IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-195 OF 1980

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| BETWEEN | LEONARD HORACE BUNNY MCLEAN | PLAINTIFF |
| A N D | HERBERT HARRISON ESPEUT | |
| A N D | RITA ESPEUT | DEFENDANTS |

Mr. Anthony Pearson for the plaintiff

Mr. Donald Scharschmidt, Q.C. instructed by Mr. Douglas Brandon of Messrs. Livingston, Alexander & Levy for defendants

HEARD: JANUARY 23; NOVEMBER 7, 8 AND 16, 1990; MARCH 21, 1991

PANTON, J.

The plaintiff is an attorney-at-law of over twenty-six years' standing. He filed the statement of claim on his own behalf. Subsequently, that pleading was amended. In the amended claim, the plaintiff alleges that on or about June 6, 1977, there was an oral agreement, evidenced by writing, between him and the defendants in relation to the sale of certain property at Constant Spring, Saint Andrew, at a price of Fifteen Thousand Dollars ($15,000.00). There is an allegation that the plaintiff was placed in possession; and that he was required to pay a deposit of Three Thousand Dollars ($3,000.00). This deposit, it is alleged, was paid to the defendants on April 8, 1980.

Due to the defendants' alleged failure to complete the agreement, despite the plaintiff's alleged readiness and willingness to fulfil his obligations under the agreement, the plaintiff now claims -

(1) specific performance of the agreement; or

(2) damages for breach of contract; or

(3) recission of the contract, with repayment of the deposit and interest; and

(4) a declaration that the plaintiff has a lien on the property by virtue of the deposit.

The defence denies the existence of any oral agreement or any writing that amounts to evidence of an oral agreement. The defence further denies that the plaintiff was placed in possession, or that there was any provision or arrangement for the plaintiff to pay a deposit. If there was a contract, the defence contends that time was of the essence, and that although the plaintiff

knew, he failed to fulfil his obligations in time.

THE EVIDENCE

The plaintiff lives on the premises that adjoin the land in respect of which these proceedings have been brought. Those premises were bought from the defendants. That transaction was conducted in a formal way, in that there was a written agreement. According to the plaintiff, he entered into separate contracts at the same time (June 6, 1977) in relation to both lots. The lot on which he now lives had a dwelling-house at the time whereas the other property which is the subject matter of this action had only a part of a shed on it - the other part of the shed being on the lot with the dwelling-house.

The plaintiff testified that the male defendant had suggested to him that it would have been a good thing if he were to acquire the land in question. He (the plaintiff) informed the male defendant that he would have had to raise a bigger mortgage, and that time was against him, so he would have preferred to deal first with the lot with the house.

The plaintiff further testified that they then made an oral agreement that he would buy the lot with the dwelling house for Fifty Thousand Dollars ($50,000.00) and the other lot for Fifteen Thousand Dollars ($15,000.00). He was informed that he could take possession of the lot. This, he said, he did and since then he has been paying electricity bills in relation to the shed referred to earlier. He produced one bill dated October 1989 (Exhibit 8b) in relation to that shed. He has, he said, also been keeping the lot cut and mowed as he regards it as his.

In July, 1977, the defendants migrated. In a letter dated December 15, 1978, (Exhibit 1) that is, eighteen months after the alleged oral agreement, the plaintiff wrote thus to the defendants:

> "Mr. & Mrs. Herbert Espeut,
> 641 East 62nd Street,
> Hialeah,
> Florida 33013,
> U. S. A.
>
> Dear Sir,
>
> Re: Premises 3 Long Lane,
> St. Andrew.
>
> I write in connection with this matter.
>
> You will no doubt recall that just before you left Jamaica last year for the United States of America you entered into an agreement for the purchase and sale of the remainder of premises at No. 3 Long Lane.

"In short I was in the process of purchasing the land and building described as Lot No. 2 on the plan of No. 3 Long Lane, St. Andrew and registered at Volume 1096 Folio 612 of the Register Book of Titles.

"I am getting in touch with the Manager of the Bank of Nova Scotia Jamaica Ltd. Victoria & Blake Road, Kingston to find out what is the outstanding balance of your accounts with him.

"The reason for so doing is that I am suggesting to you that we now enter into an arrangement, that is to say, Rita and you on the one hand and me on the other whereby I would undertake to liquidate the outstanding balance with the bank and then pay to you or your agent here in Jamaica the difference between that sum and the sum of $15,000.00 for the 3 remaining lots of land, which was agreed between yourself, your wife and myself as being the purchase price offer to me for these remaining lots at No. 3 Long Lane, St. Andrew.

Please let me hear from you early whether this arrangement within the terms of our agreement meets with your approval.

Yours faithfully,

Per: R. Stephenson
L. H. BUNNY McLEAN

The defendants replied by letter dated January 22, 1979 (Exhibit 2). They replied as follows:

"Dear Bunny:

Re: Land - 3 Long Lane, St. Andrew

We are in receipt of your letter dated 15th December, 1978 and hereby agree to your paying off the amount owing to the Bank of Nova Scotia Victoria & Blake, Kingston.

The difference between the sum of Fifteen Thousand and the amount paid to the Bank is to be paid over to Mr. Robert Miret.

Yours faithfully,

Herbert H. Espeut
Rita L. Espeut"

The plaintiff testified that having received Exhibit 2 the first action he took was to ascertain the approximate amount owed by the defendants at the bank. This enquiry, he said, was made in late 1979 - that is, nearly a year later. He learnt that the sum of Twelve Thousand Dollars ($12,000.00) was owed. It follows that there was a difference of Three Thousand Dollars ($3,000.00) between this debt and the purchase price.

The next step that the plaintiff took was to secure a manager's cheque for Three Thousand Dollars ($3,000.00) payable to himself which he endorsed

with instructions to pay Robert Miret (as requested in Exhibit 2). The manager's cheque was dated April 1, 1980 - that is, about four months after the plaintiff had ascertained the balance at the bank.

The next move by the plaintiff was to seek Robert Miret. He was not found; so the plaintiff despatched the cheque drawn in Jamaican dollars to the defendants who were living in the United States of America where Jamaican money is valueless. The cheque was returned to him in 1981.

The plaintiff further testified that in 1980 (apparently after he had secured the manager's cheque) he approached the bank in connection with the loan, only to learn that the defendants' account had been closed.

In answer to the Court, he said that he had no plan to follow the order in which the defendants had been paying their instalments at the bank. His original intention was to settle the account in 1979 but when he found it impossible to raise the money to do so he postponed the settlement to 1980. He communicated neither his original intention nor his revised plan to the defendants. Indeed, he testified that he did not feel that he had any particular time within which he should have settled the defendants' debt.

Under cross-examination, the plaintiff informed the Court that he never recorded the agreement in writing as he "was so happy to have got a piece of real estate for the first time in (his) life so that that aspect of things never came to (his) mind". The purchase price was agreed at $15,000.00 but he intended to pay more than that. The agreement, he said, changed complexion on a number of occasions - at least twice. He accepted that the longer he took to pay the bank the less the defendants would receive. This, he later said, was a slip of the tongue as he did not agree with that last answer that he had given.

Under further cross-examination, he denied that he had merely had a discussion with the defendants on June 6, 1977, about the lot. The transactions, he insisted, were concurrent as he had asked the defendants to "split the contract into two".

Under further challenge to explain why one contract was written and the other oral although they were supposed to have been made on the same day, the plaintiff said that the urgency of the first contract dictated that it should

Although the male defendant acknowledges that there were contractual relations between himself and the plaintiff as a result of the exchange of letters, he was forced to sell the second lot as the bank was pressuring him, interest was piling up and the plaintiff had not fulfilled his side of the bargain.

QUESTIONS FOR DETERMINATION

The questions for the determination of the Court may be posed thus:
Firstly; was there an oral contract between the parties on June 6, 1977?
Secondly; is there any evidence in writing of such a contract?
Thirdly; are there any acts of part performance by the plaintiff?
Fourthly; if there was an enforceable contract, was there a breach of it by the plaintiff thereby entitling the defendants to treat the contract as at an end?

In arriving at answers to these questions, the Court has had to consider not only the content of the evidence given by the plaintiff and the male defendant but also their demeanour.

It is apparent that there is much variance between the plaintiff's pleadings and his evidence. The question of the payment of a deposit is in point. This is perhaps the most significant discrepancy.

Due to variances of this nature and the fact that in evidence, the plaintiff even contradicted himself, the Court did not find the plaintiff reliable enough to repose much faith in his testimony in order to resolve areas of conflict. On the other hand, the defendant was found to be reliable and straightforward.

The Court found it extremely interesting that the plaintiff, in attempting to pay money to Robert Miret, instead of securing a cheque in Miret's favour had the cheque issued in his (plaintiff's) favour, then endorsed it in favour of Miret.

Was there an oral contract on June 6, 1977?

So far as the discussions of June 6, 1977 are concerned, I observe that the plaintiff is saying that from that moment there was a contract between

him and the defendants in relation to the second lot.

I find it improbable that any agreement was arrived at in relation to the second lot yet it was not put in writing as happened in relation to the other lot. What would be the reason for not then drafting the other contract? The plaintiff has advanced a reason - that is, that there was more urgency so far as the contract involving the house was concerned. Coming from an attorney-at-law who by then had realized that the alleged contracting parties were migrating, the excuse is ridiculous and unacceptable. I find that the true position was that the defendants wished to sell to one buyer if it were possible; that they gave the plaintiff the relevant details and all the parties hoped that someday the plaintiff would have been in a position to enter into a contract. So, I find that there was no oral contract in June, 1977 in relation to the subject matter of this action.

Is there any evidence in writing of a contract having been made in June, 1977?

I look now at the documents that the plaintiff alleges amount to evidence in writing of a contract having been in existence since June, 1977.

It is true that Exhibit 1 written by the plaintiff to the defendants refers to them having "entered into an agreement for the purchase and sale of the remainder of premises at No. 3 Long Lane". In it the plaintiff suggested to the defendants that they should then "enter into an arrangement" relating to the payment of the price. The response from the defendants simply acknowledged receipt of the letter and expressed agreement with the plaintiff paying in the manner suggested in his letter.

In my judgment, as I have already indicated, I prefer the oral evidence of the defendant that there had been no agreement. There had been discussions but no agreement. It follows that that statement in Exhibit 1 was false. Although that statement was false, there would have ~~been no~~ point in the defendants challenging it ~~when they~~ responded in Exhibit 2 as they were then entering into a contract with the plaintiff to dispose of the lot. As I see it, there was no contract in June, 1977 but there was one when the defendants penned Exhibit 2 and placed it in the post. I shall return to this contract later. It is only necessary at this stage to remind ourselves that the plaintiff is saying that

there was a contract in June, 1977 and that Exhibits 1 and 2 merely evidence that contract.

Section 4 of the Statute of Frauds reads thus:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised".

The plaintiff is urging that Exhibits 1 and 2 amount to a "memorandum" as contemplated by the section.

As I understand it, the "memorandum" ought to contain all the terms of the alleged contract. In Tiverton Estates Ltd. v. Wearwell Ltd. (1974) 1 A.E.R. p. 209 at p. 218 and 219, Lord Denning, M.R., referred to the omission of material terms in a "memorandum". It did not indicate that within a short time of completion, the vendors would move out, giving vacant possession of the parts of the premises occupied by them. Nor did the "memorandum" contain a term as to a rate of interest that had been agreed between the parties. Those terms were regarded by Lord Denning as material so there omission from the "memorandum" resulted in it being invalid for the purpose of making the contract enforceable. In Tweddell v. Henderson (1975) 2 A.E.R. 1096 Plowman, V.C., held that the non-inclusion in the memorandum of terms relating to stages of payment of the purchase money, and of variations as to the design of a building (they being material terms) was fatal.

In the instant case, the plaintiff is boldly alleging in his amended statement of claim that there was an agreement that a deposit of Three Thousand Dollars ($3,000.00) was payable. The payment of a deposit is an important term of a contract. The "memorandum" being relied on is silent on the question of payment of a deposit. This shortcoming is, in my view, fatal to the plaintiff's case - if there was an oral contract in June, 1977. There is, accordingly, no evidence in writing to meet the requirements of the Statute of Frauds.

Are there any acts of part performance by the plaintiff?

The plaintiff claims to have been placed in possession of the land, and asserts that his payment of light bills for electricity supplied to a shed thereon

and the mowing by him of the grass on the land indicate that he is in possession and that there has been part performance of the contract between him and the defendants. The contract referred to here is of course that alleged to have been made in June, 1977.

In considering acts of part performance, Lord Reid suggests in Steadman v. Steadman (1976) AC 536 at 541 that:

> "You must first look at the alleged acts of part performance to see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract".

Lord Morris of Borth-y-Gest at p. 546 in the same case said:

> "The acts of part performance must be such that they point unmistakingly and can only point to the existence of some contract such as the oral contract alleged. But of course the acts of part performance need not show the precise terms of the oral contract ...
> The terms of the oral contract must be proved by acceptable evidence but effect to them can only be given if and when acts of part performance establish that there must have been some such contract. Until then, a door is - so to speak - closed against them."

I accept the evidence of the defendant that the shed was left connected with light primarily to facilitate his brother. There is no evidence to indicate that the defendants had anything to do with the changing of the name on the meter. I do not imagine that the plaintiff would have had any difficulty in having his name put on the meter for billing purpose considering that the shed was partly on his lot and partly on the defendants'.

I accept the evidence of the defendant that the plaintiff was never put in possession by him. It would seem to me that if the plaintiff is cutting the grass on the lot, he is doing so for his own purposes - probably for security (considering its proximity to his residence) or probably to bolster his claim.

In my judgment neither the payment of light bills nor the cutting of grass in the circumstances amounts to part performance of any contract. These acts are equivocal.

The conclusions that I have arrived at so far have, in my view, put paid to the plaintiff's claim as pleaded. I shall however consider the fourth question that I posed earlier.

If there was a contract, was there a breach of it by the plaintiff thereby entitling the defendants to treat it as at an end?

In answering this question, I have in mind the plaintiff's allegation of a contract being made on June 6, 1977, as well as the fact that I have found that Exhibits 1 and 2 constitute a contract.

In December, 1978, the plaintiff indicated to the defendants that he was getting in touch with the bank manager to ascertain the balance of the defendants' indebtedness; and urged the defendants to communicate with him early. The defendants responded during the following month. It is clear that the parties were then contemplating reasonably quick action. The liquidation of the debt by the plaintiff was expected to be within a reasonable time. The plaintiff himself has acknowledged that expectation and has quantified the time as being between six and eight months. That indeed may have been a generous estimate in his own favour. However, that is unimportant.

What is of major importance is the fact that he made no serious effort to fulfil his side of the bargain. Up to April, 1980, he had not liquidated the defendants' debt at the bank. Indeed he did what appears to me to have been a very strange thing. Having learnt in December, 1979 that there was an outstanding amount of Twelve Thousand Dollars ($12,000.00) (that is approximately one year after receiving the defendants' letter) he makes no effort to erase that debt; instead, he proceeds to have issued in his name a cheque for Three Thousand Dollars ($3,000.00). This was on 1st April, 1980. He endorses this cheque in favour of Miret. I have some difficulty in understanding why he did not have the cheque made payable to Miret in the first instance. In any event, why pay the anticipated balance before liquidating the debt itself at the bank. I am left to conclude that the acquisition of this cheque for Three Thousand Dollars ($3,000.00) was a mere ploy by the plaintiff to give the false impression that a serious effort was being made by him to honour his side of the bargain. Another question is this: did the plaintiff expect the interest due at the bank to stand still between December, 1979 and April, 1980? Surely he must have been conscious of the fact that as the debt grew at the bank so would the balance due to the defendants decrease.

The plaintiff's approach to his obligations under the contract (whether it

be the June, 1977 contract or that arising from Exhibits 1 and 2) was irresponsible and cavalier at least. He cannot seriously point to any obligation that he has performed. His attitude in my view amounted to a breach and gave the defendants the right to treat the contract as being at an end. Indeed, they had a responsibility to soften the impact of the plaintiff's failure, by selling the land to a willing purchaser. This they did.

In the circumstances, however the situation is viewed, I find that the plaintiff's claim fails.

The oral contract that was pleaded did not exist. In any event there was no proper memorandum in writing. So far as the contract constituted by Exhibits 1 and 2 is concerned, the plaintiff did not fulfil his obligations. He was far from being ready, desirous, prompt or eager to perform. There is no basis for an order for specific performance. The acts relied on as part performance are equivocal.

The sad state of the plaintiff's case is highlighted by the fact that he is seeking repayment of his "deposit" as well as a declaration that the deposit entitles him to a lien on the land. The clear evidence which I accept is that the defendants did not benefit in any way from the "deposit" as the cheque payable to the plaintiff and endorsed to Robert Miret was returned to the plaintiff.

Judgment is hereby entered in favour of the defendants with costs to be agreed or taxed.

be pursued immediately as it involved a potential residence. The second contract was not put in writing as the defendants were "impinging" on him the urgency for them to depart the country. He felt he was dealing with a gentleman (that is, the male defendant) so later the contract could have been reduced into writing.

When questioned as to the other details of the contract, the plaintiff responded that there was no agreement as to how the purchase price should be paid. The amount, he said, should have been paid by arrangement after the first transaction was finalized, although he didn't recall the date for the finalizing of the first transactions. It was his understanding that there was an expectation that he would pay the balance of the purchase money within a reasonable time after paying what he regarded as the deposit of Three Thousand Dollars ($3,000.00). Surprisingly, he said there was no agreement as to what the deposit should have been. This piece of oral evidence was, of course, contrary to his pleading.

He agreed that he did not liquidate the outstanding balance at the bank. He had expected to liquidate the debt between six and eight months from the time that he had marshalled his funds and made the payment of Three Thousand Dollars ($3,000.00). He said he had never focussed his mind on how long the defendants were to wait on him to liquidate the debt, although he knew that they would have wanted it to be done within a reasonable time.

The male defendant acknowledged that he informed the plaintiff that both lots were for sale. He said that the plaintiff and himself had discussions in relation to the lot in question but the plaintiff was unable to afford both lots. A contract was prepared in relation to the first lot and the understanding was that maybe in the future the plaintiff would be in a position to purchase the second lot. The plaintiff was advised that the lot was mortgaged and that he would be required to pay the balance due to the bank and remit the difference to Robert Miret. This requirement was repeated when the defendants in response to the plaintiff's letter (Exhibit 1) wrote Exhibit 2.

The defence denied that the plaintiff was put in possession of the premises. There is a workshed which extends across the boundary between both lots. A meter for the supply of electricity is in that shed. According to the male defendant, the meter was left in the shed because his brother was using the shed.