In the Supreme Court of Judicature of Jamaica

Claim No. E 248 of 2001

Between	**Frank Hasfal**	**Claimant**
And	**Kenneth Walker**	**Defendant**

Mr. Rudolph Smellie instructed by Daley, Thwaites and Co. for Claimant.

Mr. K.V. Brooks for the Defendant.

Heard: **7th June, 2005**
8th June, 2005
8th June, 2007

Marsh J.

The undisputed facts of this case are that Claimant and Defendant in a Written agreement for sale dated 30th July, 1991, agreed that the Claimant should purchase from the Defendant, land situated at Abyssinia Cottage in the parish of St. Andrew for a purchase price of ($45,000) Forty Five Thousand Dollars.

Claimant was put in possession of the land and made development efforts on the land. The sum of fifteen thousand dollars was paid towards the purchase price in two tranches as per the agreement for sale.

The said agreement for sale provided at Clause 10 thereof that

"The said land is sold and the purchaser shall take title

thereto subject to the provisions of the Registration of Titles Act and the approval of the K.S.A.C. and Town Planning Department to the subdivision of the land of which the said land formed a part."

Claimant contends that at all material times, he was ready, willing and able to perform his obligations under the agreement for sale.

In 1996, Claimant's Attorney wrote to Defendant's Attorney's, a letter dated 22nd March, 1996, indicating that Claimant was yet to see the registered certificate of title which was to have been tendered to him for completion, pursuant to the contract and also asked that he be advised of 'the status of this matter so such steps as are still necessary can be taken with every dispatch."

The Attorney for the Defendant replied in a letter dated the 9th day of April, 1996 that he was instructed to advise that "the subdivision of the said land by the K.S.A.C and the Town Planning Department cannot accommodate the sale of the land to you, as proposed in the said Agreement for Sale. Mr. Walker has therefore instructed me to return the sum of $15,000 which you had paid as deposit in the said transaction."

Further correspondence from the Claimant's Attorney to the Defendant's Attorney dated 18th April, 1996, sought to be provided with

(i) a copy of the subdivision plan sent to the K.S.A.C. and the Town Planning Department for approval;

(ii) a copy of the letter of Application sent therewith and

(iii) a copy of the letter of response from the K.S.A.C. and from the Town Planning Department concerning the said application for subdivision approval.

In a letter dated 30th April, 1996, the Attorney for the Defendant indicated to Claimant's Attorney, that inter alia, he had not acted for the Defendant in the subdivision transaction, relative to the said land and so he did not "otherwise have any documents or information touching the said application and so was unable to provide the copy of the documents sought."

Prior to the abovementioned exchange of letters between the Attorneys the National Housing Trust had indicated in a letter dated 26th March, 1992, to Defendant's Attorney that it had given a commitment to the Purchaser for a loan of the sum of Thirty Thousand

Dollars ($30,000) and would pay out the said sum in exchange of the duplicate certificate of title.

By Writ of Summons the Claimant made claim against the Defendant for the following:

1. Specific Performance of the Written agreement between the plaintiff and the Defendant dated the 30th July, 1991 for the sale by the Defendant to the said Claimant of land situated at Seven Miles in the parish of St. Andrew being part of Abyssinia Cottage and of land formerly registered at Volume 1230 Folio 273 of the Registered Book of Titles.
2. Further or alternatively, damages for breach of the said contract including compensation for the building created by the Plaintiff on the said land.
3. Further or alternatively a declaration that the Plaintiff is entitled to an equitable interest on the said property.
4. Further or other relief.

Defendant robustly denied Plaintiff's entitlement to any of the relief's sought by him. He denied being in breach of the agreement for sale. The subdivision of the land was not approved by the K.S.A.C. and

the Town Planning Department in accordance with the application made therefor by the Defendant, but allowed a subdivision of the said land into strata lots "which could not accommodate the agreement which had been made between the Plaintiff and the Defendant." Consequently the deposit of $15000 was refunded to the Plaintiff pursuant to the said Agreement for sale of the land.

The agreement for sale of the land was made "subject to the condition contained at Clause 10 of the Agreement for sale of land. Defendant further denied that he had acquiesced to plaintiff's dealings of with the land in question and had objected to such dealings on the land, such as Plaintiff's construction of a wall on the land.

It is Plaintiff's case also that some months after he had paid the amount of the $15,000 as stipulated in the agreement, in March 1992, he had begun to build a wall around the side of the property, laying out lawns, planting fruit trees and landscaping the property.

By mid 1994, Plaintiff and his family began to live on the property in a large room partitioned into three bedrooms, with living and dining room, kitchen and a bathroom. Concrete walkways were added and a board gate was replaced by a metal gate.

All these improvements to the land were done with Defendant's knowledge as, not only would he pass everyday, he lived in premises on the opposite side of the road and had never made any objections to Plaintiff's efforts to improve the property.

The only objection that Defendant ever made was done when the Plaintiff was building a wall in the incorrect place.

Defendant's case is that plaintiff was occupying a derelict house on the land when he had purchased it. Plaintiff, wishing to continue living on the land had asked Defendant to sell him the spot on which the derelict house stood. It was his intention to develop the land as a subdivision of building lots, so he agreed to sell the Plaintiff the piece of land.

In the Agreement for Sale of land, entered into in July, 1991, there was inserted a clause which provided that the lot which was to be sold to Plaintiff would be subject to the approval of the Planning Authorities, the K.S.A.C. and the Town Planning Department.

Changes were made to the old house in which the Plaintiff was living. Fearing that these changes would affect the development planned for his land Defendant objected to these changes and from time to time

warned the Plaintiff that since no planning approval had yet been given, he should be careful of his activities on the land.

Defendant had sought and obtained advice in discussions with a Mr. Milton Richards a building inspector at the K.S.A.C. concerning the development of the land.

Defendant formed an impression as a result, that the type of development contemplated by him for the land was not in keeping with planning regulations and requirements. Consequently, he made an application for the development of the land into a multifamily scheme. This application for strata lots to the K.S.A.C. was approved in 1994, 'early in the year". Defendant stated that he informed the Plaintiff accordingly.

Submissions:-

In very extensive submissions, Mr. Smellie for the Claimant contended that -

(a) Re Claim for Specific Performance the only circumstance which could preclude Specific performance of the Contract was the existence of paragraph 10 of the Agreement for Sale of land – the clause which provided that the said agreement was subject to approval being granted by the K.S.A.C and the Town Planning Department to division of the land of which the section being sold formed a part, and

> whether it could be said that such approval had not been granted.

A key question therefore for determination must be the proper construction of this clause – clause 10 of the Agreement.

It was on implied term of the Contract that the Defendant was obliged to apply to the Planning authorities for subdivision approval in accordance with the agreement, or in terms reasonably contemplated by the said agreement.

The only proper construction of clause 10 of the agreement must be that the only circumstance under which it could properly be said that the subdivision approval had not been granted was if it was refused after it was properly applied for.

Mr. Smellie referred to and relied upon the following passages, respectively at page 147 of Anson's law of Contract. (28th Edition)

> ".... But the Court is also prepared to imply a term if it was so obviously a stipulation in the agreement that it goes without saying that the parties must have intended it to form part of their contract. This test, is applied by asking whether; if an officious bystander were to suggest some express provision for a matter in the agreement, the parties would testily suppress him with a common "Oh of course..."

At page 148, it is stated

> "In any event the term to be implied must in all the circumstances be reasonable. But this does not mean that a term will be implied merely because it would be reasonable to do so, or because it would improve the contract or make its performance more convenient. It must be necessary to imply such a term: 'The touchstone is always necessity and not merely reasonableness.' For example where parties to a contract are subject to the rules of a regulatory body there is no need to imply those rules into the contract.
>
> The touchstone is a necessity and not merely reasonableness.

It must have been intended and understood by the parties that the vendor's obligation was to have made such an application to the authorities.

It was not open to the Defendant to have made application for approval for strata late and then to say, having obtained the approval sought by him that the subdivision of the land approved by the authorities could not accommodate the sale of the land to the Plaintiff as contemplated by the agreement for sale of land. Defendant cannot purport to rescind the agreement on that basis.

Further, he submitted that as the failure to obtain subdivision approval under the contract was the result of Defendant's own election, he not applying for subdivision as contemplated by the contract,

Defendant cannot claim that there was frustration of the contract. This was self-induced frustration. See ***Maritime National Fish Ltd. v. Ocean Trawlers Ltd (1935) HC 534.*** Here the Privy Council held that the failure of the Contract was the result of Maritime National Fish Ltd's own election and that since reliance cannot be placed on self induced frustration, there was no frustration.

In the instant case, the Defendant should have made the requisite application and advised the Claimant as to the status of such an application within a reasonable time after the sale. He pointed out that it was only when the Claimant's attorney made queries, that Defendant's attorney in letter dated 9th April, 1996, replied indicating that "the subdivision as approved by the K.S.A.C. and Town Planning Department could not accommodate the sale of land to you as promised in the said agreement for sale."

It was only when the Defendant's witness Statement was filed on 7th day of February, 2005 that it was first disclosed to the Claimant that the application that had been made for subdivision approval did not include the lot sold to the Claimant and that the subdivision sought was

for strata lots and not building lots. It was only then that an explanation was proffered by Defendant as to why this was done.

Claimant should therefore be granted an order for Specific Performance of the Contract or for damages in lieu thereof.

Alternatively, Mr. Smellie argued, the Court should make a declaration that the Claimant is entitled to an equitable interest in the property as it exists now. He based this on the doctrine of licence by estoppel established by such agreement, the development of the said land pursuant and in reliance upon the said agreement and by the acquiescence in and tacit encouragement of such development by the Defendant.

Mr. Brooks, for the Defendant, however contended, inter alia, that the Claimant's suggested course of action, had it been adopted by the Defendant in applying for approval for subdivision of service lots, would have been a waste of time and money and at the end, that application would not have been approved. Further, Clause 10 of the Agreement for sale made the approval of the Planning authorities, a condition of the sale of the lot to the Claimant. This clause therefore protected Defendant from the present claim of the Claimant.

Claimant has contended that since the lot of land sold to him contemplated, by the agreement that Defendant would have sought the requisite planning approval, i.e. planning approval for subdivision of the parcel of land from which that lot came, into service lots, Defendant could not, without more seek approval for strata lots. This would be in breach of contract. Section 5(4) of the Local Improvement Act reads as follows:-

> "For the purpose of this Act a person shall be deemed to lay out or subdivide land for the purpose of building thereon, or of sale, if he sells or offers for sale any part of such land wherein a house or other building may be erected..... on such land"

Having entered into the agreement for sale of the land in question, to the Claimant, Defendant is deemed to have subdivided the land for the purposes of building. Defendant has admitted that on the time of the sale, it was his intention to subdivide the land into 10 lots. However, the sole application made by him for planning approval was an application for strata development of the said land. This application having been approved, it meant that the sale of the said lot of land to be Claimant could not be entertained.

Defendant has given an explanation as to the reason he had resiled from his intention to apply for service lots and to apply instead for strata lots.

After the agreement for sale of the lot of land to Claimant Defendant, in his witness statement said that he had had discussions with a Mr. Milton Richards, a K.S.A.C. building inspector, now deceased. As a result of these discussions, Defendant, in his witness statement said that he had had discussions with a Mr. Milton Richards, a K.S.A.C. Building inspector, now deceased. As a result to these discussions, Defendant said that he formed the impression that the development that he had contemplated for the land, was not in keeping with the requirements and regulations of the K.S.A.C. and the Town Planning Department. He therefore formed the view that an application of approval of a subdivision of the land into service lots would have been a waste of time and money. He decided to develop the land into a multifamily scheme, so in 1994, he applied for strata lot approval and this application was approved by the K.S.A.C. He informed the Claimant of this development.

In cross-examination, Defendant stated that it was in 1996 that he wrote to Claimant informing him that his purchase of the land could not be accommodated based on the kind of approval obtained. This therefore was the Defendant's submissions.

When pressed about a copy of the letter written to inform Claimant, in 1996, re his inability to entertain the sale to Claimant, he said he did not then have a copy of the letter as "Within that time, I changed office and maybe it got mislaid." He further said that he had told Claimant that the purchase could not be entertained.

Defendant further denied that he had, at anytime, written to Claimant giving him that information. But, in distinct further contrast to his earlier evidence, Defendant declared that it was only in April, 1996, that Claimant was advised in writing, because he the Defendant was then clearing the land of squatters, then he went to relevant authorities, K.S.A.C. and Town Planning Authority, to see if he had adequate land to do 10 lots of the subdivision. Despite his many conflicting statements as to whether he had informed Claimant and when, Defendant stated that he had spoken to Claimant within 1994, before he went to the relevant authorities.

Defendant also testified that he had told Claimant to be careful how he was going about developing the land since he had not yet got approval. All this was done by Defendant "out of consideration for the Claimant". He also warned the Claimant between 1993 – 1995, whenever they "bucked" up about the condition agreed on in the Sale Agreement. Defendant when cross examined, stated that he had not applied to K.S.A.C for a 10 lot subdivision as there was a K.S.A.C. requirement for a certain amount of roadway from the main rod to the land, which could not be satisfied having cut off the piece to sell to the Claimant. This he said he only realized when he cut off the piece of land to sell to the Claimant.

Further he said he only realized this in 1993 when he cleared the land and 'drived' the people off the land. He decided not to apply for the 10 lots subdivision again, sometime in 1992 – 1993. He did not advise Claimant about this decision before April 1996 because he was abroad.

Law:

The insertion of the clause of the Agreement, Clause 10, is not as a matter of construction, a condition precedent. This clause is in material particular similar to that which formed Clause 6 of the sale agreement in

Balbosa v. Ayoub Ali (1990) 37 WIR 447. That Clause was worded as follows:

> ***The sale shall also be subject to the obtaining from from the town and country planning division of all the necessary approvals for the transfer on the premises described in the schedule hereto."***

Lord Oliver of Aylmerton, delivering the opinion of the Board at p. 452 stated inter alia -

> ***"it is entirely clear that the clause, is not as a matter of construction of the agreement, a condition precedent. At the highest it is simply a term of the agreement."***

The clause having been inserted in the instant agreement, it became an implied term of that agreement that Defendant would have sought to obtain the necessary planning approval for such a type of subdivision that the lot of land, subject of the agreement for Sale, could in fact have been sold to the Claimant as agreed.

The Defendant's sole application for Approval was for strata lots is having received permission to so subdivide the land into strata lots, made it impossible for him to sell the lot of land as part of a subdivision for service lots.

There was therefore an obligation on the Defendant to have applied for subdivision of the land in service lots – not necessarily for ten lots as he had envisaged in his plans for the land's development. The Defendant declared himself as a land developer of some twenty years experience.

It is difficult to accept that there was any discussion with the since deceased K.S.A.C. building instructor, which discussion caused him to change his mind from the original development plan for the land. He has admitted that he had realized that he could not have applied for a 10 lot subdivision when he cut off the piece of land to sell to the claimant. This would have been in 1991. So on Defendant's own evidence, at the time he cut off the piece of land to sell to Claimant, he realized that a 10 lot subdivision could not receive planning approval.

This fact was never communicated to Claimant, not even when Claimant sought through his attorney at law to ascertain what steps Defendant had made to obtain planning permission and what approval had been sought.

I accept that it was only when in March 1996, that Claimant's Attorney wrote to Defendant asking about the status of the sale that

Defendant's Attorney at Law wrote to say that the subdivision of the land as approved by the K.S.A.C and the Town Planning Department could not accommodate the sale of the lot of land to the Claimant as per the Agreement for Sale and thereby returned the $15,000 paid towards the purchase price.

The National Housing Trust had as early as March 1992 written to Defendant advising of their willingness to pay to him the balance of the purchase price in exchange for the duplicate Certificate of title of the said land.

It was an implied term of the agreement that Defendant would have taken steps to obtain the kind of planning approval from the relevant authorities which would make a sale of the said lot possible.

The law may imply into a contract, terms which the parties to that conflict may not have inserted themselves. These terms will be implied by the Courts only where it would be necessary to give business efficacy to the contract. "Here the implication of a term is normally said to depend upon an intention imputed to the parties from their actual circumstances, i.e. the express terms of the agreement and the

surrounding circumstances. See Anson's Law of Contract 28th Edition P. 146.

The Defendant has been totally unconvincing in his explanation as to why he failed to apply for approval for subdivision for service lots as opposed to strata permission. The discussion with the K.S.A.C. building instructor (now deceased) was said to be the cause of his change of plans re the type of subdivision approval sought this having taken place after the Defendant had entered into the agreement with Claimant to sell him the lot of land. However, it is Defendant's evidence that he did not apply to KSAC for the 10 lots subdivision as he had realized when he cut of f the piece of land to sell to Claimant that there was an insufficiency of land to provide for the required roadway.

His decision not to apply for the subdivision of service lots again was made in 1992 – 93. This was never communicated to Claimant before April 1996. The reason he gave for this state of affairs is that he was off the island.

It is strange that having being changed his mind with regards to the nature of the development of the land intended, this fact was not conveyed to the Claimant. Not even when the application for strata

approval was sought and obtained was Defendant minded to communicate this to the Claimant.

Defendant was in breach of the agreement by not properly making the application for subdivision approval for service lots.

If Defendant had applied for subdivision approval of the land and service lots and had been unsuccessful, he could have relied upon Section 13 (2) of the Local Improvement Act which reads-

> 2) "Where a subdivision contract cannot be executed because any relevant sanction of the Council is not obtained by the subdivider of the land, the other party to the contract or any person succeeding to the rights of that other party under the contract may, after the expiration of such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the subdivider of the land any moneys paid to him under the contract, together with interest thereon at the rate of seven per centum per annum from the date in which such monies were paid."

I accept that the Claimant had made improvements by the building of a house on the land, built concrete walkways and changed a board gate

replacing it with a metal gate, and planted fruit trees also. The Defendant knew of these as, in his evidence he has stated that the attempted on occasions to warn the Claimant that he was to be careful what he was doing as he had not yet received planning permission and that he did al this out of consideration of the Claimant. Claimant has not convinced me on a balance of probabilities that he was allowed to build on land by Defendant's acquiescence.

I am not convinced that the Defendant is a witness of truth. He contended that he made his objections to the changes in writing, but although he kept copies of these letters he could not recall where their locations were. Another reason given by Defendant for his objections, was that he feared that changes being effected by Claimant would "affect the development I had planned for the land." Ironically, the development he planned was to have subdivided the land.

In the light of the above, I find that Defendant is in breach of an implied term of the Agreement by failing to apply for the kind of approval which would have made sale of the lot as envisioned in the Agreement for sale possible.

It is therefore ordered that there be

1. Specific performance of the Written Agreement between the Claimant and the Defendant dated the 30th day of July, 1991 of the sale by the Defendant to the Claimant of land at Seven Miles, St. Andrew being part of Abyssinia Cottage, formerly registered at Volume 1230 Folio 273 of the Registered Book of Titles and now composed in Certificate of Titles registered at Volume 1275 Folio 768 of the Register Book of Titles.

2. Cost to be Claimant's to be taxed if no agreed.