NMLJ

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 116/97

COR. THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

1. SUIT NO. C.L. 1985/U-053

BETWEEN	MONTEGO VACATIONS LIMITED.	1st DEFENDANT/ APPELLANT
AND	UNIVERSAL LEASING AND FINANCE LTD.	PLAINTIFF/ RESPONDENT
AND	RALPH MAIRS	2nd DEFENDANT

2. SUIT NO. C.L. 1987/U-019

BETWEEN	UNIVERSAL LEASING AND FINANCE LTD.	PLAINTIFF
AND	PETER BROOMHEAD	1st DEFENDANT
AND	MAX GAREL	2nd DEFENDANT
AND	EDGAR WATSON	3rd DEFENDANT
AND	JAMES SHROFF	4th DEFENDANT

D. Scharschmidt, Q.C. and Christopher Kelman instructed by Rattray, Patterson and Rattray for Appellant.

Crafton Miller and Nancy Anderson instructed by Crafton Miller & Company for Respondent

June 14, 15 and October 27, 1999

FORTE, P

Having read in draft the judgment of Langrin, J.A. I entirely agree with his reasoning and conclusion and have nothing further to add.

WALKER, J.A.

I agree that this appeal should be allowed in the terms proposed by Langrin, J.A. and have nothing useful to add on my own part.

LANGRIN J.A.

The defendant/appellant Montego Vacations Limited, the owner of property known as Providence, in the parish of St. James appealed from the decision of Chester Orr J. given in the Supreme Court on the 11th November, 1996 in which he ordered specific performance of an agreement dated February 15, 1982 as well as damages amounting to US$1,101,000.00.

The dispute between the parties concerns a purchase of three adjoining lots of land by Universal Leasing and Finance Limited as purchasers and Montego Vacations Limited as vendors. It is quite unnecessary to narrate the full facts in order to deal with this matter.

The central issue in the appeal is whether the agreement on which the plaintiff relies is enforceable.

The writ in the proceedings was issued on the 17th October, 1985. The endorsement on the writ states as follows:

> "The Plaintiff's claim is against the defendant for specific performance of an agreement for sale and purchase made on the 18th day of February, 1982

> whereby the defendant agreed to sell and the plaintiff agreed to purchase all those parcels of land comprised in Certificate of Title registered at Volume 1023 Folio 694 at Volume 1027 Folio 366 and the land described as 2b on the plan bearing Survey Department Examination No. 81670 prepared by B.M. Alexander and dated the 24th day of January, 1966."

The Agreement for Sale provided inter alia: On the signing hereof the purchaser shall pay a deposit of One Hundred and Forty Thousand Dollars to the Attorneys-at-Law having the carriage of sale. Within fourteen days of the date hereof the purchaser shall pay to the said attorneys a further amount of Fourteen Thousand Dollars on account of the purchase price. "The balance purchase price together with the purchasers' share of costs hereinafter defined shall be paid not later than twelve months from the date upon which the Vendors certify in writing to the purchasers that they are in a position to deliver to the purchasers vacant possession of the property sold." (Emphasis supplied)

In paragraph 8 of the Statement of Claim it is pleaded as follows:

> "By letter dated September 15, 1984 the Defendant certified to the Plaintiff that it was in a position to deliver vacant possession of the said premises to the Plaintiff as of October 1, 1984 and in effect fixed the completion date for the said agreement at no later than October 1, 1985."

In paragraph 9 it is pleaded that the plaintiff was on the 5th November, 1984 and has been at all material times thereafter ready, willing and able to complete the said sale.

In paragraph 10 it is stated that despite demands from the plaintiff the defendant has failed and/or refused to complete the said sale and the plaintiff has lodged a caveat against the titles for the said land to prevent any dealings therewith by the defendant otherwise and in accordance with the terms of the said Agreement for Sale.

In paragraph 11A the plaintiff alleges that it has suffered damages as a result of the breaches of the Agreement and has stated in the particulars:

> "(i) The plaintiff has entered into a contractual joint venture agreement for the development of the property, the subject matter of this suit and the surrounding properties as a major tourist hotel and resort, which venture has been delayed at a loss of $50,000,000.00 and continuing.
>
> (ii) Removal of sand from the property - $3,000,000.00 by Ralph Mairs on behalf of the Company
>
> (iii) Professional services for preparation of an estimate on work and alterations which were to be carried out on the property.
>
> (iv) Estimated loss of Profits - $100,000,000.00."

In the defence the defendant did not specifically traverse paragraph 8 of the Statement of Claim but at paragraph 9 of the Amended Defence and Counterclaim pleaded:

> "Save as is hereinbefore expressly admitted, the first defendant denies each and every allegation contained in the Statement of Claim as if same herein set out and traversed seriatim."

The defendant in a counterclaim seeks rectification of the written contract in relation to the purchase price as well as an order for specific performance of the contract as rectified. Alternatively, an order for rescission.

At the trial, Winston Finzi, Managing Director of the Plaintiff Company and the principal witness for the plaintiff testified:

(a) that the sum of $140,000.00 was paid to Watson and Company on the signing of the Agreement and a further sum $14,000.00 was paid

(b) when Agreement was signed Mairs was occupying the hotel

(c) vendors did not certify to the Plaintiff Company that they were in a position to deliver vacant possession of property

It is instructive to note the specific question put to the witness.

Question: Did you require in writing Certificate from Vendors that they deliver vacant possession of property?

Answer: No.

However, he asserted that Plaintiff Company had received correspondence from Watson - Agent of Defendant's Company in this regard. Further he had visited the hotel several times since the agreement was signed and on all his visits Mair and his family occupied the hotel. The plaintiff has always been

willing and able to pay and a letter of commitment from the bank was sent to the defendant to this effect.

A no-case submission was made on behalf of the defendant that the plaintiff had not established the case pleaded, and that its principal witness had indicated that there was no written certification as provided for in the Agreement.

The submission was rejected and the trial judge expressed his judgment in these terms:

> "On this evidence on a balance of probabilities I draw the inference that the First Defendant through Watson certified that it was in a position to deliver vacant possession of the property."

An appellate court is always reluctant to interfere with the exercise of a trial judge's discretion. Lord Diplock in **Hadmor Productions Limited v. Hamilton** (1982) 1 All E.R. 1042 provides helpful guidance at p. 1046:

> "....the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only, It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be

> wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

Most relevantly our attention is drawn to the Agreement which specifically provided that the balance purchase price.....shall be paid not later than twelve months from the date upon which the vendors certify in writing to the purchasers that they are in a position to deliver to the purchasers vacant possession of the property sold. The averment in the pleading that a letter dated 15th day of September, 1984 was tendered to the plaintiff certifying that the vendors were in a position to deliver vacant possession as of October 1, 1984 was not proved. Indeed, the evidence of the plaintiff through its own witness denies this allegation. It seems to me that the admission made by Mr. Finzi that the vendors did not certify to the Plaintiff Company that they were in a position to deliver vacant possession of property is unhelpful to the plaintiff. This is, in my judgment, plainly a case in which a

term in the contract has not been performed. Despite Mr. Miller's argument I have little hesitation in agreeing with Mr. Scharschmidt, Q.C., (representing the appellant) on this first point. Inferences must be drawn from proven facts. There are no facts proved from which an inference could be drawn that the 1st defendant/appellant through Watson had certified by letter dated September 15, 1984 that the appellant was in a position to give vacant possession. The fact that the plaintiff/respondent had received correspondence from Watson in this regard does not in any way prove the contents of that correspondence. Moreover, the admission of Winston Finzi leaves no room for any inference to be drawn.

Mr. Miller, had another string to his bow. Reference has already been made to paragraph 8 of the amended Statement of Claim, where the plaintiff pleaded it received a letter dated 15th September, 1984, from the defendant /appellant certifying it was in a position to deliver vacant possession by October 1, 1984. There was no specific traverse of this passage in the Defendant's amended defence. It was argued by Mr. Miller that this failure to specifically deny paragraph 8 of the Statement of Claim is in effect an admission which the plaintiff need not prove. Mr. Scharschmidt, Q.C. resisted that argument and made reference to paragraph 9 of the Amended Defence and Counterclaim which states:

> "Save as is hereinbefore expressly admitted, the First Defendant denies each and every allegation

> contained in the Statement of Claim as if same herein set out and traversed seriatim."

He relied on the well known judgment of Lord Denning in **Warner v. Sampson and Anor** (1959) I All E.R. 120 at 123 where Lord Denning said:

> "The pleader has earlier gone through many of the allegations in the Statement of Claim and dealt with them. Some he has admitted. Others he has denied. Whenever he knows there is a serious contest, he takes the allegation, separately and denies it specifically. But when he has no instructions on a particular allegation, he covers it by a general denial of this kind; so that he can, if need be, put the plaintiff to proof of it at the trial,"

In my view because of the failure of the plaintiff to produce the alleged letter of 15th September, 1984, or to account for its absence, the trial judge should have concluded that no such letter existed.

There is a third point which needs to be considered. Did the vendor breach the contract by not giving to the purchaser such certification within the three years from the signing of the agreement in February, 1982 to the commencement of the purchaser's suit against the vendor?

The vendor's obligation to complete a contract is contingent upon the occurrence of an obligation. A notice to complete insists upon performance by a party in default of an obligation binding upon him. Such notice can have no application to a situation where the party to whom the notice is given is under no obligation to perform.

On this point the authority of **Johnson v. Humphrey** 1946 1 Ch. D 460 is very instructive. In that case H and J entered into an agreement by which H agreed to sell her house to J for 750 pounds for which J had paid a 20 pounds deposit and "the balance to be paid immediately on possession." It was held that the ordinary principle of consideration that where no date was fixed for completion, completion was to take place within a reasonable time, would not be applied because the agreement provided that vacant possession was to be given on completion but completion was to be determined by reference to possession. The contract was held to be unenforceable because it contained no provision as to the date for completion.

In the instant case as in **Johnson v. Humphrey** (Supra), completion is slated to be "upon payment of the balance of purchase price in full together with the purchasers' moiety of costs." There is therefore no provision as to the date for completion. Completion is upon the payment of the balance of the purchase price which is referable to the vendor's written certification of it being in a position to deliver up vacant possession, but there is no provision stipulating a time factor for that certification. It would therefore seem that like the contract in **Johnson v. Humphrey**, the contract in the instant case is unenforceable against the vendor, there being no date by which the vendor is bound to complete the contract. Hence the vendor has unrestricted time to act, and the purchaser cannot seek to force the vendor's hand in the matter.

The contract being unenforceable, the purchaser is not entitled to any award of damages. However, the contract though unenforceable is valid. A relevant consideration is therefore what remedy lies for the purchaser who has paid sums to the vendor since 1982 under an Agreement which he cannot enforce. The remedy is in quasi-contract. The purchaser can claim for money had and received by the vendor on the plaintiff's behalf and interest thereon.

In the circumstances it is ordered that the total sum deposited should be returned to the purchaser with interest at 25% per annum from 17th October, 1985.

For these reasons I would allow the appeal and order that the sum of $154,000.00 with interest at 25% from 17th October, 1985 to the date of this judgment be returned to the respondent.

Costs awarded to the appellant here and in the court below to be taxed if not agreed.