IN THE SUPREME COURT OF JUDICATURE

IN EQUITY

SUIT NO. E. 151/1982

BETWEEN	DELROY ZAIDIE	PLAINTIFF
A N D	CRICHTON QUARRY LIMITED	DEFENDANT

Clinton Hines and Elizabeth Hines for the Plaintiff
Gordon Robinson for the Defendant

Heard: March 7, May 2 and May 17, 1985

JUDGMENT

DOWNER J.

THE ISSUES

The clue to understanding this case is to appreciate that the principal issue to be determined is whether the oral agreement between Delroy Zaidie, a Businessman of Montego Bay and Crichton Quarry Limited of those parts agreed to a Contract in May 1979, creating rights and liabilities between parties was still alive on the 22nd July, 1982 when the Plaintiff invoked the jurisdiction of the Supreme Court to determine whether he is entitled to specific performance to have the Registered Title of two plots of land at Worcester in Saint James delivered up to him. The conflict has arisen because during the late 70's the expectations of businessmen were pessimistic because profits were low and the future perceived to be bleak. Crichton Quarry Limited was willing to dispose of their realty, the bulldozer and Stone

Crushing Plant at low prices. Delroy Zaidie was willing to purchase and he was a friend of Athol Crichton, the dominant figure of Crichton Quarry Limited. Although Delroy Zaidie acquired the realty and chattels he took off to Miami and left his wife and Attorney Francis Tulloch to manage his business. He also left some EIGHTY THOUSAND DOLLARS ($80,000) unpaid under the terms of the Contract. When he returned in April 1982, he wanted to secure the titles to the land but optimism had returned prices had increased enormously and Athol Crichton was dead. Crichton Quarry Limited said that the oral agreement was terminated. Delroy Zaidie on the other hand, insisted that the rights he had acquired under the agreement were / enforceable in a Court of Law. These were valuable rights because incorporated in the Contract was a Stone Crushing Plant which Crichton Quarry Limited had sold and if the Plaintiff is correct, he is entitled to the value of the machine together with damages to be assessed for wrongful sale of this chattel.

THE FORMATION OF THE ORAL CONTRACT

Both parties roughly agree that there was a parol agreement for the sale of Lots 11 & 12A at Worcester, John's Hall for THIRTY THOUSAND DOLLARS ($30,000), a bulldozer for SIXTY THOUSAND DOLLARS ($60,000) and a Stone Crushing Plant for SIXTY THOUSAND DOLLARS ($60,000). It is instructive therefore to advert to the evidence of Alva Smith, a Director of Crichton Quarry Limited. He was present at the discussions which resulted

in the agreement. He described it as a 'gentleman's' agreement and it is for this Court to determine its scope and effect. So far as payments were concerned, Alva Smith tells us that the Defendant was paid SEVENTY THOUSAND DOLLARS ($70,000) between May 1979 and May 1980 and those were the relevant payments for these proceedings. There was a further EIGHT THOUSAND DOLLARS ($8,000) he admits receiving in May 1982 which Mr. Zaidie does not recall. Mr. Zaidie disputes that specific prices were attached to the items, yet, under cross-examination he gives figures roughly the same as Mr. Smith. I find that specific figures were discussed, but the concluded Contract was a package deal as Mr. Zaidie asserts and the two receipts he has exhibited bear this out. Both refer to monies paid on account of purchase price of a bulldozer, crushing plant, and lands at Worcester, John's Hall, Saint James.

My ruling is that the oral agreement was a multi-termed Contract. Mr. Zaidie does not recall the EIGHT THOUSAND DOLLARS ($8,000) which Defendants say they received but he claims to have paid TEN THOUSAND FOUR HUNDRED AND TWELVE DOLLARS TWELVE CENTS ($10,412.12) which they have not acknowledged, and I will have to deal with this conflict later.

Pertaining to further details of this oral agreement I place reliance on the Plaintiff's initial Affidavit where he has stated that it was agreed that he should take possession of the bulldozer, stone crushing plant together with the lands, after he

had paid the deposit of THIRTY FIVE THOUSAND DOLLARS ($35,000). This amount was paid in May, 1979 and I accept Mr. Zaidie's evidence on this aspect of the matter. The surrounding circumstances support Mr. Zaidie - he took possession of the bulldozer after repairing it at the Defendant's premises and this is not disputed. Secondly, on July 20, 1979 when SIXTY THOUSAND DOLLARS ($60,000) was paid, the Defendant wrote to the Plaintiff at Montego Engineering Construction Limited to remove the Stone Crushing Machine from their Discovery Bay Plant. They alleged that they were closing that aspect of their business and Mr. Zaidie in return adverted to the difficulties he encountered in finding transport to remove the machine.

While there is agreement up to this point about chattels there is a sharp conflict about the land. Mr. Smith's recollection is that it was agreed that Mr. Zaidie should take up occupancy when the full purchase price was paid. Here, again, the circumstances support Mr. Zaidie's contention. Smith himself confirms that Athol Crichton and Zaidie were friends. It is undisputed that Zaidie had substantial interests in John's Hall Limited and that the Crichton lands adjoined John's Hall Limited quarry lands. Further, at that time Crichton was curtailing their business in block making; while John's Hall Limited was expanding in this area. After possession of the chattels was accorded to Mr. Zaidie their combined value being then over ONE HUNDRED THOUSAND DOLLARS ($100,000) why should he have been

denied occupancy of the realty whose value then was a mere THIRTY THOUSAND DOLLARS ($30,000)? It is against this background that I find that there was an indivisible Contract for chattels and realty for ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150,000). Moreover, contractual rights and liabilities flowed from the agreement which could only be altered by a subsequent contract. And it is settled law that it was not open to either party by unilateral action to repudiate the contract.

WRONGFUL SALE OF THE STONE CRUSHER BY CRICHTON QUARRY LIMITED

Both Counsel refrained from making any submissions as to the right of the parties regarding the Stone Crusher, yet from the outset the Plaintiff claims the declaration "that the Defendant in respect of the above-mentioned Stone Crusher Plant is in breach of the above-mentioned contract and for an order that the matter be remitted to the Registrar of the Supreme Court for Assessment of Damages." Here it is apt to advert to Section 11 of the Sale of Goods Act which states that unless a different intention appears from the terms of the Contract, stipulations in the time of payment are not deemed to be of the essence of a Contract of Sale.

Alva Smith states that Zaidie suddenly left the Island in October, 1980 and could not be found for about two years, he further stated that the Plaintiff was in touch with him in April, 1982 - therefore one and a half years might be a

better approximation. In cross-examination, Zaidie admitted that he was away continuously from Jamaica and that he was in Miami during that period. He confirmed that he made no payments during that time and that he did not get in touch with the Defendant that year. In 1981 Athol Crichton telephoned him while he was in hospital in Miami. Further he stated that Beverley, his wife remained in Jamaica and Alva Smith states that he knows her. Additionally, Alva Smith under cross-examination said that he never enquiried where Delroy Zaidie could be found.

It was in January the Defendant told the Court, that the remainder of the Stone Crusher was sold and the proceeds of TWENTY FIVE THOUSAND DOLLARS ($25,000) credited to Zaidie's Account; that would be nearly one and a half years since the last payment was received in May, 1982. The rights of an unpaid Vendor of chattels against the goods are governed by Section 38 of the Sale of Goods Act, the provision giving him a Lien is stipulated in Section 40 and the Power of Sale is expressly conferred on the following terms:-

> Section 47 (3)- "When the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within the reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of Contract."

It would seem that as it could not be contended that the Stone Crushing Machine was goods of a perishable nature, Crichton Quarry Limited should have given notice to Delroy Zaidie of their intended sale. They knew his wife was in Montego Bay and they

had used 18 Humber Avenue as an address to tell him to take his Stone Crusher in 1978 and both receipts exhibited referred to P.O. Box 1088, Montego Bay.

In those circumstances, I find that Zaidie has established his claim for the declaration under this head and therefore I remit this aspect to the Registrar of the Supreme Court to determine the value of the Crusher at the time of sale and for Assessment of Damages if this is established. This is in substance the combined effect of declarations (b) and (c) of the Summons.

THE FAILURE TO ARRIVE AT A WRITTEN AGREEMENT

Alva Smith reports that the Plaintiff communicated with him and asked that a new agreement be negotiated. Delroy Zaidie on the other hand, states that he merely asked that the oral agreement be reduced to writing. On balance, I preferred Mr. Zaidie's account as to the intention of the parties, because Alva Smith admitted in cross-examination that he wanted the agreement reduced to writing. Also to my mind this is why he stressed that the oral contract was a 'gentleman's' agreement, as he did not envisage that the legal consequences which followed from a written contract could be attached to an oral one. There is yet another aspect of the matter that reinforces my finding that the parties attempted to reduce the oral agreement to writing. The first letter of Nation and Company speaks of a formal Contract for EIGHTY THOUSAND DOLLARS ($80,000) for the bulldozer and land which was to be indivisible, significantly omitted, was the Stone Crushing Machine, but the figure of EIGHTY THOUSAND DOLLARS ($80,000) was the amount owing on both Smith's and Zaidie's computation when the letter of Nation and Company was drafted.

Francis Tulloch and Company was quick to pick up the point and raised the question of the SEVENTY THOUSAND DOLLARS ($70,000) already paid on the Contract and pointed to the

sale of the Stone Crusher without notice. They further adverted to the fact that they would be in agreement to pay EIGHTY THOUSAND DOLLARS ($80,000) to complete the Contract which supports Mr. Zaidie's contention in cross-examination that he was just concerned to pay EIGHTY THOUSAND DOLLARS ($80,000) to complete the original agreement.

Nation and Company were now half apologetic and now admitted that monies paid under the oral agreement would be credited to Zaidie as well as the proceeds of the sale of the Stone Crusher, but no amount was mentioned as to the proceeds of that sale in the letter of May 18 and that letter added nothing to the legal or factual situation. Battle lines were now drawn and the letter of 12th June from Nation and Company laconically stated that Crichton Quarry Limited were no longer prepared to proceed with the sale. The accidents of litigation are as interesting as the accidents of history and the consequences just as serious for the parties concerned. In a letter dated 7th July Tulloch and Company who had then become Tulloch, Morgan and White indicated that they enclosed the cheque for TEN THOUSAND FOUR HUNDRED AND TWELVE DOLLARS AND TWELVE CENTS ($10,412.12) with a signed Agreement for Sale requesting that certain amendments be incorporated. Nation and Company acknowledged this letter on the 12th of August pointing out that their letter dated the 12th of July was forwarded to Tulloch and Company before Tulloch's letter of the 7th reached them. On any view there was no completed Contract. If the matter is viewed from Zaidie's vantage point, then the letter of 7th July proposed changes to the written document thus disqualifying it from being an acceptance which would create a contract. From the point of view of Crichton Quarry Limited, they said in their letter of 12th of August that their 12th of July letter was forwarded to Francis Tulloch and Company before Tulloch's offer was received.

In the meantime Mr. Zaidie had instructed his then Kingston Lawyers, Tenn, Russell, Chin-Sang and Hamilton to institute legal proceeding which they did by filing an Originating Summons. The question to be posed in light of this protracted correspondence is whether the attempt to create a written agreement terminated the oral contract. The short answer is No. There being no accord and satisfaction, the parol contract still existed. However, the Defendant raised the question whether Zaidie's absence from the Island for two years was a repudiation of the contract which Crichton Quarry Limited was entitled to accept and so terminate the contract. Mr. Alva Smith thought there was termination of the oral agreement as his Affidavit stated that "the Defendant assumed that the agreement for the sale of the lands and the bulldozer had been abandoned by the Plaintiff and that if the Plaintiff ever returned and showed an interest in the said lands a new agreement would have to be made."

Unfortunately for him contracts are somewhat more complex than that. He went on to state in his Affidavit that Crichton Quarry Limited received SEVENTY THOUSAND DOLLARS ($70,000) in payments from Zaidie and as recently as January, 1982 he had sold the Stone Crusher for TWENTY FIVE THOUSAND DOLLARS ($25,000) and credited that to Zaidie also. So up to that point the inference was that the oral contract was not terminated. Further, if the substance of the negotiations was to reduce the oral contract to writing as I find ,then it would not be a fair construction of the oral contract to say that it was terminated. If I am right, the fact that EIGHTY THOUSAND DOLLARS ($80,000) was the amount talked about, indicates that this is what the substance of the negotiations was about, since Zaidie was already in possession of the chattels and the realty. The written agreement was never concluded and if Mr. Zaidie wishes to

recover the TEN THOUSAND odd DOLLARS, he would have to recover it by framing an action in Quasi-contract as this amount was not prayed for in the Originating Summons. Crichton Quarry Limited speaks about an EIGHT THOUSAND DOLLARS ($8,000) paid by Zaidie in October 1982 which he cannot recall,and presumably it is on this basis that the request was made that the Defendant should account to the Plaintiffs for all monies received under the contract, but the contract to which they refer in the light of my findings must be the oral contract. Since the last payment pursuant thereto was made in May 1980, the inference is that any further payments must have been made in contemplation of the attempted written agreement. I therefore refuse to order that the Defendant account to the Plaintiff for all terms in respect of the oral agreement.

WHETHER CONTRACTUAL RIGHTS AND LIABILITIES ARE ATTACHED TO THE ORAL AGREEMENT

The main submission of Mr. Robinson for the Defendant in this case was that by virtue of the Statute of Fraud there being no written note or memorandum, the oral agreement cannot be the basis of an enforceable contract for sale of the land in question. Mr. Hines referred to the correspondence between Nation & Company and Tulloch & Company already adverted to as capable of forming a note or memorandum in compliance with the Statute. I was unimpressed. Much more impressive was his emphasis on Mr. Zaidie's substantial interests in John's Hall Quarries Limited whose lands adjoin the Crichton lands and that Mr. Zaidie had made it known that he was expanding this area of his business. Furthermore it was common ground between the parties that Athol Crichton and Delroy Zaidie were friends and that Crichton Quarry Limited were reducing their block making business. Was it not natural, Mr. Hines asked, that Athol Crichton would permit Delroy Zaidie to take up possession of the land in the light of these circumstances? Equally convincing was Mr. Hines'

submission that both receipts exhibited speak of "lands at Worcester, John's Hall, St. James"and this he contended must refer to the antecedent oral agreement. He cited the recent case of Steadman v. Steadman 1974 2 All E.R. 977 which re-examined the equitable doctrine of part performance and in approving Kingswood Estate Company Ltd. v. Anderson 1962 3 All E.R. 604 exploded the myth that there was a general rule that the receipt of a sum of money could never constitute part performance. In the instant case the Plaintiff has acted to his detriment once the payment of money was expressly made for chattels and the realty in question and that was sufficient to take the case out of the statute. Further acts of part performance by Mr. Zaidie were the marking out and surveying of the land and the mining of aggregate. I rule that there was an enforceable agreement for the sale of the land and chattels which was not rescinded.

There is the further question as to whether the delay in instituting proceedings debars the Plaintiff from the decree of specific performance, I think not. One must always look at the circumstances of the case. It is true that from May 1980 to May 1982 no money was paid or tendered to the Defendant , but one must take into account that negotiations to reduce the oral agreement to writing took up some four months from April to July in 1982. So we are in the region of two years after payments of SEVENTY THOUSAND DOLLARS ($70,000) were paid out of a total of ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150,000), this does not take into account the TWENTY FIVE THOUSAND DOLLARS ($25,000) credited in January 1982 to the Plaintiff from the proceeds of the sale of the Stone Crusher. I am willing to grant Specific Performance to the Plaintiff so that the lands in question may be conveyed to him, but on terms that Mr. Zaidie pay FIFTY FIVE THOUSAND DOLLARS ($55,000) within a fortnight into Court for

Crichton Quarry Limited. Further, the Defendants have been kept out of EIGHTY THOUSAND DOLLARS ($80,000) since May 1980 to January 1982 so I award 12% interest on that. They have been kept out of FIFTY FIVE THOUSAND DOLLARS ($55,000) from January, 1982 to June 1982 when the Originating Summons was filed, so the award is 15% interest on this amount. The interest payments to be also paid within a fortnight.

CONCLUSION

Although this Motion was heard in Chambers, Judgment is being delivered in Open Court because of the important issues involved.

The effect of my rulings is that a declaration is granted that an oral agreement was made in May 1979 between the parties which was not rescinded. Also I grant the declaration that the Defendant has been in breach of a term of the contract by selling the Stone Crushing Plant. The value of the Stone Crusher and damages, if any, are to be assessed by referring the matter to the Registrar. Further, a decree of Specific Performance is awarded on terms indicated above. The Plaintiff must have his costs to be agreed or taxed.