IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. E180/81

BETWEEN	JUSTINA SMITH	PLAINTIFF
AND	CYRIL WILLIAMS	DEFENDANT

Dr. L. Barnett and Mrs Angella Hudson-Phillips for Defendant.
W.B. Frankson, Q.C. instructed by Gaynair & Fraser for Plaintiff.

Heard: 24th, 25th September, 1984 and 2nd May, 1984.

REASONS FOR JUDGMENT

Gordon J.

On the 25th September, 1984 after hearing submissions from the attorneys involved in the case I made an order for Specific Performance of the contract as prayed by the plaintiff, with the consequent award of costs against the defendant. I then indicated I would deliver my reasons in writing later.

On or about the 21st April, 1981 the plaintiff and the defendant entered into a written agreement for the defendant to sell and the plaintiff to buy premises 5 Perth Road, Ocho Rios in the parish of St. Ann. The evidence of the defendant disclosed that the house was a "duplex" house, that is, one constructed to be occupied by two families. The defendant occupied one part and the other part was occupied by tenants.

The defendant testified that he had asked Mr. A.C. Grossett a friend of his to sell the house. Mr. Grossett found plaintiff and the memorandum of sale was prepared by defendant's Attorney Mr. V.L.S. Scott. The sale price agreed on was $88,000.00. The deposit made by plaintiff to Mr. Scott was $8,800.00.

The balance payable: "To be secured by mortgage from Jamaica National Building Society".

A special condition in the agreement reads:

"The vendor undertakes to have the title in his name only"

Plaintiff testified that at the time the memorandum was executed she did not have all the money and it was agreed she should go to the Jamaica National Building Society to get a loan. She said Mr. Scott was then President of the Loan Bank and he must have assisted. Documents tendered as exhibits indicated that application for the loan was made on or about the 21st April, 1981 and a loan of $58,000.00 was approved on or about the 16th May, 1981. Notice of this approval was sent to plaintiff in a letter (exhibit 6) dated 26th May, 1981.

Plaintiff thereafter secured the balance necessary to complete the purchase and pay incidental costs and she spoke to defendant indicating her readiness to complete. The defendant then told her he was not selling again as his wife's name was on the title and he could not find her. He advised her to go to Mr. Scott. This she did. Eventually she consulted Mr. Fitzritson of the firm of Samuel & Samuel and paid over the sum of $25,000.00 to him. This sum was later refunded to her by Mr. Fitzritson. She also received a letter with a cheque for the deposit she had made on signing the memorandum of sale from Mr. Scott (exhibit 7).

She contended that at the time of execution of the memorandum of sale she was unaware that the title to the premises was in the joint names of defendant and his wife.

The defendant agreed with the plaintiff's evidence generally on the execution of the agreement for sale. He said he was divorced from his wife 1975. At the time of the divorce his wife and himself jointly owned two properties one at 7 Renfield Drive, Kingston 10, the other at 5 Perth Road, Ocho Rios. It was agreed between them and their lawyers that he should transfer his interest in 7 Renfield Drive to his former wife and she should do likewise to him in respect of 5 Perth Road. Mr. Gilroy English was his wife's attorney-at-law and Mr. F.K. Anderson represented him. He did in fact

execute the transfer re 7 Renfeild Drive in favour of his wife.

After execution of the sale agreement for 5 Perth Road he endeavoured to contact his wife without success. He said plaintiff came to him and told him the loan was ready and she had been to Mr. Scott and he had told her they could not locate Mrs Williams. He said plaintiff said she was a business woman and she wanted her money back. This suggestion was put in cross-examination to plaintiff and was stoutly denied. He said he informed Mr. Scott of plaintiff's demand for a refund of her deposit.

The defence filed did not plead that the contract for sale was terminated at the request of the plaintiff for a refund of her deposit. This defence was filed on 18th January, 1982. At the conclusion of the plaintiff's case the defence amended the defence by adding paragraph 8:

> "The defendant says that the plaintiff in 1981 orally agreed to the termination of the agreement for sale in the light of the defendant's inability to trace the whereabouts of his former wife, and demanded the return to her of her deposit of $8,800 which she had paid to his Attorneys".

The defendant gave evidence in support of this defence. The letter written by the defendant's attorney-at-law - Mr. V.L. Scott and tendered as exhibit 7 by the plaintiff reads:

> "On the instructions of Mr. Cyril Williams I hereby advise you that the agreement has to be cancelled, as he is not in a position to effect the transfer. The title is in the names of Vera Williams, his wife and himself. That Mrs Williams has left Jamaica without his knowledge and her whereabouts unknown. He has had his daughter make enquiries in Miami where he understands she went but she has not been found.
>
> Cheque for $8,800.00, the deposit made by you is returned herewith."

This letter does not indicate that the defendant had informed Mr. Scott that the plaintiff had agreed to terminate the contract. I do not accept the evidence of the defendant that the plaintiff agreed to terminate the contract.

The evidence given by the defendant followed the defence pleaded and for ease of reference I reproduce paragraphs 2, 4, 5 and 6 of the defence :

> "2. Save that the defendant says that the Agreement for Sale makes no reference to the quantum of the mortgage money the term of the proposed mortgage or the rate of interest, or to the said land being used as a security therefor, and is accordingly void for uncertainity, paragraph 3 of the Statement of Claim is admitted.
>
> 4. The Defendant denies that he has breached the said Agreement or that he has refused or neglected to perform his obligation under the same, as is alleged in paragraph 8 of the Statement of Claim. In respect thereto the Defendant states that it was a s special condition of the said Agreement that the Defendant would undertake to have the title to the property, the subject of the Agreement, transferred into his own name, as the Defendant and his former wife Vera Williams were at the time of the execution of the said Agreement, the registered proprietors, as joint tenants, of the said property.
>
> 5. The Defendant says that when he and his former wife were divorced in 1970 they were the registered proprietors as joint tenants not only of the said property but also of another property situate in Kingston and known as 7 Renfield Drive, Kingston 20. In or about 1978, the Defendant and his former wife orally agreed that he would transfer his interest in the Kingston property to her and by way of exchange she would in turn transfer her interest in the subject property to him. Pursuant to the said oral agreement, the Defendant transferred his interest in the Kingston property to his said former wife, and in the expectation of her transfer to him of her interest in the subject property, agreed to sell the same to Plaintiff. In breach of the said oral

"5. agreement, the Defendant's said former wife failed to transfer her interest in the subject property to him. She has migrated from Jamaica and neither the Defendant nor her Attorney-at-Law has been able to locate her.

6. In the premises the Defendant says that the special condition to the said Agreement has not and cannot be satisfied and further says that the subject Agreement for sale has been frustrated."

Dr. Barnett submitted that there were questions to be determined by the court.

1. Whether the agreement for sale was subject to conditions precedentand if so have those conditions been satisfied?

2. Is there uncertainity with respect to a material term of the agreement so that it fails?

In support of an affirmative answer he said that the undertaking given by the defendant to have the title in his name was a condition pfecedent. The defendant had used reasonable means in the context of the agreement to procure its satisfaction but had failed. It was admitted that at the time the agreement was signed it was not anticipated that difficulties would have been encountered and the defendant had done very little to protect himself. Relying on Clifton v. Caffery (1924) 34 Com. L.R. p. 434 at p.437 and Aberfoyle Plantations Ltd., v. Cheng 1960 - Appeal Cases 115. Dr. Barnett further submitted that until fulfillment of this condition precedent there was no contract.

The balance of the purchase price should have been obtained from the Jamaica National Building Society and only $58,000.00 was indicated as coming from this source vide exhibit 6. The plaintiff in obtaining $25,000.00 elsewhere went outside the terms of the agreement. The plaintiff had further failed to comply with Clause 13(b) of exhibit 6 - the offer of finance from the Building Society .... therefore the

offer had lapsed and the agreement was at an end.

Condition 13 of the "Conditions of offer of finance" Exhibit 6 reads:

> "13.
>
> Acceptance - your acceptance is indicated by your signing and returning this letter with copies within FOURTEEN DAYS after the date hereof, together with all relevant documents relating to the security. This approval automatically lapses if -
>
> (a) It is not accepted by you as above indicated in writing within fourteen days, unless extension of time has been granted by the Jamaica National.
>
> (b) If the loan monies are not advanced and paid out within three months from the date of the acceptance."

Dr. Barnett submitted that the acceptance should have been made by the 30th May, 1981, as exhibit 6 bears date 16th May, 1981, but it was not taken up until some months later.

There is no evidence to show whether extension of time had been granted in terms of 13(a) above but the letter part of exhibit 6 under cover of which the offer of finance was sent by the Jamaica National Building Society to the plaintiff bears date 26th May, 1981. In the normal course of post the plaintiff would have received it on or about the 30th May, 1981 and the acceptance is dated 8th June, 1981. The fact that the offer dated 16th May, 1981 was sent to plaintiff under cover of a letter dated 26th May, 1981 indicates how flexible the Jamaica National is in terms of its business dealings and there is no evidence that the terms of the offer were strictly enforced.

The agreement required the "Balance Payable to be secured by mortgage from Jamaica National Building Society".

The security for the mortgage must have been, in the contemplation of the partners, the subject of the agreement and having obtained the offer of finance from the Building Society in the sum of $58,000.00, it was for the defendant to fulfil his undertaking and the plaintiff to secure the shortfall in financing to complete the transaction. I do not accept that the failure of the Building Society to offer the full amount of the balance of the purchase price terminated the contract. The condition that "the sale is subject to a mortgage from the Jamaica National Building Society" was in the circumstances described by the plaintiff, assistance given by the Attorney-at-Law for the vendor to the plaintiff to enable the plaintiff to obtain the balance of the purchase price, the Attorney-at-Law being then the Chairman of the Building Society . The plaintiff having obtained an offer of finance had done all she could to fulfil this condition. The Building Society indicated the limit of financing it was then prepared to give so the Purchaser obtained bridging financing and armed with an additional $25,000.00 she was prepared to complete her obligations under the contract.

The defendant and his wife owned two houses jointly. He agreed with his former wife to transfer the house in St. Andrew to her and she to transfer 5 Perth Road, Ocho Rios to him. He fulfilled his part of the agreement and transferred the house at Renfield Drive to her. She did not fulfil her part of the agreement. The vendor, the defendant, has not shown good faith in his dealings with the plaintiff, he has not exhausted all the means available to him to ensure the fulfilment of his undertaking to have the title in his name only. He had a contract with his former wife which was enforceable, he had done nothing to enforce the contract. He said he had not checked with his lawyer

to see if the agreement he had with his wife had been ratified by the Court yet he had gone ahead and transferred 7 Renfield Drive to her. "Given the fact that the transfer re the two properties were complementary, defendant could have sought the assistance of the court. His conduct evidenced bad faith as he failed to do all he reasonably could have done in the circumstances and is in breach of his contract". With this submission of Mr. Frankson I agree. Mr. Frankson relied on Malhotra v. Choudhury 1979 1 ALL E.R. 187:

> "The plaintiff was one of two partners in a medical practice of which the senior resided at a property comprising a house and a surgery. On the retirement of the senior partner the plaintiff agreed to take the defendant into the practice as junior partner, and the senior partner agreed to sell the property to the defendant and his wife. The partnership deed, made on 19th May, 1972, two weeks after the contract for the sale of the property, provided inter alia, that if the defendant ceased to be a partner, he would offer to sell the house and surgery to the plaintiff at a fair market price, to be fixed, in the absence of agreement, by a valuer. On 1st Augsut the property was convehed to the defendant and his wife as joint tenants. At the date of the partnership deed the plaintiff was practising from the surgery at the property and thereafter both he and the defendant practised from the surgery. The partnership was not successful, and on 30th March 1973 the plaintiff gave written notice to the defendant to dissolve it, and also gave notice that he wished to exercise the option requiring the defendant to offer the property to him for sale. The defendant asserted that in the events which had happened the option was not exercisable, and refused to sell the property to the plaintiff."

The plaintiff sought and obtained an order for Specific Performance of the contract. This order was struck out by the Court of Appeal. In subsequent proceedings the plaintiff sought to obtain substantial damages. This was refused. He appealed. It was held on appeal.

"The appeal would be allowed for the following reasons:-

(i) The rule that where a vendor of land was unable to make a good title the damages recoverable by this purchaser for breach of the contract were limited to his expenses incurred in investigating title and did not include damages for the loss of his bargain was an exceptional rule which only applied if the vendor was unable, through no default of his own, to carry out his contractual duty to make a good title. To obtain the benefit of the rule the vendor was required to prove that he had used his best endeavours to make a good title. Bad faith on his part even without actual fraud, was sufficient to exclude the rule, and unwillingness to use his best endeavours to make a good title constituted bad faith. The statement that the defendant's wife refused to consent to a sale did not indicate that the defendant had tried to persuade her to consent and, in the absence of any other evidence to that effect, it was to be inferred that the defendant had not used his best endeavours to persuade his wife to agree to the sale and that he was therefore guilty of bad faith. It followed that the plaintiff was entitled to substantial damages."

The Court of Appeal struck out the order for Specific Performance "because the defendants wife was a joint tenant of the property and might resist an order for sale and refuse to agree to any conveyance." The facts in Malhotra v. Choudhury are distinguished for the facts in this case in that the defendant on his evidence has an agreement, performed by him, which is enforceable, but he has taken no steps to enforce it. His failure to seek to enforce it makes him guilty of bad faith.

Dr. Barnett submitted that damages would be an adequate remedy in this case. This Mr. Frankson resisted. He submitted that the plaintiff had elected to pursue the remedy of Specific Performance and had adduced no evidence re damages. The plaintiff has treated the contract as being still in force and if Specific Performance is refused plaintiff still has the option to prove damages. Mr. Frankson relied on Johnson v Agnew 1979 1ALL E.R. 883 (H.L.).

Here it was held -

> "A vendor who sought Specific Performance merely elected for a course which might or might not lead to the implementation of the contract; he was not electing for an eternal or unconditional affirmation of the contract but simply for the contract to be continued under the court's control. If he obtained an order for Specific Performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract."

At page 889 Lord Wilberforce said:

> ".....it is possible to state at least some uncontroversial propositions of Law: FIRST, in a contract for sale of land, after time has been amde, or has become , of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly - The vendor may proceed by action for the above remedies (viz specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue."

(Underlining mine).

I accept these propositions. I hold that the agreement for sale was not subject to conditions precedent and there is no uncertainty in the terms. The contract is valid and subsisting. The defendant was unwilling to admit the notorious fact that property values have appreciated since 1981, he however said he would not, if he could get the transfer signed by his former wife, now transfer the property, the subject of the contract to the plaintiff.

Plaintiff said she was not aware that the title was in the joint names of defendant and his former wife. She agreed she was shown the title and she read and signed agreement.

Even if she knew the title was in the joint names of defendant and his former wife she is entitled to rely on the undertaking he gave to have the title transferred to his name. Defendant has failed to show that he has done all he can do to execute his undertaking and is guilty of bad faith.