IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T 032 OF 1987

BETWEEN	OLGA MAY TURNER	
A N D	OSWALL KEITH TURNER	PLAINTIFFS
A N D	TOWER ISLE DEVELOPMENT COMPANY LTD.	DEFNDANT

Mrs. Margaret Forte and Mr. Maurice Frankson for the plaintiffs instructed by Gaynair and Fraser.
Mr. Norman Davis for defendant instructed by Myers, Fletcher & Gordon.

HEARD October 26, 29, 30, 1992 and May 17, 1993.

Judgment

RECKORD J.

On the 25th of July, 1989, the defendant who were owners of Balmoral property near Orracabessa in the parish of St. Mary, entered into an agreement in writing with the plaintiffs to sell to the plaintiffs who are wife and husband, lots 50 and 51 of the said property for a price of $2000.0.0.

In keeping with the terms of the contract the plaintiffs paid the deposit of $400.0.0 and began paying the sum of $7.0.0 per month to cover the purchase price until the month of August, 1975. When the payment for September 1975 was sent to the defendant's office at 69½ Church Street Kingston, the bearer found the office closed and there was no sign anywhere there to indicate if it had moved to some other address. On two subsequent occasions when the plaintiff sent the monthly payment the office was still closed.

Efforts made by the plaintiffs to find the new address of the defendant, including travelling to Orracabessa on several occasions to find someone on the property who could assist failed. It was not until early 1984, some nine years later, that the plaintiffs found the defendant's office at 4½ Ivy Green Crescent, Kingston 5. Mrs. Turner spoke with the then managing director of the defendant's company Mr. Wilson - she told him how long she searching for the company's office and asked for balance on the account as also for a copy of the plan. He promised to telephone her concerning the balance and asked her to return the following week for the plan. Mr. Wilson never kept his promise to call her about the

balance and so she went to see her Attorneys-at-Law. The Attorneys wrote to the defendant asking for the balance and indicating the plaintiff's willingness to pay the outstanding sum and subsequently lodged a caveat on the land.

There was no response from the defendant and on the 9th of March, 1987, nearly three years later this action was filed on behalf of the plaintiff seeking specific performance, damages, account and inquiries and an injunction.

In its defence filed the defendant sought to rely on paragraph 3 of the agreement, the relevant part of which reads:-

> "On failure of payment (in whole or in part) of any installment of purchase money and costs of the terms specified herein as to which time shall be of the essence of the contract, all payments made shall be forfeited to the vendor who shall be at liberty to re-take possession of the said land and or resell the same by public sale or private contract at such time and in such manner and subject to such conditions as the vendor shall think fit without any previous tender of transfer and without notice to the purchaser ....."

The defendant claims therefore that it rescinded the contract and, or in the alternative, the agreement was lawfully determined by operation of the term referred to in paragraph three of the contract. Further that the right to sue was barred under the Limitation of Actions Act and that the agreement was barred by laches or was lawfully determined and unenforceable by abandonment. The defendant also counter-claimed for a declaration that the agreement had been rescinded and or lawfully determined and for a declaration that the deposit and instalments paid were lawfully forfeited.

In reply to the amended defence and counter-claim the plaintiff stated at paragraph 4 that

> "The defendant in or about the month of September 1975, the defendant unbeknown to the plaintiffs and without notifying the plaintiffs directly or indirectly, secretly removed its offices to a new location to wit: Number 4½ Ivy Green Crescent Kingston 5 in the parish of St. Andrew with the specific intention of defrauding the plaintiffs by taking advantage of the aforesaid term of the agreements".

Particulars of the fraud were set out in the reply and the plaintiff contended that the defendant was estopped from relying upon or enforcing the terms of the agreement referred to in paragraph three of the amended defence.

The roads and water mains that the defendant agreed to lay down to the

lots were not done. The plaintiffs were never notified by the defendant of any change in its address, neither did they receive any correspondence from the defendant that it had cancelled the agreement. They saw no notice in the newspaper of any change of address of the company. The plaintiffs recently had a valuation on the two lots one now valued $300,000.00 and the other $250,000.00.

When the female plaintiff was cross-examined she said that both herself and her husband ran a business downtown Kingston at the time of entering the contract and that telephone was always there. The home they then lived had a telephone. She was shown the directories for the Jamaica Telephone Company for the years 1973 - 74 and 1974 - 75 and agreed that the defendant company's address was listed there at 69½ Church Street, Kingston. For the year 1976 - 77, the company's address was listed at 76 Church Street, Kingston. For the years 1978 - 79, the company's address was listed at 72 Harbour Street, Kingston. For the years 1980 - 81 and 1982 - 83 the company's address was listed at 24 Duke Street, Kingston. For the years 1983 - 84 the company's address was listed at 4½ Ivy Green Crescent.

When she could not find the defendant's address in September 1975 she never looked in the telephone directory for its address.

In answer to the Court, this witness said "it never dawn on me to look in the directory" (for defendant's address). She knew she was dealing with a company yet, "it never dawned on me to go to the Registrar of Companies to look for the address." Finally she said, "during the period 1975 - 84 it never dawned on me to go to a lawyer to ask for assistance."

This was the end of the case for the plaintiffs.

When called upon, Mr. Davis for the defendant, elected not to call any witness and relied on submissions which he tendered in writing.

In summary, he submitted that the plaintiff having alleged fraud, "their case stands or falls on proving the alleged fraud." He referred to section 27 of the Limitations of Actions Act.

Mr. Davis submitted that the plaintiff could not rely on this section for several reasons:-

1. This was action for breach of contract, not for recovery of land or rent. The relevant limitation period was therefore six (6) years

and not 12.

2. Even if section 27 was relevant, the plaintiff had not pleaded same. (see English and Empire Digest Vol. 32, 1978 paragraph 5346.

3. The plaintiffs were guilty of acquiescence and therefore by virtue of section 28, cannot rely on section 27.

4. The plaintiffs have not alleged or proved any 'reasonable deligence' on their part to locate the offices of the defendant.

5. The alleged fraud was discovered in September, 1975, the plaintiff had six years within which to file suit which would be before September 1981. This suit was not filed until 1987, and hence on their own case they were barred under the Limitations of Actions Act and by virtue of laches from specific performance also.

6. Even if this alleged fraud could estop the defendant up to 1984 from relying on the rescission clause, it could not do so after 1984 as the plaintiffs made no payment after locating the defendant.

7. The plaintiffs having failed to prove fraud, the defendant was entitled to rely on the rescission clause to determine or discharge the contract.

On the question of waiver Mr. Davis submitted that the plaintiff could not rely on this as waiver was not pleaded. See Bullen &Leake Precedent and Pleading, 12th Edition at paragraph 1286. In any event - "A mere extension of time will not in general constitute a waiver of the benefit of the time clause, but will only substitute the extended date for the original date, time remaining essential as to the substituted date." See Voumard's Sale of Land, 3rd Edition page 303.

Re Claim for Damages

Mr. Davis submitted that the onus of proof that action is not statute barred rested on the plaintiffs. The action was filed on 9th of March, 1987. Any breach committed by the defendant prior to the 9th March, 1981 was statute barred. The breaches complained of by the plaintiff were failure by the defendant to provide roads and water and fraud in moving its offices without informing the plaintiff. No time was set by the parties for the provision of roads and water, and 1975 should be inferred by the Court as a reasonable time. Therefore a claim for damages for this breach was statute barred. In September 1975 the plaintiff

discovered that defendant had removed its office: Any claim for damages must be filed within six years or thereafter that claim action would be statute barred.

Re Claim for Specific Performance

Mr. Davis submitted that claim under this heading was barred by laches as also claim for injunction and other acquitable reliefs. The onus rested on the plaintiffs to prove readiness and willingness on their part to complete the agreement. He cited cases where unexplained delays of more than a few months were fatal. In considering whether laches applies:-

> "Two circumstances are of particular importance viz - (1) the length of the delay, and (2) the nature of the acts done during the interval which may affect either party, and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy" - see Stoneham the Law of Vendor or Purchaser para. 1523.

The plaintiffs had delayed for about nine (9) years before making any serious effort to locate the defendant. After they found the defendant they waited nearly three (3) more years before filing suit. During this period the nature of the land appreciated considerably and it would be unjust to the defendant to allow the plaintiffs to benefit from a grant of specific performance.

Discharge by Abandonment

Because of the tardiness and non-interest of the plaintiffs and their inordinate delay in seeking to enforce the agreement, Mr. Davis submitted that this operated to discharged the contract by abandonment. The effect of abandonment is to relinquish all rights and obligations under the contract.

The plaintiffs having failed to prove their case he applied for judgment from the defendant on the claim and counter-claim.

On behalf of the plaintiffs Mrs. Forte submitted that the vendor, as a trustee for the purchaser, had a duty to notify the plaintiffs of any change of address. The rights of the parties, therefore, had to be determined as of some date in September, 1975.

Re Rescission Clause

Given payments not made as required by the contract, the defendant had waived that requirement and could not rely on it.

See Steadman v. Druischle & Anor. (1914 - 15) AER reprint at 298.

Charles Rickards v. Oppenheim (1951) AER 420.

The defendant had failed to notify the plaintiff that he was cancelling the agreement. The defendant could not rescind in secret.

When the defendant in 1984 promised to tell the plaintiff what her balance was at a later stage, this would amount to a waiver.

Stickney v. Keeble & Anor (1914 - 15) AER reprint p. 731.

It was the fault of the vendor why the plaintiff stopped making payment. It was the vendor's conduct that has caused the plaintiff to bring this action.

See Jones v. Gardener (1902) 1 Ed. 191 Williams v. Greatrex (1958) 3 AER 705.

There had been no abandonment by the plaintiff and the fact that between September, 1975 to March, 1984 cannot amount to an abandonment. There was no duty on the plaintiffs to search all over Jamaica for the defendant. They had done what was reasonable. See Cornwall v. Houson (1900) 2 Ch. 298.

Re Laches - The relevant principles are set out in Chitty on Contracts, 24th Edition para. 1759 et seq. Mrs. Forte submitted that the length of the delay was due wholly by the fraudulent conduct of the defendant. Defendant had not shown that any injustice or prejudice would fall on it if the plaintiffs claim succeeded. It was its delay that caused the plaintiffs not to complete the contract. There had not been any unreasonable delay in commencement of the prosecution of the proceedings and the consequences of the delay have not rendered an injustice to the defendant. See Spry on Equitable Remedies 3rd Ed. p.219 Well-Blundell v. Detre (1928) AER (reprint) at p. 564.

Re Action Statute Barred

Mrs. Forte submitted that under the contract the defendant was to notify the plaintiff when road and water were in place. On the evidence up to time of trial neither road nor water was in place - this amounted to a continuing breach and therefore time had not begin to run.

See Chitty on Contracts - 24th Ed. para. 1703.

Spark v. Green (174) LR 9 Ed. 99 Stephen v. Junior Honey & Vary Stores (1940) 2 Ch. p. 516 at 523.

Question of Fraud

In concealing its address from the plaintiffs, Mrs. Forte submitted that defendant was attempting to take advantage of its own act of concealment to the

severe damage of the plaintiffs in not being able to meet their obligation to the defendant. It was the fraud of defendant in preventing the plaintiff from meeting their obligation under the contract and therefore time could not run because of the fraud. See Beaman v. A.R.T.S Ltd. (1949) 1AER 465.

Re Acquiescence

Mrs. Forte submitted that the plaintiffs showed continuing interest and intent to pursue the contract and far from abandoning it, displayed clear intention to carry out their obligations. The defendant's claim of lack of reasonable deligence and acquiescence was unfounded. The interval 1975 - 84 was due solely to the defendant. The period 1984 to 1987 was equally due to the conduct of the defendant. It was not until 1991 that the titles for the two lots were made available. The defendant could not convey title until then.

The plaintiffs, Mrs. Forte submitted, have proved their action and proved that the defendant was in substantial breach. The plaintiffs have made substantial payment under the contract and failure to pay any further amount was due solely to the fraudulent conduct of the defendant. She asked for specific performance and damages and asked the Court to order the defendant to transfer the two lots of land to the plaintiffs on the payment of the balance of the purchase price and costs.

Mr. Davis in reply, referred to the present value of the lands - $550,000.00 as against the value at time of contract - ₤2000.0.0. The loss to the defendant in equity on the land would be very substantial.

The rescission clause in the contract was not oppressive and was common in conveyancing cases.

The terms of the agreement allowed the defendant to sell the lands on breach without notice.

The lack of reasonable deligence and delay was a bar to the plaintiffs from any equitable relief.

The discovery of the alleged fraud was September 1975 and time began to run then.

Findings

It is clear from the pleadings and from the evidence given by the female plaintiff that this was an action for breach of contract. The period within which an action for breach of contract must be brought is therefore six (6)

years. Under the Limitation of Actions Act, an action brought after this period is statute barred. Faced with this dilemma, the plaintiffs have said that because of fraud on the part of the defendant in removing its office without notice time did not begin to run against them until when the defendant was located.

Section 27 of the Limitation of Actions Act reads as follows:-

> "In every case of a concealed fraud the rights of any person to bring a suit in equity for the recovery of any land or rent of which he, or any through whom he claims, may have been deprived by such fraud, shall be deemed to have first accurred at and not before the time at which such fraud shall, or with reasonable deligence might have first been known or discovered."

Further, the plaintiffs contend that the defendant cannot rely on the 'completion clause' as to forfeiture and resale as any outstanding balance only become payable in full at the completion of roads and the laying of water mains. Up to the time of trial this had not been done. This was a continuing breach and therefore time had not began to run.

The payment clause reads as follows:-

> "The purchase money shall be paid in the following manner:
> (a) On the signing hereof a deposit of ₦400.0.0
>
> (b) On the last day of each calender month subsequent to the signing hereof the sum of ₦7 until the completion of roadways and the laying of water mains to bring a supply of fresh water to the said lot(s), when the balance outstanding becomes payable in full."

Under the terms of the agreement, time was made of the essence of the contract as to the payment of istalment and entitled the defendant to rescind on the failure of payment at the specified times and to do so without any notice to the plaintiffs.

Both parties to the agreement had obligations. The principal obligation of the plaintiffs was to pay the monthly instalments failing which the defendant could rescind. The principal obligation of the defendant was to provide water and roads. Both parties have failed to carry out their obligations.

The plaintiffs say they could not complete their part because of the defendant's fraud while the defendant said it was discharged from its obligation by the operation of the rescission clause.

The plaintiffs having alleged fraud, the burden lies on them to prove same.

Can the plaintiffs rely on the provisions of section 27 of the Limitation of Actions Act. The section applies to a suit for 'the recovery of land or rent.' This is an action for breach of contract and clearly does not fall within the ambit of section 27. Although the plaintiffs seem to be relying on the provisions of this section they have not pleaded the Act. As a general rule where a party intends to rely on the benefit of a statute, the statute must be pleaded - See the English & Empire Digest Vol. 32 referred to by Mr. Davis on his written submissions.

Among the documents agreed on by the parties are two letters from the defendant to the Registrar of Companies informing the Registrar as to changes of address of the defendant's company. The evidence also revealed that during the relevant period the address of the defendant was always listed in the telephone directory. Surprisingly these two plaintiffs who operated a business in the heart of downtown Kingston and who at all material times had the use of a telephone both at their business place and at home never looked in the directory for any listing of the company; never asked the Registrar of Companies for the address of the company; never sought the advice of an Attorney as it never dawned on them to do so.

I am clearly of the view that the plaintiffs having initially lost the whereabouts of the defendant, failed to take any reasonable deligent steps to discover the new address. If they had done so I have no doubt whatsoever that they would easily have found it.

The plaintiffs allege that the defendants secretly removed its offices with the specific intention of defrauding the plaintiffs by taking advantage of the rescission term of the agreement.

Generally a debtor is required to find his creditor. What reasonable steps did the plaintiffs take to find the defendant? On Mrs. Turner's evidence when they had other business in the country they tried to contact one Mr. Moses in the same sub-division to inquire for the defendant's address. They never found Mr. Moses until 1984 when he told them where the defendant could be located.

Having found the defendant they made enquires of the balance and for a copy of the plan. They made no payments of outstanding balance although they

were aware that a balance was due. They also made a second visit to the defendant new offices shortly after the first and obtained a copy of the plan. Again no payment of outstanding balance was made. When they got no word from the defendant of the outstanding balance they went to their Attorney-at-Law who on the 22nd of March, 1984 wrote to the defendant saying inter alia "My clients are now ready willing and able to pay the balance and under the contract..." and again asking to be advised of the balance. This letter did not invoke any response from the defendant and on the 12th of July, 1984, a caveat was lodged by the plaintiffs in relation to these two lots.

There was no further communication between the parties until nearly three years later when this action was filed on the 9th of March, 1987. Based on all these pieces of evidence I find that the plaintiffs have failed in their attempt to prove the fraud alleged.

Attorney for the plaintiffs have argued that the defendant cannot rely on the rescission clause in the contract for the reason that having accepted payments, the defendant had waived the requirement that time was of the essence of the contract. Voumard's Sale of Land, 3rd Edition, at page 203, states as follows:-

> "It must be borne in mind that waiver is always a question of fact. It is not a valid general proposition that in a contract of sale of land by instalment that whenever some instalments are accepted late without demur the party accepting them is precluded in respect of later instalment from insisting upon the agreement that time shall be of the essence. A mere extention of time will not in general constitute a waiver of the benefit of the time clause, but will only substitute the extented date for the original date, time remaining essential as to the substituted date."

I find that the acceptance by the defendant of instalment not in keeping with the terms of the contract did not amount to a waiver of the time clause and that the defendant was entitled to rely on its right of rescission.

On the claim for damages, the burden lies on the plaintiffs to prove that their cause of action is not statute barrred. This action was filed on the 9th of March, 1987, and only breaches which took place within six (6) years of this date that is 9th March, 1981, can be considered by the Court.

In the breaches that the plaintiff complained of - failure of the defendant to provide roadway and supply of water - the contract did not stipulate a date by which time this should be done. Therefore the Court must infer a reasonable time. The contract was entered in July, 1969 - up to 1975 roads and water had not yet been provided by the defendant. As submitted by defence Attorney, a reasonable time for completion would be by 1975 and that time would began to run from then. The submission by Attorney for the plaintiffs that this breach amounted to a continuing breach and that time has not began to run is unsustainable and not supported by authority.

Therefore in my view the plaintiffs having failed to take action within the statutory period I hold their claim for damages is statute barred.

The plaintiffs have also claimed specific performance. Chitty on Contracts 24th Edition Vol. 1, para. 1765, states

> "A person asking for specific performance of a contract seeks a discretionary remedy and has an option whether to pursue it or claim damages: he must therefore exercise his option promptly and show himself to be 'ready, desirous prompt and eager.' Unexplained delay of more than a few months is usually fatal: and this is especially true if the property is speculative or precarious or liable to fluctuation in value."

If the plaintiffs had made a reasonable deligent search for the defendant they certainly would have found the new address. The defendant company was not concealing its address. Yet it was not until over nine (9) years later that the plaintiffs found the defendant company. Even at this late stage no action was taken. A further delay of near three (3) years was allowed to pass before action was taken. During all this time the value of the property had increased considerably. I find there was an unreasonable delay in the commencement of the proceedings and in all circumstances the consequences of this delay must render the grant of specific performance unjust and is accordingly refused.

The defendant submitted that plaintiffs had by their conduct discharged the contract by abandonment. The lapse of time had been so long that the proper inference was that defendant was justified in assuming that the matter was off altogether. The delay had been undue, considerable and inordinate. But was it reasonable to assume that plaintiffs had abandonded? The defendant knew

where the plaintiffs could be found at all material times. Furthermore, when the plaintiffs finally located the defendant in 1984, they enquired of the outstanding balance and for copy of the plan. This conduct on the part of the plaintiffs does not in my judgment justify the inference of abandonment.

The plaintiffs having failed to prove its case on the claim, judgment is accordingly entered for the defendant.

The Counter Claim

Consequent on my findings on the claims by the plaintiffs the declarations sought by the defendant are granted as follows:-

1. That the said agreement for sale had been duly rescinded by the defendant and that the said agreement had been lawfully determined.

2. That the deposit and instalment paid to the defendant in pursuance of the said agreement were lawfully forfeited.

3. There shall be costs to the defendant on the claim and counter claim to be taxed if not agreed.

Cases referred to

(1) Steadman v Druischke & Anor (1914-15) All E Rpt 298
(2) Charles Rickards v Oppenheim (1951) All ER 420
(3) Stickney v Keeble & Anor (1914-15) All ER reprint 731
(4) Jones v Gardener (1902) 1 Ed 191
(5) Williams v Greatrex (1958) 3 All ER 705
(6) Cornwall v Hawson (1900) 2 Ch 298
(7) Wells-Blundell v Defries (1928) All ER reprint 564
(8) Shark v Green (1874) LR 9 Ch 99
(9) Stephen v Junior Army & Navy Stores (1940) 2 Ch D 576
(10) Beaman v A.R.T.S. Ltd (1949) 1 All ER 465