

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 96/96

**BEFORE: THE HON MR JUSTICE RATTRAY, P
THE HON MR JUSTICE DOWNER, J A
THE HON MR JUSTICE LANGRIN, J A**

BETWEEN LASCELLES A. N. ROBINSON PLAINTIFF/APELLANT

**A N D EXECUTORS OF THE ESTATE OF
CYRIL WAN 1ST DEFENDANT/RESPONDENT**

**A N D SCOTIA BANK JAMAICA
TRUST AND MERCHANT BANK 2ND DEFENDANT/RESPONDENT**

**Dr Bernard Marshall for Appellant instructed by Valerie Neita-Robertson
Mrs Verleta Green for 1st Respondent**

3rd, 4th June, 19th July and December 20, 1999

RATTRAY, P:

Having read in draft the judgment of Langrin, J.A, for the reasons stated therein, I fully agree that the appeal should be dismissed.

DOWNER, J.A.

I also agree.

LANGRIN, J.A.:

This is an appeal from a decision of Ellis, J who on July 24, 1996 dismissed the appellant's application for Specific Performance of a Contract for the sale of 1A Manchester Street, Spanish Town, St Catherine and ordered:

1. That the Plaintiff forthwith give to the First Defendant possession of said premises registered at Volume 1045 Folio 102 of the Register Book of Titles.

2. That the Plaintiff pays to the First Defendant for the use and occupation of the premises.
 - (a) The sum of Fifty Thousand Seven Hundred and Fifty three Dollars and Fifty Cents to the 3rd day of September, 1991
 - (b) The sum of Fifty-two Thousand Six Hundred and twenty-seven Dollars and Ten Cents to the 7th day of April, 1992
3. That the amounts payable at paragraphs 2 (a) and 2(b) are to bear interest at 6%
4. That the First Defendants are to have costs to be agreed or taxed

Background Facts

The background facts are straightforward and largely uncontroversial. The Appellant, Lascelles Robinson a garment maker was a tenant of the deceased Cyril Wan. Mr. Robinson resided at the premises which form the subject of this appeal. The premises comprise all that parcel of land in the Register Book of Titles at Volume 1045 Folio 102.

On the 30th day of March, 1979, the appellant and the deceased Cyril Wan, entered into an agreement whereby the appellant would purchase the land from the deceased for \$30,000.00. The agreement for sale stipulated a deposit of \$10,000.00 upon signing and the balance \$20,000.00 was to be paid on completion. Completion was to be on or before the 30th day of June, 1979 and carriage of sale was in the hands of Smart Bryan, Attorney-at-Law of 25 King Street, Spanish Town. The agreement was signed by Lascelles Robinson as purchaser and Charles Wan signed for his brother Cyril Wan.

On 2nd May 1979, the appellant paid over a Manager's cheque of the value of \$10,000.00 to the Vendor's Attorney as deposit in compliance with the agreement. On the 6th May, 1979, the Vendor Cyril Wan died and in his Will he appointed his wife Norma Wan and his brother Charles Wan as the executors and trustees of his estate. Cyril Wan's Will was not probated until 18th November, 1984. On June 22, 1979, only eight days before the agreement was to be completed, the Appellant sought the return of his deposit and the cheque of \$10,000.00 was returned and signed over to him by the Vendor's Attorney.

Later that year, the appellant entered into an arrangement with Charles Wan, one of the executors of Cyril Wan's estate, whereby the Appellant would pay the mortgage owed by the estate of the deceased Cyril Wan to Scotia Bank Jamaica Trust and Merchant Bank (hereafter Scotia Bank) in lieu of the rent he owed.

Between 1979-81 the appellant paid \$5,727.46 to service the Vendor's mortgage until Mrs. Wan instructed Scotia Bank to cease accepting payments from the Appellant. On the 30th June, 1987 the executors of the deceased's estate served a Notice to Quit on the appellant. The Notice required that the appellant vacate the premises by the 30th July, 1987. This was followed by proceedings which were initiated by the executors of the deceased's estate for recovery of possession in the Resident Magistrate's Court of St Catherine on the 30th September, 1987. The hearing in the matter was adjourned sine die on the 28th day of June 1988. Between 1983 and 1987 Mrs Wan paid a total of \$22,264.85 in relation to the arrears of the mortgage.

Sometime around September 1989 an arrangement appears to have been entered into with Lascelles Robinson in which he would be sold the premises if he discharged the mortgage. This is revealed in the correspondence carried on by Mrs. D Kay Shelton-Mayne (deceased) the Attorney for Mrs. Wan. In a letter dated September 22, 1989, Mrs. Mayne wrote to Horace Edwards, Q. C., Attorney for the appellant as follows:-

"Further to our telephone conversation in which we agreed to sell to your client, Mr. Lascelles Robinson, the above-mentioned premises if he agrees to pay the balance owing on the mortgage for the said premises and all costs for the discharge of mortgage and Transfer."

Mr. Edwards replied to the letter in the affirmative.

Mrs. Shelton-Mayne then wrote to Mrs Wan in a letter dated 6th October, 1989 stating as follows:-

"As instructed by you, I have agreed on your behalf to sell Mr. Lascelles Robinson the above-mentioned premises for the amount owed to discharge the mortgage that is approximately twenty-three thousand one hundred and seventy-nine dollars and seventy-eight cents (\$23,179.78) plus ten thousand dollars (\$10,000) which he states he paid to Cyril Wan deceased and had also agreed to pay transfer tax and all costs incurred on the transfer.

This means that you will not receive any sum of money from the sale, as the mortgage payments were in arrears.

Kindly confirm in writing whether this meets with your approval so I may proceed with the transfer."

Mrs. Shelton-Mayne in a letter dated November 7, 1989 wrote to Victoria Mutual Building Society, Spanish Town advising the society that Mr.

Robinson was purchasing the property and has undertaken to pay the balance of the mortgage after which the property will be transferred to him.

On November 29th, 1989 the Mortgage Manager of Victoria Mutual Building Society, Duke Street, Kingston replied to Mrs. Shelton-Mayne:-

"We have approved a loan of \$36,900 on the security mentioned above subject to mortgage indemnity insurance coverage obtained.

Payment of the loan will be made on execution and registration of the mortgage."

The mortgage approval was communicated to the appellant on January 24, 1990 by Victoria Mutual Building Society.

On May 3rd 1990, the appellant's Counsel Horace Edwards Q.C. wrote to Scotia Bank making reference to a signed out of Court settlement between Lascelles Robinson and Mrs. Wan dated 22nd October, 1989, the settlement outlined that Lascelles Robinson would pay Scotia Bank the balance owed by the deceased Cyril Wan and in return the said premises would be transferred to him. The letter went on to add that Victoria Mutual Building Society had granted the appellant a loan of \$36,000. The appellant in the letter to Scotia Bank also mentioned the difficulty that the Attorneys of the executors of the estate of Cyril Wan had in reaching their clients to get them to sign the transfer.

Scotia Bank in a letter dated May 11, 1990 to Mrs. Shelton Mayne expressed its concern as to Mrs. Mayne's inability to contact her clients:

"Reference is made to telephone conversation, Shelton-Mayne/Ashman, May 10, 1990. Since you are unable to contact the executors of the Estate, Cyril Wan deceased, we suggest that you make an application to the Registrar of Titles under Section 155 of the

Registration of Titles Act with a view to having the property transferred to Mr. Lascelles Robinson.

We think it might be more convenient for you to make the aforementioned application than for us to exercise the Powers of Sale granted to us by the mortgage."

Section **155** of the Registration of Titles Act expressly states:

"**155.** If the Registrar is satisfied upon production to him of sufficient evidence -

- (a) that land under the operation of the Act has been sold by the registered proprietor thereof; and
- (b) that the whole of the purchase money has been paid ; and
- (c) that by virtue of such sale the purchaser or any person claiming through him has entered upon the land and taken possession thereof and the vendor or his representative has acquiesced in such entry and taking of possession; and
- (d) that the land cannot be transferred to the purchaser or any person claiming through him either because the registered proprietor or his representative is dead or absent from Jamaica or cannot be found or because it is, for any other reason, impracticable to obtain the signature of the registered proprietor within reasonable time,

the Registrar may in his discretion make a vesting instrument in the prescribed form and shall thereafter enter a memorandum thereof in the Register Book and issue a new certificate of title and the duplicate thereof in the name of the person in whom the instrument vests the land and that person shall become the transferee and the registered proprietor thereof. "

In 1991 two applications were made by the Applicant under this Section.

Between January to August 1990 the appellant spent \$48,569 on materials to refurbish and repair the premises.

On 3rd May, 1991 the appellant took out an Originating Summons in which he sought the following:

(1) An Order declaring that upon the payment by the Plaintiff of:

- (a) the outstanding balance owing on the mortgage for the said premises by the Estate of Cyril Wan deceased to Scotia Bank Jamaica Trust and Merchant Bank Ltd.; and
- (b) all costs for the discharge of mortgage and transfer - the above being the terms agreed to by the defendant herein.

2. A Declaration that the Plaintiff be deemed to have fulfilled the requirements of the said contract and has thus become entitled to:-

- (a) the ownership of the entire fee simple absolute in possession; and
- (b) the vesting of a registered title to the said parcel comprised therein.

3. Further or alternatively the Plaintiff seeks:-

(a) the like or equivalent remedy as cestui que having paid the deposit and having made substituted payments towards the mortgage owed by Estate Cyril to the second defendant, the legal mortgagee of the holding the property as security for the continuing loan made to Cyril Wan during his lifetime thus creating an implied constructive or resulting trust thereby;

(b) an Order that upon the Victoria Mutual Building Society which has agreed to lend to the Plaintiff the sum of (\$36,000) thirty-six thousand dollars (which is in excess of the amount outstanding and the closing costs giving to the second defendant (the mortgagees of the Estate)

and irrevocable undertaking to pay to them the sums outstanding that this be deemed to be a valid and complete payment of the balance of the purchase price due and owing under the contract of sale of the said premises to the Plaintiff.

(4) Further or other relief as shall be just.

On June 2, 1992 Smith, J ordered inter alia that the proceedings were to be continued in open court as if begun by Writ of Summons also that the affidavits hall stand as pleadings.

On August 29th 1991, Mrs. Verleta Green, Attorney at Law for the Executors - Mrs. Shelton-Mayne having died, caused to be served upon the Appellant a Notice to Quit and Deliver up the premises. The Notice specified the following reasons:-

- " (1) Rent lawfully due has not been paid for a period of at least thirty (30) days;
- (2) The premises being a dwelling house have been used for trade and business purposes without the consent of the landlord or under the terms of the tenancy;
- (3) The premises are required for the purposes of being improved and rebuilt;
- (4) You have sublet part of the premises without obtaining the consent of the landlord or under the terms of your tenancy
- (5) You have forfeited your tenancy by denying your landlord's title."

On January 23rd 1992 Scotia Bank through their Attorneys at Law demanded from the respondent that the mortgage be paid. The sum being

demanded by the mortgagees was forty -seven thousand two hundred and fifteen dollars and fifty cents (\$47,215.50). The first respondent eventually paid their mortgagees the sum of fifty-two thousand six hundred and twenty-seven dollars and ten cents (\$52,627.10) which settled the account of the mortgage.

The defendants (Executors of Cyril Wan's Estate) counter claimed on May 27th 1992 seeking from the Court the following:

- "1. That the Plaintiff forthwith give to the 1st Defendant possession of the premises at 1A Manchester Street in the parish of St Catherine registered at Volume 1045 Folio 102 of the Register Book of Titles
2. That the Plaintiff pays the 1st Defendant for the use and occupation of the premises:-"
 - (a) the sum of fifty thousand seven hundred and sixty-three dollars and fifteen cents (\$50,763.52) to the 3rd day of September, 1991.
 - (b) the sum of fifty-two thousand six hundred and twenty-seven dollars and ten cents (\$52,627.10) to the seventh day of April, 1992,
 - (c) mesne profits calculated at the rate of thirty-four dollars and eighty cents (\$34.80) per day from the seventh day of April, 1992 to the date of possession.
 - (d) interest."

The essence of Robinson's complaint against the Executors of the estate of Cyril Wan is that he has a legal or equitable right to the ownership of the property in question.

The written grounds of appeal may be summarised as contending that Ellis, J erred in law in refusing leave to the plaintiff to re-open the plaintiff's case; in finding that the plaintiff took back his deposit and thereby intended to cancel

the sale which was against the weight of the evidence; in finding that the sum of \$10,000 was a deposit, when in fact it was a penalty; in finding that the payments by the plaintiff to the mortgage company was not any evidence of part performance was against the weight of the evidence; that on the totality of the evidence a fresh agreement between the parties for the sale of the said land on the principle of novation would have come into existence even if the original sale was cancelled as alleged or that the original contract was varied; that the evidence clearly pointed to a construction and/or resulting trust in favour of the plaintiff and the Learned Judge erred in not so finding.

The first issue in this appeal concerns the judge's discretionary decision in refusing leave to the plaintiff to reopen the plaintiff's case to call the witness George Davidson.

It is trite law that the Judge has a discretion to admit further evidence either for his own satisfaction or where the interests of justice require it. The judge will usually exercise his discretion when the party tendering the evidence has been misled or taken by surprise or if a matter arises which no human ingenuity can foresee. Where the matter does not arise ex improviso the judge's discretion should not be exercised to allow the late introduction of an additional witness called for the plaintiff whose evidence was available before the plaintiff closed his case. The trial began in March and was concluded in July of the same year. There was more than adequate reasonable opportunity based on the evidence led in the trial which was the same evidence sworn to in affidavits before the trial. There was no surprise.

The second issue and perhaps the most essential which must be determined is whether or not there was a contract in existence between the plaintiff and the Defendant when the deposit was returned. To determine whether or not a contract was in existence one must first determine the nature of a deposit. In the law the deposit operates as a security for the completion of the purchase. It is more than simply a part-payment. It is an earnest to bind the bargain and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. This statement of the law was approved by the Privy Council in **Workers Trust and Merchant Bank Ltd vs Dojap Investments** (1993) 42 WIR 253 per Lord Browne-Wilkinson at p. 256

"Even since the decision in **Howe v Smith** (1884) 27 Ch.D.89) the nature of such a deposit has been settled in English Law. Even on the absence of express contractual provision, it is an earnest for the performance of the contract; in the event of completion of the contract the deposit is applicable towards payment of the purchase price."

In **Sober v Arnold** (1889) 14 App. Cases 429 Lord MacNaughton uttered this dicta relation to a deposit.

"Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that the deposit serves two purposes ...if the purchase is carried out it goes against the purchase money...but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

In **Mylon Ltd v Schwah Morris** (1974) 1 All E R 326 where a cheque for deposit presented twice and returned unpaid Goulding J stated at page 330:

"Speaking in quite general terms for the moment of contracts to sell land on grant or lease of land at a premium, without reference to the particular language of this document, it is well established that deposit is demanded and paid on the signing of the contract as earnest of the purchaser's ability and intention to complete the contract in due course. The Vendor, in the normal case never intends to be bound without having the deposit in his own or his stakeholder's possession as a protection against possible loss from default by the purchaser."

It is submitted that although the deposit was taken back there was no animus cancellandi. Further when the purchaser sought the return of the deposit the vendor had died. The deposit was returned after discussions with the Attorney, Smart Bryan concerning the death of the Vendor and the delay that would be caused in the transaction until the Will was probated.

In my view the purchaser's default or excessive or unreasonable delay in paying the deposit justifies the vendor in rescinding the contract or considering it repudiated. There was neither any evidence to show that there was any discussion between the purchaser or the vendor nor any evidence of any conduct on the part of the vendor to show that the contract was still in effect. The deposit having been withdrawn without any negotiation with the vendor meant that its status as a security for due performance or as earnest to bind the bargain was null and void. Ellis, J was therefore correct to conclude that the recovery of the deposit by the plaintiff resulted in there being no contract for sale of land.

The third issue relates to a complaint by the plaintiff that the Judge erred in finding that the sum of \$10,000 was a deposit, when in fact it was a penalty (being one third of the purchase price) and consequently the plaintiff was entitled to it as against the defendant.

The law is clear that parties can stipulate for any term in their contract. The Privy Council in **Workers Trust and Merchant Bank v Dojap Investments Ltd** Supra) has held that a vendor may not forfeit a sum which is not a true earnest and that by long continued usage both in the United Kingdom and Jamaica the customary deposit has been 10%. A vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit. In the absence of special circumstances the \$10,000 cannot be forfeited to the first defendant. In the instant case the relevance of this ground is unclear.

A fourth issue in the appeal is whether the payments by the plaintiff to the Mortgage Company was evidence of part performance.

The trial judge found on the evidence and in particular the rent receipt book that the plaintiff had been in serious arrears with his rent. The plaintiff's case has not been advanced because there was no definite concluded contract for the disposition of land. There was only a contract where the plaintiff and the first defendant entered into an arrangement where the plaintiff rather than pay the rent (in which he was in arrears) would pay the mortgage. He was not bound to pay the mortgage. There was no intention on the part of

the first defendant to transfer any interest in the land. This arrangement was revoked by the defendant in June 1981.

Ellis, J was correct in finding that the payments were not evidence of part-performance but were payments on account of his rental.

In light of this finding as well as the absence of any contract to dispose of the land it means that the plaintiff's payment of the mortgage as well as repairs to premises could not be construed as a constructive or resulting trust in the property as the arrangement was based on the plaintiff satisfying his obligation in paying rent to the first defendant who were his landlords.

Since there is an absence of evidence that the Attorney for the Executors had the authority to enter into any agreement the plaintiff's contention that there was a novation of the contract does not arise. An important factor in the novation of a contract is that the consent of all the parties must be obtained:

"He who comes to Equity must come with clean hands."

By this maxim the previous conduct of the plaintiff is examined. Specific Performance like any other equitable remedy is granted at the discretion of the Court in accordance with settled principles. The Plaintiff must show that he has complied with the terms of the contract and performed his contractual obligations. In the instant case the Plaintiff had deliberately and falsely declared to others that he had paid the deposit. In a letter to Mrs. Wan dated October 6, 1989 Mrs. Shelton Mayne makes reference to a discussion with the plaintiff where he claims that he had already paid the \$10,000 to the deceased Cyril Wan.

Mr. Horace Edwards Q.C. in a letter to the second defendants Scotia Bank also intimated that the \$10,000 deposit had already been paid and that he was let into possession of the premises. It was only in his testimony in Court that he admitted that he had withdrawn his deposit. In those circumstances, equity will not grant specific performance.

For the foregoing reasons I would dismiss the appeal and affirm the Order of Ellis, J.

Costs to the First Respondent to be agreed or taxed.