

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1192 OF 1983

BETWEEN	ADA BARRETT	PLAINTIFF
A N D	AUSTIN L. MCKENZIE	DEFENDANT

Mr. O.G. Dale and Mr. Delliser instructed by Messrs. O.G. Dale and Co.
for Plaintiff.

Mr. Haynes instructed by Messrs. Perkins, Grant, Stewart, Phillips and Co.
for Defendant.

Heard 2nd, 3rd, 4th, 5th December, 1991 May 15, 1992

JUDGMENT

COOKE J

It is now more than two decades since the genesis of the circumstances
which has given rise to this action. The plaintiff seeks:-

- (1) An Order for the Specific Performance of the Agreement for the sale and purchase of 15 acres of land and premises situate at Hart Hill, in the Parish of Portland.
- (2) A Declaration that the Plaintiff is the beneficial owner of the aforesaid premises;
- (3) An Order that the said land and premises be surveyed;
- (4) A Declaration that the Plaintiff is entitled to payment by the Defendant of the sum of \$20,149.85;
- (5) A Declaration that the Plaintiff is entitled to set off the amount of \$20,149.85 against the balance of the purchase price of the land hereinbefore described;
- (6) An Injunction restraining the Defendant, his servants and/or agents, or anyone on his behalf, from entering upon the land the subject herein;

defendant to sell and the plaintiff to purchase 15 acres of that land at the 'special price' of \$2,500 per acre. The plaintiff said she pointed out the portion she wished - the left side away from the tenants. She said she was instructed to go into possession forthwith and to erect all her necessary pens. Thereafter the plaintiff said she put a fence around about 15 acres. She built two pig pens and had three cow pastures and constructed a farm house thereon. All this was done before 1980. On the 15 acres which she said she acquired she had 14 cows and 180 pigs. She gave evidence of the involvement of one Mr. Paule an attorney-at-law who was engaged in having the land registered - of his death of a Mr. Grossett another attorney-at-law taking over the legal work pursuant to the land. She also spoke of the work of one Mr. Donald Mark pertaining to surveying the said land. Sometime about 1980 the plaintiff began to get anxious about the title to her land. She was told by the defendant that the subdivision application took time but she should follow up Mr. Grossett. Apparently she was performing the role of agent for the defendant in that all prospective purchasers had to come to her before going to Mr. Grossett. In May 1981 she said she paid \$3,500 towards the purchase price. Before that the expenditure of \$1,201.00 spent by the plaintiff on behalf of the defendant was to be regarded as the deposit on the purchase price. Further she said that she expended a further \$20,000.00 on behalf of the defendant and this sum it was agreed between herself and the defendant should go to the purchase price. To conclude this outline of the plaintiff's position it would seem that sometime after 1981, as far as the relationship between the plaintiff and defendant was concerned - that began to sour. The reasons need not detain us except to say that it arose out of the administration of the church.

The attack to the plaintiff's account was by way of cross-examination (as already said no evidence was called by the defence). She said, "There was no other agreement other than the agreement in 1971. Paid no monies in 1971 to Reverend McKenzie. Paid no money in 1972. When came to Buff Bay not experiencing any difficulty with livestock. Not have difficulties come down because paster wanted me to help - could not leave animals in Black Hill".

The plaintiff was then confronted with exhibit 9 a letter written by her to the defendant. This letter is dated 7th March, 1973. I quote from this letter.

"I made it clear to you from the beginning when you decided to sell that my sister and I would like to buy a portion of the land from you.

We are not interested in being any tenant. Even if we can't buy the full amount we will satisfy with 15 acres, 10 for me and 5 for my sister.

We will pay \$260.00 per acre if this figure meets your approval.

We will make a down payment and ask you for time to pay the balance whether monthly, quarterly, half yearly or yearly as it pleases you.

Kindly let us hear your decision on this matter.

We would be grateful if you would put us at the side where Theresa Thomas now lives by ourselves. You see if you were going to be here or intend to live here it would be different, but it isn't easy to live with tenants and to have them on both sides make it worse. I would like a place where I can be at peace away from the bad words and the ganja. That is the reason why my sister and I are trying to buy this portion so that we can be a little way from them also our animals."

The thrust of the cross-examination is to the effect that the plaintiff was placed on $\frac{1}{2}$ acre of land and she extended the acreage without permission.

Paragraph 9 of the defence pleads as follows:-

9. The defendant states that by letter dated the 7th March, 1973 and written by the plaintiff to the defendant the plaintiff expressed a desire to purchase land at Hart Hill belonging to the defendant. That prior to this by letter dated 20th February, 1973 and written by the defendant to the plaintiff the defendant had expressly indicated to the plaintiff that she could occupy land at Hart Hill as a tenant of the defendant and as a tenant only. That at no time did the defendant conclude any Agreement for Sale of land at Hart Hill or any other land with the plaintiff. That the said letters dated the 20th February, 1973 and the 7th March, 1973 will be referred to at the hearing of this suit for their full terms and effect.

It must be noted that neither of the letters dated 20th February, 1973

and 7th March, 1973 were referred to the court "for their full-terms and effect."

To return to exhibit 9 it is written therein:-

"With regards to Hart Hill Mrs. Theresa Thomas and Johnson are all there. In fact all tenants are still there and show no sign of going although Johnson pulled down one of the house he still has things there and goes and come. Mr. Lewis and his wife son-in-law and daughter of Theresa Thomas join with the mother and are giving my workers a hard time. I am very glad you have decided to let them go.

Of course I couldn't do anything without an authority from you. But I return this one to you for amendment.

I am in full agreement with paragraphs 1 - 5 also 8 and 9.

I am asking you kindly to read over paragraphs 6 and 7 which I am not in agreement with."

Counsel for the defendant sought to use those words to suggest that there was a tenancy on the part of the plaintiff. Quite understandably with the long passage of time the plaintiff could not recall specifically what the paragraphs 1- 5 and 8 and 9 referred. In re-examination she said the document to which the word 'paragraphs' referred was in a declaration form from the Land Valuation Department and she objected to those paragraphs because the inclusion of her acreage in it would be treating her as a tenant. To the court she said, "I can't recall specifically what was in paragraphs 6 and 7, 8 and 9 but it was objectionable for it treated me as a tenant."

I will now deal with the issue as to whether there was an agreement between the parties as to the sale and purchase as claimed by the plaintiff. It seems sufficiently certain that there was no agreement in 1971 as is pleaded in paragraph 2 of the statement of claim. The section of exhibit 9 set out supra is conclusive. The parties were up to that time negotiating. It is to be noted here that in cross examination the plaintiff said that the only agreement between her and the defendant was in 1971.

Did the parties ever reach an agreement? Examination of correspondence between the defendant and the plaintiff and between the defendant and his attorney-at-law is instructive. Exhibit 2 is a letter dated March 21, 1981

written by the defendant to the plaintiff the contents of which are set out in full:-

"March 21, 1981

Dear Miss Barrett,

Greetings!

I shall be passing through Buff Bay tomorrow but will not be able to stop to talk with you. I will advise you of a date later.

I have asked Mr. Grossett to complete the sale to you, without delay, of fifteen acres of Hart Hill. He says he has his own surveyor. You should go to see him soon.

The cost of the coconut planting has not yet reached me. Kindly send this very early! I must send the cost to Mr. Grossett.

I am sorry to take the use of the two room board house back with so short notice, but I consider "Mami" destitute and would like to help her. The survey line will exclude this house anyway.

I will, as I said above, make a day to come and have further talk with you.

Kind regards and best wishes,

Sincerely yours,

Austin L. McKenzie"

The second paragraph of this letter makes it clear that by March 21, 1981 there was an agreement between the defendant and the plaintiff as regards the sale by the defendant and purchase by the plaintiff of 15 acres at Hart Hill. There is no issue that the disputed land forms part of the land that the defendant had purchased from Andronetta Grant in Hart Hill - land which the plaintiff is at this time now in possession.

I now turn to the issue of the purchase price. The plaintiff's position is that the purchase price was \$2,500.00 per acre. She paid a deposit of \$1,201 as a deposit and a further payment of \$3,500.00 to Mr. Grossett, the attorney-at-law representing the defendant in the transaction. Paragraph 5 of the defence denied that the sum of \$1,201.00 or any sum at all was received by the defendant as a deposit. Paragraph 12 of the defence admits that Mr. Grossett received the sum of \$3,500.00 but asserted that, that sum "did not represent

any payment towards the alleged purchase price under the alleged agreement for sale". The plaintiff was not challenged in cross examination as regards these payments. I now set out in full exhibit 4 a letter written by the defendant to Mr. Grossett dated 4th May, 1981:-

"To Mr. Ian Grossett

This statement shows the amounts given to me by Miss A.M. Barrett and what she requested of me to return, to the balance of which must be added her advances with respect to land taxes while I was off the Island, the sum total of which to be treated as deposit on purchase price for fifteen (15) acres of the Hart Hill land which she has requested me to sell to her:-

Check for - - -	\$1201.00
Market for Miss Grant = 3 X 10	30.00
Purchase of stove for Miss Grant	31.00
Income tax on my behalf	37.25
Mattress for Miss Grant's bed	51.00
	<u>\$1350.85</u>

Less amount returned by me (250	
(75	<u>325.00</u>
<u>(325</u>	
Total =	<u>\$1025.85</u>

To the above \$1025.85 must be added the taxes she paid in my absence and the expenditure for planting 400 coconut plants, all of which she has to give me.

A.L. McKenzie

4/5/81

Copy to:-

(1) Miss A.M. Barrett
Buff Bay

(2) Mr. Ian Grossett
Port Antonio
(supplied him already)."

This makes it clear that a deposit of \$1,201.00 was paid by the plaintiff.

I now set out in full exhibit 1.

"F.V. Grossett & Co.
2 Harbour Street
Port Antonio
May 29, 1981

RECEIVED from Miss Ada Barrett the sum of \$3,500.00 for Rev. A.L. McKenzie cheque No. B 018900 from the Bank of Nova Scotia Jam. Ltd. Port Antonio dated May 29, 1981, on further payment for land at Hart Hill in the Parish of Portland.

Sgd....."

This document supports the contention that a further sum of \$3,500.00 was paid by the plaintiff as regards the purchase price and I so find. I now make reference to exhibit 7 a letter from the defendant to Mr. Grossett dated March 5, 1982. I quote paragraph 3 of this exhibit.

"If, however, government should demand a service road the price of \$2,500 will have to be proportionately raised to provide for this. In my rejected pro forma terms I included the clause that at \$2,500 Miss Barrett would have to build her own road, and pay for her own survey. All this holds."

To what does the "the price of \$2,500 refer? I have already found that (i) a deposit of \$1,201 was paid (ii) that a further payment of \$3,500 was made. The defendant would at the time of writing the letter, exhibit 7 be aware of this. So at the time of the writing of this letter \$4,701 had already been paid. The acreage to be sold is 15. Taking into consideration all the circumstances I construe the words 'the price of \$2,500' to mean \$2,500 per acre. This is what the parties had agreed.

I now turn to the subject matter of the sale. It is for 15 acres but which 15 acres? Exhibit 3 is in two parts. The first part is a list of the persons to whom land was to be sold. The second part is a sketch diagram delineating the respective portion of land for each purchaser. A photocopy of this sketch diagram is attached to this judgment. On it the 15 acres allotted to the plaintiff is marked out. It is noted that the allotted portion carries

the words "Miss A.M. Barrett and her sister Mrs. G. Bygrove 15 acres"; apparently there may have been a time when Mrs. Bygrove was to have been a party but she subsequently completely disappeared from the picture leaving the plaintiff as the sole purchaser of that 15 acres. I find that the subject matter of the sale is sufficiently certain. In concluding this part of the judgment I find that there was a contract for the sale of 15 acres in Hart Hill between the plaintiff and the defendant. The next question is whether this contract is enforceable and to this question I now turn.

The defendant in paragraph 24 of its defence relies on the provision of section 4 of the Statute of Frauds and contends "that there is no sufficient memorandum in writing to satisfy the said section". Section 40 (1) of the Law of Property Act (1925) U.K. has replaced section 4 of the Statute of Frauds. It reads.

"40. (1)

No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged".

There is written memorandum to satisfy the requirements of this section as regards the names of the vendor and purchaser, see exhibits 2,3,4 and 7. The vendor is the defendant and the purchaser is the plaintiff. As regards the subject matter of the sale see exhibits 2,3 and 4. Exhibits 2 and 3 speaks generally to 15 acres in Hart Hill. Exhibit 4 delineates the specific 15 acres. It is indeed true that the sketch diagram does not bear the signature of the defendant but I hold that both the list of prospective purchasers and the sketch diagram which were handed to the plaintiff simultaneously form one document and the signatures on the list also covers the sketch diagram. In respect of the consideration I have already construed the words "price of 2,500" to mean \$2,500. There was a special term which was agreed on, which is that the expenditure incurred by the plaintiff on behalf of the defendant in planting coconut plants and payment of taxes should be deducted from the purchase price:

see exhibit 2,4 and 6. In exhibit 2 it is written, "The cost of the coconut planting has not yet reached me. Kindly send this very early! I must send the cost to Mr. Grossett". In exhibit 4 the defendant wrote, "To the above \$1025.85 must be added the taxes she paid in my absence and the expenditure for planting 400 coconut plants all of which she is to give to me". In exhibit 6 dated February 28, 1981 the defendant wrote "she promised to give me very shortly the itemised statement of moneys she says she spent to plant 400 coconut plants. This is to be added to her purchase money". Each exhibit to which reference has been made i.e. exhibit 2,3,4 and 7 were written and signed by the defendant "the party to be charged". Together they constitute memoranda which sets out the contractual nexus between the parties. Accordingly it is my view that the statutory requirements have been satisfied and the contract would be enforceable.

The plaintiff urged, however not with much vigour that the doctrine of part performance could assist her. It cannot. The acts she relied on were (a) entering into possession and (b) fencing off 15 acres. But when were these acts done? They were carried out on or about 1972. I have decided that there was no contract between the parties at that time. Therefore there was no contract to which these acts could be referable. At best these acts were in anticipation of an eventual contract - whatever the state of mind of the plaintiff at that time.

The plaintiff in her statement of claim in paragraph 2 pleaded that "in or about the year 1971 the plaintiff entered into an oral agreement with the defendant for the sale and purchase of 15 acres of land situate at Hart Hill, - - - - - The agreed purchase price of \$37,500.00. The defendant has maintained that there was never any contract at any time at all and certainly none in or about 1971. As already stated I have found that no contract was in existence in 1971. The evidence has established that the contract between the parties came into existence at a much later date. This specific pleading is not in harmony with the findings of the court. Does this affect the plaintiff

adversely? The situation where there is a difference between the pleadings and the finding of the court has been judicially considered.

See: John C. Stein and Co. Ltd. [V.O Hanlon [1965] 1 A.E.R. p. 547]

Waghorn v George Wimpey and Co. Ltd. [1970] 1 A.E.R. p. 474,

Dolcie Brown v Wyncoff McKenzie [C.L. B 141 of 1986 unreported.

These cases had to do with negligence but it is my view that the principle enunciated therein is of general application. It is this. The plaintiff will succeed despite the variance between the pleadings and the finding of facts if (i) There was not such a radical departure from the case pleaded so as to say that what was presented and accepted was a new separate and distinct case and (ii) the facts on which the success of the plaintiff was established were such that it cannot be said that the defendant was prejudiced. In this case the central issue is whether or not there was a contract between the parties. The statement of claim had 22 paragraphs. The defence as pleaded had 29 paragraphs as the defendant sought to refute every assertion made by the plaintiff. There was in addition a counter claim which was not pursued. It cannot be said that there has been any radical departure as in (i) supra, nor that the defendant has been in anyway embarrassed as in (ii) supra. Accordingly the submission that because there was no contract in 1971, this would be fatal to the plaintiff's cause is without merit.

The purchase price is \$37,500.00. There is an admission by the defendant that he received a deposit of \$1,201.00 see exhibit 4. On his calculation because of reimbursement to the plaintiff this figure will be reduced to \$1025.88.. see exhibit 4. The plaintiff has given evidence of expending \$20,000 on behalf of the defendant in planting coconut plants on "parson's side" she had the land ploughed - had the plants put in, and fertilized. She said she sent a bill for the \$20,000 to the defendant and this sum was to go to the purchase price. She has not itemized this expenditure. This expenditure was not challenged in cross examination. The defendant has acknowledged that the expenditure was incurred, this expenditure would go to the purchase price, see exhibit 2,3 and 6.

In deciding whether or not I should accept the figure of \$20,000.00, having regard that there is no substantiation in detail, the credibility of the plaintiff in this regard is crucial. In all the circumstances, and in my assessment of the plaintiff I am prepared and do accept her evidence that she did incur those expenses and she did send a bill in respect of that amount to the defendant. This sum will go to the purchase price. In addition I accept that there was a further payment of \$3,500. The plaintiff will have therefore contributed \$24,525.88 towards the purchase price leaving a balance of \$12,974.11.

In conclusion it is ordered that:

- (i) The land delineated on the sketch diagram part of exhibit 3 with the words "Miss A.M. Barrett and her sister Mrs. G. Bygrove 15 acres be surveyed. The cost of this survey is to be shared equally between the plaintiff and the defendant.
- (ii) There will be specific performance of the contract of sale between the plaintiff and the defendant as regards the land to be surveyed in (i) supra.
- (iii) The sum of \$20,000.00 will go to the purchase price of the said land.
- (iv) The plaintiff will pay to the defendant the sum of \$12,974.11 the balance of the purchase price.
- (v) The defendant is restrained by himself, his servants and/or agents, or anyone on his behalf from entering the land which is to be surveyed in (i) supra.
- (vi) There will be costs to the plaintiff to be agreed or taxed.