IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1985/S088

BETWEEN	CASSELL SPENCER	PLAINTIFF
AND	WALTER REYNOLDS	DEFENDANT

W. Clarke Cousins & Carol Sewell, for the Plaintiff

Gresford Jones & Errol R.A. Swaby for Defendant.

PATTERSON, J. April 6, 7 & May 16, 1994

By a writ issued on the 19th February, 1985, the plaintiff Cassell Spencer brought an action against the defendant Walter Reynolds, claiming an order for specific performance of a contract in writing signed the 20th day of September, 1976 whereby "the defendant agreed to sell and the plaintiff to purchase all that part of Kingsland Pen in the parish of Manchester comprised in Certificate of Title registered at Volume 184 Folio 29 of the Register Book of Titles known as Miss Papple for the sum of $18,000.00".

The defendant filed a defence and counter-claim on the 1st June, 1985, and it appears that thereafter the action went to sleep. Cassell Spencer died, and on the 21st May, 1992, the executors of his estate, Edward Young and Allan Copeland, were substituted as the plaintiffs to continue the action on behalf of the deceased's estate. A reply and defence to counter-claim was filed on the 16th November 1992.

When the matter came on for trial, counsel for the plaintiff applied to amend the pleadings to reflect that the defendant was "at all material times the agent of Hilda Holness" and further to add a party as a defendant, namely "Mr. Artemus Phillips, the executor of the estate of Hilda Holness, deceased." The court considered the application and gave its reasons for refusing it. Counsel then applied to amend the relief sought by adding as a further relief to that for an order for specific performance of the contract, "damages for breach of contract in addition to or in lieu thereof." This amendment was allowed and the trial proceeded.

The plaintiff relied on the evidence of two witnesses in proof of the claim. Errol Roy Ashley Swaby testified as to what transpired between the parties in 1976. Mr. Swaby is an Attorney-at-law, and he said that in September, 1976, the defendant and Hilda Holness ("the vendors") and Cassell Spencer ("the purchaser") consulted him. He took instructions. The vendors were selling to the purchaser part of land known as Miss Papple comprised in Certificate of Title registered at Volume 184 Folio 29, estimated to (contain) 10 acres. The purchase price was $18,000.00, (calculated at $1,800 per acre) with provision for an abatement in the price depending on a surveyor's report. A deposit of $8,000 was paid on the signing of the agreement for sale which he prepared and $4,000 was paid subsequently. At the time the agreement was signed, the vendors did not produce the duplicate certificate of title, but this was done subsequently.

The history of this land is quite interesting. The land was first brought under the Registration of Titles Act in 1926. The duplicate certificate of title, issued on the 4th January, 1926 named Arthur Samuel Reynolds as the proprietor of an estate in fee simple of two parcels of land, part of Kingsland Pen, Manchester, containing by survey seven acres three roods (referred to as Section A), and twenty one acres one rood (referred to as Section B). Two diagrams are attached depicting each section, and the acreage of each. It is common ground that Section A is known as "Miss Papple" and Section B is divided into two parcels, one is known as "Negroe House" and the other as "Top Hill". All the land comprised in this certificate of title was acquired on transmission on the 20th December, 1931 by Louisa Reynolds, widow, and Hilda Reynolds, spinster, the executrices of the estate of Arthur Samuel Reynolds, deceased, and that fact was entered on the certificate of title on the 5th February, 1935. Hilda Reynolds was married to Walter Joseph Holness on the 4th June 1942. Louis Reynolds died on the 7th May, 1945. By his will the deceased Arthur Samuel Reynolds, devised the parcels of land known as "Miss Papple", "Negroe House" and "Hill Top", that is to say, all the registered land, to his son, Samuel Cornelius Reynolds for

life and after his death, to the children of Samuel Cornelius for life, with the proviso that should Samuel Cornelius die without lawful issue, then it should pass to the lawful children of the deceased's daughter Hilda, and should she die without leaving lawful issue, then to Walter Dennison Reynolds or his children. Samuel Cornelius Reynolds died without issue, and Hilda Reynolds had no lawful issue. Walter Dennison Reynolds, the defendant, became entitled to the beneficial interest in the land, and although the legal estate was never transferred to him, his entitlement was never questioned and he exercised all the customary rights of a fee simple owner in possession. It is for that reason that he negotiated the sale of various parcels of the land. But in 1935, before his interest vested, the part of Section B of the land known as "Hill Top" containing approximately 12½ acres, was sold to Ralph Albert Segree and a new certificate of title was issued for that part, registered at Volume 307 Folio 63. As a result, it was only the parcels known as "Miss Papple" and "Negroe House" that remained and could be transferred to the defendant, Those parcels were separated by a stone wall, and the boundaries were well defined.

A one acre lot of land from Section A of the property known as "Miss Papple", was sold to one Ozziel Bloomfield and title therefor was registered at Volume 1099 Folio 629 of the Register Book of Titles on the 13th September, 1973. Another 1½ acre lot from "Miss Papple" was sold to the said Ozziel Bloomfield and although it is not clear when that was done, it was certainly before 1979.

Michael Isaacs, a commissioned land surveyor, testified that in 1979, Cassell Spencer requested him to carry out a survey of certain land at Kingsland Pen, Manchester. He said that on the 31st May, 1979, acting on instructions, and in the presence of Cassell Spencer and the defendant, he carried out the survey. He prepared a plan of the area surveyed and found it to contain 4 acres, 3 roods 36.6 perches. That plan, which bears Survey Department Examination number 165530 was tendered in evidence as Exhibit 1. It clearly shows that the land is part of "Miss Papple", and is bounded to the north on land occupied by O.S. Bloomfield, and to the west

by Walter Reynolds. That area shown to be occupied by Walter Reynolds is beyond the stone wall which divides "Miss Papple" from "Negroe House", and is clearly part of Negroe House. The witness testified that at the request of Cassell Spencer and apparently other persons also, he subsequently surveyed all the land comprised in certificate of title registered at Vol.134 Folio 29, dividing it into lots. He prepared a proposed sub-division plan which bears date 19.10.80 and it was admitted in evidence as Ex.2. It shows the total area to be 28¾ acres approximately, and the lots are numbered 1 - 9. The lot numbered "3" is that registered on the 13th September, 1973 at Volume 1099 Folio 629 in the name of O.S. Bloomfield. That lot was shown as part of Section A of the parent title registered at Volume 134 Folio 29 known as "Miss Papple". The lot numbered 9 is that registered at Volume 307 Folio 63 in the name of C.A. Spencer (the plaintiff). That lot was the part of Section "B" known as "Top Hill" which had been transferred in 1935 to Ralph Albert Segree. The proposed sub-division plan divided Section A - "Miss Papple" into lots 1, 2, & 3 and "Negroe House" in Section B into lots 4, 5, 6, 7 & 8. It further shows the owner/occupier of lots 1, 7, & 8 to be C.A. Spencer (the deceased), lots 2 & 3, O.S. Bloomfield, lot 4 - Noel Robinson, lot 5, Duncan Spencer and lot 6 - a one acre plot, the only one remaining in the name of the defendant, Walter Reynolds. The lot numbered 1, containing 4 acres 3 roods 36.6 perches, is that which was surveyed on the 31/5/79, and for which the plan Ex.1 was prepared. The lot numbered 7 is said to be in the possession of C.A. Spencer, contrary to what is stated in Ex.1.

The witness was not sure whether or not the sub-division plan, Ex.2, was submitted to the Parish Council for Manchester for approval. Ex.2 is a photocopy of the original which was not produced or accounted for. However, he subsequently prepared another sub-division plan, which shows the shape and dimensions of the lots to be basically the same as those contained in the previous plan Ex.2, although the numbering of the lots were now different.

The changes in the numbering are as follows:-

On First plan: Lot 1, on Second plan - Lot 7

On the first plan - Lot 2, on Second plan - Lot 8

" Lot 3, " " " - Lot 9

" Lot 4, " " " - Lot 5

" Lot 5, " " " - Lot 3 & 4

" Lot 6, " " " - Lot 6)
)

" Lot 7, " " " - Lot 6)

" Lot 8, " " " - Lot 2

" Lot 9, " " " - Lot 1.

What is interesting to note is the person now listed as being the "owner/occupier" of the lots demarcated on the second plan. Mr. O.S. Bloomfield retains his two lots (now 9 & 8), Mr. D. Stanley retains his (now lots 7, 2 & 1), and whereas the defendant had only retained lot 6 - one acre, the new lot 6 now embraces land from the former lots 6 & 7 - and is of the area: 3 acres, 3 roods, 22 perches. In other words whereas on the first plan dated 19/10/80, C.S. Spencer is listed as being the owner/occupier of a lot containing 3 acres, 3 roods, 13 perches, in the subsequent plan he is not listed for that lot. The defendant is now listed for that lot, and a one acre lot is added to Mr. D. Stanley's holding. So whereas in 1980 , the plaintiff is listed on Ex.2 as being the "owner/occupier" of two lots, one 4 acres 3 roods 36 perches (part of Miss Papple) and the other 3 acres 3 roods 13 perches (part of "Negro House") a total of 8 acres 3 roods 9 perches, he is subsequently listed as the owner/occupier of only one lot of 4 acres 3 roods 36 perches (part of Miss Papple). The lots totalling approximately 8 3/4 acres are contiguous, with a stone wall dividing them.

The plaintiff contends, and I accept it, that in 1976, Cassell Spencer entered into a contract with the defendant and one Hilda Holness as co-vendors, whereby he agreed to purchase and the vendors agreed to sell to him "all that part of Kingsland Pen in the parish of Manchester comprised in Certificate of Title registered at Volume 184 Folio 29 of the Register Book of Titles known as Miss Papple for the sum of $18,000.00". At that time the land had not been surveyed. It was estimated to contain approximately 10 acres, and the price per acre was agreed at $1,800. It was further agreed that the purchase

price of $18,000.00 would abate, depending on the acreage which the survey would establish.

The agreement was said to have been reduced to writing, but it was never put in evidence (no doubt because it did not fulfill the requirements of The Stamp Duty Act). Consequently, the provision of the Statute of Frauds was not complied with. Nevertheless, the plaintiff relies on the equitable doctrine of part performance as evidence of the contract contended for and seeks an order for specific performance and/or damages in lieu thereof.

Let me now consider if a valid contract was concluded between the parties, and if so, the terms of that contract. The real issue in this regard seems to be the identify of the property in question. The plaintiff in his pleadings contends that the agreement was for him to purchase "all that part of Kingsland Pen ..... known as Miss Papple ....." He further said this:-

"The plaintiff surveyed the lands the subject of the agreement for sale and the proposed sub-division plan identifies the aforesaid land to be 10 acres in area."

The evidence clearly is not in accord with the pleadings. Firstly, the part of land "known as Miss Papple" which the plaintiff and the defendant agreed on was surveyed and found to contain just under five acres - that was all the land known as Miss Papple which could have been allotted to the contract. Secondly, Mr. Swaby's evidence, which I accept, is that "the parties agreed that the land being sold would be bounded north on land of Ozziel Bloomfield, south Reynolds Metal Company, east on remaining lands of vendors known as Negroe House, west on main road Mandeville to Spur Tree". Mr. Swaby said he was not in possession of the diagram at the time the agreement was made, and so the only reasonable inference to be drawn is that the parties described and agreed to the boundaries of the land subject of the agreement. The 10 acres mentioned then was purely by estimation, and it seems to me that if that were not so, then there would be no need for the parties to agree for the abatement in the purchase price depending on the acreage found after survey. The surveyor said that a dispute arose between the parties after it was ascertained that the land known as Miss Papple was only

five acres approximately. The plaintiff was then contending that he should be allotted 10 acres. That was not possible even assuming that the surveyor went out of "Miss Papple" and onto "Negroe House".

I find as a fact that the description of the land subject of the contract agreed on by the parties, was as follows:-

All that parcel of land part of Kingsland Pen in the Parish of Manchester known as Miss Papple butting north on land of Ozziel Bloomfield, south on lands of Reynolds Metal Company east on remaining lands of vendors known as Negroe House and west on main road from Mandeville to Spur Tree containing ten acres more or less, and being part of land comprised in Certificate of Title registered at Volume 184 Folio 29 (the exact acreage to be determined by survey).

I find as a fact that a special condition of the contract provided for the purchase price to abate depending on the acreage and that the sale was subject to a sub-division approval. I am of the view that the description of the land by its boundaries is quite clear, and is sufficient to put beyond doubt what area of land it was that the parties agreed on. "The maxim "Falsa demonstratio non nocet" applies and so the addition of the words "containing 10 acres, more or less" has no prejudicial effect on the description of the land.

It is quite clear that the land which the vendors and the purchaser agreed on is that which was surveyed on the 31st May, 1979 in their presence and is shown on the pre-checked plan Ex.1. It contains approximately 5 acres. The parties estimated it to contain 10 acres, more or less. There is a deficiency of approximately 50 percent, and I am of the view that the purchaser did not contemplate such a deficiency, and that the vendors were negligent in their estimate as to the acreage of the land. If the parent certificate of title had been presented to the attorney-at-law at the time the contract was entered into, I have no doubt that he would have realised that such an acreage could not possibly be obtained from the land in Section A known as Miss Papple. The provision for an abatement in the purchase price depending on the acreage found on survey, coupled with the term fixing the selling price at $1,800 per acre lead me

to hold that the misdescription in the acreage was honestly made by the vendors, although with some industry, their estimate could have fallen much closer to the true acreage. In the ordinary case where there is a substantial misrepresentation in the acreage of the land, it seems to me that it is reasonable to suppose that the purchaser may not have entered into the contract, had he known the true acreage, and so he would have the option either to rescind the contract, or to enforce it with a claim for compensation. But that is not the position in the instant case. The land was clearly demarcated and properly described in the contract. The mention of 10 acres more or less is only an estimate and does not vitiate the contract. Provision is made for the abatement of the purchase price as compensation. The nature of the contract is such that it could be enforced.

The defendant, in his pleadings, has not denied that there was a written agreement between the parties, but he contends that it is statute barred. Generally speaking, an action, based on a simple contract, must be brought within six years of the date on which the cause of action accrued. In contracts for the sale of land, time begins to run from the date fixed for completion, and when no such date is fixed, time runs against the purchaser from the date that it becomes impossible for him to convey. In the instant case, there is evidence that the survey had to be done before completion could be contemplated. The survey was not done until the 31st of May, 1979 and the action was brought on the 19th of February, 1985. The action is not statute barred. In any event when the action is one for specific performance, it does not appear that the Limitation Act applies; the prime consideration in such cases is the plaintiff's delay in seeking his remedy. That in turn depends upon whether or not the purchaser is in possession, for then his possession may have crystalized his equitable title, and all that he is awaiting would be the legal title.

As a general rule, a transfer of the legal estate in land must be made by the person who holds that estate. It is plain that

in the instant case, the legal estate does not reside in the defendant. But that is not the end of the matter. The defendant is the only person with a beneficial interest in the land which was specifically devised and Hilda Holness, the personal representative of the deceased, Arthur Samuel Reynolds, holds the legal estate for the defendant subject only to the payment of debts and other liabilities if necessary. The defendant may at any time call upon the personal representative to transfer the legal estate to him. The defendant seems to have been the dominant person in entering into the contract of sale, and he seems to have been in possession of the land although it had not been conveyed to him. There can be no doubt that he represented and agreed to sell the parcel of land as his own. In those circumstances, the defendant cannot rely on the fact that he has not got the legal estate and so cannot make title. It would be within his power to perfect his title to the land and to let the purchaser have the benefit of his contract. This seems to be based on a well established principle. In the often cited case of Mortlock v. Buller (1804) 10 Ves. 292 at 315, 316, Lord Eldon L.D., had this to say:-

> "If a man, having partial interest in an estate, chuses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interest, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and if the vendee chuses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection of the vendor, that the purchaser cannot have the whole".

In my judgment, the fact that the plaintiff has not joined the personal representative of the deceased, who holds the legal estate in the land, as a defendant in the action, would not detract from the defendant's obligation to cure the defect in his title and in his ultimate liability to the plaintiff. My views are that the parties were competent to enter into the agreement contended

for by the plaintiff, and they did arrive at an agreement whereby the vendors agreed to sell and the purchaser agreed to purchase the land that I have earlier described. They agreed on the consideration and on the terms of payment. They agreed that the land should be surveyed and depending on the acreage, there would be an abatement in the purchase price. They also agreed that the sale would be subject to a subdivision approval, and that to that end, a sub-division plan should be prepared.

The crucial consideration is whether or not the agreement can be enforced. It is not unusual for vendors to enter into contracts for the sale of lots from registered land before first obtaining planning permission, and in such cases, it is not unusual for the contract to be expressed as being "subject to sub-division approval". The parties and their attorneys-at-law would be aware of the requirements of the Town and Country Planning Act and the Local Improvements Act and the fact that the vendor would not be able to convey a registered title unless such approval was first obtained. It is usually the obligation of the vendor to seek the requisite approval, but it cannot be implied that he warrants that the approval will be given. It is not a condition that can be waived by the purchaser, and if the vendor uses due diligence and takes all reasonable steps to obtain the approval, but nevertheless, his application is refused, the contract cannot then be completed. The sub-division approval is a condition precedent to the completion of the contract, and it must have been within the contemplation of the parties to treat the contract as at an end if the law cannot be complied with.

In the instant case, a proposed sub-division plan was submitted by the defendant to the Parish Council of Manchester, the local authority, seeking its approval. The application was refused and the defendant was so informed by letter dated January 10, 1985.

It reads as follows:-

January 10, 1985

Mr. Walter Reynolds,
Pigeon Grove,
Spur Tree P.O.
Manchester.

Dear Sir:

Re: Proposed subdivision of part of Kingsland Pen, Manchester by you

With regards to your application of 26th July, 1983 seeking permission to subdivide lands part of Kingsland Pen into nine (9) lots for commercial/industrial purpose, I am to inform you that the proposal was not recommended as the property is in an area restricted for bauxite mining.

You may, however appeal for re-consideration, giving any further explanation that may assist in arriving at a favourable decision.

Yours truly,

Secretary,
Parish Council, Manchester

The matter did not end there. It appears that the defendant exercised his right of appeal, and the result is contained in a letter dated 24th April, 1986 which reads as follows:-

24th April, 1986

Mr. Walter Reynolds,
Pigeon Grove,
SPUR TREE P.O.

Dear Sir,

Re: Proposed Subdivision of part of KINGSLAND PEN by you

The Town Planning Department has advised by letter dated 7th March, 1986 that the Ministry of Construction has imposed certain conditions which will require amendment to your present proposal for subdividing lands at Kingsland Pen. This amendment is indicated in red on the attached copy of the plan.

Please therefore have the subdivision re-designed accordingly and re-submitted for further processing.

Yours truly,

Secretary/Manager
Parish Council Manchester.

The amendment indicated in red on the plan seems to require the defendant to provide a roadway for the scheme which would roughly run parallel to the main road from Spur Tree to Mandeville, extending from lot 1 to lot 7 and passing through lots 2, 3, 5, 9, & 8, with only one opening unto the main road. It does not appear that anything further was done towards re-designing that sub-division plan. I suspect that the defendant may have found it near impossible to comply with the conditions laid down by the Ministry of Construction, having regard to the fact that he had already entered into contracts for the sale of lots 2, 3, 5, and 8, and as regards lot 9, that had been sold and the transfer registered at Vol.1099 Fol.623. I am not certain how it came about that a separate title was issued for lot 9 before the sub-division plan was approved.

The question therefore is this, in the circumstances of this case, can it be said that the defendant acted diligently and has taken all reasonable steps to obtain the sub-division approval? In my view, the answer must be that he has. In the first place, the weight of authority seems to suggest that once the application has been refused, he need not have exercised his right of appeal. Nevertheless, he did, with the result that the conditions laid down are almost incapable of performance, and may be considered as being tantamount to a refusal. If I am correct then it means that the contract for sale is at an end, and the plaintiff's claim for an order of specific performance or damages in lieu thereof, must fail.

In summary, I hold that the parties reached a complete agreement for sale of the land in question; but the sale could not be completed without the approval of the sub-division plan, and that was a condition of the agreement. If the sub-division plan had been approved, then the agreement would be binding on the parties, but since the approval has been refused, the agreement is at an end and is therefore not binding on the parties. The plaintiff cannot succeed in his claim for specific performance or damages in lieu.

The defendant did not plead the absence of the written contract alleged by the plaintiff in his pleadings. In such a case, it would be open for the Court to order specific performance of the

contract, despite the fact that it was not evidenced in writing and duly signed by the defendant; if the oral contract was evidenced by sufficient acts of part-performance, the Court could order specific performance of the contract, provided the condition for sub-division approval had been fulfilled or could reasonably be fulfilled. But if that had been the case it would have been just and equitable to order an abatement of the purchase price in terms of the agreement.

The defendant has counter-claimed for damages for trespass on the land known as Miss Papple which he claims he was lawfully in possession of. He alleges that the plaintiff, by himself, his servants or agents trespassed on the land with a bulldozer pushed away boundary walls, smashed and destroyed surveyor's monuments, trampelled the herbage, and planted corn, peas and potatoes. This was done over a period extending from the 28th November 1983 to the 14th February, 1985. It is interesting to note that the plaintiff has never alleged that he had been put in possession of the land. I accept the evidence of the defendant that the plaintiff was never put in possession, and that he the defendant was in possession. I find as a fact that the plaintiff by his servant or agent, entered on land in the possession of the defendant against the will of the defendant, on divers dates between the 28th November, 1983 and the 14th February, 1985 and did the damage complained of.

The defendant has failed to specifically claim on the pleadings, any amount for special damages. He has "thrown up" in evidence certain sums which he is claiming for special damages, and in my view, there is no basis on which an award for special damages can be made. However, the defendant is entitled to recover general damages, even if he fails to prove any actual loss. (See Swordheath Properties Limited v. Tabet & Ors. [1979] 1 ALLER 240). I accept the evidence that the plaintiff planted crops on the land, and accordingly, the defendant is entitled to be compensated in a reasonable sum for the use of the land. A reasonable sum, in my view, would be the gross annual value of the land which I would put at 10% of

the value, that is $180 per acre per annum for a period of 1½ years.

I accept the evidence that the plaintiff paid a total sum of $2,000.00 to the defendant personally and the sum of $12,000.00 to Mr. Swaby, the attorney-at-law having the carriage of sale. These amounts must be returned to the plaintiff, with interest, and I am guided by S.13(2) of the Local Improvements Act.

My judgment is as follows:-

There shall be judgment for the defendant on the claim and on the counter-claim, with damages on the counter-claim in the sum of $1125.00, with costs to the defendant to be agreed or taxed.

The amount of $14,000.00 paid by the plaintiff shall be repaid with interest thereon at the rate of seven per centum per annum from the dates on which the various sums were paid.