THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

HCVAP 2009/002

NATIONAL INSURANCE BOARD

Appellant

and

[1] ANN MARIE DUNCAN-MASON
[2] PETER MASON

Respondents

Before:

The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson K. Baptiste	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Gregory Delzin, with him, Ms. Michelle Emmanuel-Steele, for the Appellant
Ms. Celia Edwards, QC, with her, Ms. Karina Johnson, for the Respondent

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2009: November 24, 25;
2012: October 1.

Civil appeal – Contract under seal – Mortgage deed in respect of land securing the principal sum of $100,000 – Letter to mortgagor from mortgagee agreeing to sale of property for $35,000.00 to be paid towards loan – Whether letter amounted to agreement – Whether letter varied terms of mortgage deed – Damages for breach of contract

By a mortgage made in the year 2003, the respondents charged certain land to the appellant. Monies advanced under the mortgage were used to construct a house on the said land. In the month of November 2004 heavy rains fell and the house collapsed as a consequence, it is suspected, of slippage/subsidence of the land. The appellant made certain concessions by way of assistance to the respondents and took a decision to waive interest on the loan. As a consequence the existing mortgage was released and a new mortgage was taken out on the same property. This mortgage was made by deed on 26th October 2004. Subsequently and upon the request of the respondents the Board of the appellant agreed to sell the property held pursuant to the mortgage deed for the price of $35,000.00 which said sum was to be paid towards the mortgage loan and informed the respondents of this decision by letter dated 6th May 2005. Subsequently, the appellant refused to sign a release of the property without payment of the mortgage debt in full or alternative collateral security which the respondents refused to give despite the appellant's

requests. The respondents then took action against the appellant for loss of bargain and damages for breach of contract. The respondents relied solely on the said letter as a contract and alleged that the appellant was in breach thereof.

Held: Allowing the appeal and making no order as to costs, that:

1. The learned trial judge erred in concluding that the letter of 6th May 2005 amounted to a binding contract and one which varied the covenants in the mortgage deed, as it lacked an essential ingredient, namely consideration.

2. The learned trial judge overlooked the nature and legal effect of the mortgage deed by which the legal estate in the property was held by the appellant and not by the respondents who held only the equitable right of redemption which could only be exercised pursuant the terms of the mortgage deed. Accordingly, the respondents could only be acting as the appellant's agents in respect of the proposed sale of the mortgaged property and thus there was no agreement as between the appellant and the respondents which may be said to have been breached by the appellant.

3. The letter, not being an instrument under seal and lacking consideration, did not attract equitable considerations which would permit it to override the covenants contained in the mortgage deed.

   Berry v Berry [1929] 2 KB 316 applied.

JUDGMENT

[1] GORDON JA [AG]: The factual background to this appeal is really quite simple. I can do no better than quote from learned counsel of the appellant's skeleton argument:

> "1. By a mortgage made in the year 2003, the Respondents charged certain land to the Appellant. Monies advanced under the mortgage were used to construct a house on the said land.
>
> "2. In the month of November, 2004 heavy rains fell and the house collapsed as a consequence, it is suspected, of slippage/subsidence of the land.
>
> "3. This cause of the loss was an exception under the insurance policy held by the Respondents and consequently the Respondents did not recover under the policy. The Appellant thus made certain concessions by way of assistance to the Respondents and took a decision to waive interest on the loan. As a consequence the existing mortgage was released and a new

mortgage was taken out on the same property. This mortgage was made on the 26th October, 2004 and is an essential feature of this claim.

"4. Subsequently and upon the request of the Respondents the Board of the Appellant agreed to sell the property for the price of $35,000 and informed the Respondents of the decision by letter dated 6th May, 2005. The letter stated thus:

'Dear Sir & Madam,

The Board at its meeting held on April 29, 2005 agreed to the sale of your property for the price of $35,000.00. The proceeds of the sale are to be paid toward your mortgage loan.

Please be guided accordingly.'

"5. Subsequently, the Appellant refused to sign a release of the property without payment of the mortgage debt in full or alternative collateral security which the Respondent[s] refused to give despite the Appellant's requests. The Respondent[s] then took action against the Appellant for loss of bargain and damages for breach of contract. The Respondents relied solely on the said letter as a contract and alleged that the Appellant was in breach thereof."

[2] As I understand the arguments of learned counsel for the appellants, the fundamental theme is that the letter of the 6th May 2005 (hereafter "the May 6th Letter") was incapable of being a contract either standing alone or varying the terms of an admitted contract, namely the mortgage between the parties.

[3] In framing the grounds of appeal the appellant stated the following in its skeleton:

> "In coming to the decision, that the contract existed the Learned Judge did not give sufficient weight to the fact that there was a lack of consideration in the alleged contract which lent support to the Appellant's contention that the said letter of 6th May 2005 did not constitute a contract."

[4] I am of the view that the lack or presence of consideration is one of the substantial issues before the Court and so I would address that as a preliminary point. If, indeed, as counsel for the appellant claims, there is no consideration, then that will be an end of the matter.

[5] The learned trial judge quite obviously addressed her mind to this issue when she said at paragraphs 9 and 10 of her judgment:

> "The Court finds that the letter of 6th May, 2005 clearly sets out the defendant's consent to the proposed sale of the land at the price of $35,000.00; the only condition being that the proceeds of sale should be paid towards the mortgage debt. This constitutes a binding agreement between the parties.
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> "While the rights of the parties were governed by the mortgage indenture, the defendant was free to consent to a variation of any of the terms contained therein. When it entered into the agreement with the claimants, it agreed to vary the mortgage indenture by allowing the sale on the terms set out in the letter of agreement. Mr. Frame [a director of the appellant] admitted in his evidence that the only condition set out in the letter was that the proceeds of sale should be paid towards the mortgage."

[6] Though not expressly stated, the learned trial judge must have considered that the Indenture dated 26th October 2004 (hereafter "the Second Mortgage") contained the following term:

> "4. 4. PROVIDED FURTHER and it is HEREBY EXPRESSLY DECLARED and AGREED as follows:
>
> (a) That if the Borrowers shall on the last day of January next pay to the Lender the said sum of One Hundred Thousand Dollars ($100,000.00) and all interest due thereon shall be paid in the manner and at the times according to the foregoing covenants in that behalf then and in such case the said hereditaments shall at the request and cost of the Borrowers be conveyed to the Borrowers or as they may direct
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> (b) Provided nevertheless that if the Borrowers shall pay the said sum of One Hundred Thousand Dollars ($100,000.00) by Two Hundred and Forty (240) consecutive monthly instalments of Four Hundred and Sixteen Dollars and Sixty-Seven Cents ($416.67) at the end of every month the first of such instalment payments to commence on the last day of the month during which initial disbursement takes place and at all times duly and punctually observe and perform all the covenants conditions and obligations herein contained (other than the covenant contained in Clause 1 for the payment of principal) the Lender will accept the said sum of One Hundred Thousand Dollars ($100,000.00) (and the said interest thereon) by such instalments and will not take any steps to obtain payment of the said sum of One Hundred Thousand Dollars ($100,000.00) by action sale possession foreclosure or otherwise.

[7] There is no other interpretation of clauses 4 (a) and (b) (nor has any other been urged) than that the respondents, though under an obligation to repay the sum of $100,000.00 and all interest due thereon by the last day of January next, that is on 31st January 2005, nevertheless provided that they (the respondents) maintained a monthly repayment schedule of $416.67 from the date of the Second Mortgage, the requirement for the repayment of the full $100,000.00 by January 2005 would not be enforced.

[8] I would be of the certain view that what the May 6th Letter meant was that in consideration of an early payment of $35,000.00 (which admittedly was not the whole debt) the appellant would release its security over the respondents' lands, thus permitting them to sell it if it were not for clause 4(c) of the Second Mortgage whilst at the same time retaining their right to be paid back the balance of the $100,000.00.

[9] The traditional definition of 'consideration' concentrates on the requirement that something of value must be given. It is sufficient that there either be a detriment to the promisee or a benefit to the promisor.

[10] Learned counsel for the appellant argued that at best, in this case, there would be no benefit to the appellant in that it would be parting with its only security for the debt. He goes further and posits that there is no detriment to the respondents in that they are required to give nothing in return. Were it not for clause 4(c) of the Second Mortgage I would disagree with counsel for the appellant. Unfortunately for the respondent, however, clause 4(c) of the Second Mortgage is the final but fatal arrow in his quiver. I reproduce the clause hereunder:

> "Notwithstanding the provisions of Clause 4 (b) hereof the Principal Sum shall be deemed to have become due on the last day of January next and the Lender shall be entitled to exercise the Statutory power of Sale and appoint a receiver at any time after that date and the provisions of that clause are not to be treated as evidence of any agreement between the Borrowers and the Lender restricting the right of the Lender to enter into

possession of the mortgaged property as and when it shall think fit and whether or not the Borrowers are in breach of that clause or any other of the provisions thereof."

[11] Another part of the argument advanced on behalf of the appellants is that there was no contract between the respondents and the appellant for the simple reason that there was no offer and hence no acceptance. This is an argument easily disposed of.

[12] At paragraphs 5 and 6 of the Statement of Claim the respondents (qua claimants) pleaded as follows:

> "In or about April 2005 the Claimants managed to obtain a buyer for their property at Mount Gay and approached the Defendant to permission to do so.
>
> "By letter dated the 6th day of May 2005 the Defendants agreed to the Claimants selling the said property for the purchase price of $35,000.00 which sums were to be applied to the said mortgage. A copy of the said letter is exhibited hereto and marked "B"."

[13] The respondent's defence at paragraph 5 answered the above pleading in this way:

> "As to paragraph 5 and 6 of the Statement of claim the Defendant states that in or about the early part of April 2005 the Claimants verbally informed the Defendant that they had found a prospective buyer for the property who was willing to pay the sum of $35,000.00 for the said property. The Defendant further states that the Claimants inquired from the Defendant whether or not the Defendant would be willing to release the said property from the mortgage. The Defendant further states that by letter dated 6th May 2005 addressed to the Claimants the Defendant informed the Claimants that it will consent to such a sale. The Defendant further states however that the Defendant's consent to the said sale was conditional on the Claimants providing to the Defendant additional security to secure the balance of the mortgage facility which would have stood at $95,741.25 as of 30th April 2005 after applying the said sum of $35,000.00 towards the mortgage."

[14] I interpret the appellant's pleading as accepting that an agreement (offer and acceptance) was made between the parties. Unfortunately for the respondent, however that agreement lacked the essential ingredient, consideration to make the

agreement a legally enforceable contract. As pleaded, the appellant is stating that there were other terms which were not included in the respondent's pleading. The learned trial judge found as a fact as follows:

> "The Court finds that the letter of 6th May, 2005 clearly sets out the defendant's consent to the proposed sale of the land at the price of $35,000.00; the only condition being that the proceeds of sale should be paid towards the mortgage debt. This constitutes a binding agreement between the parties."[1]

I can find no reason to disagree with the learned trial judge other than in the use of the word 'binding' which clearly means legally enforceable. Learned counsel's reference to a 'chain of correspondence' in his skeleton misses the point. The 'chain' is subsequent to the May 6th Letter and so is ex post facto.

[15] The final point that counsel for the appellant raises with respect to whether the May 6th Letter constitutes a contract is that the trial judge's finding that the terms of the Second Mortgage were varied by the May 6th Letter is wrong in law. Counsel quotes the case of Berry v Berry[2] in support of the proposition that 'a covenant cannot be varied or dispensed with, but by some contract of equal value; and this covenant, therefore, cannot be varied but by some instrument under seal.' Because of the view that I have taken that the agreement lacked the essential ingredient of consideration I do not find it necessary to pursue this point.

[16] The final ground of appeal raised by the appellant is directed towards the award of damages. This ground is expressed thus:

> "The award of damages to the Respondents was unjustifiable. The land was never sold and the respondents suffered no loss as the loan from the Appellant was interest free. The judgment therefore resulted in the receipt by the Respondents of an unjust double benefit, that is:
> (i) The purchase price ($35,000); and
> (ii) The mortgaged property, which remains in the ownership of the Respondents subject to the mortgage."

[1] Para. 9 of judgment.
[2] [1929] 2 KB 316 at 319.

[17] I find some merit is this ground. However, again, in the light of my earlier findings it is unnecessary to rule on this point.

[18] In conclusion, I would, reluctantly allow this appeal and reverse the whole of the order of the trial judge. I cannot help commenting, however, that the respondents have every right to feel hard done by the appellant who has acted in exercise of its legal rights without regard to the expectations of the respondent. In the circumstances, I would make no order as to costs.

[19] This judgment could not be complete without my apologising for the extreme lateness of its delivery which is no one's fault but mine.

Michael Gordon, QC
Justice of Appeal [Ag.]

[20] PEREIRA CJ [AG]: I have had the benefit of reading in draft the judgment of Gordon JA [Ag.]. I agree that this appeal should be allowed for the reasons which he gave and would only wish to make a few additional observations.

[21] I agree with counsel for the appellant that the May 6th Letter was incapable of being a contract either standing alone or as an agreement varying the terms of the mortgage deed which is a contract under seal between the parties. The learned trial judge's finding that the May 6th Letter standing on its own constituted a binding agreement and one which varied the mortgage deed, was in my view erroneous.

[22] Firstly, it overlooks the legal nature and effect of the mortgage deed which was a conveyance of the legal estate in the property to the appellant subject only to the respondents' right of redemption which the mortgage deed made clear could only be exercised upon payment of the debt in full.[3] This means that the respondents

[3] See clause 4 of the mortgage deed.

could not, as a matter of law, convey or agree to convey the legal estate in the property to any person any more than they could re-convey it to themselves. At best, they would be acting as agents of the appellant.

[23] Secondly, the May 6th Letter made no reference whatsoever to the terms of the mortgage deed and the covenants contained therein. What the May 6th Letter makes clear is that the $35,000.00 was to be applied towards the loan – a clear indication that this payment was not being treated as a payment in full satisfaction which would trigger the right of redemption under the mortgage deed. The legal title under the mortgage deed would still reside with the appellant. Indeed, the letter does not state or refer to any offer or statements made by the respondents. To find such an agreement one would be required to look at other correspondence and/or dealings between the parties. It is here that the waters become muddy as what the dealings between the parties show are that there was clearly no consensus arrived at between them at all in respect of the mortgage deed.

[24] Thirdly, it fails to have regard to the legal principle that 'a covenant cannot be varied or dispensed with, but by some contract of equal value; or by some instrument under seal' There was no consideration in law which may be attributed to the May 6th Letter and unless one can bring to bear upon it equitable considerations (of which none were advanced) which would cause the legal principle to give way in favour of such equitable considerations, then the May 6th Letter could not and does not in the circumstances of this case (lacking as it does legal enforceability for the reasons already given) vary the covenants contained in the mortgage deed. The case of **Berry v Berry** makes this clear.

[25] Accordingly, I would allow the appeal for these additional reasons also. For the reason given by Gordon JA [Ag.], I too would make no order as to costs on this appeal.

Janice M. Pereira
Chief Justice [Ag.]
(formerly, Janice M. George-Creque, Justice of Appeal)

[26] BAPTISTE JA: I have read the judgments written by Gordon JA [Ag.] and Pereira CJ [Ag.] and I also would allow the appeal for the reasons given by Gordon JA [Ag.] and for the additional reasons given by Pereira CJ [Ag.] with no order as to costs.

Davidson K. Baptiste
Justice of Appeal