SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APP. NO.14 OF 1997

BETWEEN:

YAMBOU DEVELOPMENT COMPANY LIMITED
Appellant/Plaintiff

and

SALLY HELENA KAUSER
as Executrix of the will of HELEN HADLEY, Deceased
Respondent/Defendant

Before:

The Hon. Mr. Justice Satrohan Singh	Justice of Appeal
The Hon. Mr. Justice Albert Redhead	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. Othneil Sylvester Q.C., for the Appellant,
Miss Nicole Sylvester with him
Mr. Bertram Commissiong Q.C. for the Respondent
Miss M.E. Commissiong with him

1998: March 24, 25;
April 20.

JUDGMENT

REDHEAD, J.A.

Helen Hadley owned a property at Villa, St. Vincent. The property was valued at $400,000.00. She placed the property on the market for sale in the hands of Robert Connell, a real estate agent.

In or about November, l981 Lesline Bess and Norton Bess became interested in purchasing the property. As a result Robert Connell, Lesline and Norton Bess went to the Chambers of Mr. Samuel Commissiong, solicitor, where they had a conversation with Mr. Commissiong concerning the sale of the property. The Besses were told that they were required to

make a deposit of $23,000.00 and to pay the balance of the purchase price of $377,000.00 in one month.

In December 1981, the Besses returned to the Chambers of Mr. Commissiong with Mr. Robert Connell and reported to Mr. Commissiong that they were unable to raise the money to complete the purchase. They requested an extension of time in which to complete the purchase. They were granted an extension of two months.

In January 1982, the Besses again, in the Company of Robert Connell, went to the Chambers of Mr. Commissiong who testified that the Besses informed him that they had agreed with Robert Connell that they would make an additional deposit of $107,000.00 on the property making a total deposit of $130,000.00 and that Helen Hadley had agreed to take a mortgage for the outstanding purchase price at the rate of 12% per annum or 1% per month.

Mr. Commissiong testified that he reduced the figures in writing, prepared a draft letter recording the information about the mortgage. A copy of an unsigned letter was given to Robert Connell for the Besses and an unsigned copy was also sent to Mr. Steven Kauser, financial adviser to Helen Hadley. Mr. Commissiong testified that the letter was being sent unsigned for the Besses to review and to confirm whether it was in keeping with their instructions.

According to Mr. Commissiong on Saturday 30th January he had drafted and given the letter to Robert Connell to distribute.

On Monday 1st February Mr. Robert Connell, Mr. Bess and Mrs. Bess returned to the Chambers of Mr. Commissiong. The Besses advised Mr. Commissiong that the letter reflected what they had agreed. Mr. Commissiong then gave them a signed copy of the letter.

On 2nd February, l982 the Besses, in the company of Robert Connell went to the Chambers of Mr. Commissiong and advised him that the $107,000.00 had been deposited to the account of Helen Hadley at

Barclays Bank and produced a receipt to the effect dated 2nd February, l982. Mrs. Bess then requested an Abstract of Title but did not get one.

On 3rd February, 1982 the Besses and Mr. Connell again went back to the Chambers of Mr. Commissiong. He told them that he had a problem with the letter of 30th January, l982 in that the interest in the mortgage figures had been wrongly calculated.

Mr. Commissiong testified that the Besses ignored his statement about the interest and insisted on getting an Abstract of Title.

On 9th March, l982 Mr. Samuel Commissiong wrote to Mr. Othneil Sylvester, Q.C., Solicitor for Mr. Norton Bess and Lesline Bess, inter alia, as follows:

> "…….On the last day of the month your clients indicated that they could not raise enough money to complete the transaction, and, in the normal way, requested a month's extension. Mr. Connell acceded to their request even though it was agreed that time was of the essence of the contract.
>
> On the expiration of that said month, your clients again failed to raise the remaining $377,000.00 and once again requested a month's extension. Mr. Connell again acceded to their request, but made it clear that that extension was the last. Thus, far from trying to forfeit your clients' deposit of $130,000.00, you will see that Mr. Connell was trying to assist their efforts to purchase the property.
>
> At the time of the second extension, there was a compromise arrangement, when all other sources of finance had failed. Your clients had, in the course of earlier discussions with Mr. Connell, suggested that Helen Hadley should take back a first mortgage of $270,000.00 on the property after they had made a cash payment of $130,000.00.
>
> The only outstanding question was that of the rate of interest to be charged, and on that question Mr. Connell said that he had to take specific instructions from Helen Hadley to her financial adviser. He did in fact contact Mr. Steven J. Kauser in Dorval Quebec, Canada, by telephone and was told that [a] the mortgage should be for five [5] years; and [b] that interest would be charged at the rate of 1 per cent per month. In effect that was equivalent to 12 per centum per annum. The figure of $27,000.00 was mentioned as the monthly interest in the first year. But at the time of discussion, the quantum of interest was wrongly calculated but there was never any doubt as to the percentage charged of 12 per centum per annum.
>
> Helen Hadley feels that she has sufficiently accommodated your clients by the offer of a five year mortgage which she is not

prepared to extend. However, she is prepared to refund your clients' money in full if by March 15, l982 they are unwilling to accept the mortgage with its correct rate of interest, or cannot find alternative source of finance.
Yours faithfully

Samuel Commissiong".

On 12th March, l982 Mr. Sylvester in response to the above letter wrote:

"Dear Sir,

From your letter dated March 9th, l982 which was received yesterday [11th instant] your clients have clearly indicated that they do not intend to conclude the transaction in accordance with your letter dated 30th January l982 and my client would be guided accordingly.

I am herewith requesting that you return to me forthwith the documents which I have forwarded to you with my letter of 25th February l982.

Yours faithfully

Othneil Sylvester"

The documents, Deed of Conveyance, and Mortgage Deed were returned by letter to Mr. Sylvester dated 16th March, l982. A letter dated 24th March, l982 addressed to Mr. Sylvester enclosed a cheque for the down payment of $130,000.00. The latter explained to Mr. Sylvester that nothing,except a request for return of Mortgage Deed, was heard from his client since his, Mr. Commissiong's letter of the 9th March, l982 and since the completion date had passed he was returning his clients documents.

The Plaintiff then, on 30th February 1990 filed a writ of summons against the defendant seeking specific performance of the Contract of Sale, Damages in addititon to specific performance, a mandatory injunction to compel the defendant to convey the said property to the Plaintiff on the payment of balance of the purchase price.

The learned trial judge dismissed the plaintiff's claim. It now appeals to this court. In its appeal the Appellant seeks the following reliefs:

[i] A declaration that there was a binding Contract of Sale between the Appellant/Plaintiff's predecessor in title whereby they became the owners in equity of the property and the Respondent/Defendant became a trustee of the legal estate for them.

[ii] that there was a legal and valid assignment of the equitable interest in the villa property to the Appellant/Plaintiff.

[iii] Specific Performance of the Contract of Sale by the payment of the balance of the purchase price the purchase money and a vesting order whereby the villa property is vested in the Appellant/Plaintiff.

[iv] An inquiry as to damages.

[v] An order for costs to the Appellant/Plaintiff in this court and the court below.

In my opinion I find the reply to Mr. Commissiong's letter is strange, to say the least, because in my view I interpret Mr. Commissiong's letter to be saying quite clearly that there was an obvious mistake in the calculation of the interest rate which the Appellant should have recognised. Yet the Respondent through her Solicitor responded thus:

> "……From your letter dated March 9th l982……. your clients have indicated that they do not intend to conclude the transaction in accordance with your letter dated 30th January l982 and my clients would be guided accordingly.
> I am herewith requesting that you return to me forthwith documents which I have forwarded to you….."

The documents which were forwarded to the Respondent were the Deed of Conveyance and the Mortgage Deed.

It is quite obvious in my view that the Appellant recognised that there was a miscalculation of the rate of interest in the letter of 30th January, l982 in the Appellant's favour and to say that the Respondent was not willing to complete the contract in accordance with the terms of that letter shows quite clearly the parties were not at ad idem with the terms of the contract. To put it another way the Appellant was trying to

take unfair advantage of a mistake of the Respondent in the calculation of the interest rate. That in my view should dispose of this appeal because in my view there was never any binding agreement between the parties on the issue of price which was a fundamental term of the contract.

However there is another aspect of this appeal which I must address because a lot of emphasis was placed on it in arguments by both Counsel. That is, whether the mortgage agreement, together with the Contract of Sale was a one package deal. That is to say that the sale of the property together with the mortgage deal was so intertwined as to make it one package deal or so inseparable as to be part and parcel of the contract.

I am pursuaded by the argument of Learned Counsel for the Respondent that the mortgage deal was part and parcel of the whole transaction and cannot be separated from the Contract of Sale of the property. Because in my view it was agreed to by the vendor to satisfy the essence of time that being another fundamental term of contract. Also the vendor who was providing the balance of the money for the purchaser to complete the transaction. And if there was a miscalculation in the rate of interest, it meant that the vendor would not have obtained the full purchase price for the property.

In the Canadian case of Mc Master University v Wilchar Construction Ltd et al 22 DLR [3d] p9 the University put out a construction contract for tender. The defendant in making his bid omitted the first page of his bid thus omitting an intended escalation clause to cover the forceable higher costs of labour for the duration of the intended contract, was evidently acting under a mistake and the plaintifff did apparently realise the mistake therefore there could be no agreement or contract by the plaintiffs purported acceptance of the defendants mistaken bid.

At page 16 of the Judgment Thompson J. wrote:

> “There is not the slightest doubt in my mind that the real reason that the plaintiff purported to accept Wilchar’s tender was in the hope

> that it might be able to recover the penalty of the bid bond, knowing full well as early as October 3rd that Wilchar had made a mistake in its tender, and that it would refuse to enter into a contract unless the mistake were remedied. To me this is patently a case where the offeree, for its own advantage, snapped at the offeror's offer well knowing that the offer as made was made by mistake. Mr. Wheatherston concedes that Wilchar had, by mistake, not included the escalator clause as a term of its tender but he argues that this was not a mistake of a fundamental character such as to vitiate the tender and that it was a mistake merely in the motive or the reason for making the offer.
>
> I am not prepared to accede to such argument. In a construction contract the price is always a fundamental term. In fact it is the very quid pro quo of such a contract.
>
> In the instant case, for the Contractor the mistake meant a loss of thousand of dollars as contrasted with a profit in its absence; for the contractee it meant an advantage of some $16,000.00".

A similar view was expressed by Singleton J. in Hartog v Colin and Shields, 1939 3KB at 566 where the Defendants contracted to sell to the Plaintiff 30,000 Argentine hare skins but by alleged mistake they offered the goods at prices per pound instead of those prices per pieces, the value of a piece being approximately one-third that of a pound.

At page 567 Singleton J. said:

> "Counsel for the defendant took upon himself the onus of satisfying me that the plaintiff knew that there was a mistake". In other words, realising that there was a mistake, the plaintiff did that which James L.J. in Tampling v James [1880 15 Ch.D 215 at p.221] described as "Snapping up the offer".

And at page 568 Singleton J. continued:

> "I am satisfied that it was a mistake on the part of the defendants or their servants which caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realised that there was a mistake……". The offer was wrongly expressed, and the defendant by their evidence, and by the correspondence have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerer's real intention. indeed I am satisfied to the contrary……."
>
> [see also Aircool Awning Co., Ltd v Silvera 1966 10 W.I.R]

Similarly in the instant appeal the miscalculation of the rate of interest meant a loss of thousand of dollars to the respondent because the

figure was calculated at 1 per cent per year instead of 1 per cent per month or 12 per cent per year.

Having regard to the behaviour of the Besses I entertain no doubt that they became aware of the mistake when the unsigned letter outlining the terms of the sale was delivered to them on Saturday 30th January, l982. In this regard I endorse the finding of fact by the learned trial judge when he said at page 21 of his judgment:

> "I find as a fact that the Besses first saw on or about 29th January l982 the draft letter dated 30th January. They were well aware, probably from that moment, that Mrs. Hadley's lawyer had made a grave mistake in setting out the schedule of payments in the letter. They did not do the honest thing and point out the error to Mrs. Hadley's agents. I find from the evidence that they hastened to accept the terms in his letter and pressed him to sign it and to give them a copy. Then they hurried to pay down the further deposit on the contract requested in the letter and they were precipitate in attempting to secure the Abstract after paying the deposit"

I am fortified in this view because by the next working day 1st February they returned to Mr Commissiong's office expressing agreement with the terms contained in the letter. And on the following day 2nd February l982 they returned to Mr. Commissiong's Chambers informing him that they had paid the deposit of $107,000.00. And from there on pressing for an Abstract of Title. The atttitude of the plaintiff and the Besses clearly indicate an intention to take unfair advantage of the mistake contained in the letter of the Solicitor for Helen Hadley.

This is quite evident by the letter written by Mr. Othniel Sylvester Q.C. to Mr. Samuel Commissiong on 12th March, l982 when he said inter alia:

> "……..your clients have clearly indicated that they do not intend to conclude the contract in accordance with your letter dated 30th January l982 and my client will be guided accordingly……."

This to my mind clearly indicated that Mr. Sylvester's client was only prepared to complete the contract on the mistaken terms contained in the letter of 30th January, l982.

This attitude, in my view, is emphasised in the pleadings of the Plaintiff when it said quite clearly in its Reply by paragraph 3 thereof when it alleged:

> "Further the plaintiff says that if the defendant discovered an error as alleged [which is not admitted] since 3rd February, l982 the defendant did not only fail to communicate the fact to the plaintiff's predecessor in title before the plaintiff's predecessor in title wrote that letter of 9th March, l982 but the defendant by her conduct led the plaintiff's predecessors in title to believe that the agreement was in accordance with the yearly payments therein stated and the defendant is estopped from alleging any error in the yearly payments as stated in the said letter of January 30th 1982".

I make the observation that as late as 19th February, l991 when the Reply was filed the plaintiff was not willing to admit that there was a miscalculation of the interest which in my opinion was quite obvious on the face of it.

The second observation is that Ms. Helen Hadley's Solicitor as early as 9th of March, l982 communicated to the plaintiff's predecessor in title the error in the calculation of the interest rate. I therefore reject the plaintiff's assertion in the pleadings that the defendant led the plaintiff's predecessor in title to the belief that the agreement was in order and would be completed in accordance with the yearly payments contained in the letter of 30th January, l982 which contained the mistake.

Mr. Sylvester Q.C. submitted as follows:

I. "That from 2nd February, l982 when the Appellant's immediate predecessor paid the total of $130,000.00 the Respondent was precluded from dealing with the villa property in any way except with the consent of the Appellant's immediate predecessor.

2. And when the Respondent through her Solicitor refused to provide an Abstract of Title to the Appellant's immediate predecessor and subsequently purported to rescind the Contract of Sale, her acts were unlawful, inequitable and unjust and cannot provide an answer to the Appellant's claim

for Specific Performance of the Contract of Sale. The Respondent was in default not the Appellant's immediate predecessor.

3. The letter of the 30th January, l982 is a composite transaction and is divisible

[1] A conveyance and

[2] A mortgage

each possessing a legal individuality of its own. Thus when the Respondent was notified in June l983 that the equitable title of the Appellant's immediate predecessor was transferred to the Appellant, the Respondent was bound to convey the villa property to the Appellant and to no other she being a trustee of the legal estate with a lien only for the balance of the purchase price".

I do not agree with Learned Counsel's submissions because as I have said above there was no binding contract between the parties. And Counsel submissions above are predicated on the fact that there was a binding contract between Helen Hadley and the Besses.

Having regard to what I have said above it is quite clear that there was no binding Contract of Sale between Lesline Bess and Norton Bess and Helen Hadley. The declaration and other reliefs claimed are therefore refused. The appeal is hereby dismissed.

Costs to the Respondent to be taxed if not agreed.

A.J. REDHEAD
Justice of Appeal

I Concur

SATROHAN SINGH
Justice of Apeal

MATTHEW J.A. [AG.]

I have read the judgment of Redhead J. A. and I fully agree that the appeal should be dismissed.

The Appellant's predecessors in title, Norton Bess and Lesline Bess, entered into a contract with Helen Hadley, through her agent, Robert Connell, to purchase a property at Villa for $400,000, paying an amount of $130,000 and the balance of $270,000 to be secured by a five year mortgage of the property in favour of Helen Hadley at a rate of interest of 1 per cent per month or 12 per cent per annum.

In drawing up the document which was dated January 30, 1982 an error crept in. Although the document clearly stated that interest at the rate of 1 per cent per month would be paid in respect of each of the five years, when the document proceeded to specify the monthly repayment in respect of each of the five years the figures were calculated as though the mortgage interest was in fact 1 per cent per annum.

Several bits of correspondence passed between solicitors for the purchasers and the vendor between February 8, 1982 and March 5, 1982 which it is not now necessary to go into but on March 9, 1982 the vendor's solicitor wrote to the purchasers' solicitor indicating among other things that the figures in the letter of January 30, 1982 were wrong and reminding him of the March 15 deadline and further stating that if by that time the purchasers were unwilling to accept the correct figures, the vendors would be prepared to refund their deposit in full.

This was a clear indication that the vendor was unwilling to proceed with the deal based on a document which contained an obvious error or if not so obvious, one that could be verified after being put on guard.

The solicitor for the purchasers replied on March 12, 1982, three days before the deadline. He said nothing about the deadline. He said nothing about the wrong calculations nor the desire to have a correct rate of interest reflected in the monthly payments. He simply stated to the

vendor's solicitor-

> "From your letter dated March 9th 1982…..your clients have clearly indicated that they do not intend to conclude the transaction in accordance with your letter dated 30th January 1982 and my client will be guided accordingly.
> I am herewith requesting that you return to me forthwith the documents which I have forwarded to you with my letter of 25th February, 1982."

It seems to me that from the tone of that letter the purchasers wanted to proceed with a contract which although stating it bore interest at 12 per cent per annum was in fact providing for monthly payments based at 1 per cent per annum.

I am of the further view that the letter of March 12, 1982 indicated an acceptance of the vendor's position.

I think the vendor was quite right in the circumstances to refuse to proceed with the contract. On March 16, 1982 the vendor's solicitor complied and returned to the purchasers' solicitor the two indentures requested in the letter of March 12, 1982. This was followed by a letter dated March 24, 1982 which indicated that since the purchasers had not indicated their intention to complete the purchase and mortgage facilities in the time allocated the deal was off and a cheque in the sum of $130,000 was being returned.

The purchasers later assigned to the Appellant who brought an action for specific performance of the contract of January 30, 1982. Mitchell J found that there was no valid and legally binding contract between the Besses and Mrs. Hadley for the conveyance or for the mortgage and there was no contract for sale that Mrs. Bess could have assigned to Yambou.

The Appellant has filed several grounds of appeal. In argument before us learned Counsel for the Appellant submitted that the fundamental issue is whether the mistake in calculating interest by the vendor's solicitor vitiated the agreement. Counsel advanced the submissions that there was an agreement for sale.

I agree that at one time the Parties had conducted their business on the basis that the mortgage interest would be 12 per cent per annum. The change of attitude occurred as a result of the attempt of the vendor's solicitor to express the agreed terms in the letter dated January 30, 1982.

In my judgment the joint effect of the letters of March 9, 1982 and March 12, 1982 is that the Parties were not ad idem on the amount of the monthly payments to be paid arising from the contract of January 30, 1982 and Mitchell J was quite right to dismiss the Appellant's suit.

Reference has already been made to the following cases which I support-

HARTOG V COLIN AND SHIELDS 1938 3 A.E.R. 566

MCMASTER UNIVERSITY V WILCHARE CONSTRUCTION LTD 1971 32 DLR [3d] 9

I would therefore dismiss the appeal with costs to the Respondent to be taxed if not agreed

A.N.J. MATTHEW
Justice of Appeal [Ag.]