

[2009] CCJ 7 (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  
PORTOFOLIO INVESTMENTS LIMITED**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

**Before the Right Honourable  
and the Honourables**

**Mr Justice de la Bastide, President  
Mr Justice Saunders, JCCJ  
Mme Justice Bernard, JCCJ**

**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**

**Delivered orally by the President  
The Right Honourable Mr Justice Michael de la Bastide  
on the 22<sup>nd</sup> day of May 2009**

## JUDGMENT

- [1] This case concerns a claim to enforce a contract for the sale of a parcel of land on the West Coast of Barbados. The contract was made originally between Shaka Wayne Rodney (“Rodney”), the First Respondent, and Vernon O’Connell Hope (“Hope”), the Appellant. Rodney was the Purchaser and Hope was the Vendor. The price agreed was \$395,000 which was subsequently increased by agreement to \$430,000. The agreement was made on 6<sup>th</sup> December 1996.
- [2] The sale was due for completion on 28<sup>th</sup> February 1997. Completion was not effected on that date as neither side was in a position to complete. At some time in 1997 there was an assignment by deed of the contract by Rodney to Portfolio Investments Limited (“Portfolio”), the Second Respondent. Thereafter the matter proceeded as between Portfolio and Hope and the increase in the purchase price was agreed by them.
- [3] The parties were still not in a position to complete until the beginning of May 1998. On the 4<sup>th</sup> May, which was the first date on which Hope was in a position to complete, Hope served a notice to complete on Portfolio and the date fixed for completion was 26<sup>th</sup> May 1998. The purchaser did not complete within the time specified and thereafter there were further dealings between the parties.
- [4] On 31<sup>st</sup> August, 1998 the purchaser served a notice on the vendor to complete within 28 days. There was non-compliance with that notice and finally, this action was launched by Rodney and Portfolio against Hope in which they claimed specific performance. There was a counterclaim by Hope in which he sought a declaration that his obligations under the agreement were no longer subsisting, in other words, that he had been discharged from any obligation under the agreement for sale.

- [5] The matter was heard by Madame Justice Kentish. She delivered a judgment in which she held that the plaintiffs failed in their claim basically on two grounds. One was that the assignment by Rodney to Portfolio was invalid because of lack of a proper notice of the assignment and secondly, because the notice served by Portfolio requiring completion, that is, the notice of 31<sup>st</sup> August 1998, was ineffective because at the time when the notice was served and was operative, Portfolio was not in a position to complete because of lack of funds for that purpose.
- [6] The judge also made a finding that the vendor's notice to complete, that is, the one served by Hope on 4<sup>th</sup> May 1998, was also ineffectual because at the time it was served, the other party, that is, Portfolio, was not in default in that there had been no unreasonable delay on its part since it was only at the time when the notice was served that Hope was first in a position to complete the agreement.
- [7] Rodney and Portfolio appealed to the Court of Appeal. Their appeal succeeded. The Court of Appeal reversed the decision of the trial judge and made an order for specific performance. In doing so it held that there was a valid notice of the assignment. In relation to the finding that the purchaser's notice to complete was ineffectual, the Court of Appeal treated that finding as *obiter* and held that notwithstanding the possible invalidity of that notice there was still a right under an agreement that was subsisting to claim specific performance and it was that right that the Court of Appeal enforced by its order.
- [8] The respondent, Hope, has now appealed to this Court having obtained leave to do so. A Case Management Conference was held by telephone on 22<sup>nd</sup> April, 2009 and at that Conference an order was made for the trial of a preliminary issue. It is that preliminary issue which has been argued before us today and to which written submissions have previously been addressed by both sides. The case management order was in this form:
- “That the parties do file and exchange written submissions on or before Monday the 4<sup>th</sup> day of May 2009 on the following preliminary issue:
- Is the appellant entitled to or should he be permitted to argue:

- (a) that the respondent was not entitled to an order for specific performance because
  - (i) at all material times the purchaser was financially unable to complete the contract for sale by paying the balance of the purchase price, or
  - (ii) no tender of the purchase price was ever made, or
- (b) that the appellant was entitled to an order for forfeiture of the respondent's deposit because the appellant's notice to complete was effective."

[9] As to the first issue, the first point to note is that in the Defence and Counterclaim there is no specific pleading that the purchaser was unable to complete the contract by paying the balance of the purchase price. All that there is, is a denial in that pleading of the allegation made in the Statement of Claim that the purchaser was willing and able to complete the contract. Nevertheless, at the trial there was a considerable amount of cross-examination of Rodney that was directed to this issue of whether there was available to him or to Portfolio, sufficient money to pay the balance of the purchase price. The judge in her judgment refers to some of that evidence and, on the basis of her analysis of the evidence, concluded that at the material time which, for present purposes, was the month of September 1998, Portfolio lacked sufficient monies to pay off the balance of the purchase price and therefore was not in a position to complete. The judge therefore held that the notice served by Portfolio to complete was ineffectual.

[10] It appears that this finding was not challenged by the purchasers in their Notice of Appeal to the Court of Appeal. The focus by the appellant was exclusively on the issue of the validity of the assignment, an issue on which, as I have said, the appellant succeeded. But when the court's attention was directed, largely by the efforts of counsel for Hope, to the issue of the validity of the purchaser's notice to complete, the court seems to have taken the view that the judge's finding on this issue did not present an insuperable bar to the purchasers obtaining an order for specific performance.

- [11] But the fact is that the capacity of the purchaser to find the money to pay the purchase price was a live issue in the court below and the issue to which that evidence was directed was decided by the trial judge in favour of the vendor. There was therefore no obligation on the vendor, in our view, to raise by a respondent's notice, any issue with regard to this aspect of the case since Hope would have been content to rely on the findings of the trial judge.
- [12] In those circumstances, the Court of Appeal having effectively reversed the trial judge's decision on this issue, it seems to us that Hope must be entitled to challenge before us that reversal by the Court of Appeal of the trial judge's conclusion with respect to this issue. He is entitled to do so in one or both of two ways - firstly by arguing - and we express no view as to the chances of the argument succeeding - that the service of a valid notice to complete and proof of non-compliance with it, was a prerequisite to the purchaser's obtaining an order for specific performance. Or, he may argue that in any event the inability of the Purchaser to find the necessary funds for completion at the material time would be fatal to the claim for specific performance regardless of whether or not a valid notice to complete had been served.
- [13] The first preliminary issue, (treating (a) (i) and (a) (ii) as separate issues) is resolved in favour of the appellant, Hope. We hold that he is entitled to argue this point before us.
- [14] The second issue then which we have to consider is whether Hope should be permitted to argue that no tender of the purchase price was ever made. Again it must first be pointed out that there is no pleading to this effect in the Defence and Counterclaim, and as a separate point it does not seem to have been raised at the trial. I do not think that counsel for the Appellant was able to point to any passage in the notes of evidence at the trial or in any other document reflecting what transpired at the trial, which would indicate that it was raised at that stage. Similarly it does not seem to have been the subject of any express submissions made to the Court of Appeal.
- [15] We recognize that this point may be said to be embraced both in the allegation that the vendor's notice to complete was not complied with, that is, between 4<sup>th</sup> and 26<sup>th</sup> May

1998, and in the established incapacity of the purchaser to pay the purchase price during the currency of the purchaser's notice to complete, that is, from 31<sup>st</sup> August 1998 for a period of 28 days. But it was never raised before as a separate issue and we see no good reason why it should now be introduced for the first time. We are not sure that in fact, it would serve to enhance the appellant's chances of success, but that is not the basis on which we rule out this potential argument. We do not think that it would be fair or reasonable to allow it to be introduced at this stage and we so hold.

[16] The third issue is whether the appellant should be permitted to argue "that the appellant was entitled to an order for forfeiture of the respondent's deposit because the appellant's notice to complete was effective."

[17] It is conceded by counsel for the appellant that in order to argue this point, this issue should have been made the subject of a respondent's notice when the matter was before the Court of Appeal. As it turns out, there was a respondent's notice filed in April 2006 but unfortunately, having been filed it seems to have slipped from everyone's memory. It was not included in the record of appeal that was settled by the Registrar in conjunction with counsel on both sides and it does not appear to have been listed even in the list of documents excluded from that record. When the hearing of the appeal took place counsel on both sides, it appears, had clean forgotten about this respondent's notice and the Court of Appeal accordingly was informed that none had been filed. It was only on the morning on which the Court of Appeal was delivering judgment that counsel on both sides remembered the notice or had it brought to their attention in one way or another. As their Lordships sat to give judgment, counsel for the vendor brought the notice to their attention.

[18] We are told that the Court of Appeal was provided with copies of the respondent's notice but their Lordships decided that it would not be a good precedent for them to allow a matter to be reopened at such a late stage on the basis of a notice which had not been included in the record of appeal, and in any case they did not think that any injustice

would result from their declining to entertain the notice at that stage. Accordingly they proceeded to give the judgment which they had come prepared to deliver.

[19] It is however significant that the respondent's notice that was filed does not aptly cover the issue which it is now proposed to argue before us. The respondent's notice reads:

**“Notice by Respondent of intention to contend  
that decision of court below be varied**

TAKE NOTICE that upon the hearing of the above appeal the Respondent herein intends to contend that the decision of the Court dated the 6<sup>th</sup> day of March 2006 should be varied so that the following declarations be granted:

1. A declaration that in the events that have happened the Respondent has rescinded the agreement and is no longer obligated to transfer the fee simple absolute in possession to the Appellants.
2. A further declaration that the Respondent has correctly forfeited and/or is entitled to retain the deposit paid under the said agreement.

AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows:

1. The Learned Trial Judge erred in law in failing to hold that the Respondent was fully entitled to forfeit the deposit and rescind the agreement on the basis that the Appellant at all times failed to make a proper or any tender of the purchase price.
2. The Respondent will crave leave of this Honourable Court to vary, add to or amend these grounds when the reasons for the decision become available.

Dated this 4<sup>th</sup> day of April 2006

Signed by Attorney-at-Law for [Hope]”

[20] The trouble with this notice is that it gives no hint of an intention to challenge specifically the finding of the trial judge that the notice served by Hope on 4<sup>th</sup> May 1998 was premature and therefore ineffectual. That was a central finding of the trial judge. It was not a peripheral matter. It was given a lot of prominence in the judgment and if the intention was by the respondent's notice to challenge that finding, then the notice should have so stated in explicit terms.

[21] The requirement for a respondent's notice is to be found in O. 59 r. 10 of the Rules of the Supreme Court of Barbados. The Rule speaks to three situations in which such a notice is called for, namely-

“(1) A respondent who, having been served with a notice of appeal, desires

(a) to contend on the appeal that the decision of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or

(b) to contend that the decision of the court below should be affirmed on grounds other than those relied upon by that court, or

(c) to contend by way of cross-appeal that the decision of the court below was wrong in whole or in part.”

[22] The heading of the notice served indicates that the respondent in the Court of Appeal was purporting to file a notice in order to satisfy the first of the three sub-paragraphs, paragraph (a), that is, where the intention is to vary the decision of the court. Indeed, insofar as they were seeking declarations which were not made by the judge in the court below, particularly that with regard to forfeiture, it might be thought that that was a correct application of the rule to the facts of the case. But I think that what was also in play was the situation envisaged in sub-paragraph (c), that is to say, where the intention is to contend that the decision of the court below was wrong in part. That flowed from the fact that the contention appears now to be that insofar as the judge held that the notice to complete issued by the vendor was premature and ineffectual, the decision of the judge was wrong in part.

[23] This was a very important finding in the context of the judgment and if it was sought to challenge it, as I have said, it should have been done in the clearest of terms. But what I have been at pains to point out is that even in the forgotten respondent's notice, the argument which it is now sought to raise is not properly identified; not identified at all, in fact, and therefore even if the notice had been before the Court of Appeal when it was hearing the appeal, it is doubtful whether without amendment it would have entitled the vendor to challenge that finding with regard to the invalidity of his own notice.

[24] Now we consider that it would require very grave and weighty reasons for us to take a course which would result in, first of all, our hearing argument and resolving an issue which should have been raised before the Court of Appeal but was not, and secondly, in our overriding the discretion exercised by the Court of Appeal when it declined to entertain the respondent's notice which was not properly brought to its attention. We do not think that those circumstances exist in this case and accordingly we will not allow the issue of the validity of the vendor's notice to complete to be revived before us in this appeal. If that means, as it appears to, that there is no basis for making an order for forfeiture or a declaration that would sanction a forfeiture, then so be it. It is obvious that when the matter was before the Court of Appeal, the vendor seemed to be content with a result which would have left neither party in a position to enforce the contract. We do not anticipate the result of the substantive appeal, but all we are saying is that we are not going to allow Hope to introduce at this stage, a new argument which would, if successful, give him an advantage, that is, the advantage of forfeiture, which he was not seeking at the level of the Court of Appeal.

[25] To sum up, we hold that the appellant is entitled to raise any argument based on the evidence of incapacity of the purchaser to pay for the land during the material period which I have already identified and to argue that as a result the notice to complete served by the purchasers is ineffective, and that in any event, irrespective of the notice to complete, his financial insufficiency would debar the purchaser from obtaining specific performance. But for the other two arguments which it is sought to raise, that is the

failure to tender the purchase price and the challenge of the ruling on the vendor's notice to complete, we hold that they cannot be raised at this stage.

[26] The costs of this application we will reserve to the hearing of the substantive appeal.