

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1989/P-107

BETWEEN CAROL ANTHONY PRATT PLAINTIFF

A N D OTHNIEL BERNARD COLLEY
BEVERLEY NOREEN COLLEY DEFENDANTS

Mr. C.M.M. Daley and Miss Carol Vassell instructed by Messrs. Daley, Walker and Lee Hing for Plaintiff.

Mr. M. Frankson instructed by Messrs. Gaynair and Fraser for Defendants.

HEARD: 8TH, 9TH, 11TH JULY AND 4TH OCTOBER, 1991

CORAM: MORRIS, J. (AG.):

J U D G M E N T

This is an action in which the Plaintiff seeks to recover from the Defendants Recovery of Possession of certain premises known as 11 Bronzewing Place in the parish of St. Andrew. The Endorsement to the Writ of Summons is in the following terms:-

The Plaintiff's claim is against the Defendants for:-

1. Recovery of possession of premises known as 11 Bronzewing Place in the parish of Saint Andrew.
2. Arrears of rental and /or mesne profits and/or an amount for use and occupation of the said premises.
3. A Declaration that the Plaintiff is entitled to an order for the removal of Caveat No. 94738 lodged by the Defendants in the Registry of Titles against the Certificate of Title for the said lands.
4. An Order for the removal of the said Caveat.
5. Further or such other relief.
6. Costs.

Mr. Carol Anthony Pratt is a retired steel fabricator who has lived in the United States of America for a number of years. His mother, Mrs. Winnifred Pratt died in 1984 at the age of 87 or 88 years.

Mr. Pratt emigrated to the U.S.A. in 1968 at which time his mother lived in rented premises in Vineyard Town.

He sold out his interest in a commercial concern known as Malcon Limited and used the greater portion of the proceeds to purchase premises 11C Emerald Road in Kingston. He subsequently sold these premises to the Jamaica Cricket Board of Control in exchange for 11 Bronzewing Place. The proceeds of sale of 11C Emerald Road paid off the mortgage thereon. The title to 11 Bronzewing Place was taken in the names of Mr. Carol Pratt and his mother Mrs. Winnifred Pratt. No money was owed on Bronzewing Place.

Mrs. Pratt was a retired mid-wife and as she had no form of pension, her son was her sole support.

In March or April, 1980 Mrs. Pratt visited her son, Mr. Carol Pratt, in Atlanta. There she informed him that she had rented 11 Bronzewing Place and planned to sell it to the present tenants. He became aware of the Agreement for Sale while going through his mother's papers April or May of 1980.

He subsequently received a letter from Messrs. Livingston, Alexander and Levy enclosing a Transfer with a request that he execute and return it to them. This he never did. Thereafter, a great deal of correspondence passed between Mr. Pratt and this legal firm and to a lesser extent the Colleys. I will deal with them in some detail when I come to consider the legal implications.

Around the 6th March, 1981 there was a telephone conversation between Mr. Pratt and Mrs. Colley during which he requested her to get the lawyers to expedite the matter.

At various times he gives the impression that he is not interested in the house being sold and is consequently calling off the sale while at other times he is most assertive and almost belligerent in his desire for the matter to be concluded.

The upshot of all this is that in a letter to Mr. Pratt dated 28th May, 1981, Mr. Afeef Lazarus of the firm of Livingston, Alexander and Levy pointed out to him that the delay in producing the Transfer and signed Draft Mortgage had inconvenienced the Colleys to a great extent. In an apparent reply dated 1st August, 1981, Mr. Pratt agreed once more to give the Colleys a Mortgage. Here I quote from Mr. Pratt's evidence:

"I gave instructions to my attorney to prepare a Mortgage based on what my mother had told me".

This letter was tendered in evidence as Exhibit 9.

This is apparently the meaning of the first paragraph of his letter to Livingston, Alexander and Levy dated 5th June, 1981. Again I quote from his evidence:

"When I spoke with Mrs. Colley on the 6th March, 1981 when I was asking her to see what she could do to get her lawyers to send papers relating to agreement for sale made with my mother".

He however goes on to say that at that time he did not have the agreement. I find this strange as in his letter to Livingston, Alexander and Levy dated 7th March, 1981, Exhibit 4, he complains of the tardiness of the lawyers in submitting the draft mortgage documents to both his mother and the purchaser. In all this, Mr. Pratt was aware that his mother had discussed the matter with a Mr. Altie Sasso who suggested that she contact this legal firm.

He wanted his mother to come and live with him as according to him she had got sick, become despondent, disoriented and old.

Despite his refusal to sign the Transfer, he testified that he did write Livingston, Alexander and Levy saying that he would be happy to sign Transfer after agreement had been reached on the question of the mortgage. He has stated quite categorically that he has never discussed the terms of any mortgage with anyone. Again I quote from his evidence:

"Livingston, Alexander and Levy sent me mortgage document which was not agreeable to me. By that I mean the terms were not agreeable".

Under cross-examination, Mr. Pratt agreed that he did say he wished the sale cancelled as the Purchaser had informed him that she had made other mortgage arrangements. Following upon his letter agreeing to give the mortgage dated 1st August, 1981, he decided to change his lawyers.

Mr. Othniel Bernard Colley is a businessman and his wife Mrs. Beverley Noreen Colley is a teacher. They both lived in a house owned by them at Lot 646 Passage Fort. In 1979, they arranged to sell this house and were looking for another one when Mr. Colley heard that there was one for sale at 11 Bronze-wing Place. Mrs. Colley went there by herself and then they both went there where they met and spoke with Mrs. Winnifred Pratt. It is not contested that she informed them that she was selling the premises as she was going to reside with her son who lived in the U.S.A. She informed them that the sale price

was Thirty Thousand, Five Hundred Dollars (\$30,500.00) and that a Mr. Sasso was the one to "deal with transaction". The parties went to Mr. Sasso's office on the 21st February, 1980 where an Agreement for Sale was drawn up and signed by Mrs. Pratt and Mrs. Colley. It was agreed that the purchasers would pay a deposit of Five Thousand, Five Hundred Dollars (\$5,500.00). They paid Two Thousand Dollars (\$2,000.00) at Mr. Sasso's office and Three Thousand Five Hundred Dollars (\$3,500.00) to Mrs. Pratt at 11 Bronzewing Place. On this occasion she called Mr. Sasso and he came and received this payment. In all three instances, receipts were issued to the Colleys - Exhibit 18 A, B and C. It should be noted that these sums were paid in 1979 although the Agreement for Sale is dated 21st February, 1980 in which the sums paid were duly acknowledged. It was agreed that the Colleys would pay a peppercorn rental of One Hundred Dollars (\$100.00) per month until completion of the sale.

They did not move in right away because they did not want to leave their house at Passage Fort unoccupied. They wanted to sell it to buy 11 Bronzewing Place. In October, 1979 it had not been sold but Mrs. Pratt urged them to take possession right away as she wanted to go and live with her son. Mrs. Pratt also suggested that the Colleys use a young man known to her as a caretaker until they moved in.

They did so at the end of 1979 and in January, 1980 they commenced paying the monthly rental of One Hundred Dollars (\$100.00) to Mr. Henriques. Payments ceased in June, 1980. According to Mr. Henriques, it was Mrs. Colley who told him not to collect any more as she would be dealing with the lawyers. She denies this and said simply that he did not return. I accept his evidence on this point.

At some stage Mr. Colley went to Jamaica National Building Society apparently in relation to obtaining a mortgage but this course was not pursued as Mrs. Pratt had suggested a vendor's mortgage.

There are two questions of law which arise for determination viz.,

1. Is there in existence some memorandum or note signed by Mr. Pratt referable to the Agreement for Sale Exhibit 1 to satisfy the relevant provisions of Section 4 of the Statute of Frauds 1677 which became applicable in Jamaica by virtue of U.K. Statute 21 James 1 Chapter 16 now incorporated in Section 46 of the Limitation of Action Act?

2. Is there in existence a valid and enforceable contract between
Mr. Pratt and the Colleys?

Dealing with the first question, I will quote from the various exhibits
in order to arrive at a determination thereof.

- (i) Exhibit 4 - "We the participants regret having this matter
handled in this manner..."
"I (as a valid participant)"
- (ii) Exhibit 5 - "as of the 30th April, 1981 we will not be
interested in selling this place and all
previous arrangements will be cancelled
re the sale"
- (iii) Exhibit 9 - "my share of any monies which may result in
the equivalent of \$1.00"
- (iv) Exhibit 11 - "However at this time my mother and me desire
to cancel the sale of this property, as the
purchaser has informed me by letter that she
has made other mortgage arrangements"
"in anticipation of a refund of deposit I am
enclosing a bank draft for the amount of
U.S. \$1,800"
- (v) Exhibit 14 - "In answer to your question, and to repeat an
original request, we will give the mortgage,
and we require that you prepare the necessary
documents for our approval".

I therefore answer the first question in the affirmative.

Turning now to the second question it is patently clear that the
Agreement for Sale, Exhibit 1, was made expressly subject to Special Condition
2, the terms of which were set out in detail. The parties by correspondence
agreed to waive this Special Condition.

The failure by one party to perform a condition precedent only operates
as a discharge of the contract if the other party elects to treat the contract
as at an end. He has the option of treating the contract as being still open
for further performance, and if he elects to do this he will be taken to have
waived the performance of the condition precedent. Halsbury's 3rd Edition
paragraph 335 page 198.

It is clear from the evidence that Mr. Pratt agreed to give the Colleys
a vendor's mortgage. Indeed, from the outset it appears that both Mrs. Pratt
and Mr. Sasso explained to the Colleys that it would be in the interest of all
concerned if a vendor's mortgage were given. It must be remembered that the
terms of Special Condition 2 in Exhibit 1 were spelt out. It has been held in
Re Rich's Will Trusts (1962), 106 Sol. J. 75 that where a contract for sale

providing that the vendor's solicitors should "be instructed to obtain and fix a suitable mortgage advance on this property" there was a failure for uncertainty, following *Scammell v. Ouston* 1941 A.C. 251. In *Lee Parker v. Izett* No. 2 (1972) 2 A.E.R. 803 where the parties agreed for the provision of a "satisfactory mortgage" there was no valid contract.

However, an additional question arises based on the foregoing. Were the parties *ad idem* that Plaintiff should give the Defendants a vendor's mortgage. Here I quote from the evidence of Mrs. Colley.

"I asked Plaintiff on the phone if he was still giving me mortgage. He said yes but I did not believe him".

"I went to Jamaica Teachers Association Housing Corporation in April because I did not trust Plaintiff".

"Even since I have been sued I have not got a mortgage commitment".

Despite this she said she felt she had an enforceable agreement. She had lawyers acting for her and has at all times had the balance of the purchase money. She was also aware that a notice should have been served on Plaintiff calling upon him to complete. No such notice has ever been served. Perhaps this is what prompted Mr. Frankson in his final submission to ask rhetorically - If purchasers are able to complete without mortgage, are they still obliged to obtain one?

Before disposing with this aspect of the matter, may I be permitted one final observation. Despite the view of the relevant law expressed by the then attorney-at-law for the Defendants in the second paragraph of his letter dated 18th May, 1981, Exhibit 12, there has been no attempt to file a counterclaim for specific performance until the eleventh hour had passed, viz. the second day of the hearing of this matter.

It follows therefore, that even if there had in fact been a valid and enforceable contract, the equitable remedy of specific performance would be defeated by, as Mr. Daley puts it, abominable laches.

I therefore answer the second question in the negative.

In the light of the foregoing, there will therefore be judgment for the Plaintiff against both Defendants in the terms of paragraphs 1, 2, 3, 4 and 6 of the Statement of Claim which I will particularise hereunder.

1. Recovery of possession of premises 11 Bronzewing Place in the parish

of Saint Andrew. Defendants to quit and deliver up possession of the said premises on or before the 31st January, 1992.

2. Defendants to pay Plaintiff the following sums for arrears of rental and/or mesne profits and/or use and occupation of the said premises.

Amount claimed in Statement of Claim = \$ 6,300.00

A further sum of \$36,000.00 made up as

follows based on the evidence of Mr. Henriques.

Writ was issued 5th June, 1985.

July, 1985 to June, 1988 36 months @ \$250 p.m. = 9,000.00

July, 1988 to June, 1990 24 months @ \$500 p.m. = 12,000.00

July, 1990 to June, 1991 12 months @ \$800 p.m. = 9,600.00

July to September, 1991 3 months @ \$1,800 p.m. = 5,400.00

\$36,000.00

6,300.00

3. Declaration granted as prayed. \$42,300.00
4. An order that the said Caveat be removed.
5. Costs to the Plaintiff including Plaintiff's airfare awarded on 21st March, 1990, and further sum awarded on the 1st October, 1990 to be agreed or taxed.