IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E218 OF 1991

BETWEEN	GARNETT PALMER	PLAINTIFF
A N D	PRINCE GOLDING	FIRST DEFENDANT
A N D	ETTA GOLDING	SECOND DEFENDANT

Raphael Codlin and Ms. Joyce Bennett instructed by Raphael Codlin & Co. for the Plaintiff

Donald Scharschmidt Q.C. and Robin Sykes instructed by Alton Morgan & Co. for the Defendants

February 12, 13, 14; July 15, 16, 17, 22, 23 and 24, 1996
November 8, 20, 21, 1997; January 21, 1998 and
March 13, 1998

CLARKE, J.

The plaintiff seeks several reliefs including specific performance of a written contract for the sale of land which he contends he signed on the 10th day of December, 1984.

It is not disputed that:

(a) On February 1, 1984 the Parish Council of Clarendon approved the subdivision of the defendants' 238 acre parcel of land, part of Long's Wharf, Clarendon, into 31 lots for agricultural purposes.

(b) The subdivision approval was subject to a number of conditions including the following numbered conditions:

"10. WATER SUPPLY

Water sub-mains shall be of 4 inches in diameter as shown on the plan for that purpose, and shall be of a specification approved by the Bureau of Standards.

Each lot shall be supplied with a ½ inch diameter service pipe connection from the sub-main and carried 3 feet within the boundary of each lot.

Sub-mains shall not be covered before inspection by the Superintendent, Roads and Works or his representatives.

11. ROADWAY

The reserved roadway shall be cleaned to extreme width of all vegetation. Scarify road surface and apply selected marl, consolidated in 6 inches layers to a minimum depth of 1' 0". Wet and roll to proper camber to a minimum weight of 10 ton roller.

12. The work of the subdivision shall be completed within two (2) years of the date of approval.

13. No Title shall be issued from this subdivision until a Certificate of Completion of all infrastructure works has been issued by the Parish Council to the Registrar of Titles."

(c) The plaintiff paid to the defendants' attorneys-at-law Crafton S. Miller & Co. deposits on four of the lots in the subdivision namely, lots 19, 20, 21 and 22 comprising 25 acres. The purchase price for all four lots was $150,000.00 at $6,000.00 per acre.

The first deposit of $11,500.00 was paid in respect of lots 19 and 20 on 10th December, 1984. The second deposit of $11,500.00 was paid in respect of lots 21 and 22 on 19th January, 1985.

(d) An agreement for sale of all four lots was signed by the parties. It provides for a deposit of $23,000.00 on signing thereof, a further deposit of $20,000.00 on or before the 31st May, 1985 and the balance on completion.

(e) Under the terms of the agreement for sale the title to the lots was made subject to the conditions imposed by the Parish Council.

(f) Condition 13 imposed by the Clarendon Parish Council on 1st February, 1984 was amended in February 1985 to read as follows:

"No infrastructure is required to be undertaken by the vendors".

An issue arises on the pleadings as to whether or not the plaintiff signed the agreement (Exhibit 9) on 10th December, 1984 as he alleges. It is important to resolve the issue if Condition 13 as

amended would operate to relieve the defendants of responsibility for undertaking any infrastructural work under the contract, provided that the contract was signed after the amendment.

In support of his allegation that he signed the agreement for sale (Exhibit 9) on 10th December, 1984 the plaintiff tendered in evidence:

(a) the receipt (Exhibit 8) he got when he made his first payment in December 1984;

(b) an undated agreement for sale (Exhibit 9) he alleges he signed in December 1984;

(c) the first defendant's statement, in his affidavit sworn to on 8th October, 1992 (Exhibit 45) that the contract was made on or about the 10th December, 1984:

> "That in or about the 10th of December, 1984 the First Defendant (my late wife now deceased) and I contracted to sell to the Plaintiff four lots numbered 19, 20, 21 and 22 on the subdivision plan of the lands registered at Volume 1171 Folio 241 part of Long's Wharf in the parish of Clarendon. This is the same contract referred to in paragraph 2 of the Statement of Claim dated 14th day of February 1992 ... A signed copy of this contract is now produced and shown to me and exhibited hereto ..."

It is to be observed that nowhere in that passage has the first defendant said in terms that the contract was signed on 10th or 11th December, 1984 or, indeed, on any particular date. Nevertheless, Mr. Codlin has submitted that Mr. Crafton Miller's evidence that the agreement for sale was not signed on 10th or 11th December but after 8th March, 1985, lacks credibility in the light of (a) his previous inconsistent statement when deposing in interlocutory proceedings herein that the contract was made on 10th December, 1984 and (b) attorney-at-law Derrick Russell's assertion in his affidavit in the same proceedings that "on perusal of the documents received from Messrs Crafton Miller & Co., Attorneys-at-law who had first dealt with the matter, an Agreement for sale of the said premises had been signed on the 10th day of December, 1984 by the parties ..."

Mr. Miller gave evidence that those statements are incorrect. He explained that the affidavits were sent to him by another attorney-at-law, Mr. Alton Morgan, who then had conduct of the matter and had prepared the affidavits for his signature. He had no discussion with Mr. Morgan about the affidavits and had no record to check the facts against. He relied entirely upon the fact that his colleague asked him to execute the documents and he did just that. Likewise, Mr. Russell testified that his affidavit was prepared by Mr. Morgan and he relied on Mr. Morgan's information as accurate.

I accept those explanations and have taken them into account in assessing the credibility of Crafton Miller on this and other aspects of his evidence. In light of this and further factors on this aspect of the matter that I will deal with presently, I find that, consistent with the defence, up to 8th March, 1985 no agreement for sale between the parties had been signed.

The plaintiff contends that when he signed Exhibit 9 Special Condition 13 was as it appears on the application for subdivision granted by the Clarendon Parish Council, that is to say, it provided that "no Title shall be issued for the sub-division until the approval of the Parish Council was granted". He gave evidence in support of his allegations and conceded that that the receipt for the first payment (Exhibit 8) was in the same condition when tendered in evidence as when received in 1984. He said that he signed Exhibit 9 on 10th December, 1984 and was given Exhibit 9 on 14th December, 1984.

Observe that the following words appear in a prominent position on the face of Exhibit 8:

> "Received from Mr. Garnett Palmer the sum of Eleven Thousand Five Hundred Dollars Re Deposit lot 19 and 20 Long Wharf from Prince Golding pending N.C.B. permission to prepare agreement of sale.
>
> Per E. Tennant"

I agree with Mr. Scharschmidt Q.C. that the clear and obvious meaning of the words "pending N.C.B. permission to prepare agreement of sale" is that the attorney-at-law involved, Mr. Crafton Miller, needed to obtain the permission of National Commercial Bank before preparation of

the agreement for sale and that no agreement for sale had been prepared and **a fortiori** no agreement for sale was signed by the plaintiff on 10th December, 1984.

Mrs. Ethel Tennant testified that it was she who wrote the words and that she did so on the instructions of Mr. Crafton Miller. Mr. Miller testified that the lots, the subject matter of the sale, formed a part of a piece of land that had been mortgaged to National Commercial Bank and that the Bank held the title as security and that it was necessary for him to get the Bank's permission to prepare the agreement for sale. Mr. Derrick Russell, attorney-at-law employed to the Bank, also gave evidence of the existence of the mortgage in question. Also it is to be noted that it was not suggested to either Mr. Miller or to Mr. Russell that the land, the subject matter of the sale, had not been mortgaged to National Commercial Bank, (N.C.B.).

Again, I agree that it is extremely improbable that Mr. Miller who knew that the permission of N.C.B. was necessary would have prepared an agreement for sale and had same signed by the plaintiff while at the same time instructing Mrs. Tennant to make the notation on the receipt that the permission of N.C.B. to prepare the agreement for sale was necessary.

Furthermore, the following are addtional and powerful reasons in support of the defendant's contention that the agreement for sale was not signed by the parties on 10th December, 1984 but after the amendment of the conditions of the Clarendon Parish Council took place in February 1985:

1. The plaintiff acknowledged receiving a letter dated 8th March, 1985 from Crafton Miller & Co. to Mr. Garnett Palmer. It is a letter in respect of lots 19, 20, 21 and 22 Long's Wharf. It begins thus:

> "The Agreement for Sale for the above lots have been prepared for your signature.
>
> Will you be so good enough as to come into our office and sign same".

The agreement referred to in this letter is obviously Exhibit 9.

2. The agreement provides for a down-payment of $23,000.00 on the signing thereof.

On 10th December, 1984 the plaintiff paid $11,500.00. So it is highly improbable that Mr. Crafton Miller, an attorney-at-law of 26 years standing, would have the plaintiff sign the agreement on 10th December, 1984 and give the plaintiff a copy of that agreement on 14th December, 1984 representing that $23,000.00 had been paid when it had not.

So, as pleaded by the defendant, I find that the agreement for sale was signed in or about the month of March 1985. The amendment in February 1985 to the conditions of the Clarendon Parish Council clearly took place before the agreement for sale was signed. I also find that there was no tampering or alteration by the defendants or their attorneys-at-law, of Special Condition 13 of the agreement for sale. A copy of that document retained by Crafton S. Miller & Co. on their file was admitted in evidence (Exhibit 37). Yet although Special Condition 13 of the agreement for sale was in the following terms, "no infrastructure is required to be undertaken by the Vendors" an issue arises as to whether the defendants are obliged to carry out the infrastructural work specified in the agreement for sale, so long as same has not been terminated by the parties. It is convenient at this stage to set out Special Conditions 10 to 13 of the Agreement for Sale (Exhibit 9):

"The title is subject to the following conditions imposed by the Clarendon Parish Council ...

10. WATER SUPPLY

Water sub-mains shall be of 4 inches in diameter as shown on the plan for that purpose, and shall be of a specification approved by the Bureau of Standards.

Each lot shall be supplied with a ½ inch diameter service pipe connection from the sub-main and carried 3 feet within the boundary of each lot.

Sub-mains shall not be covered before inspection by the Superintendent, Roads and Works or his representatives.

11. ROADWAY:

The reserved roadway shall be cleaned to extreme width of all vegetation. Scarify road surface and apply selected marl, consolidated in 6 inches layers to a minimum depth of 1' 0". Wet and roll to proper camber to a minimum weight of 10 ton roller.

12. The work of the subdivision shall be completed within two (2) years of the date of approval.

13. No infrastructure is required to be undertaken by the vendors".

Now, before I deal specifically with the issue as to the responsibility for the infrastructure let me address the question of possession.

It would be possible for completion to take place without the plaintiff having been previously put in possession. Indeed there is no specific provision in the agreement regarding possession. And although the plaintiff paid more than the agreed portion of the purchase money before completion could be achieved, I accept Mr. Scharschmidt's submission that the documentary evidence in the case establishes the falsity of the plaintiff's assertion that the defendants let him in possession. Exhibit 18, a letter dated 3rd November, 1986 was written by the plaintiff himself. It is captioned thus:

"Re: Purchase of Lots 19, 20, 21 and 22 - Long's Wharf, Clarendon - from Prince Golding et al".

The letter says **inter alia**:

"I am advancing a further deposit of Thirty Thousand Dollars ($30,000.00) B.N.S. #2905482 in the amount of Twenty Seven Thousand Dollars and B.O.C. #00433 Three Thousand Dollars respectively instant and hereby asking for a period of twelve (12) months to settle balance.

Upon receipt of this deposit I am reminding you of your promise to allow us full possession of the said property".

(Emphasis supplied)

As Mr. Scharschmidt correctly points out the promise referred to is to be seen in Exhibit 21, a letter of 31st July, 1985, from Crafton Miller & Co. to the plaintiff which says **inter alia:**

> "In order for you to get immediate possession you would have to obtain from your Bankers or any reputable Financial Institution a letter of understanding to pay us the balance of the purchase money and half cost of transfer upon completion".

That letter (Exhibit 21) also refers to payment of rental or interest on the plaintiff entering into possession. The letter, Exhibit 21, was in reply to the plaintiff's letter, Exhibit 19, dated 26th July, 1985 asking for permission to take possession.

All the same, in spite of the fact that the plaintiff was not let into possession by the defendants completion under the said agreement for sale was to take place "[o]n presentation of Registered Transfer or Duplicate Certificate of title in the name of the purchaser and on payment of Balance Purchase money and half cost of transfer". So, the contract provided for the presentation of a duplicate certificate of title in the name of the purchaser in respect of the transfer of four lots on payment of the balance of purchase money. Furthermore, the special conditions in the contract concerning the provision of insfrastructure would have to be addressed before completion.

Mr. Codlin has submitted that so long as the contract subsists with the plaintiff not in breach, Mr. Golding is obliged to carry out infrastructural work in respect of all four lots before completion. In my opinion Mr. Codlin is correct. Special Condition 12 says that "(t)he work of the subdivision shall be completed within in two (2) years of the date of approval. Special Conditions 10 and 11 are specific and detailed. The infrastructural specifications must have been understood by the parties to be part of the work of the subdivision to be completed within two years of the date of approval. The parties must have intended by the terms of the contract that the specified infrastructural work, by its very nature, would be performed by the vendors as subdividers of the lands described in the contract as part of Long's Wharf of which the four lots in question are numbered 19, 20, 21 and 22 on the subdivision plan for same.

I therefore hold that Special Condition 13: "No infra-structure is required to be undertaken by the Vendors" - cannot by its general words relieve the vendors of their obligation (provided the contract still subsists) to furnish the infrastructure expressly specified in Special Conditions 10 and 11. The general words of Special Condition 13 are therefore, in my judgment, otiose.

Therefore, so long as the infrastructural work was not performed, the vendors could not have effectually made time of the essence of the contract as they purported to do in October 1986 through their attorneys. They failed to provide the infrastructure called for in the contract and so could not have been ready willing and able to complete. The agreement for sale was therefore not terminated by reason of the failure of the plaintiff to comply with the "Notice to Complete Sale And Making Time Of The Essence" (Exhibit 39) which was in the result ineffectual.

An important question that arises on the pleadings and which must now be determined is whether the parties entered into four new agreements for sale in December 1987 and thereby mutually terminated the said agreement of March 1985 (the original contract). By 15th December 1986 Crafton S. Miller & Co. had ceased to act on behalf of the vendors (defendants). Completion had not taken place. The plaintiff had by November 1986 paid a total of $83,000.00 on account of the purchase price leaving an unpaid balance of $67,000.00. The defendant had not provided the infrastructure in accordance with the contract. By January 1997 attorney-at-law Derrick Russell of the Legal department of National Commercial Bank was engaged by the first defendant, Prince Golding, to act for the vendors in respect of the transaction. Mr. Russell received under cover of letter of 29th January 1992 (Exhibit 30) from Crafton S. Miller & Co. all monies and all documents held by that firm with respect to the four lots. Those documents included the duplicate certificate of title for each of the four lots as well as the agreement for sale made in respect of all four lots.

Mr. Russell who gave evidence on behalf of Prince Golding said that in 1987 on the instructions of Mr. Golding he prepared

four agreements for sale in respect of the four lots of land. Garnett Palmer came to his office and took the four agreements for sale. He got back from Mr. Palmer two of the agreements for sale duly signed by both parties and witnessed (Exhibits 17 and 16). Those agreements were in respect of Lots 21 and 22 respectively. The format for the agreements for sale for lots 19 and 20 was much the same as for lots 21 and 22 except for the price. He did not tell Mr. Palmer he couldn't find the old sales agreement from Mr. Miller's office. He opened a file in the matter but that file has been misplaced. Although he has searched diligently for the file he has not been able to find it.

On this aspect of the matter it is sufficient to rehearse a portion of Mr. Palmer's evidence under cross examination:

> "Q. Did you sign two contracts in respect of lots 19 and 20.
>
> A. I signed two contracts in front of Mr. Golding and Mr. Russell at Mr. Russell's office. I mean I signed two pieces of paper in front of Mr. Russell. Mr. Golding signed first and I signed after. No lot number was involved. No writing was on the two papers. They were blank papers. Mr. Golding and I signed the blank papers in front of Mr. Russell.
>
> Yes, two lots were transferred to me. Those were lots 21 and 22.
>
> Q. When did you become aware that those lots were transferred to you?
>
> A. When Mr. Russell wrote to me that he was in possession of the titles and I should come and collect them ...
>
> Q. Did you ever say at any time that you signed contracts in relation to lots 21 and 22.
>
> A. Yes, I did swear to an affidavit that I signed contracts in relation to lots 21 and 22.
>
> Yes, I understand that the transfers to me were as a result of the documents I signed on 16th December, 1987.
>
> Yes, the outstanding lots would be 19 and 20 ...
>
> Yes, I did lodge caveats in respect of lots 19 and 20 ...
>
> Yes, this document bears my signature. It is a caveat against the registration of any change or any dealing. I see a reference therein that the land in question was based on an agreement for sale dated 16th December, 1987.

> Yes, that caveat ... refers to a contract I entered into in respect of lot 20.
>
> Yes, this other document concerns lot 19. It bears my signature and is dated 30th November, 1990 ...
>
> Yes, that document refers to an agreement for sale dated 16th December, 1987. I swore to that document before a Justice of the Peace.
>
> Yes, the document in respect of lot 20 I swore to before a Justice of the Peace.
>
> No, at the time I swore to those two documents the action in this case had not been filed.
>
> Q. I put it to you that on the 16th December, 1987 you entered into four contracts?
>
> A. No. "

The plaintiff pleaded in paragraph 5 of the statement of claim that:

> "On the 15th June and 18th January, 1988 respectively lots 21 and 22 were transferred to the Plaintiff according to the terms of the [original contract]".

That assertion is inconsistent with the terms of the original contract (Exhibit 9) as well as with the evidence. The original contract is one agreement for all four lots. The vendor is only required to transfer on completion. The contract provided for a transfer of <u>all four lots</u> on payment of the balance of purchase money and half cost of transfer. In keeping with the evidence I find that lots 21 and 22 were transferred to the plaintiff in accordance with new contracts for sale entered into by the parties on 16th December, 1987 (Exhibits 16 and 17). As Mr. Scharschmidt points out transfer tax and stamp duty were paid on the said contracts and they were presented to the relevant authorities as agreements made by the parties in respect of the land mentioned therein.

The original contract, having been made in respect of all four lots, did not, in my judtment, survive and could not have survived in respect of lots 19 and 20 and I find that new contracts were entered into by the parties in respect of these lots. As has been tellingly put on behalf of the defendants, the plaintiff

relied on these contracts as the basis of obtaining caveats (Exhibits 26 and 26A) in which the plaintiff says that he entered into contracts in respect of lots 19 and 20 on 16th December, 1987.

In this connection I accept Mr. Russell's evidence that he prepared four contracts in respect of the lots which were the subject matter of the original contract. And I note that it was not suggested to Mr. Russell that no contracts were entered into in respect of lots 19 and 20 on 16th December, 1987. He indicated that the contracts in respect of lots 19 and 20 would have been in terms similar to the contracts in respect of lots 20 and 21 (Exhibits 16 and 17).

So, I find on the basis of the foregoing that the parties terminated the said orginal contract and entered into new contracts on 16th December, 1987 it being agreed by the parties that the sums paid under the original agreement would be applied to the purchase price and costs of the lots. I further find that so much of the sum of $92,000.00 as was necessary, which had already been paid was applied in payment of the purchase price and costs of lots 21 and 22. (see agreements for sale (Exhibits 16 and 17) copies of which together with a copy of Exhibit 9 are appended to this judgment). The balance was applied as a deposit with respect to lots 19 and 20.

The plaintiffs action must accordingly fail, predicated, as it is, on the original contract being in force at the time of action brought. As that contract was terminated by the parties in December 1987 the plaintiff is not entitled to any of the reliefs claimed.

The defendants having withdrawn their counter claim, there will be judgment for them on the claim only, with costs to be taxed if not agreed.