[2009] CCJ 12 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 1 of 2009
BB Civil Appeal No 3 of 2006

BETWEEN

VERNON O'CONNELL HOPE	**APPELLANT**

AND

SHAKA WAYNE RODNEY	**1ST RESPONDENT**
PORTFOLIO INVESTMENTS LIMITED	**2nd RESPONDENT**

Before the Right Honourable	**Mr Justice de la Bastide, President**
and the Honourables	**Mr Justice Pollard**
	Mr Justice Saunders
	Mme Justice Bernard
	Mr Justice Hayton

Appearances

Mr Alair P Shepherd QC and Ms Wendy Maraj for the Appellant

Mr Andrew V Thornhill and Mr Gregory P B Nicholls for the Respondents

JUDGMENT
of
The President and Justices Pollard, Saunders, Bernard and Hayton
Delivered jointly by
The Right Honourable Mr Justice Michael de la Bastide
and
The Honourable Mr Justice Saunders
on the 4th day of December 2009

JUDGMENT

[1] This appeal concerns a parcel of land ("the Property") situate at Prospect, St. James on the West Coast of Barbados. The Property is owned by the appellant, Mr Vernon Hope. In 1996 Mr Hope agreed to sell it to Mr Shaka Rodney, the first respondent. Mr Rodney subsequently assigned his rights and interests under that agreement to a company called Portfolio Investments Inc. ("Portfolio"). In July, 2000 Mr Rodney and Portfolio instituted these proceedings against Mr Hope for specific performance of the agreement. The trial judge, Kentish J, dismissed the action. The Court of Appeal upheld the subsequent appeal of Mr Rodney and Portfolio. Mr Hope has now appealed the judgment of the Court of Appeal. For the reasons we give here, we have determined that his appeal cannot succeed.

The essential background facts

[2] The contract between Mr Hope and Mr Rodney is contained in a formally drawn agreement dated 6th December, 1996 ("the Agreement"). The purchase price originally agreed was $395,000, ten per cent of which was paid as a deposit to Mr Hope's attorney-at-law. Completion was fixed for 28th February, 1997.

[3] The contract was not completed on the scheduled date. Neither party was then in a position to complete. Mr Hope was not in possession of all the requisite documents. But even if he had them, Mr Rodney was then in no position to pay off the balance of the purchase price.

[4] At some stage Mr Rodney executed an assignment of the agreement to Portfolio, a company of which Mr Rodney was a director and shareholder. The deed of assignment is undated. During the trial before Kentish J it was agreed that it should be dated 28th February, 1997. After the assignment was effected, further negotiations ensued between the parties. Mr Hope was able to have Portfolio, represented by Mr Rodney, agree to an increase in the purchase price of the Property to $430,000.

[5] On 4th May, 1998, Mr Hope issued a notice to Portfolio making time of the essence and requiring the transaction to be completed on or before 26th May, 1998. Portfolio did not tender the balance of the purchase price but on the said 26th May it informed Mr Hope that it was ready, willing and able to complete. On the 3rd June, 1998 Portfolio's attorney-at-law attended the Chambers of Mr Hope's lawyers waving his cheque book. Portfolio's lawyer indicated that his client was ready to close the transaction. Mr Hope's lawyer responded that he was awaiting further instructions from Mr Hope. Those instructions came two days later when Mr Hope indicated that completion of the sale had been placed "on hold".

[6] On 31st August, 1998 Portfolio issued Mr Hope with its own notice to complete the contract. A period of 28 days was given within which Mr Hope was required to complete. Mr Hope ignored this notice. No further initiative was taken on the matter by either side until Mr Rodney and Portfolio launched these proceedings in July 2000 claiming an order for specific performance.

[7] The claim for specific performance was stoutly resisted by Mr Hope on four principal grounds. First of all, the defence alleged that as a result of the purchaser failing to complete on or before 26th May, 1998, the vendor was entitled to treat the contract as being at an end and to forfeit the purchaser's deposit. Secondly, Mr Hope denied that there had been any valid assignment of the Agreement. Thirdly, the defence alleged that the action should be dismissed on account of delay and *laches* in the instituting of proceedings. Fourthly, it was claimed that the purchasers were not entitled to specific performance because it had not been demonstrated that either Portfolio or Mr Rodney was truly ready, willing and able to come up with the balance of the purchase price.

The findings of the trial judge

[8] The trial judge found that the notice served by Mr Hope on 4th May, 1998 was ineffective. The judge noted that neither party to the contract was in a position to complete on the original date fixed for completion. As a result, the judge reasoned, as at 4th May, 1998 the contract was an open one. Basing herself on

British and Commonwealth Holdings plc v. Quadrex Holding Inc,[1] the judge found that in such circumstances Mr Hope could only validly make time of the essence if (a) he himself was ready, willing and able to complete, (b) the purchasers had been guilty of unreasonable delay and (c) the served notice had given the purchaser a reasonable time within which to complete. The judge rightly held that Mr Hope's notice floundered on the second of these conditions as it was only on the very day of its issue, 4th May, that Mr Hope had overcome all obstacles to the passing of a good title. The first of the issues raised on the defence was therefore decided in the purchaser's favour.

[9] On the assignment issue, the trial judge found for the vendor. She held that the assignment was invalid because no express notice of it had been given to Mr Hope as required by statute. It was on the strength of this finding that she dismissed Portfolio's claim for specific performance. This determination of the trial judge and the challenge to it in the Court of Appeal were the focus of a considerable portion of the legal argument in the courts below. The issue is now entirely moot. Mr Shepherd QC, counsel for Mr Hope before the Court of Appeal and this Court, rightly conceded to this Court that the assignment could not properly be challenged on the ground that no proper notice of it was given. The relevant statute[2] speaks not of the need to give ***a*** notice in writing but rather of the requirement to give express notice in writing. No formal requirements had therefore to be met in the giving of notice and on the facts of this case Mr Hope had been sufficiently made aware in writing that there had been an assignment from Mr Rodney to Portfolio.[3]

[10] Having dismissed the claim for specific performance because of her finding that the contract was not validly assigned to Portfolio, the trial judge might have ended her judgment there and then without consideration of the other two defences raised by the vendor. Wisely, the judge thought that, in case she was held to be

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[1] [1989] 3 All E R 492
[2] Section 214 of the Property Act Cap 236 of the Laws of Barbados
[3] See: *Van Lynn Developments, Ltd v Pelias Construction Co Ltd* [1968] 3 All E R 824

wrong on the assignment point (as turned out to be the case), she should determine the two other issues raised by the defence as well.

[11] The pleaded issues of *laches* and delay were fully argued at the trial. The judge decided this point in favour of the purchaser. She found that although it might be said that the purchaser had waited an unreasonable length of time before commencing its action for specific performance, the vendor had neither pleaded nor proved that he had been prejudiced by the delay. In the circumstances, the judge ruled that the defence of *laches* and delay was untenable. This finding of the judge is unchallenged as there was no appeal on this point.

[12] Finally, as to the readiness and ability of the purchaser to complete the transaction, the judge treated this issue as being entirely bound up with the notice to complete that was served by the purchaser. The focus of the judge, and indeed the focus of counsel for the vendor at the trial, centred exclusively on whether, on a balance of probabilities, Portfolio was ready, willing and able to complete when it served its own notice dated 31st August 1998. Ultimately the judge held that Portfolio had not shown "*that it had* the requisite funds to pay the balance of the purchase price" (our emphasis) at the time when it issued its notice to complete. On this basis the judge held that Portfolio's notice to complete was bad.

The hearing before the Court of Appeal

[13] Ground (iii) of the notice of appeal to the Court of Appeal alleged that "the learned judge erred in refusing to consider whether the proffering of a cheque by [Portfolio's] Attorney-at-Law was a valid tender" and ground (v) claimed that "the decision of the learned Judge is against the weight of evidence". Despite these two grounds, however, the submissions to the Court of Appeal appear to have been made exclusively on the issue of the validity of the assignment. No challenge was made by the purchaser to the specific finding of the judge that during the period 31st August – 28th September 1998, when the purchaser's notice was running, there was not available to Mr Rodney or to Portfolio sufficient funds to pay the balance of the purchase price. Mr Thornhill, counsel for Portfolio, frankly

admitted to this Court that he had taken the view that if he succeeded in the Court of Appeal on the assignment point, then that court would be bound to allow the appeal and order specific performance of the contract.

[14] The Court of Appeal did just as counsel for the purchaser expected. The judgment of the court concentrated entirely on the validity of the assignment. The court correctly held that the assignment was valid and, without expressing any view as to the readiness and ability of the purchaser to complete, the court reversed the trial judge and made the order for specific performance. The court did not appear to consider whether, even if the assignment was valid, the purchaser had indeed demonstrated that it was entitled to specific performance.

The submissions before this Court

[15] Mr Shepherd's submissions on behalf of the vendor were directed at exploiting this *lacuna* in the judgment of the Court of Appeal. Counsel indicated to us that the trial judge had found that Portfolio had not demonstrated any financial ability to complete at the material time. He submitted that Portfolio ought not to be allowed to take the benefit of the equitable remedy of specific performance without first having shown its own readiness to complete during the currency of its notice. Counsel argued in two ways. Firstly, he stated, since Portfolio had been unable to complete at the time which it had by its notice stipulated for completion, the company was not entitled to specific performance. Secondly, even though it was not necessary for a claim for specific performance to be hinged on a valid notice to complete, Portfolio was still not entitled to the remedy as it had failed to show that it was financially able to complete at any relevant time. In making these submissions counsel relied on *Quadrangle Development and Construction Co Ltd v Jenner*[4] and *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd*[5]. Citing *Coslake v Till*[6] and *Macbryde v Weekes*[7] counsel contended that "the relevant time" for this purpose is the time when the notice to complete becomes effective

[4] [1974] 1 WLR 68
[5] [1996] 4 LRC 259
[6] (1826) 1 Russ 376; 38 ER 146
[7] (1856) 22 Beav. 533; 52 ER 1214

and time becomes of the essence or when the party seeks relief and when the decree is to be awarded. According to counsel the party seeking specific performance must show that it has the necessary finance at the time which it maintains is the time for closing or at the time when it is seeking the court's assistance.

[16] In answer to these submissions counsel for the purchaser submitted that the time for completion had not yet arisen and that therefore the time for testing Portfolio's financial capacity had not yet arrived.

Reasons for decision

[17] The plain fact is that as a consequence of the trial judge's finding that neither the vendor's nor the purchaser's notice to complete was valid, the contract was still in existence after the expiry of the second of those notices. Each side at that point in time was and remains to this day under an obligation to perform the Agreement. But crucially, the vendor had indicated a distinct unwillingness to complete. The vendor laboured under the misapprehension that because the purchaser had not complied with his notice to complete of 4th May, 1998, he could treat the contract as at an end. This continuing stance of the vendor is reflected in his defence and counterclaim in which he erroneously regards the contract as having been terminated and also claims a right to forfeit the purchaser's deposit. Unfortunately for the vendor, that notice of 4th May, 1998 has been held to be invalid.

[18] In light of the vendor's misguided view on the matter, and notwithstanding the invalidity of the purchaser's own notice to complete, the purchaser was entitled to seek specific performance, as he did, by launching this action in July, 2000. The invalidity of both notices to complete effectively produced a stalemate. This deadlock together with the vendor's repudiation of the contract by his indication that he did not intend to perform his side of the contract, provided a sufficient basis for the institution of these proceedings by the purchaser. Bringing this action was one method by which the purchaser could bring matters to a head. A valid notice to complete is not a prerequisite to the institution of a claim for specific

performance. It was so held in *Woods and others v Mackenzie Hill Ltd* [8] and *Hasham v Zenab.*[9]

[19] In this Court, counsel on both sides with the benefit of hindsight accepted that as at the date of the trial the contract between Portfolio and Hope was an open one. There was no date for completion. The critical questions to be answered are: what, for the purposes of this action, is the relevant time with respect to which the purchaser has to demonstrate that it is or will be ready, willing and able to complete and secondly, what exactly is it that the purchaser has to demonstrate.

[20] At the trial before Kentish J the vendor's counsel regarded the relevant time as the period commencing on the date of the purchaser's notice to complete and ending at the expiry of that notice. All the cross-examination of the purchaser and its witnesses was directed to the purchaser's financial ability at that period. This cross-examination ultimately persuaded the trial judge to hold ineffectual the purchaser's notice to complete, but it left untouched the issue of the purchaser's readiness and ability to complete at the time the writ was filed or at the date of the trial or at the time when specific performance was ordered or was to take place.

[21] In assessing the validity of the purchaser's notice to complete the trial judge made a determination of that party's readiness, willingness and ability to perform its contractual obligations at the date of service of its notice to complete. It is true that a party who gives notice making time of the essence may be in fundamental breach if he is not willing and able to complete within the time stipulated in the notice but the other party is. But the situation that faced the trial judge in this case was that both notices to complete were ineffective; in each case the party served had failed to respond to the other's notice, and a claim for specific performance was brought almost two years after the expiry of the later of those two ineffectual notices. In these circumstances the trial judge was required to go beyond an assessment of the purchaser's readiness, willingness and ability to perform its contractual obligations at the date of service of its notice to complete.

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[8] [1975] 2 All E R 170
[9] [1960] A.C. 316

[22] The critical difference between this case and the cases cited by Mr Shepherd[10] is that in each of those cases the court was looking backward, looking at a particular date for completion that had already elapsed and assessing what the position of the purchaser was on that date. Was he on that date ready, willing and able to complete? Here, since both notices were held to have been ineffectual, there is no date for completion of the contract, no date on which a party was bound to complete or else lose his right to enforce the contract. A date is still to be fixed for completion. The court is still looking to the future.

[23] In a contract for the sale of land the purchaser's fundamental obligation is to pay the purchase price to the vendor in return for the executed transfer documents at the time fixed for completion if this time is expressly made of the essence by the contract or by a valid and effectual notice to complete. If a purchaser files a claim for specific performance, the purchaser is not under an obligation to have the purchase monies in hand at the time the claim is filed. In such a case (as the present one) the vendor will have indicated that he is not willing to perform his side of the bargain.

[24] So what was the obligation of the purchaser in this case? First of all the purchaser was required to demonstrate that it was disposed to fulfil its side of the contract. Portfolio satisfied this obligation by pleading in paragraph 10 of its claim that it is and was at all material times ready, willing and able to complete. Secondly, in the circumstances of this case Portfolio had to support that pleading by demonstrating by evidence at the trial that it had *the capacity* to raise the required funds; by showing that in the event specific performance was ordered it had the ability to come up with the balance of the purchase price at such time thereafter as a proper deed of transfer was tendered to it in accordance with the Court's order.

[25] The judge made no analysis along these lines of Portfolio's ability and we consider ourselves at liberty to peruse the evidence in order to make our own. The evidence suggests that first of all, Mr Rodney's attorney-at-law, a family friend

[10] *Quadrangle Development and Construction Co Ltd v Jenner; Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd; Coslake v Till, supra*

and father figure to Mr Rodney, had been prepared to advance Portfolio the purchase monies. This was no idle promise. It was set out in writing and indeed the attorney-at-law actually attempted to complete the purchase on 3rd June, 1998 with his own funds. Secondly, there was unchallenged evidence that in the expectation of closing the transaction, Mr Rodney had secured credit facilities from the Caribbean Commercial Bank. Those facilities were approved on 20th July, 1998 and made available until 31st May, 1999. In keeping with the arrangements made, the bank was committed to advance to Portfolio a total of $430,000 and a sum of $330,000 was deposited to Portfolio's account on or about 15th July, 1998. Bank financing was clearly available to the company, to be secured on the property.

[26] The trial judge's findings on readiness and ability should have been different if instead of ascertaining whether Portfolio "had the requisite funds to pay the balance of the purchase price", the focus of inquiry had been on whether Portfolio had demonstrated *the capacity as at the date of the trial* to raise the purchase monies. In circumstances like those in the instant case the relevant time at which the plaintiff purchaser must have the capacity to complete by paying off the purchase price is when he deploys his evidence in support of his claim for specific performance i.e. at the trial or at the hearing of an application for summary judgment.

[27] The following extract from the judgment of Walton J in *Rightside Properties Ltd v Gray*[11] neatly illustrates the answer to the two questions posed above at [19]. *Rightside* was a case where the vendor had wrongfully repudiated a contract for the sale of land and the purchaser, having initially brought an action for specific performance elected at the trial to claim damages instead. In the course of his judgment the judge stated that:

> "…It appears to me that in consequence [of the vendor's wrongful repudiation] the plaintiffs were never at any time under any obligation to show that they were "able" to perform their part of the contract. "Ability,"

[11] [1975] Ch. 72 at 88

> in this connection, means arranging the finance, which, under modern conditions, could be done either by arranging a mortgage or a sub-sale, and doubtless there are other methods as well. But they all involve some form of preparation on the part of the person raising the finance; and it appears to me pessimi exempli if the vendor was in a position to say, "Because you were not on a particular day ready with your finance, you cannot claim damages against me. True it is that it would have been perfectly useless for you to make the preparations because I told you I was not going to complete, but I can now huff you for having failed to carry out this perfectly useless exercise." This is the morality of a game, not of a serious legal contest.
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> But even if I am wrong in my conclusions on this point, it is surely only at the "material" time(s) that the purchaser must be ready with his finance. One of such times must have been the time when completion ought to have taken place …
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> Had the plaintiffs claimed specific performance, I think the trial would then have been another "material time" and the plaintiffs might have had to show their financial ability to complete at that date. But, as they elected the other way, the date of the trial cannot, in my judgment, be material for this purpose".

[28] In this case as we have pointed out above there was sufficient evidence to support a finding that at the trial Portfolio had demonstrated its capacity to raise the balance of the purchase price. In the circumstances and for the above reasons we are of the view that the Court of Appeal was right to order specific performance.

[29] Accordingly, the appeal is dismissed. The order for specific performance made by the Court of Appeal is replaced by the following: Mr Hope is ordered within forty-five days upon payment made to him by Portfolio of the balance of the purchase price to do all acts and things necessary to convey to Portfolio the property more particularly described in the Schedule to the Agreement. The costs in this Court and the courts below are to be paid by the appellant to the respondents certified fit for two attorneys-at-law.

/s/ M.A. de la Bastide
The Rt. Hon. Mr Justice Michael de la Bastide (President)

/s/ Duke Pollard
The Hon. Mr Justice D. Pollard

/s/ A Saunders
The Hon. Mr Justice A. Saunders

/s/ D P Bernard
The Hon. Mme Justice D. Bernard

/s/ D Hayton
The Hon. Mr Justice D. Hayton