IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E 135 OF 2002

IN THE MATTER OF THE MARRIEDWOMENS PROPERTY ACT

AND

IN THE MATTER OF QUESTIONS BETWEEN HAROLD MORRISON and MARJORIE his wife concerning the ownership of properties

AND

IN THE MATTER OF SECTION 531A OF THE JUDICATURE (CIVIL PROCEDURE CODE) ACT

BETWEEN	MARJORIE MORRISON	APPLICANT
AND	HAROLD MORRISON	RESPONDENT

Heard April 26, and May 3, 2002

Mr. David Henry instructed by Mrs. Priya Levers for the Applicant
Mrs. Michelle Champagnie instructed by Mr. Stephen Shelton of Myers, Fletcher and Gordon

Sykes J (Ag)

Before Rattray J on October 11, 2001 both applicant and respondent were represented by experienced counsel. A consent order extending over five foolscap pages

was made. Now the parties are back before me saying that they need the court to tell them what "**sold**" means in paragraph 3(b)(iii) in the order – the very order that they agreed before the learned judge. A bit more background is needed so that the issue can be properly understood. Before giving more detail I should say that the practice is that the parties should return to the judge who made the order once he is available. This matter came before me two days ago and I advised the parties accordingly. I have been told that the learned judge is not available to hear the parties. I decided to hear the matter because of the urgency of the situation. In this case the prospective purchaser is out of pocket JA$1,500,000.00 and three months after paying his he deposit is no nearer to completing the purchase because of the absence of the applicant's signature from the sale agreement. It is undesirable that this state of uncertainty continues longer than is necessary.

The applicant and respondent were married to each other. The marriage has now ended. During the marriage property was acquired and upon dissolution of the union arrangements were being made for the division of the property between the parties. On October 11, 2001 both parties appeared before Rattray J and agreed, so far as is relevant the following that was embodied in an order made by the learned judge on the same day:

> *3. (a) That the Plaintiff and 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 "the agreed value").*
>
> *(ii) That the said property be put 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 the agreed value. (my emphasis)

(v) (sic) 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.

.....

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.

This order was signed by the applicant and respondent. The attorneys for the respondent had carriage of sale. The sequence of events comes largely from the affidavit (dated March 12, 2002) of Mr. Stephen Shelton, attorney-at-law, of the firm of Myers, Fletcher and Gordon, who were acting for the respondent. Additional information comes from the affidavit (dated March 6, 2002) of Mr. Malcolm McDonald, attorney at law and senior partner of the firm of McDonald, Millingen and Company who were acting for the applicant.

Pursuant to the terms of the order D.C. Tavares & Finson Realty Ltd. was the valuator chosen by the respondent and C.D. Alexander Company Realty Limited was the valuator for the applicant. D.C. Tavares were granted access to the premises on October 17 and 19, 2001 to conduct their valuation. C.D. Alexander conducted their inspection for valuation on September 28, 2001, thirteen days before the consent order. This suggests that the possibility of sale was contemplated by at least one party. This may explain why on October 11, 2001 the parties were able to arrive at the terms of the consent order.

The average price arising from the valuations was JA$9,000,000.00. The valuations were exchange on November 15, 2001 at the the chambers of Mr. McDonald.

About November 16, 2001, the respondent gave instructions to his attorney Mr. Shelton to ask D.C. Tavares to find a buyer for the premises at the "agreed value". It can

be seen that within five weeks of the order there was an "agreed value" and instructions given to find a purchaser. Apparently no purchaser was identified until January 23, 2002.

On January 23, 2002 it came to the attention of Mr.Shelton through the respondent that there was potential buyer. By January 28, 2002 a purchaser had been identified who apparently was prepared to sign a sale agreement. Myers, Fletcher and Gordon then prepared an agreement of sale and sent it to D.C. Tavares on January 30, 2002.

On January 31, 2002 the agreement for sale was returned duly executed by the purchaser along with a cheque for JA$1,500,000.00 representing the deposit. The purchaser agreed to purchase the propery for JA$10,000,000.00, one million dollars above the "agreed value". There is no evidence that the cheque was dishonoured. Later the same day all the relevant documents, including the sale agreement executed by the repondent and purchaser, were sent to Mrs. Priya Levers who was also an attorney for the applicant. Nothing was heard from either the applicant or her attorneys. By letter dated February 7, 2002 Myers, Fletcher and Gordon wrote to Mr.McDonald indicating that they had not heard from Mrs. Levers or him (McDonald) since January 31, 2002.

This letter prompted a response. On February 8, 2002 Mr. McDonald wrote to Myers, Fletcher and Gordon indicating that the applicant would be exercising her option to purchase as set out in the consent order. Naturally the attorneys for the respondent resisted. The applicant's riposte was this summons that is before me in which the applicant is asking for

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

Mr. David Henry in support of this summons submitted, relying in particular on paragraph11 of Mr. McDonald's affidavit, 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.

Mr. Henry made reference to the special conditions in the agreement of sale and submitted that a breach of any one of them could put an end to the sale and this possibility meant that the property could not be regarded as sold. He also said that the completion date in the agreement for sale proferred by attorneys for the respondent militates against there being a sale. The completion date was 60 days after January 31, 2002. Mr. Henry prays in aid the venerable tome of *Voumard, L.*, ***The Law Relating to The Sale of Land in Victoria***, *2nd Edition, The Law Book Co. of Australasia Pty Ltd., 1965, chapter 4 pages 92,98, 532-535.*. The submission based upon this text was that on the signing of a valid agreement for sale the vendor becomes in equity a trustee of the land for the purchaser and the property is now at the risk of the purchaser. Mr. Henry then submitted that these rights/liabilities that arise on the signing of a valid sale agreement did not arise in this case for the simple reason that the agreement for sale was not signed by the applicant. I understood Mr. Henry to be saying that when one examines the shifting legal rights and obligations on the signing of a valid sale agreement, none of

those right and obligations could have arisen here since the applicant had not signed. Thus the respondent has not even established the bare minimum requirement for a valid contract to say nothing of having "sold" the property. To put it bluntly if one does not have even a valid contract one will never get to the point of having "sold" the property. Finally, Mr. Henry submitted that the order meant that by January 31, 2002 all parties (i.e. vendor and purchaser) must have done all within their power to give effect to the sale. This means that applicant, respondent and purchaser must have signed the sale agreement, a deposit must have been paid and an undertaking to pay in full by the January 31, 2002 assuming of course that the sale agreement was signed before that date. This meant the period of inevitable delay when the documents get to the Registrar of Titles and the Stamp Commissioner should be discounted.

Mrs.Champagnie also relied on *Voumards.* The only difference being that this was the third edition and by then the text was published by another publisher.

Mrs. Champagnie agreed in substance with Mr. Henry's submission. She accepted that they were correct generally speaking. She however is contending that having regard to the order "sold" does not have the meaning given to it by Mr. Henry. She contends that in this context "sold" has a special and unique meaning. She says that it means the presentation of an agreement executed by the purchaser and the respondent. She says further that upto January 31, 2002 once this agreement, executed in the manner indicated by her, was presented to the applicant should sign unless she has some legal objection. In other words the respondent and purchaser had done all that they could do; the only outstanding signature was that of the applicant. The effect of her submission is that the applicant cannot disobey the court order by refusing to sign without saying that there was some defect in the sale agreement that would not be cured by her signature. Mrs. Champagnie also submitted that all the terms of the order so far as is relevant to this matter were complied with by the respondent.

Having heard these rival submissions I have to decide what "sold" means. To do this I have to look at the whole agreement to see what was contemplated by the court. It is significant that paragraph 7 makes provision for the Registrar of the Supreme Court to sign the transfer if either or both parties fail to sign the respective transfers. The word

"parties" in this context could only have been referring to the respondent and applicant. The order makes specific provision for the very circumstance that has come about.

On enquiries by me from both parties, I was informed that if one party refuses to sign the sale agreement then, **it is the transfer that is presented to the Registrar for his signature.** As I understand it the agreement of sale is presented to the Registrar for his examination and it is taken into account when he is deciding whether to exercise the power conferred on him by the order. From what was told to me another circumstance in which the Registrar could be called upon to exercise the power given to him by the order is as follows: the respondent and applicant may sign the sale agreement but then one or both refuse may refuse to sign the transfer. The practice in this jurisdiction is to include a power in terms of paragraph 7 whenever a court orders a sale of land. This means that once the Registrar signs the transfer the transaction proceeds as if the sale agreement and transfer had been signed.

It seems to me that the parties must have contemplated that one party may refuse to sign the agreement for sale. This is why the consent order included paragraph 7. This power is clearly designed to give effect to the order of the court. It is clear to me that the parties arrived at the consent order against the background of the practice as stated in the immediately preceeding paragraph the implications of which they must have tacitly accepted. The court must also have had this practice in mind when it made the order. Where the a court has made an order that provides a specific remedy for a situation that has arisen then that remedy should be applied. Any party who is affected by a court order must act in accordance with the order unless and until it is varied or set aside.

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 facilitated the sale of the propery 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 valid legal contract.

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 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.

I am unable to grant the applicant the relief she askes for in her summons dated March 6, 2002. I conclude 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. I conclude as well that paragraph 7 of the order was included to remedy the kind of problem that has arisen here. This being so "sold" does not and could not have the meaning contended for by Mr. Henry. The summons is dismissed. Costs to the respondent. Certificate for counsel granted. Leave to appeal granted.