JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 67/2004

BEFORE: **THE HON. MR. JUSTICE HARRISON, P**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (AG.)

BETWEEN **NEVILLE CONSTANTINE SMITH** **APPELLANT**

AND **DELROYE SALMON** **RESPONDENT**

Andrew Irving for appellant

Arthur Williams instructed by Arthur Williams & Company for respondent

30th, 31st, October; 1st & 29th November 2006

HARRISON, P

This is an appeal from the judgment of Jones, J., on 21st June 2004 ordering specific performance of the agreement dated 19th October 1983 between the appellant and the respondent, with consequential orders and costs.

On 1st November 2006 we dismissed the appeal and delivered an oral judgment. These are our reasons in writing as promised.

The relevant facts are that the appellant the registered owner of a parcel of land part of Waltham in the parish of Manchester containing 9 acres, 29.6

perches and registered at Volume 987 Folio 44 of the Register Book of Titles, and called 21 DeCarteret Road.

In 1983, the land was mortgaged to the Workers Savings and Loan Bank ("the Bank") as security for the debts of N.C. Smith Engineers Ltd of which the appellant was the principal, in the amount of $1,500,000.00. The said mortgage fell into arrears.

On 19th October 1983 the respondent and the appellant signed an agreement for the sale of the said land to the respondent for the sum of $600,000.00. The terms of payment were for a deposit of $60,000.00 on signing, a further $140,000.00 within three months thereafter and the balance "on completion of title in the name of the purchaser or his nominee." The sum of $60,000.00 was paid by the respondent on 9th November 1983.

The respondent, an attorney-at-law, had drafted the agreement for sale of 19th October 1983. His signature had been witnessed by "D Palmer" his secretary and the said agreement bore his name as having the carriage of sale. He had had no prior transaction with the appellant nor had he previously performed any professional services as an attorney-at-law for the appellant.

By letter dated 25th October 1983 Mr. Lawrence Woodham of the firm of Messrs. Woodham, Pickersgill & Dowding, attorneys-at-law, wrote to the Bank for the "attention: Mr. Howard Wright" forwarding the said agreement of sale of 19th October 1983, amended and with instructions. It read, inter alia:

RE: Proposed Sale of No. 21 DeCarteret Road, Mandeville, Manchester – Neville C. Smith to Delroye A. Salmon

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We enclose herewith the original of the Agreement of Sale in the above matter which was transmitted to us by Mr. Smith during the week-ending the 21st October, 1983.

Pursuant to discussions with the various parties involved, we have amended the Agreement of Sale as follows:

1. Carriage of Sale to be Mr. L.N. Woodham of WOODHAM, PICKERSGILL & DOWDING of No. 31 Duke Street, Kingston.

2. Special Conditions (i) financing to be provided by Workers Savings and Loan Bank or any other reputable lending institution.

The writer spoke to Mr. Delroye Salmon on the afternoon of the 24th October, 1983 and he is in agreement with these changes.

We are sending him a copy of this letter along with the Agreement of Sale duly amended.

We would ask that you be good enough to have the Purchaser's signature witnessed so that we can proceed. Kindly also have the Purchaser initial the changes along with the witness in the same places where Mr. Smith's initial appears.

This letter was signed by "Carl Dowding" on Woodham's behalf and copied to the respondent.

The amended agreement substituted "Woodham, Pickersgill & Dowding of No. 31 Duke Street, Kingston. Attention: Mr. L.N. Woodham" as the attorneys-at-law with the carriage of sale.

By letter dated 20th January 1984 Woodham wrote to the respondent in these terms:

> "Re: Proposed sale of No. 21 Decarteret Road, Manchester Neville C. Smith to you.
>
> ---
>
> We enclose herewith as a reminder, the copy of the Agreement of Sale, which discloses that an installment of One Hundred and Forty Thousand Dollars ($140,000.00) should have been paid to the Workers Savings and Loan Bank of Mandeville in the parish of Manchester, on or before the 19th day of January, 1984.
>
> Kindly let us hear from you as a matter of urgency."

By letter dated 31st August 1984, Woodham wrote to the respondent a further letter of demand inter alia in these terms:

> "We have to advise that no further payments have been made after the initial payment of Sixty Thousand Dollars ($60,000.00) on the 9th November, 1983.
>
> We accordingly hereby give you notice, that if, the full amount of the deposit is not paid within the next fourteen (14) days of the receipt of this letter, we will treat this agreement at an end."

There is no record of a response from the respondent. In that regard the respondent was dilatory.

Woodham sent to the respondent in June 1986 a "notice to complete purchase of freehold and making time of the essence." It read, after the above caption:

> "We , the undersigned as Attorneys-at-Law for and on behalf of NEVILLE CONSTANTINE SMITH of 49 Decarteret Road, Mandeville in the parish of Manchester, Civil Engineer (hereinafter called 'the Vendor') HEREBY GIVE YOU NOTICE as follows:
>
> 1. The Vendor is ready and willing to complete the sale of ALL THAT parcel of land known as number 21 Decarteret Road, Mandeville P.O. in the parish of Manchester; and being premises comprised in Certificate of Title registered at Volume 987 Folio 44 of the Register Book of Titles.
>
> 2. Time is now of the Essence of the Contract.
>
> 3. In the event of your failing to complete the purchase and to pay the balance of Purchase Price of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) as well as all other charges for which you are liable under the said Agreement for Sale within Fourteen (14) days of the date hereof the said Vendor shall rescind the Contract, forfeit the deposit paid hereunder, and seek such further and other relief as he may be entitled to by law.
>
> Dated the day of June, 1986.
>
> WOODHAM, PICKERSGILL & DOWDING
>
> PER: LAWRENCE N. WOODHAM."

The respondent was responsive to the said notice.

By letter dated 7th July 1986, one Anthony Magnus, Manager – Collections Unit of the Bank wrote to the respondent. It reads:

> "Attention: Mr. Delroye A. Salmon
>
> Dear Sirs,
>
> Re: Sale of land Neville C. Smith
> to Delroye Salmon
>
> We are in receipt of your cheque in the sum of $70,000.00 along with your letter dated July 4, 1986.
>
> We would now confirm our agreement of June 25, 1986, as follows:
>
> 1. Notice to complete with respect to premises 21 Decarteret Road comprised in Volume 987 Folio 44 shall be withdrawn.
>
> 2. You shall pay a further sum of $125,000.00 on or before the 30th November, 1986.
>
> Upon such payment, we shall finance the outstanding balance of $300,000.00 required to complete the purchase of the above premises at a rate of interest to be worked out between the parties."

Again the respondent responded favourably.

By letter dated 27th November 1986 from the Bank to the respondent, it reads:

> "Re: 21 Decarteret Road, Volume 987 Folio 44 –
> Purchase of Premises from Mr. N.C. Smith
>
> We would confirm that we have now received from you Bank of Nova Scotia Jamaica Limited cheque in the sum of One Hundred & Twenty Five Thousand Dollars ($125,000.00) dated 28th November, 1986,

being payment on account purchase price for the above property.

This brings the total payment to date to Two Hundred and Ninety Five Thousand Dollars, ($295,000.00), in addition to the sum of Five Thousand Dollars ($5,000.00) previously advanced by you to Mr. N.C. Smith. This leaves a balance of Three Hundred Thousand Dollars ($300,000.00) on account purchase price.

As per the agreement that we have today discussed, we would be willing to allow you to carry the balance on mortgage on the security of the subject property for eight (8) years at 10% per annum.

The arrangement would be that a Demand Promissory Note would be executed for the full amount along with a first legal mortgage over the subject property; with the proviso that no demand would be made once the regular monthly payments were maintained.

By calculation the monthly payment due from you would be Four Thousand, Three Hundred Dollars ($4,300.00) the first such payment to be made on or before the 30th January, 1987.

In the event that lump sums of money become available to you prior to the completion date for such mortgage payments, then no penalties would be applied for early repayment."

Following on the above correspondence with the Bank, Woodham wrote to the respondent by letter dated 23rd January 1987. It reads:

"Re: Proposed purchase – 21 DeCarteret Road, Mandeville

Enclosed please find original Transfer and original Agreement for Sale with respect to the above property.

> Kindly be good enough to execute the same at your earliest convenience and return it to this office.
>
> Please do not date the documents."

The respondent replied by letter dated 28th January 1987 for "Attention Mr. Lawrence M. Woodham. It reads:

> "Thank you for your letter LNW/cn dated the 23rd January 1987 enclosing draft Sale Agreement and Transfer respectively in the sale mentioned above.
>
> In an effort to expedite completion, we have asked Mr. Smith to sign as well; and we herewith return both the Sale Agreement and the Transfer duly executed.
>
> Kindly witness Mr. Smith's signature and acknowledge receipt of all these documents."

After a protracted delay on the part of the vendor, the respondent wrote to the Bank, "Legal Department, 153-155 East Street, Kingston" by letter dated 28th November 1989 (a) complaining of the Bank's non-return of the respondent's calls and (b) reminding the Bank that the full purchase price for the land of $600,000.00, by payments of $295,000.00 "to the bank for the account of the vendor", $5000.00 "...directly to the vendor," and $300,000.00 "by mortgage financing from the said bank," repayment of which "...is not in arrears," and inter alia, continued:

> "The bank has at all material times been privy to all the issues involving the transaction; and it was at the bank's request that the proceeds of sale, which include the mortgage loan, be paid into the bank to the Vendor's account. On this basis the Purchaser

> was then advised that his title would be guaranteed and free from the Vendor's mortgage."

The respondent enclosed in the latter letter all the documents and correspondence concerning the matter between the parties up to that time.

By notice dated 9th October 1991 to the appellant, the respondent lodged caveat no. 683163 forbidding any dealings with the said land.

The respondent had filed his writ on 7th May 1991 and the statement of claim on 27th May 1991 seeking an order for the specific performance of the said agreement of 19th October 1983.

The appellant filed a defence and counter-claim to the claim on 16th July 1991. By an amended defence and counter-claim the appellant pleaded that the 1983 negotiations were commenced with the respondent, one Gaye McMillan and Adolph Smith and himself with a view to them entering into a joint venture to discharge the mortgage which the Bank held on the land at 21 DeCarteret Road and build townhouses and apartments on the said land. It was agreed that he would contribute the said land to the joint venture and the land would be transferred into their names. The respondent requested the appellant to sign an agreement for sale of the land to him the respondent "... on condition that the proceeds of sale would be set off against the mortgage with the Bank." The appellant did not have an attorney-at-law acting for him in the sale and consequently he relied on the advice of the respondent, an attorney-at-law. The appellant pleaded specifically that the recital in the agreement that title would be "in the name of the purchaser or his nominee" was inserted so that the names of

the parties to the joint venture would be placed on the instrument of transfer of the land. Contrary to agreement the respondent failed to prepare the formal joint venture agreement. The appellant denied that $300,000.00 was paid to his bankers by the respondent and if that sum was paid to the Workers Savings and Loan Bank the latter had no authority to receive it on behalf of the appellant, who received no consideration for the sale of the land, therefore the agreement for sale was thereby terminated. Alternatively, if there was an agreement for sale between the appellant and respondent it had been terminated by the effluxion of time or the respondent's failure to purchase the joint venture and alternatively the agreement for sale was pursued by Messrs. Woodham, Pickersgill & Dowding, attorneys-at-law, without his authority.

The latter attorneys-at-law wrote to the respondent in August 1984 that pursuant to the agreement for sale the full purchase price should be paid within fourteen days and also made time of the essence in June 1986, and the respondent failed to comply in both instances. The failure by the respondent to pursue the joint venture compelled the appellant to pay the mortgage loan with the Bank from his own funds and to suffer loss or damage and incur expense in expending substantial sums of money in carrying out development work on the said land in compliance with the terms of the joint venture.

The appellant counter-claimed for damages and rescission of the agreement for sale or alternatively that the said agreement was void for lack of consideration or non-performance by the respondent.

Jones, J., found in favour of the respondent resulting in this appeal.

The grounds of appeal argued before us were:

> "(a) The learned judge erred in holding that the claimant's claim for specific performance is not barred by his failure to complete within the time given in the Notice making time of the essence of the contract;
>
> (b) That the learned judge erred in holding that Neville Smith executed a Transfer seven months later and had thereby waived breaches of the contract by Delroye Salmon.
>
> (c) That the learned judge failed to take into account that the Appellant entered into the agreement for sale on condition that a joint venture agreement is prepared and land in question being transferred to a joint venture company (Decarteret Mews Development Limited) or the parties in the joint venture;
>
> (d) That the decision of the judge is against the weight of the evidence."

Specific performance of a contract for the sale of land is an equitable remedy, by which a court will, in its discretion, enforce the performance of such a contract, where the defendant has signed the written memorandum and the plaintiff has fulfilled his obligations.

Consequently, where the party who seeks to enforce the written contract has paid the purchase price of the land and the defendant is able to give title the court will order the latter to do so.

Where however the plaintiff is in breach of a term of the contract, for example, non-payment of the purchase price or late payment, unless he can

show he is ready, willing and able to pay, he may be denied specific performance.

However, delay in payment of the purchase price will not entitle the defendant to treat the contract as at an end when the date for payment has passed unless time had been made of the essence.

The author of ***Gibson's Conveyance, 21st Edition (1980)***, at page 167, referring to time of the essence of the contract said:

> "The time fixed for completion is not, as a rule, of the essence of the contract, so that neither party may treat failure by the other party to complete on the day fixed as a ground for rescinding the contract. This will still be so even if the contract provides that if the purchaser fails to complete his purchase according to the conditions in the contract his deposit shall be forfeited and the vendor may resell, for, since the date specified in the contract is not an essential part of the contract, there has been no such breach as to make this provision operative. To this general rule there are two exceptions, the first being where the contract provides that time shall be of the essence, and the second where the nature of the subject-matter of the contract makes it so...".
> (See also ***Williams on Vendor & Purchaser, 4th Edition, Volume 1, page 603).***

See also ***Raineri v Miles*** [1979] 3 All ER.

If time is made the essence of a contract and the date has passed and the parties continue negotiating for the completion of the purchase, time is no longer of the essence of the contract – ***Webb v. Hughes*** [1870] LR 10 Eq. 281.

Where time is made of the essence and there is default, the party not in default may or may not rescind. Conduct consistent with the continued

existence of the contract is an election not to rescind - ***Carr v Berriman Property Ltd*** [1953] 89 CLR 327. See also ***Buckland v Farmer et al*** [1978] 3 All ER 929 and ***Luck v White*** [1973] 26 P v CR 89.

In such a sale of land, an attorney-at-law, who purchases from a vendor who is his client at the time of the sale, will be presumed to have exerted undue influence over such vendor. The sale will be treated as void unless it is shown that the vendor was afforded the opportunity to obtain and did receive independent advice at the time of such sale. (See ***Lalor v Campbell*** (1987) 24 JLR 67).

Mr. Irving for the appellant challenged the fact that the learned trial judge found that the respondent was not acting as the attorney-at-law for the appellant, at the time when the agreement was prepared.

The evidence reveals that the respondent was initially introduced to the appellant by one Maxwell of September Holmes Ltd, an estate agent. It is significant to note that the agreement of sale of 19th October 1983 stipulated that an "Agent's commission of 5%..." should be paid to him. There is no evidence that the respondent had met or been engaged by the appellant previously, as an attorney-at-law. Although the early draft of the agreement for sale recited the respondent's firm as having the carriage of sale and the respondent subsequently claimed half of such fees, there is no evidence that the appellant was the client of the respondent. The agreement for sale of 19th October 1983 which was re-drafted by Woodham, substituted the latter's firm as

having the carriage of sale. Importantly, the notice by Woodham in June 1986 making time of the essence, which stated, in its recital:

> "We the undersigned, as attorneys-at-law for and on behalf of Neville Constantine Smith of 48 DeCarteret Road, Mandeville ..."

proves conclusively, along with other correspondence, that the respondent did not act as the appellant's attorney-at-law. The finding of Jones, J., that:

> "The fact that Mr. Woodham was the attorney for Mr. Smith is apparent from the terms of the notice. For all these reasons, the court concluded therefore, that Mr. Smith's attorney at law, Lawrence Woodham, was wholly involved in the sale of the land at 21 Decarteret Road to Mr. Delroye Salmon, and accordingly, that Mr. Smith was independently advised."

was correct.

Mr. Irving argued as ground (a) that the learned trial judge erred in finding that the claim for specific performance succeeds, due to the fact that the respondent did not complete within the time given by the notice making time of the essence.

The notice by the appellant's attorneys-at-law making time of the essence was dated "... June 1986", without a specific day inserted, demanding completion within 14 days failing which the contract would be rescinded. Although the letter dated 7th July 1986 from the Bank purporting to treat the said attorneys-at-law's notice as "withdrawn", may not have been effective, the subsequent conduct of the parties may be construed as a waiver of such notice (See ***Webb v Hughes***, supra and ***Carr v Berriman,*** supra). The letter dated

23rd January 1987 from Woodham to the respondent sending to him the "original transfer and original agreement for sale with respect to the above property..." for execution, is clear evidence of conduct to show that the notice making time of the essence had been waived. Jones, J., was correct to so find. That ground fails.

Ground (b) is a complaint that the learned trial judge was in error to find that the execution of the transfer by the appellant seven months later was indicative of a waiver of the breaches of the contract by the respondent. Undoubtedly, the respondent committed breaches of the contract. However, the respondent eventually paid the entire purchase price by payments of $40,000.00, $60,000.00, $70,000.00, $5,000.00 (to the appellant), $125,000.00 and $300,000.00 by way of mortgage payments to the Bank. These payments were accepted, thereby effectively curing the respondent's breaches.

Although in his defence pleaded, the appellant claims that he was "compelled to pay the mortgage loan with the Bank from his own funds" there is absolutely no such evidence led before the learned trial judge.

For the reasons given above, that the notice making time of the essence had been waived, the signing of the transfer by the appellant was a conclusive waiver of any breaches having been committed by the respondent. The ground also fails.

Ground (c) is a further complaint that the learned judge failed to take into account that the pre-condition of the signing of the agreement was that

the respondent prepare a joint venture agreement and the land be transferred to the joint venture company or the names of the parties.

The learned trial judge did refer to the appellant's contention as to the joint venture. At page 79 of the record, in his judgment, he said:

> "Perhaps he [Smith] thought Mr. Salmon would be of assistance in the proposed joint venture..."

and also:

> "At the outset, Mr. Smith was deeply critical of Mr. Salmon's handling of the transaction, and felt largely betrayed by Mr. Salmon's refusal to honour a collateral agreement for a joint venture between them."

The learned trial judge was thereby fully aware of the stance of the appellant in respect of an alleged joint venture, but placed no great emphasis thereon thereafter. He was perfectly entitled to do so. Nowhere, in all the correspondence, between the parties, or by their respective attorneys-at-law, or by the Bank is any reference made or reliance placed on any such joint venture project as alleged by the appellant. He never insisted on it nor mentioned it from 1983 until 1991 when suit was filed. That absence of any such reference makes it just to conclude that no such intention existed between the parties at any time. The argument advanced by counsel for the appellant that the phrase "... the purchaser or his nominee" in the agreement, designating in whose name title would ultimately reside, was a provision for the respondent to name the joint venture company as "nominee" is without substance. There is no evidence in support of any such construction.

That phrase is a feature of most standard draft agreements for sale. This ground also fails.

Counsel for the appellant contended further that the action was statute-barred. I do not agree. Mr. Williams for the respondent argued that the date of the 31st August 1984 from which the appellant has argued the limitation period should run, cannot be supported. He maintained that after that said date there were several acts performed by the parties in accordance with the contract. He maintained that the earliest date from which time could commence to run would be 28th November 1986 when the final payment of $300,000.00 was made to the Bank or on 23rd January 1987 when the draft transfer was sent to the respondent for signing. I agree.

The earlier breaches by the respondent were expressly waived. The parties continued interacting in performance of their respective obligations under the contract. The payments by the respondent and receipts thereof on behalf of the appellant ensured that the contract remained in existence without further breach. When action was commenced by the filing of the writ on 7th May 1991 the limitation period of six years had not expired computing from either of the dates abovementioned. The action was not statute barred.

A further point taken by Mr. Irving for the appellant was that the witness statement of the respondent, not having contained the certificate of truth was void and inadmissible resulting in an absence of any examination-in-chief of the respondent. It was too late and it was incorrect that the learned trial judge ruled

that the said statement be signed after the close of the respondent's case. Mr. Irving conceded, in response to the court, that the cross-examination of the appellant, being on oath, was admissible evidence before the court.

Rule 29.5 of the Civil Procedure Rules, requires that the witness statement contain a statement of truth. Rule 29.5(1)(g) reads:

> "29.5 (1) A witness statement must –
>
> (a) - (f) ...
>
> (g) include a statement by the intended witness that the intended witness believes the statements of fact in it to be true."

Jones, J., relied on rule 26.9(3)

The witness statement of the respondent which was filed and relied on in the Court below did not contain the required statement of truth.

Jones, J., relying on rule 26.9(3) ruled that –

> "Mr. Delroye Salmon be allowed to sign the certificate of truth to his witness statement and that the statement stand as his evidence in chief at the trial."

Rule 26.9(1) provides that:

> "26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order."

The general rule in respect of facts to be proved by evidence of witnesses is proved at trial by the oral evidence in public or by affidavit – rule 29.2(1). The Court has power to strike out from such statement anything

contained therein which is inadmissible scandalous, irrelevant or otherwise oppressive – rule 29.5(2).

A witness statement, although in effect is almost like an affidavit, it differs somewhat, in that if the affidavit is not in conformity with the specific rule it may be excluded altogether – rule 30.4.

In the work ***Civil Procedure Rules on Actions 2nd Edition***, by Granger and Fealy, the authors, at page 99, referring to Part 32.2(1) (witness statements) (UK) commented, "to make such a statement without an honest belief in its truth is a contempt of court."

The absence of the certificate therefore, makes it impossible to fix such a witness with contempt if he makes the statement without signing indicating his belief in its truth.

The true purpose of the certificate is therefore relative to the witnesses' credibility. The substance of the statement as to the facts recited therein remains unaffected by the absence of the certificate. The Court is not therefore precluded from acting on the factual content of the statement which is signed without the certificate of truth. A court must be vigilant to insist that such a certificate is not omitted from a witness statement. Where therefore, such a certificate is included and signed prior to the judgment of the Court, that act ensures that if it transpires in the future by proof that the witness had no belief in its truth, he may be proceeded against in contempt of court.

Jones, J., was therefore correct, even at the close of the evidence to permit the statement of truth to be added.

For all the above reasons the decision of Jones, J., may not be disturbed.

The appeal is dismissed; the order of Jones, J., is affirmed with costs to the respondent to be agreed or taxed.

HARRISON, J.A.

I agree

MARSH, J.A. (AG.)

I agree.

HARRISON, P.

ORDER

Appeal dismissed. The order of Jones, J. is affirmed with costs to the respondent to be agreed or taxed.