IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO C.L. 1996/G210

BETWEEN	LLOYD GEORGE GORDON	PLAINTIFF
AND	ALBERT ESSON	DEFENDANT

Sylvester Morris for the Plaintiff

Maurice M. Frankson , instructed by Gaynair and Frasier for the Defendant.

Heard on: 3rd,4th, 5th December, 2001 and 28th August, 2002

Campbell J.

On the 13th November, 1998 the plaintiff filed a Writ of Summons specially endorsed with a Statement of Claim, seeking the following Orders:

1. An Order for recovery of possession against the defendant in the plaintiff's favor.
2. An award of mesne profit or rent against the defendant.
3. An order for forfeiture of the $30,000 paid to the plaintiff by the defendant.
4. An Order for the defendant to vacate the said parcel of land.
5. An Order for the defendant to deliver up to the plaintiff the common law title and survey plan to the plaintiff and
6. Cost

The defendant in his Defence and Counter-Claim, filed on the 13th October 1997, denied that the plaintiff is the owner of the land and counter-claimed, seeking;

1. A declaration that he is the equitable owner of the said land.

2. An injunction restraining the plaintiff and his servants and/or agents from interfering with the defendant's quiet enjoyment and occupation of the said land.

3. Specific performance of the said agreement.

4. Such further and or other relief that the Honourable Court deems just.

The Plaintiff, is a 65 years old farmer of Done-Be-Holden, in the parish of St. Catherine. The parties had hitherto regarded themselves as friends and had known each other for more than twenty years. The land, subject of the dispute, consists of two and a half acres and had been in the plaintiff's possession since 1966, when he bought it with a common law title. The plaintiff appeared to have farmed successfully a portion of the land, raising cash crops. It is common ground that the land is well-fruited, with some twenty-eight coconut trees, about six breadfruit trees, a number of ackee trees, a number of soursop, about eight mango trees, pear trees, orange and lime trees. The plaintiff had ceased construction in 1975 of an unfinished four bedrooms three bathrooms structure and testified to have expended the sum of $450,000 on that endeavour. He testified that he did not have enough money to continue the construction. At the time of the action, the

unfinished building was described by the defendant as "the verandah has dropped down. Some of the walls have crumbled." The plaintiff's farming activities appear to have ended in the 1980's, because of what he described as a diversion of the waters of the Rio Cobre on which he formerly relied. He had made efforts for sale of the property, with a view of relocation to a more farming-friendly community.

Thus, by the time the action was filed, the defendant described the land as a place he was afraid to enter. He characterizes it as being in a community of "zinc fences and no sewerage." The defendant claims that "everybody comes onto the land and picks coconuts, and everybody's goats roam the property." The plaintiff decided to sell the Done-Be-Holden property in order to acquire "a piece of land in Linstead." He testified that he had in his mind a sale price of $2M.

He testified that he approached, the defendant's wife "to find out whether the defendant was interested in the land. He said he did that because the defendant, whom he called Din-Din, had told him he wanted a piece of land. The defendant, lived in Independence City, and was away from the island on the occasion of the plaintiff's visit. After he spoke to the defendant's wife, she went on the telephone, and after a conversation with someone whom he thought was the defendant gave him $30,000.00 "as a deposit on the land." He said a day or two later he gave her the common-law title to the land and a diagram. He said he had wanted $2m for the land and had discussed with "Din-Din on the phone, purchase-price." He said

he told the defendant that the land needed to be valued, and was told that as soon as the defendant came from America, they would see a lawyer.

The plaintiff said on the defendant's return to the island, he saw him on the land and there was a conversation to the effect that "whatever price was agreed", he would give me under the table in order to lessen Government Revenue. The plaintiff response was that he would prefer to go through the proper channels and he would not do it. The defendant was not pleased with his response. The plaintiff said he paid several visits to the defendant with a view of getting them to attend an attorney, but without success.

On the testimony of the plaintiff, a period of three years elapsed before the parties visited a lawyer. The lawyer was unavailable. On another occasion, sometime "about 1984 or 1985", they visited an office where a lady prepared a document on the direction of the defendant and tendered it for the signature of the plaintiff. He said he refused to sign, because he had wanted to see a lawyer for the proper procedure to be followed. The same day they visited the office of a justice of the peace. Again, he was invited to sign a document that had been prepared, he said that he had not bothered to look at what had been typed on the paper and he did not sign. His refusal caused the defendant to start cursing, "telling the plaintiff a mouthful of badwords." The parties, who had travelled together, never exchanged any words on the way back. He denies having put the defendant,

Esson, on the land after returning from Canada. He noticed that a two-room house had been built on the land and was occupied by the defendant's sister. He denied that he had received $51,000 from the defendant's wife. He said that the $30,000 he had received was on the 12th January 1987. He said that the defendant's wife had asked him for the title and the surveyor's diagram.

In cross-examination, the plaintiff said he had not remembered giving a receipt. He denied the suggestion that he had decided to sell the land from 1970's, and that he had asked the defendant before 1980 if he could find a buyer for the land. He denied that in 1975, he was asking $25,000 for the land. He denied that he had given the defendant a notice to quit, as he alleged in his Statement of Claim. He denied any knowledge of a receipt in the sum of $21,000 that was signed by his brother-in-law, McKay. He denies that the signature on the receipt for $21,000 is his own.

Ruphenas McKay testified that the defendant's wife gave the plaintiff $30,000. Although he could not remember if he had signed a receipt for the $30,000, he was prepared to say he had not signed for $21,000. The $30,000 was the only money he had seen the plaintiff received.

Roy Hardial, coconut vendor of Done-Be-Holden, testified that he had been given permission by the plaintiff to pick coconuts on the land and he had done so up to the Thursday preceeding his testimony. He would pick between eight to ten

dozens nut per month and have been doing that for twenty years. He had never been stopped by the defendant, who has been on the property whilst he was picking. The defendant, cross-examined on this point, says everybody in the community picks coconuts on that property, and he is afraid to go there. Hardial said that he had never seen the defendant build anything on that land, the fowl coop that was used by the defendant had been built by the plaintiff. Hardial also said that the defendant came and introduced himself as his (Hardial's) neighbour and told him he had bought the land for $45,000.

Similarly Errol Gordon, a cousin of the plaintiff, testified that he was given permission by the plaintiff to pick coconuts and fruits on the land. He says that he has seen the defendant on the land between ten and twenty times, but has never been prevented from picking coconuts by him.

The defendant testimony was that he has known the land since 1975. He testified that whilst he was at home in January 1987 the plaintiff rode up on his bicycle and complained that "nothing was going on for him" and inquired of the defendant if he had found a purchaser for the land. The defendant states that the plaintiff would make similar inquires of him from time to time. The defendant assured him that he the defendant would be purchasing the place from him.

Shortly after the plaintiff's visit, the defendant, along with his wife and sister, Mitchell went to view the farm. The plaintiff was not there then. The

defendant said he subsequently sold a house he owned in St. Elizabeth for $60,000. After he sold the house, there was a discussion with the plaintiff who insisted that he be paid cash for the purchase. He said there was an agreement with the plaintiff to pay a sum of $50,000 for the land. He said that he agreed to give the plaintiff One Thousand Dollars for cleaning up the land. The question that springs to mind is, why having acquired the property the defendant was giving the plaintiff the responsibility of cleaning the land? On the defendant's return to Jamaica, his wife handed him two receipts from the plaintiff. He said he was to have the tax papers transferred to him, the plaintiff refused.

The plaintiff was taken to Mr. Marcus, an attorney-at-law. The defendant says that the plaintiff wanted to transfer the land as a deed gift. No agreement had been signed to sell the land. The defendant said he received a notice to quit possession of the land. He said the plaintiff has never asked him for more money. He says his wife's church sister has built a house on the land with his permission. He denies that there was a fowl coop there when he went there first in January. He has sold one square of the land. He insisted there was a payment of $21,000. Shown the receipts, he agrees that the word "Esson" is written differently on the receipts. He said the monies were not paid the same day and that Mr. Gordon did not clean the land, he had to pay $5,000 to have it cleaned. He says the sequence

of events was, he saw Gordon on the Friday, he went abroad on the Sunday and he spoke to his wife the following day.

The main issue for determination is whether there is a sales agreement enforceable between the parties.

Sylvester Morris for the plaintiff, submitted that the requirements for sale of land are; 1) there must be evidenced some writing, fully or partially, 2) there must be a proper description of the land, 3) there must be agreement between Vendor and Purchaser, 4) Time for payment must be part of the contract.

He has submitted that the evidence as to agreement as to price is contradictory. He contends that the defendant has sought to use oral evidence to vary or alter that contained in the receipts, which is impermissible. Neither of the receipts mentions cleaning of the land. If land not cleaned, why was there not a demand for the return of the $1000? The actions of Hardial are inconsistent with exclusive ownership of the land residing in the defendant. The fact that Gordon acquiesces in the building on the land by persons connected with the defendant is indicative that all they were awaiting was a valuation to regularise the situation.

The agreement for sale of land will be unenforceable by action unless there is either a sufficient memorandum thereof in writing or a sufficient act of part performance.

The memorandum need not be in any special form, it may consists of one or more documents. The memorandum must accurately state all the terms of the contract. The contract should have final and complete agreement between the parties on at least the essential terms, namely: -

1) the parties

2) the property

3) the consideration

The description of the land "a piece of land" although not an issue of contest between the parties, must be stated with sufficient particularity, that the property cannot be fairly disputed. The description should fall within the rule *id certum est quod certum reddi potest.*

In respect of consideration, the evidence before the court, on the face of the documents itself, is contradictory. The pleadings and the oral evidence claim on behalf of the defendant that the purchase price was $50,000, on the other hand the receipts sum total $51,000. The receipt dated 12th January 1987 in respect of $21,000 makes no reference to the land, the subject matter of the purported transaction. The receipts make no reference to each other. Evidence is therefore not admissible to connect one document to the other. Taylor v Smith (1893) 2 Q.B. 65.

The evidence of the defendant is that the payments were made on different dates, this is not borne out by the dates on the receipts, which are similar. It should be noted that the memorandum, such as exist, could only be enforced by the defendant against the plaintiff, and not by the plaintiff against the defendant, as it was not signed by the defendant.

The state of the defendant's evidence in relation to the consideration for the land is weakened by the evidence of Hardial that he was told by Esson that he had purchased the property for $45,000. The defendant himself had testified that he would have sold it for $45-50,000, why then did he, in the circumstances of this case pay the top-end of the scale?

I hold that there is no sufficient memorandum in writing. There exists no contract certain and definite in its terms. The evidence on the question of the consideration is contradictory. The behaviour of the defendant in giving $1000.00 to the plaintiff is inconsistent with a purchaser who had just acquired possession under an enforceable Agreement. Allowing the plaintiff and his agents to continue reaping the fruits unabated is also inconsistent with the defendant's ownership of the property. The payment of the sum, of $51,000, even if such a payment (and I hold no such sum was made) was made, is equivocal; and is equally consistent with a deposit towards a purchase-price to be determined by a valuator. I find that the purported act of part performance, e.g., the construction of the two small

dwellings, were done whilst the plaintiff was away from the island, and allowed to remain because there existed a hope that the valuation to determine the purchase-price was pending. See Dan v Spurrier 7 Ves, 231.

I hold there is no sufficient act of part-performance. Judgement for the plaintiff on the claim and counter-claim; the following orders are made:

1. An order for recovery of possession against the defendant.
2. An order for the defendant to vacate the said parcel of land.
3. An order for the defendant to deliver up to the plaintiff the common law Title.
4. An order that the plaintiff returns the said deposit of $30,000 to the defendant.
5. Costs to the plaintiff to be agreed or taxed