231

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 195 of 1981

BETWEEN JANET ROBERTSON PLAINTIFF

AND SURBITON PROPERTY DEVELOPMENTS LTD. DEFENDANTS

Mr. Norman E. Wright for plaintiff.

Mr. R. N. A. Henriques, Q.C., instructed by Livingston, Alexander and Levy for defendants.

January 25, 1982; May 10, 1982;
May 19, 1982.

Patterson J.:

A lease agreement, expressed to be under the Registration of Titles Act, was made on the 12th March, 1979, between R. Louis McGann, the duly appointed Agent/Receiver and Manager under mortgage No. 273412 of Surbiton Property Developments Limited, the mortgagor of the premises subject to the lease, of the one part and Janet Robertson of the other part. The lease agreement related to Town House numbered 11 of the Surbiton Square Town Houses situated at No. 5 Surbiton Road in Saint Andrew. The agreed term was for two years commencing on the 1st day of April, 1979. The lease contained the usual covenants. Under the provisions of clause 4(vi) of the said agreement, the plaintiff was given a first option to purchase the lessor's interest, couched in the following form:

> " (vi) The Lessee shall have the first option to purchase the Lessor's interest in fee simple in the leased premises and shall not less than six (6) months before the expiration of the term hereby granted give to the Lessor six (6) months notice in writing of such desire then the Lessor covenants that he will upon the expiration of such notice and upon payment of the sum of $49,000 representing the purchase price and costs of and incidental to the transfer of these premises to the purchaser herein and being subject to the terms and conditions set out in the purchase agreement dated 12th day of March 1979 and attached hereto and marked with the Letter "B" for identification

" together with all arrears of rent up to the expiration of the notice, transfer the leased premises to the Lessee in fee simple. Further it is hereby agreed that of the total amount rental paid by the tenant during the term hereby created seventy-five (75) per centum thereof shall accrue to the Lessee's credit as the deposit payable on account of the agreed purchase price herein."

The plaintiff, by a letter dated the 14th day of November, 1980, gave notice to the defendants of her desire to exercise the option to purchase the leased premises "at the end of the lease agreement."

The plaintiff in an action commenced by way of an **Originating Summons** claimed to be entitled to have transferred to her all the estate and interest in the property, 11 Surbiton Close, and to that end, sought the determination of the following questions:

" 1. That this Honourable Court Determine whether JANET ROBERTSON by letter dated 14th November, 1980 validly exercised her option contained in Lease Agreement dated 12th March, 1979;

2. That This Honourable Court Determines and makes a Declaration that the said JANET ROBERTSON is entitled to have the said premises transferred to her upon payment of the sum of FORTY-NINE THOUSAND DOLLARS ($49,000.00) and the necessary legal costs of and incidental to the transfer of the said premises by the Defendant Surbiton Property Developments Limited and accordingly grants an order for specific performance of the sale agreement herein; and

3. That this Honourable Court makes a Declaration that the Plaintiff is entitled to be credited with 75 percent of the sums paid in respect of rental for the said premises in keeping with item (vi) on page 3 of the said Lease Agreement;"

The plaintiff's affidavit in support of the **Originating Summons**, in so far as it is material to this action, reads as follows:

" 2. That under Lease and Sale Agreements, both of which are dated the 12th day of March, 1979, I entered into possession of premises situate at No. 11 Surbiton Close, Kingston 10 in the parish of Saint Andrew on the 1st day of May, 1979 for a period of two years and I annex herewith photo-copies of the said Lease and Sale Agreements marked Exhibit JR. 1 and 2.

" 3. That under the said Lease Agreement the term of the Lease should have commenced on the 1st day of April, 1979 but at the request of the then Receiver/ Manager of the Defendant Company I did not commence occupation until the 1st day of May, 1979.

4. That under item (vi) on page 3 of the said Lease Agreement I was granted a first option to purchase the said premises at No. 11 Surbiton Close, Kingston 10 and was required to give six (6) months notice in writing of my desire to exercise the said option.

5. That in accordance with the said item (vi) on page 3 of the said Lease Agreement, by letter dated the 14th day of November, 1980, I exercised the said option and I annex hereto marked Exhibit JR 3, photocopy of the said letter.

6. That notwithstanding my exercise of the said option the Receiver/Manager of the Defendant Company has refused, failed and/or omitted to take any steps to transfer the said premises to me.

7. Further, that under the said item (vi) on page 3 of the said Lease Agreement I am entitled, on the exercise of my option, to be credited with seventy-five per cent (75%) of the rental paid during my two years of occupation under the said Lease Agreement.

8. That I ask this Honourable Court to Declare that my option has been properly exercised and remains valid, that I am entitled to have the premises transferred to me for the sum of FORTY-NINE THOUSAND DOLLARS ($49,000.00) and further that I am entitled to be credited with the seventy-five per cent (75%) of the rental in accordance with item (vi) on page 3 of the said Lease Agreement."

The defendants filed an affidavit in reply, but abandoned the use of it on the plaintiff's objection that it was served out of time.

The plaintiff also sought to rely on a further affidavit sworn 9th March, 1982 and filed subsequent to the commencement of arguments by Mr. Wright but I held that it was too late to admit such further evidence.

The main thrust of Mr. Wright's arguments was that the option to purchase was validly exercised on the date of the notice i.e. on 14th November, 1980. He agreed that the option to purchase the freehold reversion was an independent contract, a collateral agreement to the lease. He said that in relation to contracts generally, time is not of the essence unless made so by the nature of the subject matter, the conduct of the parties or by notice

making time of the essence. In the instant case, there was nothing in the nature of the property or the conduct of the parties to support any suggestion or inference that the parties intended time to be of the essence. On the contrary, the conduct of the parties supported a finding that time was never regarded to be of any importance. In support of this argument, he pointed out that clause 1 of the lease fixed the term to begin on the 1st April, 1979 and in disregard of this, the defendants requested the plaintiff to commence the term one month later. Again, the sale agreement dated 12th March, 1979, fixed completion date as "on or before two months of the date hereof", although the parties knew that was not possible. Lastly, the plaintiff exercised the option and the defendants did nothing relative thereto, neither in terms of the sale agreement as regards the deposit nor by requesting the plaintiff to pay the balance of the purchase money, nor by refuting the validity of the exercise of the option. These considerations, he argued, as well as the "general tenor of the relationship" between the parties, were such as to rebut any suggestion that time was of the essence of the option agreement. Alternatively, the defendant has waived by conduct any possible requirement as to time. That being the case, he submitted that notwithstanding that the notice to the defendant was dated 14th November, 1980, it was a valid exercise of the option to purchase the reversion.

Additionally, he argued that the Memorandum of Agreement for Sale, which was duly executed by the parties simultaneously with the lease agreement on the 12th March, 1979, should be regarded as a valid agreement which can be read independently of the option clause and on which the Court would be entitled to decree specific performance.

Mr. Wright referred to a number of cases but in my view, although they may be supportive of his arguments, they did not really assist me in determining the real issue in this action.

Mr. Henriques relied on the plaintiff's originating summons and affidavit in support and contended that the plaintiff was seeking

to determine whether or not the option was validly exercised and that the other reliefs sought were ancillary. All the rights of the plaintiff depended on the valid exercise of the option to purchase the reversion.

He argued that the lease agreement would be irrelevant if the sale agreement was read to be independent of it. Under the provisions of clause 4(vi) of the lease, the valid exercise of the option is a condition precedent to the operation of the sale agreement. The sale agreement is an integral part of the option and is only enforceable if the option is validly exercised by six months' notice and then on the expiration of that notice, upon the payment of the purchase price of $49,000.00 by the plaintiff to the defendants. Six months' notice was necessary for the valid exercise of the option. On the plaintiff's admission, the notice of intention to exercise the option was 14 days' late; the option had lapsed and the plaintiff therefore lost the right to any benefit under it. In fact, she was six weeks late and not 14 days, as the lease was expressed to commence on the 1st April, 1979 and the fact that she entered on the 1st May, 1979, was not relevant to the date of the lease. He cited, in support, the case of Allan Estates Limited v. W. G. Stores Limited [1981] 3 All E.R. 481.

He argued that it is a well established principle that the agreed terms of an option must be strictly construed and complied with, and in support he referred to the case of West County Cleaners (Falmouth) Ltd. v. Soly [1966] 1 W.L.R. 1485.

He contended that the defendants had not waived the right to treat the purported exercise of the option as invalid, since it had done nothing to give that impression.

I am much indebted to counsel for their refreshing arguments in this case. In my view, the crucial question to be decided is whether or not the plaintiff's notice to the defendants, given on the 14th day of November, 1980, was a valid exercise of her option to purchase the reversion. It is admitted that such notice was given

at least 14 days late.

I must now look to see what the terms of the option are, and what is the proper construction to be put on those terms.

Clause 4(vi) of the lease agreement, in creating the option, limited the time for service of the notice of a desire to exercise the option to "not less than six (6) months before the expiration of the term hereby granted." The term granted in the lease was for "two years commencing from the first day of April 1979," although the plaintiff's evidence is that, by oral agreement, the commencement date was altered to the 1st May, 1979. It follows that the term granted expired on either the 31st March, 1981 or the 30th April, 1981, but it is not necessary to decide which, as in any event, the notice of intention to exercise the option was served less than six (6) months before the expiration of the term granted and therefore late.

At common law, stipulations as to time in a contract were, as a general rule, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Equity, on the other hand, regarded stipulations as to time, in the absence of express or implied evidence to the contrary, not to be of the essence of the contract, save in mercantile contracts. The doctrine of Equity that time is not of the essence, is especially true in the case of contracts for the sale of land but it is not one of universal application. It is well settled that "an option for the renewal of a lease or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse." (See Halsbury's Laws of England Vol. 8, 3rd edition, 165) There is no difference as regards stipulations for time between the rule of the common law and the rule of equity. Where time is limited the option must be exercised within the time in which it is expressed to be given, both at law and in equity. Where six months' notice in writing was necessary, a shorter notice was held to be

insufficient (Riddel v. Durnford [1893] W.N. 30.)

But a landlord may by conduct waive any delay in the exercise of the option. In Pegg v. Wisden (1852) 16 Beav. 239, it was decided that a letter sent by the landlord to the tenant after the time for the exercise of the option had elapsed, requesting him to complete, amounted to a waiver. The landlord had taken some positive steps which showed an intention to waive the breach. In West County Cleaners (Falmouth) Ltd. v. Soly (supra) it was held that where a landlord was aware of a breach of a covenant to repair and raised no objection, it was no more than mere silence and could not amount to waiver of the tenants' breaches of contract.

In the instant case, it is admitted that the plaintiff's notice of her intention to exercise the option was served out of time. I hold that in those circumstances the option has not been validly exercised and that it lapsed.

I am of the view that the defendants' silence after the notice was served out of time cannot amount to a waiver of its right to treat the option as having lapsed.

I further hold that the sale agreement cannot be considered in isolation; it is inextricably bound to the valid exercise of the option. It is subject to the valid exercise of the option and all amounts payable in consequence thereof will stand or fall with it.

It only remains for me to declare that for the reasons stated, the answers to the questions are:

1. The plaintiff, Janet Robertson, by letter dated 14th November, 1980, did not validly exercise her option contained in the lease agreement dated 12th March, 1979;
2. As a consequence, the plaintiff, Janet Robertson, is not entitled to have the premises No. 11 Surbiton Close transferred to her by the defendants; and
3. The plaintiff is not entitled to be credited with any amount paid in respect of rental for the said premises.

In as much as I have decided against the plaintiff, the defendants are entitled to the costs of this action.

229

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO; 1/81

BEFORE: The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Wright, J.A. (Ag.)

R. v. WINSTON HILL

Mr. Anthony Pearson for the Applicant

Mr. Anthony Smellie for the Crown

April 21 & May 19, 1982

ROWE J.A.

Mr. Pearson in his very first appearance in the Court of Appeal argued meritoriously that the learned trial judge misdirected the jury in connection with the appellant's conviction for Rape by failing to direct the jury clearly that any evidence for which the complainant was the source was incapable of corroborating the complainant's evidence. We accordingly allowed the appeal, quashed the conviction but in the interests of justice we directed that there be a new trial.

The Crown's case was that at about 9.30 p.m. on December 20, 1979, a Miss Marston was walking home alone in the Maroon Town area of St. James. She was set upon by a man who held a knife to her throat, took off her scraf and used it to gag her, then he placed her in some bushes, stripped her of her clothes and forcibly had sexual intercourse with her twice. Then the rapist stole her handbag and while he was rummaging through it, she escaped and ran to the home of Alfred and Iris Martin, shouting for murder. She showed the Martins her hand which was bleeding from a cut received when she grabbed the knife during the assault upon her and she made a report to them. This report contained not only the details of the attack but the fact that the appellant was the rapist.

At the trial the appellant denied that he was Miss Marston's assailant and the issue was then one of identification. It was being contended by the defence that the complainant did not know the identity of her assailant and that it was some days after the attack that she first linked his name with the offence.

The learned trial judge dealt adequately with the issue of identification and as to this the appellant makes no complaint. He was constrained to give directions on corroboration and in so doing he heeded the admonition of the Lords of Appeal in D.P.P. v. Kilbourne (1973) 57 Cr. App. R. 381 that the word "corroboration" is not a technical term of art and that by itself it meant no more than evidence tending to confirm other evidence. This is how the learned trial judge defined "corroboration".

> "Corroboration is a big word which, you know might even confuse the jury; all it means is that you must look for support, if you can find it, somewhere else in the case."

Where a judge in his discretion decides to direct the jury in so casual a manner, he has a duty to exercise caution as to what evidence he leaves to the jury as capable of giving support to the complainant's evidence. At page 7 of the summing-up the learned trial judge indicated to the jury that probably there was in the evidence some material supportive of the complainant and he promised to point out such evidence in due course. He said:

> "Now in this case, it may be that there is some evidence that supports her story. When I come to the evidence I will deal with that."

The learned trial judge kept his promise and at page 16 of the summing-up he said:

> "So that is Precisous' case and you might well consider that she has been supported to some extent by Mrs. Iris Martin who said - remember what Miss Iris said - that her husband and her brother had gone to bed. She was in the kitchen making her little coffee. She heard this commotion, door burst open and Precious came in there breathless, puffing, distressed, her hair all over the place, her clothers full of

> "burrs and looking completely dishevelled and her hand was bleeding. Measure that against what Precious was telling you happened to her and see whether that supports Precious' story. She said she had to bathe the hand and put a little rum on it and bandage it and bathe Precious herself; but here is the key now, listen carefully. She said that Precious when she came in told her that is Winston Hill who raped her. Now that you must consider, you see, because what the defence is suggesting to you is that nothing was said about Winston Hill. It is either the day after or days after that Precious came up with this story about it is Wintson Hill. So you have to consider was Mrs. Martin speaking the truth when she said 'when Precious came to me that night she said it was Winston Hill who raped her. She saw the two brothers and it is the brown one', and we already have evidence from the accused man's father himself that the other brother is blacker then he is; so is the brown one Winston Hill. So if you believe Mrs. Martin, then there is some support and Mr. Alfred Martin to a lesser extent also gave some supporting evidence."

It is beyond argument that the complaint made by Miss Marston to Mr. and Mrs. Martin could not amount to corroboration in law. Since the jury were directed to look for supporting evidence to satisfy the requirement of corroboration and since the jury mere expressly invited in the passage quoted above to regard the complaint as evidence supporting the complainant, this was a misdirection in law.

In 1970 Eric James appealed from the Court of Appeal of Jamaica to the Privy Council from his conviction for Rape and the learning to be garnered from the judgment of the Board as delivered by Viscount Dilhorne with regard to corroboration is both well known and extremely simple of application. Viscount Dilhorne said:-

> "Where the charge is of rape, the corroborative evidence must confirm in some material particular that intercourse has taken place and that it has taken place without the woman's consent, and also that the accused was the man who committed the crime. In sexual cases, in view of the possibility of error in identification by the complainant, corroborative evidence confirming in a material particular her evidence that the accused

"was the guilty man is just as important as such evidence confirming that intercourse took place without her consent."

James v. R. (1971) 55 Cr. App. R. 229 at 302.

Where, as in the present case, there is no admission by the accused person that he had sexual intercourse with the complainant, a trial judge at the outset of his summing-up should advise himself as to whether there is any evidence capable of satisfying the three-pronged test so lucidly stated by Viscount Dilhorne. If he cannot identify such evidential material, then it is his clear duty to tell the jury that there is no corroboration. He should then proceed to give the directions appropriate to a case in which there is no corroboration. In the instant case there was no evidence capable of amounting to corroboration and having regard to the misdirection referred to earlier, we were constrained to allow the appeal.

On the Crown's case this was a dastardly attack upon the complainant and although she must suffer the ordeal of a second trial, the interests of justice clearly require that there should be a new trial and we made an order accordingly.