

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. OF 1982/W - 107

BETWEEN	DERRICK WILLIAMS	PLAINTIFF
AND	BARBARA GRANT	DEFENDANT

John Vassel for Plaintiff.
St. Michael Hilton for Defendant.

Heard: April 10, 11, 12, and 26, 1985.

JUDGMENT

DOWNER J.

On the 11th May, 1981, Derrick Williams an electrical engineer of Bougainville Avenue, Kingston 6, signed an agreement with Eric Frater, an attorney-at-law of some eleven years standing to purchase that parcel of land with house thereon known as 48 Chestervale Avenue at a price of \$33,500. He had responded to an advertisement in the Gleaner newspaper and agreed at that price after some hard bargaining. It was important to note that in the written Agreement for Sale, the vendor was described as a widow of 1 Central Road, Kingston 13, in the parish of St. Andrew and that Eric Frater signed as agent for her. Further, it was stipulated that the date for completion was to be on the 31st of August, 1981 and was subject to a special condition which reads as follows:

"Subject to the purchaser obtaining a mortgage.
If the purchaser fails to get a mortgage by
the 31st August, 1981, the deposit will be
returned less costs (minimum \$100)."

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Against this background of facts, there has arisen three issues to be determined in order to decide whether the plaintiff is entitled to a decree of specific performance or an award of damages. Those issues were firstly, whether Eric Frater was an authorised agent for Barbara Grant to enter into a contract for the sale of the property. Secondly, whether if the answer to the first question be in the affirmative, whether provisions of the Exchange Control Act

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would make a contract illegal as formed, thus disentitling the plaintiff to any remedy in the courts, and thirdly, whether on the pleadings as they stood at the conclusion of the evidence, the defendant was permitted to contend that the special conditions of the contract was void for uncertainty. These issues of law arose because Mrs. Grant instructed the Insurance Company of the West Indies not to hand over the Certificate of Title to Mr. Frater as she directed previously, and both parties effectively terminated the Agency. Mr. Williams in the meantime had secured his mortgage from the Victoria Mutual Building Society and had sufficient resources to complete the transaction. He however was told by Mr. Frater that the transaction was at an end and that he could have his deposit returned, which he refused. It was in the light of those circumstances that the plaintiff seeks redress in our courts. He is in possession albeit as a tennant and he has told the Court and I accept it that both Mrs. Grant and her new Attorneys, Myers, Fletcher & Gordon has offered him the property for upwards of \$40,000 sometime after August 1981 when the sale should have been completed. He refused those offers too, and lodged a caveat to protect his interest. Because of the depreciation of our currency I take judicial notice of the fact that the property would be worth at least twice the \$40,000 now, and this is in reality what this case is about. Mr. Grant gave uncontradicted evidence that he spent between \$1,200 - \$1,400 to make the place habitable and Mr. Frater admits that he told him that he would be refunded that part for which the landlord was responsible. But if there was an agency, Williams acquired an equitable interest as soon as he paid his deposit and he had a right to protect that interest by doing essential repairs.

Was Eric Frater an agent for Barbara Grant with authority to sell the property?

The evidence of Eric Frater a witness for the plaintiff and that Barbara Grant the defendant are irreconcilable on this issue and I will have to resolve it on a balance of probabilities as regards

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the oral instructions before I consider the legal effects of Exhibit 2, the Agreement for Sale. Frater stated that in March or April of 1981, Mrs. Grant came to him as a client in connection with retaining him to sell and manage the property pending the conclusion of the sale. He was also given instructions to take over and complete existing litigation, collect rents and was to be attorney-at-law having the Carriage of Sale. As regards the agency, he pointed out that there was a prospective agreement with Bailey's Realty at a price of \$30,000 and Frater asserts that he was given authority to sign that contract if it materialised on Mrs. Grant's behalf. One must bear in mind that on balance this is credible evidence as Mrs. Grant had lived and worked in the United States since 1964 and although she visited Jamaica during two year intervals, it was desirable for her to have a reliable agent in Jamaica especially since previous agents had proved ineffective. Suffice it say that the property was deteriorating because of lack of maintenance.

On the other hand, Mrs. Grant denies that she ever gave specific instructions to Frater to sell on her behalf and she stressed that all she gave was instructions to Mr. Frater to find a purchaser. She readily admitted that she had given the other instructions which Mr. Frater adverted to and I find it hard to accept her in regard to the matter of the agency to sell. In the event, I find for the plaintiff on this aspect of the case as I accept Mr. Frater's evidence that he was instructed to sign the contract of sale on her behalf. Surrounding circumstances all support Mr. Frater. He said that it was he who advised her that he thought a price of \$35,000 was more probable than the Bailey intimations of \$30,000 and further stressed that \$33,500 would even be better than \$35,000 from the real estate agent, as he, Frater, would not ask for a finders fees or an agent's commission.

Independently from the specific oral instructions to sell,

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which was accepted by Mr. Frater, Mr. Vassel for the plaintiff relied on the written instructions of the defendant to support his contention that an agency was created to sell the property. At first I was skeptical of such a submission, but I found compelling authorities in support of his submission. In construing the document one must have regard to its origin. Both parties agreed that a document embodying the instructions was prepared by Mr. Frater but it was not signed by Mrs. Grant as his secretary wrongly appended his signature to the document instead of that of Mrs. Grant. Mrs. Grant could not wait for the document to be corrected as she was preparing to depart for the United States the following day and she therefore, with the assistance of a cousin who had introduced her to Mr. Frater, prepared her own documents which is in evidence as Exhibits 1 and 9. There are two features to note about these documents and that is that Mrs. Grant gave her address as 1 Central Road, Kingston 13 and further stated in evidence that she lived there before her marriage as it was her aunt's residence. She also informed the court that it was her address whenever she visited Jamaica although she was staying at the Sheraton when she signed those documents. Secondly, it is pertinent to quote the caption and the first paragraph of the letter to determine its force and effect -

"Re: 48 Chestervale Avenue, Pembroke Hall, Kingston
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Dear Mr. Frater,

Please accept this letter as your authorization to represent me as Attorney in the sale of the above property at a sale price of \$35,000.00 or within this immediate price range."

Mr. Vassel submitted that once a specific price was mentioned this raised a necessary implication that an agency was created and the agent had authority to sign the contract for sale. The authority for this proposition is to be found in Keen v. Mear 1920 2 Ch. p. 574. The passage which is appropriate at 579 from the judgment of Russel J. is as follows:

"Hamer v. Sharp (1): Wilde v. Watson (2): Chadburn v. Moore (3): Rosenbawn v. Belson (4): Thuman v. Best (5) were cited to me. The result of those cases is, in my opinion, this: that the mere employment by an owner of an estate agent to dispose of a house confers no authority to make a contract; the agent is solely employed to find persons to negotiate with the owner; but if the agent is definitely instructed to sell at a defined price, those instructions involve authority to make a binding contract and to sign an agreement."

In the result both the oral instructions and on the construction of the document Ex. 1 I find Mr. Frater was an agent to sign a contract of sale on behalf of the defendant. For completion one should also refer to Ex. 3 the letter from Fenwick, Stone, Davis & West of New York on behalf of Mrs. Grant to Mr. Frater, the first paragraph reads as follows:

" Dear Mr. Frater,

At the request of Barbara Grant Parry, we have been instructed to inquire into the status of the above mentioned property.

It is our understanding that you are in the process of attempting to sell the above property for Mrs. Parry and have entered into an Agreement for Sale with a prospective buyer. Please be advised that before proceeding any further in the proposed sale, Mrs. Parry would like to receive a copy of all documents relating to the sale along with a complete breakdown of all fees and taxes arising from the sale of the property (i.e. - Legal fees, Transfer Tax, Stamp Duty, Registration Fees, Transfer Fees, etc.)"

To my mind this reinforces the contention that Mr. Frater was an agent to sell and up to this point there was no withdrawal of the agency. In fact Mrs. Grant told the court that she would have given authority for the transfer if Mr. Frater had sent her a written account of the transactions and it was his failure to do so that caused her to seek to cancel the agreement.

There is yet another aspect of the evidence which it is necessary to refer in order to grasp the nature of the agency relationship before it was terminated by Mr. Frater and Mrs. Grant. Mrs. Grant admitted that she telephoned Mr. Frater frequently, sometimes

twice weekly and that she phoned him even at his house while he was recuperating from the injuries he received from an accident. Yet she asserts that she was not told of the sale until around August, while Mr. Frater gives a date of some time in May. On balance I accept Mr. Frater's version on this aspect. After all, the date for completion was August and he would hardly have waited till then to have informed her.

Did the provisions of Sec. 33 restricting the sale of real property coupled with the provisions of Sec. 20, vitiate the contract entered into by the agent and the purchaser?

It is appropriate to set out the relevant sections relied on by the defendant for ease of reference and to facilitate their construction -

"Restriction on
sale of real
property

Sec. 33(1) - Except with the
consent of the Minister it
shall not be lawful in the
Island -

(b) - for any person resident outside the scheduled territories, or any person acting on behalf of any person so resident, to transfer, convey or do any act forming part of a series of acts calculated to result in the transfer or conveyance by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in the Island or any instrument, or certificate of title relating thereto to any person wherever resident; or

(c) - for any person wherever resident to purchase or agree to purchase or to accept a transfer or conveyance by way of sale, exchange, gifts or mortgage of any land, buildings or other hereditaments situated in Jamaica from any person resident outside the scheduled territories or any person acting on his behalf, or to pay any money to any other person in consideration for, or in connection or association with, any such transfer or conveyance.

(2) - Subsections (2) and (3) of section 20 shall apply in relation to a transfer or conveyance prohibited by this section as they apply in relation to a transfer prohibited by this Act of a security.

Validation
of certain
transfers.

Sec. 20 (2) - Without prejudice to the provisions of subsection (1), the Minister may issue a certificate declaring, in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts where were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the Minister, and the said acts shall have effect accordingly.

(3) - Nothing in this section shall effect the liability of any person to prosecution for any offence against this Act."

The conclusion I derive from examining Section 20 (2) and (3) is that transactions caught by section 33(1) (b) (c) to which Sec. 33(2) refers, is that if there were a transfer by the defendant to the plaintiff as a conclusion of implementing the contract, a certificate from the Minister may be issued to make the transfer and conveyance valid. An instance for this in the case of securities was Bank of London and Montreal Ltd. v. Noel Courtney Sale 1967 10 J.L.R. at page 319.

Since, however, the defendant refuses to seek ministerial approval to carry the terms of contract, the plaintiff must seek comfort elsewhere from the Exchange Control Act and the operation of common law principles. Watkis v. Roblin (1964) 6 W.I.R. at page 533 is of some assistance. There, Douglas J. cites 35(1) of the Exchange Law now section 36 which reads:

"Contracts, legal
proceedings, etc.

36(1) - It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the

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permission or consent is given or is not required:

Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason."

There was no evidence that either the oral instructions or the written agreement ousted the implied terms that the permission of the Minister was required for the performance of the contract. Since the implied conditions operated when the contract was formed, the agreement would not be struck down as illegal by virtue of Sec. 33, although it could only be performed by either or both parties seeking ministerial sanction for a transfer or conveyance. Douglas J. summarizes it at 536 and says:

"Where the sub-section applies, therefore, contracts in breach of this law are on a footing entirely different from that upon which contracts in breach of the Local Improvements Law rest. Thus, where the agreement is not caught by the proviso in s. 35 (1), the Exchange Control Law goes to performance of the contract and not to its formation."

If this contention be correct, then one has to look at the general operation of common law principles to determine what rights and liabilities accrue as a result of the formation of a legal contract. Here again reference may be made to the helpful judgments of the Court of Appeal in Bank of London and Montreal. Waddington JA at pages 335 - 336 poses the problem thus:

"The Exchange Control Law, unlike the statutes considered in the cases referred to above, contains no mandatory provisions with respect to the observance of conditions imposed by the Exchange Control Authority, and although contravention of any "restriction or requirement imposed by or under the Law" (which presumably would include non-compliance with a condition imposed under s. 39(1) constitutes an offence punishable under the Law, the absence of precise mandatory provisions can conceivably lead to difficulty in determining in any particular case whether any or what condition has not been observed."

and concludes on page 336 by saying:

"In these circumstances, I am clearly of the opinion that it was not within the scope or purpose of the statute that the entire contract of loan should be regarded as being illegal or unenforceable."

Luckhoo J.A. is even more emphatic. He cites Lord Campbell at page 359 as highlighting the issue as to the legal effect of mandatory provisions in contracts is distinct from the specified criminal sanctions thus:

"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be construed as directory or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

and came to the same conclusion as Waddington J.A.

To my mind the purpose of the Exchange Control Act was to permit the government to use monetary policy to manage and control the economy of the country and it is within that framework that one must determine what was the purpose of the restriction on the sale of real property. It was to control monies which a vendor may wish to move from the shores of Jamaica or prevent monies being paid to the credit of a non resident and the provisions in the Third Schedule relating to blocked accounts and those in the Fourth Schedule for payment of money into court emphasises the control of currency movements and reinforces the view that the purpose was not to prohibit agreement for sale as such. Moreover, the general provisions of section 20 which enable the Minister to validate transactions even though they were commenced without his approval all point to the same direction. Against this background, section 36 by requiring the Ministerial consent at the time of the contract is to be performed, brings into operation common law doctrines which enable the litigant to obtain remedies from the courts where a contract is breached and there is nothing illegal about its formation. Bank of London and Montreal v. Sale is an illustration and this principle and it is instructive that Luckhoo JA refers to the important observations of Denning LJ in Marls v. Trent Phillip & Son Ltd. no. 2 page 29 at page 36 where he states -

"The truth is that it was not the contract itself which was unlawful, but only the performance of it. The seed merchants performed it in an illegal way in that they omitted to furnish the prescribed particulars. That renders the contract unenforceable by them, but it does not render the contract illegal. Atkin L.J. expressed the position with his usual accuracy in Anderson Ltd. v. Daniel when he said simply that the contract was unenforceable. I do not think that the law has ever countenanced the idea that a transaction, lawful when done, can be rendered unlawful by the doctrine of relation back: see Elliott v. Boynton. A transaction which is unlawful, when done, can be rendered lawful by relation back (see Howell v. Falmouth Boat Construction Co. Ltd.) but not vice versa.

Once rid of the notion that the contract with the farmer was itself illegal, the question becomes: what is the effect of the admitted illegality in performance? It certainly prevents the seed merchants from suing the farmer for the price, but does it prevent them suing their supplier for damages? I think not."

More impressive support comes from Contract and Trading Co. (Southern) Ltd. v. Barbey and others (1960) A.C. 244 as the matters in issue pertain to the Exchange Control Act. Viscount Simmonds on page 253 puts it thus:

"The only previous case in which the construction of this part of the Act has been considered by the courts is Cummings v. London Bullion Co. Ltd. In that case it was not perhaps necessary for the court to determine the precise question that now arises, but I am happy to find that Somervell L.J. did think fit to consider it and used language with which I am in agreement. "The person," he says, "entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part II of the Act and the rules to which I have referred. The defendant, assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into court. The Act is not to be used to enable the defendant to retain the money in his pocket, but to control its reaching its destination, namely, the plaintiff." I cannot express more succinctly my own views in regard to the present case."

On these principles, since Mrs. Grant refused to carry out the contract by taking the appropriate steps, I find that she was in breach of her contractual obligations to the plaintiff and he is entitled to a remedy from this court. A further illustrating of

the court's willingness to assist a plaintiff even where there is a breach of the Exchange Control Act is Shelly v. Paddock (1979) 1 Q.B. 120.

There is an alternative way of approaching this problem. On the face of the contract, the vendor Mrs. Grant is stated as being of 1 Central Road in the parish of St. Andrew. This is the basis on which the plaintiff contracted with her and it is pertinent to note that it was on that basis she herself gave written instructions to Mr. Frater - See Exhibit 1. There is nothing in the contract as it stands which contravenes the provision of the Exchange Control Act. Here, it is important to state that it was on the first day of trial that amendment was sought by the defendant to add the following paragraph to his defence. It reads as follows: 'The defendant resides and has at all material times resided in the United States'. Mr. Vassel strongly resisted this amendment, but I granted it in the interests of justice, as the uncontradicted evidence now establishes that Mrs. Grant resides in America. But does that disentitle the plaintiff from securing redress in these courts? I think not. Nowhere in the plaintiff's statement of claim is there any reference that the defendant resides abroad nor was there any reliance placed on this fact to establish that the contract was breached. In these circumstances, common law has never denied its remedies to a plaintiff such as this. Of the many authorities I could choose from, I cite Amar Singh v. Kilubya (1964) A.C. 142 where the defendant although a party to an illegal contract for the lease of land was allowed to maintain an action for possession based on his title as a registered owner and there was no necessity for him to rely on the illegal contracts.

Is the defendant permitted to raise the issue of uncertainty of the special provision on the pleadings as they stand?

Mr. Hilton submitted that on the authority of Barbey and another and Izzet and others (1972) 2 All E.R. 800 that he could raise this issue. In the first place, it should be noted that this

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matter was raised in Mr. Hilton's final address and Mr. Vassell rightly objected. Initially, for the matter to be raised the special condition in the contract of sale should have been pleaded in the defence, and that not being done, it could not be fair to the plaintiff that this issue should be answered by the plaintiff. In any event, I would have ruled that the special conditions were not void for uncertainty. It contained a time limit during which time a mortgage must be obtained. It contained a provision for the return of the deposit less cost. While these terms were not as precisely worded as if they were penned by an equity draftsman, they are tolerably clear. Further, the case relied on speaks about subject to the purchaser obtaining a 'satisfactory mortgage' without any attempt to delineate the meaning of satisfactory in the markedly different circumstances of that case. On this issue my decision is for the plaintiff that he is entitled to enforce the contract.

What remedies are available to the plaintiff, as a result of the breach of contract?

Damages are the legal remedy open to the plaintiff but it is trite law that they are inadequate in cases of breach of contract for the sale of land. No evidence has been adduced as to what the quantum of damages ought to be, but the general rule is that the measure would be the loss of a bargain. It would be the difference between the purchase price and the market price at the date of the breach of contract.

The plaintiff asks for damages as an alternative to specific performance and my approach is to see if any difficulties which may arise from the award of such a decree can be avoided and at the same time be in harmony with the Exchange Control Act. After all these courts are about justice and a plaintiff should not leave the doors of the court with an inadequate remedy if he has established his legal or equitable rights.

I was helpfully referred to Section 158(1) of the Registration

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of Titles Act by a brother judge and applied to this case, then

The result would promote the interests of justice. That section reads:

"Court or a Judge
may direct
cancellation, etc.
of certificate, etc.

158(1) -Upon the recovery
of any land, estate or
interest, by any
proceeding at law or
equity, from the person
registered as proprietor
thereof, it shall be
lawful for the court or
a Judge to direct the
Registrar -

(a) to cancel or
correct any certificate
of title or instrument
or any entry or
memorandum in the
Register Book, relating
to such land, estate
or interest; and

(b) to issue, make or
substitute such
certificate of title,
instrument, entry or
memorandum or do such
other act, as the
circumstances of the
case may require,

and the Registrar shall give
effect to that direction."

I take recovery to be used in the legal sense and the plaintiff certainly has an equitable interest in the land once he paid his purchase money and further he is entitled to request that the contract be specifically performed so as to acquire the legal estate as well. But there are two issues to be disposed of before specific performance or the statutory power in the nature of specific performance can be decreed. Firstly the evidence is that the defendant resides abroad and if she refuses to carry out the equitable decree she cannot be punished for contempt, but I can order that the plaintiff's name be substituted for that of the defendant on the Certificate of title and I so order upon terms which I will advert to during the judgment.

There is the other issue of Ministerial consent to 'making a payment to or for the credit of a person resident outside the

scheduled territory but my order is that the full purchase money together with the incidentals of the transaction be paid into court by the plaintiff within six weeks hereof in accordance with the Fourth schedule of the Exchange Control Act paragraph (1) which reads -

"The provisions of Part II of this Act shall apply to sums required to be paid by any judgment or order of any court or by any award as they apply in relation to other sums, and it shall be implied in any judgment or order of any court in the Island, and in any award given under the law of the Island, that any sum required to be paid by the judgment, order or award (whether as a debt, as damages or otherwise) to which the said provisions apply shall not be paid except with the permission of the Minister."

On this basis Ministerial permission will have to be sought to remove it from our shores. The law will be complied with and justice will be achieved.

There is yet another aspect to be considered and that is that permission must be sought with by the purchaser or the vendor for Ministerial permission or exemption pursuant to Sec. 33 of the Exchange Control Act to transfer or convey the property. May I reiterate that the purpose of the provisions of the Exchange Control Act is to manage the currency as part of government's economic policy. It was not intended to restrict the court's power to substitute a plaintiff's name on a title which he recovered in proceedings at law or equity nor to alter enforceable rights entrenched in the Registration of Titles Act. The order which I propose therefore should include provisions that \$30,000 together with the incidental payments which are the purchasers costs to be paid into court by the plaintiff within six weeks hereof. Myers, Fletcher & Gordon the defendant's Attorneys-at-law to have the Carriage of sale and the necessary expenses of the sale to be paid from \$3,500 deposited with Eric Frater, Attorney-at-law. Mr. Frater is to pay over this sum within four weeks hereof. Also the transfer tax to be paid from this sum and if insufficient from the purchase money in court on a plication to the Registrar. Additionally the Registrar of the Supreme Court is to inform the Registrar of

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Titles as to my directions that the plaintiff's name be substituted on the title when the Registrar of this court is satisfied that the orders have been complied with. Further, that the Registrar of the Supreme Court is to inform the Bank of Jamaica of the payment into court of the purchase money for Mrs. Grant pursuant to the Exchange Control Act. The plaintiff is to have his costs, which are to be agreed or taxed.