

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E207 OF 1994

BETWEEN TRAUTE RAFFONE PLAINTIFF
AND ALARIC ASTOR POTTINGER 1ST DEFENDANT
AND THE REGISTRAR OF TITLES 2ND DEFENDANT
AND THE ATTORNEY GENERAL 3RD DEFENDANT

Mr. D. Morrison, Q.C. and Mr. Patrick Foster for the Plaintiff

Mr. D. Scharschmidt, Q.C. and Mr. Norman Davis for 1st Defendant

The 2nd and 3rd Defendants were withdrawn

**HEARD: October 23, 24, 26 and 27, November 3 and 10, 2000
 October 17, 2001 and March 20, 2002**

ELLIS J.

The plaintiff claims –

1. A declaration that she is the owner of and entitled to possession of all those parcels of land in Gibraltar Estate in St. Mary being lands which were previously registered in stated volume and Folio numbers.
2. An injunction to restrain the first defendant from dealing with or purporting to deal with the aforesaid lands.

3. An injunction to restrain the first defendant his servants and/or his agents from trespassing upon the said lands or interfering with the plaintiff's possession thereof.
4. Damages against the first defendant for wrongfully selling or purporting to sell six [6] lots registered at stated volumes and folios in the Register Book of Titles.

The plaintiff said in evidence that she in 1986 purchased property at Gibraltar Estate in St. Mary. The property which comprised building lots is the subject of this action. She purchased the property from her husband who had responsibility to sell the property.

A Mr. Eugene Sugarman was the vendor. She said she signed a document relating to the purchase and she identified Exhibit 3 to be that document. She also paid a cheque and she identified that cheque as Exhibit 4.

The plaintiff said she gave her husband Douglas Campbell Power of Attorney over the purchased property in 1987 (see Exhibit 5) She did visit the property about 10 times up to 1994 and saw no sign of occupation of the land. It is to be noted that the Power of Attorney does not conform to the form in The Registration of Titles Act and was not registered.

In 1994 she became aware that the first defendant had acquired registered titles to the property.

In cross examination by Scharsmidt, Q.C. the plaintiff agreed that the document (Exhibit 3) did not speak to the giving of anything to Sugarman.

The cheque evidenced by Exhibit 4 was signed before Exhibit 3_ was signed. That cheque was drawn in favour of Sugarman and not to Gibraltar Estates Investments Company Limited.

She was unaware that the first defendant's house was called Gibraltar. She had done nothing to the land up to 1987. Douglas Campbell gave evidence to say that the plaintiff is his wife from 1996. He knows first defendant for over 30 years.

The land the subject of this case was owned by Gibraltar Estates Investments Company Limited prior to 1986. He knew Eugene Sugarman who was the last surviving director of Gibraltar Estates Investments Company Limited. He was in charge of the property since 1982 on the instruction of Sugarman.

In 1982 the first defendant and himself had discussions about the land and it was agreed that the land would be sold to the first defendant.

At the same time he did tell the first defendant that Gibraltar Estates Investments Company Limited was dormant.

That defendant told him that he had a lawyer friend who would check that out.

Campbell said Exhibit 7 was a sales agreement between Sugarman and Pottinger. He did not know who had prepared the Exhibit 7 but it was first defendant who gave him the document.

He concluded that there was agreement between Pottinger and Sugarman.

Julius Dixon was called to say that he never saw the defendant Pottinger on the land during the 1980's. On the contrary, it was Campbell whom he saw and had discussion with about his using the land. That was the evidence for the plaintiff.

The first defendant said he owns a house in the Gibraltar Estates area since 1972. There are over 300 lots in the area with 15 residents. He became interested in the vacant lots. He bushed the lots used them for goat rearing and reaped pimento. He enquired as to who owned the lots and in 1983 the name of Eugene Sugarman was given to him as owner. Sugarman and himself agreed purchase price of 34 lots. There was a written agreement which he took to his attorney-at-law in Highgate. He was advised by his attorney and as a consequence, he discontinued negotiation with Sugarman. He has had no further negotiations with him since 1983.

He has known the plaintiff and her husband from between 1964 – 1965. The first defendant said he has lived in Gibraltar Estates since 1972 and he employed men to bush the lots.

He saw Douglas Campbell on the property twice, once in 1986 and the other in 1994. He first heard of plaintiff's ownership in 1994. He took possession of the lots in 1975.

He called witnesses Adolph Murdoch and Herman Webley to support his case.

A plaintiff to successfully challenge a claim to land based on “adverse possession” must cumulatively prove the following:-

- (i) ownership of the land by way of a paper title or otherwise;
- (ii) possession of the land and that he has neither been dispossessed nor that he has abandoned possession;
- (iii) the limitation period which would bar his claim and extinguish his title has not elapsed.

Section 3, 4 and 30 of The Limitation of Actions Act in my opinion bears the weight of the above statement.

The basis of the Plaintiff's assertion to ownership.

The plaintiff's assertion of ownership rests on a contract to purchase the property. That contract to purchase the property, is to be seen at Exhibit

3. It was signed on the 12th December 1986 by Eugene Sugarman and by the plaintiff on the 31st December 1986.

To found a contract for the disposition of land there has to be a complete agreement between the parties on essential terms. Those terms are:-

- (a) parties
- (b) the property to be conveyed
- (c) the consideration
- (d) what is the interest being granted.

Mr. Scharschmidt challenged the validity of the contract on the ground that it provided for no consideration (see clauses 2 and 10 of Exhibit 3). Then he said that the plaintiff was not in possession. Possession can only be obtained on completion and reference was made to the Law relating *The Sale of Land by Voumard (Second Edition at page 333)*. He contends that Exhibit 3, the contract, does not stipulate for possession and therefore plaintiff's possession was dependent on the payment of full purchase money.

Mr. Morrison submitted that the case is not a contest between plaintiff (purchaser) and the vendor. The plaintiff's claim to the property rests on the Agreement for Sale. That document (Exhibit 3) is a perfectly good document. It sets out the consideration at paragraph 2. The plaintiff was

therefore entitled to claim an interest in the property and was competent to bring the action.

He relies on a passage from *Barnsley's Conveyancing Law and Practice, Third Edition at 226.*

In Jamaica the Torrens System of Land Registration is practiced. The land which is the subject of this suit is registered land. It follows that learning and case law jurisprudence on the Torrens System are to be considered in relation to the validity of the agreement (Exhibit 3)

I do not find that the Agreement is an enforceable contract. It does not provide for any consideration which flows from the plaintiff to the vendor.

What to my mind paragraph 2 has done is to request the one party to pay the statutory liabilities of the other party. There is no evidence that the requested party did discharge any statutory liability of the property.

There is no act which could go to part performance. The cheque at Exhibit 4 cannot be so treated it having been drawn and negotiated prior to the signing of the agreement. The cheque at best is equivocal which is contrary to the requirement that an act of part performance must be unequivocally referable to some agreement. (See *Chaponiere v Lambert* [1917] 2 Chancery 356.

There is no doubt that if the agreement was valid and enforceable it would, by the doctrine of conversion, make the plaintiff owner of the land (See *Lysaght v Edwards* (1876) Ch. D. 499 at 506) and the passage from Barnsley's text book cited by Mr. Morrison.

I have concluded the invalidity of the contract on which the plaintiff relied to found her ownership. Since the contract has not established her ownership, she has no competence to bring any action. That circumstance is enough to dispose of the case in favour of the first defendant.

However, if I am wrong in my conclusion as to the validity of the contract there is another issue which demands consideration. It was raised by Mr. Scharschmidt in his final address to the court. He said the plaintiff can only succeed on her own title. If she has no title she cannot succeed unless she was in possession of the land. Plaintiff was never in possession.

Under the Torrens System, where a contract for the sale of land makes no provision as to when the purchaser is to be entitled to take possession he is only entitled to possession when he pays the purchase price in full. In *Lysaght v Edwards* (1876) 2 Ch. D. 499, Lord Jessell the Master of The Rolls at 506 said "the moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold.....the vendor having a right to purchase

money,....., and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. (my emphasis).

In a later case, *Cam and Sons Property Ltd. V Commissioner of Land Tax* [1964] 112 C.L.R 139 at 147 and 148 Menzies J. made a statement of similar tenor to that of Lord Jessell quoted above. In addition to the statement "possession" was defined to be "de facto possession referable to the agreement and not the right to possess or to have legal possession".

The contract (exhibit 3) certainly does not speak to when possession is to be taken. That being so, possession under that contract could only have been given on the payment of full purchase price.

On the plaintiff's own evidence she has never been in defacto possession of the land and she gave no evidence of having paid any full purchase price.

I find that the submission on the issue of possession are well founded. They are well supported by the cases cited and the passage from the text book.

In the light of my findings I must conclude that the plaintiff has not established her competence to bring this action.

The claims set out in the Statement of Claim are refused.

There will therefore be judgment for the first defendant with costs to be agreed or taxed.