JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 63/80

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN	MICKLETON DEVELOPMENT LTD.	DEFENDANT/APPELLANT
A N D	IRIS BATHER	PLAINTIFF/RESPONDENT

R.N.A. Henriques Q.C. for appellants, the developers

M.K. Chin-See for respondent, the purchaser

February 10, 11 & June 30, 1982

CARBERRY J.A.

I have had the benefit of reading in draft the judgment of Carey J.A. and I agree with it, but we have reserved for further argument the form which the final judgment in this case should take,

CAREY J.A.

Mrs. Iris Bather lived in England. In 1973 she saw an advertisement, relating to the sale of building lots in a subdivision in this country. In the result she signed two contracts dated 10th December, 1973 with the appellants (whom I shall hereafter refer to as "the developers") the first of which dealt solely with the purchase of the building lot, to wit, lot 71 being part of Mickleton in Linstead, St. Catherine. The agreed purchase price was stated to be $2,250.00 and the deposit which she made, was $500.00. By a clause in this agreement, the agreement was conditional on Mrs. Bather "commencing and completing construction of a dwelling house on the land hereby sold with reasonable expedition, failing which the agreement will be rescinded and all payments made hereunder will be refunded." I come now to the second contract which Mrs. Bather also executed. This was a building contract whereby the developers were required to "commence as early as possible" to construct and continue with due diligence to completion a dwelling

house on the lot at a price of $14,500.00 subject to a cost escallation clause and as to that she paid the required deposit of $500.00.

The purpose of having two agreements, admittedly a legitimate device was to avoid the payment of transfer tax on the value of the developed land. Thus it was to the advantage of both these parties to avail themselves of this procedure. The developers were selling a lot on which they had constructed a dwelling house; the purchaser was killing two birds with one stone so to speak. Everybody would be happy if all went well. But this little scheme did not go at all well.

> "The best laid schemes o'mice an men
> gang oft a-gley" (Robert Burns - To a mouse).

It is now a matter of historic record, that the year 1973 marked the beginning of profound economic problems for developing third world countries who depended on oil from the lack of that natural resource. For Jamaica, there were disastrous consequences which of course affected these parties. There was not only a general sharp rise in prices but items for building became scarce and as often unavailable. In the event there was delay on the part of "the developers" in beginning construction. Indeed one letter from "the developers" to the purchaser," suggested an alteration of the design of the proposed dwelling house in an endeavour to reduce the escalation in costs. Finally after further delay, two letters were written one by each of the parties, the effect of both and their construction are crucial to a determination of this appeal.

The first of these, was written on 15th June, 1977 3½ years after the contract was signed by "the developers" to "the purchaser". It was in the following terms:

15th June, 1977

Mrs. Iris Bather
40 Moberly Road
London SW4 - 8EY
England

Dear Mrs. Bather:

Re: Lot 71, Mickleton Meadows, Linstead

We regret to advise you at this time that we are unable to commence construction of house on the above lot due to the unavailability of building supplies such as lumber, sanitary-ware and fixtures and ceiling materials to name only a few items.

For the past six months, we have been making all possible effort to obtain building supplies in order to commence construction but as the months went by, building materials became scarcer and scarcer and consequently we are not even in a position to advise when we can commence construction.

At this point, we are left with only two alternatives 1) to refund your deposit and cancel our Agreement for Sale or 2) to offer the abovementioned lot only at a considerable reduced price of $5,000.00 because of the circumstances. (current prices on these lots are $5,750.00 - $7,000.00) If you decide on the latter alternative, we could enter into a new agreement for lot sale only and the deposit that we have already received from you could be applied as a credit against the sale price of the lot or if this is not agreeable to you, we would refund your deposit.

In closing, we wish to bring to your attention the fact that the Company did not arrive at this decision without giving the matter serious consideration and would appreciate your advising us by return mail your decision in this matter.

Yours faithfully
MICKLETON DEVELOPMENTS LIMITED

Per: Chang.

c.c. Mr. H.P. Myers

/pac."

The second letter set out hereunder was a response by Mrs. Bather to the letter set out above.

" 40 Moberley Road

London

SW4

Sept '77

Mickleton Developments Limited
6 Altamont Crescent
Kingston 5

Jamaica

Dear Mr. Chang,

Re: Lot 71, Mickleton Meadows, Linstead

I regret your inability to commence construction of house on the about (sic) mentioned lot. Although I'm grossly disappointed over the previous arrangement, I feel I have to go ahead with the purchase of "Lot" only.

Please proceed with the Lot purchase and advise without delay.

As far as payments are concerned, these should be no worry as I shall make arrangements as necessary.

Thanking you

I remain,

Yours faithfully

(Sgd.) IL Bather "

For completion, I would add that "the developers" subsequently on 13th September 1977 posted her the new agreement for sale which they had intimated would have been forwarded but she never executed that agreement. Instead she consulted her lawyers and in the result a writ for specific performance of the original contract of sale made on 10th December, 1973, was filed on 9th February 1979 at her instance. By this writ, and her Statement of Claim of the same date she also claimed damages for breach of contract, alternatively recission of that contract, and a refund of all payments made by her with interest thereon. "The developers" for their part, pleaded that the effect of the two letters which I have earlier set out, was mutually to rescind the 2 original agreements of 10th December, 1973 and to replace them by a new agreement of sale in respect of the lot only at a stated price of $5,000.00. "The developers" counter

claimed for specific performance as regards the contract spelt out by the two letters recited above. In the alternative, they sought damages in addition to or in lieu of specific performance.

The appellants contend before us, as they did before Theobalds J. in the court below, that on the true construction of the two letters, there was an offer by the appellants to rescind the original agreements and to replace them with a new agreement for the sale of the lot only, and an acceptance of this offer by the purchaser. The abandonment of further obligations under the original agreements, supplied the necessary consideration on each side. The respondents on the other hand say that "the developers" sought to impose more onerous terms when they were themselves in breach in failing to construct the dwelling house, and that there was no acceptance of those onerous terms. Even if an acceptance could be spelt out of the two letters, there was no consideration for an agreement to rescind. This argument was based on learned counsel's submission that there had been a unilateral discharge by the developers. As he puts it, where a party has performed all that is required of him up to breach but by reason of a breach by the other party, the former is disabled from performing his remaining obligations, then the party not in breach will be deemed to have performed all his obligations. The developers sought to obtain a release from their obligations, but had not provided consideration. None had been provided by the developers for there had already been a unilateral discharge on their part.

The respondents argument found favour with the learned judge below for judgment was entered for the purchaser. He held that there was no consideration for the new agreement.

I am, with respect, quite unable to agree that the order of the learned judge in the court below, can be supported. The first question which may conveniently be considered is the true construction of the two letters set out above. We do not have any record of the judgment

delivered below but the learned judge very thoughtfully noted his findings, albeit exiguous, and these appear in the notes of evidence. From these it would seem that having considered the effect of the purchaser's letter, he found that she was prepared to continue with the purchase of lot 71 only at the original contract price. The learned judge expressed his perturbation at the "temerity of the developers in offering Mrs. Bather her own land at a price more than double the agreed price." There were two valid contracts subsisting he said, one had been repudiated by the developers (they declined to build) and as to the other i.e. sale of land that was to be proceeded with. Mr. Henriques for the developers pointed out, as I think, correctly that the learned judge came to a remarkable conclusion in that the developer's letter was effective to cancel the building contract, but nevertheless effective to keep the agreement for the sale of the land intact.

In the 1973 agreement for sale of the land there was inserted a condition numbered 5 which recited as follows:

> "5. This sale is subject to the Purchaser commencing and completing construction of a dwelling house on the land hereby sold with reasonable expedition, failing which this agreement will be rescinded and all payments made hereunder will be refunded."

The plain effect of this clause was to link the sale of the land with the building contract. There was thus a conditional sale of land, which enabled a purchaser to acquire a dwelling house with transfer tax being paid only on the land itself. Viewed synoptically there was one agreement in two parts. In my view, the letter of the developer sought to determine that twin agreement and to substitute another, that is, an agreement for the sale of the lot only. At all events the developer's letter speaks of cancelling "the Agreement for sale", obviously of the land. In these circumstances, I must express my dissent to the view of the learned judge below, that one contract only was repudiated by the

Mr. Chin-See had another string to his bow. He argued that the circumstances showed a unilateral discharge, presumably of the building contract, and the letter of the developers sought a release from the contract of sale, and to obtain an effective release, there must be consideration or an agreement under seal. But even if he were held wrong as to unilateral discharge and there was in fact a mutual recission, no consideration existed to support it. It was a "nudum pactum".

It is the fact that 'the developers' had not performed their obligations under the building contract: they had not constructed nor even begun to construct a dwelling house for Mrs. Bather, they were in breach. As the innocent party Mrs. Bather had an option. She could elect to hold 'the developers' to their obligations under the contract, in which event she would be entitled to recover damages for any loss sustained; or to accept the breach as discharging the contract. In this latter event, she would be relieved of performing any of her obligations and could take proceedings for recission of the contract, and sue for the recovery of damages. But Mrs. Bather for good or for ill, did none of these things. She responded to offers made by 'the developers' which she accepted. It was 'the developers' who acted, obviously to protect their best interest, but there was no suggestion either in the court below or before us that 'the developers' had acted other than fairly: no question of fraud arose. Mrs. Bather was perfectly free to consult her lawyers or not as she chose. Indeed, she did, but it was at a time subsequent to her responding to the developer's letter, accepting their offer.

Was there consideration for this mutual recission? The answer depends on whether the contract is executory on both sides. A contract is executory where neither party has completely performed his obligations under the contract. The consideration is to be found in this regard in the mutual abandonment of the rights of performance or further performance under the contract. (See Halsbury (4th ed.) Volume

9 at paragraph 563 and the cases cited in support viz. Scarf v. Jardine (1882) 7 App. Cases 345 at 351 per Lord Selbourne re: Foster v. Dowbar (1851) 6 Exch. 839 at 851.)

Before I consider whether the contracts were executory and whether any rights to performance were mutually abandoned, it is necessary to state that there was not in the circumstances of this case a variation of the contract, but rather a recission of the original agreement and the substitution of a new one. The developer's letter offered to terminate the original agreements which was, in the event, accepted and also offered the land for sale, which offer was also accepted.

The developers had not performed their obligations under the building contract, the purchaser had, it is true paid the deposit but other sums would become payable under the contract. All these obligations remained to be done under the contract. Obligations on both sides remained to be performed under the agreement for sale of land. All these obligations which were thus mutually abandoned, in my view from the basis of the required consideration.

Mr. Chin-See in the course of his submissions pointed to the fact that there had been a unilateral breach of the building contract by the developers, and he said this precluded the purchaser from accepting an offer to terminate the contract. A unilateral breach may of course discharge a contract. But "eodem modo qui oritur, eodem modo dissolritur:" What has been created by agreement may be extinguished by agreement. I have earlier indicated that where there has been a breach, the innocent party has certain courses open. I am therefore of opinion that the contracts were executory and both parties could agree to rescind them.

Before parting with this appeal, I desire to make a final comment. Mrs. Bather made a bad bargain which has led to this unfortunate litigation. But although she is entitled to our sympathy, the law does not and cannot support her claim. We cannot "wrest the law once to

(our) authority, to do a great right, do a little wrong."

For my part, I would allow the appeal, set aside the judgment entered in the court below and enter a judgment for the appellants both on the claim and counter-claim. The appellants would of course be entitled to their costs both here and below.

WHITE J.A.

I agree with the reasoning of the judgment of Carey J.A. and that the appeal be allowed.

developers on the footing that they were unable to commence construction of the dwelling house. It is in my judgment quite impossible to read the developer's letter and arrive at the conclusion ineluctably, that the building contract only was being terminated when they expressly offered that the agreement for the sale of the land be cancelled and deposit refunded. As I understood Mr. Chin-See for the purchaser the developer's letter confirmed the breach of the building contract and sought to impose additional obligations on the purchaser by an increase in the sale price. Even if this construction be right, as I think it is not, nevertheless it puts an option or options to the purchaser which she was at liberty to accept or reject or to ignore. She responded as her letter demonstrates.

It is right to point out that the developers requested the purchaser to communicate her decision by return mail. The reply was 3 months in arriving but it is, in my view, inescapable that the letter of September 1977 from Mrs. Bather was a response to the developer's letter of June 1977. It showed her reaction to all the points raised in the developer's letter. The first sentence expresses her chagrin at the impossibility to build. The second laments the abortive "previous arrangement." It is impossible to conceive that she was not by the use of these words referring to <u>both</u> agreements between the parties as reduced into writing in two documents, namely the agreement for sale of the lot and the building contract. Next she accepts that in the event, she is constrained to "go ahead with the purchase of lot only" and instructs the developers to "proceed with the lot purchase and advise without delay". It appears to me beyond a scintilla of a doubt that this direction was in response to the developer's offer of "the lot only." See option 2 in their letter. I conclude from all this that she was accepting the termination or recission of both agreements and the substitution therefor of an agreement for the sale of the land only at the price stated in their letter. In fine, there was a mutual recission of the two contracts.