EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2014/0019

BETWEEN:

BENEDICTE MONTOUTE

Appellant

and

[1] VITUS FREDERICK
[2] FELICIA FREDERICK

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Dexter Theodore for the Appellant
Mr. Oswald Wilkinson Larcher for the Respondents

2016: May 20;
2017: January 16.

Contract – Sale of land – Principle of merger of agreement and deed of sale – Articles 1411, 1412 and 1413 of the Civil Code of Saint Lucia – Whether sale of land was sale of 'a certain determinate thing, without regard to its quantity by measurement, whether such quantity is mentioned or not' within meaning of article 1413 of the Civil Code

By deed of sale dated 5th October 2007, the appellant sold a portion of land ("the Land") to the respondents for a sum of $215,000.00. The respondents instituted proceedings against the appellant nearly 3 years later, claiming $149,380.00 as the market value of 10,670 square feet of land which, they alleged, was the difference between the amount of land which the appellant had agreed to sell to them and the amount of land which was actually sold to them. The appellant pleaded in her defence that although at the time of the sale she had no knowledge of the actual size of the Land, she had agreed to sell to the respondents the portion of land registered at the Land Registry as parcel number 1454B 982 which, according to the land register, had an approximate area of 0.50 hectares. The appellant stated that this approximate area appearing on the land register was all she

knew concerning the size of the Land. The appellant further stated that the first respondent had walked the Land on more than one occasion (including with his land surveyor) prior to the sale and that he had agreed to buy that parcel of land from her, which she, in turn had agreed to sell to him and his wife.

Judgment in the matter was handed down by the trial judge on 12th June 2014, whereupon the trial judge found in favour of the respondents. The judge held that, based on a written agreement dated 6th June 2007 which was signed by the appellant, the appellant had agreed to sell 54,000 square feet of land to the respondents and, accordingly, the respondents had a right to expect that the land purchased by them would be no less than 54,000 square feet. The appellant appealed the learned judge's decision on four grounds, including: (i) that the learned trial judge failed to appreciate that the contract for the sale of the Land was merged and extinguished in the conveyance of the property sold; and (ii) that the learned judge failed to appreciate that the sale of the Land was the sale of a determinate thing within the meaning of article 1413 of the Civil Code[1] and consequently, articles 1411 and 1412 of the Civil Code were inapplicable to the case at bar.

Held: allowing the appeal, setting aside the judgment and order of the learned trial judge, awarding prescribed costs to the appellant in the court below on the sum of $149,380.00, and two-thirds of that amount on appeal, that:

1. Where parties enter into an agreement for the sale of land, which agreement is intended to lead to the execution of a deed of sale between the parties, the agreement for sale is merged in the executed deed of sale and it is to the deed of sale and not the agreement for sale that one must turn to ascertain the terms of the contract between the parties. Accordingly, in the instant case, the document dated 6th June 2007 which was signed by the appellant, merged with the deed of sale executed on 5th October 2007 and it is the latter document which contained the terms of the contract between the parties.

   Knight Sugar Company, Ltd. v The Alberta Railway & Irrigation Company [1938] 1 All ER 266 applied.

2. The sale of a parcel of land by a deed of sale in which the land is identified by its distinct parcel number, rather than by a precise measurement derived from a survey of the land, is a sale of a certain determinate thing without regard to its quantity by measurement, even if (as in the present case) the deed of sale refers to an approximate quantity of land noted on the land register. Therefore, article 1413 of the Civil Code does apply to the case at bar and the learned trial judge erred in holding otherwise.

   Parrot v Thompson [1948] 1 R.C.S. 57 applied; articles 1411-1413 of the Civil Code Cap. 4.01, Revised Laws of Saint Lucia 2008 considered.

[1] Cap. 4.01, Revised Laws of Saint Lucia 2008.

JUDGMENT

[1] MICHEL JA: This appeal centers around two short points. The first is the recognition and application of the doctrine of merger to a contract for the sale of land when there is an agreement for the sale of the land followed by a deed of sale of the land. The second is the construction and application of articles 1411 to 1413 of the Civil Code.[2]

Background

[2] The brief facts are that by deed of sale dated 5th October 2007 and registered in the Land Registry on 19th October 2007, the appellant (as attorney in fact of Etiennese Anderson Eugene) sold a portion of land to the respondents, described in the schedule to the deed as –

> "All that parcel of land situate at Mount Layau and registered in Land Register Number 1454B 982 in the Registration Quarter of Gros-Islet, and bounded as follows:
>
> NORTH by Block 1254B 914, 981, and an Access Road – Block 1454B 375
> SOUTH by Parcel 1454B 596
> EAST partly by Block 1454B 695, 797, 799, 921, 922, and 923 and
> WEST by Block 1454B 596
> or howsoever otherwise the same may be bounded
>
> The whole containing approximately 0.50 Hectares."

The land was sold to the respondents for $215,000.00.

[3] In August 2010, nearly three years after the sale of the land by the appellant to the respondents, the respondents instituted proceedings against the appellant claiming compensation of $149,380.00 as the market value of 10,670 square feet of land which they say was a shortfall in the quantity of land that they obtained from the sale to them. The basis of the respondents' claim was that the appellant

[2] Cap. 4.01, Revised Laws of Saint Lucia 2008.

had agreed to sell 54,000 square feet of land to them, but that the land in fact sold to them by the appellant measured 43,330 square feet – a difference of 10,670 square feet.

[4] The appellant's defence was that the she had agreed to sell to the respondents the portion of land registered at the Land Registry as parcel number 1454B 982 in the registration quarter of Gros-Islet, which was shown on the land register to have an approximate area of 0.50 hectares. She asserted that the first respondent had walked the land on more than one occasion (including with his land surveyor) prior to the sale, and he agreed to buy that parcel of land from her, which she in turn agreed to sell to him and his wife. She had no knowledge of the actual size of the land, only that the approximate area of the land stated on the land register was 0.50 hectares.

[5] The case was heard on 7th March 2012, with two witnesses (the first respondent and his surveyor) giving evidence for the claimants, and the appellant as the sole witness for the defence. After all evidence had been given and the parties had closed their cases, the trial judge stated that he was ready to render a decision that very day or by the following week if counsel were prepared to make their closing submissions immediately. Upon the hesitation of counsel, the trial judge proceeded to state that the facts were fresh in his mind, as were the impressions which he formed on the basis of the witnesses, and then pretty much stated what his findings were, which clearly indicated his intention to rule in favour of the defendant, who is the appellant in this appeal. When, however, counsel for the claimants (the respondents to this appeal) persisted in his request for a week or two to submit written closing arguments, the trial judge proceeded to reserve judgment and to order that written submissions be filed in seven days.

[6] The case was recalled over two years later, on 12th June 2014, whereupon the trial judge gave judgment in favour of the claimants/respondents on the basis of findings made by him which appeared to be at considerable variance with his

utterances at the conclusion of the evidence in the case in March 2012. The passage of time between the closing of the parties' cases and the preparation of the judgment had evidently stripped the trial judge of his recollection of the facts and impressions which were fresh in his mind at the conclusion of the testimony of the witnesses two years and three months earlier. There was nothing contained in the closing submissions of counsel on behalf of the parties or in the judgment itself to suggest that there was any new material which altered the thinking of the trial judge between March 2012 and June 2014.

Grounds of Appeal

[7] The appellant appealed against the judgment on the following grounds:

> "(1) The learned judge failed to appreciate that the contract for the sale of the land was merged and extinguished in the conveyance of parcel 1454B 982.
>
> (2) The learned judge failed to appreciate that the sale of parcel 1454B 982 was the sale of a determinate thing within the meaning of Article 1413 of the Civil Code of Saint Lucia with the consequence that Articles 1411 and 1412 are inapplicable to the case at bar.
>
> (3) Assuming without admitting that the Respondents had any right to compensation by way of abatement of the price, the learned judge erred in law by failing to consider or to adequately consider that the respondents would have waived such right by their failure to make the present claim before execution of the deed of conveyance of parcel 1454B 982.
>
> (4) Alternatively, the learned judge erred in law in [sic] when he failed to appreciate, or to adequately appreciate, that having asked for and obtained a rebate at the time of execution of the deed of sale, the Respondents are estopped from claiming a further rebate in these proceedings."

Ground One

[8] It was submitted on behalf of the appellant that the trial judge found that the appellant had signed an agreement on 6th June 2007 in which she agreed to sell 54,000 square feet of land to the respondents for $220,000.00 and that the respondents had a right to expect that the land purchased by them would be no

less than 54,000 square feet, based on the quantity stated in the agreement. The appellant's counsel, however, argued that in the Canadian case of Knight Sugar Company, Ltd. v The Alberta Railway & Irrigation Company,[3] the Privy Council affirmed the principle that an agreement for sale cannot be looked at after the execution of a conveyance, since the agreement is merged in the conveyance. Indeed, Lord Russell of Killowen, who delivered the judgment of the Board, stated that –

> "[I]t is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed ..."[4]

Lord Russell went on to say that –

> "The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied."[5]

[9] The respondents did not address this ground of appeal in their written submissions filed in response to the appellant's submissions. In response to a question from the bench, however, learned counsel for the respondents appeared to be saying something to the effect that there was a merger of the agreement and the deed of sale, but that they merged into a new oral agreement for 54,000 square feet. Counsel did not however provide any authority, or justification even, for this extraordinary proposition.

[10] On the authority of the Privy Council's clear statement of principle in the Knight Sugar Company, Ltd. case, I am of the firm view that the document bearing the signature of the appellant and the date of 6th June 2007, on the basis of which the trial judge held that the appellant was contractually bound to convey 54,000 square feet of land to the respondents, was merged with the deed of sale dated

[3] [1938] 1 All ER 266.
[4] At p. 269E.
[5] At p. 269E-F.

5th October 2007, and it is to this deed that one must turn to determine what the contract was between the parties.

[11] Although neither of the parties in the court below referred to the merger principle or to the case of Knight Sugar Company, Ltd. v The Alberta Railway & Irrigation Company, and so the trial judge was not assisted by counsel in this regard and did not himself address either the principle or the case, the fact is that it is a legal principle applicable to the facts and circumstances of the case at Bar, which I unhesitatingly adopt and adapt as follows:

> Where parties enter into an agreement for the sale of land, which agreement is intended to lead to the execution of a deed of sale between the parties, the agreement for sale is merged in the executed deed of sale and it is to the deed of sale and not the agreement for sale that one must turn to ascertain the terms of the contract between the parties.

The consequence of the application of this principle to the facts of this case is that the "letter of intent", "letter of agreement" or "agreement" dated 6th June 2007 and signed by the appellant, merged with the deed of sale executed on 5th October 2007, which latter document contained the contract between the parties.

[12] In the case at bar, there was no reference to 54,000 square feet in the deed of sale. In fact, there was no reference to 54,000 square feet even in the document dated 6th June 2007, which the trial judge referred to as "an agreement". The deed conveyed to the respondents a 'parcel of land situate at Mount Layau and registered in Land Register Number 1454B 982 in the Registration Quarter of Gros Islet'. The schedule to the deed of sale enumerated the parcels of land bounding the subject land and included the words: '[t]he whole containing approximately 0.50 Hectares'. The reference to 'approximately 0.50 Hectares' in the deed of sale was clearly no more than a repetition of what was stated on the land register of

parcel number 1454B 982, there being no evidence that the parcel of land was ever surveyed to determine its actual measurement.

[13] The appellant accordingly succeeds on her first ground of appeal, that the 'learned judge failed to appreciate that the contract for the sale of the land was merged and extinguished in the conveyance of parcel 1454B 982'.

[14] This does not, however, take the appellant all the way, but only to the point of establishing that the contract between the parties was for the sale by the appellant to the respondents of a specified parcel of land, with specified boundaries and containing 'approximately 0.50 Hectares'.

Ground Two

[15] In ground two, the appellant contended that the judge failed to appreciate that the sale of parcel 1454B 982 was the sale of a determinate thing within the meaning of article 1413 of the Civil Code, with the consequence that articles 1411 and 1412 do not apply in this case.

[16] It is worth reproducing here each of the three mentioned articles of the Civil Code.

> "1411. If an immovable be sold with a statement, in whatever terms expressed, of its superficial contents, either at a certain rate by measurement, or at a single price for the whole, the seller is obliged to deliver the whole quantity specified in the contract; if such delivery be not possible, the buyer may obtain a diminution of the price according to the value of the quantity not delivered.
>
> If the superficial contents exceed the quantity specified, the buyer must pay for such excess of quantity, or he may at his option give it back to the seller.
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> 1412. In either of the cases stated in the last preceding article, if the deficiency or excess of quantity be so great, in comparison with the quantity specified, that it may be presumed the buyer would not have bought if he had known it, he may abandon the sale and recover from the seller the price, if paid, and the expenses of the contract, without prejudice in any case to his claim for damages.

> 1413. The rules contained in the last two preceding articles do not apply, when it clearly appears from the description of the immovable and the terms of the contract that the sale is of a certain determinate thing, without regard to its quantity by measurement, whether such quantity is mentioned or not."

[17] As submitted by counsel for the appellant, article 1411 deals with the situation where land is sold by reference to its area, which then obliges the seller to deliver the specified quantity to the buyer or rebate the price paid by the buyer commensurate with the shortfall in the quantity delivered. This would apply here if the appellant had contracted to sell to the respondents (say) "54,000 square feet of land at Mount Layau in the Quarter of Gros Islet" or "8,000 square feet of land to be dismembered from parcel number 1454B 982". This would be a portion of land sold by reference to its area and would oblige the appellant either to deliver to the respondents the full quantity of land agreed to be sold to them or to give a rebate to the respondents on the price at which the land is sold to them. As also submitted by counsel for the appellants, article 1412 gives to the buyer the option to abandon the sale and to recover from the seller the price paid, plus expenses and damages, if the deficiency in the quantity of the land is sufficiently significant. Article 1412 will, of course, only come into play if the conditions for the application of article 1411 have been satisfied.

[18] Counsel for the appellant submitted that this is a case where it clearly appears from the description of the land and the terms of the contract that the land sold to the respondents was a determinate thing, being a specified parcel of land identified by its block and parcel number and the registration quarter within which it is located, and specifying the boundaries within which it is contained. Learned counsel also highlighted the specific provision in article 1413 that the land is sold 'without regard to its quantity by measurement, whether such quantity is mentioned or not'.

[19] Learned counsel for the appellant also referred the Court to the Quebec case of Parrot v Thompson,[6] decided on the provisions of the Quebec Civil Code in identical terms to articles 1411, 1412 and 1413 of the Civil Code of Saint Lucia. In that case, Chouinard J, delivering the judgment of the Supreme Court of Canada on appeal from the Quebec Court of Appeal, made the following statement of principle: 'When a lot is designated by its cadastral number, as was the case here, there is a sale of a certain determinate thing within the meaning of art. 1503 *C.C.*'[7] Article 1503 of the Quebec Civil Code is identical to article 1413 of the Civil Code of Saint Lucia.

[20] The cadastral number of a portion of land under Quebec law is akin to the parcel number of a portion of land under Saint Lucia law and so the statement of principle made by Chouinard J in the Supreme Court of Canada in the case of Parrot v Thompson can equally be applied in this case.

[21] The respondents, in responding to ground two of the appellant's grounds of appeal, proceeded on the basis – both in their written submissions and in the oral submissions by counsel on their behalf – that the contract between the parties was for the sale of 54,000 square feet of land, based on the document variously referred to as a "letter of intent", "letter of agreement" or "agreement".

[22] Having allowed the appellant's first ground of appeal, with the consequent determination that the agreement between the parties was merged with the deed of sale and the contract became embodied in the deed of sale, it is to this deed that one must turn to ascertain what the contract was between the parties.

[23] According to the deed of sale, which is at pages 34 to 37 of the record of appeal, the vendor (the appellant in this appeal) sold, and the purchasers (the respondents in this appeal) accepted, the land described in the schedule to the deed of sale.

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[6] [1948] 1 R.C.S. 57.
[7] At p. 63

The land was described in the schedule to the deed of sale as at paragraph 2 above, by its parcel number and its boundaries, with the reference to 'approximately 0.50 Hectares' being, as I stated earlier, a mere repetition of what was on the land register for parcel 1454B 982.

[24] The respondents' position on this issue, proceeding as it does on the false premise that the contract between the appellant and the respondents was reflected in the 6th June 2007 document which, rather than being merged with the subsequently executed deed of sale, was modified by a supposed oral agreement for the sale by the appellant to the respondents of a portion of land measuring 54,000 square feet, is therefore not sustainable.

[25] It clearly appears to me from the description of the subject land in the deed of sale executed between the parties hereto and the terms of the contract as embodied in the deed, that the sale of the land by the appellant to the respondents was the sale of a certain determinate thing, namely, parcel number 1454B 982 in the registration quarter of Gros Islet, with the boundaries as stated in the schedule to the deed, and that the land was sold to the respondents without reference to its quantity by measurement, even if it was mentioned in the schedule to the deed that the land was approximately 0.50 hectares. Moreover, although there are factual differences between the case of Parrot v Thompson and the case at bar, the statement of principle quoted in paragraph 16 above made by Chouinard J in the Supreme Court of Canada in Parrot v Thompson can equally be applied in this case given the virtual identity of the applicable legal regimes in Quebec and Saint Lucia on the point in issue here. Indeed, I am prepared to hold, on the strength of the statement of principle by Chouinard J in Parrot v Thompson, and on the wording of articles 1411,1412 and 1413 of the Civil Code of Saint Lucia, that the sale of a parcel of land by a deed of sale in which the land is identified by its distinct parcel number, rather than by a precise measurement derived from a survey of the land, is a sale of a certain determinate thing without regard to its

quantity by measurement, even if (as in the present case) the deed of sale refers to an approximate quantity of land noted on the land register.

[26] I note the statement made by the trial judge at paragraph [1] 10 of his judgment, as follows: 'I do not agree with the Defendant that this is a sale of a "certain determinate thing without regard to its quantity by measurement.." as is referred to in Article 1413 of the Civil Code'. I regard this statement by the trial judge as a finding of law made by him, as indeed it is treated in paragraph 2. (3) of the notice of appeal, and – for the reasons reflected in the immediately preceding paragraph – I take the view that it was a finding made in error, which ought therefore to be overturned. If, however, the statement is treated as being a finding of fact made by the trial judge, then the learned judge had clearly misdirected himself in law in making this finding in light of the wording of articles 1411, 1412 and 1413 of the Civil Code and in light of the very persuasive authority of Parrot v Thompson decided by the Supreme Court of Canada on the basis of articles 1501, 1502 and 1503 of the Quebec Civil Code, which are identical to articles 1411, 1412 and 1413 of the Civil Code of Saint Lucia. In any event, the benefit which the trial judge was supposed to have had by having seen and heard the witnesses as they testified in court was obviously lost when he gave judgment well over two years after hearing and seeing the witnesses and made findings in his judgment which were clearly at variance with those which he appeared to have made after all the evidence had been given. The finding by the trial judge therefore that the sale of the land by the appellant to the respondents was not a sale of a certain determinate thing without regard to its quantity by measurement, even if it was a finding of fact made by the learned judge, ought to be overturned.

[27] I will accordingly allow the appellant's second ground of appeal that 'the learned judge failed to appreciate that the sale of parcel 1454B 982 was the sale of a determinate thing within the meaning of Article 1413 of the Civil Code of Saint Lucia with the consequence that Articles 1411 and 1412 are inapplicable to the case at bar'.

Conclusion

[28] The determination of these two grounds of appeal in favour of the appellants means that, having decided that the contract between the parties is embodied in the deed of sale dated 5th October 2007, and having decided that the contract was for the sale by the appellant to the respondents of a certain determinate thing, namely, parcel number 1454B 982, and not for the sale of 54,000 square feet of land, it is unnecessary to consider the third and fourth grounds of appeal in order to arrive at the position that the appeal should be allowed and the judgment and order of the trial judge entering judgment in favour of the respondents in the court below for the sum of $149,380.00, together with interest and costs, should be set aside.

[29] I will accordingly allow the appeal, set aside the judgment and order of the trial judge, and award prescribed costs to the appellant in the court below on the sum of $149,380.00, and two-thirds of that amount on this appeal.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar