IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S. 347/1992

BETWEEN	VERNON SMITH	1st PLAINTIFF
A N D	LORNA SMITH	2nd PLAINTIFF
A N D	LYDWIN MORRIS	1ST DEFENDANT
A N D	VIVIAN KNIGHT	2ND DEFENDANT

Mrs. Nancy Tulloch-Darby for the Plaintiffs
Mrs. Michelle Champagnie instructed by
Myers, Fletcher & Gordon for 1st Defendant
2nd Defendant not present and not represented

Heard: 15th June, 1999, 16th and 17th, November, 1999 and 12th June, 2000

DUKHARAN, J

The Plaintiffs claim is against the Defendants for:

(a) Specific Performance of contract of sale of property between the Plaintiffs and the Defendants dated the 13th September, 1991, whereby The Defendants agreed to sell and the Plaintiffs to buy premises at 39 Teak Way, Barbican Terrace, Kingston 6 in the parish of St. Andrew, Registered at Volume 1138 Folio 578 of the Register Book of Titles or In the alternative;

(b) Damages for Breach of Contract.

The Plaintiffs case is that they entered into a valid contract with the Defendants for the sale of premises 39 Teak Way, Barbican, St. Andrew on the 13th September, 1991. This was signed by the second Defendant as agent as the duly appointed agent of the first Defendant. On the 20th March, 1992 the Plaintiffs received a cheque for the refund of their deposit. This cheque was negotiated by the Plaintiffs who subsequently lodged a caveat against the property and commenced legal action against the vendor and his agent.

The first Defendant denies that the Power of Attorney was in force and also denies that he agreed to sell the property or that the second Defendant was empowered to sign the Agreement for Sale on his behalf.

The first Plaintiff Mr. Vernon Smith said in evidence that he had discussed with the first Defendant Mr. Lydwin Morris about the purchase of the property in 1986. He said Mr. Morris expressed a desire to sell but not at that time. In 1990-91 he spoke to Mr. Morris's agent, the second Defendant about the sale of the property. A valuation was obtained for $375,000. He said he signed the sale agreement and made a deposit of $56,250.00 in November 1991. This was signed by the second Defendant as agent of the first Defendant.

A mortgage loan of $315,000.00 was approved by Jamaica National Insurance Company. The Plaintiff said he did not speak with the first Defendant directly but to his agent, the second Defendant. He said he received a cheque dated 20th March, 1992 from the vendor's attorney which represented the deposit he had made and no reason was stated why the deposit was being returned. The

returned cheque was negotiated on the 25th March, 1992. On the 2nd November, 1992 suit was filed against the Defendants.

The Plaintiffs now seeks an order for specific performance and in the alternative damages for breach of contract.

The first Defendant said in evidence that in 1991 while he was in Miami, U.S.A. he requested the second Defendant to have a power of attorney prepared because he was thinking of selling the property. The 2nd Defendant engaged the services of Mrs. Maureen Moncrieffe, an attorney-at-law to prepare a power of attorney. A copy of this was sent to the first Defendant for his signature which was duly signed and returned. Mrs. Moncrieffe subsequently requested the first Defendant to obtain and attach a County Clerk's certificate to the Power of Attorney. This was not done and in fact the first Defendant never returned the Power of Attorney to Mrs. Moncrieffe or the second Defendant, as he said he decided not to sell the property.

On the 16th January, 1992 Mrs. Moncrieffe wrote to Mr. Richard Brown, attorney-at-law for the Plaintiffs enclosing a cheque for $56,250.00, representing a refund of the deposit paid by the Plaintiffs. Mr. Brown in response on the 20th March, 1992 returned the cheque and requested a cheque payable to the Plaintiffs. This was duly prepared by Mrs. Moncrieffe and sent to Mr. Brown. The plaintiffs negotiated this cheque and in November, 1992 lodged a caveat against the property.

The first Defendant said he became aware of this when he was informed by letter from the Registrar of Titles. It was subsequent to this the first Defendant

said he found out that the second Defendant had entered into an agreement for the sale of the property with the Plaintiffs.

There are several issues to be resolved in this matter. The first issue to be determines is whether the agent of the first Defendant, Mr. Vivian Knight had the authority to enter into the agreement for sale with the Plaintiffs.

It was submitted by the attorney for the first Defendant that the Power of Attorney was not a valid document as it never bore a County Clerk's certificate and therefore was never effective in Jamaica. Section 149 of the Registrar of Titles Act states:

> "The proprietor of any land under the operation of this Act, or of any lease, mortgage or charge, may appoint any person to act for him in transferring the same, or otherwise dealing therewith, by signing a power of attorney ...
>
> Every such power or a duplicate or attested copy thereof, shall be deposited with the Registrar, who shall note the effect thereof in a book to be kept for that purpose."

Section 152 of the Act also states that ...

> "... Provided that where any such instrument or power of attorney purports to have been witnessed or certified by any Notary Public in any foreign state or country, there shall be annexed to such instrument or Power of Attorney a certificate under the hand and seal of the appropriate officer of such foreign state or country ..."

It was submitted by the first Defendant that the Power of Attorney did not comply with the requirements of Section 152 of the Act, since it was not duly executed ad therefore was never operative in Jamaica. It was also not deposited

with the Registrar of Titles and noted and not valid so as to convey a right to the second Defendant to deal with the property as is required by Section 150 of the Registration of Titles Act. It would also not have been accepted for deposit in the absence of compliance with Section 152 of the Act.

It was submitted by the Plaintiff that by signing the Power of Attorney the first Defendant held out the second Defendant as his agent. It is to be noted that the first Defendant never revoked the Power of Attorney. The evidence discloses that the second Defendant as agent collected the rent from the Plaintiffs on behalf of the first Defendant.

In the case of **Drew vs Nunn** 1879 Q.B.D. 661 the plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards, the defendant became insane and whilst his malady lasted his wife ordered goods from the plaintiff who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant afterwards recovered and refused to pay for the goods supplied to his wife by the plaintiff. It was held that the defendant was liable for the price of the goods. As Brett, L.J. said at pages 666-667

> "... Authority may be given to an agent in two ways. First it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the principal that the agent may act for him. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him."

In this case the wife was held out as agent, and the plaintiff acted upon the defendants representation as to her authority without notice that it had been withdrawn. The defendant cannot escape from the consequences of the representation which he has made; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract upon his behalf.

In the instant case there is no evidence that the first Defendant gave notice of termination of the agency to the second Defendant.

In Halsbury's Laws 3rd ed. Vol. 1 at para. 549 it is stated that the cases in which notice of termination has been held to be necessary are cases in which a third person had been induced to believe through the act of the principal that the agent had authority and therefore depend on the principle of estoppel.

In the instant case it has not been denied that the second Defendant was the agent of the first Defendant. The Power of Attorney showed the existence of an agency. The Plaintiffs knew this as they paid rent to the second Defendant on behalf of the first Defendant. The Plaintiffs attorney was in possession of a copy of the Power of Attorney and the Plaintiffs relied on this when they contracted with the second Defendant as agent of the first Defendant.

The fact that the County Clerk's certificate was not attached to the Power of Attorney and that it was not recorded at the Titles Office does not in my view affect the validity of the Agreement for Sale. The Power of Attorney gave the agent (second Defendant) express authority to enter into the contract of sale. The

first Defendant never gave notice of termination of the agency which was created by him. I therefore find that the contract entered into with the second Defendant was valid and binding.

Having found that there was a binding agreement for sale the next issue to be determined is whether it was repudiated by the first Defendant, and if so whether that repudiation was accepted by the Plaintiffs.

It was submitted by the first Defendant that even if there was a binding agreement a letter dated the 16th January 1992 (Exhibit 9) would have amounted to a repudiation of the agreement for sale. In looking at the contents of this letter which was sent by the vendors attorney to the Plaintiffs reads:

> "The vendor herein has now indicated that he does not wish to proceed with the sale of his house. Accordingly I enclose herewith B.N.S. cheque in the sum of $56,250.00 being refund of the deposit herein."

On the 20th March, 1992 Mr. Richard Brown, attorney for the Plaintiffs wrote to the first Defendant's attorney Mrs. Maureen Moncrieffe to the following effect.

> "I refer to our telephone conversation on the 19th March, 1992... I am asking if you could deliver replacement cheque to the bearer .... and make same payable to Mr. Vernon Smith and/ or Mrs. Lorna Smith (Plaintiffs). Thanking you for your kind cooperation."

The question that arises from this is whether the request by Mr. Richard Brown that the returned deposit cheque be drawn in favour of the Plaintiffs and the subsequent negotiation of the cheque amounted to an election by the Plaintiffs to rescind the agreement for sale by accepting the first Defendant's repudiation and the return of the deposit.

Was this an election by the Plaintiffs to treat the contract as terminated?

In **Edwards vs Cowan et al** (1980) 33 W.I.R. 261 it was held that as a result of the respondent's election to pursue their right to damages for repudiation of the contract they were precluded from pursuing a claim for specific performance because of their election, the contract had been discharged

Also in **Scarf v Jardine** 1882 7 Appeal Cases 345, Blackburn L.J. said at page 360,

> "The principle, I take it running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or had indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act ... I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way. The fact of his having done that unequivocal act to the knowledge of the persons concerned is an election".

This passage by Blackburn L.J. was approved by the Law Lords in **Edwards and Cowan (supra)**

In the instant case the Plaintifs negotiated the return deposit cheque. No notice was served on the defendants requiring completion of the contract. No time frame was given to complete.

I am of the view and so find, that there was a mutual recission of the agreement. I find that the Plaintiffs elected to treat the contract as terminated when they failed to serve notice on the Defendants requiring completion. They

not only negotiated the cheque but did nothing for almost eight (8) months. Neither party had completely performed their obligations under the contract.

Since there has been a mutual recession of the contract the Plaintiffs therefore cannot succeed in a claim for specific performance, as there is no longer an unenforceable contract.

The Plaintiffs have claimed damages an alternative to specific performance. I am of the view that where a claim is made in this way, the Court cannot award damages, if at the time of trial specific performance is not available, and since there was no breach of contract no loss flowed from that recession.

In the case of **Hipgrave v Case** 1884 28 Ch. D. 356, it was held that the Plaintiff was bound by the form of the claim which he deliberately elected to make. At page 361 Brett M.R. said;

> "I agree I think that the Plaintiff having by the form of his pleadings and by the conduct of the case elected to put his claim as one for specific performance, with an alternative claim for damages merely as a substitute for specific performance in case for any reason the Court should feel itself unable to give effect to his prayer for specific performance, the Plaintiff cannot now be allowed to change the whole nature of his action by turning it with an ordinary action for damages at common law".

Even if the contract was not terminated, on the question of delay in filing suit it was submitted by the Plaintiffs that a delay of eight (8) months was not fatal to a claim for specific performance. To support this view the case of **Williams vs Greatrix** 1956 3 A.E.R. 705 was cited. This was a case in which there was a contract for the sale of two (2) pieces of land. After the vendor had accepted the deposit he put the purchaser in possession. The vendor sought to cancel the

contract and sell the land to another party. The purchaser was ordered off but remained in possession until some eight (8) years later when the vendor was selling to someone else. It was held that despite the delay the purchaser was entitled to specific performance.

This case however is distinguishable from the instant case as here the plaintiffs were already a tenant of the 1st defendant and this tenancy had nothing to do with the Contract of Sale.

There are a line of case in which a delay of four (4) months have been considered and held to be fatal to an action for Specific Performance:

The Plaintiffs in this case have not explained the long delay of close to eight (8) months in filing suit. I am of the view that this delay would also be fatal to an action for Specific Performance.

For the reasons given I would dismiss the Plaintiffs action.

Accordingly I give judgment in favour of the 1st Defendant .

I would also order the Caveat dated November 2nd 1992 lodged by the Plaintiffs against the title to the said premises be withdrawn within fourteen (14) days of the date of the judgment. If this is not done within this specified time the Registrar of the Supreme Court is empowered to sign the withdrawal of the Caveat.

Cost to be awarded to the 1st defendant to be taxed if not agreed.