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IN THE SUPREME COURT OF JUDICATURE

IN EQUITY

SUIT NO. C111 OF 1982

BETWEEN	ANTHONY CHRISTOPHER SIMONS SANDRA PAULINE SIMONS		PLAINTIFFS
A N D	BERTRAM ALEXANDER WATKIS	FIRST	DEFENDANT
A N D	JANICE WATKIS	SECOND	DEFENDANT
A N D	GEORGE DESNOES	THIRD	DEFENDANT

Mr. Ian Ramsay for Anthony Simons

Mr. Maurice Tenn and J. Samuels-Brown for Sandra Simous

Mr. R. Henriques Q.C. and D. Morrison for First Defendant

Mr. W. K. Chin See Q.C. and Clark Cousins for Second Defendant

Mr. David Henry for Guardian ad Litem of Third Defendant

APRIL 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 1991

AND MAY 7, 1992.

ELLIS, J:

The Plaintiffs were married in 1980 and lived in rented premises at 9 Banana Walk in St. Andrew.

On the 16th of December 1980 a Mr. Dennis Chin introduced the Plaintiffs to and showed them a dwelling house on 6 acres of land at Lot 101 Belgrade Heights. This property was owned by the first and second Defendants as joint tenants. The Plaintiffs were enamoured with the property and on the 17th of December 1980 they attended the offices of the third Defendant and signed a purchase agreement in respect of the property for $285,000.00.

The third Defendant then, an attorney-at-law, indicated to the Plaintiffs that he had authority from the first and second Defendants to sign on their behalf.

The transaction was a cash sale one and possession and completion should have been by the 31st of March 1981. The Plaintiffs made a deposit of $28,000.00 on the 17th December, 1980 being 10% of the purchase price.

The Plaintiffs say that on the 17th December, 1980 the third Defendant put forward only the first Defendant's name as the vendor. They contend that they were deliberately misled by third Defendant as he well knew there was a joint tenancy in first and second Defendants he having dealt with them as regards the said property as joint tenants.

The Plaintiffs contend that the Defendants avoided the transaction because they wished to sell for much more than the $285,000.00 which was agreed.

As a consequence, the Plaintiffs have been deprived of their bargain and have been put to loss and expenses. They now seek to be redressed by this Court.

The Plaintiff's allegations and claims are contained in a Statement of Claim of 26 paragraphs. The particulars of the Claim are contained at paragraph 26 and are as follows:-

26. (a) Specific Performance of the said Agreement by the First and Second Defendants.

(b) Alternatively, that as a tenant-in-common in Equity an Order that the First Defendant transfers his half share in the said premises to the Plaintiffs for half the said purchase price.

(c) The sum of $4,695,615.30 and continuing with interest thereon until payment or judgment as:-

(i) damages in lieu of Specific Performance against the First and Second Defendants; and/or

(ii) damages for negligence against the Third Defendant.

(iii) damages for breach of contract against the First and Second Defendants.

(iv) damages for breach of warranty of authority against the First and Third Defendants.

(v) damages for careless/negligent misstatement under the rule in Hedley Bryne v. Heller

against the Third Defendant; and/or misrepresentation under the rule in Derry v. Peek against the First and Third Defendants.

(d) Such further or other relief as in the opinion of the Court shall seem just or equitable.

In his defence the First Defendant avers a joint tenancy with the Second Defendant in the property the subject of the Suit.

Moreover, he says the Second Defendant is the beneficial owner of the said property since in December 1978 he transferred the property to her.

He denies any agency on his behalf in the Third Defendant and denies that he offered any property for sale to the Plaintiffs.

He says in his defence that the Third Defendant did not have his authority to act as he did and he did not ratify the act of the Third Defendant and has no intention of doing so.

He further says that if any agreement was made on his behalf by the Third Defendant, it is illegal and unenforceable against the provisions of The Exchange Control Act. He does not admit the loss and damage claimed by the Plaintiffs.

The Second Defendant has put forward a defence in identical terms as that of the First Defendant. In addition, she sought and obtained leave to amend the defence to aver the absence of any note or memorandum in writing signed by her or by any person authorised by her with regards to the sale of any property.

There is also denial of the Plainitffs' entitlement to the remedies which they claim.

The Third Defendant denies being the agent of the Second Defendant and that he caused any property to be offered for sale as alleged by the Plaintiffs. He admitted the Plaintiffs' and Chin's attendance at his office on the relevant date but denies that it was in response to any offer of property for sale by him.

He has however admitted that he prepared an agreement for sale, received the deposit of $28,000.00 and signed the agreement for the vendor the First Defendant. He says he did not act as attorney for the Plaintiffs and therefore he owed

them no duty of care to advise them as to any joint tenancy.

He admits that it was an express term of the Agreement for Sale that Plaintiffs would receive title to the property under the Registration of Titles Act.

At paragraph 13 of his defence he admits that he represented to the Plaintiffs that he had First Defendant's authority to sign Agreement for Sale. There is also the averment that the Agreement for Sale is illegal and unenforceable being contrary to the Exchange Control Act.

There is no doubt that the Plaintiffs were shown the premises Lot 101 Belgrade Heights and that they decided to purchase the said property. There is also no doubt that the Third Defendant acted as the attorney-at-law, if not for the First Defendant and the Plaintiffs, certainly for the First Defendant. There is also the admission that the Third Defendant did evince to the Plaintiffs some authority to sign and act for the First Defendant at least. It is common ground that the Plaintiffs have not obtained the property which they agreed to purchase.

In those premises, are the Plaintiffs entitled to the remedies sought or any of them?

For the First Defendant Mr. Henriques is not in agreement with any such entitlement. He launched his arguments for disagreeing, by firstly challenging the authority of George Desnoes to act for Watkis. He did so by saying that where Desnoes purports to vest himself with authority it is not enough to say he had that authority. It is necessary for him to show a vesting of that authority. He argued that an attorney has no general authority to bind his client and authority will not be presumed, it must be expressly conferred or implied from the terms of his retainer.

He contended that there is no evidence that the First Defendant instructed the Third Defendant to act on his behalf. He said authority does not arise merely from a solicitor and client relationship.

He submitted that:-

(i) Neither on principle nor authority is the First Defendant bound by the Agreement for Sale (Exhibit 2) since Desnoes has no authority to sign for him.

(ii) The contract is unenforceable as the property was a joint tenancy and the Agreement is signed by only one party. There can therefore be no Specific Performance in such a case.

(iii) The Contract (Exhibit 2) is conditional in that special condition 2 provides for a "Sale subject to a sub-division of Lot 101 so that the purchasers may get the land he has purchased with house thereon." The condition had to be complied with on or before the 31st March 1981. If it was not complied with the contract came to an end and there was no agreed extension. On the 24th February, 1981 the purchasers deposit of $28,000.00 was returned and they refused it. The purchasers then sought to unilaterally make time the essence of the contract. In that circumstance, if the contract did not end on the 31st March, 1981 it certainly ended at the expiration of the time specified in the Notice making time of the essence of the contract.

(iv) The contract was in breach of the Exchange Control Act, Section 33 and as a consequence is unenforceable. The illegality of the contract was pleaded in 1982 and the Act was not complied with until 1 year after such a plea. The argument was that permission cannot be retrospective.

Mr. Henriques argued that there can be no Specific Performance in this case. The claim for loss of rent is not sustainable. He argued so, because -

(a) it was obvious from February 1981 that Specific Performance could never be granted since only one joint tenant had signed the Agreement.

(b) the Plaintiffs should have mitigated by seeking alternative property.

(c) in any case, the Exhibit 4 show no claim for rental since rent was paid by a company.

On the claim for Loss of Bargain Mr. Henriques contended that for the Plaintiffs to be successful would have to show an existing enforceable contract. He said the land in question here is subject to a Registered Title. An examination of the Register would have shown a joint tenancy. The First Defendant would have shown a defective title and damages cannot be awarded where there is a defective title. He cites Bain v. Fothergill [1874-80] All E.R. REP. 83 and Malhotra v. Chowdury [1979] 1 All E.R. 186 in support of his contention.

Mr. Ramsay for the Plaintiffs put forward as the critical question, did the First Defendant hold himself out as owner of 101 Belgrade Heights ready and willing to accept purchasers?

He said the witness Foster set the stage for a positive answer to that question. Watkis gave him the key to open the house for inspection by intending purchasers whenever Gordon Hay told him to do so.

According to him First Defendant was in front making arrangements to accommodate purchasers and in that circumstance it was reasonable for Plaintiffs to accept his sole ownership. First Defendant held himself out as having authority to sell the property on his own. If he had no such authority anyone who relied on him would have suffered loss from the breach of warranty.

Chin, he said, informed Watkis of the Plaintiffs interest in the property and Watkis approved of their attending at Third Defendant's office. In that case, First Defendant was aware of the intending purchasers and sent them to his attorney for him to prepare an agreement and to sign that agreement on his behalf. The First Defendant he said, displayed an attitude which showed that he authorised Desnoes to sign on his behalf. The First Defendant according to him, admitted that he did not tell the Plaintiffs of the joint tenancy.

In his contention for the Second Defendant's liability Mr. Ramsay put forward the following circumstances as evidence of liability:-

(i) she knew that First Defendant was trying to sell the property.

(ii) the common identity of interest would make First Defendant's

action binding on her.

(iii) she left title deeds with third Defendant thereby putting him in a position to deal with the property.

(iv) she participated in the transfer dated 5th December, 1978 (Exhibit 9).

(v) First Defendant saying on the telephone to Plaintiff that second Defendant had changed her mind as to the sale.

He cited the cases of Whitely and Roberts' Arbitration [1891] 1 Ch at p.563 and Rapp v. Latham 2B and Ald. 793 as supportive of the contention.

With regards to the third Defendant Mr. Ramsay argued that his liability is founded on the fact that he warranted to the Plaintiffs that he had the authority of the first Defendant.

On the point of the Agreement being a conditional contract he said the contract did not fail because a condition was not satisfied. He said it failed because it was repudiated on strength of the letters dated 17th February, 1981 and 24th February, 1981. In that light he argued for the non applicability of the case of Aberfoyle Plantation v. Cheng [1959] 3 All E.R. 910.

Mr. Ramsay admitted that the decision in Armagas Ltd v. Mundogas S.A, The Ocean Frost [1985] 3 All E.R. 795 is good law but said it is not relevant to the instant case.

Mr. Tenn then addressed the court on the claim based on Negligent Misstatements within the principles of Hedley Bryne v. Heller [1963] 2 All E.R. 575. He said the facts indicate that the Plaintiffs were meeting the third Defendant for the first time and that he was expecting them. Third Defendant dictated certain terms to his secretary concerning the Agreement (exhibit 2) and asked who was the attorney-at-law for the Plaintiffs and was told.

In such circumstances Mr. Tenn argued that firstly, the third Defendant ought to have advised the Plaintiffs to have their attorneys read the Agreement before they signed which has always been the practice where there is another attorney for the purchasers. Secondly the third Defendant either acted for both parties or he purported to do so. He said he is supported in that by the fact that the costs were not discribed in the Agreement as "Vendors Costs" but

"Costs of transfe ." It was his contention that where parties do not have the benefit of the advice of their own attorneys the other attorney should be careful in his actions or statements.

He submitted that this is a case with special circumstances which places third Defe dant's conduct within Hedley Bryne v. Heller. If that is so, third Defendant owed a duty of care to the Plaintiffs and is liable for the tort of negligent misstatement.

Mr. Ramsay addressed on remedies and damages after referring to the amendments to the Statement of Claim which he was granted leave to make on the 17th April, 199 . Those amendments were to paragraph 25 (a) and (e) of the Statement of Clai , 25 (a) now reads "$4,600.00" instead of "$579,915.00" and 25 (e) now reads '$375,205.00" instead of "$309,322.38."

Mr. Chi n See argued against any liability on the part of the second Defendant. He co tended that on an examination of the evidence and the principles of Agency there is nothing which implicates the second Defendant.

The first Defendant had no general or implied authority to act with regards to property of the second Defendant. Any authority of agency over a wife's property must be from express consent, estoppel or ostensible authority. In this case, Mr. Chin See said, there was no express consent given by the second Defendant to any one to act for her.

The doctrine of estoppel does not apply to her. There can be no question of ratification on the part of Mrs. Watkis and he cited Saunderson v. Griffiths 5 B and C, 339 and 340 in support.

Mr. Chi See contends that the Plaintiffs should have mitigated their loss and therefore the only damages recoverable would be that suffered for a reasonable period from the date of completion. The evidence shows that the Plaintiffs have been unreasonable in their insistence that the Belgrade property was the only one which was fit to be their matrimonial home.

Mr. Ramsay replied.

LIABILITY

I must say at this point that I do not accept the contention that the Contract in this case is unenforceable it being in breach of The Exchange Control Act. I find, from a consideration of the evidence and the Exhibits 5m, that there was compliance with the provisions of The Exchange Control Act.

It is necessary to deal with each Defendant's liability separately.

Is there evidence on which to find liability of the first defendant?

There is evidence that first Defendant Watkis gave the keys to the premises at Lot 101 Belgrade Heights to Mr. Foster with instructions to show prospective purchasers around. He did show the property to the Plaintiffs whom he understood to have been potential purchasers. That is the first piece of evidence which links the first Defendant to the Plaintiffs.

Mr. Anthony Simmons as a consequence of his being shown the property at Lot 101 Belgrade Heights went to the third Defendant's office. He said the third Defendant Desnoes told him, in the presence of the second Plaintiff and Chin, that first Defendant Watkis had authorised him to conduct the sale of the property to him and his wife. The third Defendant thereupon dictated the terms of an agreement (exhibit 2) to a secretary. The third Defendant also agreed to reduce the purchase price from $300,000.00 to $285,000.00 provided first Defendant would not be required to pay any commission fee to Chin. On being asked who would sign on behalf of first Defendant the third Defendant assured them of his authority to sign for him. A deposit of $28,500.00 was made and third Defendant gave a receipt for that amount (exhibit 1).

Mr. Dennis Chin said in evidence that he spoke to the first Defendant on the telephone concerning the Plaintiffs' interest in purchasing the property at Lot 101 Belgrade Heights. He attended the third Defendant's office with the Plaintiffs on the 17th December, 1980 and confirmed the events in that office as stated by the first Plaintiff.

The second Plaintiff also stated that assurance was given by the third Defendant that he had the authority to sign on behalf of first Defendant. She supported first Plaintiff and Chin as to the events in third Defendant's office. Second Plaintiff met and spoke with the first Defendant on the 4/2/81 and spoke of her purchasing several items of furniture which were in the house which first Defendant was willing to sell for $5,000.00.

The first Defendant in his evidence in chief denied the Plaintiffs' evidence as to what transpired at third Defendant's office but admitted that he met Mrs. Simmoms on the 4/2/81 at 101 Belgrade Heights. On cross examination,

he admitted that third Defendant who was an attorney-at-law handled all his conveyances and rent collections. He might have given third Defendant instructions over the telephone. He said a Mr. Gordon Hay would introduce purchasers to him and he would telephone third Defendant and instruct him what to do. He however said he gave no instruction in this case. He admitted that he was acting on his wife's behalf as to the sale of the property 101 Belgrade Heights. He said that when he saw the second Plaintiff he did not inform her that third Defendant had no authority to sign the contract on his behalf.

I have emphasised the above area of the evidence as I am of the opinion that it is from that area, which evidence if any, may come to place liability on the first Defendant.

From the evidence given by the witnesses and the admissions of the first Defendant I find that the first Defendant was aware of the Plaintiff's interest in purchasing his property at 101 Belgrade Heights. I am also convinced that he instructed the third Defendant to sign the agreement on his behalf and to act for him in the conveyance of the property.

The behaviour of the first Defendant induced the Plaintiffs to enter into the contract in the belief that he was solely entitled to sell. It was a misrepresentation as to title by conduct. The case of Watts v. Spence [1976] Ch. 165 is on point. Although the judgment there is founded on the English Misrepresentation Act of 1967 full references to and reliance was placed upon Bain v. Fothergill [1874-1880] All E.R. 83 to make it in my opinion, an important case for consideration.

In the Watt's case, the Plaintiff recovered substantial damages for loss of bargain inter alia, against a vendor who misrepresented a capacity to provide a good title to property. The vendor had no reasonable grounds for believing and did not believe in the truth of the representation that he was sole owner of the property.

The Defendants did rely on Bain v. Fothergill for the contention that the Plaintiff was limited to a recovery of the expenses incurred and a recovery of the deposit paid with interest thereon. It was said that fraud was

not alleged and fraud was the only exception to Bain v. Fothergill to entitle a recovery of damages for loss of bargain.

The principle as stated Bain v. Fothergill is

> "If a person enters upon a contract for the sale of real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred for the breach of the contract; he can only obtain other damages by an action for deceit."

In Watts v. Spencer [1975] 2 All E.R. 528, Bain v. Fothergill [1874-80] All E.R. 83 was not followed since the Plaintiff's case could be supported by section 2(1) of the Misrepresentation Act of 1967.

That Misrepresentation Act is not applicable in Jamaica and it would seem that the rule in Bain v. Fothergill would apply here unless there is some aspect of the instant case which negates its applicability.

I have looked at the case of Wroth v. Tyler [1973] 1 All E.R. 897 which was cited in Watts case. At page 918 at letters (d) and (e) I found dicta which are very interesting. Firstly, Chief Baron Kelly in Engell v. Fitch [1869] L.R. 4 Q. B. 666 stated that the rule which was repeated in Bain v. Fothergill was

> "founded entirely on the difficulty that a vendor often finds in making a title to real estate, not from any default on his part, but from his ignorance of the strict legal state of his title."

That dictum in my opinion, suggests that the rule was founded to mitigate the harshness against a Defendant who defaulted from "ignorance." Secondly, at (e) Megarry J., as he then was, said

> "As I have indicated a rule laid down for defects in title which lay concealed in title deeds which were often in the phrase attributed to Lord Westbury, "difficult to read, disgusting to touch, and impossible to understand" seems singularly inapposite to the effect of a modern statute on registered land with its, aseptic certainty and clarity of title."

Megarry J. is saying that the rule is not appropriate in cases of registered land where title is not shrouded or suspended in uncertainty. I respectfully adopt the dictum as proper and unhesitatingly apply it to the instant case.

The title here is not "difficult to read, not disgusting to touch and not impossible to understand" it being mirrored in a Registered Title. There can be no plea of ignorance as to its true position.

I therefore hold that that aspect of this case, places it outside the rule in Bain v. Fothergill [1874-1880] All E.R. 83. I am also fortified in so holding by Malhotra v. Chowdury [1979] 1 All E.R. 186.

The first Defendant is liable to the Plaintiffs and that liability is not confined to a recovery of damages for expenses incurred but extends to damages for loss of bargain. The Plaintiffs have pleaded fraud as defined in Derry v. Peek [1880-90] All E.R. 1.

The second defendant goes from the case from the point of liability. There is no evidence whatsoever on which a court could hang any liability on her part. She made no representation to the Plaintiffs and she authorised no one so to do.

The third Defendant's liability if any, must depend on his connection with the first Defendant. The first Defendant in his evidence both in chief and under cross examination presented a picture of a very close association between himself and the third Defendant. He admitted that he might have given verbal instructions over the phone to third Defendant regarding the transaction which has given rise to his case.

The third Defendant in his statement of defence admits that he prepared the Agreement for Sale and signed "for vendor" (first Defendant) and accepted the payment of deposit.

At paragraph 12 of his defence, he represented that he was fully authorised by first Defendant to sign the Agreement. I find on the evidence that the third Defendant closely associated with the first Defendant to misrepresent an ability to convey Lot 101 Belgrade Heights to the Plaintiffs. He is jointly liable with the first Defendant.

The finding of liability on the part of first and third Defendants leads to a consideration of the measure of damages. There cannot be in this case any thought of Specific Performance. Damages therefore will be in substitution of Specific Performance.

There are cases which have decided that damages awarded in

substitution of Specific Performance of a contract of sale of realty are to be assessed at the date of judgment and not at the date of the breach of the contract. See Wroth v. Tyler [1973] 1 All E.R. 897. and Malhotra v. Choudury [1979] 1 All E.R. 186 in which the English Court of Appeal adopted and applied the reasoning on the point by Megarry J. in Wroth (Supra).

In the circumstances, I accept the authority of these cases and hold that damages are to be assessed as at 26th April, 1991.

The Writ in this case, is dated 23rd June, 1982. Since that date, the records disclose a series of interlocutory proceedings mainly by the Defendants. The Malhotra case moved back the date for valuing the property 1 year on ground that the Plaintiff there had delayed the completion of the case. There is nothing in this case, in my opinion, which could be discribed as any delay on Plaintiffs' part in completing this case. I see no reason for rolling back the period of assessment in this case.

COMPUTATION OF DAMAGES

The valuation of the property at 101 Belgrade Heights stood at $4,600,000.00 on 26/4/91 and the asking purchase price in December 1980 was $285,000.00. Damages for the loss of bargain and in place of Specific Performance is the difference between $4,600,000.00 and $285,000.00 i.e. $4,315,000.00.

The Plaintiffs also claim $5,407.38 which includes committal fee to retain a mortgage on the property and fire insurance. This claim is certainly remote and in any event, the Plaintiffs being aware of the failure of the contract should mitigate their losses. That claim is not allowed. There is also a claim of $375,208.00 for rent up to 30/4/91.

Mr. Henriques argued that this amount ought not to be paid as the evidence (Exhibit 4) shows that a company paid the rent. It is quite clear that the Plaintiffs are the company and the rental was paid to them. Any doubt I have as to the propriety of the claim relates only to the applicable period. I am of opinion that the necessity to pay rent was particularly referable to the Plaintiffs' loss of bargain.

The Plaintiffs should have mitigated their loss and I would therefore only allow the claim for rental for five years up to the year 1986. That is an amount of $135,600.00.

The total damages are:-

Damages for loss of bargain	$4,315,000.00
Rental for a period of five years	
1/4/81 - 31/3/82	21,600.00
1/4/82 - 31/3/83	24,000.00
1/4/83 - 31/3/84	26,400.00
1/4/84 - 31/3/85	30,000.00
1/4/85 - 31/3/86	33,600.00
	$4,450,600.00

There will be judgment for the Plaintiffs against the first and third Defendants and Special Damages assessed at $4,450,600.00 which is to bear interest of 2% as of 31/3/81 the date on which the contract should have been completed. The Plaintiffs are to have the amount of $28,500.00 which they paid as deposit returned to them with interest payable at the commercial rate as of 31/3/81. The Plaintiffs are to have their costs against first and third Defendants agreed or taxed.

There will be judgment for the second Defendant against the Plaintiffs with costs to be agreed or taxed.

The delay in delivering this judgment is regretted and is due to the fact that I was engaged in criminal work in the country and in the Home Circuit Courts. I apologise for the delay. I also apologise for not making reference to all the cases which were cited by counsel and to all the arguments which were advanced. The failure to so refer is not to be taken as any lack of respect for counsel's argument but is only because the point on which I found liability rendered some of the cases and arguments redundant.