SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

SUIT NO: 439 OF 1993

Between:

1. **GEORGE OCTAVE**
2. **IVENIA OCTAVE**

PLAINTIFFS

AND

FRANCIS MAURICE

DEFENDANT

AND

SUIT NO: 92 OF 1995

Between:

1. **GEORGE OCTAVE**
2. **IVENIA OCTAVE**

PLAINTIFFS

AND

FRANCIS MAURICE

DEFENDANT

Mrs. Claire M. L. Green-Malaykhan for the Plaintiffs/Applicants

Mr. Martinus J. Francois for the Defendant/Respondent

1997: OCTOBER 15
AND 24

JUDGEMENT

FARARA J (Ag) In Chambers

These two Suits were consolidated for trial by Order made 21st February, 1996 by d'Auvergne J.

In Suit 439 of 1993 filed 15th July, 1993 the Plaintiffs seek, inter alia, an order for improbation of a Deed of Sale made 10th November, 1989 between the First Plaintiff and the Defendant (registered 15th March, 1993 No. 107412) made pursuant to a written agreement dated 25th July, 1989 whereby the First Plaintiff agreed to convey to the Defendant certain lands comprising 2.44 hectares (6 acres) at Bisee in the Quarter of Castries, as consideration for the sum of $80,000.00 (**Exhibits CO3 and CO4**); and for an injunction restraining the Defendant from dismembering selling or otherwise dealing with the said land until trial or further order. The Plaintiffs contend that the said agreement is void ab initio, inter alia, because of the First Plaintiff's lack of capacity because of inpairment of memory at the time. This suit is defended and a Request for Hearing was filed by the Plaintiff's Solicitors on 6th April, 1994, but a trial has yet to be fixed.

Having received the Deed of Sale, the Defendant caused one (1) acre of the said land at Bisee to be surveyed and sub-divided into seven (7) lots for sale to repay debts incurred by him in the construction of the Plaintiffs' home at Maynard Hill. These seven (7) lots were then registered as Block 1049B Parcels 266 to 272 inclusive; and the remaining 6 acres as Parcel 273.

The Plaintiffs, on 22nd July 1993, caused a caution to be entered on the Land Registers relating to Parcels 266 to 273 thereby preventing the Defendant from selling or otherwise dealing

therewith.

The Defendant's application made 7th June, 1994 for an Order for the removal of the caution was, on 20th July, 1994 after an inter partes hearing, granted in part by d'Auvergne J. The Learned Judge ordered the caution removal from Parcels 266 to 272 inclusive, representing the one (1) acre of land previously sub-divided by the Defendant, thus enabling the Defendant to sell those parcels. The caution was maintained over the balance of the land, Parcel 273, until the determination of Suit No. 439 of 1993.

However, the Solicitors for the Defendant did not have the said order perfected as required by Order 42 Rule 5 of the Rules of the Supreme Court 1970, and an application filed 7th January, 1997 to extend the time to file the said order was refused by d'Auvergne J. in a written judgement delivered 22nd April, 1997.

Suit No. 92 of 1995 was commenced on 1st February, 1995. By their Statement of Claim, as amended, the Plaintiffs' claim against the Defendant, as architect and builder, inter alia, damages (including special damages of $48,858.39) for breach of an agreement for the design and construction of the Plaintiffs' home at Maynard Hill, and rescission of the sale of the lands at Bisee by the First Plaintiff to the Defendant effected by the Deed of Sale sought to be improbated in Suit No. 439 of 1993. This second action (Suit 92 of 1995) is ripe for hearing and a

Request for Hearing was filed by the Plaintiffs' Solicitors on 13th February, 1995.

The Plaintiffs by summons filed 14th March, 1997 in the consolidated action, seeks an injunction restraining the Defendant from selling or otherwise disposing or dealing with the land at Bisee registered as Block 1049B Parcels 266 to 273 inclusive, until the determination of the consolidated actions. However, the affidavit evidence, both in support of and in opposition to the said application, revealed that Parcels 267, 268, 269 and 271 were sold by the Defendant and so only Parcels 266, 270 and 272 of the one acre portion remains unsold; and, also, that Parcel 273 was sub-divided into Parcels 417, 418 and 419. How this latter sub-division and reparcelation, which would necessitate the making of new entries, was effected in light of the caution and the Order of the Court on 20th July, 1994 for its continued maintenance, is rather bewildering.

The Plaintiffs' Summons filed 14th March, 1997 is supported by the Affidavit of Carlyle Octave (the son of the Plaintiff) filed 30th May, 1997 with some six (6) exhibits, including the Report of Cromwell R. Goodridge, Chattered Engineer, dated 26th September, 1994 (**C.O.1**) addressing the damage to the Plaintiffs' home constructed by the Defendant and the methods for remedying said defects. Also exhibited is an estimate of the remedial costs by Charlemagne Construction Ltd. dated December 1, 1994 for $46,258.39 (**C.O.2**); a copy of the

Agreement dated 25th July, 1989 (**C.O.3**) and the Deed of Sale dated 10th November, 1989 (**C.O.4**).

In opposing the Plaintiffs' application for an injunction, the Defendant filed some eight (8) affidavits, viz, the affidavit of Allan Hiployte, Alvin Daniel, Clement James, Joseph Remy and the Defendant Francis Maurice with some seventeen (17) exhibits, including a report of Oliver Scott dated 10th March, 1995 concerning the damage to the Plaintiff's home and the causes thereof, and an estimate of $6,000.00 cost of remedial work.

In reply, the Plaintiffs filed 14th October, 1997 an Affidavit of Cromwell Goodridge, a Chartered Engineer, and an affidavit of Leonora Octave, the daughter of the Plaintiff.

In brief, the Plaintiffs assert in Suit 92 of 1995 that the defects to their home were caused by the negligence and breach of contract of the Defendant, and in Suit 439 of 1993, they assert that the agreement, which provided for the sale of the land at Bisee by the First Plaintiff to the Defendant, was executed when the First Plaintiff was not of full mental capacity, ought to be improbated and the Deed of Sale declared null and void.

The Defendant's case in Suit 92 of 1995 is that all defects and damage to the Plaintiffs' home, were caused by the excavation and undermining of a foundation column at the north eastern

corner of the building, and the unabated intrusion of water into the underlying soil strata below the foundation. In Suit 439 of 1993 the Defendant asserts that the agreement and Deed of Sale were executed by the First Plaintiff when he was of full mental capacity, and the conveyance of the land at Bisee was in part payment of monies expended and costs incurred by the Defendant in the construction of the Plaintiff's house at Maynard Hill.

Learned Counsel for the Plaintiffs submitted that the causes of action in the respective Suits are different, Suit 92 of 1995 was filed after the decision of d'Auvergne J. on 20th July, 1994 in Suit 439 of 1993 ordering the withdrawal of the caution in respect of parcels 266 to 272 inclusive and, accordingly, an injunction ought to be granted to restrain the Defendant from selling or disposing of the remaining three Parcels of land based principally on the matters pleaded in Suit 92 of 1995.

Counsel for the Plaintiffs referring to the principles set out by Lord Diplock in **American Cynamid Co. v. Ethicon Ltd. (1975) 1AE 504**, further submitted -

(1) there was a serious issue to be tried in both Suits, viz, whether the First Plaintiff had the capacity to validly execute the Agreement and Deed of Sale, and whether the serious defects in the Plaintiffs' house were caused by the negligence of the Defendant;

(2) land, being a peculiar entity and having its own aesthetic value, damages would not be an adequate remedy for the Plaintiffs and the Defendant by his own affidavit, (where he addressed his current indebtedness) is unlikely to be financially able to pay damages to the Plaintiffs if they were to succeed after a trial; and

(3) if the Court is left in doubt as to whether damages would be an adequate remedy for the Plaintiffs, the Court must then go on to consider the balance of convenience, which she submitted weighs with the Plaintiffs being granted the interlocutory injunctive relief sought. If the injunction was not granted, Counsel continued, and the Defendant sold the lands and the Plaintiffs were successful at trial, they would be unable to recover the land from third parties and would be left with a defective house. On the contrary, if the injunction was granted and the Defendant succeeded at trial, he would simply retain the lands and would have suffered little or no damage as a consequence of the injunction having been imposed. In other words, while there is a risk of damage to the Defendant if the injunction was granted, there is a certainty of damage to the Plaintiffs if the injunction is not granted, Learned Counsel submitted.

Learned Counsel for the Defendant submitted that there were two separate contracts between the parties namely, the

contract (apparently oral) for the construction of the Plaintiffs' home, and a second contract for the sale of the land at Bisee to the Defendant in partial consideration of the debts incurred by the Defendant in the construction of the said home. Of the 6 acres of land conveyed to the Defendant, he caused one (1) acre to be sub-divided for the sale of lots to pay of the debts and expenses incurred by him in financing the construction of the Plaintiffs' home, which they were unable to do. The remaining 5 acres of land are still under caution and available to be re-conveyed to the First Plaintiff or to satisfy any money judgement obtained by the Plaintiffs if successful at the trial.

Learned Counsel for the Defendant further submitted that, in Suit 92 of 1995, the Plaintiffs' claim for rescission of the agreement relating to the sale of the land, on the basis of a total failure of consideration, cannot succeed as any alleged failure by the Defendant to carry-out his side of the bargain cannot, on the Plaintiffs' documentary evidence, amount to a substantial deprivation of their benefit under the Agreement, as the Plaintiffs' expert's assessment of the remedial costs at $46,258.39 (**Exhibit C.O.2**) contradicts any such plea. Learned Counsel cited in support of this submission, **George Mitchell Ltd. v. Finney Lock Seeds (1983) 2AC 803**, however this decision is not on point. Accordingly, the Plaintiff's only remedy lies in damages and their case for rescission of the agreement cannot succeed, and is certainly not a strong one, Counsel surmised.

On the relevant authorities including **American Cyanamid Co. v. Ethicon (1995) 1AER 505 and Series 5 Software Ltd. v. Clarke (1996) 1AER 853** a Court, though not precluded from considering the relative strength of each party's case when deciding whether to grant an application for interlocutory relief, should rarely attempt to resolve difficult issues of fact or law. Any view of the strength of the parties' cases should be reached only where it is apparent from the affidavit evidence and any exhibited contemporary documents that one party's case is much stronger than the other.

I am of the view that in Suit 92 of 1995 it would be difficult at this stage, upon the affidavit and documentary evidence before me, to form some clear view of the relative strength of each party's case in so far as it relates to blameworthiness for the damage and defects to the Plaintiffs' home and, therefore, there is a serious issue for trial on that aspect. I am, however, satisfied that the Plaintiffs' case for rescission of the agreement for the sale of land at Bisee to the Defendant, based on a total failure of consideration, is a weak one and unlikely to succeed at the trial. The Plaintiffs' claim for $48,858.39 cost of repairs is indicative of a partial and not a total failure of consideration, and the Plaintiffs are restricted to a claim for damages for breach of contract or negligence. **Halsbury Law of England 4th Ed. Vol. 9 Para. 667**.

I am also satisfied that damages will be an adequate remedy for the Plaintiffs if they are successful at a trial on the issue of defects to their home. In this regard, there are conflicting estimates exhibited, the Plaintiffs' expert putting the remedial costs in December, 1994 at $43,258.39 and the Defendant's experts putting it at $6,000.00 and $8,500.00 respectively.

I am not satisfied that the Defendant will be unable to meet any award of damages in favour of the Plaintiffs, especially in light of my conclusions with regard to the lack of strength of the Plaintiffs' case for rescission of the agreement on the basis of a total failure of consideration.

In assessing the balance of convenience, I have taken into account, in addition to the matters already alluded to, the decision of d'Auvergne J. on 20th July, 1994 in Suit 439 of 1993, after an inter partes hearing, ordering the withdrawal of the caution from the one (1) acre and the maintenance of the caution on the remaining five (5) acres. From this decision there has been no appeal.

I am satisfied that the balance of convenience lies in not granting the injunction sought in respect of the three unsold lots out of the seven lot sub-division of the one acre site. I also hold that the present status quo ought to be maintained, whereby 5/6ths of the land conveyed by the Deed of Sale, is kept unsold pending the determination of the consolidated

actions, and 1/6th is available for sale so that the Defendant can liquidate his indebtedness (including a bank loan) incurred in financing, in part, the construction of the Plaintiffs' home.

The caution having been maintained on the remainder of the land, provides adequate protection for the Plaintiffs against any sale or disposal thereof by the Defendant and, accordingly, any injunction to that end would be superfluous.

The Plaintiffs' application by Summons filed 14th March 1997 is accordingly dismissed with costs to the Defendant to be taxed unless otherwise agreed.

I agree with Counsel for both parties that an early trial date should be fixed for these consolidated actions.

GERARD ST. C. FARARA, Q.C.

HIGH COURT JUDGE