

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No: CV 1787 of 2011**

**BETWEEN**

**JUNE EVERETTE GRIFFITH**

**Claimant**

**AND**

**GWENDOLYN BARTON**

**Defendant**

**Before: The Honourable Mr. Justice Barry L. Carrington, Judge of the High Court.**

**Date of Hearing: January 10, 2020.**

**Date of Decision: May 22, 2020.**

**Appearances:**

**Mr. Floyd Phillips for the Claimant.**

**Mr. Anthony Wiltshire for Defendant.**

## DECISION

### Introduction

- [1] This is a matter that should not have engaged the attention of the court. The facts are not in dispute and the agreed issues could have been resolved with very little effort. Attempts at an amicable resolution have been unsuccessful due in part to the stubbornness of the parties.
- [2] The application before the court is a claim by the Claimant (Vendor) for the rescission of an agreement between the Claimant and the Defendant (Purchaser) for the sale of a parcel of land located at Duncans, St. Philip; forfeiture of the deposit paid under the agreement, payment in the amount of \$140,395.19 which represents the balance of the purchase price and the interest thereon, and delivery of possession of the said parcel of land.
- [3] The Purchaser counterclaimed seeking an order for specific performance, i.e. that the Vendor sell the parcel of land to the Purchaser and, the interest on the purchase price be stopped from 2001 when the defects in title were discovered and communicated to the Vendor who did not rectify them. In the alternative, the sums paid towards the purchase of the said land be returned by the Vendor to the Purchaser due to the failure of the Vendor to provide a clean title.

### Background

- [4] On or about June 1, 1992, the Purchaser entered into a written agreement with the Vendor to purchase a parcel of land, namely Lot 2 as shown on a plan

dated January 10, 1990 containing 1,515 square metres which was part of a larger area of 4,943 square metres. The draft conveyance made no reference to any planning application for subdivision of the 4,943 square metres or any permission, conditions or a Certificate of Compliance. No restrictive covenants were imposed in favour of the Vendor. Further, there was no covenant of the production of any of the muniments of title or a schedule listing of such documents.

[5] The relevant parts of the agreement are as follows:

- i. at paragraph 11, the balance of the purchase price to attract an interest rate of 10 % per annum and paid by monthly instalments of \$500 over a period of 18 years;
- ii. at paragraph 16, the lot is sold subject to:
  - (a) the conditions attributed to the development permission of the Chief Town Planner of Barbados under Application numbered 989/4/89 I;
  - (b) the obtaining of all the necessary governmental or other permissions required by law.
- iii. at paragraph 17(c), a good and marketable title shall be given to the purchaser;
- iv. at paragraph 18, it is stated *inter alia*, that if the purchaser fails to complete the purchase in accordance with the terms of the agreement, the vendor shall be able to retain out of the moneys paid in on account of the purchase price, recover from the purchaser as liquidated damages for breach thereof-
  - (a) the deposit paid as specified in clause 10;

- (b) interest at a rate of ten per centum per annum on the remaining balance of purchase from date of default up to date of forfeiture;
- (c) legal costs.

On forfeiture, the vendor shall refund to the purchaser any moneys paid in excess of the sums set out above.

[6] The Purchaser paid the sum of \$41,718.00 between the years 1992 and 2004 towards the purchase price. In or about July 2000, the Purchaser's brother approached a financial institution to obtain a loan to assist her with the purchase of the said lot. The Attorney-at-law for the financial institution examined the title documents and discovered the following, which were subsequently brought to the attention of the Vendor:

- (i) the Registrar's Conveyance of July 6, 1990 conveyed, *inter alia*, an area of 4,896.5 square metres to June Everette Griffith, the Vendor, whereas a copy of a plan dated January 10, 1990 (which predated the Conveyance) was produced showing an area of 4,943 square metres. An explanation of the difference was requested;
- (ii) the said plan dated January 10, 1990 by W.A.G. Scott, Land Surveyor was not signed as certified by him. A copy of the certified plan was requested; and
- (iii) copies of the Application, Permission and Certificate of Compliance from the Town & Country Planning Department were not produced but were requested.

[7] The Vendor did not respond to the request for the information and the Purchaser stopped paying the monthly instalments. Approximately ten (10) years later, the Vendor by letter dated May 25, 2011, demanded payment of the balance of the purchase price and interest due in the amount of \$140,395.19. By letter dated July 28, 2011, the Vendor gave the Purchaser 28 days to complete the purchase thereby making time of the essence. The Purchaser refused to continue making instalment payments and did not pursue completing the transaction.

*Vendor's Submissions*

[8] Counsel for the Vendor, Mr. Phillips submitted that the discrepancy of 46.5 square metres in an area of land between 4,943 square metres and 4,896.5 square metres is not sufficient to be treated as a defect in title or grounds to annul the agreement. As it relates to the Certificate of Compliance, Counsel argued that the only condition imposed by the Chief Town Planner to his permission dated September 18, 1989 was “the submission and approval by the Chief Town Planner of a certified surveyor’s plot or plots of the subdivision”.

[9] Counsel contended that submission of the plan dated January 10, 1990 constituted compliance as expected by the Chief Town Planner. He further argued that the Purchaser through her then Attorney-at-law, failed to pursue

the remedy for rectifying any discrepancies or omissions that would have satisfied Counsel for the proposed mortgagee. Counsel submitted that the two (2) remaining lots were conveyed while the misdescription of the overall plot of land was extant.

*Purchaser's Submissions*

[10] Counsel for the Purchaser, Mr. Wiltshire submitted that the case was a simple matter to resolve. He stated that the requirements to establish and convey a good and marketable title were not satisfied, namely:

- (a) the conditions attached to the development by the Permission of the Town & Country Planning Department;
- (b) the requisite governmental or other permission required by law was not obtained; and
- (c) Certificate of Compliance as required by the Town & Country Planning Act, Cap. 240 was not obtained.

[11] Counsel submitted that those omissions, coupled with a misdescription of the land and the absence of the surveyor's signature on the 1990 plan are grounds for the Purchaser to initially refuse making further instalment payments and ultimately, rescind the agreement.

## The Issues

- [12] Whether the Vendor who failed to perfect the title of the land, can legally forfeit the deposit, claim interest on the balance of the unpaid sums and, reclaim possession of Lot 2.
- [13] If the first issue is answered in the negative, whether specific performance can be ordered against the Vendor or, alternatively whether the Purchaser is entitled to a full refund of all of the moneys paid without any penalties attached.

### Issue 1

#### *Perfecting Title*

- [14] In order to determine what, if any consequences flow from the Vendor's failure to perfect or regularize the title to property, it is instructive to note what the law provides. The learned authors **Emmet and Farrand on Title (Loose Leaf Edition, November 2010 release)** para. 2.050 stipulate that certain terms are implied into a contract for sale as follows: (i) "good title" must be shown within a reasonable time, and (ii) completion should occur as soon as a good title has been shown. The authors posit the view that term (ii) would be better expressed as being 'promptly after' rather than 'as soon as'.
- [15] **Megarry and Wade**, the authors of **Law of Real Property, Sixth Edition** state at paragraph 12.064 that the vendor must accurately describe the land

which he intends to convey. They indicate that the description usually encompasses four (4) matters, namely:

- (i) the physical identity of the land;
- (ii) the estate to be transferred;
- (iii) proprietary rights which inure for the benefit of the land; and
- (iv) any incumbrances which burden the property.

[16] The authors also indicated that a vendor who misdescribes the land commits a breach of contract. They provided examples of misdescription, one of which is the erroneous statement as to the size of the land. Reference was made to **Watson v. Burton [1957] 1 W.L.R. 19**, where land consisting of 2360 square yards was described as consisting of 3920 square yards; and **King Brothers (Finance) Ltd. v. Northwestern British Road Services Inc. [1986] 2 E.G.L.R. 253**. They contend that where the misdescription is substantial, the purchaser may terminate the contract and sue for damages. Where, however, the misdescription is insubstantial, the vendor may specifically enforce the contract against the purchaser subject to an abatement of the price (see **Smith v. Tolcher (1828) 4 Russ. 302, 325; Flight v. Booth (1834) 1 Bing. (NC) 370, 372.**)

[17] There are several unsatisfactory features of this matter, one of which is the absence or failure of the Purchaser's Counsel, when the agreement was entered, to establish that the Vendor possessed a good title which could be

conveyed. It is also unsatisfactory that the misdescription of the property was identified after several years and only through an attempt by the Purchaser's brother to secure financing to enable his sister to complete the transaction.

[18] Additionally, there appear to be no clearly defined policy or practice in relation to conveyancing matters in Barbados. The initial evidence of this can be seen from the stark disagreement of the parties in resolving what appears to be a rather simple matter. On the one hand, the Vendor is called on to rectify the misdescription, provide necessary documents and have a certified plan signed. On the other, the Purchaser was basically told to rectify/resolve those issues herself.

[19] What then is the proper approach to resolving this and other matters involving title to land in Barbados? The Caribbean Court of Justice heard and determined the Barbadian case of **Delys Osleen Colby Dec'd by D.V.B. Colby, Executor v. Felix Broome Incorporated, CCJ Appeal No. C.V. 7 of 2010, BB Civil Appeal, No. 30 of 2006 (Felix Broome Incorporated)**.

The Honourable Justice Hayton stated at paragraph 1, as follows:

“Conveyancing in Barbados would be much simpler and quicker-and recourse to the courts very much less-if a small working party of experienced conveyancing attorneys could prepare a set of standard conditions to be incorporated into land contracts except to the extent expressly modified with special conditions to cover the exigencies of a particular sale”.

[20] In the absence of the standards referred to by The Honourable Justice Hayton, every effort must be made to determine accepted legal standards that should be adhered to in these matters. Since the statement of The Honourable Justice Hayton in **Felix Broome Incorporated (supra)**, I am not aware of the formulation of standards or guidelines for conveyancing matters in this jurisdiction.

[21] However, guidance was obtained from the Privy Council case of **Mungalsingh v. Juman [2015] UKPC 38 (Juman)** which examined what amounted to a 'good title', a 'good marketable title' and the consequences of not establishing title in Trinidad and Tobago.

[22] In that case, the vendor failed to produce an up-to-date water certificate and land tax receipt and said that the purchaser would have to obtain them himself. The vendor later sought to make time of the essence for completion of the contract. The facts were not in dispute and expert evidence of conveyancing practice in Trinidad and Tobago was provided by Mr. Roop Chan Chadeesingh. He testified that it is the vendor's responsibility to provide the documents and if he did not, he was not ready to complete. He also advised that the non-payment of those liabilities would be an encumbrance on a 'good and marketable title'. Mr. Chadeesingh said and the court accepted, that in conveyancing practice in Trinidad and Tobago, good title was not shown

unless the seller produced to the purchaser, documents relevant to establishing a good and marketable title.

- [23] The court examined whether or not there was a difference between ‘a good title’ and ‘a good and marketable title’. Reference was made to **Re Spollon and Long’s Contract [1936] Ch. 713, 718** where Luxmore J referred to a purchaser under an open contract being entitled to ‘a good marketable title’. Mallet LJ in **Barclays Bank PLC v. Weeks, Legg & Dean [1999] Q.B. 309, 322-323** described ‘good marketable title’ as a title which the purchaser was bound to accept. Lord Neuberger in **Juman** said at para. 19:

“The Board also finds it very hard to accept the notion that the courts would force on a purchaser a title which would be unacceptable to a reasonable mortgagee, and Mr. Chadeesingh explained that his view as to what constituted ‘good and marketable title’ was based on his experience of what a bank would expect as a secured lender”.

- [24] In the present case, paragraph 17(c) of the agreement specified that the vendor shall give to the purchaser a good and marketable title, but as was shown in the cases cited, the responsibility is the vendor’s to satisfy the requirements of establishing a good marketable title by producing the requisite documents.
- [25] Based on my knowledge of and experience with conveyancing matters, plus discussions with an experienced conveyancing practitioner in Barbados, I am satisfied that the practice of conveyancing in Barbados is identical in every respect to the practice in Trinidad and Tobago. In that regard,

taking guidance from the foregoing authorities, the Vendor needed to provide the muniments of title to the purchaser on request and not leave it up to the Purchaser to procure them on her own.

*Making time of the essence*

[26] Notwithstanding my holding at paragraph 25, I now consider the issue of making time of the essence in this matter and generally. The Vendor's letter of July 28, 2011 that gave the Purchaser 28 days to complete the purchase amounted to making time of the essence. Taking into consideration the Vendor's failure to produce the information to perfect the title, what then is the effect of a notice making time of the essence?

[27] The Trinidad and Tobago case of **Chaital and Others v. Chandamal Ramlal** [2003] UKPC 12 (**Chandalal Ramlal**) examined the remedy of specific performance, and when time can be made of the essence. Sir Martin Nourse said at para. 28:

“The related but distinct ground is that the party serving the notice purporting to make time of the essence must himself be ready, able and willing to complete at the date when the notice is served. This is an express requirement of the conditions commonly incorporated in contracts for the sale of land in this country, but it does no more than express what would otherwise be implied by law; see 42 (1999 reissue) *Halsbury's Laws of England* (4<sup>th</sup> Edn) para 21, note 7 and the cases there cited. It is evident that the requirement cannot be satisfied where the party serving the notice is himself in default”.

[28] I have distilled from **Chandalal Ramlal (supra)**, two (2) barriers to making time of the essence. Firstly, a party not being ready, able and willing to complete at the date the notice is served on the other party. I can envisage where through delay, the party would not, for example be in a position to provide documents to satisfy a good and marketable title (e.g. delay in obtaining a Certificate of Completion). Secondly, where a party is in default. Default may arise from a party's recalcitrance, negligence or plain refusal to do what the law and practice demand. An obvious example of a party's default is his failure to rectify a misdescription of property.

[29] Consequently, applying the principle enunciated in **Chandalal Ramlal (supra)**, I accept that the Vendor's purported notice to complete in the 28 days timeframe was of no effect since the Vendor was not ready, able and willing to complete the sale of the property on the date of issue of the letter.

[30] Paragraph 18 of the agreement between the parties provides that on the Purchaser's failure to complete the purchase in accordance with the terms of the agreement, the Vendor could retain the deposit and recover payment of interest at a rate of ten per centum per annum on the remaining balance of purchase from date of default up to date of forfeiture. The agreement also provided at paragraph 17(c) for a good and marketable title to be given to the

Purchaser. The Vendor's failure to provide the agreed good and marketable title prevents her from succeeding on her claim.

[31] I therefore hold that the Vendor is not entitled to rescind the agreement, forfeit the deposit, claim interest on the balance of the unpaid sums and, reclaim possession of the Lot.

## **Issue 2**

### *Grant of Specific Performance or refund of money*

[32] Having answered the first issue in the negative, consideration must now be given to the second issue, which essentially is the Purchaser's counterclaim.

It would appear that the Purchaser made her last instalment payment sometime in 2004 but remains in occupation of the property, while the Vendor demanded payment in 2010/11.

[33] What then does the justice of this case demand? The Purchaser was in occupation of the property before the written agreement was executed in 1992. She was well on her way to completing payment for the property and would have completed the purchase via a mortgage to be obtained by her brother. All things being equal, the purchase could have been completed in 2001 when mortgage funds were sought. Further still, the information re the title to the property and the signed copy of the plan ought to have been easily provided on request but they were not. The Purchaser's refusal to continue making the

instalment payments has also contributed to this unfortunate set of circumstances.

[34] The court must nevertheless do its best in the circumstances. The Purchaser's continued occupation of the property from the signing of the agreement until presently, the Vendor's refusal to provide information to satisfy a good marketable title as per the written agreement and the denial of the remedies sought by the Vendor, are matters which must be weighed and considered in arriving at a conclusion.

[35] **Section 54 of the Property Act, Cap. 236** is applicable to assist the court to do justice and ensure fairness in this case. It states:

- “(1) A vendor or purchaser of any interest in land, or their representatives respectively, may apply in a summary way to the court in respect of any requisitions, objections, claim for compensation or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as appears just, and may order how and by whom all or any of the costs of, and incident to, the application are to be borne and paid.
- (2) Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.
- (3) This section applies to a contract for the sale or exchange of any interest in land”.

[36] This section authorizes the court to deal with matters relating to a contract for the sale or exchange of any interest in land, and to make orders that will do justice to the parties based on the circumstances of each particular case. Lord Wilberforce while dealing with a claim for specific performance made the following forceful point in the case of **Johnson v. Agnew [1980] AC 367, 399:**

“Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised [by the court] according to equitable principles”.

[37] **Section 37 of the Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** states that law and equity shall be administered by the High Court in every cause or matter commenced in that court. **Section 38** authorizes the High Court and the Court of Appeal to give effect “... (a) to all equitable estates, titles, rights, remedies, reliefs, counter-claims, duties and liabilities; and (b) to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by common law or by any custom, or created by any statute....”

[38] **Professor Rose-Marie Belle Antoine** in her seminal text, **Commonwealth Caribbean Law and Legal Systems, Second Edition** at page 176, commented on statutory provisions similar to **sections 37 and 38** of

**Cap.117A** and stated that since the fusion of the common law and equity the separate systems were converted into a concurrent jurisdiction and "...there is therefore no need to go to a separate court if one wishes to obtain an equitable remedy." She stated that:

"Still, equity continues to perform the same function, complementing and supplementing the common law in accordance with moral notions of justice and fairness".

[39] Our courts are courts of equity empowered and equipped to dispense equitable remedies as and when necessary to do justice in particular cases. Where legal remedies have been denied or are not suitable, equity can be administered to mitigate the harshness of the law. In the present case, the Purchaser is seeking to obtain the equitable remedy of specific performance and her suitability for the grant of the remedy will be examined.

[40] In the Caribbean Court of Justice case of **Vernon O'Connell Hope v Shaka Wayne Rodney and Portfolio Investment Limited, No. CV 1 of 2009, BB Civil Appeal No. 3 of 2006 (Shaka Wayne Rodney and Portfolio Investment Limited)**, a contract for the sale of property was not completed on the scheduled date and neither party was then in a position to complete. The vendor was not in possession of all the requisite documents but even if he had them, the purchaser could not pay off the balance of the purchase price. The purchaser issued the vendor with a notice to complete within 28 days,

which was ignored. On the purchaser's claim for an order for specific performance, in a judgment jointly delivered by The Honourable Justices, the court said, *inter alia*:

“If a purchaser files a claim for specific performance, the purchaser is not under an obligation to have the purchase monies in hand at the time the claim is filed”.

[41] Taking note of the dictum in **Shaka Wayne Rodney and Portfolio Investment Limited (supra)**, if the court is minded to order the remedy of specific performance, the Purchaser needed not to be in a position to complete the sale when she filed her claim.

[42] In arriving at its decision, the court would be unwise to ignore the factual basis of this case and how each party may be impacted by its decision. Noteworthy is the fact that the agreement for the sale of the land was made in 1992 and the agreed payment plan was activated. In anticipation of her ownership of the property, the Purchaser gave permission to her brother to place a small house on a portion of the land. That brother sought to assist the Purchaser to finalize her ownership of the land by seeking to procure a mortgage for the outstanding purchase price. As earlier indicated, defects which prevented the transfer of a good and marketable title, were discovered by counsel for the proposed mortgagee. The defects were communicated to the Vendor who refused to have them rectified and as a consequence, the Purchaser stopped paying the

monthly instalments. The Vendor did not take any action until several years after the last instalment payment.

[43] The remedies sought by the Vendor were drastic, namely rescission of the agreement and forfeiture of the deposit; recovery of all outstanding interest payments, and delivery of possession of the land. In the meantime, during the intervening period, the Purchaser continued in occupation of the property.

[44] In my opinion, it would be palpably unfair and unreasonable to make the orders that the Vendor seeks. The obvious results would engender severe hardship on the Purchaser and her household, along with her brother and his household who occupy a portion of the land. The hardship could possibly include the Purchaser having to vacate the premises on receipt of notice to quit, and also requiring the Purchaser to make outstanding interest payments totaling tens of thousands of dollars.

[45] This view, when compared with the fact that the Vendor failed in her obligation to provide the requisite documents to satisfy the requirements of a good and marketable title that she is obligated to convey at the end of the transaction, makes it more evident for the need for fairness to prevail. To deny the Purchaser the remedies which she seeks would be to allow the Vendor to benefit from her (the Vendor's) wrong doing.

## **Conclusion**

- [46] The Vendor's failure to provide documents that were necessary to establish a good and marketable title which by contract, she was obligated to give, prevents her from having her remedies at law, namely termination of the contract, forfeiture of the deposit and collection of the outstanding payments plus accrued interest. Additionally, at the time of the issue of the letter seeking to make time of the essence, the Vendor was not ready, able and willing to complete the sale and consequently, the purported act of making time of the essence was null and void and of no effect.
- [47] The Purchaser is entitled to the equitable remedy of specific performance as the hardship that she and her household would endure if forced to give vacant possession of the land would be severe. Her right to specific performance is not diminished by her inability to complete the sale when she filed her counterclaim for specific performance.
- [48] In the circumstances, the justice of this case dictates that the Purchaser should be granted the equitable remedy of specific performance to complete the purchase of the property when a good and marketable title has been established.

[49] I therefore hold that the Purchaser should prevail on her counterclaim and specific performance is hereby ordered against the Vendor to complete the sale of the land to the Purchaser.

### **Recommendation**


[49] Before disposing of this matter, I wish to commend for consideration and corresponding action, the words of the Honourable Justice Hayton at paragraph 52 of **Felix Broome Incorporated (supra)** who said as follows:

“This is an appropriate stage to exhort conveyancing practitioners in Barbados and similarly circumstanced Caribbean countries to produce detailed standard conditions of sale for contracts for the sale of land that will then be used as the basis for all such contracts subject to such variations or ousters as might be appropriate for particular special circumstances. Currently, it seems that too many contracts afford scope for time-consuming arguments even on basic points e.g. involving the date and time and place for completion and what is required for a valid notice to complete and compliance with it.”

### **Disposal**

- [50] 1. The Vendor’s application to rescind the agreement, retain the deposit, and to take delivery of Lot 2, Duncans, St. Philip, is refused.
2. The Vendor is ordered to
- (i) remedy the defects in title at her expense, within 3 months from the date of this Decision, to enable the passing of a good and marketable title to the Purchaser; and

- (ii) complete the sale of the said property to the Purchaser.
3. If the Vendor fails, refuses or neglects to comply with the requirements in paragraph 2 above, the Purchaser shall complete the purchase of Lot 2 by remedying the defects to ensure that there is a good and marketable title. All costs associated with finalizing the title shall be deducted from the balance of the purchase price.
  4. Lot 2 must be surveyed and if there is a reduction in the size of the lot, the purchase price of that lot should be abated ratably.
  5. There shall be no recovery of interest payments or any costs occasioned by or arising from the cessation of the instalment payments.
  6. The Vendor shall pay the Purchaser's costs to be assessed if not agreed.

  
**BARRY L. CARRINGTON**  
High Court Judge