

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 47 OF 1999

BETWEEN:

GEORGE TURNBULL

Plaintiff

and

EILEEN BARONVILLE

Defendant

Appearances:

Mr. O. Ramjeet for Plaintiff

Mrs. Price-Findlay for the Defendant

February 19 & 20, 2001

JUDGMENT

[1] **Benjamin, J.:** On April 14, 1999, the Plaintiff filed a Writ of Summons against the Defendant. In the said Writ, which was indorsed with a Statement of Claim, the Plaintiff pleaded an agreement made on or before July 16, 1997 between the parties ("the agreement") for the sale by the Defendant and purchase by the Plaintiff of Parcel 89 of Block 2537B of the West Central Registration Section situate in Tortola, British Virgin Islands and located at Shannon Estate, (hereinafter referred to as "Parcel 89") at a purchase price of \$40,000.00.

[2] The Plaintiff claims by way of relief the following: -

- “(a) Specific performance of the agreement
- (b) An Order directing the Registrar of Lands to execute an instrument of transfer of Parcel 89 in favour of the Plaintiff upon his payment of the \$15,500.00 balance of purchase price to the Registrar of the High Court.
- (c) Rectification of the Land Register of Parcel 89 to your effect of (sic) the said transfer to the plaintiff.
- (d) Further and other relief.
- (e) Costs.”

[3] The Defendant entered an appearance on May 16, 1999 by her Solicitors and on May 27, 1999 filed a Defence.

[4] The Plaintiff averred that four payments by cheques totaling \$24,500 were made by him to the Defendant between July 16, 1997 and April 3, 1998, leaving a balance of \$15,500.00 which was to be paid upon the execution of the instrument of transfer in respect of Parcel 89. Paragraph 5 of the Plaintiff’s claim stated that it was a condition of the agreement that the said transfer would take place within a reasonable time. It was further said in Paragraph 6 that, notwithstanding numerous requests to effect the said transfer and collect the balance of the purchase price, the Defendant had neglected or refused to comply. The ensuing paragraphs set out a number of letters exchanged between the parties’ respective Solicitors and their purport, save and except for paragraph 10 wherein the Plaintiff stated that he had plans to construct a building on Parcel 89 and that he had been put to great inconvenience by the delay.

[5] By way of Defence, the Defendant admitted that there were “discussions” between the parties for the sale and purchase of Parcel 89 and that there was never any agreement in writing. It was said that the Defendant informed the Plaintiff of the

existence of covenants attached to the land and that any agreement would be subject thereto.

- [6] The Defendant denied the existence of any agreement but admitted receiving the four payments totaling \$24,500.00 from the Defendant as being "in furtherance of the discussions" for the sale for Parcel 89. She pleaded that in the course of the discussions the Plaintiff was told that an agreement in writing had to be drawn reflecting the said covenants but that the Defendant neglected or refused to attend at the Chambers of the Defendant's Solicitors for the purpose of having the covenants explained to him and an agreement prepared.
- [7] The Defendant in essence admitted the correspondence between the parties' Solicitors save for a letter dated March 14, 1999 received from other Solicitors on behalf of the Defendant, which letter was not admitted.
- [8] Both parties acknowledged that a letter dated April 6, 1999 was received by the Plaintiff's Solicitors from the Defendant's Solicitors with a cheque for \$15,500.00 which had been previously sent on behalf of the Plaintiff by his solicitors with a letter dated March 11, 1999. Also returned with the former letter was an Instrument of Transfer which had accompanied a letter dated March 4, 1999 from the Plaintiff's Solicitors.
- [9] The Plaintiff is a building contractor. In his evidence-in-chief he stated that while engaged in the construction of a building for his clients, the Gabriels, at Shannon Estate, he was visited by the Defendant at the site and she told him that she wanted to sell Parcel 89 as she needed money. This discussion, he said, took place about 15 days to one month before July 16, 1997 and during the discourse it was agreed that the purchase price would be \$40,000.00 or \$38,000.00 plus conveyancing expenses.
- [10] An extract from the Land Register was admitted in evidence by consent. The said Register recorded the Defendant as registered proprietor of Parcel 89/Lot 15 and

save for certain easements and rights of way there were no encumbrances entered thereon.

[11] The Plaintiff said that he made four successive payments towards the purchase price by cheques payable to the order of the Defendant. The copies of the said four cheques were exhibited by consent and the same reflected the following:-

(1) Cheque No. 1879 dated July 16, 1997 for \$10,000.00 on which was written "deposit on Parcel 89 Shannon"

(2) Cheque No. 2007 dated September 23, 1997 for \$10,000.00 on which was written "second Deposit on House Lot"

(3) Cheque No. 2168 dated February 6, 1998 for \$3,000.00 on which was written "Deposit on Lot 15"

(4) Cheque No. 2378 dated April 3, 1998 for \$1,500 which did not indicate what it was paid for. The second cheque for \$10,000.00 was deposited to an account at Barclays Bank Plc. and the remaining three cheques encashed as evidenced by the signature of the Defendant.

[12] The Plaintiff said that subsequent to the second payment, he told the Defendant that he would liquidate the balance by November 1997 when he expected to obtain the Deed, which can be taken to mean the transfer of Parcel 89. The transfer was not effected within that time frame.

[13] The Plaintiff's evidence is that on two occasions the Defendant asked him for additional payments of \$3,000.00 and \$1,500.00 and he obliged. He recalled that the fourth payment of \$1,500.00 was made at the Defendant's request on the express representation that she needed to pay workmen who were working at her house. He insisted that the \$1,500.00 was paid towards the purchase price though the cheque did not carry a notation to that effect like the other cheques.

- [14] As to the final payment of the balance, the Plaintiff said that whenever he approached the defendant about completing the transaction she told him that there was a lien on the property. In his understanding, a lien meant that the property was subject to an outstanding obligation such as a loan.
- [15] The Defendant admitted telling the Plaintiff and her lawyer that there was a lien on the property. As far as the Court can discern, her explanation, though somewhat vague, seemed to suggest that the lien was imposed by Mr. Farara, because when she sold another Parcel other purchasers - the Balls - there was some confusion as to the numbering of the parcels. Let me at once say that this explanation was less than convincing to the Court.
- [16] The Plaintiff said that, having being told by the Defendant on December, 22, 1998 about a lien on the property, he made inquiries at the Land Registry on the next day. Having ascertained that there was no lien in existence he placed a caution on the said Parcel 89 and took a transfer form to the Defendant for her signature. She refused to sign it. Thereafter, his Solicitors' opened correspondence with the Defendant by a letter dated December 24, 1998. That letter essentially recited the agreement and its alleged terms and the payments made. It also referred to the so-called lien and requested that the Defendant take steps to transfer the property.
- [17] In examination-in-chief as well as in cross-examination, the Plaintiff consistently denied that Parcel 89 was expressly sold to him subject to any covenants. He acknowledged that the Defendant had referred him to her lawyers but refuted the suggestion that it was for the purpose of having the covenants explained to him. In response to the direct questioning of counsel for the Defendant he denied that he was told of the covenants or that he had told her that such covenants were not applicable to belongers like him but rather to non-belongers.
- [18] There was a discrepancy between the evidence of the parties as to whom the first payment was made. The plaintiff asserted that he paid the cheque to the Plaintiff's Solicitors and received a receipt. Whereas, the Defendant said the first payment

was made at her home and she wrote the Plaintiff a receipt. No receipt was produced for that payment and given that the cheque was made out in the name of the Defendant and not to her Solicitors it is reasonable to conclude that the first payment was made directly to the Defendant. However, this conflict in the evidence is of the moment to the resolution of the factual issues and can only be taken into account for the purpose of credibility.

[19] The Plaintiff consistently denied that he was told by the Defendant to go to her lawyers' offices to sign an agreement and that he excused his failure to do so on account of being busy.

[20] Both parties admitted that in December, 1998, in a discussion, the Plaintiff asked for the return of the moneys paid. The Plaintiff conceded that the Defendant did agree to return the money but that as she did not have the money at that time he would have to await a refund. When cross-examined, the Defendant admitted that she did not have the total amount to return to the Plaintiff. This exchange between the parties yielded no change in the contractual arrangements, as there is no evidence on either side of any step being taken to carry it into effect.

[21] The Defendant is a retired Police Officer but was on active duty up to February, 1999. She said she has known the Plaintiff for sometime. She recalled the transaction for the sale and purchase of Parcel 89 in mid-July 1999. She said that it was the Plaintiff who approached her at her home about the land. According to her testimony, the purchase price was agreed at \$40,000.00 or \$38,000.00 with the Plaintiff paying the legal expenses. She said no payment was made at that time but the Plaintiff came back to her and told her that there was another parcel of land nearby up for sale. He did not revert to the Defendant until a month later when he said that he would first pay \$20,000.00 and thereafter he would finalise the agreement with her lawyer and pay the balance of \$20,000.00. Curiously, this chain of events was never put to the Plaintiff and as such the Court was not given an opportunity to hear and assess his response thereto. Another matter to be noted is that the first cheque was paid in mid July 1997 - July 16 to be precise,

making it impossible to reconcile the delay of one month alluded to by the Defendant as having elapsed after the initial discussion in mid-July.

[22] The Defendant was emphatic that in the inaugural discussion of the sale of Parcel 89, she told him of the covenants and explained what they were. She said that his response was that they had nothing to do with him but applied to non-belongers. This is altogether, puzzling to the Court, considering that if his rejection of the covenants is to be accepted, the obvious question is why then did the Defendant nevertheless accept four payments from the Plaintiff.

[23] The Defendant testified that, notwithstanding repeated requests by telephone and in person, the Defendant did not attend at the chambers of her Solicitors. She also said, and it stands uncontroverted, that other parcels at Shannon Estate had been sold subject to the very covenants that she allegedly explained to the Plaintiff.

[24] The Defendant tendered in evidence a copy of an agreement of sale with covenants attached (Exhibits "EB1A" and "EB1B"). She stated that these documents were prepared by her Solicitors upon her instructions. Paragraph 2 of the Agreement of Sale acknowledges the payment of \$10,000.00 as a deposit. Accordingly, since the Agreement only bears the year 1997 by way of date, the document must have been prepared after July 16 but before September, 1997, that is between the dates of the Plaintiff's first and second payments. The said paragraph 2 refers to a payment schedule which is attached. That schedule provides for the balance of \$30,000.00 or \$28,000.00 to be paid as follows: -

September 30, 1997 --- \$10,000.00

November 30, 1997 ---\$10,000.00

December, 15, 1997 --\$10,000.00 (\$8,000)

This departs from the payment arrangement to which the Defendant said on oath that the Plaintiff had agreed. She said he told her he would pay \$20,000.00 as an initial payment and the balance of \$20,000 when the agreement was finalized with the lawyer.

[25] This departure conveys the clear impression that the defendant, through her Solicitors, was introducing new or different terms in the agreement between the parties. It should therefore come as no surprise that the Court was put on the quiver as to whether the covenants were being likewise introduced into the contractual arrangements subsequent to and contrary to the original consensus of the parties.

[26] The main issue to be resolved by the Court was essentially factual. Since each party gave evidence in support of his or her own case, the Court's findings of necessity hinged upon the credibility of the respective testimonies and what little support could be gleaned from the documents admitted in evidence.

[27] In the Defence, it was pleaded that there was no agreement at all between the parties. Paragraph 9 attributed the absence of agreement to the Plaintiff's refusal or failure to acknowledge the existence of the covenants. The defendant throughout her evidence asserted that Parcel 89 was sold subject to covenants. There is no doubt that the Plaintiff understood what is meant by a covenant, as he adequately described it in re-examination as a restriction on the use of land in a defined area. However, the letter from his Solicitors to the Defendant specifically refers to a "lien" and not to "covenants". It is common ground that the unsigned instrument of transfer sent by the Plaintiff's Solicitors to the Defendant's Solicitors made no reference to any covenants.

[28] In my considered view of the evidence, the Defendant's admission that she continued to receive payments in the face of the Defendant's express rejection of the covenants is significant. She signaled to the Court that she accepted that state of affairs. Viewed from the Plaintiff's evidence, I found it to be of some note

that the Plaintiff's focus was upon a lien as late as December, 1998. It was not until the Plaintiff's Solicitors letter of March 11, 1999 that the covenants seemed to have surfaced as a bone of contention. At that stage, the Plaintiff asserted that covenants did not form part of the agreement.

[29] I need not cite any authority for reiterating that a party to a contract is not permitted to unilaterally introduce fresh terms into the original agreement. I am satisfied that the Defendant sought to do so from as early as between July and September, 1997. I do not accept that the Plaintiff was informed of, let alone agreed to the inclusion of covenants in the conveyance to him of Parcel 89. The Defendant is precluded from seeking to alter the original agreement between the parties. I accept, as did the Defendant, the Plaintiff's evidence to the effect that he agreed to pay \$20,000.00 initially and a balance of \$20,000.00 upon the transfer of title of Parcel 89.

[30] Even if the Court were to accept the Defendant's evidence that the Plaintiff was told of and declined to accept the covenants as part of the conveyance, the conclusion would inevitably be the same, given her acceptance of successive payments totaling 424,500.00 towards the purchase price. It is not open to the Defendant to have accepted the moneys and to then have contended that the parties were not ad idem. The Plaintiff would in those circumstances have been entitled to draw the conclusion that his non-acceptance of the covenants was acceded to by the defendant and that the conveyance would be free from the alleged covenants.

{31] I turn now to the enforceability of the agreement for the sale and purchase of Parcel 89, there being no demur that the agreement was essentially an oral one between the parties. The Court's attention was drawn to Section 4(1) of the Conveyancing and Law of Property Act, Cap. 220 which prescribes that no action may be brought for the enforcement of a contract for the sale of land or any interest in land unless the agreement relied upon is evidenced by some note or memorandum in writing signed by the party against whom the suit is to be brought

or some other person lawfully authorized by him. Section 4(2) goes on to preserve the applicability of the equitable doctrine of part performance in relation to contracts for the sale of land.

[32] It must be noted that these provisions are substantially mirrored by section 37(2) of the Registered Land Act, Cap. 229 which is applicable to the transaction in issue. Section 37(2) reads:

“(2) Nothing in this section shall be construed as preventing any unregistered instrument from operation as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorized:”

[33] The Plaintiff relied upon the doctrine of part performance in equity. More specifically, it was contended that the payments made by the Plaintiff to the Defendant were referable to an agreement for the sale of parcel 89 thus rendering the said agreement enforceable in equity. The House of Lords in **Steadman v. Steadman [1976] A.C. 536** has laid to rest the earlier position and ruled that the payment of money ipso facto can amount to part performance sufficient to entitle the appellant to relief in equity. Counsel for the Defendant readily conceded the Plaintiff's contention and I can find no circumstance to prevent the exercise of the Court's discretion in granting relief to the Plaintiff.

[34] Counsel for the Defendant has urged the Court if it is minded to order specific performance, to impose conditions in the form of the covenants attached to the other neighbouring parcels of land sold by the Defendant. As I made clear during arguments, such a course of action would be adverse to the contractual arrangements between the parties and would be inequitable in all the circumstances.

[35] In the premises, it is ordered as follows: -

- (1) That the agreement made between the Plaintiff and the Defendant on or before July 16, 1997 for the sale of Parcel 89 (Lot 15) of Block 2537B in the West Central Registration of Tortola be specifically performed and carried into execution.
- (2) That the Plaintiff do on or before Friday, February 23, 2001 lodge with the Registrar of the High Court the sum of \$15,500 being the balance due upon the purchase price of Parcel 89 aforesaid.
- (3) That the Registrar of Lands effect the transfer of the said Parcel 89 to the Plaintiff within 21 days of the receipt of proof of the lodgment of the balance of the purchase price subject to the payment by the Plaintiff of all stamp duty and fees prescribed by law.
- (4) That upon the said transfer the Registrar of the High Court shall pay to the Defendant the said sum of \$15,500 with a deduction for the stamp duty and fees liable to be paid by the Defendant in respect of the said transfer, such deducted amount to be repaid to the Plaintiff.
- (5) Costs of this action shall be taxed if not agreed and shall be paid by the Defendant.

Kenneth A. Benjamin
High Court Judge