

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C-154 of 1977

|         |                                |                  |
|---------|--------------------------------|------------------|
| BETWEEN | PAULINE CROOKS                 | PLAINTIFF        |
| A N D   | GRANVILLE ST. PATRICK HARRISON | FIRST DEFENDANT  |
| A N D   | HELEN MARIE HARRISON           | SECOND DEFENDANT |

C. M. M. Daley and C. W. Walker for the Plaintiff.

Dr. Lloyd Barnett instructed by E. M. Poulle for the Defendants.

Heard on July 2, 3 and 4, 1979. December 19, 1979

Handed down December 1, 1980.

JUDGMENT

ORR J.

In this action the plaintiff claimed as follows:

"The plaintiff's claim against the defendants jointly and severally is for the refund to her of \$6,000.00 paid by her and received by them under a conditional agreement of purchase and sale dated 18th September, 1975 in respect of Lot 25 Brooks Level Road, Golden Spring in the parish of Saint Andrew which conditional agreement lapsed and determined as therein provided for and which sum the defendants have refused and or neglected to refund despite demand".

By an amended Statement of Claim the plaintiff claimed alternatively:

- (a) That the Agreement was void for uncertainty because of a special condition which rendered the agreement void for uncertainty;
- (b) That it was an implied term of the contract that the premises were free from latent physical defects known to the defendants;
- (c) That the premises suffered from material latent physical defects which the vendor failed to disclose;
- (d) That the defendants made a false misrepresentation with reference to the premises;
- (e) That the plaintiff gave notice of her rescission of the contract.

The claim was therefore for:

- (a) A declaration that she was entitled to rescind;
- (b) A return of the deposit paid by her;
- (c) Damages for breach of contract.

The plaintiff is an employee of the Bank of Jamaica and as such enjoys the benefit of participating in a Housing Loan Scheme whereby the bank lends money to its employees for the purchase of premises on terms more favourable than those obtainable in ordinary transactions.

In 1975 the defendants advertised their premises 25 Brooks Level Road, Golden Spring, for sale.

In response to this advertisement, the plaintiff and her mother, Mrs. Edna Phipps visited and inspected the premises. During the course of their inspection Mrs. Phipps became aware of a foul odour on the premises. The plaintiff unfortunately, has lost her sense of smell as a result of an accident during her childhood and was unaware of the odour. Mrs. Phipps enquired of the 2nd defendant whether they had a pit problem. She said no she never had any. Mr. Harrison the 1st defendant said that when it rained the pit next door gave trouble and the smell came from it.

The plaintiff reassured, decided to purchase the premises and an Agreement Exhibit 12, was subsequently prepared by the plaintiff's then attorney, Mr. Delisser and executed by all parties on the 22nd August, 1975.

The schedule to this Agreement is in the usual terms. The special conditions are as follows:

- 1. Subject to the Restrictive Covenants (if any) endorsed on the Certificate of Title and to the existing tenancies and easements.
- 2. Subject to the Purchaser obtaining a mortgage from the Bank of Jamaica.

The deposit was not paid at this time. The plaintiff changed her attorney and a new Agreement Exhibit 1, was prepared in identical terms save that the name of attorneys having the carriage of sale was changed..

This Agreement was executed on the 18th September, 1975, and the deposit of \$6,000 paid.

The plaintiff entered into possession of the premises on or about the 20th November, 1975, with the consent of the defendants. This consent was embodied in a written document (undated) (Exhibit 4).

The plaintiff claimed that she entered into possession at the request of the defendants who were unwilling to leave the premises unoccupied, they had by then removed to a new address. The defendant asserted that the plaintiff had entered into possession at her request and on the understanding that she would complete the contract within the time stipulated therein. My view is that both parties at this stage contemplated that the contract would be completed and the plaintiff entered into occupation on this basis.

Some three weeks after plaintiff took up occupation there were showers of rain and the house was flooded. Water came under the tiles in the bathroom and bedrooms. Mrs. Phipps visited the plaintiff the following day and opened a trap door grill to the rear of the premises and observed that "it was full to the brim" and emitted a foul odour like that of effluent.

Plaintiff contacted the male defendant who came to the premises. The septic pit was full and he had it emptied. The plaintiff left the premises the following day. Plaintiff and this defendant had a discussion about the pit. He suggested that they should share the cost equally of erecting a new pit. The plaintiff declined stating that she was unable to do so.

The plaintiff had the premises examined by an Engineer and on the 5th February, 1976, her attorneys wrote to the defendants' attorneys by letter Exhibit 2, intimating that the premises were unfit for human habitation, the contract should be regarded as frustrated and at an end, and requested the return of the deposit of \$6,000.

Plaintiff also made a report to the Legal Officer at the Bank of Jamaica, Mr. Theobalds. The defendants' attorneys replied

by letter 20th February, 1976, Exhibit 6, advising that they had no previous instructions that the foundation of the house was defective but would have same inspected by an Engineer. This was done and a further letter was sent by them indicating that there was no undermining of the foundation and rejecting the allegations of the plaintiff.

In the meanwhile negotiations for obtaining a mortgage had been proceeding apace.

The plaintiff had told the defendants that she would obtain a mortgage from the Bank of Jamaica and the transaction was conducted on this basis. Mr. Theobalds, the Legal Officer of the Bank of Jamaica dealt with this matter.

On the 25th September, 1975, he wrote to the defendants' attorneys a letter, Exhibit 2. I quote from paragraph 1:

"The purchaser, a member of our staff, will be receiving a mortgage from this bank (subject to satisfactory title and survey) to cover the balance of the purchase price, and I shall be handling the transaction in the Bank's interest from here on".

He then set out the normal practice of the bank in such matters and requested the loan of the Duplicate Certificate of Title and Valuation and Tax Certificates.

Further correspondence passed. On the 4th November, 1975, Mr. Theobalds requested confirmation that:

- (a) "Appropriate planning permission was obtained for construction of the premises in question;
- (b) A certificate of satisfactory completion was duly given by Architect/Quantity Surveyor".

On the 26th November, 1975, he acknowledged receipt of Certificate of Title which he returned and looked forward to receiving Transfer, Discharge of Mortgage and Certificate of Title together with Statement of Account.

These were duly forwarded him on the 7th January, 1976, Mr. Theobalds stated that the bank was concerned about the circumstances under which the premises were constructed and was also influenced by the dispute about the condition of the premises.

He stated "after some time we had not received satisfactory answers to questions we had asked and in the meantime further circumstances arose concerning a dispute about the condition of the premises and we therefore decided not to do anything positive at that stage and simply waited to see how the situation would resolve itself".

Further under cross-examination he stated: "The whole question of Survey was the Crux of the matter".

He made this rather startling statement: "We do not consider that we have an obligation to state all the precise terms of our conditions when we give an undertaking".

The Vendor's attorneys requested the return of the documents which was done.

In the event the mortgage was never granted to the plaintiff.

The defendants had entered into an Agreement to purchase premises at No. 9 Norbrook Acres Road, and gave an undertaking to complete the transaction by January 1976. They were depending on the proceeds of the sale of the Brooks Level premises to assist in completion of the transaction. This money was not received and as a result additional expenses were incurred. They eventually sold Brooks Level for \$26,000 - \$4,000 less than the sale price to the plaintiff.

As a result there was a Counter Claim for \$7,370.33, and for a declaration that the deposit of \$6,000 was forfeited to the defendants.

The first question for decision is whether or not the special condition "Subject to the Purchaser obtaining a mortgage from the Bank of Jamaica", is void for uncertainty.

Mr. Theobalds stated that under the Staff Housing Loan Scheme the rate of interest was determined which was then 3% less than the commercial rate. The principal and maximum amounts were pre-determined by a formula applicable to the member of staff.

Both sides relied on the case of Lee - Parker v. Izett No. 2[1972] 2 All. E.R. 800.

At page 803 Goulding J. observed:

"Nevertheless it seems to me that in the circumstances of the present case the concept of a satisfactory mortgage is too indefinite for the court to give it a practical meaning. Everything is at large, not only matters like rate of interest and ancillary obligations, on which evidence might establish what would be usual or reasonable, but also these two most essential points - the amount of the loan and the terms of repayment".

In Greater London Council v. Connolly [1970] 1 All. E.R.

870, Lord Denning M.R. said this at page 874.

"The courts are always loath to hold a condition bad for uncertainty. They will give it a reasonable interpretation whenever possible".

Lord Pearson said at page 876:

"As Lord Denning M.R. had said, the courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it, and it seems to me easy to give a reasonable meaning to this condition".

In the instant case the plaintiff herself knew the rate of interest on a mortgage from the bank and was in no doubt that provided certain conditions were fulfilled she could obtain a mortgage from the bank.

The terms of repayment and rate of interest of such a mortgage were not at large but were determined by the status of the plaintiff as a member of the staff of the bank. In the circumstances I hold that the condition is not void for uncertainty.

The question therefore arises: Was the condition fulfilled? Despite Mr. Theobald's undertaking to the defendants' attorneys, the mortgage was never granted to the plaintiff. There is no document in existence evidencing a mortgage of premises 25 Brooks Level Road to the Bank of Jamaica.

In Barker v. Crickett [1958] N.Z.L.R. 1057 Cleary J. said at page 1060.

"In the light of the foregoing authorities, I think that where a contract is conditional on a purchaser raising a mortgage, the purchaser can assert the non-fulfilment of the condition only where it occurs without any default on his part".

In this case the default was not on the part of the plaintiff but on the bank. On this limb I find for the plaintiff. The condition was not fulfilled and she is entitled to a refund of the deposit of \$6,000.

The plaintiff also based her claim on misrepresentation. The case was conducted on the basis that the flooring had been undermined.

Both the plaintiff and the defendants agreed that the house was flooded shortly after the rain.

There was conflicting evidence from the two Engineers Mr. Anderson for the plaintiff and Mr. Hue for the defendants.

On the balance of probabilities I find that there was a problem with the septic pit which caused a foul odour to be emitted and which caused the flooding of the house.

This flooding was due either to faulty workmanship in that the pipes to the pit were not properly connected or the fall towards the pit was not correct. From the evidence I find that the fall towards the pit was not correct. It is of note that a new pit was relocated at the front of the house where the level was lower than at the previous location at the back.

I find that this problem existed for some time and was known to the defendants at the time of the negotiations for the sale of the premises. When Mrs. Phipps made her enquiry as to the pit problem, the defendants made a misrepresentation by alleging that the problem existed on the neighbour's premises and there was no problem on theirs.

On the basis of this misrepresentation the plaintiff is also entitled to have the contract rescinded.

The plaintiff is also entitled to **succeed** on the basis that the Vendors failed to disclose a material latent physical defect.

From the attitude of the plaintiff it is clear that she would not have entered into the contract had she been aware of the defect.

There will therefore be judgment for the plaintiff against both defendants on the claim for:

- (a) Declaration as Prayed;
- (b) \$6,000.00.

There will also be judgment for the plaintiff on the Counter Claim.

Costs to be agreed or taxed.