IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T141/87

BETWEEN	ALEXANDER TERRIER	PLAINTIFF
A N D	RAPHAEL ROBOTHAM	FIRST DEFENDANT
A N D	KENNETH ROBOTHAM	SECOND DEFENDANT

Mr. Patrick Foster for the plaintiff
instructed by Knight, Pickersgill, Dowding & Samuels.

Mr. Arthur Williams and Miss T. Small for the defendants
instructed by Kelly, Williams & McLean.

RECKORD J,

HEARD: 8th November 1994, 29th October, 1998, 4th June 1999 and 9th June, 2000

This action is one of some antiquity. As the suit number indicates, it was filed as far back as 1987 and the issues from which the suit arose took place in 1980.

The plaintiff's claim in the action is for:-

(a) A declaration of his rights under an agreement for sale of land.

(b) Damages for use and occupation of the land; in the alternative profits; in the further alternative interest on the balance of the purchase money.

The defendants counterclaimed for

(a) specific performance

(b) Damages

(c) Cost

Before the trial commenced, on application by attorney for the plaintiff, the defence to the counterclaim was amended and the counterclaim was amended on application of the attorney for the defendants.

By consent, the following documents were admitted in evidence Exhibit I - Agreement for sale.

(ii) Letter of undertaking dated 2/6/80.

(iii) Letter from Commissioner of Lands dated 12/2/80.

(iv) Letter from Commissioner of Lands dated 22/2/83.

(v) Letter from Commissioner of Lands dated 22/6/83.

(vi) Letter from National Commercial Bank to attorney-at-Law dated 6/8/85 (via) Addendum to agreement for sale dated 11/2/80

(vii) Letter from Patricia Harvey, to attorneys, Woodham, Pickersgill & Dowding - 17/11/86.

(viii) Letter from Commissioner of Lands - 1/11/94

Mr. Alexander Terrier the plaintiff, testified that he was a retired carpenter now residing in the United States of America. Before migrating he had lived in New York Town, Denbigh, in the parish of Clarendon.

In 1970 he bought two lots of land at Rhymesbury in the parish of Clarendon from Mr. Owen Bachelor for approximately $37,000.00 which he paid in full. The total acreage was 39 acres and two roads. He got no title from Mr. Bachelor who had purchased

the land from the Commissioner of Lands and he made no attempt to get a title.

In February, 1980, the plaintiff signed an agreement to sell both lots to the defendants for $70,000.00. At the time of the agreement for sale the plaintiff had to pay off the balance due by Mr. Bachelor to the Commissioner of Lands, which he did.

The plaintiff said he was aware that he had an obligation to give title to the defendants. The defendants had paid a deposit of $8,500.00 and the balance by way of a draft for £7000.0.0 while he was in England. This amounting to JA$28,000.00. He had thereafter put the defendants in possession in February, 1980.

The plaintiff said he made efforts to obtain title for the land. He had contacted the Lands Department by telephone on numerous occasions and by personal visits to the head office in Kingston. While he was off the island his daughter and his lawyer Miss Patricia Harvey made enquiries on his behalf to the Commissioner of Lands but without success. His last visit to the Lands Department was the 31st of October, 1994. He had also got a letter from the Lands Department saying that they had no title for these lands - he referred to Exhibit 8. He has never been told when it was likely to get title. He had made three visits to the head office of the Lands Department in Kingston.

Mr. Terrier said he was personally aware of what use these lands have been put . He had passed by the lands and

saw sugar canes growing there.

Under cross-examination, the plaintiff said he was not aware that the lands were compulsory acquired by the Government in 1959. He had the lands for about six years before he sold them to the defendants. In the agreement for sale he had undertaken to obtain title in their names. For some time he had operated a dairy business on the lands which he closed down before he left the island. The land had been put up for sale about three months before the defendants bought it. He was not aware that the house on the property had been vandalized; that the pastures were in ruinate; that the fencing was broken down; that individuals in the area were using the property for their own purposes; that doors and windows and bathroom fixtures had been stolen and that the roof had disappeared.

He was on visit to the island about eight months ago when he observed that canes were growing on the lands. He could not say what acreage was in canes and when they were planted. He was not aware if other purchasers of the Rhymesbury lands had obtained title.

DEFENDANTS CASE

After a protracted delay of near four years the trial continued on the 29th of October, 1998 when Mr. Chapman Longmore testified on behalf of the defendants. He was a farmer, who bought one lot in 1975, consiting of ten acres of land – Lot 38, Rhymesbury in Clarendon from one Mr. Grover Gracey. Mr. Gracey could not give him a registered title. He subsequently

received a registered title for the land which he tendered in court as exhibit 9.

He had applied for title at the office of the Registrar of Titles. He had made several personal visits there. He also made several visits to the Lands Department in Kingston. He had to contact several lawyers in Kingston to obtain clearance of various caveats that were lodged against his neighbours title because the title was attached to a parent title. Over a two years period he had made about twenty five trips to Kingston.

He knew both defendants, only knew their property at Rhymesbury from about 1976. It formerly belonged to the plaintiff. There was a two storey dwelling house on it. He had knowledge of the value of lands at Rhymesbury.

He had his own land and was agent for a five acres under-developed lot in the same area which was up for sale now. The asking price was $250,000.00 per acre.

Under cross-examination, Mr. Longmore said that the plaintiff was in possession of the land when the defendants bought it. He did not knew if the plaintiff grew anything on the land but the defendants had planted the land with canes. The land was across the road from his.

The case was adjourned at this stage pending settlement.

On the 9th of June 1999, when the hearing returned, counsel for the defendants announced that they were closing their case.

Counsel on both sides agreed to the submit their final arguments in writing the following day and the Judgment was accordingly reserved pending the receipt of these submissions.

Submissions

Mr. Williams on behalf of the defendants, submitted that the evidence of the plaintiff shows clearly that he had not in fact made any real efforts to obtain title for the said lands, in order to fulfill his contracted obligations. The evidence of Mr. Longmore demonstrated real efforts at obtaining title which he did after some twenty one years. On the contrary the plaintiff gave up all efforts after only eight years and instead has filed suit against the purchasers to whom he had undertaken to furnish a registered title , seeking inter alia to rescind the agreement.

Counsel further submitted that the evidence of the plaintiff did not in any way substantiate the claim of "a defect in title". The mere difficulty in obtaining title does not constitute, in law, a defect in title" (see Thomas v Kensington (1942) 2 AER 263).

The plaintiffs contention, he said, that the defendants are liable to pay mesne profits, is without merit and without legal authority and that the true position is that a purchaser in possession is liable to pay interest on the balance of the purchase price. Counsel referred to the Privy Counsel Appeal No. 15 of 1986 from the Court of Appeal of Jamaica Noel Sale v Sonia Allen

where their Lordships said:

> "Their Lordships are unable, however, to find in this arrangement anything which would displace the ordinary rule that even where delay in completion is due to the default of the vendor, a purchaser in possession and in receipt of the rents and profits of the property sold is liable, on completion, to pay interest on the balance of the purchase price from the date when he takes possession."

The plaintiff was therefore entitled to interest on the balance of the purchase price from the date of possession until completion.

However, Mr. Williams submitted that the defendants were entitled to succeed in their claim for specific performance of the agreement for sale. The plaintiff had failed to fulfill his obligations under the contract to provide the defendants with registered title, and the evidence shows that there was in law, no defect in title, but rather a mere difficulty which faced the plaintiff in obtaining and giving title to the defendants which with due diligence on the part of the plaintiff, would have been overcome.

Counsel also requested that if the order for specific performance was to be effectual the court should also order that the plaintiff deliver to the Commissioner of Lands a duly executed and stamped instrument of transfer.

On the question of the rate of interest to be paid on the balance of the purchase money, Counsel submitted that the rate of interest to be applied is the deposit rate of interest.

Using the overall Average Weighted Deposit Rates of Commercial Banks, the average rate of interest for the period from the date of possession to the date hereof is 18.95%. This would result in interest for nineteen years, in the amount of $118,816.50.

With regard to the cost of the action, counsel submitted that the interest would not in fact be due to the plaintiff until completion and it is the plaintiff who had wrongfully failed to complete. An order for specific performance against the plaintiff would mean that the plaintiff had wrongfully brought this action against the defendants and the plaintiff should therefore bear the costs for the defendants.

On the behalf of the plaintiff, Mr. Foster submitted that the plaintiff had used his best endeavours to obtain the relevant certificate of title but despite this has not been able to do so. Submissions by defendants counsel to the contrary was misconceived and not supported by the evidence - Further, defence counsel's argument that because Mr. Longmore obtained title, it followed as a matter of logic that the plaintiff should, is without merit because there was no evidence to indicate that Mr. Longmore's property for which the title was issued arises from the same factual and legal context as the plaintiff's property.

Counsel further submitted that due to a defect in title, the plaintiff had not been able to make a good title to the defendants as opposed to a conveyancing problem. He is in those circumstances entitled to be relieved of his contractual obligations (see Bain v Fothergill, L.R. 7 H.L. 158, 209 - 210.

Counsel sought to distinguish the case of Thomas v Kensington (supra) relied upon by the defendants - In that case the plaintiff was unable to get title because the defendants had a mortgage endorsed thereon which he was unable to pay in order to have it discharged. It was on these facts that prompted Mr. Justice Stable to state . "This is not a case where there is any question of defect in title."

Mr. Foster contended that the defendants had the use and benefit of the plaintiff's lot since 1980 and they had put it to commercial use over that period of time and it was only fair and reasonable that the defendants should be required to pay the plaintiff mesne profits or interest on the balance purchase price. In support he referred to case of Noel Sale v Sonia Allen (supra) Counsel agreed with the defendants counsel that the rate of interest should be 18.95%. In the circumstances counsel asked the court to made an order that there be judgment for the plaintiff and that the defendants' counter-claim be dismissed.

FINDINGS

The question in issue concerns title.

The problem started when the Commissioner of Lands sold two lots of land at Rhymesbury to Mr. Bachelor and gave him no title. Mr. Bachelor in turn sold the said two lots to the plaintiff and gave plaintiff no title as he had none. In 1980, the plaintiff agreed to sell the said land to the defendants.

The plaintiff claims that he made every effort to secure title to pass to the defendants over a eight years period without success and therefore asked for recession of the contract.

The defendants claim that the plaintiff had failed to make sufficient efforts and brought Mr. Chapman Longmore who bought lands from the same property around the same time as the plaintiff from one Mr. Grover Gracey.

He also had difficulty in obtaining title but he relentlessly pursued it and finally obtaining title after some twenty years.

The defendant submitted that difficulty in obtaining title does not in (law constitute a defect in title.

The plaintiff relied on the old case of Bain and Fothergill (supra) and claimed that because of a defect in title the plaintiff is in those circumstances entitled to be relieved of his contractual obligations.

Reference was also made by both attorneys to the case of Noel Sale v Sonia Allen (supra) where their Lordship said in the Privy Counsel

> "..... even where delay in completion is due to the default of the vendor, a purchaser in possession and in receipts of rent and profits of the property sold is liable, on completion, to pay interest on the unpaid balance of the purchase money from the date when he take possession."

The plaintiff's claim for rents and profits cannot succeed.

It is clear from facts in the instant case that the delay in completion was due to the default of the plaintiff, not because of any defect in title, but because of failure to make

sufficient effort in obtaining and giving title to the defendants to whom he had given an undertaking.

Both attorneys-at-law have agreed that the average rate of interest for the period from the date of possession to the date of trial is 18.95%.

On the claim the plaintiff's claim for damages for use and occupation of the land, and in the alternative mesne profits is dismissed.

It is hereby declared that the plaintiff is entitled to interest on the balance of the purchase money, at the average deposit rate fo 18.95% from the date of possession until completion.

On the counter-claim there shall be judgment for the defendants. It is hereby ordered that there be specific performance of the agreement for sale dated February, 1980.

It is ordered that the plaintiff delivers to the Commissioner of Lands, a duly executed and stamped instrument of transfer.

I agree with Mr. Williams submission on the question of cost and order that costs for the action to the defendants to be agreed or taxed.