JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 77/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	WILLIAM JOHNSON	DEFENDANT/APPELLANT
A N D	KENNETH THOMAS DWIGHT THOMAS ANDREA O'MEALLY	PLAINTIFFS/RESPONDENTS

Miss Millicent Rickman for Appellant

Michael Hylton and Miss Minnette Palmer for Respondents

NOVEMBER 12, 1990 and March 5, 1991

ROWE P.:

At the conclusion of the arguments we dismissed the appeal and promised to supplement our oral judgment with written reasons at a later date.

The appellant as the Contractor and respondents, as the Purchasers, entered into an Agreement dated November 24, 1983, clauses 1 and 4 of which provided:

> "1. The Contractor will build and the Purchasers will purchase at the price of Eighty-four Thousand Dollars ($84,000.00) the dwelling house described in the drawings and specifications hereunto annexed and signed by the Purchaser and Contractor together with the land described in 2 below.
>
> .....

> "4.1 The date for completion of the purchase shall be the 90th day after the Contractor or His Attorneys-at-Law shall have notified the Purchasers in writing that the construction of the dwelling house aforementioned has been completed.
>
> On completion of the dwelling house the parties hereto agree to execute an agreement for sale (Contractor to Purchaser) in the usual form with purchase price at ($84,000.00) as stated above and deposit of $16,800.00."

On the following day, the same parties entered into a second Agreement in which the appellant describing himself as Vendor agreed to sell to the respondents, described as Purchasers, Lot No. 476 then known as 25 Clayton Crescent, Willowdene, Spanish Town, in the parish of St. Catherine, comprised in Certificate of Title registered at Vol. 1048 F. 609 for the sum of $12,000.00. That was the self-same lot upon which the dwelling house referred to in the Agreement of November 24, was to be built.

The transactions were not completed, and on June 10, 1985 the respondents brought an action against the appellant seeking specific performance of the Agreement of November 24, 1983. In their Statement of Claim the respondents averred that:

> "By Agreements in writing dated the 24th November, 1983 and the 25th November, 1983, the Defendant agreed to sell the said premises to the Plaintiffs and to erect a dwelling house thereon. ....."

To this Claim the appellant filed a Defence on June 5, 1987 which stated in para. 1 thereof that:

> "The Defendant admits paragraphs 1 and 2 of the Statement of Claim."

Application was made to the Master to enter Summary Judgment on the ground that the Defence as pleaded showed no reasonable defence in law. Leave was granted to the respondents to enter Summary Judgment on June 17, 1987 and Judgment was duly entered on June 25, 1987 ordering the appellant to specifically perform the contract pleaded.

Notwithstanding that the respondents had filed a Caveat in 1985 to protect their interests in the subject property and that on the hearing of the Summons for Summary Judgment on June 10, 1987 an officer of the Registrar of Titles gave evidence that the Caveat was still in force, the respondents became aware in October 1987 that the Registrar of Titles could not locate the original Certificate of Title nor the respondents' Caveat and more significantly that the appellant had transferred the property to one John Beacon in 1986. Specific performance being no longer a remedy available to the respondents, they applied to set aside the Summary Judgment of June 17, 1987 and to substitute a judgment for damages to be assessed. An Order was made in those terms on January 19, 1988 and damages were assessed by Morgan J. on April 6, 1988 at $72,331.30 plus interest at the rate of 6% from the date of the original judgment with costs to the respondents to be agreed or taxed.

Against the Order of the Master to proceed to assessment of damages the appellant has filed six grounds of appeal as follows:

"1. That there was no Agreement for Sale of the House.

2. That alternatively the plaintiffs were in breach of the Agreement signed on 24th November, 1983 between the Plaintiffs and the Defendant, which breach was accepted by the Defendant.

3. That the Defendant/Appellant suffered considerable loss as a result of the Plaintiffs' breach and in order to reduce the loss was forced to enter into an Agreement with a third party to sell the House.

4. That accordingly the Plaintiffs were not entitled to damages but only a return of his deposit.

5. That the Learned Master erred in holding that the Plaintiffs were entitled to damages.

6. That the weight of the evidence is against the judgment of the Learned Master."

Miss Rickman applied for leave to adduce further evidence under the provisions of Rule 18(2) of the Court of Appeal Rules 1962 which enables the Court to receive further evidence upon questions of fact. This evidence, from affidavits which were filed with the application to adduce further evidence, related to the date of the completion of the house. Notice was given that "the said evidence which it is intended to adduce was at all material times available but that the matter was not heard or tried on the merits." In the ordinary way this admission would be sufficient ground for a Court to refuse to exercise its discretion in favour of a litigant who deliberately withheld information at the hearing stage and attempted to put it forward at a later date, on appeal. The appellant filed two affidavits in opposition to the application for Summary Judgment and in neither of them did he allege that the apparently unfinished condition of the house was due to the act of strangers, i.e.

thieves, who had broken into and removed the sanitary fixtures and a kitchen fixture, viz., the kitchen sink.

A letter from the appellant's attorneys dated May 10, 1985 to the respondents' attorneys set out clearly the reason for the non-completion of the contract. That letter states, inter alia:

> " .....
>
> (4) We are fully aware of the purchasers' position in this matter and have in fact been trying for a considerable period of time to have the matter completed. The position however is that the Vendor is at present unwilling to sign the instrument of transfer as he is seeking, despite our advice, to obtain a greater price than that stated in the contract. This situation has been in existence for approximately 7 months now without our being able to come to an amicable solution between the parties, consequently we recently advised both Vendor and Purchaser to seek independent legal representation in the matter. ....."

On this state of the evidence we refused to exercise our discretion to admit the additional evidence, which in any event, was of a very tenuous nature.

Miss Rickman submitted that on a proper construction of the Agreement of November 24, 1983, there was no Agreement for the sale of a house. There was she said an Agreement to build a house which upon completion would be sold by the appellant to the Vendor. At best, she said, the parties had made an Agreement to make an Agreement in the future upon the occurrence of a certain event, viz., the completion of the construction of the dwelling house.

Mr. Hylton neatly countered these arguments by submitting that it was not open to the appellant's attorney to contradict her own pleadings. It is true that she did not file the Defence, but that Defence has not been amended and consequently the appellant is bound thereby. As the extracts from para. 2 of the Statement of Claim and para. 1 of the Defence clearly shows, the defendant admitted that he agreed to sell the land and to erect a house thereon. When the construction was completed the house would become part of the land and at no time prior to the filing of the appeal was the point taken that there was no Agreement for sale between the parties which could be specifically enforced. We found that there was no merit in this ground of appeal.

Although we were not addressed at any length as to the practice in Jamaica whereby one attorney acts for both Vendor and Purchaser in the transfer of registered land, we did express the view that in an effort to avoid conflicts this practice should be adopted as seldom as possible.

It was for these reasons that we dismissed the appeal with the result set out earlier.