IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P/093/1997

BETWEEN OSWALD POWELL PLAINTIFF

AND DENNIS FRANCIS LARMAN DEFENDANT

Mr. Lawrence Haynes for Plaintiff.

Mr. Patrick Foster instructed by Chandra Soares and Company for Defendant

Heard on November 29th, December 1st, 2nd, 1999, May 21st, 24th, & August 8th, 2001, May 27th, 29th, October 18th, 2002.

Cooke J.

The case has taken far too long for resolution. The main reason for this undesirable delay is that it was sought to have as a witness the Attorney-at-Law who was concerned with the creation of a vital document on which the defendant relied. The interest of justice warranted adjournments. Alas, this prospective witness fell ill and with the passage of time his health did not improve and so the evidential aspect of this trial had to be concluded without his contribution.

Despite the amplitude of the pleadings there is consensus that these are the questions to be addressed:

1. Which is the document that governs the legal relations between the parties?
2. Having decided this, is the defendant obliged to return to the plaintiff the sum of $1,000,000?
3. Whether the plaintiff is entitled to the return to him of a portion of the payment received by the defendant for use and occupation?
4. Whether the defendant is liable to the plaintiff for damages in conversion/determine for items belonging to the plaintiff?

The plaintiff, Oswald Powell, is a businessman who at the relevant time operated a bakery on Maxfield Avenue in Kingston. At that time, in November 1995, he had just sold his home at Morningside Drive. He was in the market for another home. This led him to enter into negotiations with the defendant Dennis Francis Larman for the purchase of the latter's property at 16 Old Stony Hill Road. There were various meetings between the parties and lawyers became involved. As a result a document embodying the agreement

between the parties was formulated. Before this court are two documents both entitled "Option to Purchase". The plaintiff relies on undated exhibit 11 which he says is the document he signed dated 18th November 1995 and the defendant on exhibit 3. First let it be stated forthwith that exhibit II does not bear any signatures at all. It is the contention of the plaintiff that the document he signed was in the terms contained in exhibit II. Which document governs the transaction?

I now reproduce hereunder the relevant parts of both documents to demonstrate the issue between the parties.

Exhibit II

In consideration of the sum of one million dollars ($1,000,000) (hereafter called "the option money") paid to DENNIS FRANCIS LARMAN of in the parish of Saint Andrew (hereinafter called "the Grantor") by OSWALD POWELL and PEARLINE POWELL, both of 15 Morningside Drive, Kingston 19, in the parish of Saint Andrew or their Nominee (hereafter called "the Grantees") the Grantor HEREBY GRANTS to the Grantees the Option to purchase the

land more particularly described in the Schedule hereto upon the terms and conditions herein contained.

1. *The Option shall be exercisable at any time during a period of six (6) months from the date hereof by the Grantees delivering to the Grantor notice in writing signed by the Grantees of their intention to purchase together with a payment of THREE MILLION THREE HUNDRED THOUSAND DOLLARS ($3,300,000.00) by the Grantees.*

2. *In the event of this Option not being exercised for any reason the sum of NINE HUNDRED THOUSAND DOLLARS ($900,000.00) shall be refundable to the Grantees by the Grantor. If this Option is exercised in accordance with the terms hereof the sale shall be subject to the terms and conditions contained in the Schedule hereto.*

3. *The purchase price for the said land shall be the sum of TWELVE MILLION THREE HUNDRED THOUSAND DOLLARS ($12,300,000.00).*

4. *It is hereby agreed that the Option money shall be deemed to be payment of the purchase price herein.*

Exhibit 3

IN CONSIDERATION of the sum of ONE MILLION DOLLARS ($1,000,000.00) (hereinafter called " the option money") paid to Dennis Francis Larman of 66 Main Street, St Ann's Bay in the parish of Saint Ann (hereinafter called "the Grantor") by Oswald Powell and Pearline Powell, both of 15 Morningside Drive, Kingston 19 in the parish of Saint Andrew or their Nominee (hereinafter called "the Grantees") the Grantor HEREBY GRANTS to the Grantees the Option to purchase the land more particularly described in the Schedule upon the terms and condition herein contained.

1. *The Option shall be exercisable at any time during a period of six (6) months from the date hereof by the Grantees delivering to the Grantor notice in writing signed by the Grantees of their intention to purchase together with payment of THREE MILLION THREE HUNDRED*

DOLLARS ($3,300,000.00) by the Grantees. The sum pf THREE HUNDRED THOUSAND ($300,000.00) represents a shortfall of the amount that should be paid which is TWO HUNDRED THOSUAND DOLLARS ($200,000.00) per month.

2. *In the event of this Option not being exercised for any reason the sum of ONE MILLION DOLLARS ($1,000,000.00) is not refundable to the Grantees by the Grantor. If this Option is exercised in accordance with the terms hereof the sale shall be subject to the terms and conditions contained in the Schedule hereto.*

3. *The purchase price for the said land shall be the sum of TWELVE MILLION DOLLARS ($12,000,000.00).*

4. *It is hereby agreed that the Option money shall be deemed to be a deposit of the purchase price herein.*

The plaintiff did pay the sum of $1,000,000. The option was not exercised. The plaintiff submitted that since exhibit II was the governing document he is entitled to a refund see paragraph 2 exhibit 11. The defendant relies on paragraph 2 of exhibit 3.

The plaintiff finds himself in an uncomfortable position for in 1997 in legal proceedings filed on his behalf, he placed reliance on exhibit 3 the very document he now disavows. This is the document which in my introductory paragraph I referred to as a vital document. It is to this document which Mr. Headley Bryce Attorney-at-Law for the defendant was to speak. The evidence of the plaintiff was that in his negotiations it was agreed to come down from $15,000,000 to $12,000,000 in respect of the purchase price. Further he would make a deposit of $1,000,000 and pay $150,000 towards occupation and purchase. He said:

> *" Agreed to pay $1,000,000, down as deposit $1,000.000 to be paid as option money for period of six months of which further 2.5 million to be paid as deposit. I did not know what option meant- hence going to see my lawyers".*

This lawyer was Alexander Cools-Lartigue This is the evidence of the defendant on this aspect:

> *"I told him one million to ensure purchasing property –agreed within six months –able to pay another 3 million – Bakery doing well couple of months another 2 million- which would be six million. I wanted deposit and I prepared to give mortgage. I told him non refundable – he not have problem for sure to go through with."*

I accept the evidence of the defendant. He was an engineer and businessman. He then resided abroad. He wished to sell. The

defendant had sold his house at Morningside Drive. He wished to buy. It would seem that he may have been overly optimistic as to his future financial capacity. Exhibit 3 is a representation of what was agreed between the parties. It is true that Alexander Cools-Lartigue sent a draft option agreement to the office of Headley Bryce. It is also true that this was done by the hand of the defendant on the 17th of November 1995. It is a fact that with this draft (exhibit II) was a cheque from the plaintiff for $1,000.150.

The evidence of the defendant is that he signed exhibit 3 on the 20th of November 1995. I accept this. He had been assured that the requisite sum required as consideration for the option had been paid. The evidence of the plaintiff is that he signed exhibit 3 in mid December 1995. I do not accept this. I accept that when the defendant signed exhibit 3 the signatures of the plaintiff and his wife were already affixed to the document which was dated 18th of November 1995. I hold that exhibit 3 is the governing document.

The next question that arises is whether the court should say that the option agreement is unconscionable. The plaintiff, so says, and would seek to rely on Workers Trust and Merchant Bank Limited v Dojap Investments Limited (1993) 30 JLR 56. This judgment of the

Privy Council is of no assistance. That case dealt with whether or not the sum required to be paid as a deposit in a contractual agreement for the sale of land should be regarded as earnest money or as a penalty. If it were construed as a penalty then such deposit would be unlawful. In the instant case the $1,000,000 was consideration for the benefit of the option. Admittedly this sum would, if the option was exercised go to the purchase price. However, it is my view that the contractual agreement in respect of option is distinct and separate from the contractual agreement in respect of the terms and /or conditions of sale. The option entitles the party who has the benefit thereof to exercise that right within the context of the agreement. It is essentially a business transaction. I would be loath to interfere with the bargains of the businessmen who are as in this case at arms length. They made a bargain and the plaintiff failed to honour his obligations.

Mountford and Crooker v. Scott [1976] 2All ER 198 is instructive. The head note accurately represents this judgment which I regard as an authoritative representative of the law. It is as follows:

> *The defendant was the owner of a dwelling house. He signed an agreement with the plaintiff whereby, in consideration of the sum of £1 he granted the plaintiffs an option to purchase his house at the price of £10,000. Subsequently the plaintiffs gave notice exercising the option. The defendant refused to complete the sale and*

the plaintiffs brought an action for specific performance. The Judge held that the plaintiffs were entitled to the order sought on the ground that an option to purchase land constituted an equitable interest in land and it was immaterial that it had been granted gratuitously or for a token payment. The defendant appealed contending inter alia, that, since the consideration for grant of the option was a token payment equity would not enforce the contract, and that the plaintiffs should therefore have been left to their remedy in damages.

Held- The option agreement constituted an irrevocable offer to sell and once the plaintiff had accepted that offer by exercising the option, a contract had come into being for the sale of the house for $10,000. It was that contract which the court was being asked to enforce and the fact that the consideration for the option could be described as a token consideration was irrelevant to the question of the appropriate remedy under the contract of sale. The appeal would therefore be dismissed (see p200j, p 20r b to e and p 202 f and g, post).
Decision of Brightman J [1974] 1 All Er 248 affirmed on different grounds.

I hold that the plaintiff is not entitled to a refund.

The plaintiff was in occupation of the premises from 17th of November 1995 until the 28th of September 1996. I will regard this as a period of 10 months. During this time the defendant admits that he received from the plaintiff $1,026,000. The plaintiff sought to have a return of a portion of this payment on the ground that his requirement to pay $150,000 per month claimed by the defendant for use and

occupation of the premises was excessive. I will refer to exhibit 3 (option to purchase). In the schedule under tenancy it is stated:

> *I the Grantee shall pay the sum of One Hundred and Fifty Thousand Dollars ($150,000) to the Grantor for use and occupation of the premises from the date of the exercise of the option.*

This rather curious stipulation is inapplicable as the option was never exercised. Accordingly the court will have to look elsewhere to determine this issue.

Mr. Lowell Brown has been involved in real estate evaluation and appraisal since 1973. From his evidence the court has no reason to doubt his competence in this field. It was his view that upon his investigation a fair rental for the premises would at the relevant time have been $48,000 per month. This figure was unchallenged.

There can be no doubt that the parties in their negotiations discussed the payment by the plaintiff of $150,000 per month. When the plaintiff delivered his first cheque it was for $1,00150,000. Clearly $1,000,000 was the consideration in respect of the option. So what was the $150,000 for? The plaintiff contends that part was for use and occupation and the rest was to be regarded as going towards the purchase price. He was unable to demonstrate the formula upon

which the $150,000 was to be apportioned as between use and occupation vis-à-vis payment on the purchase price. The defendant in answer to court as to how he arrived at the figure of $150,000 for use and occupation said-:

> *"It was funds that I needed to offset expenses- to maintain property = Mortgage –property taxes- fixtures".*

Despite many bounced cheques the plaintiff endeavoured to honour the payment of $150,000 per month. His total obligation at $150,000 per month for use and occupation would have been $1,500,000 of which already said he paid $1,000,026.00. My view is that the parties agreed that the plaintiff would pay $150,000 per month for use and occupation until the purchase price had been paid. The plaintiff miscalculated. He struck what has subsequently turned out for him to be a bad bargain. I hold that the defendant is not obliged to return any of the payment received for use and occupation. In raising the question of what was a reasonable payment for rental, the plaintiff has belatedly stumbled on a forlorn afterthought. The fact is that the plaintiff agreed to pay the sum of $150,000 per month for use and occupation. Therefore the evidence of Lowell Brown does not assist him.

Finally the plaintiff claims compensation for chattels which he said he was prevented from removing from the premises. No great emphasis was placed on this aspect of the case. In any event I accept the evidence of the defendant that the plaintiff was not obstructed as he (the plaintiff) contended.

There will therefore be judgment for the defendant who still have his costs to be agreed if not agreed.