(19)

IN THE COURT OF APPEAL

STATE OF ST. CHRISTOPHER NEVIS ANGUILLA:

CIVIL APPEAL NO. 1 of 1977

BETWEEN: WENTWORTH NICHOLLS (Plaintiff/Appellant)

and

DANIEL R. WALWYN (Defendant/Respondent)

Before: The Hon. Mr. Justice St. Bernard - Ag. Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Renwick - Ag.

Appearances: Dr. W. Herbert for Appellant
D. Byron with him.

F. Kelsick for Respondent
E. Walwyn with him.

1977, March 30 and 31

J U D G M E N T

PETERKIN, J.A.:

This is an appeal against the judgment of Glasgow, J. in which he dismissed the Plaintiff/Appellant's claim for damages for breach of contract or, in the alternative, for specific performance of the contract, and in which he allowed the Defendant/Respondent's counterclaim and ordered the return of $50,000.00 paid on account of the purchase price.

The grounds of appeal are:

(1) That the learned Judge erred in finding that no enforceable contract between the parties was concluded

(2) That the learned trial Judge erred in that he failed to find the terms of the letter of 16th July, 1974 were capable of being read into the agreement in order to determine the terms of the mortgage.

/(3).....

(3) That the learned trial Judge should have found the statement made that on the 23rd of July 1974 by the Defendant's Solicitor said to the Plaintiff "I will draw a mortgage in your favour" was proof that all material terms of the mortgage were settled.

(4) That the finding of the Judge was unreasonable having regard to the evidence.

(5) That the Judge erred in ruling that the $50,000.00 should be refunded.

The facts as found by the trial judge are as hereunder stated. The Appellant is a hotelier and the owner of the property known as Pinney's Beach Hotel in Nevis. The Respondent has been for the past 21 years the Managing Director of the Nevis Co-operative Banking Company Ltd. They were good friends. The Appellant built the hotel partly with financial assistance obtained from the Co-operative Bank. The Respondent was aware of the Appellant's efforts to sell the hotel, and on 16th July, 1974, while the Appellant was in St. Kitts he received a telephone call from the Respondent in Nevis asking him if he was willing to sell him the hotel. The Appellant replied that he was willing to do so if the Respondent was willing to buy it. The Respondent then told the Appellant that he wanted something urgent from him not later than the afternoon of 16th July, and that he wanted him to write down the amount of money he was asking, together with the interest, also, that he was asking for 60 days in which to make his first down payment. The Appellant accordingly had a document typed in triplicate and sent two copies to the Respondent. The document reads,

/"16th July, ...

"16th July, 1974

Mr. Daniel R. Walwyn,
Bath Village,
Nevis.

Dear Sir,

I beg to inform you that I have dicided to sell you the Pinneys Beach Hotel with its lease, fixtures, furnishings, therein for the sum of $850,000.00 E.C.C. (Eight hundred and fifty thousand dollars, East Caribbean Currency)

Terms are as follows:

(i) The sum of $300,000.00 (Three hundred thousand dollars to be paid within 60 days from 16th July, 1974.

(ii) The balance of $550,000.00 to be paid in 5 years at a yearly instalment of $100,000.00

(iii) Quarterly interest at the rate of 8½% until full payment.

(iv) Mortgage on property "Pinneys Beach Hotel would be drawn up in the interest of both parties concerned.

With best of luck for the future.

I remain,
Yours respectfully

(Sgd.) W. Nicholls".

The Appellant returned to Nevis on the afternoon of 17th July, 1974, and the Respondent told him that he had received the two copies. On being asked by the Appellant the reason for his urgency the Respondent replied that his son was expecting some investors very soon and that if he got a sale for the hotel he would resell it.

On or about 17th September, 1974, the Appellant went to the Respondent and told him that the time for making the first down payment had expired. The Respondent told the

/Appellant.....

Appellant that his son Eugene was out of the State, and that they could do nothing until he returned, but that he would get in touch with him.

On 12th October 1974, the Appellant went to the Respondent's home and informed him that a man had telephoned from Canada saying that he had heard that the hotel was for sale, and expressing a desire to invest in a hotel in Nevis. The Appellant said that he told the man that the hotel was for sale and that the man had replied that he would be coming to Nevis in February, and had asked that a room be reserved for him. The Respondent then asked the Appellant if he had told the man how much he wanted for the hotel, and the Appellant replied that he had told him that he wanted $550,000.00 Canadian currency. The Respondent told the Appellant that this was good, and that he should sell the hotel, whereupon the Appellant said this,

> "Mr. Walwyn, I am hard pressed for some money now. If you would take over the hotel from me for $800,000.00, pay the debt to the Nevis Co-operative Bank and the Bank of America, you can give me $50,000.00 on account. I will wait on you for the balance."

The Respondent then told the Appellant that if he would come to the office of the Co-operative Bank on the Monday morning and sign an agreement he would let him have $50,000.00.

At about 9 a.m. on Monday 14th October, 1974, the Appellant went to the Co-operative Bank and the Respondent gave him a form of agreement which he had previously prepared in typescript. The Appellant read it and said to

/the.....

the Respondent,

> "I notice you have left out where you are prepared to give me a mortgage for the money that you will be owing me."

The Respondent took the form of agreement from the Appellant and looked at it. He agreed that what the Appellant had said was correct, and he amended the form of agreement by adding at the end of the second para thereof these words,

> "in accordance with a deed of mortgage to be given later."

The Respondent also amended the form of agreement by deleting the words "said item" occurring at the end of the fourth line of the second para and substituting therefor the word "condition". He also amended a carbon copy of the form of agreement in the same way. The two forms of agreement were then signed by the Appellant and the Respondent in the presence of a Mr. Robert Clifton, the Secretary and Treasurer of the Co-operative Bank. The amendments referred to were initialled. The Respondent gave the Appellant one of the forms and kept the other. The Respondent then gave the Appellant a cheque for $50,000.00, and the Appellant left. The form of agreement, amended as aforesaid, reads as follows:-

> "This Agreement made the 14th day of October, 1974 between Wentworth Nicholls on the one part and Daniel Reynold Walwyn on the other part, sheweth that the said Wentworth Nicholls being owner of Pinneys Beach Hotel situated on Pinneys Estate in the Parish of St. Thomas, Nevis, the said Pinneys Beach Hotel is comprised of buildings on the Hotel compound and operates as a Hotel restaurant and bar also land on which the building is erected being about two (2) acre leased to the said Wentworth Nicholls.

/The.....

The said Wentworth Nicholls has agreed to sell the said Pinneys Beach Hotel with all the buildings, furniture and equipment connected with the hotel to the said Daniel Reynold Walwyn for the sum of $800,000.00 on the condition that he is paid the sum of $50,000.00 on account and that the said Daniel R. Walwyn assures the debts owed to Nevis Co-operative Banking Co., Ltd. and the Bank of America St. Kitts, by the Pinneys Beach Hotel for Wentworth Nicholls. The amount of these debts will be deducted from the balance of $750,000 and the remaining balance will be paid in instalments by Daniel Reynold Walwyn or his executors or assigns to the said Wentworth Nicholls or his executors or assigns - In accordance with a deed of Mortgage to be given later.

The said Wentworth Nicholls will continue to be the Manager of Pinneys Beach Hotel and will be remunerated by a commission of ten per cent (10%) of all receipts from the hotel, restaurant and bar.

The said Daniel Reynold Walwyn has agreed to take over the hotel and the lease of the land on the hotel premises on the terms and conditions stated in the foregoing and will do all that is reasonable to encourage the manager in his work.

In witness whereof the said parties have hereunto set their signatures.

(Sgd.) Wentworth Nicholls
Wentworth Nicholls

(Sgd.) D.R. Walwyn
Daniel Reynold Walwyn

In the presence of
(Sgd.) R.B. Clifton"

The record shows that para 3 of the Appellant's statement of claim as originally pleaded read,

"3. On the 14th October, 1974 the Plaintiff and the Defendant signed an agreement which contained all material matters relative to the sale and purchase of the hotel except the provisions for a mortgage in respect of the unpaid portion of the purchase price. These provisions had been agreed upon orally between the Plaintiff and the Defendant prior to that date".

However, when the Appellant was giving his evidence in chief at the trial he stated inter alia,

/"On.....

> "On the morning of 14th October, 1974 before the Defendant began to write we discussed the terms of the mortgage, Defendant agreed to pay the mortgage that the Bank of America was holding on the hotel. Defendant said he will also deduct a certain sum of money which I was owing to the Co-operative Banking Company and that the balance would be paid within five years at 8½% per annum".

Appellant's Counsel then sought and obtained leave to amend para 3 by the insertion of the words "on or" between the words "Defendant" and "prior" in the last line, and it is seen at P.7 of the record in its amended form. Despite this, the trial judge went on to make findings on what was said to have taken place at a meeting of the Appellant with the Respondent and the Respondent's son on 23rd October, 1974, in relation to the mortgage. This has been criticised by Counsel for the Respondent on the ground that it had never been pleaded, nor was it the subject of cross-examination. He contended that it had always been the Respondent's case that the Appellant and himself had never discussed or settled the terms of a mortgage on 14/10/74 or at any other time. He drew the courts attention to para 2 of the statement of claim and to the alternative remedy sought at the end of the statement of claim. The trial judge went on to find, however, that in his view the meeting of the 23rd October, 1974, was the meeting at which it was proposed to discuss the terms of the mortgage contemplated by the agreement of the 14th October, 1974, but that no such terms were agreed upon at that meeting or at any other time. He later went on to make the following finding,

/"In.....

> "In the instant case, the agreement of the 14th October, 1974, was subject to a deed of mortgage to be given later. The terms of the proposed deed of mortgage were never settled, and the Defendant later repudiated the transaction."

In my view there was evidence on which he could have so found. At the closing stages of the hearing of this appeal an application was made to amend further para 3 of the Appellant's statement of claim to include an alleged oral contract between the parties made on 23rd October, 1974. Counsel for the Respondent opposed this application on the ground that at the close of the Appellant's case at the trial the attention of the Appellant was directed to this evidence and such an amendment was not sought. I would refuse such an application. Counsel had ample opportunity at the trial stage of seeking such an amendment. Instead, he pursued and obtained the alternative amendment shown at p.7 of the record. It is clear also that this Court would not have had before it all the facts bearing upon the new contention as would have been the case if the amendment had arisen at the trial. Evidence could have been adduced there which could have prevented the new contention from succeeding.

What falls to be considered therefore is whether or not on the pleadings as they now stand and on the facts as found by the trial judge up to the 14th October, 1974, there could be said to be an enforceable contract between the parties.

Counsel for the Appellant argued grounds 1, 2 and 3 together. He contended that, having found the facts as

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indicated in the judgment, the trial judge should have logically gone on to find that a valid contract of sale was concluded; that the parties intended to create legal relationships, and that they considered themselves bound. He submitted that the essential ingredients are t he subject matter, the amount of consideration, and the parties being ad idem, and that the court if satisfied of this can imply terms into a contract. He cited, among others, the case of Foley v. Classique Coaches Ltd., 1934, K.B.,1.

On ground (4) he agrued that the finding of the trial judge at P. 26 of t he record was contradictory, and on ground (5) he submitted that the amount paid down should not be refunded on the facts and circumstances as found by the trial judge.

Counsel for the Respondent referred to t he findings of fact by the trial judge. He contended that it was a material term to a contract how the remainder of the purchase money was to be paid if on the face of the contract it was clear that the purchase money was not to be paid at once. He argued that the mortgage was not just to secure the price, but that what was to be settled was how the remainder was to be paid. He submitted that on the facts as found one cannot say that the parties came to any binding agreement.

The older authorities in cases of contracts for t he sale of land, as opposed to contracts for the sale of goods, offer very little assistance in matters of this nature. There

/are, ...

are, however, two relatively recent authorities which are of some assistance. They are, (i) Kings Motors (Oxford) Ltd v Lax and Another, 1970, 1 W.L.R., 426, and (ii) Lee-Parker and Another v Izzet and Others (No.2), 1972, 1 W.L.R., 775.

In the former case, a lease granted by the Defendants to the Plaintiffs of a garage filling station and adjoining premises contained an option for the grant of a further term at such rent as might be agreed between the parties. The Plaintiffs purported to exercise the option but were served by the defendants with a notice to terminate. The plaintiffs brought an action seeking, inter alia, a declaration that the notice to terminate was null and void. On the question whether the option was enforceable it was held that in the absence of an arbitration clause or some supplementary agreement fixing the rent to be paid, the option was void for uncertainty and could not be enforced against the defendants, and, accordingly, the plaintiffs action failed. In this case Foley v Classique Coaches Ltd was distinguished. In Foley's case there was at the end of the agreement an arbitration clause, and the Court of Appeal was able on the facts to hold that if any dispute arose about what was a reasonable price it was to be determined by arbitration.

In the Lee-Parker case, there was a special condition "J" in a contract for the sale of land which provided that the sale was "subject to the purchaser obtaining a satisfactory mortgage." It was held that the special condition "J"

/contained.....

contained in the written agreement was a condition precedent to the existence of a binding contract for sale of the property, and that that condition precedent was void for uncertainty, the concept of a satisfactory mortgage being too indefinite for the court to give it practical meaning, and that its uncertainty avoided the whole contract.

In the instant case the words "in accordance with a deed of mortgage to be given later" in my view create a condition precedent to the existence of a binding contract between the parties. The words in my opinion made the vendor's obligation to sell and the purchaser's obligation to buy dependant on the terms of the proposed deed of mortgage being settled, and until that condition was fulfilled there could be no binding contract of sale. It seems to me that too much is at large, including matters like the rate of interest, and the amount of the mortgage instalments, and I do not see how the court would be able to step in and assist. I agree moreover with the Judge's finding that no enforceable contract was ever concluded between the parties because the expression "in accordance with a deed of mortgage to be given later" is too indefinite to be given any practical meaning by the court.

In regard to the Respondent's counterclaim, I would agree with the Judge's order that there should be judgment entered for the Respondent for $50,000.00, being the deposit made by him to the Appellant on account of the purchase price.

/Accordingly,.....

Accordingly, for the reasons given I would sustain the judgment and dismiss the appeal.

(N.A. Peterkin)
JUSTICE OF APPEAL

I agree.

(J. D.B. Renwick)
(Ag.) JUSTICE OF APPEAL

I also agree.

(E.L. St. Bernard)
(Ag.)CHIEF JUSTICE