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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1984/C328

BETWEEN	WESLEY CHANG	PLAINTIFFS
AND	ARLENE SABDUL	
AND	TREVOR SALMON	DEFENDANT

Messers M. Tenn and Keith Brooks for Plaintiffs
Messers Norman Davis and Donovan Jackson for Defendant

Heard: 26th, 27th, 28th July 1993

Reasons for Judgment

HARRISON J. (Ag.)

On the 28th day of July, 1993 I gave judgment for the Defendant in this action and had promised to put my reasons for judgment in writing. It is regretted that there has been some delay in doing this but I now seek to fulfill this promise.

Plaintiffs' Claim

The plaintiffs' claim in this action is for specific performance of alleged agreement for sale of land in respect of premises at 9 Worthington Close, St. Andrew. The Statement of Claim alleged inter alia that, "in or about the month of December, 1982, the Defendant orally agreed with the Plaintiffs to sell to the Plaintiffs the said land together with two 100 lbs gas cylinders then on the land and together with new drapes for the townhouse thereon for a price of One Hundred and Twenty-seven Thousand Dollars ($127,000.00)." It was further alleged that this agreement would be put into writing at a later date and for the sale to be completed within three months of the date of the said written agreement. In fact, the agreement was put in writing and executed by the parties, but according to the plaintiffs it ommitted certain terms and conditions which were orally agreed upon.

Circumstances surrounding the Sale

The circumstances surrounding this sale have played a very important part in the determination of the matter hence, it is my view that the chronology of events leading up to the execution of the sale agreement ought to be set out in some detail.

By letter dated 1st December, 1982 the Defendant's Attorney-at-law advised the first plaintiff that the premises were being sold. Subsequently, a price of $125,000.00 was quoted. However, by letter dated 20th December, 1982 the defendant's attorney advised the first plaintiff that the defendant would not accept less than $127,000.00.

An Agreement for Sale of the premises dated 5th January, 1983 was drawn up, signed by the defendant and witnessed by his attorney-at-law and sent to the plaintiffs for execution. The terms and conditions of the Agreement for Sale (part of Exhibit 1) were set out and they included inter alia the purchase price, description of the property, and the date for completion.

The plaintiffs' attorney-at-law responded by letter dated 17th January, 1983 addressed to the defendant's attorney. This letter forms part of the agreed bundle of documents in the case. The details of this letter are important so I have reproduced its contents. It states as follows:

> Messrs. Robotham, Bishop & Co.
> Attorneys-at-law
> 4 Constitution Street,
> Kingston (sic)
>
> Dear Sirs,
>
> Attention Mr. P.J. Robotham
>
> Re: Sale and Purchase: 9 Worthington Close
> Trevor Salmon to Wesley Chang et al
>
> I refer to the above transaction and enclose herewith the relevant Sale Agreement which has been duly signed by my clients and witnessed.
>
> I have been instructed that the vendor had agreed with my clients that two 100 lbs gas cylinders now on the said premises would be included in this sale, and that new drapes would be supplied for the house.
>
> Kindly confirm, that these instructions are correct, and thereafter, amend the said Agreement accordingly.
>
> At the same time, I shall be very grateful if you will let me have a copy of the duplicate Certificate of Title in respect of the said premises for my perusal. Thereafter, I shall have the required deposit forwarded to you.
>
> Yours faithfully,
>
> Sgd. Keith V. Brooks.

By letter dated 1st February, 1983 Mavis Robotham-Salmon wrote the defendant's attorney pointing out to him inter alia that additional conditions were now being raised by the purchasers and that the house was no longer for sale. Of course,

Mr. Brooks responded quite quickly and queried the status of this Mavis Robotham-Salmon. His letter dated 17th February, 1983 reads as follows:

> "I refer to letter dated the 1st February, 1983 from Mavis Robotham-Salmon to you in connection with the above matter.
>
> Mavis Robotham-Salmon is un-known to this transaction and so is in no position to affect this sale.
>
> In any case, the relevant Sale Agreement has already been signed and if any attempt is made to cancel same the ..... legal steps will be taken to protect the interests of my clients herein.
>
> It was not intended that this sale should be aborted on some frivolous ground, and so I await word from the vendor, Trevor Salmon, regarding my clients' contention as set out in my letter to you of the 17th January, 1983.
>
> In the meantime, I enclose herewith cheque No. 355391 drawn on the National Commercial Bank and made payable to your Mr. P.J. Robotham in the sum of Twelve Thousand Seven Hundred Dollars ($12,700.00) being the deposit herein and shall be grateful if you will forward to me a copy of the Sale Agreement which is needed by my clients for their mortgage application."
>
> Yours truly,
>
> Sgd. Keith V. Brooks

After other correspondence passed between the parties, the defendant's attorney, by letter dated 10th May, 1983, returned the deposit cheque on the ground that he was unable to hear from the defendant concerning the additional terms mentioned by the plaintiffs.

Commencement of Suit

On the 25th September, 1984 the plaintiffs filed a Writ of Summons accompanied with a Statement of Claim in the Registry of the Supreme Court and sought:

1. A Declaration that upon the true construction of the said agreement arrived at between the plaintiffs and the defendant in the month of December, 1982 the plaintiffs are entitled to the said two 100 lbs cylinders and new drapes along with the land mentioned in the agreement dated the 5th January, 1983.
2. In the alternative, Rectification of the agreement dated the 5th day of January, 1983 by inserting in the schedule thereof the words: "together with two 100 lbs cylinders and new drapes," immediately following the description of the said property.
3. Specific Performance of the said agreement as rectified.

4. Damages for breach of contract in lieu of or in addition to Specific Performance.

5. Further or other relief.

Amendments

An amended Writ and Statement of Claim were filed on the 26th February, 1991. Paragraph 3 of the prayer was amended to read:

> 3. Specific Performance of the said agreement as rectified or in the alternative specific performance of the completed contract dated the 5th day of January, 1983 between the plaintiffs and the defendant.

A further amendment to the Statement of Claim was made at the trial. The plaintiffs' claim was amended as follows:

> The words "together with two 100 lbs gas cylinders then on the said land together with new drapes for the townhouse thereon" were deleted from paragraph 3.
>
> Paragraph 6 was deleted completely.
>
> The words "nevertheless" and "but gave instructions to their said attorneys-at-law to ensure that the items which had been ommitted by error as aforesaid were written into the said agreement by the said P.J. Robotham and initialled by the defendant" were deleted from paragraph 7.
>
> At paragraph 8, the words "for the said ommitted items to be included therein and for the said inclusions to be initialled by the defendant". were deleted.
>
> The words and figures "two 100 lbs gas cylinders and new drapes along with the" were deleted from item number 1 in the prayer. Item number 2 was completely deleted. Item 3 had the words "as rectified" deleted.

The effect of these amendments was to withdraw the remedies for rectification and to seek specific performance of the written agreement or damages for an alleged breach of the said written agreement.

Defence

The defence denied inter alia that the defendant had agreed to sell the gas cylinders or to supply new drapes. It further averred that the defendant did not accept the counter offer of the plaintiffs contained in letter dated the

17th January, 1983 as there was no agreement concerning the said cylinders and new drapes. In these circumstances the defendant contended that there was no concluded agreement for sale and so no question of completing the agreement arose.

The defence also stated that since the defendant had been a resident of the United States of America and that no Exchange Control Approval was obtained in respect of the said Agreement, the contract was void for illegality under the provisions of the Exchange Control Act.

Submissions

Mr. Tenn approached the trial in this way. He submitted that he relied upon the pleadings, and the evidence contained in the agreed bundle of documents. He therefore did not call any witnesses and submitted that upon a proper construction of these documents the plaintiffs were entitled to judgment.

He contended that Mr. Brooks' letter of the 17th January, 1983 was not a counter offer nor was it a proposed amendment to the already signed agreement for sale. His interpretation of the letter was that in effect there was an agreed term in the oral agreement which was not reflected in the written agreement and if that was correct, it should be confirmed and the agreement amended accordingly. On the other hand, he said if they were not correct then the written agreement stood.

It was further contended by Mr. Tenn that one cannot have a counter offer after an agreement was concluded. A counter offer he says, predates the conclusion of an agreement and is in essence part of the negotiations leading up to the agreement. He submits therefore that there was a legally binding agreement between the parties.

So far as the alleged breach of the Exchange Control Act was concerned, Mr. Tenn submitted that the contract was not void for illegality. He maintained that under that Act illegality goes to performance and not to the formation of the agreement. He cited and relied upon several authorities as to the approach by the Courts in relation to this issue. The cases show he says, that one could apply for exchange control permission but he pondered at its relevance seen that the Exchange Control Act has now changed. In other words in the present state of affairs there would be no need to seek approval now.

Mr. Davis highlighted four issues. They can be summarised accordingly:

i) That the plaintiffs had made a conditional and qualified acceptance, that is, a counter offer when they sought to make amendments to the written agreement for sale.

ii) That the Agreement was illegal as it was in respect of a sale from a non-resident (the Defendant) to residents (the Plaintiffs) and therefore in breach of the Exchange Control Act and hence unenforceable.

iii) That the plaintiffs' conduct in general and other circumstances would disentitle them to an order for specific performance.

iv) That since the Plaintiffs had claimed damages in the alternative, the Court would have to determine the measure of damages, if any, in the circumstances.

Mr. Davis submitted that although the legal issues which arose in relation to the Plaintiff's claim for rectification and specific performance of the rectified agreement were no longer relevant by the withdrawal of this aspect of the claim, the issue whether the plaintiffs had made a conditional and qualified acceptance of the offer was indeed a live one.

He cited the leading case of **Hyde v. Wrench**, which demonstrated principles relating to the absolute unconditional and unqualified nature of an acceptance. He submitted that these principles are clearly applicable to signed agreements and this is illustrated by the case of **Orion Investments (Pvt.) Ltd. v. Vianna Investments (Pvt.) Ltd.** [1988] L.R.C. (Comm.) 419 (Zimbabwe) which is summarized in English and Empire Digest Vol. 12(1), 2nd Re-Issue paragraph 1093. The facts of this case are as follows:

In August, 1984 the appellants (hereinafter called the Purchaser) entered into negotiations with the respondents (hereinafter called the Sellers) for: i) the sale and purchase of certain shares held by the sellers in a certain company as at the close of business on the 31st October 1984 and ii) the cession and transfer to the pruchaser of some credit loan accounts held by the sellers in

the said company. The negotiations were embodied in four draft agreements. The fourth draft agreement (prepared by E, the legal representative of the sellers) incorporated as clause 20 an earlier clause which had been included in the third draft agreement, namely "The agreement shall only become of force and effect when executed by the sellers and by the purchaser..."

On the 9th October the fourth draft agreement duly signed by the sellers was submitted to K, the legal representative of the purchaser, under cover of the sellers' memorandum, which said: "We enclose in duplicate agreement duly signed by the all sellers. If it is not acceptable, your early reutrn of the agreements would be appreciated."

On the 17th October the fourth draft agreement was signed by the purchaser but its legal representative, K wrote a letter dated 22nd October requesting further amendments to the agreement as signed by the parties. The sellers refused to accede to further amendments and by their letter dated 30th October terminated all further negotiations with the purchaser. Consequently, the purchaser, contended that the sellers were in breach of the the agreement.

The learned trial judge held inter alia, that there was no binding contract between the parties because the purchaser had not communicated its acceptance of the sellers' offer as embodied in the fourth draft in the light of the memoranda and that the purchaser's letter dated 22nd October constituted a counter-offer. The purchaser appealed against the decision.

The Appeal was dismissed and it was held:

> The general rule was that a contract was not concluded until acceptance by the offeree had been communicated to the offeror, unless the offeror had specified another mode of acceptance of the offer or had expressly or tacitly dispensed with communication of acceptance of the offer; nor did the agreement prescribe a method of acceptance. The words "if it is not acceptable, your early return of the agreements would be apreciated" indicated no more that the sellers' desire to be informed early should the offer be rejected - envisaging that the purchaser would, in its own time, notify them in the event of acceptance of the offer. The use of the term "agreements" was significant - the strong inference being that the sellers intended that acceptance would be notified by the return of one signed copy, and rejection by the

return of both copies unsigned. If silence were good enough as a method of communicating acceptance, it would put the sellers at great disadvantage; they would be not only kept guessing as to the fate of the offer but also unable to offer their property to someone else. Therefore, the failure by the offeree, the appellant, to communicate its acceptance to the offeror means that the offer had not been accepted and that there was no valid contract.

Per curiam: In any event there would have been no valid contract because by seeking amendments to the signed agreements, the purchasers had made a conditional and qualified acceptance, i.e. a counter offer which was rejected by the sellers.

Mr. Davis submitted that in the instant case the Plaintiffs' Attorney by his letter dated 17th January, 1983 on his clients' behalf and on their instructions to the Defendant's Attorney, alleged that additional terms were agreed by the parties and that they should be included in the sale. He therefore requested the Defendant to confirm this and thereafter amend the written agreement which was returned to the Defendant's Attorney. He further submitted that the language of this letter clearly showed that the Plaintiffs were not merely making an enquiry as to the existence of these additional terms but rather, were insisting on the amendment of the agreement to incorporate these additional terms. He added that other circumstances buttressed this conclusion. "Firstly, the said letter was the letter by which the agreement, which was sent to the Plaintiffs' Attorney for his client's signature, was returned, which tends to show that the Plaintiffs were not contending that these additional terms were an afterthought by them to be negotiated, if possible, into an existing agreement. Secondly, the deposit was withheld and not sent with his letter; in fact the Plaintiffs' Attorney's position was that after his requests, for amendment as aforesaid, and an additional request for the supply of the Certificate of Title were met, the deposit would be forwarded."

In his reply, Mr. Brooks argued that the case of Orion was distinguishable from the instant case. In his view the letter in Orion's case needed no interpretation. It plainly requested further amendments and therefore that request con-

stituted a counter offer. It was also his view that no amendments were requested in the instant case. He submitted that the letter of the 17th January, 1983 referred to the Plaintiffs' Attorney's instructions and all it did was to ask that they be confirmed and that thereafter the agreement be amended accordingly. This he said left it for the Defendant or his Attorney to decide whether there was to be an amendment and that the amendment would only be made if the instructions which the Plaintiffs' Attorney had received were confirmed. In other words, the Plaintiffs' letter was not insisting on any amendment but was asking only for confirmation of the instructions and in these circumstnaces it did not constitute a counter offer.

So far as the second issue raised by Mr. Davis is concerned, he submitted that an order for specific performance ought not to be granted as the agreement was void under the provisions of the Exchange Control Act Section 33(1)(b) makes it unlawful for a non-resident or his agent except with the consent of the Minister through the Bank of Jamaica, to sell land in Jamaica to any person wherever resident. He also submitted that in this case the clear inference was that both parties intended to act contrary to the provisions of the above-mentioned Act. In these circumstances the Court ought to conclude that in applying the case of **Tulloch v. Friend** S.C.C.A. 56/90 (unreported) delivered 23rd September, 1991 that the Agreement was prior to the repeal of the Exchange Control Act, incapable of **ex post facto** validation and therefore was unenforceable, then and remained so now.

Mr. Davis submitted that the Plaintiffs' conduct should disentitle them to an order for specific performance. The attempt to mislead the Court in so far as the Plaintiffs in their Reply asserted that they were led to believe that the Defendant was a resident of Jamaica, the delay in prosecuting the case and the fact that it was the Defendant who filed the Certificate of Readiness to have the matter set down for trial are instances he said which show the Plaintiffs lack of readiness, willingness and ability to complete at all material times.

Conclusion

Mr. Tenn in his summary of the several issues raised said, "In this case it is either a blatant case of trying to get out of a contract lawfully entered into by using the excuse of two gas cylinders and a set of drapes" or "alternatively the defendant's case is a total misconception of Mr. Brooks' letter of the 17th January, 1983, when they say it is a counter offer, an attempt to vary the contract."

From my point of view, the real issue here concerns whether or not the letter of the 17th Janaury, 1983 constituted a counter offer. The acceptance of an offer must be absolute, unconditional and unqualified. An acceptance which is conditional, or qualifies any of the terms in the offer, or adds a term not comprised in the offer is a counter offer. This means therefore that it terminates the offer with the result that it cannot thereafter be accepted.

There is no dispute that the Defendant did sign and forward to the Plaintiffs' Attorney, the written agreement and that this constituted the offer to sell the premises on the terms set out therein. It is therefore trite that any previous oral agreement in respect of the sale of the land would now be irrelevant. The execution by the Plaintiffs would have completed the requirements for the sale of these premises under the Agreement. Simultaneously, the Plaintiffs through their Attorney, whilst signing and returning the Agreement, have made it clear that other terms and conditions have been ommitted. How then is this letter of the 17th January to be considered? Was it merely an enquiry on their part and was it so trivial that it could not have affected the document they have already signed? It is my view and I so hold, that the language of the letter clearly showed that the Plaintiffs were not merely making an enquiry as to the existence of additional terms but rather they were seeking to make amendments of the Agreement to incorporate them as additional terms. The Plaintiffs having maintained up to trial (although finally abandoning it) a claim for rectification of the agreement and specific performance of the rectified agreement, cannot in my view say that this was merely an enquiry. I find **Orion's** case very relevant and hold that the amendments sought amounted to a counter offer which was rejected and which would have the effect of making the prior signed agreement invalid.

So far as the issue of the Plaintiff's conduct of this case is concerned, I hold the view that they have been found wanting in a number of ways. I agree with Mr. Davis that a person asking for specific performance of a contract must act promptly in exercising his options whether to pursue it or claim damages. That person must be prompt and ready to proceed. In this case, the records show that there was delay of some five years on the part of the Plaintiffs in taking out a Summons for Directions. Furthermore, the matter would have had further delays had it not been for the Defendant to file a Certificate of Readiness to have the

action set down for trial. It is my view therefore that because of the inordinate delay on the part of the Plaintiffs in bringing this matter to a finality, it would be unjust to grant an order for specific performance in this case. If such an order were granted it would mean that the Plaintiffs would have the distinct advantage of acquiring property agreed at a purchase price of One Hundred and Twenty-seven Thousand Dollars and which now values in my view far in excess of the agreed sum, at today's increase in the value of real estate.

I further hold that the Agreement was illegal and hence unenforceable under the provisions of the Exchange Control Act. The Agreement was in respect of the sale of land by a non-resident to the Plaintiffs for which prior approval was not obtained from the relevant Authorities pursuant to the provisions of the Exchange Control act.

It was for these reasons therefore why I gave judgment for the Defendant with Costs to be taxed if not agreed.