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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B-402/80

BETWEEN	DERRICK BROWN	PLAINTIFF
A N D	HENRY SIMPSON	DEFENDANT

Mr. Gordon Robinson for Plaintiff.

Mr. C. M. Daley for Defendant.

Heard on: July 8, 1982 and October 4, 1982

JUDGMENT

ELLIS J. (Actg).

The plaintiff claims Specific Performance of an Agreement between himself and the defendant dated 4th July, 1975, for the sale of certain freehold property situated at Princess Street in Falmouth, Trelawny. Alternatively, he claims damages for breach of contract and a Declaration that he is entitled to a lien on the said property for his deposit of \$5,000.00 with interest thereon.

By consent of the parties, 11 documents were admitted into evidence as Exhibits 1 - 11. These documents contain the Agreement between the parties, a sub-division plan and correspondences between the legal representatives of the parties and a receipt for \$5,000.00 by the defendant.

The plaintiff says that in 1975 he was informed that the defendant wished to sell a piece of land at Princess Street in Falmouth. He visited the defendant and indicated his interest in buying the land from him.

The defendant pointed out the boundaries of the land to him.

These were:

- (i) on the West which is the side on Princess Street, he was shown 2 metal pegs;
- (ii) on the South he was shown a wall
- (iii) on the East, a wall;

(iv) on the North, he was shown the boundary as running through an old garage and butting onto a metal peg on the East boundary.

On being shown the boundaries he said he asked the purchase price and the defendant said it was \$10,000.00. He requested the defendant to reduce the price but his request was refused.

On the 4th July, 1975, he obtained a cheque from the Bank of Nova Scotia for \$5,000.00 which he paid to the defendant and obtained a receipt (Exhibit 11).

On the following day, he took his papers to his attorney who drew up an Agreement for sale which was signed by himself and the defendant (Exhibit 4). The plaintiff said that he was put in possession of the land but could not get a title since a sub-division plan (Exhibit 5) took sometime to be approved.

On the plan being approved, he said the defendant objected to it on the ground that he was not satisfied with the northern boundary going through the garage. The defendant sought to have the land re-surveyed to which he plaintiff objected because the object of a re-survey was to vary the agreed boundary. The plaintiff says he is willing to complete but the defendant refuses to facilitate that completion.

In answer to questions from Mr. Daley for the defence, the plaintiff said he was shown the northern boundary as passing through the garage and in his opinion about half of the garage would fall on his side. He said he was the one who gave instructions to his lawyer to draw up the Agreement and when he did so, he had been shown the boundaries. He said that he was told by Simpson to await a sub-division plan for his title. After waiting for sometime, Simpson told him to contact the surveyor; he did so and obtained the plan (Exhibit 5) for which he paid. He denied that he unilaterally indicated to the surveyor the boundaries of the piece of land he was buying. He said his attorney did not inform him that the defendant was disputing the northern boundary and that an adjustment of that boundary was being negotiated. He did not agree to any such

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adjustment neither did he instruct his lawyer to negotiate any adjustment.

The defendant Simpson on his case, said he agreed to sell the piece of land to Brown estimated to be 2000 square feet in area. He denied that the northern boundary was as alleged by Brown or as shown on the plan (Exhibit 5). He said he gave no instruction to the surveyor Scott to sub-divide his land and the first time he saw that plan was when his lawyer showed it to him. He said he is willing to complete the Agreement but not in terms of the northern boundary. Brown did agree to a change in the boundary and that was why he retained the services of surveyor Alexander. He denied that -

- (i) he instructed Scott to sub-divide his land;
- (ii) he did instruct him so to do before he agreed to sell to Brown;
- (iii) the plan was done on his instruction;
- (iv) that he changed his mind as to the northern boundary after he saw the sub-division plan;
- (v) that he tried to get a change in the Agreement.

The Agreement (Exhibit 4) when examined describes the land to be sold with the boundaries. In particular, the northern boundary which is in dispute is said to be butting and bounding on the remainder of the defendant's land.

The boundary description as worded is not disputed. What is disputed is that the boundary is a straight line through the garage as alleged by the plaintiff.

Every valid Agreement for the sale of land must contain a description of the subject matter but it is not necessary that it should be so described as to admit of no doubt what it is, for the identity of the actual land and the land described may be shown by extrinsic evidence. The description in the Agreement as to the northern boundary is susceptible of sustaining the contention of either party; the one that it is a straight line and the other that it is not. In that case extrinsic evidence can be adduced

to show what were the facts which the parties had in mind. See Bank of New Zealand vs. Simpson [1900] A.C. 182, 189.

The extrinsic evidence in this case is the sub-division plan (Exhibit 5). That clearly shows a straight north boundary as contended for by the plaintiff. But the defendant denies giving any instruction as to the preparation of that document. He is therefore saying that the surveyor arrogated unto himself the sub-division of the land.

For my part, that is incredible. Equally, the plaintiff's statement that he did not agree to an adjustment of the northern boundary cannot stand in the light of Exhibits 6, 7, 8 and 9. Those exhibits which are correspondence between the attorneys of both parties evince strong indication as to an Agreement by the parties to effect an adjustment in the northern boundary. Mr. Robinson for the plaintiff addressed me to say that the correspondence are not binding on him and he cited the case of Smith-Byrd vs. Blower [1939] 2 All E.R. 406 in support of his contention. I find no comfort on the point from that case and I would prefer to consider the case of Clark Limited vs. Wilkinson [1965] 1 All E.R. at page 934.

In that case the question was whether or not counsel's admission was binding on his client. The Court of Appeal held that in the circumstances it did not. However, the Court was quite certain that counsel's admission is binding in certain circumstances e.g. where the admission is made within counsel's ostensible authority.

See also Waugh Et al vs. H.B. Clifford Ltd [1982] 2 W.L.R. 679.

In this case the correspondence of the plaintiff's attorney appear to have been made with every ostensible authority. There was a series of correspondence ending with the plaintiff's demand for a title by plan. In the circumstances there was an Agreement to vary the north boundary of the land to be sold. I am not convinced that the plaintiff was unaware of such agreement. I therefore find:

- (i) The defendant agreed to sell to the plaintiff an estimated 2000 sq. ft. of land for \$10,000;

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- (ii) The defendant showed the boundaries of the piece of land to the plaintiff;
- (iii) The plaintiff accepted those boundaries and duly paid \$5,000 as a deposit;
- (iv) The defendant did instruct the surveyor to sub-divide the land co-incident with the boundaries indicated on the plan;
- (v) It was only after defendant saw the plan (Exhibit 5) that he had a change of mind as to the northern boundary;
- (vi) The plaintiff agreed and consented to an adjustment of the northern boundary as evidenced by exhibits 6, 7, 8 and 9.

The findings (i) - (v) indicate an Agreement between the parties to sell and to purchase the plot of land No. 2 as shown on the sub-division plan (Exhibit 5). But finding (vi) cannot be ignored and gives rise to the consideration whether or not it affects the original Agreement as to the north boundary.

It appears to me that the defendant sought to give effect to that Agreement and to the plaintiff's request for a title by plan as contained in exhibit 9. He did so by engaging a surveyor who went to survey the land on the 9th October, 1979. On that day the plaintiff objected to the survey on the ground that the land should conform to the previous boundaries - the very boundaries which he had agreed to be adjusted. In my opinion, and I so hold, the Agreement to adjust the original north boundary made for a new north boundary which could only have been ascertained by survey since plaintiff required a title by diagram.

In so holding I have found support in the case of Perry v. Suffields Limited [1916] 2 Ch. 187. In that case, terms in a contract for the purchase of land were agreed but there were subsequent negotiations as to one of those terms. The question was what effect the subsequent negotiations had on the original Agreement?

The Court of Appeal through Lord Cozens-Hardy the then Master of The Rolls, held that the subsequent negotiations did not of in the peculiar circumstances the case alter the original Agreement.

The Court of Appeal however adopted the decision of Mr. Justice North in Bellamy v. Dibenham 45 Ch. D. 481 that:

" When once it is shown that there is a complete Agreement, further negotiations between the parties cannot, without the consent of both, get rid of the Agreement already arrived at".

The original contract in this case, has been varied by the consent of the parties. It has now been replaced by one to sell land with a new north boundary.

It is, on the evidence, the plaintiff who has stymied the attempt to perform that later Agreement by objecting to the survey. He cannot in the circumstances be heard to pray in aid the equitable and discretionary remedy of Specific Performance in respect of the original Agreement. Neither is he entitled to the alternative remedies sought, since the defendant is not in breach of the contract and plaintiff is in possession which secures adequately his deposit of \$5,000.

There will therefore be judgment for the defendant with costs to be agreed or taxed.

Before passing, it is my suggestion that the parties get together on this matter to have it concluded with a possible abatement of purchase price as the evidence is that the adjusted boundary will result in the plaintiff getting over 200 square feet of land short of 2000 square feet originally bargained for.

Ellis J. (Actg.)

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