

40 IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E – 227 OF 2002

BETWEEN	WILBERT BRETTON (On behalf of Claudette Davis-Bonnick)	APPLICANT/VENDOR
AND	RHOAN COLLINS	1 ST RESPONDENT/ PURCHASER
AND	SONIA COLLINS	2 ND RESPONDENT/ PURCHASER

Mrs. Marvalyn Taylor-Wright instructed by Marvalyn Taylor-Wright & Co. for applicant.

Miss Ingrid Lee-Clark and Miss Maureen Smith instructed by Pollard Lee-Clark and Associates for the respondents.

Heard: May 6 and July 15, 2003

JONES, J. (Ag.)

On February 5, 2002, when the respondents through the National Housing Trust made the final payment to complete the purchase of their home in Spicy Grove, Waugh Hill in the parish of Saint Catherine, it must have been a special moment. It brought closure to what many would consider a life long investment. Alas, approximately two years later questions arising from the purchase of the home unexpectedly materialised, when the applicant (in his capacity as agent of the vendor Claudette Davis-Bonnick) filed a Vendor's Summons seeking the determination of a number of questions. These questions are conveniently summarised as follows:

"1. Whether the purchasers are obliged under Special Condition 7 of the Agreement for Sale dated July 28, 1999, made between Claudette Davis-Bonnick and themselves to pay interest to the Vendor?"

2. Whether the purchasers are obliged under the said agreement to pay rental to the vendor, and if so, for what period?"

3. Whether the purchasers are obliged under the said agreement to repay the vendor the costs of the water tank which the purchasers had built but which costs of Eighty Thousand Dollars (\$80,000.00) was reimbursed by the vendor?"

4. If the answers to the above questions are in the affirmative, at what rate, for what period, and on what amounts should the interest be paid?"

The court has jurisdiction to hear this matter by virtue of Section 7 of the Vendors and Purchasers Act, which provides as follows:

"A vendor or purchaser of real or leasehold estate in this Island, or their representatives respectively, may at any time or times and from time to time apply, in a summary way, to a Judge of the Supreme Court, in Chambers, in respect of any ...claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid."

It will be useful to summarise briefly the facts of this case. On July 28, 1999, Claudette Davis-Bonnick, (the vendor), entered into a written agreement to sell to Rhoad Collins and Sonia Collins (the purchasers) property comprised in Certificate of Title registered at Volume 1223 Folio 755 for a purchase price of Nine Hundred Thousand Dollars (\$900,000.00).

At the date of the agreement for sale, the vendor was not the registered owner; she was subsequently registered on transmission on September 24, 2001, as Executrix of Estate Meva Bretton.

Clause 7 in the conditions attached to the agreement for sale provided that:

"In the event of the balance of purchase price not being paid in full on or before 45 days from the presentation of the Letter of Commitment referred to in Special Condition 3, the purchasers shall pay interest on the unpaid balance of the purchase price at the rate of 20% per annum calculated from the date on which payment should have been made to the date of actual payment."

The purchasers paid to the vendor a total of One Hundred and Sixty Six Thousand Four Hundred Ninety Dollars (\$166,490.00). This consisted of a part payment of One Hundred and Twenty One Thousand Four Hundred and Ninety Dollars (\$121,490.00, and a deposit of Forty-Five Thousand Dollars (\$45,000.00). The deposit was paid under an earlier agreement (which does not arise for consideration) and the part payment was made in June 1999. The National Housing Trust provided a letter of commitment which was delivered to the vendor's attorneys-at-law on or about September 8, 1999.

It was a term of the agreement that if the purchasers did not pay the balance of the purchase price of Seven Hundred and Thirty Three Thousand Five Hundred and Ten Dollars (\$733,510.00) within forty five days after the date of the letter of commitment, interest would be payable. The effective date, then, for the payment of the interest would be on or about October 24, 1999; the purchasers did not pay the balance of the purchase price on that date.

The vendor's attorney wrote to the National Housing Trust on August 18, 1999, requesting an up-to-date commitment letter while admitting to delays. On September 7, 1999, the National Housing Trust as Mortgagee for the purchasers gave an undertaking to the vendor's attorney-at-law to forward the sum of Eight Hundred and Fifty-Five Thousand Dollars (\$855,000.00) less the amount advanced for stamp duty upon receipt of certain documents and upon registration of a mortgage and transfer. For completeness the text of the National Housing Trust's letter of undertaking to the vendor is faithfully reproduced below:

"September 7, 1999

*Davis, Bennett & Beecher-Bravo
Attorneys-at-Law
10 Kensington Crescent
Kingston 5*

Dear Sirs

*Re: Application PIE # 849084: Open Market Purchase Part of Spicy
Grove, Waugh Hill, St. Catherine
ROHAN & SONIA COLLINS*

*We acknowledge receipt of Agreement for Sale between the parties
herein and ask that you furnish us with the following documents:—*

- (1) Duplicate Certificate of Title*
- (2) Registrable Instrument of Transfer*
- (3) Cheque for registration fee on Transfer*
- (4) Certificate of Payment of water rate and land taxes*
- (5) Discharge of Mortgage, if any*

*We undertake to forward the sum of Eight Hundred and Fifty Five
Thousand Dollars (\$855,000.00) less the amount advanced for stamp
duty to you upon receipt of the aforesaid documents and the
registration of the mortgage and transfer.*

Kindly let us have your response at your earliest convenience.

Yours faithfully,

NATIONAL HOUSING TRUST

*BENITA CHIN
LEGAL COUNSEL"*

There was no reply to this letter. This undertaking was given in accordance with clause 6 of the said agreement for sale, which for ease of reference is set out below:

"The vendor's attorney at law shall not be obliged to deliver the duplicate certificate of title and registrable transfer to the Registrar of Titles for registration and where the purchasers have obtained a mortgage, to the mortgagee's attorney unless:

- a. the balance purchase price and other moneys payable by the purchasers hereunder have been paid over to the vendor's attorney at law and/or*
- b. the vendor's attorney at law has received an undertaking satisfactory to him/her from a financial institution, for the payment of the balance of purchase price and other money payable hereunder."*

Two years later, on August 22, 2001, the National Housing Trust followed up the matter with the vendor's attorney requesting a report on the status of the title. On September 18, 2001, the vendor's attorney-at-law replied to the National Housing Trust and apologised for the delay in fulfilling the vendor's obligation for delivery of title in accordance with the agreement. It was only on October 17, 2001, that the vendor's attorneys-at-law forwarded the title and the other documents requested in letter of undertaking dated September 7, 2001. Again for completeness the terms of that letter are set out below:

"2001, October 17

*National Housing Trust
4 Park Boulevard
Kingston 5*

ATTENTION: MR. ANTHONY BOLT

Dear Sirs:

*Re: Application PIE #849084 — Open Market Loan Part of Spicy
Grove, Waugh Hill, St. Catherine
Rhoan Collins & Sonia Collins*

We refer to your letters dated September 7, 1999 and March 20, 2000 on captioned matter (copies attached).

Enclosed are the following for your attention:-

1. Duplicate Certificate of Title registered at Volume 1223 Folio 755 with the Purchasers' names endorsed thereon;

*2. Certificate of Payment of land taxes;
* Water — National Water Commission does not supply water to the premises and there are thus no receipts and/or other proof of payment of water relevant to the premises.*

As per your undertaking, kindly forward Cheque in the amount of \$733,510.00, being mortgage sum of \$855,000.00 less sum advanced of \$121,490.00.

*Yours truly,
BENNETT & BEECHER-BRAVO*

*PER:
ROSE M. BENNETT (Ms.)"*

On November 26, 2001, the National Housing Trust made a further request to the vendor's attorney at law for a copy of the Transfer Tax Certificate. On January 29, 2001, having received all the documents requested, the National Housing Trust paid the vendor's attorney-at-law the balance of the purchase price which amounted to \$733,510.10. The terms of the letter enclosing the cheque are set out below:

"2002 January 29

*Bennett & Beecher-Bravo
Attorneys at Law
1 1/2 Downer Avenue
Kingston 5*

Attention: Ms. Rose M Bennett

Dear Sirs,

*Application PIE #849084 - Open Market Loan
Land part of Spicy Grove, Waugh Hill, and St. Catherine*

Reference is made to the captioned matter. Enclosed please find NHT cheque No.573442 dated 2002 January 28, drawn in your favour in the amount of Seven Hundred and Thirty-three Thousand Five Hundred and Ten Dollars (\$733,510.00) being mortgage proceeds.

Kindly sign and return the attached copy letter acknowledging receipt of the enclosed cheque.

*Yours faithfully,
NATIONAL HOUSING TRUST*

*Rose-Marie Duncan Ellis
Senior Manager Legal Conveyancing*

*10:30 a.m.
Feb 5, 2002"*

As can be observed, the letter enclosing the cheque was date stamped by the vendor's attorney-at-law on February 5, 2002. A receipt was also issued on the same day acknowledging the receipt of the money. It is apparent that the purchasers did not make any interest payments in accordance with Special Condition 7 of the Sale Agreement.

During their occupancy of the premises, the purchasers built a tank costing Eighty Thousand Dollars (\$80,000.00) using their own funds. It was agreed between the vendor and purchasers that the cost of building the tank would be set off against outstanding rental. The purchasers discontinued the payment of rent on October 21, 1999.

As to the first question: are the purchasers obliged to pay interest under special condition 7 of the Agreement for Sale dated July 28, 1999, between themselves and the vendor?

Counsel for the applicant Mrs. Taylor-Wright submitted correctly, that it is only where the vendor is in 'wilful default' that the purchasers can escape liability

to pay interest on the balance of the purchase price. She argued, that this was a case that the vendor and purchasers entered the agreement with full knowledge of the lack of readiness of the title. She said that this proposition can be inferred from the fact that the attorney with carriage of sale in the transaction acted for both parties. She cited the case of *North v. Percival* [1898] 2 Ch. 128 in which Kekewich J. at page 135 observed that "*Wilful default*" is obstruction in the completion of the contract." On the basis of this test she submits that there is no evidence of obstruction in this case.

Mrs. Taylor-Wright admitted that Special Condition 6 in the agreement does not place an obligation on the vendor to send the title and the registrable transfer to the Registrar of Titles to effect the transfer until either the balance purchase money was paid or a satisfactory undertaking was received. She then offered a variety of tortuously reasoned arguments, contending that the provision of the undertaking cannot be equated with the payment of the actual money. On that basis, she asserted that the undertaking is, simply, a commitment to make a payment.

On the other hand, counsel for the respondents Miss Maureen Smith submitted that the vendor was registered on transmission on September 24, 2001, and therefore was not in a position to transfer title to the purchasers before that date. She contended that the vendor entered into the contract in July 1999 with knowledge that she was not in a position to transfer title to the purchasers until her name was placed on the title. She also knew that she could not have completed the transaction in ninety days as the contract demanded. She further contended that the vendor took two years to transfer the title to the purchasers and that was the direct result of the vendor's will. Counsel for the respondent has asked the court to conclude that the delay of the vendor in providing the title ought to be treated as 'wilful default'.

In relation to Special Condition 6, counsel for the respondent Miss Smith submitted that this clause puts an obligation on the vendor to procure a registered title in the name of the purchasers on receipt of a satisfactory letter of

undertaking from a financial institution. She argued that although the undertaking was given by the purchasers' mortgagee, the vendor's attorney did not deliver the documents to the mortgagee until two years after receipt of the said documents. On this basis, she argued that the vendor is guilty of 'wilful default' and is not entitled to the interest claimed.

In contracts for the sale of land it is usual that the special conditions provide for payment of interest on the balance of the purchase money from the date fixed for completion until the actual date of payment. Where the purchase is not completed on the date fixed for payment, the payment of interest would depend on the wording of the condition in the contract. In general the conditions would make interest payable if the delay arises (1) from any cause whatever; (2) from any cause whatever other than the vendor's 'wilful default'; or (3) from the purchaser's default.

It is generally accepted that where the special condition in the contract makes the payment of interest payable in cases of delay; from any cause whatever; or from any cause other than the vendor's 'wilful default', the result is the same. This is so, as a court will not insist that a purchaser pay interest when the delay is as a result of the vendor's 'wilful default'; see *in re Riley to Streatfield* 34 Ch.D 386,

So then, the ultimate issue in this case is whether or not the delay, which occurred in the completion of this purchase arose from (1) the act of the vendor, and (2) was 'wilful default' on his part? It is to this task that I must now turn my attention.

As a general proposition of law it is for the purchaser to show that the vendor was guilty of 'wilful default', and that this 'wilful default' was the cause of the non-completion of the contract on the date fixed. In *re Hewitt's Contract* [1963] 1 WLR 1298 the vendors were the former shareholders of a company in voluntary liquidation, and sold a number of parcels of freehold and leasehold land which had belonged to the company for £800,000. The contract contained as a condition of the contract that:

"(1) If the purchase shall not be completed on the completion date then (subject to the provisions of paragraph (2) of this condition) the purchaser shall pay interest on the remainder of his purchase money. ... Provided nevertheless (i) That ... the vendor may by notice in writing before the actual completion elect to take the income of the property ... instead of interest ... (2) The purchaser shall not be liable to pay interest under paragraph (1) of this condition - (i) so long as the delay in completion is attributable to any act or default of the vendor. ..."

The completion date was chosen by the vendors although the purchasers would have preferred a later time. The properties had been transferred to a bank acting for the shareholders and completion of the contract would require the transfer by the shareholders of their holdings and registration of the transfers at the Land Registry. The vendors gave notice to the purchasers under the above condition choosing the income of the properties rather than interest. The completion did not take place until 14 days after the date fixed for completion. The purchasers argued that there was no unexpected difficulty; the vendors had misjudged the time required to complete the sale. As a result, the purchasers argued that the vendors were not permitted to obtain interest or income as the delay in completing the contract was as a result of their fault.

The court held that where the delay in the completion of the transaction was caused, not by some unexpected event, but by the vendors underestimating the time needed; it is 'wilful default'. Furthermore, it was held that where a vendor entered into a contract with the knowledge that there was pending litigation into the title, and the date for completion was delayed by seven months, it was 'wilful default', notwithstanding that he had acted on counsel's opinion; see ***Re Kissock and Taylor's Contract* [1916] 1 IR 393**.

By contrast, delay occasioned merely by the state of the title and not 'wilful default' on the part of the vendor does not relieve the purchaser from paying interest. In ***re Woods and Lewis's Contract* [1898] 1 Ch. 498** it was held that where the delay in the completion of a purchase, on the date fixed in the

agreement for sale, was due to remedying a defect in the vendor's title which was unknown to him at the time of the contract, this will not be considered 'wilful default' on his part so as to prevent interest running against the purchaser under the contract. In addition, where the vendor has made a honest mistake of fact or omitted to do something, it is not 'wilful default' where he does not persist in it; see ***Bennett v Stone* [1902] 1 Ch 226 at 232.**

In the present case, the purchasers provided a letter from the National Housing Trust undertaking to pay the balance of purchase price in full. It was a condition of this undertaking, that the vendor send to the N.H.T the duplicate Certificate of Title along with the other documents. There was nothing curious about this arrangement; it was provided for in the agreement for sale signed between the parties. In the light of this undertaking, it was plainly the obligation of the vendor to provide the duplicate Certificate of Title to the purchasers' mortgagee.

It goes without saying, that the duplicate Certificate of Title was required to enable the mortgagee to place its interest on the title before releasing the balance of the purchase money. Consequently, in the context of the conditions included in the particular agreement for sale, and the behaviour of the parties, Mrs. Taylor-Wright's argument sophistically distinguishes between the payment of the balance purchase money and the undertaking from the purchasers' mortgagee.

It is my judgment, then, that the failure of the vendor to provide the title and other documents requested within the ninety day period from the signing of the agreement for sale to October 28, 1999, was the reason for the delay. It is undisputed that the vendor was unable to provide a title within the required time period. It can be inferred from the nature of her duties as an executor, that the vendor ought to have been aware that -- from current operational practice -- there was a high probability of a delay in obtaining the title when she contracted with the purchasers. It cannot be denied that the facts of this case fall squarely within the definition of 'wilful default' as it is understood in the cases.

These considerations, leads me inexorably to conclude that -- as there was 'wilful default' on the part of the vendor in this case -- she is not entitled to claim interest from the purchasers on the balance of the purchase price from October 28, 1999, to the date of payment February 5, 2002. So then, the short answer to question one is; no.

As to the second question; are the purchasers obliged under the agreement to pay rental to the vendor? As a general proposition, where a tenant, enters into an agreement with his landlord for the purchase of the premises that he rents and acquires an immediate equitable interest in the premises, it operates to determine the lease where the terms of the agreement renders its performance incompatible with a continuance of the lease.

In ***Cockwell v. Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370** it was held that where provision is made for the payment of interest on the purchase money as of a certain date, this showed that the relationship of landlord and tenant was at an end after that date. As a result, the defendants were not liable for rent after that date. The facts were that on 8 March 1929, Cockwell, whose executors were the plaintiffs in this action, granted a lease of premises to the defendants, and included in the lease an option for the lessees to purchase the freehold of the premises. By the terms of the option clause, the lessees were at any time before 24 June 1938, to give the lessor 6 months notice in writing of their desire to purchase, and the lessor was, upon the expiration of such notice, and the payment of the purchase price, together with interest from the expiration of such notice until the completion of the purchase, to convey the premises to the lessees. The defendants contended that, the option having been exercised, the relationship of landlord and tenant ceased on 25 December 1938, and was replaced by that of vendor and purchaser; therefore, there could be no liability for rent after 25 December 1938.

In any event the vendor cannot be entitled both to the rent and to interest on the purchase money; see ***Brooke v. Champnowne* [1837] 4 Cl. & Fin. 509.**

In the instant case, the purchasers were sitting tenants as they occupied the premises under a tenancy prior to the signing of the agreement for sale. In my judgment, the terms in the agreement for the payment of interest by the purchasers after October 28, 1999, would make the performance of the conditions therein incompatible with the continuation of the lease after that date for the following reason. The status of the purchasers changed from tenants to purchasers in possession, after the date set for completion. Put another way, the purchasers became debtors to the vendor for the balance of the purchase money at the date set for completion.

Consequently, I am constrained to hold that the vendor is not entitled to the receipt of rental from the purchasers as of October 28, 1999. As for any outstanding rental due and owing up to that date, this should be pursued in an action for recovery of rent in the appropriate court.

As to the third question: are the purchasers obliged under the said agreement to repay the vendor the costs of the water tank which the purchasers built, but which costs of Eighty Thousand Dollars (\$80,000.00) was reimbursed by the vendor? The court took the view that this is not a proper question for a vendor's summons as it is not an issue of compensation that arises from or is connected to the agreement for sale in this case. The court will therefore decline to express any opinion on this issue and invite the vendor to pursue that claim in a separate action. There shall be cost to the respondents, to be taxed if not agreed.