JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIV. APPEAL NO. M5/88

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN CURDELLA ROSE APPLICANT

AND LLOYD FORSYTHE RESPONDENT

B.J. Scott, Q.C. for Applicant

John Vassell for Respondent

October and November 17, 1988

WRIGHT, J.A.:

On October 3, 1988 we dismissed this application by motion for leave to appeal from an Order by McKain J. made on July 11, 1988 giving effect to an agreement for the sale of land entered into between the parties on December 9, 1983 from which the applicant sought to resile. The application for leave to appeal became necessary because McKain J. had refused leave to appeal.

The agreement was for the sale of Lot 2 on the proposed sub-division of No.12 Queensbury Avenue, Kingston 13 for a consideration of $36,000 to be paid in full to the Vendor's Attorneys as stakeholders with immediate possession upon signing. Messrs Silvera and Silvera, Attorneys-at-Law had the Carriage of Sale and completion was to be upon the presentation of a registrable Transfer. Litigation centred around the Special Condition which provided:-

> "It is understood and agreed between the parties that should the Vendor fail to obtain the approval of the appropriate authorities to subdivide the land into two (2) lots including application to the Supreme Court of Judicature of Jamaica to amend Covenant No.1 on the relevant

> "Certificate of Title by 30th June, 1984 this contract shall be null and void and the full Purchase Money refunded to the Purchaser who will forthwith give up possession of the premises".

The purchase price was paid and the purchaser, the respondent entered into possession.. The completion awaited action by the Vendor (the applicant) in keeping with the Special Condition, there being no further requirement on the part of the purchaser. By letter dated 4.6.84, Messrs Silvera and Silvera disclosed what steps had been taken. The letter reads:-

> "Re: Lot 2 part of No.12 Queensbury Avenue, St. Andrew - Curdella Eugenie Rose to Lloyd Magnus Forsythe
>
> Thank you for your letter of 1st instant and now take pleasure in enclosing herein photostatic c copy of Subdivision Approval of the Kingston & St. Andrew Corporation.
>
> The Surveyor has not yet supplied the Pre-checked Diagram and, as a consequence, we have held off making application to the Supreme Court as we, naturally, want to have the area of the land precisely matching the land in the Pre-checked Diagram.
>
> In the meantime, however, Mr. Forsythe has been in to see us with a request that he erect a temporary fence between the lots, and this leaves us with a distinct impression that he is quite happy to go along with the purchase even if the Title for his lot does take a bit longer."

The last paragraph of this letter makes it plain that both parties contemplated that the date in the Special Condition was not likely to be kept but there was no contemplation of aborting the agreement. Accordingly, on the 7th February, 1986, Messrs Silvera and Silvera forwarded to the purchaser's Attorneys-at-Law the Instrument of Transfer to be signed by the purchaser and returned. The purchaser complied and on February 13, 1986, the signed Instrument of Transfer was returned. However, the Vendor's Attorneys-at-Law had not applied for the modification of the Covenant as provided for in the Special Condition and that seems passing strange since in the Statement of Account rendered to the Vendor by his Attorney there is shown a retention of $1,500.00 "Estimated amount to cover costs of modification of Restrictive Covenant". The respondent's Attorneys-at-Law applied for the required modification and this was granted on November 13, 1987. Paragraph 15 of the Respondent's Affidavit sets the matter out thus:-

> "That the Defendant has been notified by me that the application has been granted and the special condition satisfied and I have demanded that the Defendant complete the sale by tendering the Transfer signed by me together with the Duplicate Certificate of Title but the Defendant has failed, neglected or refused to do so."

Both stipulations in the Special Condition were now satisfied but the Vendor would not proceed to completion. This drove the respondent to file a Writ which he did on 25.3.88 claiming,

> (a) Specific Performance
> (b) Damages for Breach of Contract
> (c) Re-payment of the sum of $2,500 expended in securing modification of the Restrictive Covenant on the property.

The Writ and the Statement of Claim were served in April but up to June 9th no defence was filed and on that date the respondent issued a Summons for Summary Judgment under Section 86A of the Judicature (Civil Procedure Code) Act claiming Specific Performance of the Agreement for Sale and an Order for reimbursement of the sum of $2,500, being expenses incurred by the respondent in obtaining modification of the Restrictive Covenant referred to earlier. This Summons was returnable on July 11, 1988. This spurred the dormant Vendor into action and on July 5, 1988, a Summons was filed on her behalf seeking leave to file and serve a defence out of time. Both Summonses came before McKain J. on July 11 when she made an Order on the Summons for Summary Judgment which effectively disposed of both Summonses and it is from this Order that the Vendor sought leave to appeal. The Order reads as follows:-

> "1. The agreement for sale of land dated 9th December, 1983 in the Writ of Summons and Statement of Claim mentioned ought to be specifically performed and carried into execution.
>
> 2, Let the Defendant deliver to the Plaintiff's Attorneys-at-Law within twenty-one (21) days of the date of this order the Duplicate Certificate of Title registered at Volume 452 folio 44 of the Register Book of Titles, the original approval of the Kingston & St. Andrew Corporation for the subdivision of the said land and a transfer under the Registration of Titles Act in favour of the Plaintiff duly signed by her and let the Plaintiff's Attorneys-at-Law lodge the said documents, and any others that may be

" appropriate, with the Registrar of Titles paying in connection therewith the prescribed transfer tax, stamp duty, registration fee or other charges to the intent that titles to lot 2 will be issued in the name of the Plaintiff as registered holder and be retained by the Plaintiff's Attorneys-at-Law on behalf of the Plaintiff and title to lot 1 will be delivered to the Defendant.

3. That the following sums be retained by the stakeholder, Messrs Silvera & Silvera, from the purchase price held by them to be paid over, on completion, to the Plaintiff's Attorneys-at-Law:

(a) the sums advanced by the Plaintiff for transfer tax and surveyor's fees and vendor's half-costs.

(b) the sum of $2,500.00 being the cost of obtaining modification of the restrictive covenant.

4. Costs to the Plaintiff to be taxed if not agreed.

5. Leave to Appeal refused."

Before us Mr. Scott contended that the non-performance by the Vendor as required under the Special Condition automatically brought the Agreement to an end, accordingly, said he, McKain J. was wrong in not considering and acceding to the application to file and serve a defence out of time.

The matters urged in the affidavit in support of that application were that her then Attorneys-at-Law, Messrs Silvera and Silvera, had undertaken to secure the amendment to the relevant Restrictive Covenant and that by virtue of the non-fulfilment of the Special Condition the Agreement became null and void. This latter contention is the defence sought to be advanced and the leave to appeal is sought to enable her to pursue this defence. This is disclosed in paragraph 12 of the affidavit in support of the application before us and paragraph 13 discloses the learned judge's reason for deciding as she did. -

"13. That the learned Judge found that I was in breach of contract; that I could not hide behind my own default or the default of my Attorney-at-Law and that the Plaintiff waived the breach."

Paragraph 5 of the same affidavit complains that the learned judge should have heard her Summons, which was not even first in time, first. The basis for equity denying the applicant's cause is unwittingly divulged in paragraph 8 of the said affidavit. It reads:

> "That I am not in a position to carry out the Orders at 2 and 3 of paragraph 7 of this affidavit since Messrs Silvera & Silvera are holding all the documents in question as well as the sum of $36,000.00 paid over to them pursuant to the Agreement for Sale dated 9th day of December, 1983."

Be it remembered that the money was paid over to Messrs Silvera and Silvera as stakeholders and this paragraph seeks to maintain that such is still the position. But that is demonstrably not so. The very Statement of Account from Messrs Silvera and Silvera exhibited to the applicant's affidavit in support of the Summons for leave to file and serve defence out of time shows that on 2.4.84 i.e. three months before the date fixed for fulfilment of the Special Condition the only amount remaining undisposed of out of the sum of $36,000.00 was $30.97. Several costs were deducted and then finally there were eight payments to the applicant and one on her account. After so consuming the purchase price, it does not, in my opinion, lie in the mouth of the applicant to contend that the contract is void or to make the statement at paragraph 8 (supra)-

Mr. Scott would repudiate the clear indication in the letter dated 4.6.84 from Messrs Silvera and Silvera (supra) as well as the forwarding of the Instrument of Transfer to be signed by the purchaser long after 30.6.84.

Clearly, the applicant intended that the contract should subsist. What other meaning can be attributed to -

(a) the last paragraph of the letter dated 4.6.84 from Messrs Silvera and Silvera

> "In the meantime, however, Mr. Forsythe has been in to see us with a request that he erect a temporary fence between the lots, and this leaves us with a distinct impression that he is quite happy to go along with the purchase even if the Title for his lot does take a bit longer."

(b) the forwarding of the Instrument of Transfer for signing well over one year beyond the date on which Mr. Scott now contends the contract came to an end?

In this regard, I also observe that the application for the modification of the Covenant by the respondent does not appear to have been opposed. Could the applicant have been ignorant of the application? I think not. Then, too, the respondent's affidavit to ground his application must have shown his interest which a judge of the Supreme Court accepted. Added to that the application must have been advertised as required by the Restrictive Covenant (Discharge and Modification) Rules. This was more than three years past the date when the contract would have come to an end! In addition to this, there was the substantial fulfilment of the Special Condition by the applicant securing the sub-division approval within the time limited. By not taking any steps to obtain the modification of the Covenant the applicant was plainly in breach of the contract and it fell to the lot of the respondent to waive the breach and insist on completion.

The proposition that a party cannot hide behind his own fault is not new and really needs no support from authority. Nevertheless, see Amalgamated Building Contractors Ltd vs Waltham Holy Cross Urban District Council (1952) 2 All ER 452 at 455C per Denning LJ: (as he then was) -

> ".....the building owner cannot insist on a Condition if it is his own fault that the Condition has not been fulfilled. That was decided in Roberts vs Bury Improvement Commissioners (1870) LR 5 C.P.310; and many other cases."

This citation proves the principle to be of respectable antiquity.

In my opinion, the present ill-informed stance of the applicant is a belated and unconscionable after-thought which only deserves to be rejected. It is observed that there is no offer to refund the purchase price as provided for in the Special Condition.

For these reasons, I concurred in dismissing the application for leave to appeal out of time with costs to the respondent to be taxed if not agreed.

MORGAN, J.A.:

I agree. A purchaser cannot be penalized because the vendor has failed to do what he must do within a stated time in the contract. In such a case it is the purchaser who ought to have the option of avoiding the contract as is stated therein. The party in this case responsible for the delay in obtaining a registrable Transfer was the vendor who failed to apply to modify the Covenant as set out in the "Special Condition" of the contract for sale. The purchaser made good the delay by applying for and receiving the required modification with the knowledge of the vendor. The purchase price was paid in full to the vendor's Attorney-at-Law as stakeholder who had disbursed it and paid to the vendor his entitlement almost in full. The purchaser had been put in possession of the property and had indicated to the vendor that he was willing to wait a bit longer for his Certificate of Title. All the conditions of the Contract as far as the purchaser was concerned were fulfilled, and this was achieved because he had assisted beyond what he was obliged to do to fulfil them.

The submission before us by the vendor's Attorney is that the vendor having failed to apply for and receive the modification of the Covenant prior to the date of completion - which by the contract is "on presentation of a registrable transfer" - the contract is null and void. In support is cited the Special Condition which requires the vendor to apply "to the Supreme Court of Judicature of Jamaica to amend Covenant No.1 on the relevant Certificate of Title by 30th June, 1984". That date is long past. The submission avoids the fact that the vendor had not put himself in any position to obtain for the purchaser a registrable transfer to complete the sale having not modified the Covenant which was his contractual duty. It was the purchaser who did what was necessary to complete the sale.

In my view the point is baseless and without merit.

The second submission was that the judge was wrong in law in hearing the Summons applying for Summary Judgment dated 9th June, 1988 before hearing the defendant's Summons applying for leave to file Defence out of time dated the 5th July, 1988. This submission is also groundless. Apart from the vendor not being first in time, which by rule of practice might have gained him priority if he were first, it is good sense and a common rule of practice that where two Summonses for hearing on the same day overlap and cannot by consent be taken together, that Summons in which the hearing thereof, in the opinion of the Judge, if decided in one way is likely to be decisive to the litigation, should have priority. The beneficial objective being to expedite the hearing by eliminating unnecessary issues, thus doing justice to the parties by reducing delay and expenses.

I agree that leave to appeal be refused.

GORDON, J.A. (Ag.):

On 9th December, 1983, the respondent and applicant entered into an agreement whereby the applicant agreed to sell and the respondent to purchase premises known as Lot 2 - No. 12 Queensbury Avenue, Kingston 11. Under the agreement the purchase price of $36,000 was paid on execution of the contract to the applicant's Attorneys-at-law, Messrs. Silvera & Silvera who had the Carriage of Sale, as stakeholders. The respondent purchaser was given immediate possession of the subject premises.

The special condition in the agreement reads thus:

> "It is understood and agreed between the parties that should the Vendor fail to obtain the approval of the appropriate authorities to sub-divide the land into two(2) lots including application to the Supreme Court of Judicature of Jamaica to amend Covenant No. 1 on the relevant Certificate of Title by 30th June, 1984 this contract shall be null and void and the full Purchase Money refunded to the Purchaser who will forthwith give up possession of the premises."

On 4th June, 1984, the applicant's Attorneys-at-law and stakeholder wrote the respondent's Attorneys-at-law -

> "Re: Lot 2 part of No. 12 Queensbury Avenue, St. Andrew - Curdella Eugenie Rose to Lloyd Magnus Forsythe.
>
> Thank you for your letter of 1st instant and now take pleasure in enclosing herein photo-static copy Subdivision Approval of the Kingston & St. Andrew Corporation. The Surveyor has not yet supplied the Pre-checked Diagram and, as a consequence, we have held off making application to the Supreme Court as we, naturally, want to have the area of the land precisely matching the land in the Pre-checked Diagram.
>
> In the meantime, however, Mr. Forsythe has been in to see us with a request that he erect a temporary fence between the lots, and this leaves us with a distinct impression that he is quite happy to go along with the purchase even if the Title for his lot does take a bit longer."

The applicant's Attorneys-at-law on the 7th February, 1986, sent to the respondent's Attorneys-at-law, Instrument of Transfer under cover of this letter -

"Re: Sale of Lot B part of No. 12 Queensbury Avenue, St. Andrew - Curdella Rose to Lloyd Forsythe.

We refer to previous correspondence herein and now enclose herein Instrument of Transfer which we ask that you be good enough to have the Purchaser sign and return to us."

To this letter the respondent's Attorneys-at-law promptly replied by letter dated 13th February, 1986 -

"We have for acknowledgement and thanks your letter of the 7th instant enclosing therewith Instrument of Transfer which we have had our client sign and now return same herewith together with Pre-checked Plan annexed thereto. We would point out for the record that the Agreement for Sale refers to Lot 2 as does the copy of the approved subdivision Plan in our possession; however, as Lot B and Lot 2 appears to be the same parcel of land, it would seem to be in order to proceed.

We now look forward to receiving from you the new Certificate of Title for the land purchased by our client registered in his name together with the appropriate TR1 Form and evidence of payment of Taxes to the date of possession."

The applicant displayed a remarkable lack of interest in completing the contract and accordingly the respondent obtained, on 13th November, 1987, modification of the restrictive covenant which the applicant had undertaken to obtain under the special condition referred to above. The respondent in pursuing his rights under the contract filed Suit seeking specific performance of the contract and on 9th June, 1988, he filed a summons returnable on 11th July, 1988, seeking Summary Judgment. The applicant, by summons dated 5th July, 1988, sought the leave of the Court to file and serve a defence to this action out of time. This summons also was returnable on the 11th July, 1986.

Summary Judgment for specific performance of the contract and consequential reliefs was granted by the learned trial judge in Chambers on the 11th July, 1988. Leave to appeal was refused. The applicant now seeks leave to appeal from this order.

Mr. Scott submitted that leave should be granted as the applicant has a good defence to the action as disclosed in the proposed defence filed with his application in the Court below, viz,:

> "The agreement for sale became null and void after the 30/6/84 when the special condition to which the agreement was subject was not fulfilled."

The special condition obliged the Vendor -

(1) to obtain planning permission to subdivide the property; then

(2) to have the restrictive covenant modified.

The letter sent by the applicant's Attorneys-at-law to the respondent's establishes that condition (1) had been satisfied and indicated that there would be a delay in completing condition (2). The respondent had accepted and agreed to wait on the eventual fulfilment of condition (2). This impliedly was a waiver of the stricture imposed by the special condition, a consensual variation of the terms and the contract remained effective. In furtherance of this, the applicant sent to the respondent the Transfer for his signature and the respondent's response was affirmative and prompt.

It was left to the respondent in his own interest and at his own expense to see that condition (2) of the special condition was fulfilled. The lethargy of the applicant may be explained by the fact that, on the evidence of a statement of account exhibited by her, she had, between the signing of the agreement on 9th December, 1983 and April, 1984, received from the stakeholder $28,000 of the purchase price of $36,000 deposited with the stakeholder. After accounting for expenses to the date of the accounting, 11th April, 1985, there was left the princely sum of $30.97 held by the stakeholder.

The applicant submits that the agreement for sale become null and void after the 30th June, 1984, when the special condition to which the agreement was subject was not fulfilled. No reference has been made by the applicant to the third segment of the special condition which requires that on the agreement becoming null and void "the full purchase money (shall be) refunded to the purchaser". The applicant's hands are not clean, she has not shown that she has a meritorious defence to the respondent's action.

The applicant Vendor has utilised the purchase price and refused to fulfil her obligations under the contract. She now seeks to benefit from her own default and prays the Court to aid her endeavours.

The principle that a litigant cannot benefit from his/her own default is as good now as it was at the time when Amalgamated Building Contractors Ltd. vs. Waltham Holy Cross U.D.C. [1952] 2 All E.R. 452 was decided.

I agree the application must be refused with costs to the respondent.