

SUIT NO. E. 97/1974

BETWEEN

CLINTON OSBOURNE McGANN

PLAINTIFF

AND

17/2/76 ADMINISTRATOR GENERAL FOR JAMAICA

(ADMINISTRATOR ESTATE OF EDGAR McGANN DECEASED)

LYNFORD A. McGANN

DEFENDANTS

ROY A. McGANN

Appearance:- Mr. Hugh Small, with Mr. P. Rikards, instructed by
Messrs. Orville Cox & Company, for plaintiff,
Mr. D. Muirhead, Q.C., instructed by Mr. Glen Miller of
Messrs. Hew & Bell, for 1st and 3rd defendants,
Mr. H. Haughton Gayle, Attorney, for 2nd defendants.

J U D G M E N T

When this case came on for trial Mr. Muirhead appeared for the first and third defendants - the Administrator General for Jamaica as administrator for the Estate of Edgar McGann and Mr. Roy A. McGann - and informed the court that the first and third defendants were withdrawing from the action and would no longer be defending.

As a result the case proceeded between the plaintiff and the second defendant only - Mr. Lynford McGann.

The plaintiff's claim is for specific performance of an agreement in writing dated the 6th day of August, 1971, made between the plaintiff as purchaser and his brothers Edgar McGann, Lynford McGann, Robert McGann and Roy McGann as vendors whereby the vendors agreed to sell to the plaintiff their shares and interests in Windsor Lodge a property situated at ~~Mavis Bank~~ in the parish of Saint Andrew and containing 315 acres (of which the plaintiff and vendors were tenants in common) for \$46,840.00; there was an alternative claim for damages for breach of contract.

In support of his claim the plaintiff produced various documents in evidence and gave evidence, inter alia, of the signing of the agreement

for sale at the St. Joseph's Hospital on 6th August, 1971, by Edgar - McGann (who was then a patient there) and the other brothers, the question of the sale having been previously discussed and agreed among the brothers, and Mr. C. G. Plummer having been asked to value the property to order to fix a fair price and having submitted his report.

The plaintiff further gave evidence of handing the signed agreement for sale together with \$2,000 by way of deposit to Mr. Orville Cox, Solicitor.

In his defence the second defendant admitted the agreement for sale of 6th August, 1971, but alleged that there was a prior collateral agreement between the plaintiff and himself that if he entered into the agreement for sale the plaintiff would not interfere with the defendant's operation of some 10 acres of garden, etc., which the defendant had on the said land, and that the plaintiff further agreed that the defendant would produce chickens to supply to him on contract; the reason the defendant stated for this action by the plaintiff is that the plaintiff told him he desired to raise a loan in order to expand his poultry farm to produce broilers. This conversation was alleged to have taken place in the early part of 1971, and the defendant orally agreed to enter the written agreement subject to his being allowed to operate his garden indefinitely and without interference and subject to his being given the chicken - contract the plaintiff agreed. The defendant further alleged fraud on the part of the plaintiff and set out particulars.

In support of his allegations the second defendant gave evidence and called his brother Roy.

Looking at the witnesses who gave evidence I formed the view that

the plaintiff gave his evidence in a frank and forthright manner and he impressed me as a truthful and reliable witness who was not in all shaken in cross-examination.

The second defendant Lynford McGann was not particularly impressive in examination in chief, and in cross-examination he was seriously discredited by documents made by him which clearly conflicted with his testimony, and for which there was no reasonable explanation. The evidence of the defence witness, Roy McGann was to my mind coloured by the very strained relationship existing between himself and the plaintiff, brought about by politics and other factors; this witness, too, was seriously discredited in cross-examination.

Looking at the version of the events given by the defence it seems to me to be rather improbable and inconsistent with written documents in evidence and unchallenged. On the other hand the plaintiff's story was straight forward and consistent with the documents adduced in evidence.

Consequently, I have no difficulty in accepting the plaintiff's evidence and rejecting the defence of the collateral agreement and the allegations of fraud.

I find :-

- (1) that the plaintiff paid the deposit referred to in the agreement for sale;
- (2) that the plaintiff was ready, willing and able to complete his part of the agreement for sale;
- (3) that the ~~facts~~ do not support the allegations of fraud;
- (4) that there was no collateral agreement between the plaintiff and the second defendant.

I found it a little suprising that so much emphasis was placed on the payment of the deposit by the plaintiff to Mr. Cox, when as I recall, not one question was asked about it in cross-examination. In any event, I find no merit in the submission made in regard to the deposit as Mr. Cox had up to then, it appears, been acting for the parties in regard to the survey and title to Windsor - Lodge and it is highly unlikely that any of the brothers did not know that the deposit had been paid to Mr. Cox; if they did not wish this, they would have raised the matter or have had a different arrangement made.

Having regard to my findings on the evidence it seems to me that the written agreement for sale dated 6th August, 1971, ought to be - specifically performed and I order and adjudge the same accordingly.

Before I deal with the question of costs there is one other matter to which I should refer, and it is to the question of the second defendant's claim for damages or compensation; as I understand it, in the light of my findings above, no question of an award of damages to the second defendant arises. On the question of compensation, it seems to me that there are certain limited cases in which the court has power to order payment of compensation where hardship results to the defendant in consequence of the making of an order for specific performance, but as I understand the authorities, such hardship must have existed at the time when the contract was made; this has no application to the present case, as such hardship as exists arises, as I understand it, from the buildings or installations erected by the second defendant since the agreement was made; I accept the evidence that the second defendant had no buildings or installations

142

of any substantial value on the land prior to the date of the agreement for sale.

On this aspect of the case Mr. Gayle submitted that the doctrine of estoppe applied, and that in consequence the court should make an order awarding some compensation to the second defendant, On this submission it seems to me firstly, that the doctrine of estoppe has no application here, and secondly, that even if it had, the evidence forming the basis on which the court could properly assess reasonable compensation is not before the court.

In regard to costs, at the commencement of this action, on the withdrawal from the action of the first and third defendants, it was ordered as follows:-

"Cost against the 1st defendant waived by the plaintiff, costs of an incidental to proceedings up to this stage incurred by the plaintiff and occasioned by the defence of the 3rd defendant be borne proportionately by 3rd defendant, and any other parties against whom the plaintiff might succeed, and such costs be agreed or taxed".
Consequently these costs will now be borne by 2nd and 3rd defendants.

All subsequent costs of this action incurred by the plaintiff to be taxed or agreed and paid by 2nd defendant.

Mr. Gayle applied for a stay of execution of judgment for 6 weeks, after **hearing** submissions this application was refused.