BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISIDICTION

No. 1111 of 2000

BETWEEN:

SHAKA WAYNE RODNEY

(1stPlaintiff)

PORTFOLIOINVESTMENTS INC.

(2ndPlaintiff)

AND

VERNON O'CONNELL HOPE

(Defendant)

Before The Honourable Mr. Justice Carlisle Payne, Judge of the High Court.

2002: January22

February: 1, 6, and 13

Mr. Andrew Thornhill for the Plaintiffs with MissShelley Stuart

Mr. Alair Shepherd, Q.C., for the Defendant with Mr.Adrian King and Miss Wendy Maraj.

DECISION

ThePlaintiffs (purchasers) are seeking specific performance of an agreement forthe sale of property in Prospect, St. James, pursuant to Order 81 of the Rulesof the Supreme Court.

Thefacts briefly are as follows:

Theagreement was dated 6thDecember, 1996, with the date for completion being 28thFebruary, 1997. Thiscompletion date was not met by the purchasers, and the contract wasrenegotiated between April 1997 and December 1997, and a new purchase price of$430,000.00 was agreed. [1]

On4th May, 1998 theDefendant (vendor) served Notice on the purchasers to complete on or before 26thMay, 1998, as to which time was made of the essence.

At3.27 p.m. on the said 26thMay, 1998, the vendor's Attorney-at-Law received a fax message fromthe purchasers' Attorney-at-Law which read as follows:

"Re: Conveyance VernonHope to Portfolio Investments Inc.

The above matter is about to be completed. Kindly send us in escrow the conveyance to the purchaser. Also send us:-

1. CIR Forms in duplicate,

2. Change of Ownershipforms in triplicate

3. Land Tax Certificatevalid until 31st March 1998."
It is to be observed that as appears from theevidence, these documents are now being requested for the first time, and thatthere is no tender of the balance of the purchase money.

The vendor's attorney responded the same day asfollows:-

“ I refer to your letter dated the26th May, 1998. The documents requested by you in your said letter have been held by mesince before the Notice of Completion dated 4th May sent to you andwhich expires today.

In a fax to me today by the Vendor, I am to report to him by the closeof business today on the status of the transaction. I will do so and take his instructions”.

Onthe following day, the Vendor’s attorney received the following letter, dated 26thMay, 1998 from the purchasers’ attorney.

“Werefer to your fax dated May 26, 1998.

We are aware that your completion notice expiredtoday, that is why we requested you to forward us the documents. We are in funds to complete this matter andare ready, willing and able to do so provided that all the documents are inorder.”

Therewas still no tender of the purchase money, and as I see it the vendor couldhave rescinded the agreement at this point. [2]

However,on 29th May, 1998,the vendor’s attorney wrote to the purchasers’ attorney as follows:

“I am instructed by my vendor client, that withoutprejudice to his rights, he is prepared to extend the time for completion byseven days from today provided the purchaser pays interest on the unpaidbalance of the purchase money that is, $390,500.00 at the per diem rate of $42.79from 4th May, 1998 until the date of actual completion.

If your client is not prepared to agree to this, myclient will forfeit the deposit paid and proceed to another sale.”

Accordingto paragraph 7 of the affidavit of Mr. Thornhill filed 18th January2002, the purchasers’ attorney attended the office of the vendor’s attorney on3rd June, 1998 with his clients’ account book and advised that hewas there and then ready, willing and able to draw a cheque for the balance ofthe purchase price, but the vendor’s attorney advised that he was awaitingfurther instructions from the vendor.

Mr.Shepherd submits that the purchasers’ attorney was still under a duty to tenderthe balance of the purchase money. Herefers to the Court of Appeal (UK) decision in Carne v Debono 1988, 3 AER 485where the following passage appears at page 489:

“The purchaser asks what was he to do; his solicitorswere in funds but what had been askedfrom them was the payment of a sum which, on the face of the completion statement,was the wrong sum. The purchasersubmitted, in effect, that the vendors were in breach of contract in that theyfailed to send in good time a completion statement specifying the right amountdue….

Although it is a customary step in conveyancing procedurethat completion statements should be sent and agreed so that the parties shouldbe clear well in advance of the date of completion what their respectiveobligations are, so far as I am aware, that is merely a matter of practice and not of law. So far as the authorities drawn to our attention are concerned,there is no legal obligation on a solicitor to provide a completion statement.

In those circumstances, what was the purchaser to dowhen faced with an erroneous completion statement? The master held that it was his duty to tender the correct amountof the purchase money and that as the purchaser had done nothing and had not tendered the purchase price, hewas in breach….

I agree with that view. There being no contractualobligation to provide a completion statement, in my judgement, it is not arepudiation by the vendor if in the completion statement he asks for more thanthat to which he is entitled. So tohold would give rise to great disputes in vendor/purchaser matters since theexact calculation of [3] thepurchase money is often a matter of some difficulty. The completion statement is often the subject of negotiationsbetween the parties to arrive at the correct figure.

What then happens if there is no agreement asto that amount? In my judgment, therewould be a complete stalemate in the conveyancing procedure if it were open tothe purchaser merely to say:‘I do not agree your statement and I will thereforedo nothing.’In my judgment, Megarry J was right in saying that the duty then is for the purchaser to comeforward and tender the money which he says is the amount due if he wishes toavoid being in breach of contract.”

Mr.Shepherd further submits that, in the absence of agreement or custom, apersonal or ordinary cheque would not constitute valid tender.

Inany event it seems to me that whether the purchasers’ attorney could reasonablyhave been expected to tender on the 3rd day of June 1998,notwithstanding the position taken by the vendor’s attorney, would depend on aninterpretation of exactly what transpired. This seems to me a question which ought to be tried.

Mr.Thornhill however contends that once a deed is signed, sealed and delivered,the party is irrevocably bound and cannot rescind. In this case the conveyance was executed by the parties,signed and sealed by the vendor andsent to the vendor’s attorney. He citesthis passage on page 323 of Contract and Conveyance, 4 ed. By Farrand.

“After delivery as an escrow, the grantor isirretrievably committed; he cannotresile or recall the document but can only await performance of the conditionby, more often than not, the grantee.”

The authorities show that delivery is verymuch a matter of intention. In FoundlingHospital v Crane, 1911 2KB 367 at377 Farwell LJ in his Judgment said :-

“There are two sorts of delivery, and two only, knownto the law, one absolute, and the other conditional, that is as an escrow to bethe deed of the

party when, and if, certain conditions are performed. If the deed operated as a complete delivery,cadit quaestio; if it did not, then it must [4] be either an escrow or a nullity. The mode in which it in fact operated is a question of intention,primarily of the grantor, and secondarily of the grantee; nothing passes out ofthe grantor against his intention, and no one can be compelled to accept anassignment of any property, onerous or otherwise, without his consent. Now an escrow or script is not a deed atall; it is a document delivered upon a condition on the performance of which itwill become a deed, and will take effect as from the delivery, but until suchperformance it conveys no estate at all."

In Walter v Ware Rye 1865, 35 Beav 58, RomillyMR gave judgment as follows:-

"It is the ordinary and almost invariably practice forthe vendor to execute the conveyance and give it to his solicitor, whoexchanges the deed for the purchase-money when paid by the purchaser. But it would be a monstrous thing for thepurchaser to be allowed to say to the seller, "You have executed the deed, andtherefore I need not pay the purchase-money; and I have got the legal estate,and you must enforce payment of the purchase-money as you can." On the contrary, I am of opinion thepurchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day, where thedeed of conveyance is executed as an escrow."

Inthis case, the alleged deed of conveyance, just like the agreement, statedunequivocally the intention of the parties that the balance of the purchasemoney was to be paid on or before completion, or before the deed of conveyancecould take effect.

Myopinion therefore is that after delivery as an escrow, the vendor cannotrescind or recall the document during the time that pursuant to the contractthe purchaser is entitled to performthe condition. During that time it canbe said that the vendor is irretrievably committed and can only awaitperformance of the condition by the purchaser. I think that this is what the passage quoted from Farrand reallymeans. But after the time fixedpursuant to the contract for performance has passed, time having been made ofthe essence, it would make no sense, to my mind, to say that the vendor canonly await performance of the condition.[5]

Another issue relates to thecondition attached to the offer to extend the time for completion contained inthe letter dated 29th May,1998 from the vendor's attorney. The question arises whether this condition was accepted by thepurchasers. I consider that this alsois a question which ought to be tried.

Further,paragraph 20 of the affidavit of Mr. Hope filed 18th January, 2002appears to raise another question. Thisparagraph is as follows:-

"In fact I am informed by my daughter and verilybelieve that Mr. Rodney contacted her on the 5th day of June 1998,the day of the expiration of the unauthorised and "without prejudice"extension, and apologized for the delays associated with the transaction. Mr. Rodney further informed my daughter thathe would let us know if and when hewould be able to complete. It was clearto both myself and my daughter that Mr. Rodney was in no position to completethis transaction at this time."

Forthese reasons, I consider that there are issues and/or questions in disputewhich ought to be tried. I alsoconsider that the Defendant has an arguable defence.

Theapplication for specific performance is therefore refused.

Therewill be liberty to apply for directions as to the further course of the matter.

Costsin the cause. [6]
Carlisle S. Payne

Judge of the High Court.