IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W100/98

BETWEEN	BOYSIE WOOLCOCK	PLAINTIFF
A N D	WILLIAM HOGG	DEFENDANT

Carlton Williams instructed by Williams McKoy and Palmer for the plaintiff.

Raphael Codlin and Miss S. Morris instructed by Raphael Codlin and Co. for the defendant.

Heard: 1st, 2nd, 3rd July 2002 and 26th July, 2002

Williams J. (Ag.)

The plaintiff and the defendant are two elderly gentlemen, the latter seemingly the older of the two.

At one time they enjoyed a good relationship and the plaintiff agreed to purchase and the defendant agreed to sell a lot of land described as lot 35 Pitkelleney in the parish of Westmoreland in June 1986. There is no dispute about this initial agreement. It is however

what followed on this agreement about the acquisition of the other lots that eventually led to a deterioration in their relationship and to this matter being before the Court.

In April of 1998 the plaintiff issued a writ of summons claiming damages for breach of contract partly in writing and part performance of sale of land by the defendant to the plaintiff.

The plaintiff's claim against the defendant as finally settled in an amended statement of claim is inter alia as follows:-

1) Specific performance of the contract for sale Of premises known as lot 80 part of Pitkelleney in the parish of Westmoreland of alternatively.

2) That there being a total failure of consideration The plaintiff be refunded the sum of $1;064,000.00 paid for the purchase of the said lot 80 with interest thereon. Damages for breach of contract.

The defendant counter claims that there was an inordinate delay by the plaintiff in completing the purchase and as a result he was subjected to great inconvenience trouble and expense and suffered loss damages. He is seeking damages for delayed completion.

In June 1986, the plaintiff paid a deposit of $5,000.00 towards the initial agreement to purchase lot 35 and alleged the agreed

purchase price was Eighteen Thousand Dollars exclusive of costs. After discussions, final cost was agreed at Thirty Thousand Dollas which was duly paid and a receipt issued. However the plaintiff has since mislaid this receipt.

Subsequently there were discussions about the purchase of another lot – lot no 104 which the plaintiff stated he was told would cost $40,000.00 plus cost and expenses. The receipt he was issued upon payment of this amount was duly exhibited.

In evidence the defendant claimed there was an error on the receipt which should have said the payment was to be in united States dollars and not in Jamaican dollars as the receipt clearly stated. He also said under oath the actual price was US$50,000.00.

Although in his pleadings in his defence he acknowledged receipt of a sum of $70,000.00 in two (2) installments towards the purchase price for lot 104 in exchange for lot 35, under oath he categorically denied receiving this money for this reason.

He agrees that he received $40,000.00 as an advance payment on lot 104.

There was a sale agreement drafted and agreed once again exhibiting the sale price clearly as JA$40,000.00.

The plaintiff was put in possession and sometimes after he claimed: he was offered lot 80 in exchange for 35 as lot 80 was directly adjacent to lot 104 where he had began to do some construction. This lot 80 was bigger than lot 35 so it was agreed that he would pay an additional amount for the difference in acreage.

The defendant denied that any such agreement took place. He contended the exchange involved lot 35 for lot 104. He also stated under oath that he never saw the plaintiff for sometime after that and the purchase of lot 104 was never properly completed.

The plaintiff however, claimed that he was put in possession of lot 80 which he cleared, had trees planted on it, spread marl and top soil on it, and built a shed and dry pack wall on it. He was placed on the tax roll for it and proceeded to pay the relevant taxes.

He further claimed that in 1991 after continuous request for the title for his lots he was given a diagram which had his lots 80 an 104 clearly outlined. He said the defendant gave him with clear instructions to take care of it. This diagram was exhibited.

The defendant denied giving him any diagram and maintained there was no agreement involving lot 80.

Finally, in 1997, the plaintiff stated he was told the titles were ready and the final cost was One Million, One Hundred and Thirty-six Thousand Dollars being the balance on lot 104 and the remainder for lot 80. The plaintiff said he expressed his inability to pay this amount and was encouraged by the defendant to sell part of lot 80 to assist in paying for it.

An interested purchaser is Mrs. Claudette Yvonne Peters was found and she entered into an agreement with the plaintiff and paid him One Million, Seven Hundred Dollars for it. She commenced building on the land but was forced to stop when the defendant visited the property and spoke to her workmen.

The plaintiff exhibited a receipt which he claimed was issued to him upon his paying the balance required to cover the costs for lot 140 and purchase price for lot 80.

He however contended the receipt reflected the entire amounts he had paid to the defendant, One Million One Hundred and Seventy-five Thousand Dollars.

The defendant challenged this evidence of the plaintiff. He insisted there was no agreement about lot 80 and he was never fully paid for lot 104. The receipt was issued to "help his friend" because

of the problems he faced when Mrs. Parsons confronted him about selling lands she had learned he did not own. The defendant further stated that the plaintiff had asked him to make the receipt with lot 80 on it because he plaintiff was going "to bring money to pay for it".

The plaintiff expressed surprise at the fact that the defendant had informed Mrs. Parsons that there had been no agreement concerning the sale of lot 80. He was forced to pay back to Mrs. Parsons the money he had received from her and he claimed to have learnt subsequently that the defendant sold her the land.

Mrs. Parsons gave evidence on behalf of the defence and admits to purchasing the land from the defendant after he claimed the plaintiff could not sell her as he had no interest in it. She gave evidence of a meeting between the two gentlemen and herself which was confusing and where anyone seemed to have been angry. She claimed the plaintiff insisted there was an agreement about his purchasing the lots 104 and 80 which the defendant flatly denied. Eventually the plaintiff she claimed expressed no further interest in lot 80 and handed her a cheque of US$30,000.00 which she gave to the defendant. The understanding arrived at was that she would purchase the property, she was issued a receipt. Subsequently the

plaintiff repaid her the remaining amount on what she had paid him which she delivered to the defendant to complete her payment for the portion of lot 80.

As a result of his failure to complete the sale to him of lot 80, the plaintiff contended he spoke to the defendant with a view to getting back his money. He was eventually given a cheque for $182,000.00 with a promise by the defendant to look into the matter.

It is significant to note that in his evidence the defendant denied receiving any further sums for payment towards lot 104. In his defence as pleaded, he acknowledged receiving from the plaintiff the sum of One Million, One Hundred Thousand Dollars ~~being the~~ balance of the purchase price for lot 104 and indeed the basis of his counter claim was for delayed completion of the purchase of lot 104. Under oath the defendant now sought to deny ever receiving the money and tried to explain away the receipt as being just done to "help out his friend" who was facing "trouble" for attempting to sell what was not his to sell. In his submission for the defence Mr. Codlin did not rely on or aver to much of the defence as pleaded. He instead sought to rely on sec. 4 of the Statute of Fraud there being no contract or memorandum in writing but an alleged oral agreement

which is unenforceable as same does not satisfy the requirement of the relevant statute.

Further he submitted the three receipts tendered as proof of payment in relation to transaction between the parties although no objection had been taken to their being tendered into evidence, they however cannot be used as evidence as they were not stamped. He urged the court to consider the application of sec 36 of the Stamp Duty Act which states:

"No instrument not duly stamped according to law shall be admitted in evidence as valid or effectual in any court or proceedings for the enforcement thereof".

He contended the relevant stamp duty under the Transfer Tax Act had not been paid and this was a penal provision which cannot be contracted out of. He suggested while it could be admitted to show it was made, a receipt not duly stamped cannot be admitted to prove what it contains to be valid. He referred to the case of Barrington Price vs. Kavanagh Investment Ltd., Suit No. E 042 of 1993.

He went on to state that there being no writing to prove any contract for sale of land the plaintiff would only seek to rely on acts

of part performance which he contended must be specifically pleaded and proved and neither had been done here.

Mr. Codlin then went on to submit that in any event sec. 5 of the Local Improvement Act had not been complied with. This relevant section provides as follows:

> 5(1) Every person shall before laying out or subdividing land for the purpose of building thereon, or for sale, deposit with the Council a map of such land; . . .

In the instant case he submitted the evidence of Mr. Hogg was that no map had in fact been submitted prior to the writing of any receipt. This failure makes any purported contract void. He relied on the case of Watkis v. Roblin (1964) 8 JCR 444 where Douglas J stated:

> "In my view the Local improvements Law goes to the formation of the contract and not only its performance and therefore, so far as the question of legality goes, a contract made in breach of its provisions is illegal and void".

Mr. Codlin urged that the fact that a title was exhibited was not conclusive proof that all that should be done was in fact done in compliance with the Law. He reminded the court of the massive fraud that has been unearthed at the Titles Office which must call into question all Titles issued therefrom.

On the issue of special damages as claimed by the plaintiff he submitted the claim for the amount expended on lots 80 and 35 for bushing and clearing over the years the lots were in possession of the plaintiff was not recoverable as there was no evidence as to how the figure of One Million and Five Thousand Dollars had actually been arrived at.

Mr. Williams on behalf of the plaintiff submitted firstly that as regarded the damage, this is a matter within the discretion of the Court and where litigants have difficulty in proving their losses by way of itemising each ingredient the court has a residual discretion to allow the damages.

He went on to submit that the provisions of sec. 36 of the Stamp Duty Act, cannot apply to the case as the receipts were not being admitted as valid or effectual for enforcement thereof. He pointed out that the documents in the case of Price v. Kavanagh are different from those referred to in this instant case. The plaintiff was not relying on an agreement of sale which would have to be stamped but the receipts before the court was to show there was an agreement concerning lot 35 and lot 80. He contended the receipts for the purchase price for land could qualify as a sufficient memorandum in

writing and given that there was part performance, this would satisfy the Statute of Fraud.

He pointed out that the defendant had not in fact pleaded the Statute of Fraud and ought not to be able to rely on it.

He referred to the case Roma Faulknor v. Pearjohn Investments Suit C.L. F097/94.

The plaintiff he submitted relied on the issue of part performance which he submitted was in fact pleaded. The evidence led to support there being part performance was the evidence that that the plaintiff had paid money towards lot 80 in the exchange for the lot 35 for lot 80. The plaintiff had built a part wall, fenced part of the lot, built a shed on it. The evidence led suggested the lot was like a wilderness and the plaintiff had cleared it. Mr. Williams referred to Steadman v. Steadman 1994 2 ALL E.R. 977 which he submitted had facts similar to this case. He urged the court to disregard the question of the Local Improvement Act as in this case. Title had already been obtained by the defendant when final payment on lot 80 and the balance on lot 104 was being made.

Mr. Williams urged the court to consider the fact that the pleadings of the defendant which had assisted the plaintiff's case was

categorically denied by the defendant under oath. He pointed out that much of what had been said by Mr. Hogg and Mrs. Parsons had not been put to Mr. Woolcock and finally urged the court to find Wooolcock's evidence as true and credible on a balance of probability.

In response Mr. Codlin submitted that the case of Steadman v. Steadman was of limited assistance as the facts in that case made it not applicable to instant case.

Further he stressed the Privy Council's decision of Eldermire vs. Honiball 40 WIR 278 established that the Statute of Fraud need not be pleaded.

Finding

The evidence of the plaintiff and the defendant was so diametrically opposed on the crucial issues it is perhaps best to first make a determination as to the credibility of the witnesses.

It is most significant that the defendant under oath spoke of things he had not pleaded and denied things he had. Mr. Codlin was mindful that one is bound by their pleading and did not rely on their defence as pleaded and raised in his submissions mattes which had not been pleaded.

The defendant did not impress the court as a reliable or credible witness. It is true that he is obviously getting on in years but he maintained he has a good long term memory. His blatant denial of matters to which he had pleaded five (5) years ago, his demeanour in the witness box combined to make the defendant come across as a man who ought not to be presume believed.

The plaintiff, on the other hand impressed as more believable and forthright. However, in so far as his evidence about his knowledge of the sale of lot 80 to the 3rd party is concerned, I believe that this was not something clandestinely done. I accept the evidence of Mrs. Parsons in this regard that the plaintiff was aware that the defendant had decided to deal with her directly in effecting the sale of the lot.

I find that the plaintiff's evidence is credible and on the balance of probability accept his account of the transactions between himself and the defendant.

I believe he had completed payment for lot 35 and had made agreement to exchange lot 80 for it. I believe he had paid One Million, One Hundred Dollars to settle amounts outstanding on lots 104 and for lot 80.

Although there is no pleading on the part of the defence as to the reliance or the Statute of Fraud, the way the case has been conducted on behalf of both parties I am constrained to deal with this aspect.. Mr. Codlin had submitted that the ruling in the Privy Council decision of Eldemire vs. Honiball 40 WIR 278 now made is unnecessary to plead the Statute of Fraud. However what was held in that case was as follows:

> Where a case proceeds as of one party had pleaded the Statute of Fraud and as if the other party had pleaded acts of part performance of a contract for the sale of the land (although neither plea had been expressly pleaded), the party seeking to assert the Statute of Fraud could not rely on the failure of the other party to plead part performance.

This decision therefore does not appear to remove the requirement of one specifically pleading the Statute of Fraud if one sought to rely on it in . . . but gave one instance where failure to plead would not affect the party adversely.

Having accepted that there was a verbal agreement, it is recognized that this is unenforceable as not having complied with the formalities as required by section 4 of the Statute of Fraud. This section provides:

"No action may be brought upon any contract for

> or the disposition of land or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be change or by some other person".

It is well established that where there is existence of an oral contract followed by acts of part performance equity will exclude the operation of the Statute of Fraud. In a decision of the Jamaican Court of Appeal – Arthur George McCooke others vs. Holden Hammond and Ronald Brown Appeal re 1987 Downer J.A. expressed it thus:

> "Equity permits part performance to be a substitute for a written note a memorandum if the acts of part performance are only intelligible if there was some prior agreement".

The principles relating to part performance were also considered in Steadman vs. Steadman 1976 ALL E.R. 536 in which Lord Reed stated:

> "I am aware that it has often been said that that the acts relied on must necessarily or unequivocally indicate the existence of a contract. It may well be that we should consider whether any prudent reasonable man would have done those acts if there had not been a contract but many people are neither prudent or reasonable and they might often spend money or prejudice their position not in reliance on a contract but in the optimistic expectation that a contract would follow: . . . . . In my view unless the law is to be divorced from reason and principle the rule must be that you take the whole

> circumstances leaving aside evidence about the oral contract and see whether it is proved that the acts relied on were done in reliance on a contract, that will be proved if it is shown to be more probable than not".

The plaintiff in this case pleaded at paragraph 10:

> "That the plaintiff commenced paying taxes for lot 80 as he was put in possession of the lot, was partly fenced by him and a shed built thereon".

In evidence he went on to explain that he had also cleared the land and built up the land with the defendant's assistance in preparation for building on it.

The defendant in evidence does admit that he had given the plaintiff permission to build a shed on it and to make a garden on it while he was building on lot 104.

The plaintiff also had claimed to be relying on this agreement and was acting with the consent of the defendant when he attempted to sell part of the property to Mrs. Parsons

Another act the plaintiff relied on as establishing part performance was the fact that he had completed payment on lot 35 which was to be exchanged for lot 80.

These acts I find to be sufficient acts of part performance which are unequivocal and referable to and provide proof of the oral

agreement alleged by the plaintiff in respect to the sale of lot 80 to him.

In addition the plaintiff also sought to rely on the receipts as constituting sufficient memorandum in writing which could provide proof of the verbal contract for sale of land in compliance with the Statute of Fraud. The receipts I find to be admissible for that purpose and the provisions of sec 36 of the Stamp Duty Act was not a bar to their being considered as evidence of the oral agreement. In particular **Exhibit 111** the receipts dated February 27, 1997 constituted a sufficient memorandum in writing for the following reasons:

a) It identified the parties to the agreement namely Mr. Boysie Woolcock and W. Hogg.
b) The subject matter of the agreement is adequately described i.e. lot 104 and 80.

c) The purchase price is given although One Million, One Hundred and Seventy-five Dollars is the total amount, it is broken down as less $36,000.00 cost and transfer. Balance $1,100,360.00 on 80 re lot 104 and 80.

d) The receipt is clearly signed by Mr. Hogg as vendor .

I find that from the evidence of the plaintiff there was an apparent mistake as to the figures on the receipt and was satisfied with his explanation.

Finally, I now consider the submission of Mr. Codlin that if there was an agreement amounting to a contract it must fail as unenforceable given that there was no compliance with the locl Improvement Act.

Certainly this position would have been true up until 1968 when the Local Improvement Act was amended by what is now sec. 13 (1) which provides:-

> "The validity of any sub-division contract shall not be affected by reason only of failure prior to making of such contract, to comply with any requirement of subsections (1) (2) and (3) of section 5 or to obtain any sanction of the Council under section 8 or section 9, as the case may be, but such contract shall not be executed by the transfer or conveyance of such land concerned unless and until the sanction of Council hereinbefore referred to has been obtained".

Sec. 5 (1) is the section which Mr. Codlin urges has not been complied with. The effect of the amendment was to validate such contracts entered into in breach of the Act.

The Court of Appeal in Garnett Palmer vs. Prince and Etta Golding SCCA 46 of 1998 considered the effect of this amendment.

It reviewed cases which had dealt with the principles of subdivision involving the Act.

The case of Albert Fernando Rose and Wilbert Charles Hanchard v Patrick Wilkinson Chung and Patrick City Ltd., [1978] 16 JLR 141 was recognized by Downer J as giving the legislative history of section 9A now section 13A of the Act.

The Court in Palmer v. Gokling expressly reiterated the fact that where formally failure to obtain the sanction of the council and to do other acts referred to in subsections (2) and (3) of section 5 prior to entering into contractual arrangements for the sale of lands rendered such contracts illegal and void, section 13 of the act validates such omissions.

Mr. Codlin appeared for the successful appellant in Palmer vs Prince and Etta Golding making it a bit curious that he should be urging this court to arrive at a decision relying on the earlier case of Watkins v. Rublin

Judgment

I therefore give judgment for the plaintiff on his claim and on the counterclaim.

In these circumstances I find an order for specific performance would not be appropriate given that the property has been sold to a third party with the plaintiff's knowledge.

It is therefore ordered that there being a total failure of consideration, the plaintiff be refunded the sum of One Million and Sixty-four Thousand Dollars ($1,064,000.00) paid for the purchase of the said lot 80.

The plaintiff claim interest on this sum but failed to make any submissions to assist the court as to the rate of interest to be awarded.

This agreement for sale of land is clearly to be regarded as a commercial case.

In determining the rate of interest the Court of Appeal in British Caribbean Insurance Company Ltd v. Delbert Perrier SCCA No. 114/94 delivered on the 20th of May 1996 laid down the guidelines to be followed. At page 16 Carey J states:

> "I do not think that it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld. . . . . If restitutio in integrum is the rationale for the award of interest then the rate at which a plaintiff can borrow money must be the rate to be set by the Judge in his award. In civil cases, the object of the entire process is to restore the aggrieved party,

> the plaintiff to the position he occupied before the wrong".

Having outlined the principle involved Carey J went on to state at page 19:

> " The judge, in my view should be provided with evidence to enable him to make that realistic award".

He concluded –

> . . . "In summary, the position stands thus:
>
> (i) awards should include an order for the defendant to pay interest.
>
> (ii) the rate should be that in which the plaintiff would have had to borrow money in place of the money withheld by the defendant
>
> and
>
> (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed".

Mr. Williams for the plaintiff made no submission on the matter of interest.

However, in the bundle of agreed exhibits there was exhibited a promissory note dated July 27, 1997. The plaintiff had given evidence that he was forced to seek a loan to repay the third party Mrs. Parsons after the defendant had denied any agreement to sell

him the land. The interest rate revealed in that document was 34. 232 per year. I will use this figure as a guide and award an interest rate of 35% per annum to the date of judgment.

In relation to damages Mr. Williams indicated that he could not be of assistance to the Court under this heading. I am satisfied that the amount paid for lot 35 which was to be exchanged for lot 80 is recoverable as special damages proved and make that award.

However, I have to agree with Mr. Codlin that the amount claimed as having been expended on lots 35 and 80 for bushing and clearing over the years of $1,500,000 cannot be awarded in the absence of specific proof.

In conclusion therefore, it is judgment for the plaintiff on the claim and counterclaim.

The plaintiff to recover from the defendant:

(1) The sum of [$1,064,000.00] One Million and Sixty-four Thousand Dollars with interest at 35% per annum from February 27th, 1997 to July 26, 2002

(2) Special damages at Thirty-five Thousand Dollars ($35,000.00 with interest at 35% per annum from February 27, 1997 to July 26, 2002.

(3) Costs to be taxed if not agreed.