[2016] JMSC Civ 170

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 03867

BETWEEN	**OWEN GRANT**	**CLAIMANT**
AND	**SILBOURN HUNTER**	**1ST DEFENDANT**
AND	**WITHBOURN HUNTER**	**2ND DEFENDANT**

Mr. Lijyasu M. Kandekore for the Claimant

Ms. Avrine Bernard and Mrs. Claudia Forsythe instructed by Forsythe & Forsythe for the Defendants

26th October, 25th November 2015 and 14th October 2016.

Application to adjourn trial – Application to Strike Out the Claimant's case – Rule 26.3(1) of the CPR

MCDONALD J

[1] Two applications are before the Court for determination. The first one being an application by the Claimant to remove the matter from the trial list pending the determination of a Fixed Date Claim Form filed on the 23rd of October 2015 in Suit No. 2015HCV04988. The second application is filed by the 1st and 2nd Defendants to strike out the Claimant's Statement of Claim.

[2] The trial matter seeks the following:-

(1) Specific performance of an oral agreement and/or agreement by conduct and/or agreement by course of dealings between the parties sometime in

2002 for the purchase by the Claimant from the Defendant of property situate at 27½ Grants Pen Road, Kingston 8 and more particularly described in the Certificate of Title registered at Volume 389 Folio 18 of the Registrar Book of Titles in the name of Charles Augustus Hunter.

(2) An Injunction restraining the Registrar of Titles from proceeding to register any transfer in respect of the said land to any third party of any interest in the said land registered at Volume 389 Folio 18 of the Registrar Book of Titles or any part thereof to any person other than the Claimant, until after the trial or determination of the matter herein.

(3) An Order that the property at 27½ Grants Pen Road, Kingston 8 be transferred into the names of the Claimant and/or his nominee(s).

(4) A Declaration that the Claimant is entitled to an interest in the said property for the said purchase money (together with interest thereon) and any damages and costs accrued.

(5) All necessary and consequential accounts, directions and inquiries.

(6) Damages for breach of contract in lieu of or in addition to specific performance.

(7) Such further or other relief as this Honourable Court deems fit.

(8) Costs

(9) Interest

[3] On the 28th of October 2014 the claim against the 3rd Defendant, Ms. Ponsetta Golding, was struck out by consent of the parties.

BACKGROUND

The Claimant's Case

[4] Owen Grant, the Claimant, is the registered proprietor of 27¾ Grants Pen Road occupied by Israel Transport and Equipment Company Limited which is managed by the Claimant, the majority shareholder. From about 2002, the 1st Defendant represented to the Claimant that the 2nd and 3rd Defendants were joint owners of the property and that he had full authority of the other owners to sell the property.

[5] Letters of Administration were granted by the Court in the said estate of their late father Charles Augustus Hunter on the 31st of October 2002 to the 1st and 2nd Defendants. Charles Hunter was survived by his wife Amy Hunter, mother of the Defendants and who died prior to the grant of the Letters of Administration.

[6] By an oral agreement between the Claimant and the 1st Defendant, it was agreed that the Defendants would sell the property to the Claimant for $1,500,000.00 and this was agreed by all the Defendants. The Claimant was informed that the Defendants' Attorney-at-Law, Mr. Charles Campbell would have conduct of the sale.

[7] In or around July 1998 the Claimant had filed an action in the Supreme Court CL 1988/I037 for the encroachment of land against Amy Hunter, now deceased, widow of Charles Hunter and mother of the Defendants who was at that time in possession of the property.

[8] While the negotiations were proceeding and upon her death, the 1st Defendant told the Claimant that he was aware of the said claim filed against his mother and asked the Claimant to discontinue the case in consideration of the sale.

[9] As a result the Claimant instructed his Attorneys-at-Law not to pursue the claim. Prior to the commencement of negotiations, and to date the property has been occupied by various persons. The 1st Defendant informed the Claimant that he would give the occupants notice to vacate the premises and later informed the Claimant that this had been done.

[10] The parties having agreed to the purchase, the 1st Defendant requested that as part of an advance deposit on the purchase price the Claimant advance $40,000.00 to one Vivian Williams. Such amount to be applied towards selling the Defendants' late father's estate.

[11] The 1st Defendant identified Vivian Williams as the person who attended to the business of the beneficiaries of the estate in their absence from Jamaica.

[12] The deposit was paid by cheque drawn on Canadian Imperial Bank of Commerce (CIBC) Jamaica Limited dated April 18, 2002 payable to Mr. Vivian Williams. The 1st Defendant subsequently confirmed receipt of the said money and that it was being applied towards settlement of his father's estate.

[13] The Claimant says that as a result of the foregoing he has to date incurred expense of approximately $250,000.00 to hire a tractor and trucks to clear material from the property and $36,000.00 to repair the fence of the property.

[14] During this period the Claimant maintained contact with Mr. Charles Campbell, Attorney-at-Law, who confirmed that he had carriage of sale on behalf of the Defendants. He informed the Claimant that there were some problems with the boundaries and that sale could not be completed until the boundary problems were sorted out.

[15] As a result, and with Mr. Campbell's agreement, the Claimant caused the said property to be surveyed at a cost of $9,775.00 and was furnished with a report which confirmed the encroachments on the Claimant's property. It further revealed that two concrete buildings along the eastern section of the property have been constructed across the registered boundary line.

[16] The Claimant states that he informed the 1st Defendant of the report while at the same time confirming his continued interest in purchasing the property that this would not be a bar to his completing the purchase.

The Defendants' Case

[17] The 1st Defendant avers that there was no agreement oral or otherwise between the Claimant and himself and in 2000 the Claimant made contact with him and asked if he was selling 27½ Grants Pen Road. He told him he would think about it. The 1st Defendant later called the Claimant and told him he would sell for $3,000,000.00. The Claimant said he would get back in touch with him and later made an offer for $1,500,000.00. The 1st Defendant told him that if he had cash he would consider selling for that amount.

[18] There was no definite offer and acceptance between the 1st Defendant and the Claimant.

[19] The 1st Defendant informed the Claimant that Attorney-at-Law Charles Campbell was administering the estate of deceased Charles Hunter and if he was interested in purchasing the property he should get in touch with him.

[20] The 1st Defendant states that up to twenty-seven (27) months after the Claimant asked if he was willing to sell the property, the Claimant showed no further interest.

[21] In 2005 an appraisal of the property was done and it was valued at $4,000,000.00. Thereafter Mr. Charles Campbell sent a copy of the appraisal to the Claimant to enquire from him whether or not he was still interested in purchasing the property. The Claimant never responded.

[22] In April 2006, the Claimant contacted the 1st Defendant and asked to meet with him. The 1st Defendant and his wife Ruby Hunter visited the Claimant at an address in Miramar, Florida. The Claimant made proposals about the property. The 1st Defendant informed him that the property was valued for $4,000,000.00 and the beneficiaries of the estate had decided that if it was to be sold, the sale price should be the amount for which it was valued. The Claimant made a counter offer of $2,600,000.00 for the purchase of the said property. He told the Claimant that he would have to advise the

other beneficiaries of the estate of this offer before a decision could be made whether to accept this offer.

[23] There was no further contact or correspondence between the Claimant and any of the Defendants until the claim was served on each of them. The Claimant lodged caveat No. 1506489 on the 11th of December 2007 against the title for the said property.

[24] The 1st Defendant later learnt that the Claimant went to the premises with others and informed the tenants that he, the Claimant had purchased the property and started to collect rent from the tenants.

[25] The Defendants deny that the $40,000.00 was considered as a deposit or part payment on the property. The Defendants also deny that any permission was given by them for the Claimant to collect rental, to occupy or enter upon the property, remove any item or construct anything thereon.

Claimant's application to remove matter from trial list pending determination of Fixed Date Claim Form

[26] Counsel for the Claimant, Mr. Kandekore relied on his Affidavit filed on the 16th October 2015 in which he stated that the Claimant intends to take steps to initiate proceedings in another action in which he claims that the Defendants (who own the neighbouring land which is the subject matter of the instant case) have significantly encroached on the Claimant's land and built two concrete buildings on the Claimant's said land.

[27] The land encroached upon by the Defendants is part of the said land which the Claimant in the instant action believed was the property of the Defendants and which the Claimant asserts he entered into a contract to buy from the Defendants.

[28] He submitted that the result of this encroachment is that the Claimant would be buying his own land and the Defendants would be selling the Claimant's land which the Defendants do not own.

[29] He contended that it would be prudent to stay any action in the instant case about the contract of sale until the encroachment is rectified. He requested that the Fixed Date Claim Form along with Affidavit in Support filed on the 23rd of October 2015 in Claim No. 2015HCV04988 be dealt with first.

[30] Mr. Kandekore opined that the Claimant's application to have the trial case adjourned is not frivolous and vexatious as Mr. Nelton Forsythe alleges in his Affidavit, but a necessary step to resolve the matter expeditiously and to avoid a waste of the courts time.

[31] He stated that the Claimant has initiated a court action to have the encroachment by the Defendants on the Claimant's land resolved in Claim No. 2015HCV04988 and currently awaits a date for the hearing. On the 25th of November 2015, Mr. Kandekore announced to the Court that he had secured the 6th of April 2016 as the First Hearing for this Fixed Date Claim Form. However the records of the Court indicate that no parties appeared on the 6th of April 2016 and on the 25th of April 2016 a Notice of Application for Court Orders was filed for (1) an extension of time in which to serve the Fixed Date Claim Form and (2) Leave to serve the Fixed Date Claim Form out of the jurisdiction.

[32] In relation to delay in the instant matter, Mr. Kandekore submitted that Notice of Change of Attorney was filed by him on the 24th of October 2014. The matter was set down for hearing on the 28th of October 2014 and subsequently adjourned to the 26th to 28th October 2015. He states that after the adjournment in October 2014 he wrote to the Defendants' Attorneys in an effort to broker an amicable settlement of the matter.

[33] He proposed to the Defendants' Attorneys that the Defendants buy the Claimant's land on which the Defendant encroached instead of the parties pursuing an action which could not be resolved until the two encroachments have been rectified.

[34] He said that the Defendants' Attorney never responded to their letter, despite numerous telephone calls to his office and personal visits; he has never been able to speak to him. Further, on the 2nd of October 2015, he received an e-mail from Mr. Forsythe enquiring if the case set for trial on the 26th of October 2015 would go ahead,

and he responded to his e-mail and told him no because the Claimant intended to take steps to have the matter of the encroachment litigated in which event the pending case will be moot and therefore he should not bring his clients in from overseas for the trial.

[35] Mr. Kandekore reiterated that it was his belief that the instant action cannot be tried until the encroachments are rectified because in the case of the encroachment on the Claimant's land, the Claimant would be seeking to buy his own land and in the case of the encroachment on the other side, the Defendants would be selling land which does not belong to them.

The Defendants' Response

[36] Ms. Bernard objected to the matter being removed from the list. She also noted that Mr. Kandekore's Affidavit was short served and that the 1st and 2nd Defendants were present in Court having travelled from abroad.

[37] She submitted that there was a contract for sale between the parties and the Claimant seeks to enforce the sale which can be honoured by the Court.

[38] She said there is no reason to marry the Fixed Date Claim form to the trial claim where there are so many avenues for settlement. She said issues of boundaries are simple matters of title and there are other means of rectifying boundary issues, - surveyor's diagram, notices of rectification and sanctions follow modification of restrictive covenants. She submitted that boundary issues can be dealt with by the mechanics of an Agreement for Sale.

[39] She opined that the surveyor's report is dated 2004 and cannot be the substratum of a claim in 2005, as this document has always existed to the knowledge of the Claimant and his Attorneys-at-law.

[40] Ms. Bernard said that the Surveyor's Report is dated 2004 and this case was filed in 2008 and to have this case await the outcome of another when the former has no basis in law or equity and should be struck out is highly prejudicial and an abuse of the Court's process. The Defendants maintain that this case cannot be sustained and

there is no current or other contract for sale between the Claimant and the Defendants which warrants that a boundary issue be attached to the case at bar.

[41] Miss Bernard stated that the Defendants could not rely on the e-mail from Mr. Kandekore and not bring the Defendants as there was no immediacy of a settlement. As to whether the trial would proceed is a matter within the remit and discretion of the Court.

[42] She submitted that to speak of delay in this forum in terms of without prejudice correspondence or seeking a settlement is to wrongfully incorporate out of court matters in judicial proceedings. She said delay in judicial proceedings is marked by failure to comply with the rules and not forced settlement or undesirable terms of settlement.

Application to Strike Out the Claimant's Statement of Claim

[43] If the Defendants were to succeed in this application, it would be the end of the matter before this Court. This application has been brought pursuant to Rule 26.3(1) of the CPR.

[44] Ms. Bernard states that the Claimant's claim is not supported by any contract/agreement in writing between the parties and no written evidence of any such contract/agreement has been tendered or is being relied on by the Claimant.

[45] She said the Claimant's claim is bound to fail as the Claimant's Statement of Case (Claim) discloses no reasonable grounds for bringing the claim. She averted the Court to the Claim Form which does not allege that the parties had a written agreement. Additionally, the Particulars of Claim as a whole do not touch on an oral agreement being concluded.

[46] She submitted that the Statute of Frauds requires a memorandum in writing containing the essential terms of the contract being relied on. The draft Memorandum of Agreement for Sale does not meet the standard, neither does the letter of Silbourn Hunter to Mr. Charles Campbell, Attorney-at-Law. The Agreement for Sale is undated

and unsigned. The terms were not agreed, only discussed, particularly the purchase price was not agreed nor any agreement entered into.

[47] The Defendants relied on **Scammell & Nephew Ltd. v. Ouston** (1941) 1AC 251 for the proposition that in order for a contract to be binding, the terms thereof must be certain/complete.

[48] Ms. Bernard contended that in this case, there was no agreement between or among the Claimant and any of the Defendants regarding the amount of the purchase price (consideration) or the manner of payment. Additionally, there is no agreement regarding the resolution of boundary issues relating to the property, the subject matter of the contract; and the resolution of such issues would necessarily be a condition precedent/term of any contract for the sale of the subject premises.

[49] She further submitted that the payment of money is not sufficient part payment to give rise to the Court exercising its jurisdiction to order specific performance. She said that even if a Court was to find any acts of part performance on the Claimant's part, notwithstanding same, that remedy of specific performance is not available where the alleged contract terms are uncertain. Reliance was placed on **Communtel Broadband Limited & Starcom Cablevision v. McKay** [2012] JMSC Civil 10.

[50] Ms. Bernard submitted that the alleged payment/receipt to Mr. Vivian Williams even if considered is not addressed to any Defendant in this matter and it does not refer to a sale of land. She said that in any event the alleged payment of money would not meet the jurisdiction of equity. She said the authority for this is **Nation Hardware Limited v. Norduth Development Co. Ltd. et al.** Claim No. 2005HCV02314 delivered on October 3, 2015. She contended that the payment of money alone is equivocal.

[51] Mr. Kandekore was given until the 4th of December 2015 to file written submissions dealing with the cases cited by Miss Bernard. These submissions were filed on the 17th of December 2015 and came to the attention of the Court belatedly.

[52] In summary, Mr. Kandekore challenged the applicability of the authorities relied on by the Defendants. In relation to **Nation Hardware Limited** his attack was two-fold. Firstly, it was submitted that Sykes J recognized that there is no necessity for a written contract/agreement, what is required is a "sufficient memorandum in writing" and Mr. Kandekore contends that the receipt for the part-payment of the purchase price is a memorandum in writing.

Secondly, Mr. Kandekore submitted that Sykes J erred when he relied on the dicta of Lord Chancellor from **Maddison v Alderson** instead of the dicta of Lord Reid from **Steadman v Steadman** [1976] AC 536, which is a more recent House of Lords decision which the Court of Appeal approved.

[53] It was further submitted that the Defendants failed to recognise that in addition to the memorandum in writing, the Claimant was relying on part performance which operates as an independent ground to prove the existence of a contract as well as evidence which clarified the reason for the parties' conduct.

[54] Mr. Kandekore submitted that there were a number of matters which were evidential disputes and challenges by the respective parties and can only be resolved by way of a trial. In response to **Communtel Broadband Limited**, it was submitted that in order to determine whether the alleged contract is incomplete there should be a trial and that striking out the Claimant's case would not be appropriate. A similar submission was made in respect of **Scammell & Nephew Ltd**, Mr. Kandekore contended that there should be a trial to determine the meaning of the letters and other communication. Finally, it was submitted that if the disputes were to be resolved against the Defendants the Court could find an Agreement for Sale without violating the Statute of Frauds.

The Law and Analysis

[55] The burden of proof is on the Claimant to prove that a contract existed as alleged on a balance of probabilities.

[56] Section 4 of the **Statute of Frauds** states-

> *"No action against Executors...upon a special promise, or upon any Agreement, or Contract for Sale of Lands,...unless Agreement ... be in Writing and signed. Noe Action shall be brought [...] whereby to charge the Defendant upon any special promises to answere for the debt, default or miscarriages of another person [...] unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the partie to be charged therewith or some other person there unto by him lawfully authorized."*

[57] In relation to the **Statute of Frauds**, Sykes J in **Nation Hardware Ltd. v. Norduth Development Co. Ltd et al** (supra) at paragraphs 26- 28 enunciated -

> *26. Before the passing of the Act oral contracts for the sale of land were sufficient. Apparently, there was no shortage of convincing mendacious witnesses. A method of cutting down on the many fraudulent practices which [were] commonly endeavoured to be upheld by Perjury and Subordination of Perjury would be to require writing as a prerequisite for enforceability. Therefore any act of performance has to be very cogent because one was now starting from a position of non-enforceability...*
>
> *27. I should point out that shortly after the Statute of Frauds was passed some judges thought, no doubt because of the purpose of the Act which I have set out above, that where there was no risk of perjury or fraud then an oral contract for the sale of land could be enforced even if there was no writing. This led some to think that sale of land by auctioneers and brokers were outside the statute. This view was eventually rejected (see Lord Blackburn in **Maddison** at page 488) All this reinforces the demand for an unequivocal act which payment of money alone could not provide.*
>
> *28. The Lord Chancellor went back to 1701 and traced the decisions of the courts in order to make the point that in balancing these two principles identified in paragraph 24 the issue was what type of evidence had the cogency to pull the contract away from section 4 of the Act. It necessarily follows from this that the type of evidence required would have to be quite cogent and difficult to explain on any other reasonable and rational basis other than a prior oral agreement. **Consequently, acts such as taking possession and expenditure of money, unsurprisingly, became the quintessential acts of part performance. These acts by their nature tended to be unequivocal.** In fact, these acts but for the contract would have been trespasses. It does not require a great deal of imagination to appreciate that in this context payment of money, simpliciter, paled in comparison to taking possession and expenditure of money on the property by the purchaser. The conclusion would be even stronger if the purchaser who did these acts was a stranger to the vendor.* (emphasis added)

[58] My understanding of the Claimant's case in summary is that:-

(a) There was agreement for the purchase of 27½ Grants Pen Road which was partially in writing as evidenced by the cheque for $40,000 being part payment of the purchase price.

(b) There was part performance of the Agreement in that the Claimant-

(i) paid the deposit;

(ii) was put in possession by the sellers;

(iii) expended money in clearing debris from the property and in fixing the fence; and

(iv) incurred expenses by his visits to the Defendant's Attorney as well as incurring costs to commission the survey.

By these acts of part performance the Claimant acted to his detriment in reliance on this oral agreement / agreement by conduct and/or agreement by course of dealings with the Defendants.

[59] On the other hand, the Defendants deny that any enforceable contract with the Claimant for the sale of land exists. There were only discussions but no agreement.

[60] It is for the trial judge after hearing the evidence of the witnesses, examining any documents exhibited and assessing the credibility of the witnesses to determine:

(i) whether or not the payment of $40,000 represents partial payment of the purchase price; and

(ii) whether the Claimant was put possession and expended monies on the property to his detriment.

[61] The pivotal question being whether the Claimant and Defendant had a valid Agreement for Sale of the said property.

[62] A review of the law makes it clear that the payment of the $40,000 would be insufficient to sustain an action for specific performance. This act is equivocal. Part performance can be shown by evidence relating to payment of a deposit and by the

purchaser being in possession of the property among other acts. It is for the trial judge to examine these issues and determine whether there was an enforceable agreement.

Conclusion

[63] In conclusion, I find that the Application to Strike Out the Claimant's Statement of Claim is dismissed.

[64] To return to the application to adjourn the trial pending the hearing of the Fixed Date Claim Form concerning the encroachment, I find that this application ought to be granted, I find it makes sense that the latter claim ought to be tried first in time, as the issue of the encroachment is fundamental to the resolution of the entire matter.

[65] Having regard to the overriding objective contained in CPR rule 1.1, and in particular ensuring that cases are dealt with expeditiously and fairly and allotting an appropriate share of the court's resources; it may be appropriate to dispose of the two claims together whether by consolidating the proceedings or trying the two claims on the same occasion (per rule 26.1(2)(b) or (h)).

[66] I would adopt the reasoning of my brother Anderson K. J from **Williams-Phillips v University Hospital Board of Management** [2014] JMSC Civ. 177 at paragraph [10] – *"If therefore, two or more claims have previously been filed, but this court considers that the same can be conveniently disposed of together, then this court not only can, but should make a consolidation order."* I find that the two claims can be conveniently disposed of together. Save for the 2nd Defendant, the parties to both proceedings are the same and there is a significant overlap between the two claims as both Claims are concerned with the property registered at Volume 389 Folio 18 of the Register Book of Titles (i.e. 27 ½ Grants Pen Road, Kingston 8). In other words, the Claim filed later in time deals with the subject matter in dispute in the Claim filed earlier in time.

[67] It is noted that the one or more of the parties reside overseas and will have to travel to participate in the proceedings. It is also noted that if the matter is consolidated, the parties may have to redraft their respective statements of case, I do not consider

this to be necessary as this may increase costs for the parties. Based on the foregoing, it appears that it would be more efficient to have the claims remain separate but tried on the same occasion.

Disposition

[68] It is hereby ordered as follows:

1. Claimant's Application to remove matter from trial list/adjourn pending determination of Fixed Date Claim Form is granted and Claim No. 2008 HCV 03867 and Claim No. 2015 HCV 04988 are to be tried on the same occasion;

2. No order as to costs in respect of the Claimant's Application;

3. Defendants' Application to Strike Out the Claimant's statement of case is refused; and

4. Costs to the Claimant in respect of the Defendants' Application to be agreed or taxed.