

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.H. 003/1988

BETWEEN WINSTON MANLEY HO-SHING PLAINTIFF  
AND ROSE LEE DEFENDANT

Mr. B. E. Frankson and Hector Robinson for Plaintiff  
Mr. Norman E. Wright and C. Dunkley for Defendant

Heard: November 13, 14, 15 & 16, 1990  
February 25 & 27, and March 1, 1991  
July 29, 1992.

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CHESTER ORR, J.

This is an unfortunate case. The plaintiff and defendant are brother and sister respectively. The plaintiff being the younger of the two. The dispute concerns premises 11 Market Street, Trelawny, the registered Title of which is in both their names.

In 1956 the plaintiff emigrated to the United Kingdom, where he pursued his occupation as a mechanic and also purchased a house. The defendant a widow, carried on business and owned property in Jamaica. She was the champion Farmer for the Parish of Trelawny in the year 1984.

In 1968, the defendant purchased land at Green Park, Trelawny for the plaintiff. Although she claims that she was not paid the fees for the Transfer of the Title, this did not disturb the amicable relationship between herself and the plaintiff, who was affectionately called "Joiner". She also purchased cattle for the plaintiff.

In 1978 the defendant visited the plaintiff in the United Kingdom and the plaintiff requested her to obtain premises for him in the town of Falmouth where himself and his wife could reside and he could also carry on his business. The defendant made enquiries and sometime in 1979 advised the plaintiff that 11 Market Street, Falmouth was available. It was agreed that these premises should be purchased for the plaintiff. The defendant engaged the services of Mr. Roy Barrett, Attorney-at-Law, to

effect the transaction. The vendor Mrs. Whiteside, resided in the United States of America and there were then in existence restrictions on the transfer of funds out of Jamaica. In order to effect payment to Mrs. Whiteside, it was arranged that the plaintiff would send to Mr. Barrett a Draft payable to her in the U.S.A. Mr. Barrett in turn would forward same to her Attorneys in the U.S.A.

In 1980 the plaintiff and his wife visited Jamaica and inspected the premises which met with their approval. The parties attended on Mr. Barrett and discussed the transaction. There is acute conflict concerning the meetings with Mr. Barrett and the ensuing events. This conflict has been heightened by the absence of Mr. Barrett as a witness. The house and premises were in disrepair and the defendant had the necessary repairs effected. Letters from the defendant to the plaintiff were tendered in evidence. They deal with the progress of the transaction and the repairs. It is unfortunate that the plaintiff did not emulate the example of the defendant: a lot of misunderstanding would have been obviated.

The premises were rented and rental collected by the defendant. The plaintiff gave the defendant two Bank Pass Books in relation to two Bank accounts in which half of the rental should be deposited to his account with his wife and the other half to Mr. Barrett in connection with the premises.

On the 25th March, 1982, the defendant telegraphed the plaintiff as follows:

"I finish pay Mrs. Whiteside for 11 Market Street.  
Please don't send any more money.

Rose Lee."

This should have been the harbinger of a happy ending to the transaction but such was not to be. The plaintiff stated that he wrote Mr. Barrett but received no reply. Apparently, Mr. Barrett contacted the defendant who in turn sent the following letter to the plaintiff - Exhibit 22 dated the 25.5.82:

"29 Market Street,  
Falmouth P.O.

25.5.82.

Dear Manley,

Good day, now I would like to know where is your dam sense, it seems you turn a fool or you are trying to work your brain and to hold on to what I have, now try and remember from you ask me to get 2 pieces of Land at Green Park and you send ~~£~~1,000 I pay for the land and leave ~~£~~25.00 change, you said I must keep it that in case your Mother dead take it to help bury her I gave her the ~~£~~25.00 and she eat it before she die. You never pay for the paper Cost of these two pieces of Land, you dont know nothing about cleaning, fencing, planting grass up, keeping yearly, paying Taxes for so long, you also told me you want to build a house on one piece and I should cut a road and house spot and a big yard and collect some material, and I cut the road, house spot, and yard and buy sand and up to now you dont pay one cent yet, all those money it is mine, and you cause me to spend it on your property, you told me to allow you to take my Husband Coin Collection to England and sell it for me and up to now you do not return with a penny, what is your intention tell me, you ask me to get a place in Falmouth without one cent and I get No. 11 Market Street, I pay over Twenty Nine Thousand Dollars (\$29,000.00) to Mrs. Whiteside on the Land, I pull down one of the old houses and rebuilt it, and you come and see it and you promise me so faithfully to send some good money from 1980 until now not even one penny, and look how often you forfeit the agreement what we both sign, I am afraid Mrs. Whiteside would take back her place and now I take my good money and finish pay for the place, and I send and tell you, now before you kneel down and pray and write me a good letter you come with your boastness get Lawyer to write Mr. Barrett to give statement and it is the Rent me collect from property and give Mr. Barrett to pay for the place and you want to know about the Title. Now tell me you pay me one cent as yet, on that house, I alone built on the Land, or you build any house what soever in Jamaica, you pay as such as what I pay to Mrs. Whiteside, you pay any Lawyer Cost as yet towards the property. Then what the hell you are talking, do you think buying and building in Jamaica it is like buying in England? Your wife come to Jamaica and boast on me about money, why she dont try and build in Jamaica and let me see for she have money and I dont have anything now, all I have to tell you it is full time for you to settle up with my coin collection. And the two pieces of Land at Green Park before we touch No. 11 Market Street. I try to help you as a little brother and look how unfair you are, God Almighty of all the good I have done this is my thanks. I am telling you straight if you think you can get that house without money go ahead. I want your wife to lick me down with the money, I spend on No. 11 Market Street. When Geta was boasting 1980 I was in tears, sweat and blood. Thank God all the storm is over. Pay me now for my foot prints on the land. More over the money I spend, this is the cry of my blood. I am a poor widow come to me straight come to me soft, your might cannot beat right, you dont have one nail on this building it is just me alone. No law dont make yet to take this house from me and give you without money. Read, Mark, inwardly Digest money for money gold for gold. No hope, faith or love no more sister.

This is

Lady Rose Lee.

The plaintiff did not reply to this letter. He said he asked his Attorneys to do so (see Exhibit 24). Correspondence passed between the Attorneys for the plaintiff, Mrs. Whiteside and Mr. Barrett in which it transpired that the Title to the premises had been placed in the names of the plaintiff and defendant. Efforts were also made to obtain an accounting of the payments made by both plaintiff and defendant. These were inconclusive.

There is an hiatus until 1987 when the plaintiff and his wife returned to Jamaica to reside. He was unable to occupy the house at 11 Market Street. He built a house on a part of the premises but eventually had to vacate the premises as a result of an Injunction obtained by the Defendant. He brought action in 1988.

#### THE PLEADINGS

##### STATEMENT OF CLAIM

1. The Plaintiff is a Mechanic and is temporarily residing at Litchfield, Salt Marsh in the parish of Trelawny.
2. The Defendant is a sister of the Plaintiff and was the duly authorised Agent of the Plaintiff to act on his behalf in respect of the negotiations and purchase by the Plaintiff and his wife premises situate at No. 11 Market Street, Falmouth in the parish of Trelawny and being the land registered at Volume 1160 Folio 58 of the Register Book in the Office of Titles.
3. The Defendant in breach of Trust fraudulently and/or falsely transferred and/or caused to be transferred to herself and the plaintiff as tenants in common the fee simple estate in the aforesaid parcel of land when she knew or ought to have known that she had no proprietary interest therein and that the plaintiff intended that the fee simple estate would be vested solely in the Plaintiff and/or in the alternative jointly with his wife.

##### PARTICULARS OF FRAUD

- (a) Causing and/or permitting her name to be endorsed on the said Certificate of Title when she knew or ought to have known that she had no interest therein.
- (b) Having her name endorsed and entered thereon as the fee simple owner as Tenant in Common with the Plaintiff by a trick and/or deception.
- (c) Obtaining a Transfer of the premises in her name along with the name of the Plaintiff as Tenants in Common when she knew or ought to have known that the Plaintiff had not consented and had no intention that her name should be entered thereon.
- (d) Obtaining a Transfer of the said premises into her name as Tenant in Common not knowing or caring whether the Plaintiff intended to part with possession thereof.

- (a) Purporting to having obtained the fee simple Estate as Tenant in Common under the Registration of Titles Act without ascertaining and/or caring that the transactions was bona fides.
4. The Defendant at the time when he made or caused to be made the said representations knew them to be false and untrue or made them recklessly not caring whether they be true or false and that she gave no consideration for the purported Transfer. Further the Defendant has remained in possession thereof and has unlawfully dispossessed the Plaintiff and has prevented and still continues to prevent the Plaintiff from entering the aforesaid premises.
5. Further and/or in the alternative the Defendant negligently took a Transfer of the fee simple estate in the said parcel of land.

PARTICULARS OF NEGLIGENCE

- (a) Taking no steps to find out the bona fides of the transaction.
- (b) Taking the aforesaid Transfer recklessly, carelessly and having no regard to any damage or loss it might likely cause to the Plaintiff.
- (c) Failing to ensure that the Plaintiff was the fee simple owner in the entire parcel of land absolutely.
- (d) Failing and/or refusing to deliver possession to the plaintiff.
6. The Plaintiff has never entered into any agreement at the time of the aforesaid purchase and/or on any subsequent occasion that the premises should be in the joint names of the Plaintiff and the Defendant as Tenants in Common and the Plaintiff still claims to be the fee simple owner absolutely and is entitled to possession.
7. Further and/or in the alternative the Plaintiff contends that the Defendant has furnished no consideration and is a Volunteer.

AND THE PLAINTIFF CLAIMS:-

1. A Declaration that he is the fee simple owner of the premises known as No. 11 Market Street, Falmouth in the parish of Trelawny and being the lands registered at Volume 1160 Folio 58 of the Register Book in the office of Titles free of all encumbrances.
2. An Order that the Defendant's name be removed therefrom and that she delivers possession of that premises to the Plaintiff.
3. An Injunction restraining the Defendant whether by herself her servants and/or otherwise from preventing the Plaintiff from entering upon the aforesaid parcel of land.
4. An Account of all rental collected therefrom.
5. Damages.
6. Costs.
7. Such further or other relief as this Honourable Court deems just."

DEFENCE

The defence is substantially stated in paragraph 3 thereof, as follows:

"The Defendant denies paragraph 3 of the Statement of Claim and further specifically denies the allegations and particulars of fraud set out therein. The Defendant says that in consideration of monies contributed by her towards the purchase price, as well as monies expended by her to effect repairs to the said premises, it was agreed between the Plaintiff and herself that the premises would be transferred in their names as tenants-in-common and that pursuant to such agreement the Plaintiff and herself executed Transfer herein dated the 16th day of April, 1981, the lodgement of which resulted in their names being endorsed on Certificate of Title registered at Volume 1160 Folio 58 as proprietors and tenants-in-common."

The Transfer and Title, Exhibit 9 were tendered at the trial. The plaintiff denied that he signed the Transfer in the presence of a Mr. Johnson, a Justice of the Peace. He denied that he authorised Mr. Barrett to place the Defendant's name on the Title in order to secure the money she had expended on the premises. He stated that he first became aware that her name was on the Title when he saw a letter dated 26th July, 1982 - Exhibit 21 - from Mr. Barrett to his Attorneys, Messrs. Denton and Wood. He signed no documents in connection with the transaction. He was of the opinion that the Defendant had sufficient money from the rental of 11 Market Street and proceeds from the premises at Green Park to cover the balance of the purchase price and to effect the necessary repairs.

On his return he had to obtain the services of the police in order to retrieve the Bank Pass Books from the Defendant. These books Exhibit 25 contain no entries since August 1980.

Mr. Carl Major, a Deputy Superintendent of Police and Document Examiner in charge of the Questioned Document Section of the C.I.B. Headquarters gave evidence in connection with the Transfer. It was his opinion that the signature on the transfer was not that of the plaintiff. He admitted that additional writings between 1980 and 1982 would have been of invaluable assistance to him in carrying out his examination, but nevertheless arrived at the conclusion stated.

The defendant in her evidence stated that she made the deposit of \$4,000.00 on the premises from her own funds. She made further payments to Mr. Barrett as also mortgage payments amounting to \$10,949.62. She paid for the repairs out of her own money and despite having so advised the plaintiff he had not sent any money towards this.

She recounted the circumstances in which the Transfer was signed. In August 1980 during the visit of the plaintiff and his wife to Jamaica, the three of them attended on Mr. Barrett. After some discussion, it was agreed that there would be a mortgage in favour of Mrs. Whiteside and the defendant's name would be placed on the Title together with the plaintiff's as security for the money she had expended on the premises. When she had been repaid her name would be removed from the Title. The plaintiff agreed to this. Pursuant to the Agreement, herself and the plaintiff signed the Transfer and Mortgage documents in the presence of Mr. Johnson, a Justice of the Peace, now deceased. The mortgage was not tendered in evidence. She denied having forged the plaintiff's signature on the Transfer.

She made payments on account of the mortgage to Mr. Barrett to a total of \$30,447.22.

She said

"I have no interest in being part owner of 11 Market Street. I want my money I spent with interest."

She gave evidence of the cost of repairs and produced receipts in support. I make no comment on their authenticity as such a decision is not necessary for purposes of this Judgment. She said she retained all the rental from the premises as repayment of her monies she had expended on the premises. The total spent for repairs and maintenance was \$222,403.59.

It is a matter of regret that there is no evidence from Mr. Barrett who it is alleged played a pivotal role in the transaction. It is of note that the Transfer (Exhibit 9) is dated the 14th April, 1981. The defendant alleges that it was executed during the visit of the plaintiff to Jamaica in August 1980. There is unchallenged evidence that he did not return after 1980 until 1987.

It is also of significance that the defendant in her pleadings indicated that the premises had been transferred to both parties as tenants in common with no reservations. However, in her evidence she disclaimed any proprietary interest in the premises. No explanation was proffered for this discrepancy.

I accept the evidence of the plaintiff supported by Mr. Major that he, plaintiff did not sign the transfer. I find that the signature purporting to be that of the plaintiff thereon is a forgery and that the defendant was privy to the forgery. The defendant's name was placed on the Title by fraud and the plaintiff is entitled to have the Title rectified.

It is obvious that there must be a proper accounting by both parties in order that justice may be done in this matter.

The plaintiff claims damages for loss of use of the premises and in addition for loss of trade as the premises were purchased for this purpose.

Damages for the loss of use of the premises will abide the result of the accounts ordered hereunder.

With regard to the loss of trade as a mechanic there was no evidence of any attempt by the plaintiff to mitigate his loss nor was the point raised by the defence. The onus of proof is on the defendant. The learned author of McGregor on Damages 14th edition states at 216:

"The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has been long settled, ever since the decision in Roper v. Johnson, and is now confirmed by Garnac Grain Co. v. Faure and Fairclough."

I adopt Mr. Frankson's basis of the minimum wage of \$100.00 per week and to his figure of \$10,400.00 is added a further sum of \$7,600.00 from 1st March, 1991 to July 1992. Seventy-six (76) weeks at \$100.00 per week making a grand total of \$18,000.00

There will therefore be Judgment for the plaintiff and the following reliefs are granted.



1. A Declaration that he is the fee simple owner of the premises known as No. 11 Market Street, Falmouth in the parish of Trelawny and being the lands registered at Volume 1160 Folio 58 of the Register Book in the office of Titles free of all encumbrances.
2. An Order that the Defendant's name be removed therefrom and that she delivers possession of that premises to the plaintiff.
3. An account of all rental collected therefrom.
4. An account of all monies paid by the plaintiff in respect of the purchase of the premises.
5. An account of all monies expended by the Defendant on the premises.
6. Damages in the sum of \$18,000.00.
7. Costs to be agreed or taxed.

The injunction granted on the 18th March, 1989 is hereby discharged.