintiff's Attorney and the Defendants were thereby discharged from further performances of the contract."

Plaintiff's case

Plaintiff gave evidence at the time of the agreements into which he and Defendants had entered on a date in July 1990, namely agreements for Sale and land and of Chattels respectively. Having entered these agreements, he intended to transfer the property to Gordon Ian Lee, his son and consequently he had the said Gordon Ian Lee sign the transfer.

He spoke to 2nd Defendant concerning the agreements; conversation, he thought, had to do with the closing off of the agreements and why the hold, why the transaction was not completed. No reason was advanced for this state of affairs.

On October 1990, he was informed by his lawyer that the 2nd Defendant was unwilling to proceed with the agreements.

As a result, he caused a caveat to be entered against the property on 9th October 1990 and instructed his attorney to protect his interest "by entering a suit."

Plaintiff agreed that he was informed of the letter dated 1st October, 1990 from 2nd Defendant's Attorney that she was no longer selling but denied that he had known as a fact that the deposit had been returned. He also denied that second defendant, had, prior to October 1, 1990, called him several times asking him to pay up funds.

Defence Case

Defence called no witnesses.

SUBMISSIONS

Mr. Graham for the Plaintiff pointed out that payment of all monies was to have been made before 21st September, 1990; that both agreements were signed on or about 6th July, 1990.

Completion - three months from the date hereof.

Special condition 5 of the Agreement for Sale of land, stipulated:

"If after being given notice of Default by vendor, the purchaser shall fail to comply with any agreement on his part herein contained at or within the time stipulated the vendor may (but shall not be obliged to) rescind this agreement without tendering a transfer, whereupon the deposit paid herein shall be forfeited to the vendor, not as a penalty but as liquidated damages and the vendor shall be free to sell the realty retaining any sums realized."

This contemplates that a notice of default should have been served on Plaintiff if any aspect of the agreement had not been carried out by the Plaintiff. There is no evidence of any complaint by vendor of any default or failure of the Purchaser to do anything which ought to have been done by him in the agreement. There was no evidence that Plaintiff was aware that the deposit had been in fact returned.

Defendant's letter dated 1st October, 1990 did not indicate a single reason or complaint, only that Defendant Fearon was having a change of mind or acting on a whim. Defendant relies upon "Estoppel", if it were to be successfully invoked as a defence, defendant would have had to prove that she acted to her detriment because of Plaintiff's conduct. Further the conduct relied upon must be unequivocal. Consequently, defence pleadings are insufficient and do not conform, with the law.

Mr. Samuels, for Defendant, referred to the Affidavit of Defendant Delia Fearon, in the Agreed bundle, with special reference to para. 6 in which, Defendant asserted that

"the deposit was accepted by the
Plaintiff and encashed, and at no time
was the moneys returned or accepted
under protest."

This assertion remained uncontested by Plaintiff and Court should rely on this. Defendants had formally indicated their intention to rescind contract on part of the Vendor. Letter dated 1st April, 1990 communicated this to purchaser and his Attorney, Notice to the Attorney being notice to the purchaser.

Plaintiff accepted that the Defendant had decided not to complete the sale. Acceptance of and encashment of the cheque contained in the letter put an end to the contract.

Return of the deposit meant that Defendants acted to their detriment.

Plaintiff is stopped, by his action of accepting the refunded deposit, unconditionally from treating the contract as subsisting. But can second defendant rely on this. Why was the deposit returned?

The letter of 1 October 1990 gave no real reason only that for second defendant was "no longer willing to sell this property."

If, as cross-examination of Plaintiff suggested, it was because she had called him many times prior to 1st October, 1990 asking him to "pay up funds", then it would be expected to be subject of a Notice of Default, as provided for in Special conditions 5 of the Agreement of Sale. There is no evidence of any such Notice of Default, as provided for in Special conditions 5 of the Agreement of Sale. There is no evidence of any such Notice of Default being served on the (purchaser) Plaintiff.

The law relating to Estoppel is discussed in **Spencer Bower and Turner's "The Law Relating to Estoppel by Representation."** 3rd Edition - Sir Alexander Kingcome Turner. At para. 318 on page 324, the rule governing this kind of Election may thus be stated:

318 "The law governing this kind of election may thus be stated; where A in his dealing with B, being at liberty to adopt either of two mutually exclusive steps, proceedings courses of action, or attitudes, in relation to B, elects to take or adopt one of them, and to reject the other, or to 'waive' his right in respect thereof, and A's declaration of such election or 'waiver' by words, conduct, or inaction, influences B to alter his position to his detriment, A is estopped, as against B, from thereafter resorting to the course of action which he has thus intimated his intention of relinquishing, dispensing with, or "waiving."

An election cannot rest upon equivocal words or conduct. Defendant contends that by receiving and accepting the returned deposit Plaintiff had accepted the rescission of the contract. However, Plaintiffs conduct subsequent to the 18th day of October, 1990 quite clearly indicated that he was not accepting Defendant's default that he was not accepting Defendant's default as putting an end to the contract. He caused a Caveat to be entered claiming an estate an interest in the land, the subject of the Sale Agreement, on or about October 9, 1990.

Summons for Interim injunction dated 21st December, 1990, was filed by plaintiff against defendants and on 14th January, 1991, an order was made in plaintiff's favour restraining defendants from selling, charging or otherwise disposing of any estate or interest, in freehold property, the subject of this action.

Plaintiff further sought a Summary Judgment against Defendants.

Defendants would need to prove that the conduct in which they relied was unequivocal. Further, defendant need to prove that they acted to their detriment. None of these has been proven by defence, no evidence having been called by the defences.

Defendants by refusing to continue with the contract are in breach thereof. Nothing in the letter of 1st October 1990, presented evidence of defendant's relying upon any reason for their conduct other than that "She indicates she is no longer willing to sell this property." Defendant from this judgment seemed to have only suffered a change of heart.

Plaintiff testified that he had at all material times been ready to perform his obligations under the said Agreement for Sale.

Judgment is therefore entered for the Plaintiff as follows:-

1. Specific performance of agreements in writing made between Plaintiff and Defendant for the sale by the defendants to the plaintiff of certain freehold property known as 11 Surbiton Road, St. Andrew being the strata lot numbered 2 and being all of land registered at Vol. 1193 Folio 985 of the Register Book of Title as well as the equipment, fixtures and fittings situate thereon.
2. Costs to the Plaintiffs and all to be agreed or taxed.
3. Liberty to apply.