EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0033

BETWEEN:

ESTHER AUGUSTIN aka ESTHER ST. MARIE,
representative for MARIE MADELEINE MARSHALL aka MARIE MADELEINE AUGUSTIN (deceased)

Appellant

and

PAUL JASON AUGUSTE

Respondent

BEFORE:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

APPEARANCES:

Mr. Evans Calderon for the Appellant
Dr. Robert Barrow with him, Ms. Elaine French for the Respondent

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2016: February 8;
April 18.

Civil appeal – Contract – Agreement for Sale of land – Whether learned trial judge erred in granting specific performance of agreement

The eight heirs of the late Francis Clovis ("the deceased") owned in common a large parcel of land registered as Parcel 177. Madeleine Clovis ("Madeleine"), the daughter of the late Stephen Clovis who was one of the eight heirs of the deceased, received permission from her aunts and uncles (except the appellant) to construct a house on a part of Parcel 177. Madeleine and the respondent, her common law husband, built the house between 1995 and 1999 and have lived in it since then. In or about 2004, the respondent, commissioned a valuation of Parcel 177 with a view to partitioning the parcel and obtaining title to the area of Parcel 177 that he occupies.

Subsequently, the respondent and the appellant entered into a written agreement for the sale of the appellant's undivided one-eight share of Parcel 177, measuring approximately 27,715.05 square feet, to the respondent ("the Agreement"). The Agreement provided that (1) the portion of land would be sold at $3.50 per square foot or $97,002.68; (2) the respondent would pay a deposit of $10,000.00 on the signing of the Agreement and the balance of $87,002.68 immediately on completion of the survey and partition of Parcel 177; and (3) the respondent would represent the appellant in all matters relating to the survey and partition of Parcel 177.

The respondent duly paid the $10,000.00 deposit to the appellant. In 2009, the appellant's attorneys wrote to both Madeleine and the respondent purporting to terminate the Agreement on the ground that the appellant never agreed to its terms. The respondent did not accept the appellant's purported termination of the Agreement.

The Deed of Partition of Parcel 177 was completed in 2011. Parcels 331 and 332 were allotted to the appellant. The respondent's dwelling house is on Parcel 331; Parcel 332 is an undeveloped parcel close to but not adjoining Parcel 331. The respondent tendered payment of the balance of the purchase price to the appellant who did not accept the payment and refused to complete the sale. In 2012, the respondent filed a claim for specific performance of the Agreement, damages and costs.

The learned trial judge found that the respondent was a witness of truth and that the appellant was sufficiently apprised of the contents of the Agreement and knew what she was signing. She therefore granted the respondent's claim. The appellant has appealed alleging that the trial judge erred in granting specific performance of the Agreement and that she failed to deal with the relevant provisions of the Civil Code of Saint Lucia ("the Code").

Held: dismissing the appeal; amending the order to delete the figure 168.95 square feet in paragraph 5 and substituting 158.95 square feet therefore; and ordering costs of the appeal to the respondent at two-thirds of the amount awarded in the court below, that:

1. An appellate court would be very reluctant to interfere with a trial judge's findings of fact where the trial judge had the advantage of observing the witnesses give their evidence and where there was an abundant of evidence on which the judge could have made the findings which he made.

   Golfview Development Limted v St. Kitts Development Corporation et al SKBHCVAP2004/0017 (delivered 20th June 2007, unreported) followed; **Central Bank of Ecuador and others v Conticorp SA and others (The Bahamas)** [2015] UKPC 11 applied.

2. The Agreement defined the property being sold as a one-eight share of Parcel 177 measuring approximately 27,715.05 square feet. Following the completion of the

partition of Parcel 177, the appellant was awarded Parcels 331 and 332 measuring 21,442 and 6,432 square feet respectively. The combined acreage of 27,874 is 158.95 square feet more than the amount specified in the Agreement of 27,715.05 square feet. This small increase in the amount of the land being sold to the respondent had no impact on the overall sale. Further, the Agreement had a formula for determining the price – $3.50 per square foot. The terms of the Agreement were clear and did not give rise to any uncertainty. There is therefore no basis for interfering with the judge's findings that there was no uncertainty regarding the amount of land being sold under the Agreement.

Golfview Development Limted v St. Kitts Development Corporation et al SKBHCVAP2004/0017 (delivered 20th June 2007, unreported followed; **Central Bank of Ecuador and others v Conticorp SA and others (The Bahamas)** [2015] UKPC 11 applied.

3. Article 1387 of the Code states that if a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it; he who has given the earnest, by forfeiting it, and he who has received it, by returning double the amount. Article 1388 goes further stipulating that a promise of sale with delivery and actual possession is equivalent to sale. In construing legislation, it is a basic rule of interpretation that regard must be had to the entire statute and not just the provision being interpreted. Applying this principle it is clear that where the respondent is in possession of the property that is the subject of the Agreement, there is no option to recede as in Article 1387.

   Article 1387 of the **Civil Code of Saint Lucia**, Cap. 4.01, Revised Laws of Saint Lucia 2008 distinguished; Article 1388 of the **Civil Code of Saint Lucia**, Cap. 4.01, Revised Laws of Saint Lucia 2008 applied; **St Rose v Lafitte** (1992) 42 WIR 113 followed.

JUDGMENT

[1] **WEBSTER JA [AG.]**: This is an appeal against the judgment of the learned judge granting specific performance of an agreement dated 31st May 2005 between the late Marie Madeline Marshall ("Mrs. Marshall") and the respondent, Paul Jason Auguste, for the sale by Mrs. Marshall to the respondent of property at Bella Rosa, Gros Islet, registered as Block 1256B Parcels 331 and 332, special damages of $5,897.06, interest and costs.

Background

[2] Parcels 331 and 332 were formally a part of a larger parcel of land registered as Parcel 177 owned in common by the heirs of the late Francis Clovis, deceased ("the deceased"). Mrs. Marshall was one of the eight heirs of the deceased and as such entitled to an undivided one-eighth share of Parcel 177. Regrettably, she passed away before this appeal was heard. The appeal is being carried on by her representative, Esther Augustin.

[3] The respondent's common law wife, Madeleine Clovis ("Madeleine"), is the daughter of the late Stephen Clovis who was one of the eight heirs of the deceased.

[4] Prior to the commencement of the claim in the High Court, Madeleine got permission from her aunts and uncles (except Mrs. Marshall) to build a house on a part of Parcel 177. Madeleine and the respondent built the house between 1995 and 1999 and have lived in it since then.

[5] In or about 2004, the respondent was desirous of getting title to the area of Parcel 177 that he occupies with Madeleine and started discussions with the heirs about partitioning the Parcel 177. The respondent also commissioned a valuation of Parcel 177 with a view to partitioning the parcel.

[6] The respondent and Madeleine also engaged Mrs. Marshall in discussions to purchase her share of Parcel 177. Eventually they agreed terms of sale and on 31st May 2005 entered into a written agreement for the sale of Mrs. Marshall's share of Parcel 177 to the respondent ("the Agreement"). The basic terms of the Agreement are:

(a) Mrs. Marshall would sell her undivided one-eighth share of Parcel 177 measuring approximately 27,715.05 square feet to the respondent at $3.50 per square foot, or $97,002.68;

(b) the respondent would pay a deposit of $10,000.00 on the signing of the Agreement and the balance of $87,002.68 immediately on completion of the survey and partition of Parcel 177;

(c) the respondent would represent Mrs. Marshall in all matters relating to the survey and partition of Parcel 177.

[7] The respondent duly paid the $10,000.00 deposit to Mrs. Marshall and proceeded with the surveying and partitioning of Parcel 177 in conjunction with the other heirs or their representatives.

[8] There were delays in completing the survey caused by the survey or submitting an incomplete plan that was initially rejected by the Ministry of Planning. The plan had to be corrected and re-submitted. It was eventually approved and showed the proposed division of Parcel 177 between the heirs ("the Plan").

[9] On 12th August 2008, Mrs. Marshall's attorneys wrote to the respondent purporting to recede from the Agreement on the ground that Mrs. Marshall never agreed to the terms of the purported Agreement. The attorney wrote to Madeleine on 17th March 2009 confirming the purported termination of the Agreement in the letter of 12th August 2008 to the respondent and informing the respondent that he was no longer authorised to represent Mrs. Marshall in any matter concerning the Parcel 177. Another letter to the same effect was sent to the respondent.

[10] The respondent did not accept Mrs. Marshall's termination of the Agreement.

[11] The partition of Parcel 177 was eventually completed on 5th October 2011 when the Deed of Partition was registered. Parcels 331 and 332 were allotted to Mrs. Marshall. The respondent's dwelling house is on Parcel 331 which is shown on the Plan as Lot A1 measuring 21,442 square feet. Parcel 332 is an undeveloped

parcel close to but not adjoining Parcel 331. It measures 6,432 square feet and is shown on the Plan as Lot A2.

[12] The respondent then tendered payment of the balance of the purchase price of $87,002.68 and called upon Mrs. Marshall to complete the purchase of Parcels 331 and 332. Mrs. Marshall did not accept the payment and refused to complete the sale. On 5th December 2011, the respondent's attorneys wrote to Mrs. Marshall asking for completion of the Agreement and also advising Mrs. Marshall that the expenses that the respondent had incurred on her behalf for the survey and partition of Parcel 177 would be deducted from the balance of the purchase price due on completion.

[13] On 16th March 2012, the respondent started proceedings in the court below claiming specific performance of the Agreement, damages and costs.

Proceedings in the court below

[14] The learned judge conducted the trial on 23rd September 2013 and delivered judgment on 18th November 2013. The terms of her order are summarised in the first paragraph of this judgment.

[15] Mrs. Marshall filed a notice of appeal on 30th December 2013. By way of comment, the drafting of the notice of appeal displays a complete disregard for the requirements of rule 62.4 and form 23 of the **Civil Procedure Rules 2000** ("CPR"). The CPR states that the notice should set out in separate sections the findings of fact and of law that are challenged, the grounds of appeal and the orders sought. The draftsman of this notice has placed all of the above elements in one section of the document without specifying what are complaints and what are grounds of appeal. The reader is left to work out these details.

[16] Doing the best I can, with the help of skeleton arguments by both counsel, the issues on this appeal are:

(a) The validity and enforceability of the Agreement having regard to:

(i) Mrs. Marshall's alleged lack of understanding of the Agreement.

(ii) Uncertainty of the land being sold.

(iii) Undervalue.

(iv) Delay by the respondent.

(v) Invalidity or illegality of the Plan.

(b) The judge's failure to deal with the relevant provisions of the **Civil Code of Saint Lucia** ("the Code").[1]

I will deal with these issues in turn.

THE AGREEMENT

Mrs. Marshall's Understanding

[17] Mrs. Marshall alleges in her written and oral evidence that she did not understand the agreement that she signed on 31st May 2005 – she thought she was signing a document in connection with the intended survey. She supported this allegation by saying that she does not really understand the English language, and that she was under the influence of the attorney representing the heirs. The judge found that:

(a) Mrs. Marshall understands both the English language and patois very well;[2]

(b) her evidence that she only understood the Agreement after her granddaughter explained it to her one month after she signed does

[1] Cap. 4.01, Revised Laws of Saint Lucia 2008.
[2] At para. 32.

not hold true.[3] She took no steps to challenge the Agreement for another three years;

(c) she was sufficiently apprised of the contents of the Agreement and knew what she was signing;[4]

(d) the respondent is a witness of truth; and

(e) the allegation of undue influence by the attorney was rejected completely and provoked a sharp comment from the judge for making such an allegation.[5]

[18] These are all findings of fact by the judge based on her review of the written evidence and her observation of the witnesses giving oral evidence. On well-known principles in cases such as **Golfview Development Limited v St. Kitts Development Corporation et al**[6] and **Central Bank of Ecuador and others v Conticorp SA and others (The Bahamas)**[7] this Court would be very reluctant to interfere with the judge's findings that Mrs. Marshall understood the Agreement that she was signing and was not unduly influenced in any way to sign it. In any event, in this case there was abundant evidence on which the judge made her findings.

Uncertainty

[19] Mrs. Marshall's allegation that there is uncertainty regarding the property to be sold is entirely misconceived and without merit. The Agreement was signed in May 2005 and defined the property being sold as a one-eighth share of Parcel 177 measuring approximately 27,715.05 square feet. Shortly after the Agreement was signed, one of the eight surviving heirs of the deceased, Bernadette Clovis, died.

[3] At para. 34.
[4] At para. 35.
[5] At paras. 36 – 43.
[6] SKBHCVAP2004/0017 per Rawlins JA at para. 23 (delivered 20th June 2007, unreported).
[7] [2015] UKPC 11 per Lord Mance at para. 5.

As a result, the lawyer who was in charge of the division and distribution of Parcel 177 advised Mrs. Marshall that the one-eighth share of the late Bernadette Clovis fell to be divided among the remaining seven heirs, and that their proportionate responsibility for the survey and legal fees for the project had increased from a one-eighth share each to a one-seventh share. This development had no impact on the land to be sold to the respondent. He still had a contract to purchase approximately 27,715.05 square feet at $3.50 per square foot.

[20] Following the completion of the partition of Parcel 177, Mrs. Marshall was awarded Parcels 331 and 332. These parcels are shown on the Plan as Lots A1 and A2 measuring 21,442 and 6,432 square feet respectively. The combined acreage of 27,874 is 158.95 more than the amount in the Agreement of 27,715.05 square feet. It is apparent that there is a small increase in the amount of land being sold to be respondent. However, this does not create any uncertainty. The Agreement contemplated that the land being sold had to be surveyed which is probably why it is described in the first recital of the Agreement as "approximately 27,715.05 sq. ft." The Agreement also had a formula for determining the price – $3.50 per square foot. The judge found at paragraph 46 of her judgment that "The subject matter of the Agreement was determinate as to its kind, and its quantity was capable of being and has now been ascertained". She calculated the increase in the square footage as 168.95, applied the formula of $3.50 per square foot and ordered the respondent to pay the resulting increase in price. This shows that there is no uncertainty regarding the subject matter of the Agreement. My only comment is that the actual increase in the square footage was 158.95 and not 168.95 as found by the judge. This is reflected in the order below.

[21] There is no basis for interfering with the judge's findings that there was no uncertainty regarding the amount of land being sold under the Agreement.

Undervalue and Delay

[22] There was evidence before the judge of a valuation of Parcel 177 commissioned by the respondent shortly before the heirs agreed to survey and partition the parcel. The assessed value was $4.00 per square foot. The judge rejected Mrs. Marshall's case that the valuation was done for ulterior motives and found that the difference in price of 50 cents per square foot between the assessed value and the contract price was not such as to amount to an undervalue. There is no basis for interfering with this finding.

Delay by the respondent

[23] The judge also rejected the allegation that the respondent was guilty of delay in completing the Agreement. Completion was scheduled to take place on completion of the survey and partition. There were delays in completing the survey that were not attributable to the respondent.

The Survey

[24[Mrs. Marshall also complained that the person who conducted the survey of Parcel 177, Mr. Conrad Larcher was not a licensed land surveyor and therefore the resulting plan is illegal. Dr. Barrow disposed of this ground of appeal in his written and oral submissions. He submitted that the evidence disclosed that Mr. Larcher did not hold himself out as a licensed surveyor and the letter of 11th July 2005 from the attorney for the heirs disclosed that the surveyor in charge of the survey was Mr. Cletis Felicien, a licensed land surveyor. The Plan was signed and presented for approval by Mr. Felicien which meets the requirements of the **Land Surveyors' Act**.[8] Mr. Larcher was working as the agent of Mr. Felicien, a practice that is not inconsistent with the **Land Surveyors' Act**.

[25] This ground of appeal is without merit and fails.

[8] Cap. 5.07, Revised Laws of Saint Lucia 2008.

Consideration of the Codal Provisions

[26] Mrs. Marshall complained in the notice of appeal that the learned judge failed to consider the relevant laws of Saint Lucia that apply to the Agreement, namely: the Code and in particular article 1387. Article 1387 reads:

> "If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it; he who has given the earnest, by forfeiting it, and he who has received it, by returning double the amount."

A literal reading of this article means that if there is a promise to sell accompanied by the payment of a deposit (earnest) either party may recede from the promise and the consequences of such recession are limited to the matters listed in the article – forfeiture of the deposit by the giver or return of the double the amount of the deposit by the receiver.

[27] However, it is a basic rule of statutory interpretation that in construing a provision in a statute regard must be had to the entire statute and not just the provision being interpreted.[9] This is a rule of general application and was applied to the interpretation of the Code by the former Chief Justice Sir Vincent Floissac in **St. Rose v Lafitte**[10] where he said at pages 115 to 116:

> "The interpretation of the articles, words and phrases of the Civil Code is an ascertainment of the meanings which the legislature intended those articles, words and phrases should bear. The legislative intention is an inference drawn from the primary meanings of those articles, words and phrases with such modifications to those meanings as may be necessary to make them consistent with the codal or statutory context. The codal or statutory context comprises every other article, word and phrase in the Civil Code and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."

Consistent with this approach, Dr. Barrow submitted that article 1387 is not the only article in the Code dealing with withdrawing from a contract. He relied on three other provisions in the Code.

[9] Halsbury's Laws of England, (Volume 44(1), 4th edn. Reissue, Butterworths 1995) para. 1484.
[10] (1992) 42 WIR 113.

[28] Firstly, article 1388 which provides that "A promise of sale with delivery and actual possession is equivalent to sale". This article goes further than article 1387 which deals with a promise of sale coupled with the giving of earnest. Article 1388 deals with a promise of sale coupled with actual possession by the buyer. In this situation, there is no option to recede as in article 1387 and the transaction is described as being "equivalent to sale". Dr. Barrow submitted that the facts of this case, where the respondent is in possession of the property that is the subject of the Agreement, article 1388 applies and the right to recede is not available to Mrs. Marshall. I agree with this submission.

[29] The second provision that Dr. Barrow relies on is article 954 which falls under the general heading "The Effect of Contracts". Article 954 reads:

> "Contracts produce obligations, and sometimes have the effect of discharging or modifying other contracts.
>
> They have also the effect in some cases of transferring the right of property.
>
> **They can be set aside only by the mutual consent of the parties, or for causes established by law**." (My emphasis).

Dr. Barrow submitted that the respondent did not consent to the setting aside of the Agreement and so it could not have been set aside by the unilateral act of Mrs. Marshall.

[30] Counsel for Mrs. Marshall, Mr. Calderon, responded by submitting that a contract can be set aside in accordance with article 954 if the receding party is acting under a "cause established by law", and receding under article 1387 is such a cause. However, article 1387 does not give the parties to a contract a cause for setting aside the contract. What it does is to give either party the option to withdraw from a promise of sale without cause and in that event the withdrawing party suffers the

consequence set out in the article. I do not accept Mr. Calderon's submission that article 1387 gives the parties a "cause established by law" to set aside a contract in the sense contemplated by article 954.

[31] Finally, Dr. Barrow relied on article 997 to submit that the right of a contracting party to sue for specific performance is preserved by the Code. Article 997, insofar as it is relevant reads:

> "The creditor may without prejudice to his claim for damages, demand specific performance ... subject to the special provisions of this Code."

Article 997 should be read with article 917A which imports English law relating to contracts into Saint Lucia:

> "(1) Subject to the provisions of this article, … the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to [Saint Lucia], and the provisions of Articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Cotume de Paris" "

[32] Mr. Calderon's response is to the effect that article 1387 is a specific provision that prevails over all the other parties referred to by Dr. Barrow, including articles 954 and 997.

[33] I prefer Dr. Barrow's submission on this issue and find that the law relating to specific performance of contracts is very much a part of the law of Saint Lucia. It would make nonsense of the Civil Code with its provision in article 1358, 954, 997 and 917A for protecting the rights of a party who has entered into a serious contractual obligation that he could have all his rights under the contract simply because the other party decides to recede from the contract without cause.

[34] In my opinion, the right to claim specific performance of a contract is preserved by the Code and in particular by articles 997 and 917A. This case is the classic example of why the Code preserves the right to demand performance of a contract in appropriate cases. The respondent has constructed his home on the property that is the subject of the Agreement and has lived there with his common law wife since the late 1990s; he expended additional monies on the surveying of the Parcel 177 at the request and with the approval of Mrs. Marshall, and has generally acted in a manner that would make it inequitable for him to be denied the right to receive title to Parcels 331 and 332. This is completely consistent with article 956 of the Code which provides that:

> "The obligation of a contract extends not only to what is expressed in it, but also to all circumstances which, by equity, usage or law, are incidental to the contract, according to its nature."

[35] This article imposes a clear obligation on Mrs. Marshall's estate, by "equity, usage and law" to convey title to Parcels 331 and 332 to the respondent.

[36] The learned judge did not make express references to the Code on the issue of specific performance, but it is clear that she applied all the principles embodied in that doctrine as set out in the Code and at common law. She was correct to grant specific performance of the Agreement.

Order

[37] I would make the following orders:

(a) The appeal is dismissed.

(b) The order of the learned judge made on 18th November 2013 is confirmed save for deleting the figure 168.95 square feet in paragraph 5 and substituting 158.95 square feet therefore.

(c) Costs of the appeal to the respondent at two-thirds of the amount awarded in the court below.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal