IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. V002/82

BETWEEN	KENNETH VAZ		PLAINTIFF
AND	YORK CASTLES LIMITED	FIRST	DEFENDANT
AND	CITIBANK N.A.	SECOND	DEFENDANT

Mr. Roy Fairclough instructed by Thwaites, Watson, Fairclough and Company for the Plaintiff.

Mr. D. Muirhead Q.C. and Mr. Shelton instructed by Myers, Fletchers and Gordon, Manton and Hart for the second Defendant.

The first defendant was not served and was not represented.

Heard on: 29th March 1982 and 8th June 1982

JUDGMENT

ORR J:

By Writ filed on the 2nd December 1982, the plaintiff claimed as follows:-

1. Against the first defendant as vendor the specific performance of an agreement in writing dated the 7th December 1977 by which the first defendant agreed to sell to the plaintiff land part of Norbrook Estate in the parish of St. Andrew containing approximately 28.5 acres at a price of $13,500.00 alternatively damages for breach of the said agreement.

2. Against the second defendant as mortgagee of the said land:

   (a) a declaration that the plaintiff is entitled in equity to a beneficial interest in the said land;

   (b) a mandatory injunction ordering the second defendant to discharge its mortgage on the said land on the plaintiff's undertaking to pay to the second defendant the balance outstanding on the agreed purchase price of $13,500.00;

   (c) an injunction restraining the second defendant by itself its servants or agents from offering the said land for sale or from doing any act which would result in the plaintiff deprived of his interest.

3. Such further or other relief as to the Court seems just.

4. Costs.

On the 8th day of February 1982 on the application of the plaintiff, a judge in Chambers granted an interim injunction in terms of paragraph 2(c) of the endorsement on the Writ, for seven days.

On the 5th March a similar injunction was granted for seven days and on the 17th March a further injunction was granted until the 29th March 1982 when this summons came before me seeking the injunction to continue until the trial of the action.

The defendant is the owner of land part of Norbrook Estate in the parish of St. Andrew containing approximately 28.5 acres.

The second defendant is the mortgagee of the said land which was mortgaged by the first defendant to the second defendant to secure moneys advanced to the first defendant by the second defendant.

On the 7th December 1977 the plaintiff entered into a written agreement with the first defendant for the purchase from the first defendant of the land in question. Prior to entering into this agreement the plaintiff visited the offices of the second defendant and spoke with a Mr. Maier who gave permission on behalf of the second defendant for the sale to the plaintiff.

On or about the 19th December 1977 the Attorneys-at-Law for the first defendant Messrs. Judah Desnoes and Company put the plaintiff in possession of the land.

On the 23rd December 1977 the second defendant wrote to the Attorneys for the first defendant as follows:-

> " Re sale of 28 Acres part of Norbrook Heights St. Andrew York Castle Ltd. to Kenneth Vaz.
>
> This is to inform you that we agree with the terms of the agreement for sale and purchase of captioned: however, the net proceeds of the sale being paid over to us must not be less than $11,000.00
>
> In acknowledgement of your agreement with the above please sign and return the attached copy of this letter."

The date of completion under the agreement was on or before the 30th day of June 1978.

It was a condition of the agreement that it was subject to

subdivision approval.

The plaintiff alleges that he made several requests of both the first and second defendants for completion of the contract. The second defendant denies that such requests were made concerning this transaction. There was another transaction in connection with another lot of land and the second defendant avers that conversations with the plaintiff relate to this other transaction.

The Attorneys for the second defendant received instructions on the 21st February 1979 and they sent the relevant documents to Mr. Eric Desnoes Attorney-at-Law who had the carriage of sale. The second defendant in their instructions fixed a new deadline for completion, the 30th June, 1979. The postscript to their letter reads as follows:-

> "P.S. Please advise him to complete the above by no later than 30th June, 1979 or return documents to us."

It appears that subdivision approval was obtained in 1980.

In 1981 Mr. Desnoes sent the draft Transfer to the Attorneys for the second defendant and it was discovered that there were erros. The Transfers had been prepared from the second defendant as Vendor to the plaintiff and not from the first defendant to the plaintiff.

There was a meeting between the second defendant and their Attorneys, the second defendant refused to sign the Transfers and a check was made on the indebtedness of the first defendant. This revealed that his indebtedness in respect of the land in question was then $350,000.00. The value of the land had also escalated and was now in the region of $440.000.00. As a consequence, the second defendant demanded payment by the first defendant of all outstanding indebtedness and on the 5th October 1981 wrote both the first defendant and the plaintiff's Attorneys indicating that they would no longer accept the old release price of $10,000.00 but would now accept only $350,000.00 and gave a deadline of the 26th October 1981 for payment of this sum after which they would assume that the release was no longer desired.

The plaintiff in the meanwhile had entered into two agreements for the sale of portion of the land. In one instance a suit has been filed against him in this Court claiming Specific Performance.

Negotiations took place between the plaintiff and the second defendant for the purchase of the land at a revalued price. These were unsuccessful and the second defendant advertised the land for sale by Public Auction and the plaintiff instituted these proceedings.

Mr. Fairclough invoked the doctrine of equitable estoppel in support of the application. He submitted that the plaintiff had acquired rights to the land by reason of the agreement by the second defendant for sale of the mortgaged property by the first defendant to the plaintiff and it would be unconscionable for the second defendant to be allowed to renege on this agreement to the detriment of the plaintiff who had incurred liabilities as result.

Mr. Muirhead submitted that the plaintiff had no cause of action. He is a stranger to the Mortgage transaction and as such cannot seek to fetter the exercise of the Power of Sale by the Mortgagee.

Further, the plaintiff is a volunteer and cannot invoke the aid of Equity and even if he could, he would be denied Specific Performance because of his laches derived from the first defendant. He maintained that the second defendant was entitled to exercise the power of sale as the date for completion of the agreement between the plaintiff and the first defendant had expired.

In deciding the issues I am guided by the principles enunicated by Diplock L.J. in American Cyanamid v. Ethicon [1975] 1 All E.R. 504 at 510 d -

> " The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide

> difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial..... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought".

Is there a serious question to be tried?

Although the plaintiff is a stranger to the mortgage transaction he had direct dealings with the second defendant. The second defendant by its servants or agents made a promise or representation that it would not insist on its strict legal rights in respect of the mortgaged property provided certain conditions were fulfilled by the plaintiff and the first defendant. On the strength of this representation, the plaintiff has acted to his detriment. If the second defendant now seeks to renege on his promise, Equity will intervene even if there is no consideration for the promise. See Crabb v. Arun D C [1975] 3 All E.R. 865 at 871 c - per Denning M.R.

> " The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as 'estoppel'. They spoke of it as 'raising an equity'. If I may expand that, Lord Cairns said in Hughes v. Metropolitan Railway Co: '..... it is the first principle upon which all Courts of Equity proceed.....' that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. What then are the dealings which will preclude him from insisting on his trict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights - even though that promise may be unenforceable in point of law for want of consideration or want of writing - and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: See Central London Property Trust v. High Trees House, Charles Rickards v. Oppenheim".

and in Greasley v. Cooke [1980] 1 W.L.R. 1306 at 1311 G - Lord Denning M.R. said:

> " It so happens that in many of these cases of proprietary estoppel there has been expenditure of money. But that is not a necessary element. I see that in Snell's Principles of Equity, 27th ed. (1973), p. 563, it is said: "A must have incurred expenditure or otherwise have prejudiced himself." But I do not think that that is necessary. It is sufficient if the party, to whom the assurance is given, acts on the faith of it - in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it: see Moorgate Mercantile Co. Ltd. v. Twitchings [1976] Q.B. 225 and Crabb v. Arun District Council [1976] Ch. 179, 188."

I hold there is a serious question to be tried.

The next question to be considered is whether the balance of convenience lies in favour of granting or withholding the interlocutory relief sought.

In my opinion there is doubt as to the adequacy of the remedy in damages availableto the plaintiff. I take into consideration the various factors including the plaintiff's dealing with the land, the resultant litigation and the escalation in the price of land.

My conclusion is that the balance of convenience lies in favour of my exercising my discretion by granting the interlocutory injunction and preserving the status quo until trial.

Interlocutory Injunction granted in terms of Summons.