

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 62 of 1981

BEFORE: The Hon. Mr. Justice Kerr, P. (Ag.)
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Wright, J.A. (Ag.)

BETWEEN JOHN TREVOR SCARLETT) DEFENDANTS./APPELLANTS
CILMA SCARLETT)
AND VENORA THOMAS PLAINTIFF/RESPONDENT

Messrs. Scott, Gayle & Co. for Defendants/Appellants

Messrs. Messado, Woodham & Pickersgill for Plaintiff/Respondent

4th May, 1982

KERR, P. (Ag.):

This is an appeal from orders made by Ellis, J. on the 4th November, 1981 in respect of certain summonses heard together before him. The first, dated 22nd July, 1981, was by the Respondent seeking to have the following orders made, amongst others:

- (a) That the Registrar of the Supreme Court be given the authority to sign the transfer in relation to premises 10 Glendon Drive, Trafalgar Park, in the parish of St. Andrew, which said premises by contract of sale dated 22nd November, 1977, defendants agreed to sell to the plaintiff.
- (b) For an order that the Victoria Mutual Building Society do release the relevant duplicate certificate of title to the purchaser's Attorney with whichever conditions this Honourable Court may deem fit to attach to such an order.

- (c) For an order that the purchaser's Attorneys, Messrs. Messado, Woodham and Pickersgill, of No. 31 Duke Street, Kingston, be empowered to prepare all relevant documents and to effect all acts necessary for the completion of the sale.
- (d) Any other or further relief that this Honourable Court may deem just.

The second, dated the 24th September, 1981, by the respondents seeking a declaration that a contract for the sale of land dated 22nd November, 1977 and made between the appellant and the respondents has been lawfully rescinded as of the 14th September, 1981, and the third, dated 25th September, 1981, by the applicant seeking to have the respondent's summons struck out for being frivolous and vexatious and an abuse of the process of the Court.

The learned trial judge refused to grant the order as in the terms applied for in the respondent's summons of the 22nd July, 1981 but considered the general prayer and having regard to the issues raised before him, considered himself competent to make the orders which he did and to which I shall refer later. In so doing he had regard to the history of the proceedings and contention raised before him. The summons of the respondent was headed, "Summons under the Registration of Titles Act," but the recitals referred to was "In the matter of the Vendors and Purchasers Law". The learned trial judge was of the view that Section 67 of the Registration of Titles Act which was prayed in aid by the respondent was not applicable to these proceedings and dealt with the matter as a summons under the Vendors and Purchasers Act.

The history of the matter is of some importance. After the agreement of sale was entered into apparently nothing was done by either parties to effect completion until in 1978 when the purchasers indicated by letter to the vendors their willingness and readiness to complete. The vendors in return probably terminated the contract and forfeited the purchase. The purchaser sought, by way of a summons under the Vendors and Purchasers Act, certain

- (1) Is the purchaser in the circumstances competent to proceed vide a Vendor and Purchaser Summons?
- (2) Is the Vendor in the circumstances competent to make time of the essence and to rescind if completion is not effected within that time?
- (3) Is the Court competent to make the order sought in the applicant's summons?

We considered Section 7 of the Vendors and Purchasers Act, which provides that a vendor or purchaser of real or leasehold estate in this island or their respective representatives may at any time or times and from time to time apply, in a summary way to a judge of the Supreme Court in Chambers in respect of any requisition or objection or any objection or any claim for compensation or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of incidents to the application shall be borne and paid.

In considering the jurisdiction granted under this Section Ellis, J. resorted to and cited with approval passages from "Williams on 'Vendor and Purchaser', Third Edition Vol. II, p. 1076", thus:

"Whatever could be done in Chambers upon a reference as to title under a decree for specific performance, when the contract was established can be done upon proceedings under this enactment. It enables the parties to put themselves in Chambers in exactly the same position in which they would have been with all the rights which they would have had under the old form of decree. Evidence by affidavit may therefore be given and deponents may be cross-examined."

And further at page 1077:

"In fact, as a general rule, all questions may be so decided which may arise between the parties on the assumption that there is an unimpeachable contract of sale between them, and which must be cleared up before the parties can proceed to completion."

He is also mindful of the decision in Hargreaves and Thompson's Contract, Vol. 32 Chancery Division (1886) p. 454, and came to the conclusion that the plaintiff purchaser was competent to bring the summons. We are in agreement with this decision because the contract had been held by a competent court to be in existence, to be valid and enforceable. He considered also the question raised by the summons of the appellant as to whether or not the contract had been, subsequent to the order of McKain J. rescinded and he held that to make time of the essence of the contract in order to be able to rescind the contract for non-performance the requirements as defined in Barr's Contract (1956) 2 A.E.R. p.856-7 had to co-exist. These are:

- (1) that the vendor's willingness, readiness and ability to proceed had not been established having regard to the defective form of transfer,
- (2) that the purchaser was not guilty of such delay or default that would entitle the vendor to rescind, and
- (3) that the notice to rescind did not allow a reasonable time for payment of purchase price.

Ellis, J. found that these requirements were absent.

We see no reason to disagree with those findings. With respect to the third question as to the Court's competence to make the order, having denied the orders in the terms sought nevertheless felt, under the general prayer he was competent to make the following orders against the appellant:

- " (i) That the Vendor within two weeks hereof deliver to Purchaser's Attorneys the duplicate Certificate of Title for premises 10 Glendon Drive;
- (ii) that the Vendor within three weeks hereof do produce to the Purchaser's Attorneys a duly executed and stamped transfer of Land;

"(iii) that the costs of these proceedings be paid to the Applicant by the Vendor. Such costs to be agreed or taxed. "

Now before us the appellant's Counsel contended:

"(1) The Judge, having refused the specific order asked for, should have dismissed the summons and that the finding upon which he purported to make his order were never identified or defined in the summons of correction and that the order made were in the nature of a specific performance and were outside the competence granted by the Act. "

We are of the view that the questions referred to arose for his determination, having regard to the nature and conduct of the case before him, of the Affidavits filed and of the issues raised and the appellant's summons seeking a declaration that the contract had been rescinded. We have considered the Orders made and we are of the view that they do not, viewed against the background of his findings, amount to an order for specific performance. We agree that the summons for direction did not identify the questions to be answered but we are of the view that in the course of the arguments on the merits those questions were sufficiently identified for the Judge to answer the specific questions.

In the circumstances we are of the view that the order should be modified because in that order there were no corresponding duties placed upon the purchaser, not only to show readiness and willingness to perform but able to perform concurrently with the appellant complying those specific orders.

So the order will be modified in the following manner: That as an addendum to Order (i), we would include that the purchaser, within six weeks of delivering the document mentioned therein pay into Court the balance of the purchase money; that the vendor, in relation to Order (ii), produce to the purchaser's Attorney the documents mentioned therein within six weeks of the payment the balance of the purchase money into a joint bank account in the name of the Attorneys on the Record.

Cost of the proceedings in the Court below and here
to be the respondents.

Appeal dismissed.

declarations and these were granted by Miss Justice McKain on the 25th January, 1980 when she held:

- (1) That the contract had not been lawfully rescinded by the vendor and is still valid and enforceable.
- (2) The Plaintiff be granted relief from forfeiture.

This decision came before this Court and was affirmed on the 28th April, 1981. Two days after this decision the purchaser requested certain documents from the vendors' attorney which would facilitate completion by obtaining the necessary balance of the purchase money from the prospective mortgagee. No positive steps having been taken in that regard, the purchaser applied to the Court by the summons dated the 22nd July, 1981. The learned trial judge considered the contentions raised before him, which, inter alia, included on behalf of the appellant that the plaintiff should have sought specific performance of the contract by issuing appropriate writ and that jurisdiction of the Court under Section 7 of the Vendors and Purchasers Act was limited and the orders sought in the summons were outside the competence of the Court.

Reference was made on either side to the Affidavits in support and for the respondent it was argued that the transfer exhibited was challengeable on the ground that it was not a registrable document as it was signed out of the jurisdiction and not in conformity with the Exchange Control Act. The judge considered quite rightly in our view that in the light of the history of the matter and in the light of the appellant's summons contending that the contract be rescinded, the following questions arose for his consideration: