



[2016] JMSC Civ. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007/HCV02564

IN THE CIVIL DIVISION

BETWEEN	A1 LIMITED	CLAIMANT
A N D	MARY GRACE ABRAHAMS	DEFENDANT

IN CHAMBERS

Miss Keiva Marshall instructed by Clough Long & Co. for the Claimant.

Miss Kimone Tennant instructed by Hart Muirhead Fatta for the Defendant.

APPLICATION FOR SUMMARY JUDGMENT

Heard: March 16, 2016

CORAM: KING, J.

- [1] By an Agreement for Sale dated 27th March, 2007 the Defendant contracted to sell to the Claimant a parcel of land at Roaring River, St. Ann registered at Volume 1156 Folio 974 of the Register Book of Titles at a Sale price of US\$500,000.00
- [2] The agreed deposit of US\$75,000.00 was paid. Special Condition 4 of the Agreement for Sale provided as follows:-
- 4 (1) the purchasers shall on or before 21 days after the date of this Agreement, cause to be delivered to the Vendor's Attorneys-at-Law either

- (i) a letter of undertaking from a reputable licensed financial institution, in a form acceptable to the Vendor's Attorneys-at-Law, as to the payment to the Vendor's attorneys-at-Law of the balance Sale Price and costs of this sale as set out in this agreement upon completion, or ;
- (ii) payment in full of the balance Sale price and costs of this Sale as set out in this Agreement.

(2) Time shall be of the essence of this special condition 4.

- [3]** A letter of undertaking purporting to comply with the provisions of special condition 4 and dated May 2, 2007 was sent to the Vendor's Attorneys-at-Law by Attorneys-at-Law for First Caribbean Building Society, and receipt thereof by FAX was subsequently acknowledged to have taken place on May 4, 2007.
- [4]** Meanwhile on May 3, 2007 the Defendant's Attorneys-at-Law wrote to the Building Society's Attorneys-at-Law informing them that the Agreement for Sale had been rescinded and enclosing a copy of a letter of the same date to the Claimant's Attorneys-at-Law informing them of that fact.
- [5]** Subsequently on the May 24, 2007 the Defendant's Attorneys-at-Law wrote to the Claimant's Attorneys-at-Law beginning the process of refunding the deposit.
- [6]** On June 22, 2007 the Claimant filed this suit seeking Specific Performance of the Sale Agreement.
- [7]** [On May 10, 2011 an application for Court Orders was filed by the Defendant seeking Orders for Summary Judgment and costs.
- [8]** On May 19, 2011 the Claimant applied to Strike Out the summary judgment application filed on May 10, 2011.
- [9]** The above applications of May 10 and 19, 2011 are now before this Court for a decision.

[10] The Claimant's Attorneys-at-Law indicated their objection to the Summary Judgment application being heard on the basis of two procedural omissions attending the filing of the application, viz.

(i) Failure to identify the issues as is required by Civil Procedure Rules 15.4 (4),
and

(ii) Failure to file an accompanying affidavit of evidence in support as is required
by Civil Procedure Rules 15.5 (4)

[11] The application filed on May 10, 2011 had been preceded by a similar application filed on May 2, 2011. The application filed on May 10, 2011 was duplication, but stood after the previous application was withdrawn. That previous application had been accompanied by two affidavits filed by Attorneys-at-Law, Noelle-Nicole Walker and Novar Patrick McDonald, both of whom were from the law firm of Hart Muirhead Fatta which represented the Defendant. These affidavits outlined the issues to be decided by the Court.

[12] These issues were further addressed by the submissions filed by Attorneys for both sides. Consequently neither the Court nor the Claimant were deprived of the opportunity to grasp these issues.

[13] Both sides in their respective submissions cited **SWAIN v HILLMAN (2001) 1 ALL ER 91** as indicating that the Court may grant Summary Judgment on the claim or on a particular issue if it considers that the Claimant has no real (meaning realistic as distinct from fanciful) prospect of succeeding on the claim or issue.

[14] The Defendant rescinded the Agreement for Sale on the grounds that the letter of undertaking came some two weeks or more too late.

[15] The Claimant seeks to argue that since special condition 5 '...allowed the Claimant to opt for interest instead of rescission', and 'including forfeiture of the deposit and rescission of the Agreement for Sale' because she did not rescind as soon as her right arose she should be taken to have waived that right. This

ignores the fact that the right to opt for interest is expressly stated in Clause 5 to be “without prejudice to right of the vendor to take such steps against the Purchaser as she is entitled to take including forfeiture of the deposit and recession of the Agreement for Sale, provided that the Purchaser’s delay in paying the balance of the purchase price is not due to the fault of the vendor.

- [16] The Court’s approach is guided firstly by the principle enunciated in **SWAIN v HILLMAN**. The Purchaser’s delay in the instant case was in no way due to the fault of the Vendor. Special condition 5 preserves to the Defendant the right to rescind the contract – a right which she chose to exercise.
- [17] The Court takes further guidance from the advice of the Privy Council delivered by Lord Hoffman in the case of **UNION EAGLE LTD. V GOLDEN ACHIEVEMENT LIMITED (1997) AC 514 at 521**. In that case time was of the essence in respect of the final payment which was made 10 minutes late. Lord Hoffman advised that certainty was needed in business. Accordingly, the contract’s terms would be strictly enforced and the contract rescinded and the deposit lost. Lord Hoffman said “the present case seems to their Lordships to be one in which the full force of the general rule applies. The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late which can be resolved only by litigation.”
- [18] In the instant case the Court holds that there is no realistic prospect of the Claimant succeeding in the suit. Consequently, the Claimant’s application to strike out the Defendant’s application for Summary Judgment is denied. The Claimant’s application for Summary Judgment is granted with costs to be agreed or taxed.