JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 17/92

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	WOODROW LIMITED	PLAINTIFF/APPELLANT
AND	URBAN DEVELOPMENT CORPORATION	DEFENDANT/RESPONDENT

R. B. Manderson-Jones for the appellant

Anthony Pearson for the respondent

May 11 and June 2, 1992

ROWE, P.:

At the conclusion of the arguments we dismissed the appeal and, as promised, we now deliver our written reasons therefor.

Patterson, J. in a considered judgment, with which I entirely agree, refused to grant any of the eight declarations sought by the appellant in Originating Summons filed on December 13, 1991. The respondent in its capacity as a developer of real property entered into a written contract with the appellant to sell to the appellant a strata lot number 11 in a development known as "The Point" situated at Negril, Westmoreland. Then and now the appellant had its registered office at 68 Mexborough Street, Leeds, England.

Under the written contract the respondent covenanted to erect the strata unit and attendant communal amenities as shown in the Plans and Specifications seen and approved by the respondent - clause 4(a). It was mutually agreed that on the occurrence of certain eventualities there could be price variations and that these, when ascertained, would be added to the

original price and be payable by the appellant - clause 5(a)(i). Upon completion of the construction, the appellant was notified by letter of September 16, 1991, of the amount of the escalation. A dispute arose as to the interpretation of several clauses of the contract culminating in the Originating Summons of December 13, 1991.

The first declaration sought was that the purchase price of the Unit D 11 was J$335,960.00 payable in pounds sterling of the United Kingdom at the rate of exchange prevailing at the date of payment or in Jamaican dollars.

Clause 2 of the contract under the rubric "Purchase Price" provides:

> "Subject to the provisions of paragraph 5(a) hereof the purchase price of the Unit shall be £37,000.00 (J$335,960) payable by the Purchaser to the Vendor in the manner prescribed hereunder:
>
> (a) A deposit of 20% shall be payable on the execution hereof £7,400.00.
>
> (b) The Purchaser shall pay half costs of preparing, stamping and registering the Transfer and issuing the Title as per the Bar Association Scale of Fees £331.00.
>
> (c) The Purchaser's costs of preparing this Agreement is fixed and agreed at £25.00.
>
> (d) The Purchaser shall pay a further 20% of the purchase price being £7,400.00 within six (6) months after execution hereof.
>
> (e) The Purchaser shall pay a further 10% being £3,700.00 within 12 months after execution hereof.
>
> (f) The balance of the purchase price shall become due and payable on the date of delivery of possession of the Unit by the Purchaser inclusive of escalation, if any, determined as at the date of completion."

Mr. Manderson-Jones challenged the finding of Patterson, J. that the Jamaican dollar figure J$335,960.00 which appears in parenthesis in clause 2 can be regarded as surplusage as the context in which it appears clearly shows that it was not essential to the agreed price or the denominated currency of the

contract. He urged us to say that the figure in parenthesis had to be given some meaning as they cannot be ignored altogether and he relied upon the dictum of Lord Russell of Killowen in Feist and Societe Intercommunale Belge D'Electricite P.C. 1934 A.C. 161 at 173, when in reference to words denoting the "gold clause", the noble and learned Lord said:

> "I therefore ask myself this question. If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it."

It seems to me that at the date of the contract the Jamaican dollar figure was used to set the price in sterling. But beyond a peradventure the price demanded was in pounds sterling and the unit of payment was denominated in pounds sterling. As the Exchange Control Act then stood, it was beneficial to the Vendor as developers to stipulate for hard currency and it was beneficial to the Purchaser to pay in pounds sterling which it could repatriate if and when the property was sold. On any reading of clause 2 it becomes obvious that the total purchase price as well as the periodic instalments were to be paid in pounds sterling. It would be a re-writing of the Purchase Price Clause to insert in clause 2(a) - 2(c) Jamaican dollar figures as the alternative form of payment and this the Court cannot do.

If Mr. Manderson-Jones is right then the Purchaser could have borrowed from a bank in Jamaica the amount of J$335,960.00 and tendered that sum in full payment of the purchase price. However, the purchaser would have to tender pounds sterling to cover the minor sums referred to in clause 2(b) and 2(c). This construction would, in my view, make nonsense of the Purchase Price Clause and would have the effect of substituting a subordinate term for the dominant provision in the contract.

In clause 5(a) the parties made provision for variations in the purchase price. They said:

> "It is hereby mutually agreed by and between the parties hereto as follows:
>
> (a)(i) That the price more particularly set out in paragraph (2) herein shall be subject to variations at any time during the construction of each Unit if the cost of construction of such Unit is increased to the Vendor after the date hereof as a result of increases in the price of materials or equipment, increases in wages or related labour payments or benefits or in taxes included in the cost of construction including also increases resulting from the fluctuation in the value of the Jamaican Dollar, then such variations shall form an addition to the said price and shall be paid by the Purchaser to the Vendor on production by the Vendor of a Certificate from the Quantity Surveyor or Architect of the additional amount, such Certificate to be conclusive as to the same.
>
> (ii) The Purchaser shall be entitled to notice of a period of not less than thirty (30) days before which any increases due to any of the causes mentioned in paragraph 5(a)(i) become due and payable."

My first comment in relation to this provision is that it was present to the minds of the parties that the Jamaican dollar was unstable and could fluctuate in value at any time. This was a powerful reason for the Vendor to set the purchase price in pounds sterling so as to minimise any risk of currency depreciation during the construction period.

Berkeley and Spence, Chartered Quantity Surveyors, by their letter of September 5, 1991, certified as follows:

> "Re: Point Condominiums - Negril
> <u>Escalation on Apartment No. D11</u>
>
> Having ascertained the construction and related final costs of the Point Apartment Complex, we now certify that the escalation costs attributable to the above Apartment is £12107.76."

The appellant through its Attorney-at-law informed the Court during argument that it had sought from the respondent an itemized statement of the increases but none was supplied. Mr. Manderson-Jones challenged the validity of the Certificate of the Quantity Surveyor on the ground that it could only be conclusive if it was calculated in accordance with the provisions of clause 5(a) of the contract and there was nothing to indicate how the calculation was made. To be conclusive, he submitted, the Certificate must show;

(a) Original construction cost of the unit.

(b) Final construction cost of the unit.

(c) The period of construction of the unit.

(d) Increases, if any, in the prices of materials, equipment, wages or related labour payments or benefits, taxes, and increases resulting from the fluctuation of the value of the Jamaican dollar which occurred during the period of construction of the said unit.

(e) The rate of exchange used to convert Jamaican dollars into pounds sterling.

In Jones v. Sherwood Computer Services plc (1992) 2 All E.R. 170, it was held that where the parties to a contract expressly agreed that certain matters arising in relation to a contract were to be determined by an independent expert whose determination has to be "conclusive and final and binding for all purposes," then in the absence of fraud or collusion the expert's determination could only be challenged on the ground of mistake if it was clear from the evidence (including the determination, the terms of the contract and the letter of instruction) that the expert had departed from his instructions in a material respect. Mr. Manderson-Jones sought to say that in the instant case the Quantity Surveyor exceeded his instructions in that he made his valuation on the completion of the entire project rather than on the completion of Unit D 11, that he took into consideration the overall cost of the Point complex in order to determine the escalation costs attributable to

Unit D 11 and that he calculated the escalation cost in pounds sterling.

The affidavit upon which the appellant relied did not make any allegation of mistake or fraud or collusion. The complaint was that neither the statement of account nor the Quantity Surveyor's Certificate provided any indication of escalation costs in Jamaican currency or any documentation in support of the claim for escalation costs. This unit was sold on the basis that it was subject to the provisions of the Registration (Strata Titles) Act, Regulations made thereunder, and a host of special conditions relevant to the maintenance of the unit as part of a strata complex. It is inconceivable that the Unit D 11 could be constructed in its entirety independent of other portions of the building comprised in the strata complex and that the cost of the unit could be divorced from the common areas which provide access and regress to and from the said unit.

Patterson, J. held that "the increase in price would have been incurred in Jamaican dollars since the building is situated in Jamaica." It is possible that the learned trial judge based this finding on paragraph 6 of the affidavit of David Sykes which was filed in support of the summons for the declarations. That paragraph reads:

> "The construction was carried out in Jamaica under a building contract which I verily believe was denominated in Jamaican currency and I also believe that the certificates of payments and the final accounts of the contract are in Jamaican currency."

Nowhere did the deponent identify the source of his information and the grounds for his belief, a non-compliance with the provisions of section 408 of the Judicature (Civil Procedure Code) Law. This paragraph of the affidavit was quite worthless to prove any of the matters stated therein. See Pathe Freras Cinema Ltd. v. United Electric Theatres Ltd. (1914) 3 K.B. 1253; and Re J. L. Young Manufacturing Ltd. (1900) 2 Ch. 753; Lumley v. Osborne (1901) 1 K.B. 532.

I have already held that the parties stipulated and intended that the purchase price and any escalation thereof should be denominated in pounds sterling. Consequently the strictures upon the conduct of the Quantity Surveyor for certifying in pounds sterling the amount of escalation is unmeritorious.

The parties in making their contract did not stipulate for an itemized account of the escalation referred to in clause 5(a)(i) and the Quantity Surveyor did not provide any. Can the appellant challenge the validity of this Certificate? Lord Denning M.R. in Campbell v. Edwards (1976) 1 All E.R. 785 at 788 expressed the applicable rule of law thus:

> "It is simply the law of contract. If two persons agree that the price of the property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he had made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."

Dillon L.J. explained the distinction between speaking and non-speaking Certificates in Jones v. Sherwood Computer Service plc (supra). He said:

> "Even speaking valuations, may say much or little; they may be voluble or taciturn if not wholly dumb. The real question is whether it is possible to say from all the evidence which is properly before the Court (and not only from the valuation or certificate itself) what the valuer or certifier has done and why he has done it. The less evidence there is available, the more difficult it will be for a party to mount a challenge to the certificate. This may lead of course to questions such as whether it is proper to join the certifier as a defendant in proceedings for the purpose of getting discovery from him... and whether it is proper to administer interrogatories to the certifier to discover his reasons."

There is a paucity of evidence in this case and questions such as joining the Quantity Surveyors as defendants or administory interrogatories raised by Dillon L.J. in the passage cited above do not arise. In my opinion there is no basis upon which

the appellant can challenge this Certificate on the ground of mistake or departure from instructions and the declaration sought was properly rejected.

In clause 3 of the Sale Agreement the Purchaser covenanted, inter alia, to pay to the Vendor an advance to cover operational costs of the Strata Corporation. The respondent submitted, quite rightly, that the "Other Charges" amounting to £1701.91, fall within that clause and became payable no less than thirty days before the estimated date of completion of the said unit. No declaration that this sum was not due under the contract could be granted.

A final point argued by Mr. Manderson-Jones concerned the rate of interest payable by the Purchaser on overdue purchase money. Clause 3(b) and (c) provide for the payment of interest at the rate of 1% "above the prime rate charged by Commercial Banking Institutions." Clause 5(a) is to the same effect. Patterson, J. although holding that "the contract is denominated in pounds sterling, and I am of the view that the parties intended the rate of interest to be 1% above the prime rate charged by the Commercial Banks in England, the place that payments were intended to be made from and that interest is payable in pounds sterling calculated on unpaid balances as provided for in clause 3(c) and 5(a)" did not go on to make any declaration. I entirely agree with Patterson, J. that the rate of 34% interest per annum demanded by the respondent is not payable under the contract and that the correct rate of interest is 1% above the prime rate for Commercial Banks in England on the date of payment of the balance of the purchase price and other charges.

For these reasons I concurred in the decision that the appeal be dismissed with costs to the respondent to be agreed or taxed.

DOWNER, J.A.:

I agree.

MORGAN, J.A.:

I agree.