

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E - 185 OF 1981

BETWEEN

MARIE B. McLEOD

PLAINTIFF

A N D

MAE S. HARRIS

DEFENDANT

Mrs. P. Benka-Coker for Plaintiff instructed by Jennifer Messado and Company.

Mr. Clinton Hines of Hines, Hines and Company for Defendant.

HEARD: MARCH 1, 2: JULY 11 AND 12, 1983.

MALCOLM, J.

Reasons for Judgment

On the 17th day of March, 1989 I gave Judgment in favour of the Plaintiff on the Claim and Counter-Claim herein with costs to be agreed or taxed and promised then to put my reasons in writing at a later date. I offer my apologies for the delay in so doing which was largely due to circumstances beyond my control. Suffice it to say that this effort of mine seeks to fulfil that promise.

This action was commenced by way of Writ of Summons filed by the Plaintiff and bearing date the 11th June 1981. At the outset it is necessary and convenient to refer to the Statement of Claim attached to the said Writ.

It reads:-

- "1. By an Agreement in writing dated the 13th day of March, 1980 and made between the Plaintiff and the Defendant, the Defendant agreed to sell and the Plaintiff agreed to buy for the purchase price of J\$56,000.00 certain freehold property situated at and known as 41 Hope Road in the Parish of St. Andrew

and registered at Volume 407 Foilio 76 of the Register Book of Titles.

2. The said Agreement provided (inter alia) that the said sale should be completed on or before the 30th June 1980, subject to the Plaintiff obtaining a mortgage loan on the security of the abovementioned property in the amount of \$42,000.00 from the National Commercial Mortgage and Trust Company at 12% for 20 years.
3. Pursuant to the said Agreement the Plaintiff:-
 - (a) duly paid to the Defendant the sum of J\$2,000.00 as a first deposit and a sum of J\$3,600.00 as a second deposit (total) sum of J\$5,600.00 in respect of the said purchase price.
 - (b) obtained a mortgage loan of \$40,000.00 from the Jamaica National Building Society on the security of the above-mentioned premises and has at all material times been and is now ready and willing to fulfil and perform all the obligations under the said agreement.
4. In breach of the said Agreement and notwithstanding requests made by the Plaintiff's Solicitor on her behalf, the Defendant wrongfully failed and refuses and continues to neglect and refuse to complete the said sale or take any steps towards such completion.

And the Plaintiff claims:-

- (1) Specific performance of the said Agreement.
- (2) All necessary and consequential accounts, directions and inquiries.
- (3) Damages for breach of contract in lieu of or in addition to Specific Performance.
- (4) Further or other relief.
- (5) Costs."

In due course a Defence and Counterclaim bearing date the 11th August, 1982 was filed on behalf of the Defendant. For the purposes of these Reasons I will merely refer to some portions of that document.

Paragraph 2 reads:-

The Defendant admits it is a term of the written Agreement that the sale should be completed on or before the 30th June, 1980

and further admits that the sale was subject to the condition set out in paragraph 2 of the Statement of Claim.

Paragraph 3 reads:-

The Plaintiff is not entitled to the relief sought in that she has failed to perform the essential terms of the contract.

Paragraph 4 reads:-

The Defendant denies that the deposits referred to at Paragraph 3 (a) of the Statement of Claim were paid to her as alleged or at all and the Defendant makes no admission of the matters pleaded at Paragraph 3 (b) of the said Statement of Claim.

Paragraph 5 reads:-

The Defendant says that on the 16th December, 1980 her Attorneys-at-Law made a written request upon the Plaintiff for the payment of the deposit required under the terms of the Agreement but the Plaintiff in breach of the contract failed and or refused to pay the said deposit of \$2,000.00 and the required second deposit of \$3,800.00

Paragraph 8 reads:-

Alternatively the Defendant says that the payment of the deposit by the Plaintiff is a condition precedent to the coming into operation of the Agreement and the Plaintiff failed to justify this condition.

Later at the trial Mr. Hines conceded that it is not a condition precedent and that that was not his argument.

Paragraph 9 reads:-

Further or in the Alternative the Defendant says that the term of the Agreement requiring the Plaintiff to pay the deposit on execution is a fundamental term and the Plaintiff's failure to pay the deposit is in breach of the said fundamental term and the Defendant is accordingly discharged from further obligations under the contract.

Paragraph 10:-

That the Plaintiff's conduct, namely the unreasonable delay occasioned by her failure to pay any of the deposits required by the contract, and her failure to submit the proof in the terms of special condition 3 of the written Agreement lead the Defendant reasonably to believe that the Plaintiff was unable or unwilling to perform the contract and thereby impliedly repudiating the said contract.

Counterclaim

11. The Defendant repeats Paragraph 5, 6, 8, 9, 10 and claims for breach of contract.
12. The Defendant says that the Plaintiff and the Defendant entered into a Tenancy Agreement under the terms of which the Plaintiff agreed to pay the Defendant the sum of \$300.00 per month as rental for her occupation of the said premises. That the Plaintiff has failed and/or is unwilling or has refused to honour the terms of the said Tenancy Agreement and is in arrears with payments in the sum of approximately \$8,400.00 due and payable to 1st July 1982.

Then follows paragraph 13 and the claims:-

- (a) A Declaration that the Agreement is not binding upon the Defendant.
- (b) A Declaration that the Plaintiff has no interest legal or equitable in the said premises.
- (c) An Order for the Rescission of the contract.
- (d) An Order that the Plaintiff removes or withdraws any Caveat lodged by her obstructing the Defendant's dealing with the said property.
- (e) An Order that the Plaintiff's claim be dismissed.
- (f) An Order that all sums due to the Defendant as rental be paid by the Plaintiff up to the date of Judgment with interest therein.

Damages etc.

In opening the case for the Plaintiff Mrs. Benka-Coker recited certain agreed facts and provided the Court with a Statement of those facts.

It reads:-

"The parties through their Attorneys-at-Law have agreed the following facts.

1. A Written Agreement for the sale of premises 41 Hope Road, St. Andrew, registered at Volume 965 Folio 250 was concluded between the parties during or about the month of December 1980.

2. The Defendant has not been paid the deposit as provided by the Agreement for Sale.

3. That Special Condition 3 of the Agreement for Sale required the Plaintiff to deliver proof to the Defendant that the Plaintiff had obtained a Mortgage Loan of \$42,000 on the Security of the premises.

4. The Plaintiff's Attorneys-at-Law sent draft Agreement for Sale to the Defendant's Attorneys-at-Law under cover of letter of 13th March, 1980. The signed Agreement for Sale was returned to the Plaintiff's Attorneys-at-Law by letter of 16th December 1980 from the Defendant's Attorneys-at-Law who in the said letter requested the Plaintiff's Attorneys-at-Law to pay the deposit.

(Sic) 5. The Plaintiff and the Defendant are parties to a Tenancy Agreement since during 1978 under terms of which the Plaintiff was obliged to pay to the Defendant rental of \$300.00 per month. For the occupation of the premises since about 1981."

This document was signed by both, Attorneys.

In the briefest of openings Mrs. Benka-Coker put as the "substantive" and "material", issues", issues:- "Enforcement of Agreement for Sale - ready since January 1981 - Plaintiff in undisturbed possession since 1977. Question of payment of deposit itself - nonpayment of deposit was an oversight not an attempt to avoid. Fundamental question is the effect of the nonpayment of the deposit on the existence of the contract.

Mrs. Jennifer Messado was the first witness called in support of the Plaintiff's claim. I will not quote her testimony in extenso but the following portions are worthy of note. In chief she stated that she was an Attorney-at-Law and Senior partner in the firm of Jennifer Messado & Company. The Plaintiff was a client of hers since early 1980 having been referred to her. She testified, and here I quote:-

"Plaintiff came with a hand written Agreement for Sale and wanted me to act on her behalf with regard to the purchase of 41 Hope Road. She advised me that purchase price was \$56,000.00 and that she would be obtaining a mortgage and advised me as to who the Vendor would be, told me Vendor's name was Mac Harris. I told her I was not satisfied with handwritten agreement. It was already signed by Purchaser and Vendor. I typed contract in consultation with Vendor's Attorney - Mr. Derek Jones of Messrs Myers Fletcher and Gordon, Manton & Hart

The Plaintiff signed agreement in my presence and paid deposit of \$2,000.00 into my office. This was March 1980.

..... I was instructed that Mr. Jones was for Vendor. I submitted same to Mr. Jones with covering letter - sent to Vendor for signature. This is letter I refer to, I said in letter I would pay over deposit to Vendor's Attorney when the contract was returned signed. I had with me the \$2,000.00. I got it back signed on 16th November, 1980 (shown copy of letter of same date from Mr. Jones) this was letter sent to me dated 16th November 1980. In this letter sent by Mr. Jones - He said "Please let us have the deposit." I did not send deposit at that time. I sent the deposit of \$5,000.00 to Miss Ethlyn Norton who I was advised was acting for Vendor It should have been for \$5,600.00. In any event from as early as January 1981 I had given Mr. Derek Jones the previous Attorney for the Vendor my professional undertaking for payment of entire balance personally and all costs."

Later in her evidence in chief this witness was asked:-

"Question: Why didn't you send off the deposit to Mr. Jones when he requested same in December, 1980?

Answer: It was merely an oversight as I did not realise that I had not sent deposit. I never received any request from Mr. Jones for deposit got no further demand from Mr. Jones for deposit subsequent to December, 1980. I never received transfer signed by Vendor. Never received notice making time essence of contract Failure merely an oversight; not a deliberate attempt not to pay deposit."

However one cares to describe it there can be no room for argument that it was an omission of monumental proportions - carelessness almost too frightening to contemplate. Later I shall consider what to my mind is it's legal effect.

In cross-examination by Mr. Hines Mrs. Messado testified, inter alia:-

"Cheque paid to Miss Norton for \$5,000.00 never negotiated - she said she was no longer in it. I cannot confirm to Court that I know where cheque is now.

Question: You said I send deposit of \$5,000.00 by cheque to Miss Norton, must Court understand

that cheque is still out-standing?
Answer: I have no record on my file of Miss Norton returning cheque to me. I cannot be sure if cheque left my office."

Later in her evidence she stated:- "I discovered in January 1982 I think I was getting opinion of Counsel and it was pointed out that the deposit was not paid."

On the subject of the Defendant's Counterclaim this witness had this to say:-

"Before the Agreement I had heard it discussed that the Plaintiff was a tenant of the Defendant. Don't know the rent. Hines, Hines & Company wrote a letter to my firm about this aspect, at that time an associate who was with me dealt with it. I have seen a letter subsequently (Shown letter dated 12th November 1985). That is letter in reply.

Question: Does not that letter suggest that Plaintiff had been occupying the premises without paying rental?

Answer: Yes.

I had discussions with her she said the money she paid outweighed what she spent. I told her to bring in papers to show how much she spent. I have read your counter-claim. I never told her she was refusing rent. She wanted an accounting of repairs against rent. Never went into numerical facts of that part. I knew she had not been paying rent. I have never discussed the rental with my client. I never studied documents for repairs. I have never visited No. 41."

The Plaintiff McLeod was next to give evidence and testified as to living at No. 41 Hope Road, subject of this suit, from 1977. She rented the premises at \$300.00 per month from a Mrs. McNamee, agent of the Defendant.

She testified as to the arrangements re the payment of rent and stated that in 1980 she signed an agreement for the purchase of the premises. She testified that in March of that same year she paid a deposit of \$2,000.00 to Mrs. Messado and recalled making a further payment of \$360.00 which she said represented 1% of Mrs. McNamee's interest (commission).

As regards the tenancy she had this to say:-

"Premises were in bad condition when I commenced occupancy, in 1977. I keep repairing the top, very bad - leaking. I had to paint outside of the house and

the roof. Done by my money. I used the money I should give Mrs. Harris and did repairs. It was about \$14,000.00."

As regards the Agreement for Sale she had this to say:-

"I didn't know until here in Court that the lawyer didn't pay the defendant the deposit" - - - .

I had given my money to my lawyer. I assumed that my money had been paid to Mrs. Harris."

Mr. Hines in opening for the Defence admitted that the central legal issue "is the effect of defendant not having been paid the deposit as required by the agreement."

Mrs. Mac Harris testified that she now resides in Ontario Canada and said that the premises at 41 Hope Road, St. Andrew was registered in her name and that prior to going to Canada in 1970, she had lived there. Since then she has not lived at No. 41. The last time she went there was "shortly before Mrs. McLeod came " of the premises she said it was in perfect condition. She left prior to the Plaintiff going in. It was painted, the roof was not leaking - the ceiling was perfect. She gave Mrs. McNamee instructions to find a tenant. She found out later that the place was rented. Continuing in chief she said:-

Sic "I was in touch with Hines and Hines re tenancy. I gave instructions that endeavours should be made to collect arrears of rental. I never collected any rent. To my knowledge no rent has been collected since Mr. Jones handed over to you. I didn't sign any document before the agreement. I didn't see my signature on written agreement. I see terms about deposit. Never received any money. I considered payment of the deposit as a very important part of agreement. I didn't know Mrs. McLeod and didn't know if she was a person who would go through with the transaction. I signed with full knowledge that the deposit would be paid
..... as far as I know that deposit has not been paid to my lawyer. I was in Canada when I signed the agreement. Don't remember when, it would have been about March 1980."

To Mrs. Benka-Coker the Defendant said that when she finally went away in 1976. Mrs. McNamee acted only in relation to getting a tenant. She further testified

that she did sign an agreement for sale - she testified that the agreement was the one now shown her, she said:

"I probably conversed with the Plaintiff on phone in 1982. I never asked Plaintiff to pay Mr. Jones a further \$1,000.00 on purchase price. I had further discussion with Plaintiff about purchase price. The amount was for \$2,000.00 more. She offered to make additional payment, not certain of the amount, it was not I who suggested it. I referred to Mr. Jones re the payment. I never agreed. I never called Mrs. McLeod she called me by mutual agreement we terminated the agreement can't remember the year of termination."

She further testified that the last time she saw the house was yesterday. The time before was 1977. She further stated that she wouldn't know what repairs if any Mrs. McLeod had to do between 1977 and now. She went on further to say:

"I know nothing whatever of repairs. Apart from speaking to Mr. Jones after discussing that deposit had not been paid. I did nothing else."

Mrs. Messado was recalled and in further cross-examination testified that she never got back a negotiated cheque in her Bank Statement and there was no record that the cheque was ever negotiated. She further stated that she was of the opinion that the money had been paid to the Defendant's Attorney and stated: I can't remember when I became aware the deposit was not paid. More significantly she stated further to Mr. Hines "I believed I had originally sent the deposit. It escaped me because of human error." Further re-examined by Mrs. Benka-Coker. Mrs. Messado testified that Mrs. McLeod had paid over all moneys due and that there was no lapse on her account.

The Submissions

In her final address Mrs. Benka-Coker submitted that the Plaintiff McLeod had done all she should do to complete the contract. She expressed the opinion that the only material issue as to law that arises on the pleadings is the effect of the failure of the Plaintiff's Attorney-at-Law to pay over the deposit to the Vendor's Attorney.

She contended that the Counter-Claim in this matter forms no part of the substantive issue. The tenancy was created in 1978 prior to the date

of the agreement for Sale they are not related contracts. The Plaintiff came in possession of the premises under a Valid Agreement. She submitted and I quote: "There is in existence a valid and enforceable contract for sale of premises 41 Hope Road - not a single thing the Plaintiff has left undone." She further expressed the view that it is the Plaintiff's conduct that is material. She submitted that the payment of the deposit was not a condition precedent but merely a term of the contract.

She stated that there was no repudiation by the Defendant if it was being contended that non - payment was a fundamental term. Re Repudiation, she submitted:

"It must be certain and cannot be imputed. Payment of further \$1,000.00 shows Plaintiff had not repudiated the contract" she recited some of the salient features of the case which are not in dispute. The Agreement for Sale was signed by the Plaintiff on the 13th March, 1980. On March 10, 1980 the deposit was paid. Mrs. Messado duly dispatched the Agreement for Sale to Mr. Jones. She referred to correspondence in this matter and submitted that "the documents and evidence demonstrate the Plaintiff's ability to complete the contract from as far back as January 1981."

Counsel for the Plaintiff further submitted that the failure of the Plaintiff's Attorney to pay over the deposit of \$2,000.00 plus further deposit to Vendor's Attorney-at-Law was not on the facts of this case, a breach of contract on the part of the Plaintiff herself.

She said: "Even if the argument is that Mrs. Messado was to be deemed an Agent the Plaintiff for purposes of this case, for the Plaintiff herself to be fixed with any alleged breach of contract, she herself would have had to participate in the breach."

Mrs. Benka-Coker further submitted that contrary to allegation in the defence the failure on the part of the Plaintiff's Attorney-at-Law to pay over the deposit to the Vendor's Attorney was not a condition precedent to the coming into existence of the contract (Mr. Hines later conceded that it was not a condition precedent and that was not his argument).

Counsel further went on to state that "even if non-payment of the

deposit was a breach of a fundamental term - of the contract the Defendant waived her right, if it existed, to repudiate the contract and took no steps to repudiate and she continued to treat the contract as still in existence." One act, she submitted, was the payment of \$1,000.00.

Mrs. Benka-Coker fortified her submission by relying on Millichamp and others vs. Jones (1983) 1 ALLER 267. It is convenient to cite the headnote as it accurately and concisely sets out the facts and the decision of Warner J: It reads:

"Option - option to purchase - exercise of option - Deposit - provision for payment of deposit to purchaser on exercising option - Purchaser exercising option but inadvertently failing to pay deposit - whether vendor entitled to cancel option agreement - whether Vendor required to give purchaser opportunity to pay deposit before cancelling agreement."

By an agreement under seal, the defendant granted the Plaintiffs an option to purchase a plot of land. The agreement provided for the serving of a notice of intention to purchase and payment of a deposit within a prescribed time. The Plaintiffs served the notice within the prescribed time but failed to pay the deposit. The Defendant informed the Plaintiffs that he did not intend to proceed with the agreement. The Plaintiffs sought specific performance of the agreement. HELD - (1) A requirement in a contract for the sale of land that a deposit be paid by the purchaser was a fundamental term of the contract breach of which entitled the Vendor if he so elected to treat the contract as at an end and to sue for damages including the unpaid deposit

(2) However where failure to pay the deposit was a mere oversight, it was incumbent on the Vendor before he could treat the failure to pay the deposit as a repudiation of the contract to tell the purchaser that he intended doing so and to give her the opportunity of complying with his obligation. Only if the purchaser then showed unwillingness or inability to comply was the Vendor entitled to treat the contract as discharged. Since the Plaintiffs had inadvertently and not deliberately omitted to pay the deposit they were entitled to specific performance of the option contract."

At Page 271 of the Judgment Warner J has this to say:-

"The Defendant resists specific Performance on two grounds. The first is the Plaintiff's

failure to pay the deposit. The second is that, so it is contended on the Defendant's behalf, the option Agreement was void for uncertainty. As regards the first ground the Defendant's case is put in three ways. First it is said that the payment of a deposit was a condition precedent to the formation of the contract. Alternatively it is said that the payment of a deposit was a condition subsequent the failure to perform which automatically discharged the contract. In the further alternative it is said that the requirement of a deposit was a Fundamental Term of the contract the breach of which entitled the defendant to treat it as discharged

.....
Counsel for the Defendant very properly referred me to a Note "Bouncing Deposits" in which it was pointed out that the Authorities on the consequences of the non-payment of a deposit required to be paid by a contract for the sale of land were difficult to decide. He invited me to effect the judicial reconciliation of those authorities for which the author of the note called. It seems to me that that is a task that can only be carried out authoritatively by the Court of Appeal. I cannot do more than express my own view in so far as it is necessary for the decision of this case."

Mr. Hines in reply said that here the Court is being asked to say that Mrs. Messado's inactivity had no effect on her client's position. He said this was a case of a "principal acting through an agent."

He expressed the view that the proposition put forward by Counsel on behalf of the Plaintiff "Cannot be the law." He referred to Halsburys Laws of England 4th Edition Volume 44 under the Rubric "Solicitor and Client," at Paragraph 84 - Relationship established by retainer. I reads in part:-

"The relationship between Solicitor and Client is a fiduciary one but it does not follow that a Solicitor is in all respects a trustee in relation to his Client. There is no such thing as a general retainer imposing a duty on the Solicitor to consider all aspects of the Client's interests generally. Ordinarily the relationship between Solicitor and Client is that of agent and principal and therefore time well run against the Client in respect of money left in his Solicitor's hands. However special circumstances as where money is paid by the Client to his Solicitor for a particular purpose may constitute the Solicitor a trustee of

that money in relation to the Client so that time will not run against the Client to preclude his recovery of money not applied for the particular purpose."

The latter portion clearly has no relevance to the instant case.

He went on to submit that when an Attorney is acting on behalf of a client carrying out a client's instructions the Attorney is the conduit through which the client's work is being done and if any undiscernable consequences are produced from any default on the part of the Attorney those consequences attach to the client. The client he said "is not without remedies against her Attorney-at-Law if the Attorney causes loss or financial detriment to the Client. Plaintiff has a right to go against her Attorney for negligence."

He described Mrs. Benka-Coker's argument as "a vain attempt to ignore Mrs. Messado's Conduct." He submitted that this default on Mrs. Messado's part cannot escape her principal i.e. the Plaintiff. This default he said in the light of all the available facts cannot be described "as a mere oversight" as Mr. Justice Warner described the Plaintiff's conduct in the Millichamp case - and asked the Court to distinguish that case and the instant case.

He asked the Court to hold "that the payment or non-payment of the deposit was a term of sufficient gravity in the contemplation of the parties at the time they entered into the contract the breach of which would seriously affect the performance of the said agreement."

He asked the Court to say that the Defendant is entitled to treat the contract as discharged.

Re Counter-Claim

Mr. Hines stated as follows: "Evidence was led to the effect that the place was rented since 1978. Tenancy agreement \$300.00 per month as rental." He posed the question:-

"Is there any evidence before the Court that repairs were done?" Submitted that there was no credible evidence. He claimed an entitlement to an Order or Declaration on (a) (b) (c) (d) and (e) of the Counter - Claim.

In a short submission to Mr. Hines reply Mrs. Benka-Coker admitted that Attorneys are agents of their clients but asked what is the extent of the agency in this case? In her view Mrs. Messado's conduct cannot bind the

Plaintiff in this case. The Plaintiff can bring an action against Mrs. Messado but that does not affect the contract behind the parties. She submitted that the Defendant Harris had knowledge that the deposit had not been paid over to her Attorney and expressed the view that the \$1,000.00 payment was a waiver of the right to repudiate. The Court should say that it is a reasonable inference, on a balance of probability, that the \$1,000.00 was paid as an additional amount.

Conclusions and Findings

In my view Mrs. Benka-Coker's pronouncement at the beginning of the case that in the final analysis the fundamental question is the effect of the non-payment of the deposit on the existence of the contract cannot be faulted.

As I said earlier in these reasons the non-payment of the deposit by Mrs. Messado was an omission of frightening proportions, but should that deprive the Plaintiff of the relief sought?

I gave judgment in her favour as when the evidence is examined evaluated and assessed and the law considered, I concluded:

(1) That the Plaintiff did all that was required of her and since it was conceded that payment was not a condition precedent Mrs. Harris would not be entitled to treat the contract as at an end -

(2) That although Mrs. Messado was in the broad sense agent for the Defendant Harris, her conduct did not bind the Plaintiff and did not deprive her of the right to enforce the contract and claim specific performance.

(3) I find that there was no repudiation of the contract by the Defendant. I accept as good law the submission of Mrs. Benka-Coker that repudiation must be certain and cannot be inferred.

(4) As regards the Defendant's Counter-Claim. I find that there is evidence that repairs were done and I adjudged that the Defendant was not entitled to the relief sought in her Counter-Claim.

It is for the reasons stated above that on the 17th March 1989 I gave Judgment for the Plaintiff on the Claim and on the Counter-Claim herein with costs to be taxed if not agreed.