JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 58/2002

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (Ag.)

BETWEEN: MARJORIE MORRISON APPELLANT

AND: HAROLD MORRISON RESPONDENT

David Henry and Priya Levers instructed by Priya Levers for the appellant.

Michele Champagnie instructed by Myers Fletcher and Gordon for the respondent.

June 20 and 21, 2002, and November 4, 2004

DOWNER, J.A.

The issue of construction which was determined in this case was the meaning of the word "sold" in the context of a Consent Order approved by Rattray J., in the Supreme Court. The Agreement For Sale prepared by the Attorneys-at-law for the Respondent is also relevant to the determination of the issue. Sykes J., (actg.) decided that the property in issue was sold. Mrs. Marjorie Morrison appealed against that order. She was entitled to a considerable advantage if the property was not sold by 31st January, 2002. Panton, J.A., has gone fully into the facts, so I will concentrate on the issue of law.

The relevant clause in the Consent Order

The Consent Order at page 12 of the Record was drafted by Mr. Stephen Shelton and Mrs. Priya Levers two very experienced lawyers. Clause 3 reads as follows:

> "3. (a) That the Plaintiff and the Defendant each own 50% of the real property known as Lot 31 Millsborough Pines, Kingston 6 in the parish of Saint Andrew registered at Volume 1187 Folio 802 of the Register Book of Titles.
>
> (b) (i) That the said property be valued by a reputable valuator agreed on by the parties and failing agreement, each party will appoint a reputable valuator to value the said property and the parties agree to accept as the value for these purposes the average of the two valuations (hereinafter called " agreed value").
>
> (ii) That the said property be put up for sale by private treaty for the "agreed value".
>
> (iii) In the event that the property is not sold by the 31st day of January, 2002, the Defendant, wife, is hereby given the first option to purchase the Plaintiff's share in the property for Twenty Percent (20%) less than the agreed value.
>
> (iv) In the event that the wife does not purchase the Plaintiff's share in the said property and the same is sold to a third party, the net proceeds of sale shall be divided equally between the parties. Each party to bear their own legal fees of transfer."

Clause 3 (b)(iii) is a valuable advantage to the appellant.

The Agreement For Sale

The word "sale" and "sold" in paragraph 3 (b) (ii) and (iii) of the Consent Order must be considered in the context of the Agreement For Sale which is exhibited at pp 16-20 of the Record. The following paragraphs are pertinent in construing the word "sold". The agreement begins thus at page 16 of the Record:

"AGREEMENT FOR SALE

AGREEMENT FOR SALE made on the date set out in Item I of the Schedule hereto whereby IT IS AGREED that the VENDORS whose full name address and occupation are set out in Item 2 of the Schedule shall sell and the PURCHASER whose full name address and occupation are set out in Item 3 of the Schedule shall purchase ALL THAT parcel of land herein described in Item 4 of the Schedule together with any building or buildings thereon (together hereinafter called "the said Property") UPON the terms and conditions set out as follows:-

PURCHASE MONEY	The sum set out in Item 5 of the Schedule.
HOW PAYABLE	A deposit of the sum set out in Item 6 of the Schedule on the signing hereof payable to the Attorneys-at-Law having Carriage of Sale, **MYERS, FLETCHER & GORDON.** Further payment of the sum set out in Item 7 (A) of the Schedule on the date also appearing in Item 7 (A) of the Schedule. The balance purchase price as set out in Item 7 (B) of the Schedule shall be paid on completion.
COMPLETION	On the date set out in Item 8 of the Schedule on payment of all moneys payable by the Purchaser hereunder in exchange for the Duplicate Certificate of Title for the said property duly endorsed in the name of the Purchaser and/or her nominee."

Additionally, there are special conditions of which the following are of importance:

"1. It is a condition precedent to the coming into effect of this Agreement for sale that same shall first be signed by both the Vendors and the Purchaser and the deposit and further payment paid. In the event of the deposit and/or further payment being paid by cheque or other negotiable Instrument which is dishonoured on first presentation this Agreement shall be automatically rescinded.

...

3. The amount set out in Item 9 of the Schedule together with General Consumption Tax thereon shall be contributed by the Purchaser on the signing of this Agreement towards the fees for preparing this Agreement for sale.

...

6. It is understood and agreed that if the amount of Transfer Tax on this sale is assessed by the Stamp Office to be more than 7½% of the Purchase Money hereunder the Vendors may notify the Purchaser of the amount of assessment made by the Stamp Office within seven (7) days of such assessment and the Purchaser shall within seven (7) days of receipt of such notification by the Vendors pay to the Vendors as purchase money such amount as will equate to fifty per cent (50%) of the transfer tax payable on the portion assessed to be over the value of 7½ of the Purchase Money hereunder. Should the Purchaser fail to pay the Vendors within the aforesaid seven (7) days the Vendors shall be entitled to treat this Agreement as rescinded and to serve the Purchaser with a Notice of Rescission, in which event all moneys paid by the Purchaser hereunder shall be refunded without interest and free from deductions save and except money paid under Special condition 3.

...

9. The said property shall be at sole risk of the Purchaser upon this Agreement being signed by the Vendors and the Purchaser. In the event that any loss or damage occurs to the building on the said property or any part thereof by fire or earthquake or any other Act of God once the said risk has passed to the Purchaser, the Purchaser shall not be entitled to rescind this Agreement and the Purchaser shall nevertheless be obliged to perform all her obligations under this Agreement save that the Purchase Money payable shall be abated in an amount equal to that recovered by the Vendors from their insurers in relation to the loss or damage to the said property provided that any such abatement shall not exceed the Purchase Money payable in this Agreement.

...

13. In the construction of this Agreement, where the context so admits, the word "Purchaser" shall be deemed to refer to one or more persons purchasing from the Vendors and vice versa, and the words "he", "him" or "his" indicating the masculine gender and singular number shall be deemed to refer to and include the feminine and neuter gender and the plural number, and where there is more than one Purchaser, their Agreements shall be joint and several.

14. The Vendors shall not be obliged to lodge the registrable Transfer and Duplicate Certificate of Title at the Office of Titles for registration until the Purchaser has paid to the Attorney-at-Law having Carriage of Sale all monies payable by the Purchaser to

complete the sale or have delivered to the Attorneys-at-Law having Carriage of Sale an Undertaking acceptable to the Attorneys-sat-Law having Carriage of Sale for payment of same."

The Schedule is also of importance.

The vendors stated thus at page 19 of the Record.

> "2 **VENDORS** Harold Morrison, Architect of 10 Durie Drive, Kingston 8 and Marjorie Morrison, Housewife of Lot 31 Millsborough Pines, Kingston 6 (TRN # Harold Morrison –
>
> TRN # Marjorie Morrison –"

It is common ground that the appellant Marjorie Morrison did not sign the Agreement. The affidavit of Malcolm McDonald one of the Attorneys-at-law for the appellant explains the circumstances. He said in part at pages 7 and 8 of the Record:

> "9. That on the 31st January, 2002, Mrs. Priya Levers received the annexed Agreement for Sale marked "**MM 2**" from the Defendant's Attorneys, Myers, Fletcher & Gordon, the 31st January, 2002 being the date specified in the Court Order by which the property should have been sold.
>
> 10. That by tendering this Agreement on the 31st January, 2002, the Applicant did not even have the opportunity of perusing and/or getting legal advice on the special conditions contained therein.
>
> 11. That I crave leave to refer to the Agreement For Sale and in particular to the Special Conditions, and would submit that the property has not been sold for the following reasons:
>
> (i) That Special Condition 1 has not yet been fulfilled in that the Applicant, Marjorie Morrison, has not signed the Agreement;

(ii) Paragraph 6 – The Agreement for sale has not yet been stamped and therefore it is not determined whether the Stamp Commissioner will accept the consideration for the sale and therefore the Agreement is subject to rescission by its terms.

(iii) There is no undertaking as to the payment of the balance of the purchase monies."

The following paragraphs at pages 26 and 27 from the affidavit of Stephen Shelton the attorney-at-law for the respondent Harold Morrison are pertinent:

"14. On January 31, 2002 Myers, Fletcher & Gordon wrote to Mrs. Levers, Attorney-at-Law on the record for the Applicant and sent her all relevant correspondence and the Agreement for sale for execution by her client the Applicant herein. I attach hereto a copy of the said letter marked "SMS 10" for identity.

...

22. The fact that the purchaser signed the Agreement for Sale without any conditions material to her payment of the balance of the purchase money and paid her deposit and further payment **by** the 31st January 2002 and the Respondent having also signed the Agreement the very day, all that was left was for the Applicant to sign and there would have been a binding contract which could have been enforced by specific performance."

Both affidavits purported to state principles of law when what was necessary was to state the facts. It seems that the judge accepted the implications of law in paragraph 22 of Mr. Shelton's affidavit. Here is how Sykes

J. (Actg.) approached the problems and certain issues in this case at page 110 of the Record:

> "The affidavits do not disclose why the applicant refused to sign the sale agreement. There is no evidence that there was some defect in the agreement for sale that would affect its validity. The parties agreed to, in the order, a number of steps from valuation right onwards that would facilitate the sale of the property in accordance with the consent order.
>
> It does seem quite remarkable that the applicant refuses to give effect to the court order and then seeks to rely on that refusal to say that she is exercising her option. In my view her option to purchase could only arise if, for example, there was no purchaser by January 31, 2002 or if there was a purchaser, either the purchaser or the respondent had not signed a valid agreement for sale or there was some thing that prevented the formation of a valid legal contract."

With respect to the learned judge in this passage he has not attempted to construe the word "sold" in the Consent Order against the provisions in the Agreement For Sale.

Further the learned judge misconstrued paragraph 7 of the Consent Order which deals with transfers and would only come into effect after the property is sold pursuant to the Agreement. Here is how the learned judge states the position at page 111 of the Record:

> "From what I have said it follows that the option to purchase could not have arisen in the circumstances of this case. By January 31, 2002 there was a valuation, there was a purchaser, there was a sale agreement that was executed by the purchaser and the respondent, there was even a

> deposit of JA$1,500,000.00. If Mr. Henry's interpretation is correct then paragraph 7 of the order has no meaning. Once it is accepted that the Registrar's powers could be invoked where one party refuses to sign the agreement for sale then that seems to put an end to the applicant's submissions. As I said before, court orders are to be obeyed unless they are varied or set aside."

Paragraph 7 of the Consent Order at page 13 of the Record reads:

> "7. In the event of either of the parties failing to sign the respective transfers to give effect to this Order, then the Registrar of the Supreme Court is hereby empowered to sign the same on behalf of the party or parties."

To reiterate a transfer would come into effect if there were an enforceable contract for sale and the Supreme Court or the Court of Appeal ordered Specific Performance. In such circumstances section 158 of the Registration of Titles Act would come into play and the Court would direct the Registrar of the Supreme Court to cancel the relevant Certificate of Title and substitute a new Certificate in accordance with the order for Specific Performance. In the instant case there was no enforceable Agreement for Sale so neither paragraph 7 of the Consent Order or section 158 of the above Act would be applicable.

The authorities which support the Appellant's stance

Photo Production Ltd. v. Securicor Transport Ltd. [1980] 1 All E.R. 556 contains useful statements of principle which are applicable to this case. Lord Diplock at page 566 said:

> "A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

In the instant case the special conditions of the Agreement of Sale are determinative. The agreement was not signed by the Appellant and that was mandatory for a completed Sale to take place pursuant to Clause I of the Special Conditions. The Agreement of Sale must be construed in the light of the primary obligations in the Consent Order.

For a specific authority for the sale of land in a Torrens jurisdiction the following passage from **Schollum v Barripp and Another** [1916] N.Z. L.R. 1050 at 1055 is relevant:

> "In **Joel v. Barlow** 22 N.Z. L.R. 900; 5 G.L.R. 450 it was held by His Honour the Chief Justice that, where a person enters into possession of a property under an agreement that he shall give up possession when the property is "sold," the term "sold" must be construed in its ordinary popular meaning, and means that the property is "sold" when a binding bargain is made by the vendor to convey the property and by the purchaser to accept a conveyance. In the present case I am of opinion that the agreement between Matthews Bros. and the plaintiff was that the plaintiff was to retain possession up to the time the

> property was "sold" in the ordinary meaning of the term, and that his right to possession determined when he knew that a binding agreement of sale and of purchase was made between Matthews Bros. and Corringham."

When this principle is applied to the facts of this case, it is clear that there was no enforceable contract for sale between the owners and the prospective purchaser. To reiterate, the appellant Mrs. Marjorie Morrison did not sign the contract. The draft contract was sent to her Attorney-at-Law Mrs. Priya Levers on the 31st January 2002. There was no time for the Appellant to seek or consult her lawyers on the effect of the Consent Order or whether it was appropriate for her to sign the contract pursuant to special conditions adverted to previously. So this Court at the conclusion of the hearing delivered a judgment in favour of the appellant Mrs. Marjorie Morrison, to the effect that the property in issue was not sold by 31st January, 2002, and that she had an option to purchase the property at 20% less than the agreed value. There was also an order for taxed or agreed costs in favour of the Appellant.

These are the reasons why I concurred with my learned brothers in allowing the appeal.

PANTON, J.A.

1. At the heart of this appeal which we allowed on June 21, 2002, was a determination of the meaning of the word "sold" as used in clause 3 (b)(iii) of a consent order made by Rattray, J. However, the appeal was from the judgment of Sykes, J. (Ag.) who had been called on by the appellant to interpret the use of the word in the consent order. At the conclusion of the hearing of the appeal, we gave oral reasons for our judgment and promised to expand and reduce those reasons into writing.

2. The parties were once married to each other, but are now divorced. By suit E268 of 2000, the respondent had petitioned for the division of properties. The consent order referred to earlier was entered by Rattray, J. on October 11, 2001. The relevant clause in that order read thus:

> "In the event that the property is not sold by the 31st day of January, 2002, the defendant wife is hereby given the first option to purchase the plaintiff's share in the property for twenty percent (20%) less than the agreed value."

3. The appellant by means of an originating summons asked Sykes, J. (Ag.) for the following:

> "1. A determination of the questions of the meaning and construction of the word "sold" as used in Clause 3 (b) (iii) of the Consent Order made by the Honourable Mr. Justice Rattray on the 11th day of October, 2001.
>
> 2. A declaration that the proposed Agreement for Sale tendered by the Respondent's Attorneys-at law to the Applicant's Attorney-at-law on the

31st day of January, 2002, does not constitute the property being sold as specified in paragraph 3 (b) (iii) of the said Consent Order.

3. A declaration and Order that the Applicant is entitled to purchase the property the subject of the said Order, from the Respondent pursuant to paragraph 3 (b) (iii) of the said Consent Order.

4. Further or other relief as this Honourable Court may deem just.

5. Costs of this application be the Plaintiff's to be agreed or taxed."

4. Sykes, J. had for consideration the evidence of Mr. Malcolm McDonald, senior partner in the law firm McDonald Millingen & Co. who, in an affidavit dated 6th March, 2002, said that:

(i) the property, lot 31, Millsborough Pines, was valued and an agreed value arrived at;

(ii) on January 31, 2002, Mrs. Priya Levers, attorney-at-law, received the agreement for sale from the respondent's attorneys-at-law, Myers, Fletcher and Gordon, that date (January 31, 2002) being the date specified in the Court Order by which the property should have been sold;

(iii) the appellant did not get an opportunity to peruse and, or get legal advice on the special conditions contained in the agreement;

(iv) special condition 1 had not yet been fulfilled in that the appellant has not signed the agreement; and

(v) the agreement has not yet been stamped so it has not yet been determined whether the

Stamp Commissioner will accept the consideration for sale; and

(vi) there is no undertaking as to the payment of the balance of the purchase monies.

5. There was also evidence from Mr. Stephen Shelton, attorney-at-law and a partner in the firm Myers Fletcher and Gordon, attorneys-at-law for the respondent. He told of the valuations of the property done by C.D. Alexander Co. Realty Ltd. (on behalf of the appellant) and D.C. Tavares and Finson Realty Ltd. (on behalf of the respondent). These valuations were exchanged and a value of $9 million was set, being the average of the market values in both valuations. On January 23, 2002, the respondent informed Mr. Shelton that he had been advised by D.C. Tavares and Finson Realty Ltd. that although there were persons showing an interest in the property, there was not yet a certain offer, and he requested that D.C. Tavares and Finson be written to. On the next day, Mr. Shelton acted as requested. On January 28, he received a letter from D.C. Tavares and Finson with an offer to purchase for $10 million. The agreement for sale was prepared and sent to D.C. Tavares and Finson Realty Limited on January 30. Then, on January 31, the date of the deadline, Mr. Shelton received the agreement which had been signed by the purchaser. Mr. Shelton immediately had the respondent come in and sign the agreement. That same day, the appellant's attorney-at-law was written to and the agreement for sale was enclosed for the appellant to sign.

6. On February 8, 2002, Mr. Malcolm McDonald wrote to Mr. Shelton advising him that the appellant was exercising her option to purchase the property, in accordance with the terms of the Consent Order. After an exchange of letters the determination of the Court was sought in respect of what the parties had consented to.

7. Before Sykes, J. it was contended by Mr. David Henry for the applicant that "at a very minimum "sold" as used in paragraph 3 (b) (iii) of the order means:

- there is in existence an agreement for sale signed by both vendors and the purchaser;
- execution of a registrable transfer;
- payment of purchase price in full by January 31, 2002, or at least an undertaking to pay the purchase price in full on or before January 31, 2002"

Mrs. Michele Champagnie for the respondent, on the other hand, contended that once the agreement was executed by the purchaser and the respondent, the appellant was obliged to sign it unless she had a legal objection. These arguments were repeated at the hearing of the appeal.

8. Sykes, J. concluded that the property had been sold by January 31, and the appellant had no option to purchase it. He reasoned thus, on page 111 of the record:

> "By January 31, 2002, there was a valuation, there was a purchaser, there was a sales agreement that was executed by the purchaser and the respondent, there was even a deposit of $1,500,000. If Mr.

> Henry's interpretation is correct then paragraph 7 of the order has no meaning."

Sykes, J. went on to say that "court orders are to be obeyed unless they are varied or set aside". He said he was unable to grant the relief that the appellant sought, and concluded that "the presentation of the agreement for sale, executed by the purchaser and the respondent to the applicant on January 31, 2002, was what was contemplated by the learned judge (Rattray,J)." He concluded further that paragraph 7 of the order was included to remedy the kind of problem that had arisen. "This being so", he said, " 'sold' does not and could not have the meaning contended for by Mr. Henry."

9. Mr. Shelton and Mrs. Priya Levers collaborated in the drafting of the Consent Order. In paragraph 26 of his affidavit, at page 28 of the record, Mr. Shelton states that his intention based on his instructions was that "once a purchaser entered into an agreement to purchase the said property by way of private treaty at a price in excess of the agreed value of $9,000,000.00 by the 31st January, 2002, that for purposes of the Order the property would have been considered 'sold'."

10. Despite Mr. Shelton's intention, it has to be said that the word 'sold' as used in paragraph 3 (b) (iii) cannot be given that expanded interpretation. The sale process involves execution of the agreement for sale by the vendors and the intended purchaser. This was clearly recognized by the attorneys-at-law for the respondent who took steps to ensure same. The non-execution by the appellant does not mean that there is blame to be attached to the respondent.

(d) the reading of the agreement by the appellant; and

(e) the giving of advice by the attorney, if necessary, to the appellant on completion of the reading of the agreement.

12. It is in my view unreasonable for anyone to have expected all these events to have been done on the 31st January, especially when it is not known at what time the agreement was delivered to the appellant's attorney-at-law. In any event, it cannot be expected that the appellant and her attorney-at-law had no other business to attend to on that date, and were merely sitting and awaiting the receipt of the agreement on the final date specified in the consent order.

13. Mrs. Champagnie submitted to us that "sold" did not mean a completed sale; rather, it meant a binding agreement in the context of the consent order. The appellant, she said, was obliged to cooperate with the sale to the purchaser who is identified and willing to pay the agreed price.

Mrs. Champagnie's submission was in keeping with what Mr. Shelton said was his intention. Words are to be given their ordinary and natural meaning. It is from their use that intention is ascertained. Accordingly for the stated intention to have prevailed, the words in the consent order should have been to that effect, that is, it should have been stated that once a purchaser was identified who was willing to pay the agreed price, the property was to be

(d) the reading of the agreement by the appellant; and

(e) the giving of advice by the attorney, if necessary, to the appellant on completion of the reading of the agreement.

12. It is in my view unreasonable for anyone to have expected all these events to have been done on the 31st January, especially when it is not known at what time the agreement was delivered to the appellant's attorney-at-law. In any event, it cannot be expected that the appellant and her attorney-at-law had no other business to attend to on that date, and were merely sitting and awaiting the receipt of the agreement on the final date specified in the consent order.

13. Mrs. Champagnie submitted to us that "sold" did not mean a completed sale; rather, it meant a binding agreement in the context of the consent order. The appellant, she said, was obliged to cooperate with the sale to the purchaser who is identified and willing to pay the agreed price.

Mrs. Champagnie's submission was in keeping with what Mr. Shelton said was his intention. Words are to be given their ordinary and natural meaning. It is from their use that intention is ascertained. Accordingly for the stated intention to have prevailed, the words in the consent order should have been to that effect, that is, it should have been stated that once a purchaser was identified who was willing to pay the agreed price, the property was to be

regarded as sold. The failure to use such words meant that the circumstances did not amount to a sale.

14. In **Schollum v Barripp and Another** (1916) N.Z.L.R. 1050, the headnote reads in part:

> "The plaintiff, who under an agreement with a previous owner had been given the right to occupy a house and land until the property was sold, refused to give up possession when the defendant purchased the property. The defendant thereupon forced his way into the house, assaulted the plaintiff, removed some of the plaintiff's chattels, and refused a subsequent request of the plaintiff for their delivery.
>
> **Held**... Where a person remains in possession of a property under an agreement with the owner that he shall give up possession when the property is sold, the term "sold" must be construed in its ordinary popular meaning, and his right to possession is determined when he knows that a binding agreement has been made for the sale of the property."

Cooper, J. who tried that action for trespass on house and land and wrongful seizure and detention of chattels, relied on an earlier decision of the New Zealand Courts. At page 1055, Cooper, J. said:

> "The duration of the period during which the plaintiff was entitled to remain in possession of the property was therefore until the property was sold for Matthews Bros. either by the plaintiff himself or by some other agent.
>
> In **Joel v. Barlow** (22 N.Z.L.R. 900) it was held by His Honour the Chief Justice that, where a person enters into possession of a property under agreement that he shall give up possession when the property is "sold", the term "sold" must be construed in its ordinary popular meaning, and means that the property is "sold" when a binding bargain is made by

> the vendor to convey the property and by the purchaser to accept a conveyance. In the present case I am of the opinion that the agreement between Matthews Bros. and the plaintiff was that the plaintiff was to retain possession up to the time the property was "sold" in the ordinary meaning of the term, and that his right to possession determined when he knew that a binding agreement of sale and of purchase was made between Matthews Bros. and Corringham."

15. The interpretation of the word "sold" as given in **Schollum v Barripp and Another,** following **Joel v. Barlow** is the interpretation that is in keeping with the circumstances of the instant case. It is the interpretation which coincides with the ordinary meaning of the word "sold" in the consent order. In the circumstances, the property not having been sold, we allowed the appeal, set aside the order of the Court below, and ordered as follows:

(i) it is declared that the proposed agreement for sale tendered by the respondent's attorneys-at-law to the appellant's attorney-at-law on the 31st January, 2002, does not constitute the property being sold as specified in clause 3 (b) (iii) of the Consent Order made by Rattray, J. on October 11, 2001.

(ii) it is declared that the appellant is entitled to purchase the property the subject of the said Consent Order, from the respondent, pursuant to paragraph 3 (b) (iii) of the said Order; and

(iii) costs below and of this appeal are to be the appellant's such costs to be agreed or taxed.