

14/11/05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO C. L. 1998/W-101

BETWEEN ORVILLE FITZROY WALKER 1ST CLAIMANT

A N D ORVILLE FITZROY WALKER
& MERLE YVONNE SHAW
(Executors of the Will of Newton Eric Walker) 2ND CLAIMANT

A N D GEORGE LAWRENCE 1ST DEFENDANT

A N D GERDA LAWRENCE 2ND DEFENDANT

Garth McBean and Courtney Bailey for Claimants instructed by DunnCox

Michael Thomas for 1st Defendant instructed by Huntley Martin

**Sale of Land – Agreement not signed by both vendors – Whether Part
Performance – Whether Partition of joint tenancy – Whether False
Representation or deceit by vendor signing**

BROOKS, J.

HEARD 12th, 13th, 20th October and 3rd November, 2006

Mr. George Lawrence has a classic case of vendor’s remorse. In February 1990 he signed an agreement to sell a portion of land that he owned jointly with his wife. The purchasers were Messrs. Newton and Orville Walker. Mr. Lawrence’s wife refused to sign the agreement. There was an extended delay and by November 1993 Mr. Lawrence no longer wanted to proceed with the agreement. Whether it was that he believed the

price to be too low or because of his wife's stance is not known. He offered to return their money to the Walkers but they refused.

The Walkers sued Mr. Lawrence for specific performance or damages in lieu thereof. Mr. Newton Walker has since died. Newton's executors (one of whom is Orville) and Orville have continued the court action. They claim firstly, that Mr. Lawrence signed on behalf of his wife. In the alternative they claim that Mr. Lawrence falsely represented that his wife would sign the agreement. Mr. Lawrence, for his part, says firstly, that there was no contract because Mrs. Lawrence did not sign. Secondly, he denies ever making any representation concerning her signing.

The issues to be decided are:

1. Whether there is a concluded contract for the sale of the land, and,
2. Whether Mr. Lawrence made any statements to the purchasers which would make him liable for fraudulent misrepresentation and/or deceit.

In assessing each issue, further facts will be provided in order to assist the reasoning. At the outset however, I shall outline that the land in question comprises one-quarter acre, and is part of a two-acre (approximately) parcel of land comprised in a certificate of title registered at Volume 1170 Folio 287 of the Register Book of Titles. The land is situated at Huntley, in the

parish of Saint Ann. Mr. and Mrs. Lawrence are described on the title as, “the proprietors of an estate as Joint Tenants in fee simple”.

The sale document is said to have been signed in or about February, 1990. It contemplated that a surveyor would have ascertained the smaller parcel and that subdivision approval would have been secured.

For convenience, I shall refer to Mr. Orville Walker as ‘Orville’, and to his father as ‘Newton’. I mean no disrespect by the reference.

Application to amend the particulars of claim

At the commencement of the trial, Mr. McBean for the Walkers, applied to amend the particulars of claim to add a claim for damages for deceit. Mr. Thomas, who is counsel on behalf of Mr. Lawrence, opposed the application stating that it would add a cause of action in circumstances where the limitation period had already run. In light of the recent (unreported) decision in *The Jamaica Railway Corporation v. Mark Azan* SCCA 115/05 (delivered 16/2/06) I am of the view that since the facts supporting the claimed cause of action were already pleaded, and that no additional facts would be pleaded, it is permissible to grant the application.

Whether there is a concluded contract for the sale of the land

The answer to this question would, at first blush, seem to be simple. Special Condition 4 of the sale agreement document stated:

“It is a condition precedent to the coming into effect of this Agreement that same shall first be signed by both Vendors and Purchasers.”

Since Mrs. Lawrence has not signed, it would seem straightforward to conclude that there is no contract in place. However, in assessing this issue, there are two supplemental questions. The first is whether Mr. Lawrence signed on behalf of both vendors. The second is whether Mr. Lawrence’s action constituted an act of partition of the legal interest in the land.

Did Mr. Lawrence sign on behalf of both vendors?

Orville has averred in the Statement of Claim that the “agreement was executed by...Mr. George Lawrence, on behalf of the vendors”. This was, however, not supported by the evidence. Orville, in his witness statement, said that the Sale Agreement document was drafted by Mr. Lawrence’s Attorney at Law, Mr. George Thompson. He said (at para. 8), “Mr. Thompson...assured us that he would have Mrs. Lawrence’s signature at the appropriate time.” At paragraph 12, Orville continued, “we were given the impression by Mr. Lawrence that his wife was a party to the agreement and was willing to and would execute the agreement for sale and that he and his wife would complete the sale transaction”. The clear impression is that it was always intended that Mrs. Lawrence would sign on her own behalf. This was clear from the outset because the document has a provision for Mrs. Lawrence’s signature. Mr. Lawrence did not sign at that location.

There are also letters in evidence from Mr. Thompson which address the point. One is addressed to Orville. It is dated 7th August, 1991 and states in part: "Mrs. Gerda Lawrence the wife of George Lawrence has not yet signed the Documents but as soon as you have signed them I would ask Mr. Lawrence to get her to sign also".

On this evidence, it is clear that Mr. Lawrence did not sign, or purport to sign, on behalf of Mrs. Lawrence. There is therefore no sale agreement which included Mrs. Lawrence. Indeed the claim was discontinued as against her, just prior to the first Case Management Conference.

Did Mr. Lawrence's action constitute an act of partition of the legal interest in the land?

This second subsidiary issue is a little more complex.

Mr. Bailey in his skeleton submissions stated:

"...the Claimants contend that the Defendant's execution of the Agreement for Sale constitutes an act of severance of his interest in the property and that there is a binding and subsisting Agreement of Sale between the Defendant and the Claimants for the sale of (the quarter acre) to the Claimants out of the Defendant's severed half interest in the property."

The closing submissions repeated the essence of this argument. There are many difficulties with this submission. Firstly, it fails to recognize that neither Mr. nor Mrs. Lawrence has any specific possession of any portion of their land. This is jointly owned property. Neither can properly point to any portion and say, "that's mine". Secondly, the submission assumes that each

of the Lawrences holds a one-half beneficial interest. That may or may not be so. It is not within the remit of this court to determine that issue in this case. Thirdly it requires the convoluted result that the purchasers would be co-owners with Mrs. Lawrence in respect of a portion of Mr. Lawrence's interest in the land, (the portion which they say he has sold) while Mr. Lawrence would become a tenant in common with Mrs. Lawrence in respect of the remaining portion, (which he has not sought to deal with separately, but would no longer have unity of title with her).

There is no doubt that a joint tenant may alienate his interest in land during his lifetime. He may convey his interest to some other person, who would then become a tenant in common with the remaining owner or owners. (*Williams v. Hensman* (1861) 1 John and Hem 546, 70 E.R. 867, *Hawkesley v. May* [1956] 1 Q.B. 304). That principle only applies where the vendor joint tenant seeks to alienate his undivided share. It does not apply where he seeks to sell a particular portion of the land. The case of *Leiba v. Thompson* (1994) 31 J.L.R. 183 is instructive on the point. In that case, the vendor was one of two tenants in common of an undivided interest in land. He entered into an agreement to sell $\frac{3}{4}$ of an acre of that land to Mr. Leiba. After the death of the vendor, Mr. Leiba sought an order for specific performance against the administrator of the vendor's estate. Although

allowing specific performance because of other circumstances, which are not material here, the Court of Appeal ruled (at p. 184) that:

“each co-tenant may contract to sell his undivided share without the consent of the other co-tenant but where, as in the instant case, the interest of the deceased is in an undivided share of the entire property he may not contract to sell $\frac{3}{4}$ of an acre, for he has no interest in the property which may be quantified as $\frac{3}{4}$ of an acre; had he contracted to sell his undivided share then the sale would have been valid”

I believe that this is sufficient to dispose of this issue, but I would also rely on the case of *Lamb v. Coulthard* (1994) 31 J.L.R. 658 in support of the principle that a decree of specific performance is not available against an unwilling co-owner. As in *Lamb v. Coulthard*, the payment of monies to Mr. Lawrence similarly cannot constitute part-performance so as to satisfy the requirements of the Statute of Frauds. No payment was made to Mrs. Lawrence.

Whether Mr. Lawrence made any statements to the purchasers which would make him liable for fraudulent misrepresentation and/or deceit.

In their closing submissions, Messrs. McBean and Bailey made the point that damages for fraudulent misrepresentation is only applicable where there is a valid contract in place. The representation must have been made before the contract and was made to induce the innocent party to enter into the contract. The tort of deceit does not require that connection between the parties, but the burden of proving fraudulent conduct on the part of the

person making the statement is common to both causes of action. Orville has to prove that Mr. Lawrence made a statement knowing it to be false or had no belief in its truth, but made it not caring whether it was true or false.

The answer to the question as to whether Mr. Lawrence made any such statements requires a decision on issues of fact. Some background is therefore required. Mr. Newton Walker, during his lifetime, owned a business which sold animal feed. Mr. Lawrence was his customer. Mr. Lawrence had credited goods amounting, according to him, to \$12,000.00. He says, in his witness statement, at paragraph 3, that in December 1989 Newton refused him further credit. Newton made an offer to purchase a portion of his land. They discussed the matter. At paragraph 4, he says that a week later Newton visited him and handed him a cheque for \$12,000.00. He cashed the cheque and used it to pay off his debt to Newton. Shortly thereafter, says Mr. Lawrence, he went with Newton to Newton's lawyer Mr. George Thompson, where the matter was discussed. An agreement for sale was later drawn up by Mr. Thompson. Mr. Lawrence says that he signed it. It is noteworthy that the agreement included this statement in the section headed "Consideration":

"EIGHTY SIX THOUSAND DOLLARS (\$86,000.00) of which the Vendors acknowledge to have already received \$12,000.00 the balance to be paid as to \$31,000.00 on execution of this Agreement by the Vendors and Purchasers and the remaining balance as to \$30,000.00 on presentation of a Registrable Transfer

to the Purchasers and the balance on issue of Title in the names of the Purchasers.” (Emphasis mine)

Mr. Lawrence says that although he knew Orville and had seen him from time to time, they had never exchanged anything other than pleasantries. They certainly did not discuss anything to do with this land, says Mr. Lawrence. Whereas Mr. Lawrence and Newton were members of the same community, Orville resided in Kingston, and Mr. Lawrence says he made no representations to Orville about this land.

Orville has testified to the contrary. He says that he met with Mr. Lawrence and Newton at the land, met with Mr. Lawrence at Mr. Thompson’s office and had several discussions with Mr. Lawrence about the land. Orville insisted under cross-examination that although he was the manager of a branch of a bank in Kingston, he did, from time to time, visit his father during the work week, and that Mr. Lawrence told him on several occasions that his wife would sign the agreement for sale. He admitted that Mr. Thompson was one of Newton’s lawyers.

Of critical importance is that Orville in attempting to demonstrate his close connection with, and knowledge of, this transaction insisted that the first sum of money paid in respect of it, \$12,000.00, was paid to Mr. George Thompson. He said that he was present when it was paid. He said all monies were paid to Mr. George Thompson.

I reject Orville's account. The wording of the section of the agreement concerning the purchase price which I have quoted above makes it highly improbable that that sum was paid to Mr. Thompson. If it had been paid thus the agreement would not have been so worded. I believe Mr. Lawrence's account as being far more probable than Orville's. I am bolstered in my finding by the fact that in August 1991, Mr. Thompson, was still reminding Orville that he had not yet signed the Agreement for Sale. I find as a fact that this was his father's business transaction, not his; he had no direct interest in it.

It is noted that by letter dated July 1995, Mr. Thompson wrote to Orville noting that the Agreement for Sale had up to then, only been signed by Mr. Lawrence and Newton. Orville brought to the court's attention that his signature was on the document but that it was not in the correct place. He insisted that he had signed the document in the presence of Mr. Thompson before the end of 1991. Again I cannot accept this *viva voce* evidence in the face of the documentary evidence. Whereas a Justice of the Peace H.G. Logan had signed the document in two places as having witnessed Mr. Lawrence's signature and Newton's signature, there is no one who purports to witness Orville's signature. The probability is that if he had signed it in the presence of Mr. Thompson, the latter would have not only

signed as witnessing the execution, but would have ensured that Orville signed at the correct place. Orville's account is not credible.

Orville was not the only party who was less than frank with the court. Mr. Lawrence when asked some questions about a sale of another parcel of land by his brother to the Walkers, claimed ignorance. Similarly when he was asked about matters to do with the subdivision and his expectation as to the time for completion of the sale, said that he did not know about those matters and that he left that up to the lawyers. His demeanour was not convincing in these matters, but they did not affect the central issue and do not affect my finding of fact concerning whether he made representations to Orville. There is no evidence before me that he made representations to Newton. Only convincing evidence of that nature could ground the claims for fraudulent representation or deceit. The claimants have therefore failed in this claim.

I also accept the submission of Mr. Thomas, that even if the representations were made, they could not base an action in deceit. This is because Mr. Lawrence is reported to have said that his wife would sign the document. *Yorkshire Insurance Co. v Craine* [1922] 2 A.C. 541 at p. 553 is cited by the learned authors of *Clerk and Lindsell on Tort* (14th Ed. at para

1612) as authority for the principle that the representation must be one as to a past or existing fact. That would not be applicable in these circumstances.

The claimants sought to say at one stage that Mr. Thompson was acting as agent for Mr. and Mrs. Lawrence when he wrote to the Walkers' bankers stating that the Walkers were purchasing the land from Mr. and Mrs. Lawrence. I find the proposal ill-founded. Not only is the provision made in the Agreement for Sale for Mrs. Lawrence to sign but Mr. Thompson also wrote to Orville in that letter of August 7, 1991 stating that he (Thompson) would ask Mr. Lawrence to have Mrs. Lawrence sign. Mr. Thompson never purported to act as anything other than an attorney -at- law in the transaction.

What is the Claimant's relief?

In light of the findings, the claimants are not entitled to specific performance or damages for breach of contract or misrepresentation. They are entitled to the refund of their money. In *Bain v. Fothergill* (1874) L.R. 7

H.L. the principle was established that:

"Where, on a contract for the sale of land the vendor, in the absence of any fraud and any express stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he had paid one."

The Court of Appeal in *Lamb v. Coulthard (supra)* had ruled that there was nothing wrong with Mrs. Coulthard's title. There may be nothing wrong with Mr. Lawrence's title. Indeed there was no contract. He has, however, taken money from Newton. He has not delivered value for the money. The claimants are therefore only entitled to a refund of that money.

Mr. Lawrence has attempted on at least three occasions to refund the monies which he received from Newton. It was refused by Mr. Thompson. The refusal should not now relieve Mr. Lawrence of the responsibility to repay it. He has had the benefit of the money and should pay interest thereon. However, no evidence has been provided as to the rates of interest applicable over the period. I shall therefore award interest at the rate payable on judgment debts.

Conclusion

The absence of the signature of one of the joint owners of the land in question, in the context of an Agreement for Sale which stipulated that to be effective it must have been signed by both the Vendors and the Purchasers, made the document unenforceable against that joint owner. The Agreement for Sale was also not enforceable against the co-owner who signed it, as he sought to sell a specific portion of the land, when he had no such right as a joint owner.

There is no evidence that the co-owner who signed had made any representation to any of the purchasers which would amount to a fraudulent misrepresentation or a deceitful statement. The claimants' action must therefore fail. They are however entitled to a refund of the monies which they have paid to Mr. Lawrence. He should pay interest on those sums at the rate payable on judgment debts. Mr. Thomas has submitted that the amounts paid to the Stamp Commissioner for Transfer Tax and Stamp Duty should be returned in proportion to Mr. Lawrence. There is no evidence however, that Mr. Lawrence made any contributions to those payments. I shall not make any such order as Mr. Thomas has requested.

The orders therefore are:

1. Judgment for the Defendant on the Claim.
2. The Defendant shall pay to the Claimants the sum of \$43,000.00 together with interest thereon as follows:
 - a. At the rate of 6% per annum for the period February 27, 1990 (the date of the signing of the Agreement) to June 30, 1999.
 - b. At the rate of 12% per annum for the period July 1, 1999 to June 21, 2006.
 - c. At the rate of 6% per annum from June 22, 2006 to November 3, 2006
3. Costs to the Defendant in the sum of \$112,000.00 as per item 5, Table 1, Appendix B of the Civil Procedure Rules 2002.