JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO.

COR: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTTCE WRIGHT, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

BETWEEN	FLORENCE MAE TULLOCH	PLAINTIFF/RESPONDENT
AND	CAROLINE FRIEND	DEFENDANT/APPELLANT

Dennis Goffe, Norman Davis & Miss Minette Palmer
for Appellant

Mrs. Margaret Forte & Miss Avlana Johnson
for Respondent

18th, 19th, 22nd, 23rd, 25th July
& 23rd September, 1991

CAREY, P. (AG.)

This is an appeal from an order of Theobalds, J., dated 14th June, 1990 whereby he decreed specific performance in favour of the plaintiff, of an agreement for the sale of land situate at Stokesfield in St. Thomas by the defendant, (the vendor) who is the present appellant.

The appeal raises two matters of substance, viz, the authority of an attorney to sign an agreement for sale on behalf of a vendor and secondly, the effect of breaches of the Exchange Control Act on the validity of the agreement for sale. The grounds of appeal also challenged certain findings of fact relating to the residence of the parties to the agreement which bear on the second question. It becomes necessary therefore to consider the challenged facts in that regard and to provide some material, essential to a proper understanding of the issues which fall to be determined.

Prior to the signing of the agreement for sale of the premises, the subject matter of the suit, the respondent was in possession of these premises as a tenant of the appellant. She had secured these premises in order to provide a home for her mother and a lady who cared for her. Thereafter, the respondent herself returned to New York where she lived. At some time subsequently, she learnt that the premises were for sale, and returned to Jamaica in order to see an attorney, Mr. Frankson who was acting for the appellant. The agreement was executed by the respondent apparently on 5th April, 1989 when she actually attended on Mr. Frankson. She paid a deposit of $20,635. The agreement for sale recited that the parties were both resident at Port Morant in St. Thomas and stipulated a purchase price of $137,500. No date of completion was stated. The balance of the purchase price was payable "on completion." There were no special conditions included in the agreement. Mr. Frankson signed for and on behalf of the appellant. The respondent called on Mr. Frankson at some time later, when she learnt that the sale was off because the appellant no longer wished to sell.

The only evidence adduced at the trial was that of the respondent and Mr. Frankson who gave evidence on her behalf. The appellant did not herself give or call evidence. She was too ill at the time of trial. Mr. Davis, who appeared below on behalf of the appellant, raised two points which I indicated are the issues in this appeal. The judge found that Mr. Frankson had authority from the appellant to sign the agreement. Further, so far as is relevant, he found that the parties were resident in Jamaica. The respondent, he held, visited the United States of America (U.S.A.) from time to time and in the case of the appellant, she had migrated for health reasons in order to have a relative take care of her. This latter reasoning, I confess some difficulty in appreciating.

A person who sells her house, migrates for health reasons and to be cared for by a relative who lives overseas, can hardly be said to be resident in Jamaica.

I turn then to consider the evidential base of that finding. But first, the relevant provision of the Exchange Control Act should be rehearsed:

> "33.—(1) Except with the consent of the Minister it shall not be lawful in the Island—
>
> (a) for any person resident in the scheduled territories to transfer or do any act forming part of a series of acts calculated to result in the transfer by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in the Island or any instrument or certificate of title thereto, to a person resident outside the scheduled territories, or
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> (b) for any person resident outside the scheduled territories, or any person acting on behalf of any person so resident, to transfer, convey or do any act forming part of a series of acts calculated to result in the transfer or conveyance by way of sale, exchange, gift or mortgage of any land, building or other hereditaments situated in the Island or any instrument, or certificate of title relating thereto to any person wherever resident; or
>
> (c) for any person wherever resident to purchase or agree to purchase or to accept a transfer or conveyance by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in Jamaica from any person resident outside the scheduled territories or any person acting on his behalf, or to pay any money to any other person in consideration for, or in connection or association with, any such transfer or conveyance.
>
> (2) Subsections (2) and (3) of section 20 shall apply in relation to a transfer or conveyance prohibited by this section as they apply in relation to a transfer prohibited by this Act of a security."

The term "resident" is not defined in the Act but it was, I think, accepted in course of argument at the Bar that it bears its plain ordinary meaning of a permanent inhabitant of a place; not a visitor. The case often cited in this regard is **Levene v. Inland Revenue Commissioners** [1928] A.C. 217 at p. 225:-

> "... and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

per Viscount Care, L.C. The evidence as to the residence of the appellant emanated from Mr. Frankson. In March 1988 he was advised by the appellant that she was very ill and her nephew Noel McCarthy had come to take her, not only to obtain medical attention but to reside with him in Miami, Florida, his home. She migrated after that conversation. Mr. Frankson could not be understood as suggesting that her stay in Miami would be temporary. He said explicitly (p. 18) that she was going to join her nephew "for the rest of her days." In April 1989 when he executed the agreement on her behalf, she was living in the U.S.A. Mr. Frankson was well aware of this fact. He said so. Nevertheless, when he drafted the agreement, he stated the address of the appellant as resident in Jamaica. That finding by the judge that at the relevant time she was resident in Jamaica, was plainly unreasonable: he regrettably did not appreciate the significance of the evidence adduced.

With respect to the respondent, Mr. Frankson stated that he understood that she lived in the U.S.A. at the time the agreement for sale was executed. He gave no explanation, or perhaps he was not asked. Why then had he stated in the agreement that her residence was in Jamaica? On the evidence given by the respondent, it was clear, that she resided in the U.S.A. and visited Jamaica occasionally to visit her mother who was old, blind and needed someone to care for her. She herself stated that she was living in U.S.A. on 13th October, 1988. Nowhere in her evidence did she even state that she visited the U.S.A. She came down from New York

to see Mr. Frankson about the purchase. She used a lawyer practising in New York to act on her behalf in that regard. I am yet to be shown a scintilla of evidence of her residence in Jamaica. The weight of evidence is against the finding of the judge that the respondent resided in Jamaica. The conclusion at which I have arrived, means that Section 33 of the Exchange Control Act was breached. Even if any one of these findings were held wrong, my opinion would be the same.

I will now proceed to consider the question of Mr. Frankson's authority to execute the agreement for sale on behalf of the appellant. This Court in **Grant v. Williams** (unreported) **S.C.C.A. 20/85** delivered 25th June, 1987, considered as is now required to be done in this appeal, the scope of an attorney's authority to sign an agreement for sale on behalf of his client. Kerr, J.A. having reviewed a number of authorities, expressed his view of the law in these terms at pp. 12 - 13:-

> " From these cases I extract the principle that when a vendor authorises an estate agent to sell property at a stated price, or a solicitor to have the carriage of sale, it must not be taken that they are empowered to do more than in the case of an estate agent to agree with a prospective purchaser, the essential term i.e. the price, and in the case of a solicitor or attorney to protect the vendor's interest and prepare the necessary documents to complete the transaction. In short, to be able to act as agent beyond the normal role of their respective professions, specific authority must be conferred. In either case the authority to enter into a binding agreement for sale must not be lightly inferred from vague or ambiguous language. There must be definite instructions to that effect or the conduct and circumstances in the particular case must be such that the estate agent or attorney must reasonably have understood that he was authorised to make the particular contract and to sign the agreement for sale."

It is plain on the authorities which Kerr, J.A. reviewed and his crystallisation of the principles to be extracted from those cases,

that specific authority to act in the way the attorney did must have been conferred. If the authority is to be implied, then the evidence must show quite clearly, that the attorney could have understood his authority to be exercisable only in the way he acted. In **Grant v. Williams** (supra) there was a deal of evidence of the oral instructions given by the appellant and as well, documentary evidence which required interpretation. In the present appeal, the evidence of any oral instructions by the appellant to the attorney is at best exiguous. In a conversation with Mr. Frankson before her departure to Miami, the defendant dwelled largely on her loneliness, the relationship with her family and her desire to sell the property and use the proceeds for her medical bills and maintenance abroad. It seems to me that the only material from which instructions to sell or enter into a binding agreement can be ascertained, must be the correspondence tendered. Mr. Frankson wrote the appellant on 11th August, 1988. I set out the relevant portion of this letter:-

> "...
>
> I had thought that I would have heard from you re the sale of the property at Port Morant with particular reference to the price you are asking for it.
>
> Sometime ago a young man from Port Morant came to see me and indicated a willingneess to purchase. I told him to have a valuation done but he has not yet returned.
>
> Today a Miss Caroline Friend who lives in Bronx, New York came to see me and expressed a willingness to buy. She will pay in U.S. Currency. She wants the place for her mother who is living there now and is blind.
>
> I am of course unable to do anything until I have proper instructions from you, hence this letter.
>
> Please let me have your firm instructions with particular reference to the selling price you are asking."

She responded by an undated letter which he received 10th October, thus:-

> "I am ready to sell the home Port Morant now the cost of house and furniture twenty thousand dollars $20,000 U.S. I did not get in touch with you because I did not have a phone thank you for writing me. I want the dollars to go in Hospital up to now I am not better so do your best for me."

On any fair construction of this letter, it seems to me that she was requesting Mr. Frankson to do his best to sell, that is to sign an agreement for sale on her behalf. So far as any special conditions went, she was stipulating for a price of not less than $20,000 U.S. and further, she wanted to be able to get the proceeds in the U.S.A. Seeing that her health had not improved, she would need the money as a matter of urgency.

Mr. Goffe argued with force that Mr. Frankson was not authorized to sign the particular agreement he did in fact sign. He pointed to the absence of any completion date from the agreement for sale and any condition for Bank of Jamaica approval.

Mrs. Forte, on the other hand, contended that the instructions in the appellant's letter were non-specific as to time. Further, it was Mr. Frankson's expectation that the sale to the respondent would have been in effect, a cash sale. Mr. Frankson had stated that he would have taken any foreign currency to the Bank of Jamaica to approve its transfer abroad. She also placed great store on the fact that the respondent returned shortly after the agreement was signed to ascertain the completion date but was told that the sale was cancelled. So far as the transfer of the proceeds abroad was concerned, she said that was not a condition which could be imposed.

With all respect to Mrs. Forte, I cannot accept that there is any substance in these arguments. The appellant's letter was clear that since she had last seen Mr. Frankson in August, her health

had not improved. She reminded him that the proceeds of sale would be necessary to satisfy her hospital expenses. A reasonable lawyer would understand that time was of the essence. The one thing he could not do, was to ignore the consideration of urgency. In failing to make time of the essence, he was not drafting a contract according to instructions. Then the proceeds of sale were to satisfy bills overseas; U.S. dollars would be essential. Would not a reasonably competent lawyer appreciate that Bank of Jamaica approval would be required? Would he not consider that such approval should be made a condition of the agreement? If he were to do his best to sell the property to secure these advantages on behalf of the vendor, it is demonstrably clear special conditions in these areas ought to have been included. The conclusion is inevitable that Mr. Frankson was not authorised to draft the agreement, nor to sign the agreement which he did. "He could not reasonably have understood that he was authorised to make the particular contract and to sign that agreement for sale" per Kerr J.A. in **Grant v. Williams** (supra) at p. 13. I think it right to add that Mr. Frankson was given authority to sign a binding contract on behalf of the appellant, but had not the authority to sign the particular contract here in question. As further authority for this proposition, **Chinnock v. Marchioness of Ely** [1865] 4 DeG. J. & Sm. 638 is apt. In that case, it was held that a solicitor having authority to sell on special conditions cannot bind his client by any other terms.

In my judgment, this is sufficient to determine the appeal in the appellant's favour. However, in deference to the arguments put forward on the issue of illegality, it would be entirely unsatisfactory and wrong not to go on to express an opinion thereon.

Mr. Goffe submitted that the evidence showed that both parties intended to disregard the requirement of the Exchange Control Act by concealing their foreign residence. He said further that at no time was Bank of Jamaica approval sought or had, which was clear evidence that the appellant at all events, intended to avoid

the provisions of the Act. His conclusion was that the contract was illegal and void ab initio. He maintained that even if the illegal contract could be validated ex post facto pursuant to the provisions of Section 33 (2) of the Exchange Control Act, the conclusion was irresistible that the parties meant to pursue their agreement regardless of what the Act provided.

In her counter arguments, Mrs. Forte submitted that the agreement was not in breach of the Exchange Control Act because both parties were resident in Jamaica as found by the judge. I have previously dealt with the issue of residence and it is sufficient to observe that the finding of the judge with respect to residence was unreasonable. It is fair to say that Mrs. Forte was not strong on this point and argued in the alternative, that even if the Court found against her on this question of residence (as I have done) Bank of Jamaica approval could be sought even at this atage. She referred to the course taken by this Court in **Grant v. Williams** (supra) in allowing a late approval. In her view the circumstances in that case are indistinguishable from the present case.

It is appropriate to make reference to the provisions of the Exchange Control Act which are applicable to the facts in the instant case. I have already quoted Section 33 (1) and (2) earlier in this judgment. It is helpful to cite also section 20 (2) and (3):-

> "(2) Without prejudice to the provisions of subsection (1), the Minister may issue a certificate declaring, in relation to a security, that any acts done before the **issue** of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act are to be, and are always to have been as valid as if they had been done with the permission of the Minister, and the said acts shall have effect accordingly.
>
> (3) Nothing in this section shall affect the liability of any person to prosecution for any offence against this Act."

and Section 36 (1):-

> "**36.—(1)** It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:
>
> Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason."

The first question is whether the contract for sale was in breach of the Act. That answer has already been given an emphatic yes. Can it be saved by the provisions of Section 36? In the alternative, does the proviso to Section 36 apply? It was accepted at the Bar in the course of argument that the view expressed by Carberry, J.A. in **Grant v. Williams** (supra) at p. 36:-

> " The statutory protection will not however apply where it is clear that the parties mean to pursue their agreement regardless of what the Act provides."

is correct and is good law. On an examination of **Grant v. Williams** (supra), two points were affirmed. First, the fact there are breaches of the Act does not inevitably make the contract illegal or unenforceable. As Douglas, J. held in **Watkis v. Roblin** **[1964] 6 W.I.R. 533**, the effect of the statute was to strike at performance, not formation and that breaches did not necessarily make contracts bad in their formation. Carberry, J.A., summed up the matter at pp. 39 - 40 of the judgment in these terms:-

> " In short then, our section 36 (the English section 33) Contracts legal proceedings etc., with its provision of an implied condition that terms requiring the permission or consent of the Minister (or Treasury) shall not be performed except permission is given, unless it has been clearly excluded by the parties, will preserve

> the contract, and the absence of permission while it may prevent the party from collecting out of the scheduled territories does not provide in itself a defence or answer to the obligation. Further, it is possible to get ministerial validation under section 20: validation of certain transfers."

The breaches of the Act do not necessarily provide a defence to an action for specific performance.

The second point, which emerges from that case, is that breaches will provide a defence if the proviso to section 36 is applicable. In other words, the breach will operate as a defence where it is clear that the parties mean to pursue their agreement regardless of what the Act provides. **Bigos v. Bousted** [1951] 1 All E.R. 92 is an illustration of a case where the intention of the parties not to get approval was manifest. The facts and circumstances of that case appear in **Grant v. Williams** (supra) at p. 36 and I do not think it is necessary to reiterate them.

In order to determine whether an ex post facto validation is possible, the question of the applicability of the proviso to section 36 must first be settled. Mr. Goffe identified the evidence which he said, showed that it was inconsistent with the intention of the parties that an application for approval would be sought. He said the offer to purchase made by the respondent's attorney was in U.S. dollars, $25,000 U.S. to be precise. The offer by the respondent in an undated letter to the appellant's nephew was stated in U.S. dollars. In an affidavit which formed part of the Record, the respondent deposed that the appellant's newphew, her agent, intimated that he wished to purchase money in that currency. Further, Mr. Frankson himself told the respondent on the telephone that the appellant was selling the property for $25,000 (U.S.). The denomination in U.S. currency was confirmed in paragraph 5 of the statement of claim which stated as follows:-

> "5. That the Plaintiff subsequently held further discussions with the said Noel McCarthy, who told the Plaintiff that the premises was being sold for US$20,000.00."

The appellant's attorney for the sale in a letter to his client stated that the respondent "would pay" in U.S. currency. In confirming instructions to sell, the appellant signified her wish that the selling price be fixed at $20,000 U.S. There was as well, the evidence of Mr. Frankson himself. He stated as follows (at p. 17)

> "... I came to the conclusion that she was issuing specific instructions to me to dispose of the property for not less than $20,000.00 U.S. as money was needed urgently."

Later, he was recorded as saying:-

> "... I had intended to get part in foreign currency as she was in need. I spoke to Miss Friend and made it clear that I needed some of that money in foreign exchange."

At p. 18:-

> "... I anticipated Mrs. Tulloch needed as much as possible of the money in foreign currency. ... My recollection is that I thought I had indicated to Miss Friend that we would require part of the money in foreign exchange.
>
> ... My intention was to take the money to the Bank of Jamaica and get authority to send it out."

So far as the judge's reasons can be ascertained from a note he made at the end of the submissions before him, he held that the contract was binding and enforceable. He found that the parties were resident in Jamaica. We do not know what his thinking was on the proviso to section 36. We were made to understand that the submissions in the Court below on behalf of the appellant which were made by Mr. Davis, were the same as those made before us. Nothing in this note however, addresses that issue. Speaking for myself, I would have thought that having reserved judgment, the learned judge would have considered the issues serious or important enough to warrant a reasoned decision in writing. We have been deprived of that assistance.

In the light of the evidence adduced, there are some matters which can be stated with certainty. The contract stated the residences of the parties to be in Jamaica. But in fact neither resided in Jamaica. The appellant's attorney, Mr. Frankson, was aware that the respondent lived in the United States of America at the time of the agreement. He also knew that his client had migrated to the United States of America at the material time. Mr. Frankson knew that his client wished the proceeds of sale in foreign currency in order to pay bills abroad. Both parties being resident abroad, the need to obtain Bank of Jamaica approval was manifest. It is beyond belief that the purchaser resident abroad, would bring foreign currency into the Island so that Mr. Frankson could take it to the Bank of Jamaica for approval to transmit it to the vendor who also lived abroad. The conclusion that the parties intended to ignore the Exchange Control Act is irresistible. And this conclusion does not depend on the view which I have expressed, that it is unlikely that Bank of Jamaica approval would be sought for the funds brought into the country. From the fact that the parties both lived abroad and were willing, the one to pay and the other to receive, the purchase price in U.S. currency, that could be the only conclusion. I have not the least hesitation in saying that the parties concealed their foreign residence to avoid the provisions of the Act. It was never the intention of the parties to seek Bank of Jamaica approval. The proviso to section 36 (1) is, in my judgment, applicable. Accordingly the appellant cannot obtain ex post facto validation of their breach of the Act.

Having regard to this conclusion, I must now consider whether the parties are "in pari delicto." It is obvious that when the respective parties signed the agreement with their true residences concealed, they were "in pari delicto." Where that is the position, the general rule is "in pari delicto potior est conditio defendentis."

This is to be interpreted as meaning that the person resisting the claim possesses the advantage over the person making it. In the present situation, the appellant, as the defendant in the action in the Court below, is the person having the advantage. The Court will not assist the respondent "to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal ... and if the person invoking the aid is himself implicated in the illegality." per Lindley, L.J. in **Scott v. Brown, Doering, McNab & Co.** [1892] 2 Q.B. 724 at p. 728.

The respondent is in an unfortunate position. She did not draft the agreement. It was drafted by the appellant's attorney who had carriage of the sale. The illegality which is proscribed by the Act is being a non-resident entering into an agreement for sale of land with a non-resident without the Minister's consent. (Section 33 (1) (b)). The respondent, I suspect, wanted to purchase the property in Port Morant at all costs and was prepared to do whatever was necessary to achieve that objective. This fact however, cannot assist; her motive admirable though it be, is irrelevant. She remains equally guilty - "in pari delicto" and that precludes the Court coming to her aid to secure the house she desperately required for her elderly and handicapped mother.

But there is an exception to the - "in pari delicto" - rule. Where the contract is still executory, a party is allowed a "locus poenitentiae" a time for repentance, provided he takes proceedings before the illegal purpose, has been substantially performed. Cockburn, C.J. in **Taylor v. Bowers** [1876] 1 Q.B. 291 at p. 295 stated the law in this way:-

> "Now it seems to us well established that where money has been paid, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods. In **Hastelow v. Jackson** [1828], 8 B. & C. 221; 2 Man. & Ry. K.B. 269; 6 L.J.O.S.K.B. 318; 108 E.R. 1026; 25 Digest 406, 95, Littledale, J., says

> (8 B. & C. 220): 'If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards.' And in **Bone v. Ekless** [1860], 5 H. & N. 925; 29 L.J.Ex. 438; 157 E.R. 1450; 12 Digest, Replacement, 317, 2443, Bramwell, B., referring to **Hastelow v. Jackson** (supra) says (29 L.J.Ex. 440): 'Clearly an authority to pay over money for an illegal purpose may be revoked before the money is paid over. In **Hastelow v. Jackson** that proposition of law was laid down, although there the plaintiff had to prove, as part of his case, that he had entered into an illegal contract; he did not, however, seek to recover upon it ... The law is in favour of undoing or defeating an illegal purpose, and is therefore in favour of the recovery of the money before the illegal purpose is fulfilled, not afterwards.'"

Mr. Goffe argued as I think correctly, that there was no evidence to show that the respondent intended to avail herself of the "locus poenitentiae" which the law allows. Unlike the circumstances in **Grant v. Williams** (supra) where an application was made for Bank of Jamaica approval, none whatever has been made in this case. This fact provides strong evidence that the parties' intention was to act contrary to the provisions of the Exchange Control Act.

The result of what I have said means that the appellant has succeeded on the two points of substance. I would allow the appeal, set aside the judgment entered in the Court below, and enter judgment for the appellant.

There remains the counter claim in which the appellant claimed as follows:-

> "(1) **A declaration that the** Defendant is and was at all material times the rightful owner and entitled to possession of premises registered at Volume 199 Folio 100 of the Register Book of Titles.
>
> (2) An Order for recovery of possession of the said premises from the Plaintiff and/or her servants and/or agents and/or anyone occupying the said premises through her."

The notice to quit which was served on the respondent gave the following grounds for eviction:-

"1. The premises are required by the landlord for her own personal use and occupation.

2. Rental due for a period in excess of 30 days.

3. Premises required for substantial repairs and improvements to be effected."

But no evidence was given in support of the counter claim by the appellant. Such evidence as was adduced from the respondent only showed that no rental was paid on the advice of the appellant's attorney. I would dismiss the counter claim. In the event, the order of the Court below on the counter claim is affirmed.

I would propose that the appeal be allowed, that the judgment entered in the Court below on the claim be set aside and judgment entered for the appellant, that on the counter claim, the order in the Court below be affirmed. The appellant is entitled to her costs both here and below.

I think also that the respondent is entitled to a refund of her deposit. On the question of rent, we should invite counsel to address us.

WRIGHT, J.A.

have had the benefit of reading the judgment in draft of and in my opinion the relevant issues have been adequately dealt with. I am in agreement with his reasoning and conclusions and can therefore usefully add nothing save to say that I agree with the order proposed.

BINGHAM, J.A. (AG):

I have taken the opportunity of examining in draft, the judgment prepared in this matter by Carey P, (...). He has dealt fully with all the issues raised on appeal. I agree with his reasoning and the conclusions arrived at that the appeal be allowed with the order as proposed.

Having regard to the very comprehensive manner in which he has set about his task, there is nothing further that I could usefully add.