

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 158 OF 1989

BETWEEN P & P TEXTILES COMPANY LIMITED PLAINTIFF  
AND EOSWELL FORBES DEFENDANT

Norman Harrison for the Plaintiff.

Norman Wright and L. F. Smith for the Defendant.

MAY 5, 21, 22, 24, 28, 30 AND JULY 30, 1991

SMITH, J:

By Writ of Summons dated the 17th May, 1989, the plaintiff claims against the defendant:

- (1) Specific performance of an agreement for the sale of 323 Spanish Town Road, Kingston 11;
- (2) An order for vacant possession of the aforesaid property;
- (3) Mesne profits;
- (4) Rental for alternative accommodation;
- (5) Damages for delayed performance of agreement;
- (6) An order that the defendant accept the balance of the purchase price from the plaintiff pursuant to the aforesaid agreement.

The defendant through his attorney filed a Defence and Counter-claim. The gist of the defence is that the sale agreement does not reflect the agreed purchase price and that the defendant was induced to sign same through misrepresentation. The defendant in his Counter-claim seeks:

- (1) A declaration that the agreement for sale was duly and properly rescinded;
- (2) Further and alternatively, rescission of the said agreement for sale and an order reconveying the said land to the defendant;
- (3) In the further alternative, rectification of the written agreement;
- (4) Such further relief as may be just.

It should also be stated that in respect of a deed of transfer which was signed by the defendant, the defendant pleads non est factum.

In 1986, the defendant Mr. Boswell Forbes advertised for sale his property situate at 323 Spanish Town Road by placing on the said property a "For Sale" sign. This sign caught the attention of Mr. Paul Anderson the managing director of the plaintiff company. Mr. Anderson went to Mr. Forbes and intimated his interest in buying the property. This property consists of a two storey building. The defendant lives downstairs and rents out upstairs which houses a bar, grocery and a betting shop. The price was discussed. According to Mr. Anderson the defendant Mr. Forbes, told him "\$200,000 and all costs" or "\$300,000 and half the costs". Mr. Forbes is denying this; he said he told Mr. Anderson he was asking for \$600,000. I will return to this dispute.

Mr. Anderson testified that in 1986 he was not in a position to buy the property, he however kept in touch with the defendant. About one year later when his financial position had improved he and his partner went to Mr. Forbes to begin serious negotiations.

The plaintiff company offered to pay "\$300,000 and half the costs". This offer he said was accepted by the defendant.

In December 1987, Mr. Anderson, his partner one Mr. Peter Masters and the defendant Mr. Forbes went to the office of Mr. B. J. Scott Q.C. At least two trips were made to Mr. Scott's office. What happened at Mr. Scott's office is of the utmost importance. Mr. Scott acted as attorney for both parties - the defendant vendor and the plaintiff purchaser and as one might well expect found himself in an unenviable situation. The parties are at variance as to what happened in their attorney's office. Three witnesses - Mr. Paul Anderson, Ms. Jennifer Todd and Mr. B. J. Scott testified on behalf of the plaintiff as to what transpired in that office whilst the defendant gave evidence on his own behalf.

#### THE PLAINTIFF'S VERSION

Mr. Anderson said that on the first visit to Mr. Scott's office, the defendant, Mr. Masters and he in the presence of Mr. Scott ~~discussed~~ discussed the proposed sale and purchase of the property. The agreed price was \$300,000 and half costs.

Mr. Anderson claimed that the defendant Forbes said he needed \$20,000 in his hands. Mr. Scott asked them to return the following day to sign the sale agreement and transfer. They returned about four days later, one Mr. Wray Forrest joined the party.

He asserted that Mr. Scott read the sale agreement to them and also read the transfer. Mr. Forbes he said, was concerned about the fixtures and wanted to know what would happen if he pulled down the fixtures and the agreement should fall through. In spite of the plaintiff's assurance that there would be no such problem, Mr. Forbes, he stated, insisted that the plaintiff should give him a written promise to pay him \$1,000 if what he feared should eventuate. This was done. The written undertaking was exhibited in Court. This having been done the sale agreement and transfer were signed.

The plaintiff gave Mr. Scott the down-payment and \$20,000 to meet the defendant's request. Mr. Scott drew a cheque for \$20,000 in favour of the defendant and gave it to the defendant on his handing over the title to Mr. Scott. Under cross-examination Mr. Anderson insisted that Mr. Scott read over and explained the documents to all of them. He said Mr. Scott told them that one of the documents was a sale agreement and one a transfer.

Miss Todd, the Legal Secretary at Burham Scott and Comapny spoke of the first visit of Mr. Forbes, Mr. Anderson and Mr. Masters. She said after they left Mr. Scott gave her an agreement for sale to prepare. She then stated that they returned about four days later. The sale agreement was typed. They were all in Mr. Scott's office and she heard Mr. Scott read the sale agreement. She heard Mr. Forbes asking questions of Mr. Scott who explained the document to him.

Mr. Scott she said instructed her to type the transfer - she did so and the transfer was also read by Mr. Scott to the persons in his office.

Under cross-examination she said it was Mr. Forbes who asked Mr. Scott to read agreement of sale for him saying that he could not read properly.

Mr. Burham Scott attorney-at-law testified that during December 1987 Mr. Anderson and Mr. Forbes together with Mr. Masters and another man came to his office and asked him to have carriage of sale of premises on Spanish Town Road. He was told that Mr. Forbes was the vendor and a company in which

Mr. Anderson had interest (the plaintiff company P & P Textiles Company Limited) was the purchaser. He enquired what the purchase price was and asked for other details. He recalled that it was suggested at one stage that the purchase price should be \$250,000 with the purchaser bearing all the costs or alternatively that the purchase price should be \$300,000 and the costs divided. Eventually he said the parties agreed on "\$300,000 and costs divided". All the conditions of the agreement were standard except that Mr. Forbes requested \$20,000 out of deposit which Forbes said he needed for immediate purpose. Here he differs from Mr. Anderson who said the \$20,000 was in addition to the down-payment. Let me state that Mr. Scott's version is consistent with the written agreement and is preferred. He was told that the purchase was being financed by Jamaica Citizens Trust and Merchant Bank Limited.

He could not remember whether the title was made available to him on the first visit or whether it was so done subsequently. However after he received the title he told them to return to his office when he would have the agreement for sale and the transfer ready. They returned. The documents were prepared and ready. There is a variation here from Miss Todd who said the transfer was prepared whilst the men were in Mr. Scott's office. Mr. Forbes and Mr. Anderson along with two other men were in his office. He said that Mr. Forbes requested a full explanation of the documents as well as the costs he would be incurring. He supplied Mr. Forbes with all the information he required and answered the queries and explained the documents fully to him.

He, at Mr. Forbes' request, read both the agreement of sale and the transfer to him. The documents were read completely at least once but certain parts were read more than once in dealing with Mr. Forbes' queries. He mentioned Mr. Forbes' concern as to what would happen if he should remove the fixtures from the premises and the transaction was not completed.

Mr. Scott stated that he suggested that Mr. Anderson should give Mr. Forbes a personal undertaking to pay a sum of money to meet such expenses in the event that the agreement should fall through. After discussion Mr. Anderson agreed to give the undertaking.

He recalled Mr. Forbes wanting to know the net amount he would receive. This was explained to him. The parties then signed the documents. He then drew a cheque for \$20,000 in favour of Mr. Forbes and gave it to him along with copies

of agreement of sale and executed transfer. Copies of these documents were also handed to Mr. Anderson.

THE DEFENDANT'S VERSION

Mr. Forbes recalled that sometime in December 1987, Mr. Anderson spoke to him about the sale of his property at 323 Spanish Town Road. "I told him I was asking \$600,000", asserted Mr. Forbes. According to Mr. Forbes they agreed on \$500,000 for the property. He wanted \$50,000 for the fixtures but there was no agreement on this.

He told Mr. Anderson that his lawyers were Dunn Cox and Orrett. However Mr. Scott was recommended by Anderson and they agreed to use him. He agreed that they went to Mr. Scott's office on two occasions. On the second visit he took the title with him. He stated "before I signed I said to Mr. Scott that I am not seeing well because one of my eyes is blind and the other one hazy and I am asking you to hold the scale in the middle". On his request Mr. Scott read the document to him. He swore that he did not hear any reference to the purchase price. "He (Mr. Scott) skipped that one". After he signed the document he asked for a copy to take to his friend to have it read and he was given a copy of the document which he later realised was a copy of the sale agreement. The defendant later said he signed two documents but thought the two were one - "one for me and one for him". He did not know he was signing a transfer. Mr. Scott, he said, did not tell him that one of the documents was a transfer.

It was later that day when his friend read the sale agreement to him that he found out that the purchase price was stated as \$300,000 and not \$500,000. The following day he returned the sale agreement to Mr. Scott's office and handed it to Mr. Scott in person. He stated that when he told Mr. Scott that the purchase price agreed upon before signing the document was not written in the document Mr. Scott in surprise appealed to the Divine. Whereupon the defendant stepped out of his office "without saying goodbye".

So what the defendant is saying is that he was under the impression when he signed that he was signing an agreement for sale of his property for \$500,000. Further that the documents he signed were represented to him as a sale agreement and he was not aware that he had signed any other document. Thus in respect of the transfer he is pleading "non est factum".

THE ISSUES

The first issue therefore is: Did the defendant agree to sell the property for \$300,000 and sign an agreement to that effect? Or did he intend to sell the property for \$500,000 and was tricked into signing an agreement for sale which has \$300,000 as the purchase price?

To deal with this issue I must look at the sale agreement and the evidence and conduct of the parties and witnesses. The sale agreement is in the following terms:

THIS AGREEMENT is made the 14th day of December, 1987 between BOSWELL FORBES of 323 Spanish Town Road, Kingston 11 in the Parish of Saint Andrew, Businessman (hereinafter called "the Vendor") of the ONE PART and P & P TEXTILES COMPANY LIMITED of 220 Marcus Garvey Drive, Kingston 11 in the Parish of Saint Andrew (hereinafter called "the Purchaser") of the OTHER PART whereby the Vendor agrees to sell and the Purchaser to purchase all that parcel of land and building more particularly describes in the Schedule hereunder upon the terms and conditions set out therein.

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Description of Property:

ALL THAT parcel of land part of Cockburn Gardens called Seiveright Gardens in the parish of Saint Andrew being the Lot numbered 533 Sec. 5 on the Plan of Cockburn Gardens called Seiveright Gardens aforesaid deposited in the Office of Titles on the 19th day of July, 1956 of the shape and dimensions and butting as appears by the Plan and being part of the land comprised in Certificate of Title registered at Volume 403 Folio 91 and the whole of the land registered at Volume 1142 Folio 165:

Purchase Price:

Three Hundred Thousand Dollars (\$300,000.00).

Terms of Payment:

A deposit of Fifty Thousand Dollars (\$50,000.00) on the execution hereof, and the balance of the Purchase Price on or before the 4th day of April, 1988.

Occupation by Purchaser:

On completion.

Carriage of Sale:

Messrs Burham Scott & Company, Attorneys-at-Law, 17A Duke Street, Kingston.

Completion: On presentation of a registrable transfer and the Duplicate Certificate of Title by the Vendor and upon payment of the balance of the Purchase Price plus the Purchaser's half-costs on or before the 4th day of April, 1988.

Costs: To be borne by both parties equally.

Water Rates, Taxes, Insurance & Electricity: To be paid by the Vendor up to the date of possession.

Title: Under the registration of Titles Act.

Possession: On completion. Vacant possession.

Special Conditions:

- (a) The cost of Eight Hundred Dollars (\$800.00) for this Agreement for Sale is to be borne by both parties equally.
- (b) The Purchaser directs that out of the deposit of \$50,000.00 the Vendor is to be paid \$20,000.00, the receipt whereof the Vendor hereby acknowledges.
- (c) It is understood and agreed that the Attorneys-at-Law having the Carriage of Sale shall be entitled to stamp this Agreement for Sale with Stamp Duty and Transfer Tax from the deposit paid by the Purchaser.
- (d) Subject to the restrictive covenants endorsed on the Certificate of Title.
- (e) The Purchaser is obtaining a loan of Two Hundred and Fifty Thousand Dollars (\$250,000.00) on Mortgage from a financial institution approved by the Vendor at prevailing terms, conditions and rates of interest and will deliver letter of commitment for such mortgage on or before the 4th day of April, 1988. In the event of default by the Purchaser, the Vendor is at liberty to terminate this Agreement and to refund the balance of deposit, less costs pursuant to this Agreement and without any interest.

Signed by the said Roswell Forbes in )

the presence of:- )

.....  
(Sdg.) BOSWELL FORBES

.....  
The Common Seal of P & P Textile Company Limited (incorporated under the Laws of Jamaica) is hereunto affirmed by resolution of the Board of Directors and those presents signed by Ian Paul Anderson, Managing Director and Peter Mark Masters, Director in the )

.....  
) (Sdg.) IAN PAUL ANDERSON  
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.....  
PETER MARK MASTERS

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Mr. Scott said he read all the terms and conditions of the agreement to the parties and that he was at pains to explain them to the defendant who ask many questions. He was supported in this by Mr. Anderson and Miss Todd. The purchase price he said was agreed upon by the parties before the agreement was prepared and typed.

The defendant is in fact accusing Mr. Scott of having inserted \$300,000 as the purchase price well knowing that the defendant had not agreed on that. Paragraph 1 of the Defence and Counterclaim states in part:

" The defendant says that on the 14th December, 1987, he signed a document represented to him as a sale agreement in respect of his premises for the price of \$500,000 but that he subsequently discovered that the incorrect purchase price of \$300,000 had been stated therein..... "

Paragraph 2 thereof states in part:

" The defendant admits that he signed a document on the 14th December 1987 but says that he is a person with sight impaired vision and the nature and contents of the said document were misrepresented to him".

Was Mr. Scott involved in a conspiracy with the plaintiff?

The evidence shows that Mr. Scott did not know that the defendant was claiming not to be able to read until the day in his office when the defendant was given the document to read. All agreed that it was the defendant who requested Mr. Scott to read the document for him. Would Mr. Scott, having inserted the incorrect purchase price in pursuance of a conspiracy, give the document to the defendant to read? It is hardly probable.

Under cross-examination the defendant said the money (purchase price) was the only thing in the document that he was not satisfied with. The deposit is \$50,000. The purchaser is to obtain a loan of \$250,000 on mortgage. The total is \$300,000. If the defendant is right that the purchase price should be \$500,000 one must ask why is there no mention of the shortfall of \$200,000?

The defendant does not give any evidence as to how this balance would be paid. Is it reasonable to conclude that a businessman such as the defendant would enter into a bona fide agreement which is completely silent as to how such an amount would be paid?



Again the defendant said that when the agreement was read to him by Mr. Scott no reference was made to the purchase price. "He (Mr. Scott) skipped that one" the defendant insisted. He agreed under cross-examination that in the transaction, money was the most important thing to him, yet he would have us believe that he signed an agreement for sale having not heard any mention of the purchase price. The subsequent conduct of Mr. Forbes is also instructive. After Mr. Scott told the defendant to seek the advice of another attorney he went to Mrs. Harrison-Henry. Mrs. Henry having taken instructions from the defendant wrote:

Mr. Burnham Scott Q.C.  
Attorney-at-Law  
17A Duke Street  
Kingston.

16th February, 1988

Dear Sir,

I act on behalf of Boswell Forbes of 323 Spanish Town Road, Kingston 11.

Thank you for allowing me to look through the file concerning the above transaction on February 9, 1988. My client returned to see me this morning and I took fuller instructions concerning the transaction between himself and Mr. Anderson of P & P Textiles Ltd. Mr. Forbes now instructs me that the price agreed between himself and your client through Mr. Anderson was \$500,000. The Agreement for Sale and Transfer reflect \$300,000 the difference was to have been paid to him for fixtures etc.

While there is nothing in writing to this effect and while this matter may not have been brought to your attention because Mr. Anderson specifically told Mr. Forbes not to tell you, I am asking you to take instructions from Mr. Anderson on this matter. Even though, as you are well aware I cannot go to Court or the point fair is fair.

Your urgent attention is sought.

Yours faithfully

(Sgd.) ARIENE HARRISON HENRY

One will at once notice that there is no mention of misrepresentation in relation to the sale price in the agreement. In this letter it is said that the difference between the "agreed price" and that reflected in the agreement "was to have been paid to him (Forbes) for fixtures etc".

This is the instruction Mr. Forbes gave to his Counsel. Yet in his evidence in Court Mr. Forbes said "we agreed on \$50,000 for fixtures". According to his evidence he only discovered that the purchase price was \$300,000 when the agreement was read to him by his friend. He had told Mr. Scott from the beginning, he said, that the purchase price agreed on was \$500,000.

Yet Mr. Forbes' instructions to his attorney were that "Mr. Anderson specifically told Mr. Forbes not to tell "Mr. Scott and the tone of the letter would suggest that Mr. Scott did not know of the arrangement between the parties. Indeed as Mr. Scott said for him to accept a purchase price beyond that which is stated in the agreement for sale and transfer would be a conspiracy to defraud the revenue.

The question might be asked - why did Mr. Forbes seek to withdraw from the agreement?

Miss Todd testified that several days after the signing of the documents Mr. Forbes came back to the office of Mr. Scott. He asked for Mr. Scott and was told he was not in. He handed Miss Todd an envelope and requested that it be given to Mr. Scott. Under cross-examination she said Mr. Forbes told her to tell Mr. Scott that he "was not going to proceed with the transaction until one of his children come from abroad".

Mr. Scott in his evidence in Court and in a letter which is among the bundle of documents agreed to be tendered in evidence said the reason the defendant gave was that he wanted more money. The letter reads:

" Mr. Roswell Forbes,  
323 Spanish Town Road,  
Kingston 11,  
St. Andrew.

25th January, 1988.

Dear Mr. Forbes,

Re: Sale of and registered at Volume 1142  
Folio 165 P & P Textiles Company Limited

This morning you attended my office and informed me that you were withdrawing from the Agreement to sell the premises registered at Volume 1142 Folio 165 to P & P Textiles Company Limited.

You gave as a reason that you wanted more money.

I informed you that having regard to all the circumstances, namely, having executed the Agreement for Sale (which was stamped), having executed the Transfer and tendered the Duplicate of Title, it was not possible for you to unilaterally withdraw from the Agreement of Sale; P & P Textiles Company Limited would also have to consent.

You must bear in mind that any failure to perform on your part could result in a civil action being brought by the purchaser against you.

I strongly recommend to you that you consult another Attorney-at-Law to represent your interests in this matter.

Yours faithfully  
BURNHAM SCOTT & COMPANY

(Sgd.) per.....  
BURNHAM J. SCOTT Q.C."

Of course Mr. Forbes is saying that he sought to withdraw because the "agreed price" was not reflected in the agreement. If this was told to Mrs. Harrison-Henry would she have omitted to refer to it in her letter of the 16th February? I think not.

What is clear to me is that both parties in the presence of Mr. Scott stated the agreed price to be \$300,000. The question whether or not there was any "private" agreement between Mr. Forbes and Mr. Anderson does not arise for the consideration of this Court - certainly not on the pleadings.

I reject completely the evidence of Mr. Forbes that Mr. Scott when reading the sale agreement to him "skipped" that part which refers to the purchase price. I find Mr. Forbes' evidence hard to believe for reasons above stated. I accept the evidence of the witnesses of the plaintiff.

I find as a fact that Mr. Scott read all the terms and conditions of the agreement to the parties and that he was at pains to explain them to the defendant querist.

I find as a fact that the defendant signed the sale agreement well knowing all the terms and conditions.

I also find as a fact that the defendant was given a cheque for \$20,000 which he returned to Miss Todd. I accept Miss Todd's evidence that the defendant said he wanted to wait until his daughter (who was in Court) return from abroad.

THE TRANSFER

Mr. Forbes said that to his knowledge he did not sign a transfer. He testified that he signed more than once but thought it was the "same thing". He swore that Mr. Scott never told him that one of the documents he signed was a transfer. Indeed, according to him, he did not even know what he was signing

when he signed the sale agreement. "I was not aware of which document I was signing, it was when my friend to whom I took it read it for me that I realise it was the sale agreement". But paragraph 1 of the Defence reads in part "the defendant says that on the 14th day of December, 1987, he signed a document represented to him as a sale agreement....."

Again I must confess that it is hard to believe Mr. Forbes. I have considered the discrepancies in the evidence of Miss Todd and Mr. Scott. I am satisfied that Mr. Scott explained the transfer document to Mr. Forbes and that the latter signed knowing the nature and content of the document.

#### THE SECOND ISSUE

The second issue is whether or not the plaintiff or the defendant was in breach of the agreement and if so the consequence of such a breach. To deal with this issue I must look at the conduct of the parties and/or their agents.

Shortly after signing the agreement the defendant went to Mr. Scott's office returned the cheque for \$20,000 and the copy documents and said he did not want to proceed with the agreement. This was clearly a repudiation of his obligation. It was therefore open to the plaintiff to accept the repudiation and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract. Alternatively he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance.

By letter dated 12th January, 1988, the defendant was asked to attend on Mr. Scott. By letter dated 25th January, 1988, (supra) he was told that it was not possible to unilaterally withdraw from the agreement and warned of civil action. Thus it was made clear to the defendant that the plaintiff had not accepted the breach as a discharge of the contract. "The effect of this is that the status quo ante is preserved intact. The contract remains in being for the future on both sides. Each party has a right to sue for damages for past or future damages" - See Cheshire Fifoot and Farnston's Law of Contract, 11th Edition P. 528.



On the pleading and evidence, he argued, if there be any allegation of fraud it is certainly not against the plaintiff. Reference was made to sections 68 and 71 of the Registration of Title Act.

Was time of the essence? The agreement does not expressly make time of the essence. It cannot, in my judgment, be inferred from the "nature of the contract or from its attendant circumstances" that time was essential. The defendant did not by notice to the plaintiff make time of the essence. I therefore cannot accept Mr. Wright's submission that time was of the essence.

Section 49(g) of the Judicature (Supreme Court) Act provides as follows:

" Stipulation in contracts, as to time or otherwise, which would not before the commencement of this Act, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity."

At common law the principle was that, in the absence of a contrary intention, time was of the essence even though it was not expressly made so by the parties. However Courts of Equity did not view time as necessarily essential. Where no injustice would be done, in equity the time fixed for completion was not of the essence of the contract.

In construing a similar provision to section 49(g) (above) the House of Lords in Raineri v. Miles (1980) 2 All E.R. 145 held (Lord Dilhorne dissenting) that if in the contract time is not of the essence in equity, late performance does not give rise to a right to terminate but does give rise to a right to damages. Thus in the instant case even if the plaintiff was in breach through late completion, the defendant could not terminate the contract as he purports to do in letter of the 16th May, 1989. His remedy would be in damages.

The defendant's counter-claim must therefore fail. But even if time was of the essence, an acceptance of a repudiatory breach does not mean that the contract is rescinded ab initio. In Johnson v. Agnew (1979) 1 All E.R. 883 at 889 f & g Lord Wilberforce dealing with the effect of an acceptance of a repudiation of a contract said:

" At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is, sometimes referred to in the above situation as 'rescinding' the contract, this so called 'rescission' is quite different from rescission ab initio such as may arise for example in cases of mistake, fraud or lack of consent.

In those cases the contract is treated in law as never having come into existence..... In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged".

The effect of the acceptance of the repudiatory breach would be to discharge the contract as from the moment when the acceptance is communicated to the party in default. Therefore the defendant could not in the circumstances of this case demand that the property be transferred back to him. The contract is determined so far as it is executory only and the party in default is liable for damages for its breach. I also agree with Mr. Harrison that by virtue of the provisions of the Registration of Title Act, the defendant's claim must fail. I do not think it would be profitable for me consider fully the submissions made as to the effect of the provisions of the Registration of Title Act. The question as to whether or not the plaintiff was in breach by reason of non completion will be addressed when dealing with the plaintiff's claims.

#### THE PLAINTIFF'S CLAIM

Mr. Harrison for the plaintiff told the Court that he would only pursue the claims for damages, an order for vacant possession and an order that the defendant accept the net proceeds of the agreement for sale.

#### DAMAGES

The plaintiff claims damages for the defendant's breach of contract. Paragraph 8 of the statement of claim reads:

" The defendant has wrongfully neglected, refused or otherwise failed to give vacant possession of the aforesaid property to the plaintiff and has wrongfully refused to accept the net proceeds of the purchase money amounting to \$126,695 from the plaintiff".

Paragraph 9 reads:

" The defendant has not completed the sale, and the said property has not been delivered by the defendant to the plaintiff pursuant to the aforesaid Agreement of Sale and the said property continues in the possession of the defendant".

The defendant by paragraph 7 of the Defence admits that he has refused to give vacant possession of the said property to the plaintiff.

However the defendant denies that in doing so his action is wrongful and also denies that there has been any offer or attempt to pay over the net proceeds of the purchase money to himself or to anyone on his behalf. Paragraph 9 of the statement of claim is admitted by the defendant.

Mr. Wright for the defendant contends that there is no evidence that the balance of the purchase price and the purchaser's half cost were offered to the plaintiff. Failure by one party to perform will entitle the other to withhold his own performance, he submitted. Mr. Harrison on the other hand submitted correctly, in my view, that once the defendant's agent received the money then the defendant cannot say the money was not offered to him. The evidence he said is that the money was disbursed by the lending institution and that Mr. Scott has the money for the defendant. The joint representation of vendor and purchaser has placed Mr. Scott in an unfortunate position. I will return to this.

Mr. Scott's evidence is that he received the money from the J.C.B. Trust Company in April 1988. The balance of the purchase price pursuant to the agreement was \$250,000. Mr. Patterson told the Court that \$225,000 was disbursed in late April 1988. No explanation is given by the plaintiff for the short-fall of \$25,000.

However a Notice of Payment into Court dated 19th May, 1989, filed by Burnham Scott & Company and served on the defendant on behalf of the plaintiff indicates that an amount of \$261,695.90 representing the balance of the purchase price was paid into Court. Let me pause here to consider Mr. Wright's objection to this notice being a part of the judge's bundle. He submitted that premature disclosure of payment into Court is in breach of section 224 of the Civil Procedure Code Act and submitted that the proceedings should be discontinued. In my view it is clear that section 224 only relates to payment into Court made under sections 219-223 of the Civil Procedure Code Act. These sections deal with payment into Court made by a defendant in satisfaction of a claim. Certainly the plaintiff (although made a defendant to a counter-claim as contemplated by section 223) did not make the payment into Court in satisfaction of the counter-claim. Indeed the Defence and counter-claim were filed on the 28th July, 1989.



some two months after the filing of the Notice of Payment into Court. In this regard it should also be noted that the defendant through his attorney entered appearance on the 8th of June 1989 just over three weeks after the filing of the Notice of Payment into Court. It seems to me that the import of this Notice is to apprise the defendant of the fact that the plaintiff has done his part of the agreement - that the money was there for his taking.

It is not clear to me on the evidence, as of when Mr. Scott received the full amount for the defendant. Mr Scott said he received the money but did not say when. In my mind having regard to all the circumstances of this case, some of which I will soon refer to, it is not unreasonable to use May, 1989, (the month the Notice of Payment into Court was served on the defendant) as the time when the plaintiff had fulfilled his obligation under the contract.

#### ALTERNATIVE ACCOMMODATION

If I am right in this, the plaintiff would be entitled to recover the amount paid for alternative accommodation, as of June 1989.

Mr. Anderson's evidence is that the plaintiff pays \$1,800 per month in this regard. The entitlement under this head would be for 26 months (June 1989 - July 1991) at \$1,800 per month i.e. \$46,800.

#### MESNE PROFITS

There is no evidence to ground the claim under this head. The plaintiff was not planning to rent the property, the plan was to use the property to expand its business. Accordingly no award will be made under this head.

#### DELAYED PERFORMANCE

The plaintiff's claim here is for the recovery of business profits that the plaintiff had lost and is losing owing to the delayed delivery of vacant possession. The plaintiff's evidence through Mr. Anderson, is that there is limited space where its business is now located. Under cross-examination Mr. Anderson said the plaintiff had intended to expand the business. Around December 1987 the plaintiff, he said, got an estimate of \$106-107,000 for repairs to the property. The plaintiff had planned to use the property to borrow more funds with a view to increasing the productive capacity of the business and so be able to pay off the loan as early as possible. He lamented

the fact that he has been paying over \$7,000 per month without having the benefit of the use of his property. But for the plaintiff to recover damages under this head it must satisfy the Court that this kind of damages caused by the breach of contract was within the reasonable contemplation of the parties at the time when the contract was made and is therefore not too remote. I am not so satisfied on the evidence, and therefore may not make an award under this head.

VACANT POSSESSION

As said before, the defendant admits that he has refused to give vacant possession of the property to the plaintiff. Such refusal would be wrongful as of when the net proceeds of the purchase price was offered to or received by or on behalf of the defendant. On the basis of my findings herein the defendant would have been obliged to give vacant possession to the plaintiff at least from May of 1989. The plaintiff is entitled to the order for vacant possession as prayed.

JOINT REPRESENTATION

Before leaving this matter I feel constrained to remark on the joint representation of the parties by Mr. B. J. Scott Q.C. The court is concerned with the haste in which the property aforesaid was transferred into the name of the plaintiff. On Mr. Scott's evidence he stamped the transfer the day after Mr. Forbes returned to his office to say he did not wish to proceed. The date of registration of transfer and mortgage is 24th February, 1988.

The loan funds were disbursed by mortgage company after the registration of the transfer and mortgage. Mr. Scott said he got an oral commitment from the mortgage company and on that basis he proceeded to register the transfer. He said the transfer and the mortgage were required by the mortgage company. He did not think it prudent not to proceed with the registration in light of Mr. Forbes' conduct and Mrs. Harrison-Henry's letter. The latter could have lodged a caveat if she thought it was proper so to do, he added.

What was his duty as attorney for the vendor and as such the person who had the carriage of sale?

Carberry J.A. in Enid Phang-Sang v. Conley Sudeal et al S.C.C.A.

71/84 delivered 30th June, 1988, at p. 4 said:

" On the one hand it would be obviously unwise for the vendor to actually transfer the land into the name of the purchaser without either having got the purchase money or receiving from the purchaser, his attorney or banker an irrevocable assurance that the price will be paid on the transfer taking place.

On the other hand the purchaser may cavil at paying his money before getting title, though he could if he wished protect himself by lodging a caveat to protect the title between contract and transfer. Further he may need to show the title in order to raise part of the purchase money on a mortgage. In this situation the practice is for the vendor to loan the Certificate of Title to the purchaser's solicitor or attorney on the latter's undertaking to do nothing to harm the vendor. The purchaser's bank inspects and having assured itself that the title is unencumbered intimates it will advance the money". (emphasis supplied)

If this is adhered to, then joint representation will more often than not be undesirable to say the least. In this case, it was in my view, demonstrably undesirable. Mr. Forbes expressed dissatisfaction with the agreement and the desire to withdraw. Mr. Scott advised him to consult another attorney-at-law to represent his interest in the matter - see letter dated 25th January 1988 (supra). Yet in the face of this advice Mr. Scott proceeded to lodge the transfer on the verbal commitment of the lending Company. In my view Mr. Scott should have discontinued to act as attorney for Mr. Forbes. Indeed in continuing so to act he might well have exposed himself to be sued - see, for example, Suleman v. Shahsavarla and others (1988) 1 W.L.R. 1181 where vendor's solicitor was sued for breach of warranty of authority to act for the vendor. The long period of apparent inactivity between 4th April 1988 (the date set for completion) and May 1989, is probably attributable to this joint representation.

Under cross-examination Mr. Scott said he had a commitment to the mortgage company to send the transfer and sale agreement. However he hastened to say that he had commitments to three parties - the plaintiff, the defendant and the mortgage company. It certainly must be difficult in the majority of cases to represent both vendor and purchaser without there being conflicts.

In this regard may I refer to the observation of the President of the Court of Appeal in William Johnson v. Kenneth Thomas et al S.C.C.A.

No.77/88 delivered 5th March, 1991 at P.6:

" Although we were not addressed in any length as to the practice in Jamaica whereby one attorney acts for both vendor and purchaser in the transfer of registered land we did express the view that in an effort to avoid conflicts this practice should be adopted as seldom as possible".

I can only hope the President's remarks will be heeded.

CONCLUSION

Judgment is entered for the plaintiff in the sum of \$46,800 with interest at 3% from May 1989; and it is hereby ordered that:

- (1) The defendant give vacant possession of premises situate at 323 Spanish Town Road to the plaintiff within three months hereof;
- (2) The defendant accept the net proceeds of the purchase money.

Costs to the plaintiff to be taxed if not agreed. Costs and damages awarded to the plaintiff to be taken from money paid into Court prior to disbursement to defendant.