SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO: 10 OF 1997

BETWEEN:

1. DOUGLAS BRISBANE

2. MABLE BRISBANE

Appellants

and

1. LEONARD JOYLES

2. ROSETTA JOYLES

3. CYRALENE GALE

Respondents

Before: The Hon. Mr. C. M. Dennis Byron — Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal

Appearances:
Mr. Othneil Sylvester Q.C. and Ms Nicole Sylvester for the appellants
Mr. Samuel Commissiong for the respondents

1997: December 11;
1998: January 12.

JUDGMENT

BYRON C.J [Ag.]

This is an appeal against the judgment of Mitchell J. delivered on 30th June 1997, in which he dismissed two cases brought by the appellants against the respondents, and which had been consolidated with each other. In the first case, the appellants claimed against the first and second respondents for trespass to land at Friendship Bay, Bequia. In the second case the appellants claimed against the third

respondent for declarations of ownership of the land. Both cases hinged on the same legal issues because the first and second respondents admitted entering the land, but claimed to have done so as the caretakers of the third respondent who they alleged was the lawful owner.

The appellant submitted that there were three questions for determination on appeal.

[1] What was the legal effect of the fact that the appellant had paid the purchase price in full?

[2] What was the effect of the appellants' entry into possession after payment?

[3] Was the third respondent a bona fide purchaser for value of the legal estate without notice of the appellants' interest?

The Background Facts

Both the Brisbanes and the Gales owned land at Friendship Bay in Bequia. In 1988 they were among those who were interested in purchasing the parcel of land which was owned by a U.S. citizen, Mr. de Souze. Mr. Reed, a financial consultant, President of the Friendship Bay Homeowners Association, was contacted. As a result thereof and of further initiatives he eventually became the central figure in the conflict that resulted. In various communications he indicated that Mr. de Souze would sell the land on a "first come first served" basis for US$15,000.00 paid in US funds. The relevant facts can be most briefly and succinctly stated by quoting from a letter dated 22nd June, 1988 written by Mr. Reed to Mr. Brisbane.

> "As for your interest in purchasing Lots 4 and 5 adjoining your house at Friendship, I must advise you again that there is another party who has shown serious interest in the property. As you know [and as I told Paddy Punnett], sent out four identical letters on the same day, [one to Lavinia] in order not to favor any one person. It is still a 'first come first served' situation in that the first buyer who delivers to me a legal

conveyance for Mr. de Souze to sign together with payment in U.S. funds will get the property. I trust that I will hear from you in this regard in the near future."

At the trial Mr. Brisbane denied receiving this letter. The learned trial Judge, however, concluded:

> "I am satisfied that Mr. Reed put in writing not only to Mr. Brisbane but also to Mrs. Gunn as agent for Mr. Brisbane and in telephone conversations with Mr. Brisbane."

In my view there were cogent reasons for that conclusion reached by the learned trial Judge and I accept it completely.

The appellant sent the full purchase price to Mr. Reed, who received it on 5th July 1988. The legal conveyance was not sent on that date: 19th August. Mr. Reed wrote the appellant by letter dated 6th July 1988 and it contained the following:

> "I will hold such money orders until such time as I have received from you or Mr. Lane the conveyance of title to Lots 4 and 5 of the Agard tract at Friendship Bay, Bequia. Upon receipt of such conveyance, I shall proceed to Concord Massachusetts to obtain Mr. de Souze's notarized signature on such conveyance and will then make delivery of the money orders to him and take possession of the notarized conveyance."

After making the payment the appellant went into possession of the land.

On the other hand the respondent sent most of the purchase price and conveyance to Mr. Reed by Federal Express. But it was only on 10th August 1988 the respondent completed payment of the purchase price. On that day, in the presence of Mrs. Gale, Mr. Reed handed the money to Mr. de Souze, and supervised the execution and delivery of the Deed of Conveyance. This was in due course registered and the respondents went into possession.

On the same day Mr. Reed wrote the appellants informing them that the closing had taken place that day and making arrangements to return

the money he was holding. On 19th August 1988 Mr. Reed received the Deed from Mr. Layne, the appellants' solicitor, which had been sent the day before by Federal Express.

The Law

The learned trial Judge concluded that:

> "Applying the principle in **Harvey v Facey**, this is a straightforward case of the non existence of a contract between Mr. de Souze and the Brisbanes."

The relevant legal principle is the elementary and fundamental one of offer and acceptance. **Harvey v Facey** [1983] A.C.522 was a Privy Counsel case from Jamaica, which drew a distinction between an offer and an acceptance. In that case the intended purchaser sent a telegram in the following words:

> "Will you sell us Bumper Hall Pen? Telegraph lowest price-answer paid", the reply was "Lowest price for Bumper Hall Pen ,900." The intended purchasers replied "We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession."

Their Lordships rejected the contention that a contract had been concluded on the ground that the vendor had not made an offer of sale, which could be accepted. It was the purchaser who had offered to buy and that had not been accepted by the vendor. The theoretical difference between the conduct involved and an offer was described by Lord Morris thus at page 556 Their Lordships are of the opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry. The facts in the instant case are quite different. The vendor's intention to sell for the price he fixed on a "first come first served" basis was clearly and unequivocally set out in the correspondence. He had completed his

share in the formation of the contract by declaring his readiness to undertake the sale upon very certain conditions, leaving the offerree the option of acceptance or refusal.

The real issue in this case therefore is what constitutes acceptance. The appellant contends that payment of the purchase price constituted acceptance. The acceptance of an offer, may be made by words, in writing or by conduct. It is essential, however, that the acceptance corresponds with the terms of the offer, or there can be no contract. The principle is expressed in Chitty on Contract [25th edition] at paragraph 76 as follows:

> "Prescribed Mode of Acceptance -
> Method must generally be complied with. An offer which requires the acceptance to be expressed or communicated in a certain way can generally be accepted only in that way. Thus if the offeror asks for the acceptance to be sent to a particular place one sent elsewhere will not bind him; nor will he be bound by an oral acceptance if he has asked for it to be expressed in writing. This rule is particularly strict where the offer is contained in an option."

The arrangements stipulated by Mr. Reed were that the vendor would accept the offer of the first person to present the purchase price and a Deed of Conveyance for him to sign. Payment of the purchase price by itself did not correspond with the terms of the offer. Counsel for the appellant contended that the sale was completed when Mr. Reed received the purchase price as agent for the vendor, because the issue of the title was something for the benefit of the purchaser, which he was entitled to waive. The facts however indicate that this argument is unsustainable.

The offer was made in the context of the vendor giving equal opportunity to prospective purchasers, and constituted a promise to sell the "first come." The method of determining the "first come" was clearly and unambiguously defined. The presentation of the Deed for the

vendor's signature was an integral part of the process. It was not simply a method of conferring title to the purchaser, for the benefit of the purchaser. It was a rule to enable the vendor to determine who was the "first come". It could not be waived unilaterally by the appellant. An analogy, which to my mind is appropriate, is to be found in the egg and spoon race. A competitor who drops his egg and crosses the line before the other competitors has not won the race. Similarly the appellant was not the "first come" despite making his payment first because, like the egg and spoon competitor who had dropped his egg, the payment was not accompanied with the Deed of Conveyance, and the third respondent was able to be the first to make payment in US funds and present his Deed for signature.

On my reading of the facts, Mr. Reed's conduct was entirely consistent with the correspondence. The appellants' payment on 5th July 1988 was not acceptance of the offer because it was not accompanied by the Deed for signature, as had been stipulated. Mr. Reed's receipt of the money and his letter of 6th July 1988 was unambiguous. l do not read any variation of the terms by that conduct. There could be no implication that the requirement to be first had been removed or waived.

In my view the appellant simply failed to meet the terms on which the sale was stated to be conducted. He did not satisfy the basic condition of being the "first come". As a result he was not a party to a concluded agreement for sale. In my view the payment under those circumstances did not constitute performance of an agreement to purchase, and the appellant did not acquire any interest in the land. As l see it the vendor stuck to his bargain. The appellant failed to be the first come and was not entitled to purchase the property.

It is obvious that the entry into possession by the appellant was not in pursuance of any legal or equitable rights, and could not create any

interest that had been established by contract.

The issues on the third question cannot arise once the appellant does not have an equitable interest in the land. It is therefore unnecessary to consider them.

The Conclusion

I would therefore dismiss the appeal with costs.

DENNIS BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT REDHEAD
Justice of Appeal