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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S-350 OF 1985

BETWEEN	NOEL C. SALE (Personal Representative Estate Edna Veleta Laing, deceased)	PLAINTIFF
A N D	DUNN, COX & ORRETT	FIRST DEFENDANT
A N D	CHRISTOPHER BOVELL	SECOND DEFENDANT
A N D	ETHLYN NORTON	THIRD DEFENDANT

R. M. Millingen and Mrs. Bolton for Plaintiff.

Dr. L. Barnett and Mrs. Ingrid Mangatal-Munroe for Defendants.

Heard: 24th, 25th, 26th October, 1994 and 7th July, 1995.

SMITH, J.

By a Writ dated October 9, 1985 the plaintiff claims damages against the defendants for professional negligence.

The plaintiff is the personal representative of Estate Edna Veleta Laing who died on or about the 8th day of June, 1962 and was the vendor of property known as 8 and 10 Gladstone Drive, Kingston 20.

The first defendant is a firm of attorneys-at-law who acted for the plaintiff/vendor. The second defendant is a partner in the first defendant's firm and the third defendant was employed by the first defendant as an associate. The chronicle of events as disclosed by the agreed bundles is as follows:

By Memorandum of Sale made on the 9th April, 1976 and prepared and executed by the first defendant on behalf of the plaintiff, the plaintiff agreed with one Sonia Allen (the purchaser) to sell to her the aforesaid property.

On the 26th July, 1976 the death of the plaintiff's co-executor was recorded on the registered titles. On the 25th October, 1976 the defendants were informed that a part of one of the buildings (building B) on the said property encroached on adjoining land (lot 3) by a few inches.

On the 24th November, 1976 a transfer under the Registration of Titles Act was executed by the plaintiff and the purchaser. By letter dated the 25th of February, 1977 Milholland, Ashenheim and Stone, the mortgagee's attorneys informed Sonia Allen of the breach of restrictive covenant.

On the 1st March, 1977 the first defendant requested the approval of the Bank of Jamaica to register the transfer.

On the 7th March, 1977, the first defendant gave a written undertaking to apply for modification of the covenant within six months of completion of purchase.

On the 26th July, 1977, Mr. Owen Laing with acerbity wrote the first defendant regarding the delay. In that letter he stated "some devious means are being taken to delay a matter that should have been completed a long time ago." He was of the view that "this business of the lifting of a covenant......should not be applicable in this case." He was probably right. However, this did not spur the defendants to action.

On the 24th August, 1977, the mortgagee's attorneys Milholland, Ashenheim and Stone advised the first defendant that the mortgage was executed and requested all documents of good title so that they may proceed to register the mortgage.

The certificates of title were sent to the mortgagee's attorneys who notified the first defendant of the existence of an encroachment of the building of No. 8 Gladstone Drive onto No. 6 Gladstone Drive which was revealed to the defendants by their surveyor's report as early as October, 1976.

The defendant recalled the certificates which the mortgagee's attorneys returned in October, 1977. Thereafter the defendants sought and obtained confirmation that an encroachment did in fact exist. The confirmation of the encroachment was received in a letter dated June 16, 1980 from Messrs. Cooke, McLarty and Associates.

After this confirmation the defendants did nothing to remedy the breach. In May, 1981 Mr. O. Laing wrote the defendant instructing them to cancel the sale and to hand over papers - see letter dated 29th May, 1981.

In May, 1981 Mr. R. M. Millengen wrote to the purchaser purporting to rescind the contract of sale.

In June, 1981 Mr. O. Laing again wrote instructing the defendant to cancel the sale agreement and to hand over to Millingen "the rescinded sale agreement, and all papers dealing with the transaction immediately."

In June 1981 the defendant wrote to Mr. Millingen informing him that they had advised Mr. Laing against cancellation of sale and that the purchaser would be entitled to specific performance. The defendant conceded delay in the following words:

> "There is no doubt that we have been guilty of an unreasonable delay in dealing with this matter, and Mr. Laing has every ground for complaint. There have been mitigating circumstances and a perusal of the file will show this clearly. However, it cannot be argued that the delay has not been completely unreasonable in all the circumstances."

Since June 1981 the defendants have not been involved in the matter. In August 1981, the plaintiff filed suit against the purchaser Sonia Allen claiming inter alia rescission of the agreement. One of the grounds stated was that the agreement had been frustrated by reason of inordinate delay.

The defendant counterclaimed for specific performance inter alia. In June 1984 Campbell, J. (as he then was) gave judgment against the plaintiff, Noel Sale, and decreed specific performance in favour of Miss Allen.

In July 1985 the Court of Appeal confirmed the Order for specific performance.

By Writ of Summons dated 9th October, 1985 the plaintiff seeks to recover from the defendants Dunn, Cox and Orrett, Christopher Bovell and Miss Norton damages "for negligence for that the defendants who had the carriage of sale for premises Nos. 8 and 10 Gladstone Drive, Kingston 10, in the parish of St. Andrew during the period April 1976 to June 1981 negligently failed to take steps to either have the contract of sale completed or cancelled."

In 1987 the Privy Council upheld the Order for specific performance but ordered that Miss Allen pay interest on the balance of the purchase money at a rate to be determined by the Court of Appeal such interest to be paid from the date Miss Allen took possession of the property as purchaser thereof.

In June 1989 Downer, J. (as he then was) determined the date of possession to be the 30th July 1976 and awarded interest of 16% on the balance of the purchase price from that date to the 29th February, 1988 (the date of hearing).

Between 1989 and 1991 costs in the various courts were taxed and there was further litigation. In particular an application was made to increase the interest from 16 % to 40%. This was refused by Ellis, J. There was also a dispute between sale and Miss Allen as to the rate of exchange that the costs ordered by the Privy Council should be paid. Wolfe, J. as he then was, ruled in favour of Miss Allen. In February 1992 a motion for leave to appeal Justice Wolfe's order was dismissed with costs against the plaintiff (sale).

In February 1992 Accounts taken by the Registrar disclosed that Sale owed Miss Allen $65,633.96. In March and April 1992 application made by the plaintiff for leave to appeal were dismissed by the Court of Appeal. The later application was described by Rowe P. as an abuse of the porcess of the Court.

On the 23rd April, 1992 Mr. Millingen attorney for the plaintiff Noel Sale submitted the titles and registrable transger and act last the titles were registered in Miss Allen's name. In the end the balance of the purchase price was completely swallowed up by the costs awarded in favour of Miss Allen. This fact no doubt has prompted the instant case.

The Plaintiff's Case

Mr. Millingen submitted that the Court "should avoid being bogged down with legal jargon, legal niceties, legal labels, legal pigeon holes .... and look at this matter as mismanagement in the carriage of sale" which he submitted was "utterly gross, disastrous and shocking."

The Particulars of Negligence as per paragraph 14 of the amended Statement of Claim are:

(1) Failing to exercise due care and skill in drafting and preparation of the memorandum of sale.

(2) Failing to make any or any adequate provision therein of a right or power to cancel or rescind the said sale agreement in the event that the plaintiff should find himself unable to remove or comply with objection or requisition the said purchaser should take or make to in the plaintiff's title to the said property.

(3) Failing to take any or any adequate steps to complete or cancel the said sale agreement within a reasonable time or at all.

(4) Failing to display or to exercise that professional skill and knowledge in not recognising that where a building or a portion thereof encroaches on adjoining land within the ownership or is comprised in the registered title of a third person such an encroachment is an irremovable defect in title.

(5) Failing to serve on the purchaser a notice making time of the essence of the contract of sale in view of the fact that the purchaser had accepted title on the 7th March, 1977.

(6) Failing to comply with the request of the purchaser to forward to Milholland the documents of good title to enable the purchaser to proceed to register the mortgage on the undertaking to pay the amount of $30,000 on the registration thereof.

Particulars of Negligence of Second and Third Defendants

(1) By adopting, acting on, continuing and contributing to jointly and severally the acts and omissions of the First Defendant set out above at items (1) to (6) and particularly

(2) Failing to appreciate that the title documents produced had proved satisfactory to the mortgagee's Attorneys with the exception of reference to covenant No. 8 that the trifling defect of the encroachment had been waived and on the undertaking being given, the title was accepted.

The Memorandum of Sale

Mr. Millingen's complaint was that the Memorandum of Sale did not give adequate protection to the vendor. He referred to paragraph 2 of the particulars of negligence and contended that failure to have a clause as indicated therein is negligence and that it is because of this failure why the plaintiff suffered damages. The agreement is reproduced below:

"Made this 9th day of April, 1976

VENDOR	NOEL COURTNAY SALE of Vancouver, BRITISH COLUMBIA, CANADA.
PURCHASER	SONIA ALLEN of No. 8 Gladstone Drive, St. Andrew Chemist.
PROPERTY SOLD	NOS. 8 AND 10 GLADSTONE DRIVE, ST. ANDREW
AGREED SALE PRICE	FORTY THOUSAND DOLLARS (JAMAICAN) - (J$40,000.00)

PAYABLE DEPOSIT	$8,000.00 BALANCE on the 31st day of May, 1976 to be paid to Messrs. Dunn, Cox & Orrett, the Attorneys-at-Law for the Vendor at No. 46 Duke Street, Kingston. Immediately upon such payment the Vendor will execute a Transfer to the Purchaser and lodge the same for registration. On failure of payment (in whole or in part) at the time specified, as to which time is of the essence of the contract, the deposit shall be forfeited to the Vendor who may by notice sent by post to the Purchaser at the above address cancel this contract without previously tendering to the Purchaser a transfer or other assurance.
INCUMBRANCES) RESERVATIONS) RESTRICTIONS) AND/OR EASEMENTS)	AS ENDORSED ON CERTIFICATE OF TITLE.
POSSESSION	On payment in full of purchase money and proportion of costs payable by Purchaser.
TITLE	Under Registration of Titles Law. Transfer to be prepared by Vendor's Attorneys-at-Law and the Purchaser shall pay half the costs of same (Scale of Incorporated Law Society of Jamaica) and of Stamp and Registration fees and fee on new Certificate of Title (if any).
INSURANCE) PREMIUM) TAXES AND) WATER RATES)	To be apportioned up to date of possession.
SPECIAL) CONDITION) IF ANY)	SUBJECT TO THE APPROVAL OF THE EXCHANGE CONTROL AUTHORITY, BANK OF JAMAICA.

Signed by the Vendor in the presence of:- Noel C. Sale
F N Parish
Agent

Signed by the Purchaser in the presence of:- P Sonia Allen
F N Parish
Attorney-at-Law "

Mr. Trevor DeLeon an attorney-at-law and a partner in the law firm of Nunes, Scholefield & Company and who has about 30 years experience in conveyancing was called as a witness by the Defence. He testified that the form of the above agreement would in the 1970's be appropriate. The essentials, he said, are there. He said that a prudent conveyancer in drafting a agreement for sale of land would not necessarily insert any clause providing for the cancellation of the contract, in the event that the vendor should not be able to comply with any requisition the purchaser should make.

The practitioner he said would be influenced by the system of land registration

as to how he drafts an agreement of sale. In Jamaica where land registration is governed by the Torrens system, things affecting title are shown on the title, with a few exceptions. There is no prescribed set form. The Conveyancing Committee, he stated, has not prescribed any general conditions of sale. It is Mr. DeLeon's evidence that the vendor was adequately protected. The plaintiff did not attempt to refute the evidence of Mr. DeLeon. I cannot on the evidence before find that the first defendant was negligent in drafting the agreement of sale.

Failing to Take Steps to Complete or Cancel the Sale Agreement

Particulars 4 and 6 may be conveniently dealt with under this head. The date for completion was set for the 31st May, 1976 approximately six weeks after the signing of the agreement of sale. There followed a long delay. The plaintiff was not able to make title to the property because the death of his co-executor had not been recorded in the register. This was not done until 26th July, 1976. The stipulation as to time being of the essence was waived by common consent and no alternative completion date was fixed.

The chronicle of events and the correspondence in the agreed bundles clearly establish that the sale transaction could have been completed soon after August, 1977 when the titles were submitted to the mortgagees. This was not done because of the problem in relation to the restrictive covenants. It seems to me that the first defendant misconstrued the effect of the restrictive covenants. They thought the breaches of these covenants had to be corrected and became pre-occupied in addressing the abatement of these breaches. In respect of one covenant they gave an undertaking to have it modified. This was satisfactory. In respect of the other they considered three possibilities-removing the offending building or purchasing the strip of land or providing a declaration.

This approach seemed to have been supported by Campbell, J. (as he then was) who held that either the vendor should have the offending building demolished or the purchaser would be entitled at the expense of the vendor to demolish the building to clear the defect in the title. The Court of Appeal was "somewhat concerned with the order to demolish."

The Privy Council found the encroachment to be de minimis and that "any claim by an adjoining owner for breach of their restriction must long since have been statute barred ... if any such claim ever subsisted."

Thus the defendants had taken an incorrect view of the law and because of this mistake they failed to take steps to complete the sale agreement. Mr. Millingen was rather strident in his submission. He described the conduct of the defendants as "unthinking, unprofessional, careless and shocking."

He submitted that the defendants were fully aware of all the facts but having convinced themselves erroneously that they had no way out they allowed time to run on and on indefinitely. He argued that the letter of the 1st March, 1978 written by the third defendant, Miss Norton, in which she stated that "the mortgagee wished the Titles to be in order" deceived everyone concerned and "set the mischief a foot." It was this false statement he said which resulted in "long delay in completion, mis-management and blunders." The defendants he contended were in breach of their duty of care having failed to exercise professional skill and care.

Dr. Barnett on the other hand submitted that this was an error of law - a mistake as to a legal problem and its solution. This, he argued is not negligence. He contended that the principle is demonstrated in this case in so far as eminent judges treated the encroachment as a breach of covenant.

I agree with Dr. Barnett that an honest mistake of the law is not negligence. The solicitor's duty to his client "is one to exercise reasonable care and skill rather than to warrant that his work will be successful, negligence will not be established merely because of incorrect advice on a disputed point of law. Neither will there be liability if advice is subsequently rendered incorrect by judicial decisions on the point" - see Professional Negligence by Dugdale and Stanton p. 282.

However Mr. Bovell, the second defendant, in his letter already referred to admitted that there has been "unreasonable delay" by the defendants in completing the transaction. It would seem to me that an attorney-at-law may be liable for expenses occasioned by undue delay.

The question as to how far the defendants may be liable in negligence for unreasonable delay must therefore be addressed. In this regard I must confess some difficulty in understanding the submissions of Mr. Millingen. He contends that the plaintiff has no claim against the defendants for interest. Interest on the unpaid balance of the purchase price is a matter between vendor and purchaser, he submitted. This case, he emphasised is between a client and his attorney-at-law where the latter is sued in negligence for damages.

The plaintiff's claim, he argued, is for the present market value of the $40,000 less the $40,000.00, that is, the difference in market price at the date of judgment and the contract price. "The measure of the loss in damages must be, the difference between the relative purchasing powers of the money at the date when the performance should have been completed and now or 1981," he asserted.

As I understand it Mr. Millingen is saying that the plaintiff is entitled to the capital increase over the aforementioned period. But this cannot be. All the courts up/to the Privy Council held that the purchaser was entitled to specific performance. And as Dr. Barnett submitted, if the purchaser is entitled to specific performance then the moment the agreement is signed the purchaser becomes the equitable owner and all capital increases belong to the purchaser and of course the purchaser suffers all decreases - see The Law relating to the Sale of Land - Voumard 2nd Edition at pages 97-99. The plaintiff has not shown that as a result of the delay in completing the transaction the plaintiff has incurred expenses and suffered the damages claimed in the amended statement of claim. The plaintiff's loss is measurable by the appropriate interest on the balance of the purchase price.

Failure to Cancel

The three Courts i.e. the Supreme Court, the Court of Appeal and the Privy Council, held that on the established facts the vendor had no right of rescission because the purchaser was not at fault. The courts also held that the encroachment was not an irremovable defect in title. The advice the defendants gave the plaintiff against taking steps to rescind was right. Such action on the part of the plaintiff would make him liable to an order for specific performance and damages. Indeed this was the result of litigation pursued by the plaintiff on the advice of Mr. Millingen.

Failing to Serve on the Purchaser a Notice making Time of the Essence of the Contract of Sale

The documentary evidence before me clearly indicates that the delay was not the fault of the purchaser.

As I understand it, where time was not originally of the essence of the contract or having originally been so, it had ceased to be, and there had been great delay, the party not in default may serve upon the other party a notice requiring him to perform the required act within a reasonable time to be specified in the notice.

The first defendant could not have served such a notice on the purchaser since the purchaser was not at fault and was not the one guilty of culpable delay. Indeed as already stated it was the defendants, the then attorneys for the plaintiff, whom the plaintiff castigated for delay. This averment is wholly misconceived and must fail.

Conclusion

On the established facts and on the basis of the decisions of the three courts one can say with confidence that the only interest the plaintiff had in the specifically enforceable and indeed enforced contract of sale was in receiving the balance of the purchase price.

The plaintiff was kept out of his money by the unreasonable delay on the part of the defendants and was thus entitled to interest on the unpaid balance (see the judgment of the Privy Council).

The plaintiff was credited with such interest from July, 1976 to February, 1988. The defendants ceased to represent the plaintiff in June 1981. The expenses incurred in litigation from June 1981 cannot therefore be attributed ot the delay in completion by the defendants.

Therefore having received the interest for the period stated above, no loss has been suffered by the plaintiff as a result of the defendant's delay. Accordingly the plaintiff has failed to prove his case.

Judgment for the defendants with costs to be taxed if not agreed.