

DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1981

BETWEEN:

CLEMENT LEWIS THOMAS - Defendant/Appellant  
and  
ANGE FELIX OLIVACCE - Plaintiff/Respondent

Before: The Hon. Sir Neville Peterkin - Chief Justice  
The Honourable Mr. Justice Berridge  
The Honourable Mr. Justice Robotham

Appearances: H. Dyer for Defendant/Appellant  
J. Armour for Plaintiff/Respondent,  
J. Harris with him.

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1982; September 29

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JUDGMENT

PETERKIN, C.J.

This is an appeal from the decision of Hewlett, J. entering judgment in favour of the Plaintiff/Respondent, and granting to him an order in which it was adjudged that there be specific performance of an agreement between the Plaintiff/Respondent and the Defendant/Appellant in respect of the sale of Morne Patate Estate comprising 122 acres and 12 perches and situate at Soufriere in the Parish of St. Mark.

The grounds of appeal are:

1. a. The judgement's finding that the alleged contract would appear to be both valid and enforceable at law which would entitle the plaintiff to damages could not be based on the evidence and is contradictory according to his statement at paragraph 3 above.
- b. That the learned trial judge's finding that there was an oral agreement is contrary to law and contradictory to his statement that the principle of law contained in the Statute of Frauds is that the note or memorandum evidencing a sale or other disposition of land must contain all the material terms of the alleged contract."
- 2 The trial judge was wrong in law and/or misdirected himself on the evidence in not holding that even if there was a contract, such contract could not stand in law since the evidence clearly showed that it was unconscionable bargain."

/The.....

The facts and circumstances are as follows:-

The estate had been devastated by hurricane "David" in 1979 and had not been restored. It was unprofitable and was bringing in no income. In December, 1980, the Defendant/Appellant approached the Plaintiff/Respondent and offered to lease the estate to him. He accepted and they agreed on \$1,000.00 per annum as the rent. The Plaintiff/Respondent accordingly entered into possession and began clearing and planting.

Some six weeks later, in February, 1981, the Defendant/Appellant again approached the Plaintiff/Respondent. This time he offered to sell him the estate. He indicated that he wanted \$4000 urgently to pay his passage to the U.K. The Plaintiff/Respondent explained that he could only accept the offer if he was given time to pay. This was acceptable to the Defendant/Appellant, and they agreed on a price of \$25,000.00. In furtherance of this agreement they consulted a Solicitor, Mrs. Dyer, in Roseau in order to complete the transaction. She required to see the document of title. This the parties collected from Barclays Bank who had been holding it by way of an equitable mortgage for a loan to the Defendant/Appellant of \$3,244.23 which was still outstanding, and which was settled by the Plaintiff/Respondent with money which he borrowed from one Vera Emanuel. They both returned to Mrs. Dyer's Chambers where the Plaintiff/Respondent accounted for various amounts of money advanced and paid to the use of the Defendant/Appellant along with the passage money. This totalled \$8,000.00, and a receipt for this amount was prepared by the Solicitor and signed by the Defendant/Appellant.

It reads:

"4th February, 1981,

"Received from Ange Felix Olivacce the sum of eight thousand (\$8,000.00) in respect of part payment for a portion of land part of the "Morne Patate Estate situate in the Parish of St. Mark containing 122 acres 0 Roods 12 perches and bounded as follows:- Northerly by Beaupre land of the Heirs of Ange Felix Olivacce and Olive Maria Lee, Easterly by land of Mrs. Eugenia De Freitas, Westerly by lands of Mde. Mc Field Ferriere; Southerly by Morne Rouge and

/Crabiere.....

Crabiere Estates and land of the heirs of Ange  
 Felix Olivacee known as Mde. Fleurie from  
 \$25,000.00 Balance \$17,000.00

Clement Lewis Thomas"

In short, it described the land, set out the price, down payment, and balance due, but was silent regarding the payment of the balance. The Plaintiff/Respondent's evidence was that there was an oral agreement as to this, and that the agreement was that the balance of the purchase price was to be paid within 5 years by monthly instalments of \$285.00 commencing 1st March, 1981. Further to this, that the Solicitor undertook to prepare a document which was to contain the precise terms of their agreement relating to the payment of the balance of the purchase price. He stated that they were required to return in two days time to the Solicitor when the document would be ready for the signature of the Defendant/Appellant. This was denied by Mrs. Dyer at the trial, but the evidence of the Defendant/Appellant in cross-examination supports the trial Judge's finding. It reads:

"Mrs. Dyer had to draft the agreement for him to pay within 5 years. It was proposed that the first payment was to be made on the 1st March, 1981. It was proposed that she would collect the money, \$285.00 per month. We did not agree that the Plaintiff was to pay the balance when I signed the memo of transfer."

The learned trial Judge accepted the evidence of the Plaintiff/Respondent and went on to find that there was a concluded agreement embracing all the terms mentioned, and that it was not an agreement subject to formal contract or to any condition precedent. I can see no reason whatever to differ. In my opinion there was ample evidence on which to base such a finding.

He then went on to deal with the issue of the Statute of Frauds. He pointed out that the material terms of the alleged contract relating to the payment of the balance of \$17,000.00 by monthly

/instalments.....

instalments were not mentioned in the receipt exhibited and that there was no other document available that, if read together with it, would satisfy that requirement. He therefore concluded that the contract was unenforceable at law under the Statute of Frauds as there was no note or memorandum relating to the payment of the balance. Again, I would agree. This aspect appears to have been conceded as there has been no argument to the contrary by either Counsel in relation to it.

In turning to the issue as to whether or not there may be said to have been part performance on the part of the Plaintiff, he adumbrated three points which he said appeared to him to be relevant. This aspect of the judgment reads:

"The plaintiff having sued for specific performance which is an equitable remedy, it behoves me to look at the position in equity on the facts of this case. And the basic principle is that if the plaintiff has partly carried out the contract on his side, it would be fraudulent of the defendant not to keep his promise. So has there been part performance by the plaintiff? There are three points that appear to me to be relevant. Firstly, the plaintiff made a part payment over and above the agreed rent on the lease which is referable to the sale, (*Stedman v Stedman* (1974) 2 AER 977. Secondly, the plaintiff remained in possession after he acquired the vendor's reversion in the lease when the parties concluded the agreement of sale and he obtained the equitable interest in the property. And thirdly, the plaintiff carried out work on the property making improvements thereto whereby he would be able to meet his monthly payments. These, to my mind, establish unequivocally that the plaintiff has partly performed the contract, the terms and conditions of which are certain and known to the parties although not evidenced in writing."

On ground (1) learned Counsel submitted that there was not enough evidence to allow the Judge to conclude that there was part performance. He argued that the payment of rent, by itself, was not enough, and that there was no real evidence of improvements to the land which, even so he contended, was Plaintiff/Respondent's responsibility under the lease. He cited:

- (1) *Steadman v Steadman*, 1974 2 ALL.E.R., 977.
- (2) *Chaproniere v Lambert*, 1917 2 Ch. Div., 356, and
- (3) *Wood v Abrey*, 1880 E.R., 560.

/Learned.....

Learned Counsel for the Plaintiff/Respondent on the other hand pointed to a number of acts in the evidence which, he argued, were in addition to the acts found by the trial Judge, and he submitted that the finding by him of part performance was justified. He referred to Chitty on Contracts, 24th Edition, para 254 and, to *Steadman v Steadman* already cited.

The sole question in this appeal as I see it is whether the acts as found by the trial Judge amount to sufficient part performance to render the contract enforceable.

In dealing with the doctrine of part performance, the learned author of Chitty on Contracts at para 254 of the 24th Edition states:

"In his work on Specific Performance Fry L.J. further stated that the acts of part performance must be referable to "no other title" than the alleged contract; but this view "has long been exploded." If the obvious explanation of the acts is that they were done with reference to a contract, the doctrine of part performance applies although some ingenious alternative explanation for them can be suggested. It is only necessary that the acts relied on should, on the balance of probabilities, point to some contract, and either show the nature of or be consistent with the oral contract alleged."

Lord Reid puts it in much the same way in his judgment in the *Steadman* case cited at page 982:

"In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shewn to be more probable, than not."

In my opinion, taking the whole circumstances of the instant case into account, the acts relied on suffice to constitute part performance, and the trial Judge was right in concluding that there was sufficient part performance in this case to render the contract enforceable.

I do not think that there is any merit whatsoever in the second ground of appeal. Indeed, this became obvious when it was pointed out

/to Counsel....

to Counsel that the second sale to the witness Seignoret, according to the evidence of the Defendant/Appellant himself, was at the same price as that previously agreed with the Plaintiff/Respondent.

On the issue of damages, the authorities are abundantly clear that damages cannot adequately compensate a party in the circumstances of the instant case.

Accordingly, for the reasons stated I would dismiss this appeal and affirm the judgment of the learned trial Judge. The Plaintiff/Respondent should have his costs of the appeal to be taxed.

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N.A. PETERKIN,  
Chief Justice

I agree.

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N.A. BERRIDGE,  
Justice of Appeal

I also agree.

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I.L. ROBOTHAM,  
Justice of Appeal