



[2015] JMSC Civ 229

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 1998CLD00043**

BETWEEN	DR. ALTON GEORGE DAVIDSON	CLAIMANT
AND	MICHAEL CLARKE	1ST DEFENDANT
AND	THE COMMISSIONER OF LANDS	2ND DEFENDANT

IN OPEN COURT

Mr. Lawrence Phillpotts-Brown and Mr. Thomas Ramsey instructed by Lawrence Phillpotts-Brown and Company for the Claimant

Mr. Andrew Graham and Mr. Romain Tulloch instructed by Bishop and Partners for the First Defendant

2nd Defendant Absent

Heard: 12th October and 20th November 2015

Contract Law – Agreement of Sale for Land – Specific Performance – Land Allotted by the Commissioner of Lands – Was there an intention to sell the land – Is the agreement for sale of land valid and enforceable – Should damages be awarded for loss of bargain – Is there a loss of profits – Recovery of Possession

PUSEY J.

[1] This case is unusual as it is one of the few remaining matters begun under the Civil Procedure Code. Additionally, the events that led to this action occurred as long ago as 1991. The court has taken into consideration that the witnesses may have had their memories dimmed by the primordial mists which may obscure the incident at this time.

BACKGROUND

[2] The 2nd Defendant, the Commissioner of Lands (“the Commissioner”) is a corporation sole that holds real property on behalf of the Crown. From time to time the Commissioner will transfer land to individuals under specific conditions.

- [3] Through a Notice of Allotment, dated the 12th day of June, 1990, the Commissioner confirmed to the 1st Defendant, Mr. Michael Clarke, that he had been allotted 5 acres 2 Roods 16 Perches more or less situated on that section of property known as Wentworth in the parish of Saint Mary, now being lot numbered one hundred and forty-one part of Wentworth Estate in the parish of Saint Mary and being part of the land comprised in Certificate of Title registered at Volume 704 Folio 5 of the Register Book of Titles for a cost amounting to Thirty Eight Thousand Four Hundred and Seventeen Dollars and Twenty Cents (\$38,417.20).
- [4] The Claimant, Dr. Alton George Davidson, contends that in an agreement made verbally between his duly appointed agent, Mr. Roy Brenton Davis, and Mr. Clarke on various days between June 1990 and January 1991, the 1st Defendant agreed to sell the Claimant one acre more or less for the consideration of Thirty Thousand Dollars (\$30,000.00) to the Claimant and/or his nominees of the land allotted to the 1st Defendant. The verbal agreement was said to be reduced in writing in the form of an agreement for sale on or about the 30th day of January, 1991.
- [5] The Claimant's agent was put in possession of the one acre of the allotment on or about the 7th day of June 1990 by the 1st Defendant. It is that acre that is the subject of this action and is referred to as "the said land".
- [6] Developments were done to the said land to prepare it so that it could be rented to Oxford Agencies Limited, a company. The Claimant was, at the material time, a director of the company and the 1st Defendant was, at the material time, the Company Secretary. The 1st Defendant held one share of the one thousand shares in the company. That share was subsequently transferred by the 1st Defendant to the Claimant's agent in or about July 1991.
- [7] The Claimant posits that the Agreement for Sale has been part performed and satisfies the legal requirements to the extent that it is in writing and being duly signed by the Claimant and the 1st Defendant and having been duly stamped with

the appropriate Transfer Tax or Stamp Duty. However, to date the Claimant and/or his nominees have not been endorsed as owners of the said land.

[8] The Claimant has indicated at trial that they are no longer proceeding against the Commissioner. No notice of discontinuance has been filed to my knowledge. Mr Phillpotts-Brown, Counsel for the Claimant has indicated that the Commissioner has expressed a willingness to abide by the decision of the Court. In his written submission Mr. Phillpotts-Brown has quoted extensively from a letter written by the Director of State Proceedings on the 11th day of May 1998. This letter was never put in evidence and I am at a loss as to how I would be able to consider anything set out in that letter. In any case the letter quoted seems to deal with the issue of an injunction rather than any of the substantive issues of the case before me.

[9] It is appropriate to deal briefly with the discontinuance against the 2nd Defendant here. It is my view that the statements of counsel for the Claimant indicate that the Claimant has abandoned the action against the Commissioner. There are no substantive allegations against the Commissioner and no information of service on the Commissioner. It appears that some time ago action against the Commissioner was no longer an issue. In light of this, the Court finds that the matter is discontinued as the 2nd Defendant and he is removed as a party to these proceedings.

THE CLAIM

[10] In light of the foregoing, the Claimant proceeds with the substantive matter against the 1st Defendant for specific performance of the oral and written contract. Further or in the alternative, the Claimant seeks damages for loss of bargain where there is a breach of the warranty that the 1st Defendant was authorized to sell the said land.

THE DEFENCE & COUNTERCLAIM

- [11] The 1st Defendant defence, simply put, is that there was no agreement whatsoever for a sale. He argues that there must have been some fraud involved as the document was only intended to prove that there was some interest in the land by the Claimant so that their joint venture could proceed.
- [12] The 1st Defendant claims that there was a joint venture agreement that he should have been paid 10% of the annual profits of the business which was put on the land. He counterclaims for an account of the profits and the 10% of profits owed since 1994. He also seeks Recovery of Possession of the said land.

THE EVIDENCE

The Claimant's Case

- [13] The first witness called for the Claimant's case was Mr. Roy Brenton Davidson. The witness, in his examination in chief, alluded to buying the said land from the parcel allotted to Mr. Clarke. An agreement for sale was prepared on his instructions by Messrs. Tenn Russell Chin-Sang Hamilton & Ramsay and signed by the Claimant and the 1st Defendant on or about the 30th day of January 1991. The said land was to have been bought through Oxford Agencies Limited. The witness also makes the claim that at no time did Mr. Clarke disclose that there were any restrictions imposed by the Ministry of Agriculture or any statutory body with respect to sale of the allotted land nor that he did not have the capacity to sell a portion of the allotted land.
- [14] On cross-examination Mr. R. Davidson testified that himself and the 1st Defendant duly executed the agreement to the extent that it was witnessed. When presented with the Agreement for Sale (exhibit 2) which was not witnessed he could not explain why it was not witnessed.
- [15] Mr. R. Davidson admitted that this would have been his first purchase of land. He admitted that by virtue of the Notice of Allotment, Mr. Clarke was not able to sell the land. When shown the notice of Allotment in reexamination he said that it was

the first time he was seeing this document. This was more than twenty years after the transaction.

[16] The second witness called in support of the Claimant's case was Dr. Arthur Selbourne Jelf Geddes, a retired senior civil servant. The evidence of Dr. Geddes suggested that it was known that the 1st Defendant was an allottee of lands from the government and that at the material time the consideration price was not fully satisfied by the 1st Defendant. He said that the land was to be acquired in the names of Roy Davidson and himself and the agreement for Sale was prepared in that form.

[17] In cross examination Dr. Geddes was asked whether he knew if there was a title for the allotted land or who was the registered owner of the said land, the witness responded saying that he did not check and as such he does not know.

The 1st Defendant's Case

[18] The first witness called for the 1st Defendant was the 1st Defendant himself. Mr. Clarke's evidence states that he applied through the Ministry of Agriculture and the Commissioner of Lands for an allotment of a parcel of land on or about the 12th June 1990. The allotted land amounted to 5 acres 2 roods and 16 perches more or less. The full description is set out previously. The conditions of the allotment were set out in a Schedule attached to the Notice of Allotment. Section 10 of the said schedule states:

that no purchaser without the consent in writing of the Commissioner, shall part with possession of, mortgage, charge, sublet, sub-divide or otherwise encumber his allotment, or any part thereof, so long as title has not been issued.

[19] Thus any attempted sale without the consent of the Commissioner would amount to a material breach of the agreement between the Commissioner and the 1st Defendant. It is to be noted that the land was never transferred to the 1st Defendant and as such, the Commissioner of Lands remains the registered title owner.

- [20]** With this knowledge, the 1st Defendant at no time entered into an agreement for sale pertaining to the whole land or any part thereof. However, the 1st Defendant did enter into discussions with the Claimant's agent, Mr. R. Davidson, to make available a portion of the property for the purpose of having a joint venture, to wit a petroleum filling station was to be situated on a part of the land.
- [21]** No monies were received from the Claimant or his agent as consideration for the purported sale of the part of the whole land. However, in or about 1991, Mr. R. Davidson brought a document to Mr. Clarke requesting his signature. Mr. Clarke said that he did not read this document and only affixed his signature to it with the understanding that it was pursuant to prior discussions between himself and Mr. R. Davidson, wherein Mr. R. Davidson alleged that the document was required in furtherance of the joint venture agreement.
- [22]** The 1st Defendant says he was given the impression that his signature was required for administrative purposes and more specifically to allow Mr. R. Davidson to secure a license for the filling station.
- [23]** Mr. Clarke also indicated that he entered into a joint venture agreement with the Davidsons and Dr. Geddes, whereby he should get 10% of the profit of the company. He received \$60,000 in 1994 which was used to buy a car for him. He has not received any share of the profits since then.
- [24]** Mr. Clarke was asked in cross examination the reason that as a school teacher he would have executed an agreement for sale without reading it. He responded that this was done was based on the previous discussions he had with Mr. R. Davidson that there was a need for some form of proof that Mr. R. Davidson had rights to the said land, as this was needed for the joint venture agreement to materialize and would serve no other purpose. Mr. Clarke also gave evidence that due to the decades of friendship between himself and Mr. R. Davidson he trusted him to the extent that he would not have read any document presented to him for signing.

- [25] When asked if he was aware of a condition in the allotment of government lands to him which prevented him from selling the land or any part thereof, the witness responded yes. By way of re-examination, when asked if he had sold the said land to the Claimant and/or any of his nominees(s) the response was no.
- [26] The second witness called was Mr. Errol Menzie. He spoke of being at a bar when the discussion between Mr. R. Davidson and the 1st Defendant was taking place. Mr. Menzie recalled that a joint venture was being discussed as well as the 1st Defendant expressing that he had been allotted government land and would make a portion available but as a condition of the allotment he was not allowed to sell any part of the land.
- [27] The suggestion was made that no discussion as to a joint venture agreement and or the capacity of the 1st Defendant to sell the said land took place in his presence, to which he responded that he was present and the discussion as aforementioned did take place.

THE CLAIMANT'S SUBMISSIONS

- [28] Mr. Phillpotts-Brown, Counsel for the Claimant, argues that Mr. Clarke having admitted to signing the written Agreement for Sale and the Agreement for Sale having been signed by both parties, the beneficial interest has passed to the Claimant. He submits that the Claimant is a purchaser for value and Mr. Clarke is unable to refuse to complete the sale.
- [29] Mr. Phillpotts-Brown argues that the signed Agreement for Sale is prima facie, clear and indisputable evidence of the parties' intention. That intention, in his view, does not include or refer to any joint venture. Counsel relies on the case of **JTM Construction & Equipment Ltd v Circle B Farms Ltd** (unreported), Supreme Court, Jamaica, Claim No. 2007HCV05110 delivered 29 June 2009 as authority for the principle that oral evidence does not assist in to modify or contradict the terms of a written agreement.

- [30] The Claimants case is simply this: a signed agreement by an adult cannot in anyway been negated by a mere indication that he did not read it. Counsel pointed out that Mr. Clarke was a teacher who contemplated a joint venture and Mr. Clarke admits that the agreement was to give the petroleum company certain rights indicating he knew that the property was being sold.

THE 1ST DEFENDANT'S SUBMISSIONS

- [31] Counsel for the 1st Defendant submitted that the purported vendor/ 1st Defendant did not and does not have the capacity to sell the said land. This lack of capacity is as a result of the fact that the registered owner was and is still the Commissioner of Lands.
- [32] Counsel further submitted that there existed no valid agreement for sale between the Claimant and/ or his nominee(s) on the one hand and the 1st Defendant on the other hand. The agreement was not witnessed at all and further was found to be non compliant with section 152 of The Registration of Titles Act, which requires an instrument (including a conveyance) to be duly witnessed.
- [33] Counsel argued that the reason for the emergence of the purported agreement for sale was on the basis of an oral discussion between the 1st Defendant and the Claimant and therefore was never intended to be used to pass legal ownership from the 1st Defendant to the Claimant. Learned Counsel for the Claimant relied on the case of **JTM Construction and Equipment Ltd v Circle B. Farms Ltd** to assert that oral agreements cannot replace a written agreement. Counsel distinguished that case from the one at bar by submitting that there existed no valid written agreement whilst in the relied upon case there was a duly executed agreement.
- [34] It was further contended that the purported purchaser/Claimant possessed the knowledge that the vendor/1st Defendant, by virtue of being an allottee of government land by the Commissioner of Lands did not have the ability to part with

the said land or any part thereof. Moreover, the purchaser of any land has a duty to verify the capacity of the vendor and make all incidental enquires necessary, and by the evidence put forward on behalf of the Claimant they neglected or otherwise failed to make such checks.

[35] As it relates to the due diligence of a purchaser, Counsel submitted that Roy Brenton Davidson, having full knowledge that the 1st Defendant was an allottee of government lands, then the necessary checks as to the capacity of the 1st Defendant to part with the said land should have been carried out by him. On this point, Counsel relied on the principles derived from **Chasrose Ltd v Kingston and St. Andrew Corporation** (unreported) Supreme Court, Jamaica, Claim No. 2003HCV1026 delivered 25 July 2011 by. More specifically, in paragraph 24, Sykes J states:

“The broad principle emerging from the case law is that when a person is dealing with a statutory body, that person has an obligation to ensure that the body is indeed acting within its powers. The person has a positive duty to see if there are any limitations on the powers of the statutory body or whether the relevant statute lays down any procedural requirements that must be met before the body can enter into an enforceable contract with anyone. Anyone who fails to do this is indeed taking a very serious risk that any agreement may be found to be unenforceable against the statutory body...”

ISSUES

The issues that arise on the claim and counterclaim are:

- i. Was there an intention to sell the land?
- ii. Is there a valid and enforceable agreement for sale of the said land?
- iii. Should the Claimant be awarded damages for loss of bargain?
- iv. Has a claim been made out for loss of profits on the counterclaim?
- v. Should the court award recovery of possession on the counterclaim?

LAW AND ANALYSIS

Was there an intention to sell the said land?

[36] This issue can be dealt with quickly and is so done based on the facts before the court and the credibility of the parties.

[37] The Court is of the view that Mr. Clarke is not able to avoid the submission that the Agreement for Sale indicated his intention in contracting to sell the said land. Even if he had not read the Agreement when he signed it, he clearly states that he knew that a document was being signed to show that the Claimant had some ownership of the property. He said the document was to be used for nothing else. I believe on a balance of probabilities that he knew what the document said and signed it willingly.

[38] Additionally, having signed it without reading it, I believe that his allegation of fraud fails. There is no reliable evidence that the Claimant's agents disguised what they were having him sign. The only dishonesty would be the mutual dishonesty of the parties alleged by the 1st Defendant, that they intended to create a document to show ownership where there was no ownership.

Is there a valid and enforceable agreement for sale of the said land?

[39] The Notice of Allotment is clear. The agreement of sale is of no legal effect without the agreement of the Commissioner. In fact, the schedule of the Notice of Allotment goes further. It sets out that the land use is restricted to certain agricultural practices. This means that the agreement of the Commissioner is not merely formal but may include an assessment of the use of the land. In this case the land was used for a petroleum filling station which is a non-agricultural use. The Court is not able to say whether the Commissioner would or would not have allowed the use of the land. The inference to be drawn is that since this was a consideration it fortifies the position that the property cannot be sold without permission.

[40] The absence of the Commissioner from the trial does not give the Claimant any advantage. The Claimant contended at trial and in submissions that the Commissioner would abide by any decision the court makes. However, this is in relation to the portion of the Claim which merely sought an order restraining a

transfer of the land until the substantive matter, which is now before me, is complete.

[41] What is before me is an action for specific performance which is based on the equitable principle that the Court may order a party to do what it legally contracted to do and what it could do. The 1st Defendant contracted to sell the land but he could not have done so without the permission of the Commissioner. He could not have passed title at the time he signed the agreement. In any case, at this point he has no title to transfer to the Claimant, as the Commissioner still holds title to the said land.

[42] Subsequently, specific performance is not an appropriate remedy in the circumstances.

Should the Claimant be awarded damages for loss of bargain?

[43] The alternative claim by the Claimant that he should get damages for loss of bargain also fails. The Claimant and his agents knew that the property was allotted by the Commissioner. They had a duty as prudent businessmen to ascertain if this meant there were any conditions. The Agreement for Sale had a plan attached showing the lots and their disposition. Therefore, the Claimant is deemed to be aware of the restrictions on sale. Having obtained a plan of the development in creating an Agreement for Sale, it cannot be said that he was not aware of any conditions of the allotment.

[44] In view of these circumstances, the Court could not make an award for damages for loss of bargain.

Has a claim been made out for loss of profits on the counterclaim?

[45] Counsel for the 1st Defendant did not argue for a recovery of the loss of profits from the alleged joint venture. This is not surprising. The joint venture is not supported by any documents and it is unclear if the agreement was with the individuals or

with the company Oxford Agencies Limited, of which the 1st Defendant was Company Secretary. In my view, this counterclaim has not been proved.

Should the Court award recovery of possession on the counterclaim?

[46] Although the 1st Defendant does not have title to the property, he has a prior claim and there is no issue that the Claimant took possession with his agreement. Accordingly, in light of the Court's findings on the Claimant's claim, the 1st Defendant is entitled to recover possession of the property, and the Court so orders.

ORDERS

[47] In final disposition of the matter, the Court makes the following Orders:

1. Judgment for the 1st Defendant on the Claim.
2. Recovery of possession to the 1st Defendant on the Counterclaim.
3. The date of recovery to be on before December 31st 2016.
4. The Claimant's claim against the Commissioner of Lands is discontinued.
5. Costs to the 1st Defendant to be taxed if not agreed.

Sgd. The Hon. Mr. Justice L. Pusey
Puisne Judge