[2011] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 50/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE COOKE JA
THE HON MRS JUSTICE HARRIS JA

BETWEEN	**CALVIN GREEN**	**APPELLANT**
AND	**WYNLEE TRADING LTD**	**RESPONDENT**

Mrs Georgia Gibson Henlin instructed by Henlin Gibson Henlin for the appellant

Ms Carol Davis & Co for the respondent

24 April 2009 and 25 November 2011

PANTON P

[1] On 24 April 2009, we made the following order in this matter:

> "Appeal dismissed. Order of Pusey J affirmed. Costs of the appeal to the respondent to be agreed or taxed."

[2] Before Pusey J were two applications (one from each party) for summary judgment. The learned judge, on 30 April 2008, dismissed the application by the

appellant herein and ruled in favour of the respondent on its application in the following terms:

> "1. That there be summary Judgment for the Claimant against the Defendant, as follows:
>
> (i) Specific performance of the agreement for sale dated 22nd August 2005 between the Claimant and the 1st Defendant whereby the 1st Defendant agreed to sell and the Claimant agreed to purchase property part of Hope Road and known as 213 ½ Old Hope Road and being the land comprised in certificate of title Volume 1188 Folio 971 of the Register Book of Titles (hereinafter called the said land).
>
> (ii) The Attorneys-at-law for the Vendor and the Purchaser to agree the account with regard to the sale of the said land, and in the absence of agreement the Registrar of the Supreme Court be empowered to take all necessary enquiries and account with regard to the sale of the said property.
>
> (iii) That the Registrar of the Supreme Court be empowered to execute any document or documents to effect the sale and/or transfer of the said land in the event that either party refuses to sign same (a party being deemed to have refused to sign if they refused and/or neglect to sign a document within 14 days of being requested so to do).
>
> (iv) That the Defendant be Ordered to produce the Duplicate Certificate of Title registered at Volume 1188 Folio 971 of the Register Book of Titles to the Claimant's Attorney-at-law for purpose of effecting the sale. In the event that the Defendant fails to produce the said Title within

14 days of being requested in writing to do so, the Registrar of titles is hereby empowered to and shall do the following:

a. Dispense with the production of the Duplicate Certificate of Title registered at Volume 1188 Folio 971 of the Register Book of Titles in relation to the register of the Instrument of Transfer.

b. Cancel the said Certificate of Title registered at Volume 1188 Folio 971 and issue a new title in the name of the purchaser of the said title.

(v) That the purchaser's Attorney-at-Law be accorded carriage of sale.

(vi) An Order that the Claimant be permitted to advance any sums required for purpose of effecting the said sale, and that same be recovered from the balance purchase price due to the 1st Defendant.

(vii) That there be specific performance of the agreement for the sale of chattels dated 22nd August 2005 between the Claimant and the 1st Defendant.

2. Costs to the Claimant to be agreed or taxed. (without prejudice to paragraph 4 of the order herein).

3. Defendant's Application for Summary Judgment dated 13th December, 2007 dismissed with costs to the Claimant.

4. Stay of execution of the Judgment herein ordered until 27 June, 2008 on condition that the Defendant pay the sum of $200,000 as costs in the matter herein, into an interest bearing account in the joint names of the Attorneys-at-law for the Claimant and the Defendant, within 14 days of the date hereof, the said sum to

> remain in the joint account pending the determination of the appeal. In the event that the appeal is successful, the said sum is to be returned to the Defendant, and in the event that the appeal is unsuccessful the said sum is to be paid to the Claimant."

The facts

[3] By an agreement dated 22 August 2005, the appellant, as proprietor of land situated at 213 ½ Old Hope Road, St Andrew, and registered at Volume 1188 Folio 971 of the Register Book of Titles, agreed to sell same to the respondent at a price of $20,000,000.00. Completion date was agreed as being on or before 180 days from the date of the agreement, and the appellant agreed to deliver vacant possession on completion. Due to the issues raised on appeal, it is necessary to set out three of the special conditions that formed part of the agreement:

> "8. The Vendor shall not be obliged to deliver the Transfer or any other documents herein to the Purchaser's mortgagee, nor take any other steps to complete this transaction unless their Attorney-at-Law shall have received the purchase money and costs in full or an undertaking from the Purchaser's mortgagee, or a reputable financial institution, for the balance purchase monies, and or the Purchaser's or her attorney's undertaking for the costs of Transfer, acceptable as to the terms thereof to the Attorney-at-Law having Carriage of Sale herein within sixty (60) days of the Completion date herein provided.
>
> 9. If the Purchaser shall make any objections or requisitions in respect of the Title to the property sold which the Vendor or their Attorney-at-Law shall on the ground of expense or otherwise be unable to answer, this Agreement for Sale may be rescinded by the

> Vendor (notwithstanding any attempt to remove or satisfy the same or any negotiation in respect thereof) unless the Purchaser withdraws such objection(s) or requisition(s) within seven (7) days after the delivery of a letter from the Attorney-at-Law having Carriage of Sale herein declining to answer or respond to such objection(s) or requisition(s).
>
> 10. …
>
> 11. Nothing permitted or allowed by the Vendor in derogation of any terms and conditions herein contained nor any time facility given or permitted by the Vendor to the Purchaser for payment of any money payable hereunder shall be deemed to be a waiver of any of the said terms and conditions."

[4] It should be noted that there was a tenant who, three months prior to the signing of the agreement, had been served by the appellant with a notice to quit and deliver up possession. At the time of the signing of the agreement, there was also a caveat lodged by the tenant against dealings with the property. The tenant eventually filed a suit against the appellant claiming an equitable interest for improvements he had allegedly made to the property.

[5] After the signing of the agreement, the appellant informed the respondent that he was experiencing difficulty with the tenant. The parties agreed that as a result of the difficulty, there would be a suspension of the payment of the purchase money until the appellant informed the respondent that he was ready to complete the transaction. The confirmation of this agreement is contained in a letter dated 18 November 2005 which reads thus:

"November 18, 2005

Byron Ward
Attorney-at-Law
2-4 Constant Spring Road
Kingston 10

Dear Byron,

Re: Agreement For Sale of Realty and Agreement for Sale of Chattels, Calvin Abijah Green to Wynlee Trading Limited – Volume 1188 Folio 971

Reference is hereby made to the captioned matter.

As discussed in our recent telephone conversation both our clients have mutual concerns regarding the issue of completion and ability to deliver vacant possession. This is exacerbated by the fact that your client has a sitting Tenant whom he has had to resort to legal action to evict from the premises. Your client has indicated that the earliest court date he could set for the matter is in April, 2006. This would clearly take the sale outside of the completion date of February, 2006.

In consideration of the consequences to your client if he was unable to deliver vacant possession on completion, that is, liability to compensate our client for mortgage costs and/or interest until vacant possession is delivered you confirmed and advised that your client agreed to waive the payment schedule for the balance Purchase Price until it can clearly be determined when Vacant Possession would be practical. Our clients should therefore not make any further payments under the Sale Agreements at this time and will resume payments as soon as you notify us to do so. Our clients will instead pay over the funds to us to be held on escrow and to put in place the necessary mortgage financing in readiness for completion.

In acceptance and agreement to foregoing kindly sign and return the attached copy letter hereof.

Yours faithfully
NAYLOR & TURNQUEST

PER:
LILIETH TURNQUEST

cc Wynlee Distributors Ltd."

[6] The next move of note came on 20 April 2006 from the appellant's attorney-at-law who wrote to the respondent's attorney-at-law in the following terms:

"April 20, 2006

Naylor & Turnquest
Attorneys-at-Law
6 Oxford Road
Kingston 5

Attention: Mrs Lilieth Turnquest

Dear Lilieth

Re: Proposed Sale of land part of Hope Road, St. Andrew, registered at Volume 1188 Folio 971 known as 213 ½ Old Hope Road Calvin Abijah Green to Wynlee Trading Limited

I refer to previous correspondence herein.

My client has instructed me to advise that he wishes to cancel the sale and refund such monies as have been paid over by the purchaser.

He has asked me to indicate that in his pre-contract discussions with the purchaser he had informed its principals of certain challenges with a tenant on the property. Since then his worst fears have been realized and the matter has now become quite protracted with the tenant having taken the matter before the courts

> and also lodging a caveat against any dealing with the lands.
>
> My client would like to have this matter settled amicably and without any ill feelings on either side. All his plans have been frustrated and he would much prefer to withdraw from the sale at this time.
>
> I await your response.
>
> Yours sincerely
>
> **Byron L Ward**"

The respondent's response was the service on the appellant of a notice making time of the essence of the contract. The respondent also indicated its readiness to complete the transaction. Further, to protect its interest, the respondent lodged a caveat pending the receipt of the duplicate certificate of title with the transfer endorsed in its name. Up to 24 April 2006, the respondent had paid a total of $9,465,100.00 on the contract.

[7] It was against that background that the respondent sought specific performance of the agreement and an order for possession of the property to be granted to it on payment of the balance of the purchase price. It also sought necessary consequential orders.

The judge's findings

[8] As stated earlier, the learned judge granted the orders requested. He found, contrary to the appellant's urging, that the agreement for sale had not been rescinded. He also found that the respondent was always willing to make arrangements to resolve

the issues in relation to the tenant. The appellant, he found, was the architect of any difficulties being faced by him as he had been offered the means to remedy the difficulties with the tenant but had not pursued them. Difficulties between the appellant and the tenant were to be resolved between them, the judge found. More so, as the respondent had expressed a willingness to accept possession of the property with the tenant in possession.

The grounds of appeal

[9] The appellant filed 13 grounds of appeal. No harm will be done, it is hoped, in summarizing them thus:

i. The learned judge erred in granting the order as there was no evidence that the respondent was ready, willing and able to complete the contract on the date of the service of the notice to complete and making time of the essence of the contract.

ii. The learned judge erred in his interpretation and consideration of the question of hardship.

iii. The learned judge erred in failing to consider that the title was defective at the time of the signing of the agreement as there was, to the knowledge of the respondent, an encumbrance in the form of caveat #1360687. Furthermore, the subsequent claim by the tenant that he was entitled to an equitable interest in the property added to the defect in the title and made completion impossible.

iv. The learned judge erred in failing to find that the letter dated 18 November 2005 from the respondent's attorney-at-law had varied material terms of the contract

relating to the time for completion, vacant possession and the payment of the balance of the purchase money.

v. The learned judge erred in failing to find that the appellant was entitled to terminate the agreement for sale and that his letter dated 20 April 2006 had in fact done so.

vi. The learned judge erred in failing to find that the respondent is only entitled to the return of its deposit, expense incurred and interest calculated at the rate agreed on in the agreement for sale.

The submissions

Ground (i) as summarized

[10] The appellant submitted that there had been a breach of condition 8 of the agreement which states that the vendor is not obliged to deliver the transfer or any other document to the purchaser's mortgagee, nor take any other steps to complete the transaction unless the appellant has received the purchase money and costs in full or an undertaking from the purchaser's mortgagee or a reputable financial institution for the balance of the purchase money and/or the purchaser's or its attorney-at-law's undertaking for the costs of transfer within 60 days of the completion date in the agreement. The appellant's argument was that completion date would have been 21 February 2006. The notice to complete and making time of the essence was served on 26 May 2006 but there was, it was submitted, no indication that the respondent was in a position to complete. According to Mrs Gibson-Henlin, the respondent had failed to obtain the letter of undertaking and the balance of the purchase price. She made this

submission while acknowledging that the appellant was in breach of the contract in not having completed by the required date. Ms Davis for the respondent submitted in response that although a specific letter of undertaking had not been done, the mortgage financing had been put in place and confirmed by the financial institution. There was nothing further in terms of the mortgage that was to be done. She submitted that condition 8 had been satisfied by a letter dated 3 November 2005 from the National Commercial Bank, Spanish Town, set out at page 39 of the record. That letter reads:

> "2005 November 03
>
> The Managing Director
> Wynlee Trading Company Limited
> Wynlee Distributors Limited
> 17 Retirement Crescent
> Kingston 5
>
> Dear Sir
>
> **Request for Banking Facilites**
>
> We are pleased to advise that your application for credit facilities totaling Eighteen Million Dollars ($18,000,000.00) for purchase of property at 213 ½ Old Hope Road, Kingston has been approved.
>
> Upon your instructions we will issue a Letter of Undertaking to the Attorneys with Carriage of Sale to pay the sum of Eighteen Million Dollars ($18,000,000.00) in exchange for the unencumbered Certificate of Title for the property.
>
> All other terms and conditions regarding the facilities will be communicated to you in our Letter of Commitment.
>
> We thank you for placing your business with us and

look forward to the continuation of a mutually satisfactory relationship.

Yours faithfully

PETER JENNINGS
MANAGER"

Grounds (ii) and (iii)

[11] Mrs Gibson-Henlin referred to the defence that was filed by the appellant and pointed to what she said were hardships experienced by the appellant as regards completion. These hardships related to the fact that his tenant had lodged a caveat against dealings with the property and had claimed an equitable interest in the property by virtue of improvements that were allegedly done to the property. Eventually, the court ruled that the caveat should be removed, and the tenant was denied the interest that he had claimed. The fact that the appellant was put to expense in defending the claim brought by the tenant was put forward by Mrs Gibson-Henlin as a hardship which should have resulted in the appellant being relieved from performing the contract. Mrs Gibson-Henlin described as "short shrift" the manner in which the learned judge had dealt with the situation.

[12] Ms Davis, in reply, submitted that what the appellant encountered was inconvenience rather than hardship. He was, she said, obliged to take all reasonable steps to perform the agreement and not use the tenant as a stumbling block to performance.

Ground (iv)

[13] Mrs Gibson-Henlin submitted, in the alternative, that the respondent by its letter dated 18 November 2005, varied the term of the agreement, relating to completion, from "vacant possession on completion" to "completion when the vendor notifies the purchaser when it can be clearly determined that vacant possession is practical". As a result of that variation, she argued that there ought not to have been an order for specific performance. Ms Davis responded that there was nothing in the letter in question which gave the right to the appellant to determine when vacant possession would be practical. The letter was, she said, aimed at requiring the appellant to notify the respondent when payments were to resume. In the circumstances, she urged the court to find that the judge's conclusion on the matter was reasonable and that the contract remained a valid and subsisting one.

Ground (v)

[14] Mrs Gibson-Henlin submitted that the letter of 20 April 2006, effected a cancellation of the contract. Even if it was not a cancellation, she argued, the notice to complete was bad and could not form the basis of an action. However, Ms Davis submitted that the contract was valid up to the point of time when the letter of 20 April 2006 was written. By writing that letter, she said, the appellant was in breach of the contract.

Ground (vi)

[15] As regards this ground, Mrs Gibson-Henlin relied on the case ***Bain and Others v Fothergill and Others*** [1874-80] All ER Rep 83. Quite apart from pleading a case

of hardship as a result of the existence of the tenancy and the fact that the tenant was claiming an interest in the property, the appellant, according to Mrs Gibson-Henlin, did not bargain for things to turn out as they did so the respondent was left with its remedy being in damages. Those damages, she said, were to be measured on the basis of the rule in ***Bain v Fothergill***. That rule is to the effect that where on a contract for the sale, of land the vendor, in the absence of fraud, is unable to give a good title the purchaser is not entitled to recover damages for the loss of the bargain. Only expenses incurred in investigating the title and the repayment of the deposit are recoverable.

[16] After careful consideration of the evidence, and the submissions made by counsel, we found that the judge's findings of fact and conclusion were sound. The letter of 3 November 2005, stated that credit facilities up to the amount of $18,000,000.00 had been approved for the respondent in respect of the purchase of the property. That, in our view, amounted to sufficient compliance with condition 8 which required either the receipt of the purchase money and costs in full or an undertaking for the same. The respondent was clearly in a position to complete, and that was well known to the appellant.

[17] Mrs Gibson-Henlin made much of what she perceived as hardship being encountered by the appellant. However, with the greatest of respect, that was an irrelevant consideration. The appellant entered into the agreement fully conscious of the fact that he had a tenant in place. He must have realized that it would have been necessary to take steps to terminate the tenancy. He knew of the fact of a caveat having been lodged by the tenant, so he must have been confident of disposing of this

stumbling block in order to fulfill his obligation under the contract. In any event, the appellant was aware that the respondent was willing to accept the tenant in possession. The case ***Mountford v Scott*** [1975] Ch. 258, [1975] 1 All ER 198 is most apt in relation to the question of hardship. Miss Davis referred to the judgment of Russell L J therein. At page 264, he is quoted thus:

> "If the owner of a house contracts with his eyes open, as the judge held that the defendant did, it cannot, in my view, be right to deny specific performance to the purchaser because the vendor then finds it difficult to find a house to buy that suits him and his family on the basis of the amount of money in the proceeds of sale."

In the circumstances, therefore, we found no merit in the complaint as to hardship.

[18] As regards the question of the variation of the agreement, we formed the view that the letter of 18 November 2005 did not vary the agreement. It was an attempt by the respondent to assist the appellant towards timely completion of the transaction. The payments stipulated in the agreement were not being suspended – rather, they were being made in a manner aimed at securing them given the failure of the appellant to meet his obligations in a timely manner. This was a mere proposal by the respondent's attorney-at-law with a view to satisfying the concerns of the parties; that is, the appellant's concern with the tenant, and the respondent's concern with the security of its payments.

[19] Instead of embracing the opportunity presented to him, the appellant sought to cancel the sale by virtue of his letter dated 20 April 2006. Miss Davis was, in our view, correct when she said that the contract had remained valid up to the date of the letter.

It was not within the power of the appellant to cancel the contract as there was no basis for such action. The response dated 24 April 2006 was most appropriate, as it demonstrates the willingness of the respondent to complete the contract. That letter reads thus:

> "April 24, 2006
>
> Byron L. Ward
> Attorney-at-Law
> 2-4 Constant Spring Road
> Kingston 10
>
> Dear Bryon:
>
> **Re: Wynlee Trading Limited – 213 ½ Old Hope Road**
>
> Reference is hereby made to yours of the 20th instant in respect of the captioned matter.
>
> We have referred your letter to our clients and they are very disappointed as they have no wish to cancel the contract.
>
> As you are aware our clients have been in discussions since July 2005 and went into a binding contract 22nd August 2005. Since then they have paid out Nine Million Four Hundred and Sixty Five Thousand One Hundred Dollars ($9,465,100.00) being deposit and installment payment to you of Five Million Six Hundred and Twenty One Thousand Six Hundred Dollars ($5,621,600.00) and Three Million Eight Hundred and Forty Three Thousand Five Hundred Dollars ($3,843,500.00) being held on escrow by us as agreed in our letter to you of November 18, 2005 (copy enclosed). In addition, letter of commitment from National Commercial Bank in the sum of Eighteen Million Dollars ($18,000,000.00) has been provided to you.

Our clients are of the view that the issue of vacant possession with the sitting tenant is not new neither is it a matter that cannot be settled.

As pointed out to you by us in numerous telephone discussions, several options are open to your client to resolve the claims by the tenant to facilitate completion. However, to date you have still not yet responded to us on your client's position. Indeed, by letter of February 15, 2006 we wrote the Attorneys Nunes Scholefield DeLeon and Co., the Attorneys representing your client in the court proceedings with the tenant (copy letter enclosed) proposing two (2) options for settlement of the dispute and ensure completion of sale.

The proposals were that your client pay the sums being claimed by Mr. Ballie into an escrow account/court pending the outcome of the claim, this would in no way prejudice your clients. Alternatively, to settle the claim now given the likely protracted delay through the courts and your client would have immediate use of the funds in the meantime, earnings from which could be used to offset the payment.

We have received no confirmation from yourself or Nunes Scholefield if any of these options were discussed with your client or indeed whether the payment to escrow agency/court was put to the court at the hearing.

Our clients are therefore of the view that they have incurred considerable expenses and financial outlays in respect of sale and mortgage costs. In addition, the opportunity costs cannot be valued as they had stopped looking for properties on the market and tied up their funds in this sale. Your client on the other hand has failed to show any good faith in attempting to resolve the issues with the tenant even where he would not be prejudiced.

Our client stands ready, willing and able to complete and we ask that you advise your client accordingly as our final instructions are to issue a Notice to Complete making time of the essence to your client.

> We are willing to arrange a meeting with all parties to resolve this matter.
>
> We await your early response.
>
> Yours faithfully
> **NAYLOR & TURNQUEST**
>
> Per**: LILEITH TURNQUEST**
>
> Encs.
>
> cc. Wynlee Trading Ltd."

[20] The appellant contended that the respondent was entitled to damages only. He relied on ***Bain v Fothergill*** . The headnote reads in part:

> "Where, on a contract for the sale of land the vendor, in the absence of any fraud and any express stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he has paid one."

The principle enunciated in ***Bain v Fothergill*** is inapplicable in the instant case as there is no inability on the part of the appellant to "make a good title". The appellant had been merely demonstrating a stubborn and unwilling spirit in refusing to complete the contract. There was no true impediment to his fulfilling his part of the bargain.

[21] In the circumstances, we were satisfied that the learned judge was correct in ordering as he did. The appellant had all along been in a position to perform the contract but was unwilling to do so. The tenancy was never a problem as the

respondent was prepared to accept the tenant, and the respondent had early in the proceedings provided the necessary assurance that the purchase money and costs were secured.