

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M109/90

BETWEEN

VERNA MADDEN

PLAINTIFF

A N D

FRANCIS ELLIOTT

DEFENDANT

Mrs. M. Forte instructed by Messrs Gaynair & Fraser for Plaintiff

David Batts instructed by Messrs Livingston, Alexander and Levy for defendant.

Heard: 24th, 25th, 26th, & 27th April, 1990
1st, 2nd, 3rd & 31st July, 1991 &
1st August, 1991.

Harrison, J.

By a writ the plaintiff claims damages against the defendant in deceit, in that on a day in the month of November 1980 the defendant falsely and fraudulently represented to the plaintiff that he had the authority to and would sell to the plaintiff an undetached dwelling house at 8 Gwendon Park Avenue, St. Andrew, as a consequence whereof the plaintiff sold her own dwelling house in consequence whereof the plaintiff suffered damage. Alternatively, the plaintiff claims damages in that the defendant by fraudulent misrepresentation induced the plaintiff to sell her dwelling-house as a consequence whereof the plaintiff has suffered damage.

The defendant admits that he had agreed in November 1980 to sell his said premises to the plaintiff, denies that it was contingent on the sale of her dwelling house, denies that he knew of her agreement to sell or that he induced her to sell her dwelling house and states that he did represent to the plaintiff that he had and did then have his wife's authority to sell the property but did not change his mind until early in March 1981 when his wife refused to sign the relevant agreement for sale.

The Court found inter alia the facts following.

1. In November 1980, the plaintiff lived at 16 West Path, Calabar Mews Townhouse, Red Hills Road in the parish of St. Andrew. She decided to remove and wished to purchase a house in the Norbrook or Stony Hill area.
2. Both the plaintiff and defendant were then attending an evening course.

The plaintiff mentioned her desire to the defendant who informed her that he had such a property for sale, told her that it adjoined his own residence, that he was getting separate titles and invited her to view it.

3. The plaintiff visited the property at 8 Gwenden Park in November 1980, was taken by the defendant and shown the premises and house and met and spoke to the defendant's wife on that occasion.

(a) The plaintiff said in examination in chief, "I went to defendant's house. I met his wife November 1980. I saw Mrs. Elliott - she offered me a seat and asked me to wait - Defendant Elliott eventually came out."

(b) The defendant's witness, his wife Patricia, said in examination in chief " I know plaintiff. I first met her sometime in January, 1981, she came to our house", and in cross-examination, "Not so plaintiff's visit in November 1980."

(c) In cross-examination of the plaintiff, it was suggested that she first met Mrs. Elliott in January 1981 - The plaintiff denied this. There was no suggestion to the plaintiff that she did not visit the property in November 1980.

(d) The defendant stated in evidence that the plaintiff visited the property in January 1981 and that he did not recall a visit by her in November 1980. Neither did he recall a visit by her with her witnesses Aulus Madden and Emery Woodstock.

Curiously, neither Madden nor Woodstock was challenged when each stated that he visited the said property in November 1980.

More importantly, the pleadings, in paragraph 1 of the defence, confirms the evidence of the plaintiff and that in November 1980, there was an oral agreement made between the plaintiff and the defendant to sell the said property.

(4) The plaintiff informed the defendant that she would have to sell her property at Calabar Mews in order to purchase his property - She told the defendant that, at the time of the first conversation and also when she visited and inspected the property with her brother and the witness Woodstock.

Both witnesses for the plaintiff confirm the latter conversation and neither witness was challenged. The Court accepts the unchallenged evidence of these two witnesses and that of the plaintiff as truthful.

(5) The defendant's wife probably decided in November 1980 not to sell the property to the plaintiff.

(a) Patricia Elliott said in examination in chief "I told defendant I re-considering sale of house. I first told the defendant this just about same time plaintiff came to visit property - after she left."

She then said, in cross-examination, Just about in January I re-considered my decision to sell - In January coming up to March, in fact."

The defendant said, in cross examination,

"In January 1981 -- wife intimated to me changed mind about selling ... wife indicated a change very evening plaintiff left. I knew she intended not to sell from then ..." He continued, "... but from my experience with my wife she could have changed her mind again."

(6) Acting on the oral agreement in November 1980, the plaintiff visited property with Madden and Woodstock. The witness Woodstock also confirms the evidence of the plaintiff that she discussed with the defendant's the modification of the frontage of the property to look like the defendant's and "he said he would have no objection." This was unchallenged.

(7) On the Tuesday following the Sunday on which the plaintiff and her witnesses viewed the property, one Miss Josephs come to the plaintiff and offered to buy her house. The plaintiff advised the defendant by telephone that she had "found a purchaser for my house." Asked, the defendant confirmed that he was "definitely selling me the house ..."

In cross-examination the defendant stated,

"Not recall her telling me that she had obtained a purchaser for her house", but agreed that,

"Plaintiff called me several times re purchase of my house."

The Court finds that the plaintiff did so advise the defendant and prefers the evidence of the plaintiff on this point.

(8) The plaintiff agreed with the defendant on a date on which the valuers

could come to value 8 Glendon Drive. The plaintiff paid a valuation fee on 2.12.80 and the valuator's report was prepared on 10.12.80.

The defendant admitted in cross-examination that "it could be correct that she called me before valuator came."

He stated however, that,

"Plaintiff had valuation done before she visited my house." The Court finds this as quite unlikely.

(9) The plaintiff signed an agreement for sale of her property at Calabar Mews on the 11th December 1980. She applied on 3.2.81 for a mortgage to purchase the property 8 Glendon Park Avenue. She was advised on the 12th day of February 1981 that she had been granted the said mortgage in the sum of \$45,000.

The plaintiff paid to her attorneys \$5,600, the 10% deposit on premises 8 Glendon Park, vide receipt 9th day of March 1981.

Previously by letter dated the 30th of January, the vendors's attorneys advised the plaintiff's attorneys that,

"... we have now received instructions in this matter and take pleasure in endorsing herewith, Agreement for Sale in triplicate.

Kindly return the Agreements to us for execution by the vendors together with your client's deposit after execution by the Purchaser."

By letter dated February 16th February 1981, the plaintiff's attorneys returned the said agreement for sale to the defendant's attorneys requesting certain amendments.

By letter dated 27th February 1981, the defendant's attorney at law returned the said agreement to the plaintiff's attorneys at law duly amended, requesting its return "duly signed together with the required deposit."

By letter dated the 11th March 1981, the defendant's attorneys advised the plaintiff's attorney that the defendant had withdrawn "their offer to sell the said premises effective immediately ..."

By letter dated 16th March 1981 the plaintiff's attorney sent the signed agreement for sale along with the deposit. Both were returned by the defendant's attorneys by letter dated the 2nd April 1981, re-iterating the withdrawal of the sale.

The plaintiff made several telephone calls to the defendant who did not return the calls. The plaintiff failed in her attempts to purchase other premises, much to her anxiety and distress. The plaintiff stated that she cried.

The plaintiff gave possession of her home at Calabar News on the 31st day of May 1981 and found with some difficulty, and lived in rented premises at 15 Wickham Avenue from 1st June 1981 to 24th April 1984. She paid rental of \$300 per month. The plaintiff bought a lot of land, on which she built a house into which she moved in April 1984.

The plaintiff gave notice to her mortgage company in respect of the sale of Calabar News on 11.12.80. On the payment off of the mortgage on Calabar News the plaintiff incurred a penalty of three (3) months mortgage payment due to late notice to the mortgage Company. The monthly payment was \$270. The plaintiff led evidence from one Mervin Down that the value of the Calabar News premises similar to the plaintiff's, would be, in December 1980 \$30,000 to \$35,000, in 1981 \$42,000, and in 1984 between \$90,000 to \$100,000.

The plaintiff may well have told Miss Josephs that she was selling because she intended to go abroad to study - though a point in conflict, it is not material.

The defendant stated that he did not recall the plaintiff visiting the property in November 1980 nor did she visit with Woodstock and Madden, but recalls a visit in January 1981. The defendant further denied that the plaintiff told him that she would have to sell her house in Calabar News nor did she tell him so.

The defendant however admitted, in cross-examination, that he lied when he had said in evidence that he did not know that the plaintiff had a house in Calabar News.

The Court notes also that para.2 of the defence reads "except that the plaintiff informed the defendant that she proposed to sell her property at West Path, Calabar News, the defendant knows nothing of the matters set out ..."

This is a recital portraying such knowledge in the defendant. The defendant stated that the plaintiff had the valuation done and they

agreed on the sale price before she visited and saw the property.

This Court finds this most unlikely and rejects the defence on these points.

Although the defendant stated "In January 1981 my wife intimated to me she changed her mind about selling", the pleadings in para.10 of the defence recited the change of mind as being in March 1981. The defendant stated further, in cross-examination,

"Wife indicated a change very evening plaintiff left. I knew she intended not to sell from then ... but she could have changed her mind again ... I indicated about mid March to my lawyers that I not selling."

The defendant's witness Patricia Elliott stated that when she "met plaintiff for first time I had reasons to reconsider" and told defendant "about the same time plaintiff come to visit property after she left" that she was reconsidering the sale of the property. This witness stated that she and defendant had "continuous agreements" - but the next discussions were in "February or March."

She said in cross-examination,

"Just about in January I reconsidered my decision to sell. In January coming up to March, in fact."

The Court found the evidence of this witness evasive and indecisive. It is unlikely that she would have given the keys to the plaintiff, a total stranger, to visit and inspect, a tenanted property, which up to then, she as vendor was eager to sell. Certainly the Court cannot accept either that this witness took no part in the discussion between the plaintiff and the defendant, on the verandah on the plaintiff's visit - but sat throughout as a silent watcher.

Mrs. Forte for the plaintiff argued that in November 1980, the defendant and his wife orally agreed to sell to the plaintiff the said property, making a representation of an existing fact "We have agreed to sell". Acting on this representation, and with further assurances from the defendant, the plaintiff sold her own house in order to effect the purchase. The defendant knew that the purchase of his property was contingent on the sale by the property of her house. She submitted further that if the defendant's wife changed her mind and therefore thereafter the defendant did not have any

genuine belief but held out that he was acting on behalf of himself and his wife that his wife still held to the agreement that would be fraudulent. A representation of fact or conduct, with knowledge that the representation was false or wilfully without any genuine belief in its truth and intending the plaintiff to act on it and he did so incurring damage, amounts to the tort of deceit. The defendant had a duty to communicate with the plaintiff any change of circumstances, namely, the change of mind of his wife.

However, counsel for the plaintiff argued that it was a sham and pretence on the part of the defendant to escape the obligation of an agreement to say that his wife changed her mind. The plaintiff would not have sold her house but for the representation by the defendant and in addition, suffered physical inconvenience and therefore is entitled to damages, namely, the difference between the sale price of her own house and its value in 1984 or alternatively, today, plus the money expended for the valuation.

Miss Forte in support of her arguments cited Bradford Building Society vs. Borders [1941] 2 AER 205, Kafo vs. Adams [1969] 3 AER 1404, Smith Kline et al vs. Long [1938] 3 AER 887 and Director of Public Prosecutions vs. Ray [1973] 3 AER 131.

Mr. Batts for the defendant argued that no misrepresentation had been proven because the defendant at all times honestly intended to and believed he was going to sell the property to the plaintiff, that this was a case of a broken promise which was not actionable and that the cause of action of deceit demanded a high balance of probabilities which was not supported by the evidence. He conceded that if during the course of the discussions the defendant knew that there was no possibility of passing the property because of his wife's opposition and did not disclose it - that would be fraudulent - but contended that the defendant first knew this fact in January 1981. He conceded further that discrepancies arose on the defence's case, but argued that the defendant may not have recalled certain facts.

Counsel argued further, that assuming liability was found on the part of the defendant, the plaintiff should have mitigated her loss and

with the capital received from the sale of her property bought comparable property instead of taking rented premises. No loss was suffered by the plaintiff, as a result of the sale of her property; there was no allegation of a sale under value, nor did the defendant have anything to do with, nor did he encourage the plaintiff to effect that sale. The plaintiff received more than the then current market value, and the evidence of appreciation of the said property is immaterial and irrelevant. Mr. Batts submitted that the defendant changed his mind to sell the property to the plaintiff in March 1981. He relied on cases Jordon vs. Money [1843-60] ALL E.R. Reprint 350, Maddison vs. Alderson [1881-5] ALL E.R. Rep. 742, Chadwick vs. Manning [1896] A.C. 23, Suleman vs. Shahsavari [1988] 1 WLR 1181 and Bromley vs. Attorney General [1988] N.Z.L. R.75.

The tort of deceit is committed where one person by a knowingly false statement, intentionally induced another to act upon it to his detriment - see Fleming's, the Law of Torts, 7th edition, Page 597.

The representation must be one of fact not promise. Mere silence is not actionable as creating an obligation.

However, "one who makes a false statement honestly believing it to be true but later discovers that it was false or one who makes a true statement which later events falsify must correct it at any time before the deal is finally closed." Fleming, the Law of Torts, page 597.

There is an obligation to make a disclosure in such circumstances - With vs. O'Flanagan [1936] 1 A.E.R 727. The defendant, a medical practitioner represented to the plaintiff, a purchaser of his medical practice, that the said practice brought in a certain specific amount and comprised a stated amount of patients per annum. This statement was true when it was made. The defendant subsequently got ill and his said practice dwindled to "practically nothing." The contract of sale was then signed. The defendant did not disclose to the purchaser these changed circumstances. It was held by the Court of Appeal, that though the statements were true when made, had become untrue subsequently and therefore the defendant was under an obligation to disclose this fact to the plaintiff the

The plaintiff entitled to rescind the contract.

Lord Wright, at page 735, quoting Lord Blackburn in *Brownlie v. Campbell* (1880) 5 App. Cas. 925, said of the representation.

"When a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to the knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly perserved in".

In Derry vs. Peck (1889) 14 A.C. 337, it was held that deceit lies only for a knowingly false representation.

In *Bradford Building Society vs. Borders* [1941] 2 AER 205, the appellant building society was held not liable in deceit for the fraud of builders of houses effected by false representations in a brochure issued by the said builders. The building society had agreed to finance the project.

Viscount Maugham pointed out the factors to be established in order to establish the tort of deceit, at page 211,

"First there must be a representation of fact made by words, or ... by conduct ... Secondly, the representation must be made with a knowledge that it is false ... Thirdly, it must be made with the intention that it should be acted upon by the plaintiff. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing."

The defendant Francis Elliot entered into an oral contract, along with his wife, with the plaintiff for the sale of the Gwenden Park property; this contract was not enforceable. The defendant was therefore initially making a true representation of fact, namely that his wife and himself intended to convey the legal estate in the said property to the plaintiff, and that he and his wife had the power to so convey it. The defendant's act of continuing discussions with the plaintiff was a maintenance of that

posture, that is, that he the defendant had his wife's authority to continue to negotiate and that the initially true intention remained unchanged.

The fact that the defendant's wife changed her mind was a material fact showing that he no longer had her authority to proceed with the arrangement for sale and so he did not have any longer the power to convey the legal estate therein to the plaintiff. It was no longer a true statement of fact, and therefore the defendant was under an obligation to disclose the change of circumstances to the plaintiff.

This Court finds that the meeting and visit to the said property was in November 1980. The defendant was therefore aware from the evening after the plaintiff's visit ended that his wife had changed her mind. He should have disclosed to the plaintiff, this material fact, as so relieve the plaintiff of the expenses of continuing the negotiations and plans of a prospective purchaser pursuing a bona fide contract of sale, and the pain of disappointment. Even, assuming that, on the defence's case, (which this Court, does not so find) the plaintiff's first visit was in January 1981, the defendant was under an obligation to then declare the changed circumstances. He did not even advise his own attorneys at law until March 1981. One cannot fail to note the continuing correspondence between the respective attorneys between the period January and March 1981.

The plaintiff was therefore continuously led to believe that there was no obstacle to the passing of the legal estate - this was a misrepresentation of fact.

The defendant knew that the plaintiff intended to sell her own house at Calabar Mews. This Court is not convinced that the sale of the latter house was absolutely necessary in order to purchase the Gwendon Park property.

The plaintiff made an initial deposit of \$5,600 on the sale price of \$56,000. She obtained a mortgage of \$45,000.

She sold her house for \$37,000. There is no evidence of her net proceeds after the discharge of the mortgage on her own house.

The short fall in her financing in the purchase of the Gwendon Park house was \$5400 plus costs.

However, the Court finds that this is not a circumstance that materially affects the main issues.

Damages in the tort of deceit are at large. However such damages must not be remote. The plaintiff must be compensated in damages for all the actual loss flowing from the fraudulent conduct -- on the basis of restoring the plaintiff to the position in which she would have been if the tort had not been committed, vide Doyle vs. Olby (Ironmongers) Limited et al [1969] 2 AER 119.

The plaintiff's witness Down, stated, that in December 1980 premises similar to the plaintiff's at Calabar Mews would be valued at \$30,000 to \$35,000. The plaintiff by selling to Miss Josephs for \$37,000 obtained a price above the market value and therefore suffered no loss by that sale. On her evidence she would have sold the said premises if the sale to the defendant had materialized. A person who is wronged must mitigate her loss, but can select the locale in which she chooses to live. She could find no comparable and affordable alternative property to buy and so was forced to acquire rented premises. The plaintiff had been paying a monthly mortgage of \$270 and now had to pay rental of \$300 per month, an increase in expense of \$30 per month. This she is entitled to recover. She is not entitled to the difference in the market value of her house as at December 1980 and 1984 as claimed.

If the defendant had disclosed the reluctance to sell, as he was obliged to, the plaintiff would not have had the valuation done nor incurred the penalty from her mortgage company.

In the circumstances there shall be judgment for the plaintiff against the defendant in deceit.

The damages recoverable are:-

(1) the difference between the former monthly mortgage payment and the rent paid from 1.8.81 to 31.4.84

35 months @ \$30 per month

\$1050.00

(2) Three (3) months' mortgage - penalty @ \$270	
per month	\$810.00
(3) Valuation charges	132.00
	<hr/> \$1992.00

On a further submission by Mrs. Forte for the plaintiff the Court awards for General damages, on the basis of the case relied on by the plaintiff - Mafo vs. Adams, for physical inconvenience an amount of \$10,000.00.

The Court awards,

Special Damages	\$1992.00 & interest @ 5% from 11.3.81 to date.
General damages	\$10,000.00 & interest @ 6% from 12.8.81 to date

and costs to be spread or taxed.

On 1.8.81

The Court had stated, in its judgment on 31.7.91 that the general damages are awarded on the basis of the decision in Mafo vs. Adams..

The compensatory damages therein awarded was £100 for physical inconvenience.

The court used a figure of £1000 instead of £100 and consequently the said damages were given as \$10,000.00 instead of \$1000.

Accordingly in its inherent jurisdiction to correct errors and clerical slips, this Court amends the award to read "General Damages in the sum of \$1000 with interest @ 6% from 12.8.81 to date."