

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Civil Appeal No. 30 of 2006

BETWEEN:

DELYS O'LEEN COLBY *Appellant*
(Deceased, acting herein by David
Victor John Bothway Colby and duly
qualified Executor of the Estate of
the said Delys O'leen Colby.)

AND

FELIX ENTERPRISES LIMITED *First Respondent*
FELIX BROOME INCORPORATED *Second Respondent*

BEFORE: The Hon. Frederick L.A. Waterman, CHB, The Hon. Peter D.H. Williams and The Hon. Sherman R. Moore, Justices of Appeal.

2008: 27 October

2010: 27 May

Mr. Alair Shepherd Q.C. and Mr. Philip McWatt for the Appellant

Mr. Roger Forde Q.C. and Miss Heatherlyn Devonish for the Respondents

JUDGMENT

PETER WILLIAMS JA

I. INTRODUCTION

- [1] The dispute between the parties in this case had its genesis in the final amount payable by the purchaser to the vendor on the sale and purchase of a property at Maxwell Coast Road. The purchaser wishes the contract specifically enforced while the vendor's executor contends that by reason of the events that have taken place he is entitled to rescind the contract and forfeit the deposit.

II. THE FACTS

- [2] On or about 16 May 1995, Delys O'leen Colby ("Mrs. Colby"), the appellant, signed an agreement with Felix Enterprises Limited, the first respondent, to sell 35,467 square feet of land and the dwelling house thereon known as "Maristow" for \$535,000. Mrs. Colby died on 20 May 2005 and leave was granted to her son and qualified executor to carry on these proceedings.
- [3] Felix Broome Incorporated, the second respondent, was the first respondent's nominee to purchase the property. Mr. Felix Broome was the Managing Director of both companies and for easy reference the respondents are sometimes referred to individually or collectively as Mr. Broome.
- [4] A history of the matter is that Mrs. Colby rented the property to Mr. Broome for some considerable period before the agreement for sale. The property was effectively integrated as a part of Mr. Broome's hotel, the Barbados Beach Club. However, Mrs. Colby was not in a position to pass a good title to the property and she had to obtain a proper title in foreclosure proceedings through the court. These proceedings enable the owner of property to perfect the title thereto by obtaining a conveyance from the Registrar of the Supreme Court pursuant to an order of the court. The process generally takes more than a year to complete. Clause 8 of the agreement therefore provided for Mr. Broome to continue in possession of the property as a monthly tenant paying a monthly rent of \$3,000. If Mrs. Colby failed to obtain a court title she would pay Mr. Broome \$200,000 representing compensation for all improvements which were carried out to the property by him and she would also refund the deposit: clause 13(b).
- [5] Clause 2 (e) of the agreement provided for the payment of rent as follows:

"(e) The purchaser will continue to pay to the vendor the rent of Three thousand dollars (\$3,000.00) per month on the 10th day of May 1995 and continuing on the 10th day of each and every month until completion in accordance with clause 10 [provision for obtaining a court title] and all sums so paid shall be credited towards the purchase price until evidence of title has been produced to the purchaser's

Attorney-at-Law as set out in clause 10 hereof.”

However, there was an addendum to the agreement, the effect of which has been a matter of controversy between the parties and has served to derail the smooth conclusion of the sale and purchase. The addendum was in the form of a letter dated 27 June 1995 from the vendor’s Attorney-at-Law, Mr. Stephen Farmer, to the purchaser’s then Attorneys-at-Law, as follows:

“[W]e would be grateful if you would have your client sign the enclosed copy of this letter as its agreement to the following:

1. Your client has agreed to pay the rent referred to in clause 2(e) of the said agreement by standing order into our client’s Bank account [details provided].
2. Should the rent not be paid on the date specified in clause 2(e) or within fourteen days thereof, as to which time shall be of the essence, then the rent for that month shall not be credited towards the purchase price.

We remind you that the copy of the agreement forwarded to you under cover of our said letter dated 16th May was forwarded conditional upon your client agreeing to the above conditions.”

Mr. Broome signed the letter as director of the first respondent. According to Mrs. Colby “before the contract was drawn up we had a problem with non-payment of rent and I discussed it with my lawyer”. The wording of the addendum “was to ensure that the rents were paid on time and in fact gave a 14 day grace period”: Mr. Farmer’s letter dated 5 January 1999 to Mr. Leroy Inniss Q.C. (subsequently Inniss J), who was acting for Mr. Broome.

- [6] According to Mr. Farmer’s affidavit filed on 15 February 2000, the title suit was completed by virtue of a consent order on 2 February 1998 but the order was amended by the court on 30 December 1998. On 8 October 1990, Mr. Farmer wrote to Mr. Inniss forwarding a completion statement. No dispute arose on the completion statement save for the treatment by Mrs. Colby of the rent paid by Mr. Broome.
- [7] According to the terms of the addendum the rent was to be paid within 14 days after the 10th day of each month in which it was due i.e. by the 24th day of the month, failing which it would not be credited to the purchase price. The dates of payment, which Mr. Broome did not dispute, were set out in an affidavit of Mrs. Colby filed on the said 15 February 2000. Payment was made within the terms of the addendum agreement from May to November 1995; seven payments at \$3,000 or \$21,000 which was duly credited to the purchase price. Thereafter, no payment was made in December 1995 and the next payment made on 10 January 1996 was credited to the arrears in December. Thereafter the payments were always in arrears because the missing payment for December 1995 was never made. There was also a missing payment for August 1998.
- [8] Mr. Broome’s response was that he should be given credit towards the purchase price in respect of all payments save the two which were not made. His position therefore was that an additional 35 months or \$105,000 should be credited towards the purchase price.
- [9] On 23 November 1998, Mr. Farmer served the purchaser a notice to complete within 28 days i.e. by 21 December 1998. Subsequent to 23 November 1998, there was considerable correspondence between the parties in an effort to complete the matter. On 27 November 1998, Mr. Inniss requisitioned on title; Mr. Farmer replied by letter dated 1 December 1998. It was clear that the matter could not be completed within the time stipulated for completion because a further order had to be obtained from the court to facilitate the transfer of the property to the first respondent’s nominee, the second respondent. That order was not obtained until 30 December 1998. Furthermore, the disputed amount due on the completion statement was never resolved because the parties would not agree on the manner in which the 35 payments should be treated. Mr. Farmer made a point of stating in all of his letters that they were written without prejudice to his notice to complete, dated 23 November 1998.
- [10] On 29 January 1999, Mr. Farmer wrote to Mr. Inniss enclosing a copy of the executed conveyance and calling upon Mr. Broome to complete the matter by paying the balance due of \$436,532 and the two months rent of \$6,000. The letter stated that it was without prejudice to the notice to complete and added:

“We further have been instructed to advise that should we not receive your cheque in the sum of \$436,532 by Monday 8 February 1999, to commence legal proceedings in the High Court **to enforce the agreement**”. (Emphasis added.)

Mr. Forde relied heavily on this letter in support of his submission that Mrs. Colby had waived any right she may have had to rescind the contract and forfeit the deposit.

- [11] On 8 February 1999, Mr. Inniss replied maintaining that the payments of rent should be credited to the purchase price and suggesting that “the matter be closed immediately and the assistance of the court be sought to determine if any further payments ought to be made”. Nothing further happened until 10 August 1999 when Mr. Shepherd wrote to Mr. Inniss stating that Mr. Broome failed to comply with the notice to complete and Mrs. Colby was treating the “contract as terminated”, forfeiting the deposit and requiring Mr. Broome to deliver immediate possession of the property. There was no further correspondence prior to the filing of proceedings. It is unfortunate that two experienced business people and their lawyers did not resolve the issues in this commercial transaction without recourse to these proceedings.

III. THE PROCEEDINGS

- [12] On 15 February 2000, Mrs. Colby filed an originating summons against Mr. Broome’s companies seeking a declaration that she had rescinded the agreement and was no longer obliged to transfer the property, and a further declaration that she was entitled to retain the deposit. The originating summons was supported by Mrs. Colby’s affidavit and that of her Attorney-at-Law, Mr. Farmer.
- [13] Similarly, Mr. Broome and his Attorney-at-Law, Mr. Inniss, filed affidavits opposing the application. Mr. Broome sought declarations that the vendor was obliged to convey the property to him in accordance with the agreement and that in determining the balance of purchase price, all the payments of rent should be deducted from the purchase price except two.
- [14] On 23 February 2004, **Greenidge J** gave his decision and made an order on the originating summons. He decided that the contract should be specifically enforced and that the manner in which Mrs. Colby had treated the rent payments was in order. The judge found that she had “appropriated the payments first to the arrears” and held that she “was entitled to do this”: paragraph [8] of the decision. He further stated that the respondents had “part performed the contract” and that the parties should meet and “settle the application of the rent and if unsuccessful come back to court on 8 November 2004”. The judge ordered costs to Mrs. Colby. In summary, the judge rejected the vendor’s argument that the contract was rescinded and the deposit forfeited. He therefore invited the parties to settle the rent issue on the basis of the manner in which Mrs. Colby had treated the payments.

- [15] There was some controversy surrounding the terms of the order; suffice it to say that counsel for both parties appeared before the judge on 8 November 2004 and the order was finally settled. The order was filed on 19 November 2004.
- [16] The material terms of the order were as follows:
1. The agreement was to be specifically performed and carried into execution.
 2. There was due from the first defendant to the plaintiff in respect of rent from 10 October 1998 to 10 February 2004 (64 months at \$3,000 per month) - \$195,000.
 3. The first defendant was to pay the plaintiff by 30 November 2004, \$535,000 less the deposit of \$53,500, less a rent credit to the purchase price of \$21,000 - **\$460,500**.
 4. The first defendant was to pay the plaintiff mesne profits from 9 October 1998 to 30 November 2004 in the sum of **\$219,000**.
 5. The plaintiff's costs were to be paid; it was not stated by which (or both) defendant(s).
- [17] There should have been no figure of \$195,000 for rent as stated in paragraph 2 of the order because all amounts for rent after the completion date (9 October 1998) were subsumed into mesne profits as stated in paragraph 4 in the sum of \$219,000 though Mr. Forde's correspondence referred to a figure of \$216,000.

IV. EVENTS SUBSEQUENT TO THE ORDER

- [18] On 3 March 2004, Mr. Broome filed an appeal (Civil Appeal No. 7 of 2004) pending clarification of the order but on 18 June 2005 it was withdrawn. On 21 April 2004, while the exact terms of the order were still being clarified, Mr. Shepherd wrote to Mr. Forde requesting Mr. Broome to deliver possession of the property at once. Mr. Forde replied on the same day pointing out that the order had not been settled and that an unheard application for a stay of execution was pending. The reply further stated that Mr. Broome would not be delivering possession. These letters are an example of the obvious breakdown in relations between the parties which has (unnecessarily) bedevilled this litigation.
- [19] Following the judge hearing the parties on 8 November 2004, Mr. Forde wrote to Mr. Shepherd by letter of the same date stating that his client was ready to complete the sale and purchase of the property. It is important to set out this letter because it shows clearly that up to this point there was no issue between the parties on the order or hindrance to completion of the matter. Mr. Forde wrote:

"My client is prepared to complete the sale and purchase of the property at Maxwell, Christ Church in accordance with the order made by the Court earlier today, namely the payment of the sum of \$460,500,000. In the circumstances, my client requires the following:

1. That the line marks be pointed out to Mr. Felix Broome;
2. The original Conveyance duly executed by your client and adjudicated by the Registrar of Titles together with proof that the Transfer Tax and Stamp Duty [have] been paid by your client;
3. Prior title deeds, i.e. the Registrar's conveyance which your client was required to obtain under the agreement;
4. Evidence that all water rates have been paid;
5. The usual section 12A forms and the Change of Ownership forms;
6. Copy of the Land Tax Certificate.

Once the matters mentioned herein at 1 & 4 have been satisfied, I will exchange for the documents mentioned at 2 & 3 herein, a Banker's draft in the sum of \$460,500.00.

Kindly advise how soon we can close the matter. In the meantime, my client will soon be tendering a cheque for payment of [mesne profits] up to the end of November 2004."

- [20] On 12 November 2004, Mr. Shepherd replied to Mr. Forde by letter in which he stated that the order had been settled, engrossed and presented for filing. He also stated that he had received instructions to appeal the order.
- [21] On 16 November 2004, Mr. Forde wrote to Mr. Shepherd enclosing a cheque for \$216,000 representing mesne profits and confirming that his client was ready and willing to exchange its further cheque of \$460,500 for the conveyance and other documents of title to the property.
- [22] On 14 December 2004 and 26 January 2005, Mr. Forde again wrote to Mr. Shepherd stating that there was no reply to his letters of 8 and 16 November 2004. There was no reply to the follow-up letters.
- [23] Mr. Farmer of Clarke, Gittens & Farmer, Attorneys-at-Law was acting for Mrs. Colby on the conveyancing aspect of the matter and also for RBTT Barbados Limited, the proposed mortgagee, which was making a loan of \$350,000 to

Felix Broome Incorporated. In the circumstances, Mr. Forde on 4 January 2005 wrote to Mr. Farmer inquiring when he could exchange his client's cheque for the conveyance. Mr. Farmer did not reply. Mr. Forde wrote again on 4 March 2005 to no avail.

- [24] On 22 April 2005 (the letter was misdated 2004), Mr. Shepherd requested for the first time that the purchaser pay the land taxes; he stated that his client would then be prepared to complete the sale. On the same date, Mr. Forde replied that the issue of payment of land taxes had already been raised by Mr. Farmer; that his client was relying on the terms of the agreement and was therefore not prepared to pay the land taxes. The terms of the agreement in relation to land tax were the usual terms found in an agreement for the sale and purchase of land and were as follows:

"6. The Land Tax for the current year shall be apportioned as at the date of completion of the sale and purchase."

- [25] It follows that Mrs. Colby's demand that Mr. Broome pay all the land taxes and not merely his apportioned share was not in keeping with the terms of the agreement. Further, this new demand was inconsistent with the manner of dealing with the land tax shown in the completion statement dated 8 October 1998 presented by Mrs. Colby's Attorneys-at-Law in which the land tax was apportioned.

- [26] It is noteworthy that up to this point (June 2005) both parties were willing to complete the matter except that the vendor was imposing a condition contrary to the terms of the contract and the purchaser refused to accept that condition. Both parties evinced an intention to perform the contract. Mr. Forde confirmed the above in his oral submissions when he stated:

"Conduct after 2004 clearly shows that both parties contemplated the completion of the agreement and the only stumbling block would have been the land taxes."

V. THE APPEAL

(a) Notice of Appeal

- [27] On 13 December 2006, Mrs. Colby obtained leave from this Court to appeal. The appeal was stated to be "against that part of the decision which ordered the appellant to convey the property".
- [28] The sole ground of appeal was that the judge "erred in law in failing to hold that the appellant was entitled to forfeit the deposit and rescind the agreement on the basis that the respondent at all times failed to make a proper or any tender of the purchase price". The appellant reserved the right to add to the ground of appeal but no addition was made to the ground.
- [29] The appellant sought declarations that she was "no longer obligated to transfer the fee simple absolute in possession to the respondent" and that she "correctly forfeited and/or is entitled to retain the deposit paid under the said agreement". The appellant further sought orders that the respondents deliver possession of the premises and pay to the appellant mesne profits up to the date of possession.

(b) Respondent's Notice

- [30] On 2 January 2007, the respondents filed a notice of intention to contend that the decision of the court below be varied. The variation sought by the respondents was that in determining the balance of the purchase price they should be given credit for all but two payments made during the period May 1995 to October 1998. These were the payments referred to in paragraph [7] above and disallowed by the judge.

(c) Submissions and discussion

- [31] Mr. Shepherd made the following submissions in writing in relation to Mrs. Colby's right to forfeit the deposit and obtain possession of the property:

"18. The appellant bases the right to forfeit the deposit and retake possession on the basis that the respondents failed to complete the purchase in accordance with the agreement. That failure is based on two (*sic*) submissions:

18.1 The appellant was entitled to appropriate the rental payments in accordance with the letter dated 8th October 1998; and

18.2 The respondents ought to have tendered a cheque within the 28 day period as set out in the Notice dated 23rd November 1998 and the failure to do so, entitled the appellant to forfeit the deposit.

18.3 The respondents ought to have tendered a cheque in accordance with the order of Mr. Justice Greenidge and the failure to do so entitled the appellant to forfeit the deposit."

- [32] First, Mr. Shepherd submitted a number of authorities in support of the position that Mrs. Colby was entitled to credit the rent to the outstanding arrears. The legal position is "that by making a payment generally on account the debtor makes it on account of the whole of his indebtedness, that is to say, on account of the balance outstanding and due at the date of payment": per *Buckley* in *Re Footman Bower & Co., Ltd.* [1961] 2 All E.R. 161 at 166. Mr. Forde has not seriously contested that position and indeed Mr. Broome was willing to complete the purchase on that basis. We therefore agree with Mr. Shepherd's submission, reject the contrary contention in the Respondents' Notice and uphold the judge's finding that Mrs. Colby was entitled to appropriate the payments of rent first to the arrears of rent.
- [33] Secondly, Mr. Shepherd says that Mr. Broome should have tendered a cheque for the amount claimed in the completion statement in compliance with the twenty-eight day notice i.e. by 28 December 1998. He relies on the English Court of Appeal decision of *Carne v. Debono* [1988] 3 All ER 485. That case involved a contract for the sale of a property and the completion statement was received two hours before the notice to complete was due to expire. The completion statement failed to specify the correct purchase price and no tender was made of the same by the purchaser. It was held that the vendors were entitled to rescind the contract and forfeit the deposit because although it was customary for a completion statement to be sent to the purchaser and agreed between the parties prior to completion so that the parties would know in advance of completion what their respective obligations were, there was no legal obligation to provide a purchaser with a completion statement. However, that issue does not arise in the instant case.
- [34] The important fact in determining this case is that on 23 November 1998 when the vendor's Attorneys-at-Law served the notice to complete on the purchaser's Attorney-at-Law the vendor was not in a position to complete the matter. "Before serving a notice to complete on behalf of a vendor care must be taken to ensure that the vendor has deduced a

good title and carried out all his obligations: the notice amounts to an assertion by the vendor that he has performed the duties required of him before completion...Being 'ready to complete' for the purpose of serving an effective notice to complete means that the vendor (or his solicitor) must have satisfied himself on every 'matter of substance' although he need not also have made all the necessary administrative arrangements for completion": **Emmett and Farrand on Title, Nineteenth Edition** at **8.047**. The party serving a notice to complete must be able, ready and willing to proceed to completion at the time when the notice is served, failing which the notice is invalid. Mrs. Colby was not in a position to complete when the notice was served for the reasons set out herein including the fact that the final order in the foreclosure proceedings was not obtained until 30 December 1998.

[35] Thirdly, there can be no valid complaint that Mr. Broome should have tendered a cheque in accordance with the order of **Greenidge J** as the extensive correspondence between the parties subsequent to the order shows that the parties were not insisting on strict compliance with the order.

VI. DISPOSAL

[36] We would comment that it seems to us that this litigation has been quite unnecessary. As a result, the parties have no doubt incurred considerable costs disproportionate to any gain that they could have derived from the proceedings. As stated at the beginning of the judgment, the issue between the parties arose out of a difference of opinion on the manner in which the rent payments should have been appropriated. It would have been appropriate for one of the parties to have sought the assistance of the court in having the issue determined as suggested by Mr. Inniss in his letter dated 8 February 1999 to Mr. Farmer.

[37] **Section 54** of the **Property Act, Cap. 236** provides for a vendor or purchaser to make summary application to the court in respect of any question arising out of a contract for the sale of land and the court can make such order upon the application as appears just. However, no such application was made. Instead, the parties took the long and expensive route to this Court.

[38] We make the following order:

- (1) The appeal is dismissed;
- (2) The order of **Greenidge J** made on 23 February 2004 (and clarified on 8 November 2004) is confirmed in respect of the agreement marked Exhibit DC1 which is to be specifically performed and carried into execution;
- (3) The appellant is to pay the respondents' costs of the appeal to be agreed or taxed;
- (4) Liberty is granted to all parties if necessary to apply to this Court or a single Judge of the Court to give directions relative to the implementation of this order.

Justice of Appeal

Justice of Appeal

Justice of Appeal