

NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 131/97

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
 THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MR. JUSTICE PANTON, J.A. (Ag.)**

BETWEEN	BERTRAM WATKISS	APPELLANT
AND	TREVOR CAMPBELL	RESPONDENT

Ian Wilkinson, instructed by Mrs. Marina Sakhno, for the appellant

Dr. Bernard Marshall for the respondent

February 16, 18 and April 19, 1999

PANTON, J.A. (Ag.):

This is an appeal from an order made by Pitter, J. on November 29, 1996, which reads:

"That there be damages for the Plaintiff in substitution for specific performance of an agreement for sale made between the plaintiff and the defendant in the year 1991 whereby the defendant agreed to sell and the plaintiff agreed to purchase ALL THAT parcel of land part of BELGRAVE (sic) MANOR in the parish of Saint Andrew registered at Volume 1057 Folio 254 of the Register Book of Titles such damages to be assessed."

The order was made on a motion for judgment, no defence having been filed.

Grounds of Appeal

The grounds of appeal may be summarised thus:

- 1 (a)** The agreement for sale, which was in respect of a specified lot, was frustrated as the defendant/appellant did not obtain the necessary subdivision approval to enable him to obtain the splinter certificate of title to complete the agreement;
- (b)** further, or alternatively, the agreement was frustrated and could not be completed by the defendant/appellant as the terms or conditions for the grant of subdivision approval were impractical, onerous and/or unconscionable; and the defendant/appellant could not have accepted, or complied with, the said terms and conditions even if he had been able, financially or otherwise to do so;
- 2.** there was no basis in equity or at law for the learned judge to award damages to the plaintiff/respondent as the substratum of the agreement (lot 23) was not in existence at all material times;
- 3.** the affidavit filed by the plaintiff/respondent was insufficient in that it did not state that in the belief of the respondent there was no defence to the action;
- 4.** the learned judge erred in law in granting judgment for damages despite, or in contravention of, section 13 of the Local Improvements Act;
- 5.** the learned judge erred in law in accepting as evidence, or relying upon, an undated, uncertain and unstamped agreement for sale; and

6. the learned judge erred in law in failing and/or refusing to hear the motion for leave to file defence out of time, thereby depriving the defendant/appellant of the opportunity to contest the suit.

Grounds 1 and 2 were the original grounds of appeal that were filed. We gave leave to the appellant to argue supplementary grounds. This resulted in the addition of grounds 3 to 6. We heard arguments in respect of all grounds except ground 5 which was not pursued. It will be readily observed that grounds 1 and 2 relate to whether there is a contract in existence, while ground 4 deals with damages. Grounds 3 and 6 are concerned with the question of a defence to the action. There is no need to comment on the arguments that have been put forward in respect of grounds 1, 2, 3 and 4 because the submissions on ground 6 are compelling and unanswerable and effectively disposed of the real issue before us.

Notwithstanding this, it is fair to say that the sale agreement exhibited refers specifically to Lot 23 part of Belgrade Manor being part of land registered at Volume 1057 Folio 254 of the Register Book of Titles. Further, Mrs. Elsie Taylor, Attorney-at-law, is stated to have the carriage for sale. In any trial on the merits these facts must play an important role in determining the scope and effect of the contract, in particular, whether the Local Improvements Act affords a good defence in the circumstances of this case.

The Statement of Claim

In order to fully appreciate the appellant's complaint, it is necessary to set out the statement of claim which is dated the 6th March, 1996, and reads thus:

- "1. The Plaintiff is and was at all material times the purchaser of land under an Agreement for sale made with the Defendant.
2. The Defendant is and was at all material times the registered proprietor of ALL that parcel of land part of Belgrade Manor in the parish of Saint Andrew registered at Volume 1057 Folio 254 of the Register Book of Titles.
3. By an Agreement for Sale made on or about the 18th day of April 1991 the Defendant agreed to sell and the Plaintiff agreed to purchase Lot 23 being part of the land registered at Volume 1057 Folio 254 as aforesaid for a consideration of Two Hundred and Twenty Five Thousand Dollars (\$225,000.00).
4. The said Agreement for Sale provided inter alia:

 - (a) A deposit of Two Hundred Thousand Dollars (\$200,000.00) payable on execution of Agreement.
 - (b) Balance of Twenty Five Thousand Dollars (\$25,000.00) on completion in exchange for duplicate certificate of Title for the said land registered in the name of the Plaintiff.
5. The Plaintiff will at the trial of this action refer to and rely on the said Agreement for its full terms and effect.

6. Pursuant to the said Agreement the Plaintiff on or about the 18th day of April 1991 paid to the Defendant the deposit of Two Hundred Thousand Dollars.
7. The Plaintiff has at all material times been ready able and willing to fulfill his remaining obligations under the said Agreement.
8. The Defendant in breach of his obligations has failed and/or neglected and/or refused to complete the said Agreement despite repeated requests made of the Defendant by the Plaintiff so to do and assurances given by the Defendant to the Plaintiff in and about completion of same.
9. The Plaintiff has since discovered that to date no subdivision approval has been granted for the said land so as to put the Defendant in a position to transfer title to the Plaintiff.
10. Further the Plaintiff has lost the prospect of investment on other land and business ventures, his moneys being tied up in the lands of the Defendant.
11. The said land or comparable land is now worth in excess of Two Million Dollars.
12. As a consequence of the Defendant's breach of his obligations under the said Agreement the Plaintiff has been put to great inconvenience trouble and expense and has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGE

Retainer Paid to Counsel	\$30,000.00
--------------------------	-------------

13. Further the Plaintiff fears that the Defendant desires to resile from the said Agreement, the Defendant being of the view that the land was sold too cheap.

14. The Defendant threatens and intends unless restrained by this Honourable Court to continue in the course of conduct complained of above.
15. Wherefore the Plaintiff claims:
 - (a) Specific Performance of the said Agreement
 - (b) Damages in addition to or in substitution therefor
 - (c) An injunction to restrain the Defendant from dealing with the said land and/or transferring same to any person or entity other than the Plaintiff.
 - (d) Damages
 - (e) Interest
 - (f) Costs."

With reference to paragraph 6 above, it should be noted that the receipt exhibited dated 18th April, 1991, refers to a payment of \$100,000.

The agreement provides for possession to be on completion which is stated to be "on payment in full of the purchase money ... and such other amounts payable by the purchaser hereunder in exchange for the duplicate certificate of title for the said land together with a registrable transfer in favour of the purchaser..." Mrs. Elsie Taylor, attorney-at-law, has carriage of sale.

The Defence

According to an affidavit filed by the appellant's attorney-at-law, appearance was entered on behalf of the appellant on or about April 11, 1996. On October 9, 1996, the respondent filed a notice of motion for judgment. On November 12, 1996, the appellant filed a notice of motion for leave to file defence out of time. Both motions were listed for hearing before the learned judge on November 28 and 29, 1996. He heard the motion for judgment while ignoring the motion for leave to file defence out of time; so, there was no adjudication on the latter motion. Instead, judgment was entered for the respondent.

An affidavit was filed by Marina Sakhno, attorney-at-law, in support of the motion for leave to file defence out of time. The following paragraphs of that affidavit are of some relevance:

- "2. That on or about April 22, 1996 I wrote to the Plaintiff's Attorney-at-law advising him that the money, if any, advanced by the Plaintiff to Elsie Taylor, Attorney-at-law, should still be in her possession as she was acting as a stakeholder with respect to the transaction in question until a subdivision approval for the proposed development known as Belgrade Manors was obtained from the relevant authority, which approval to the date hereof has not been obtained.
3. That I also advised the Plaintiff's Attorney-at-law that the Defendant does not know what, if any, moneys had been paid by the Plaintiff to Elsie Taylor as he has not had any communication and/or accounts from her since in or about June 1992.

4. That on or about May 5, 1996 an Originating Summons, suit No. C.L.1996/W114 was filed on behalf of the Defendant herein against Elsie Taylor for, among other things, and account of moneys received in connection with the aforesaid proposed development and purported for the delivery of various documents pertaining to the same, which Originating Summons is pending to be heard by this Honourable Court.
5. That I verily believe that the Defendant has a good defence to this action in that the subject matter of the Agreement upon which the Plaintiff is relying did not exist at the time thereof nor is same in existence now. As such the document that the Defendant signed, purporting to be an Agreement for Sale, was merely a contingent agreement which could only come into existence when the subdivision approval has been granted, and this contingency not having occurred within reasonable time or at all would render the aforesaid contingent Agreement for Sale null and void ab initio.
6. That the Plaintiff had filed Notice of Motion for Judgment without any prior notice thereof to our firm and knowing that the Defendant had a good Defence and that my written request of the Plaintiff's Attorney-at-law of November 4, 1996 for a Consent to file Defence out of time was refused."

The circumstances clearly indicate that as between the appellant and the respondent, there are serious issues to be tried. The most important issue is whether there is a valid contract, considering that subdivision approval has not been received. In addition, there is the issue of the role of

the attorney-at-law who has carriage of sale and who is being described as a stakeholder.

The Decision

It was neither necessary nor relevant for the learned judge to determine any of the issues. What was required was for him to say whether there were issues to be tried; and, if so, to grant the necessary leave.

In proceeding to enter judgment, and directing that damages be assessed, the learned judge fell into error as the appellant was deprived of the opportunity to defend the suit and to present his case.

"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure" - per Lord Atkin in ***Evans v. Bartlam*** (1937) A.C. 473 at 480.

And at page 489 Lord Wright said:

"... if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

In ***Manteca Warehouse Ltd. v. Anthony Chin-Que and others*** (1988) 25

J.L.R. 376 at 377, Carey, J.A. said:

"In order that a litigant should be driven from the judgment seat, some very good reasons should be shown to allow that to take place."

The case of ***The Jamaica Record Limited and others. v. Western Storage Limited*** (S.C.C.A. No. 37/89 delivered on March 5, 1990) is not

dissimilar to the instant matter. There the learned Master had before him a summons for an order to proceed to assessment of damages. He was informed that a summons to set aside the interlocutory judgment and seeking leave to file a defence out of time had been filed, and that a date had been fixed by the Registrar for the hearing of that summons. The Master refused a request for an adjournment, and granted the order to proceed to assessment of damages. Two weeks thereafter he heard the summons for leave to file defence out of time, dismissed it and refused leave to appeal.

When the matter was heard in this court, leave to appeal having been granted by it, Campbell, J.A., in delivering the judgment of the court, said:

"We were struck at the outset by the unusual procedure adopted by the Master in granting the order authorising further proceedings on the default judgment notwithstanding that his attention had been drawn to the fact that a summons had been filed to set aside the default judgment which latter summons had been fixed for hearing on a subsequent date."

In the instant case, no reasons have been advanced to justify the removal of the appellant from the judgment seat. The appellant, having been denied the opportunity to file his defence out of time, succeeds on ground 6. The appeal is allowed. The order of the learned judge is set aside. The appellant is granted leave to file his defence within ten days of the date hereof. Costs of the appeal are awarded to the appellant, such costs to be agreed or taxed.

DOWNER, J.A.:

I agree.

HARRISON, J.A.:

I agree.