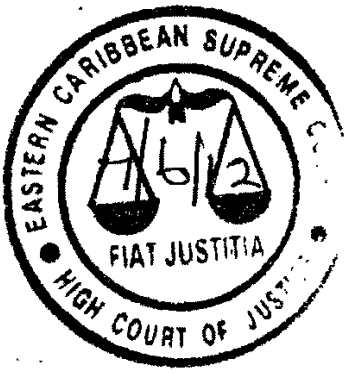
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 339/2006



BETWEEN:

JOAN GONSALVES
MARIA GORETTI GONSALVES
JENNIFER VALERIE
MICHAEL VALERI DENNIS GONSALVES

Claimants

V

JEROME CORDICE AKA JERRY CORDICE

First Defendant

CERENE HAYNES

Second Defendant

Appearances: Mr. Richard Williams for the claimants
Mr. Ronald Marks for the first defendant
Mrs. Zhinga Horne-Edwards for second defendant

2011: November 7
November 8
December 12

2012: March 5, 6, 26
June 7

DECISION

[1] **JOSEPH, MONICA J. (Ag)**: BACKGROUND; this suit arises following sale by the first defendant to the second defendant and a subsequent sale by the second defendant to the claimants, of one of two properties situate at Villa. The first property of 27,486 square feet was purchased by the first defendant from Shirley Lewis-Antrobus described in deed no. 1804/1999 (the Antrobus property).

[2] The second property adjoins the first property, and is half an acre in size. The first defendant resides in this property which was owned by his aunt, the late Agnes Cordice. That property was transferred to him in January 2001 by the Administrator of her estate, Gideon Cordice by deed no. 257/2001. (The first defendant's property).

[3] The second defendant bought the Antrobus property from the first defendant but the property actually conveyed to her was the first defendant's property. That error was discovered some three years after the sale transaction between the first and second defendants. By that time, the second defendant had sold the property she had purchased to the claimants. The claimants hold a deed from the second defendant, the description in the schedule of which relates to the Antrobus property of 27,486 sq ft.

[4] **WRITTEN SUBMISSIONS;**

April 26th, 2012; May 16th, 17th, 2012

CLAIMS

The claimants seek a declaration that they are the fee simple owners of a parcel of land described in the schedule to Deed No. 2020/2005; an order restraining the first defendant from

trespassing on the parcel of land in their possession; an order that the first and or the second defendants do pay off the outstanding mortgage amount due and owing by virtue of mortgage indenture no. 1836/1999: the first and or second defendant do obtain a release from the National Commercial Bank in relation to mortgage No. 1836/1999, damages for trespass and costs of the Antrobus property.

[5] Alternatively, the claimants sue the first and second defendants for fraud. The error that occurred was caused by the first defendant's fault and was a deliberate act to defraud the second defendant and the first defendant's bank.

[6] The first defendant denies the fraud allegation. In an amended defence the first defendant claims that he contracted with the second defendant for sale of half an acre and not all of the property referred to in Deed No. 1804/1999. They agreed that five thousand sq ft of the land would remain the property of the first defendant and he has never given up possession of that strip. The first defendant intended to mortgage the first defendant's property and at no time defaulted on mortgage payments.

[7] The first defendant counterclaims for correction of error made in the schedule to Deed No. 1804/1999 to reflect the portion of land that was the subject of the sale to the second defendant: A correction of Deed No. 2020/2005 to reflect the portion of land that the second defendant could legally transfer to the claimants: damages for trespass, costs and further reliefs.

[8] In response to the claimants' claim, the second defendant denies the fraud allegation. She denies that she was aware she was not

the fee simple owner of the property that she purported to sell to the claimants.

[9] The second defendant avers that she agreed with the first defendant to purchase the Antrobus property. She admits that the wrong deed for the parcel of land she intended to purchase was given to her. She claims that the wrong property was transferred to her by the first defendant.

[10] The claimants aver in a Reply and Defence to Counterclaim that the first defendant's deed to the second defendant did not save and except any parcel of land. The first defendant intended to sell, and did sell, all the land to the second defendant and the claimants are bona fide purchasers for value without notice.

THE FACTUAL AND LEGAL CONTENTIONS OF THE PARTIES ARE SET OUT IN PRE TRIAL MEMORANDA.

[11] **Those of the Claimants:** The first defendant has acted fraudulently in providing the wrong root of title to the second defendant. The claimants are the fee simple owners of the parcel of land set out in Deed No. 2020/ 2005. The claimants are bona fide purchasers for value without notice of the claim of entitlement of the first defendant. The first defendant, failing to save and except any portion of land in the conveyance he executed, is stopped from claiming that he reserved any portion of any land for himself, In other words, whatever the first defendant owned he transferred without reservation.

[12] **Those of the First Defendant:** The first defendant was the fee simple owner of two properties situate in Villa adjoining each other. The first defendant entered into an agreement with the

second defendant whereby the latter purchased the property situate above the first defendant's home in Villa, save for a strip of land admeasuring approximately 5000 square feet. It was further agreed that a reduction in purchase price would reflect this reduction in land price.

[13] To the best of the first defendant's knowledge this property was conveyed to the second defendant who resided in same whilst the first defendant continued to reside at the other property which he still owns today. The first defendant visited the second defendant's attorney's chambers and signed what he believed to be a conveyance prepared based on the said agreement for the property he owned by virtue of Deed No. 1804/1999.

[14] The first defendant was never motivated by fraud and had no knowledge of the falsity as alleged by the claimants.

[15] **Those of the second defendant:** The second defendant had negotiated with the first defendant for the purchase of, and believed she had purchased, the adjoining property from the first defendant.

[16] In response to the second defendant's request to the first defendant to provide his title deed for the purpose of preparing the deed of conveyance to her, the first defendant provided the second defendant's lawyers at the time with Deed No. 1804/1999.

[17] The second defendant was unaware that deed number 1804 of 1999 did not relate to the adjoining property (the Antrobus Property) and that the first defendant had in fact conveyed to her

by Deed No. 1378/2002, a property other than the adjoining property (the defendant's property).

[18] Similarly, at the date of Deed of Conveyance No. 2020/2005 from the second defendant to the claimants, the second defendant did not know that the property that she conveyed to the claimants was not the adjoining property (the Antrobus property). The second defendant discovered the discrepancy approximately three years after the transaction between the second defendant and the claimants.

[19] The second defendant has no knowledge of the falsity nor did she have the requisite intent to defraud the claimants at the material time or at all. She was therefore not fraudulent when she conveyed the first defendant's home, that is, the property admeasuring 27,486 square feet. The first defendant's property is half an acre.

[20] **Second Defendant Admissions:** The second defendant purchased 27,486 square feet of land from the first defendant, which is the first defendant's home, as shown on Deed of Conveyance No. 1378/2002. She intended to purchase the adjoining property, that is, the parcels of land shown as lot number (1) and lot number (2) on Plan G2615 and the dwelling house thereon. She took possession of the adjoining property (the Antrobus property) same.

[21] She subsequently sold the first defendant's home, that is, the property admeasuring 27,486 square feet she had purchased from the first defendant, to the claimants as shown on deed of conveyance registration number 2020/2005. In fact, the

defendant's home is on property measuring half acre (the second property) not on property admeasuring 27,486 sq ft.

[22] Approximately three years after the sale transaction with the claimants, she discovered that the property she sold to the claimants was the first defendant's home and not the property she had intended to purchase from the first defendant (Antrobus property) and that she thought she had owned, by virtue of Deed of Conveyance No.1378/2002.

[23] **FACTS AND LAW**

I consider the evidence and decide the matter on a balance of probabilities:

Agreement for sale of property

The Antrobus property originally comprised a concrete dwelling house on 27,486 sq ft of land with an access road running through it. The portion of the land below the access road adjoins the northern portion of the defendant's property. Plan G2615, ordered by the court, shows all the land in three parcels or lots: Lot No. 1, the Antrobus Property; Lot No. 2, the disputed property (originally part of the Antrobus property); Lot No. 3, the first defendant's property.

[24] Mr. Marks for the first defendant submits that there is no dispute that the second defendant intended to buy the upper parcel of land, that is, Lot No.1 the Antrobus property, and that the first defendant intended to sell it but the conveyance that was executed in an attempt to transfer title, contained a number of errors.

[25] Mrs. Horne-Edwards for the second defendant submits that the agreement between the first and second defendant was that the

sale was for the Antrobus property, comprising of Lots No. 1 and 2 (lot 2 is the disputed property).

[26] I find that the first and second defendants entered into an agreement for the sale by the first defendant to the second defendant of the Antrobus property.

[27] **Retention of strip of land - Disputed Property**

The first defendant in his amended defence claims that the second defendant had agreed that approximately 5000 sq ft of the Antrobus property (the disputed property) would remain the property of the first defendant. During a visit to the Antrobus property by the first and second defendants, the first defendant pointed out that area of land to the second defendant.

[28] In his witness statement, the first defendant states that he told the second defendant he intended to retain the strip of land adjacent to his property and would therefore only sell her the property which began above the road. They agreed that this would be reflected in a reduction of the purchase price.

[29] The second defendant's oral evidence is that she had agreed that the first defendant could retain a very small strip of land just above his property which he pointed out. He did not indicate the size of the area and there was no discussion about a reduction in purchase price.

[30] In her witness statement, claimant Jennifer Valeri states that the first defendant told her that he had made an oral agreement with the second defendant to keep the 'bottom portion of the land.' On one occasion he stated that he had knocked $25,000.00 from the

purchase price and, on another occasion, he said the figure knocked out was $30,000.00.

[31] Mr. Marks submits that, notwithstanding the vagueness or the evidence of the second defendant as to what she agreed to exclude, the undisputed evidence is that the property was never divided. He contends that the first defendant relinquished possession of all the lands to the second defendant, with the exception of the disputed property. He was in exclusive possession of the disputed property from the sale to date.

[32] The court is invited to consider, as supporting the first defendant's claim, the evidence that he has always maintained the disputed property and so was in possession of the disputed property. That fact, counsel advances, manifests that the second defendant accepted that the disputed property was excepted from the sale.

[33] Mrs. Horne-Edwards' submission is the evidence that the disputed property was maintained by the first defendant does not unequivocally support the first defendant's evidence that the disputed property was excepted from the sale agreement between the first and second defendants. Further, counsel argues, if the court is minded to hold that there is an oral collateral contract regarding the disputed property, there has been no act done by or on behalf of the first defendant, that can be regarded as part performance of the oral contact, making it enforceable.

[34] I consider that the burden rests on the first defendant who asserts that the disputed property is excluded from the sale to so establish ,on a balance of probabilities. Has he done so? I accept there is an agreement between the first and second defendants in relation

to retaining a portion of the disputed property - the size of which was not identified. I would regard that as an agreement collateral to the main contract for the sale of the Antrobus property.

[35] For that collateral agreement to be recognized as enforceable one of two situations must be present:: (1), there must be a document referring to that collateral agreement; (2), if that is missing, as it is here, there must be an act of part performance. That act of part performance must be referable to the collateral agreement. The act relied on is that the first defendant maintained the disputed property, before the agreement with the second defendant, and he continues so to do.

[36] The legal principle is that, remaining in possession of property does not, per se, authenticate a part performance claim. There may well be other explanations, for example, the first defendant maintains the disputed property, for security purposes, and to ensure that the area of land near to his property is kept clear and clean. **Wills v Stradling** (1817) 1 Vesey Junior Supplement 390 reads:

> "For instance, when a man is admitted into possession, he is made a trespasser and is liable to answer as such, if his possession be not referred to the agreement.....With respect to a tenant already in possession the fact of his continuing in possession amounts, indeed, to nothing; but where a person, not previously in possession, makes an agreement with the owner of an estate, and enters into possession, such possession is always to be held a part performance; because it is an act unequivocally referring to the contract. **Morphet v Jones** 1 Swanst. 181."

[37] **Common Mistake;**

Mr. Williams for the claimants contends: that the case falls to be decided between the first and second defendants. The first defendant claims that his execution of a conveyance of his home to the second defendant was a mistake.

[38] Mrs. Horne-Edwards submits that there was a common mistake made by the first and second defendants and the wrong property was transferred by deed to the second defendant by the first defendant.

[39] Mr. Marks contends: the erroneous conveyance No. 1378/2002 cites Deed No. 257/2001 as the source of title and the description in the schedule as the subject property, Deed No. 257/2001 relates to the first defendant's property purchased from Agnes Cordice's estate. That property was not the subject of the sale agreement between the first and second defendants.

[40] How does the court determine that there is a common mistake in the deed? The general rule is that extrinsic evidence is not admissible to vary the terms of a written document. Those terms can only be varied where there is clear evidence that the text of the document is not consistent with what was agreed between the parties.

[41] The evidence from the first and second defendants is that the subject matter of the sale agreement is the Antrobus property. Having so agreed, the first and second defendants believed that that property was the property transferred. However, the schedule of Deed No. 1378/2002 by which the first defendant transferred the property to the second defendant describes - not the Antrobus

property of 27,486 sq ft. – but the first defendant's property of half an acre.

[42] It is clear there is a mistake, common to the first and second defendants. In those circumstances, the court may rectify the Deed to bring it in line with what was agreed. Without the knowledge that the wrong property was transferred to her by the first defendant, the second defendant agreed with the claimants to sell the Antrobus property to them.

[43] The Antrobus property was transferred by the second defendant to the claimants by deed 2020/2005. The second defendant has no title for the Antrobus property. She holds a deed for the first defendant's property, which is the property erroneously transferred by the first defendant to the second defendant.

[44] There is a common mistake between the second defendant and the claimants as what they agreed (the transfer of the Antrobus property which includes proper title) has not materialized. Does the doctrine of rectification come into play here?

[45] **Rectification**

Mr. Williams submits it is clear from the facts that all of the parties agreed that rectification is an order that the court must make, as there was a common mistake between the first defendant and the second defendant. The first defendant sold his home to the second defendant instead of selling the adjoining Antrobus property. The first defendant is to be considered a trustee of the legal estate for the second defendant in respect of the Antrobus property and ultimately the claimants. Counsel cited **Craddock Brothers v Hunt** (1923) 2 Ch 136.

[46] With respect to the transaction between the second defendant and the claimant, counsel's submission is that it is necessary to ascertain what was the intention of the parties. If the court finds that the claimants are bona fide purchasers for value without notice then the necessary declarations are to be made.

[47] Mr. Marks submits that the conveyance that was executed in an attempt to transfer title to the land, contained errors.

[48] Mrs. Horne-Edwards submits there could only be rectification of Deed No.1378/2002 so as to exclude the disputed portion of land from the Antrobus property where these factors are present: (1) there was a collateral oral agreement between the first and second defendants to exclude the disputed portion of land (2) the oral agreement (if any) is enforceable (3) the court should exercise its discretion in enforcing the oral agreement (if any). It is counsel's submission that that Deed No.1378/2002 ought not to be rectified to exclude the disputed portion of land. Counsel also cited **Craddock Brothers v Hunt**.

[49] I have found that a common mistake was made. Two conditions must be present to give rise to rectification. There must be an antecedent contract and there must be a common intention of giving effect to that contract in writing. The first and second defendants entered into a contract for the sale of the Antrobus property. It was their common intention to give effect to that contract for sale by a written instrument, a deed. The drawn deed did not reflect that common intention for the sale of the Antrobus property. Mistakenly, the deed referred to the first defendant's property.

[50] As the conditions for rectification are present, the court has authority to rectify the mistake. The court will order the schedule of Deed No.1378/2002 to be rectified by deleting the description of the property referred therein, and substituting a description of the boundaries of the Antrobus property as shown in Survey Plan G2615 lots 1 and 2.

[51] In **Murray v Parker** (1854) 19 Beav. 305 Lord Romilly M.R. said:

> "In matters of mistake the court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised, in all cases, where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether oral or written...If there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly: if ambiguous, oral evidence may be used to explain it in the same manner as in other cases where oral evidence is admitted to explain ambiguities in a written instrument."

In **Craddock Brothers v Hunt** p159 Warrington L.J stated:

> "The jurisdiction of Courts of Equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded upon it."

[52] Can the same principle be applied in respect of what has occurred between the claimants and the second defendant following their agreement for the sale of the Antrobus property? I think not.

[53] Their common intention was to transfer the Antrobus property, and the drawn deed expressly refers to the Antrobus property. Implied in that transfer deed, is the condition that the second defendant has proper title to the property, which she does not hold. Thus, the deed is not in total conformity with the contract between the claimants and the second defendant.

[54] The drawn deed contains the corporeal statement, but not the additional incorporeal attribute, that is required in the transfer of ownership of property. However, the deed does not contain material, that is, a written error, that would satisfy a condition for rectification. By that deed the claimants hold a defective title to the Antrobus property from the second defendant.

[55] **Purchasers for value**

The claimants, without notice of the defective title of the second defendants, purchased the Antrobus property from the second defendant. That lack of knowledge protected them and any rights they may have. The law is that a purchaser for valuable consideration without notice of a defective title is not tainted with the defective title. I find that the claimants are purchasers for value without notice. In **Pilcher v Rawlins** (1872) 7 Ch. App.259, Sir W.M. James LJ said:

> "I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my

> view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without - notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea , may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the bona fides or mala fides of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has conveyed to him."

[56] **MORTGAGES**

The outstanding mortgages are: The Antrobus property of 27,486 sq ft of land is mortgaged by Jerome Cordice to National Commercial Bank, Deed No. 1836/1999, principal sum of $270,000.00, monthly repayment of $2,430.00. The second defendant purchased the Antrobus property from the first defendant. The Court will order the first defendant to pay off the outstanding amount on this mortgage.

[57] The first defendant's property half an acre of land, is mortgaged by him to National Commercial Bank, Deed No. 334/2001, in the sum of $130,000.00 monthly repayment of $3600.00.

[58] **Fraud**

Mr. Williams' submission is that the first defendant acted fraudulently in deliberating transferring the wrong portion of land

to the second defendant, in order to receive more money from this transaction. Counsel submits that the other loan was for a substantially lower amount. As against the second defendant, the claim is that she was fully aware that she was not the owner of the disputed parcel of land yet she sold the land to the claimants.

[59] The first defendant claims that the claimants amended the claim to allege fraud. There was no evidence led at the trial to advance this allegation which is no longer an issue. Any mistake or error made in the conveyances was not made by the first defendant but by makers of the documents who were acting for the second defendant.

[60] Mrs. Horne-Edwards contends that, in the absence of facts and of evidence upon which the claimants rely, to establish fraud by the second defendant, the fraud allegation ought to be disregarded in its entirety as being vague and general in nature.

[61] The court considers that it is peculiar that the first defendant and his wife, who he said handled his financial affairs, were not aware of the situation with respect to the mortgages. However, the court does not think that the first defendant knowingly transferred the property in which he lives. That just does not make sense. I think there was carelessness in the conduct of the property transactions.

[62] I find that the claimants have not led a sufficiency of evidence to establish that the first and second defendants are fraudulent. Indeed, I have accepted the evidence that there was a common mistake between them in the description of the property transferred. I do not find fraud on the part of the first and second defendants.

[63] **Trespass**

The claimants allege trespass by the first defendant, who entered the disputed property and demolished a concrete block wall that the claimants were constructing. The first defendant's evidence is: that there is no trespass on his part, as he owns the disputed property. There was an agreement, he said, with the second defendant that the disputed property would be excepted from the area sold to the second defendant.

[64] I have found that the disputed property was not excepted from the sale an d that the disputed property is included in the area that was sold to the second defendant. In the circumstances of the case, I award the claimants nominal general damages of $100.00 for trespass. Special damages must be pleaded and proved. The special damages of $1020.00 pleaded have not been proved and I make no award.

[65] **IT IS ORDERED;**

1. On the claimants' claim:

   (a) A declaration that the claimants as purchasers for value without notice are the fee simple owners of the Antrobus property.

   (b) Mortgage on Antrobus property to be paid by the first defendant.

   (c) The first defendant holds the Antrobus property as trustee of the legal estate for the claimants;

(d) An injunction restraining the first defendant whether by himself his servants and or agents from trespassing on the said land.

(e) The first defendant to pay the claimants $100.00 damages for trespass.

2. On the first defendant's claim:

   The second defendant holds the first defendant's property as trustee of the legal estate for the first defendant.

3. On the second defendant's claim:

   The schedule to Deed 1378/2002 between Jerome Cordice and Cerene Haines, is to be rectified to include the boundaries of lots 1 and 2 on Survey Plan G2615 – the Antrobus property.

4. The Registrar of the High Court is authorized (if necessary) to sign any deed giving effect to this order.

5. Oral submissions half hour total costs in chambers on the 14th June 2012.

Monica Joseph
HIGH COURT JUDGE (AG)
June 1st, 2012.