

5. 1. 2004

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 5 OF 1996

BETWEEN:

JUNE DIANE SMITH
(As Administrator of the Estate of Alvey W. Smith Jr.)

Plaintiff

and

ELERY ELROY SMITH
(As Administrator of the Estate of Samuel Smith Jr. (Deceased))

Defendant

**SUPPLEMENTAL REASONS FOR JUDGMENT of
The Honourable Mr. JUSTICE SANDERSON**



APPEARANCES:

For the Plaintiff: Mr. P. Broadhurst

For the Defendant: Mr. W. Helfrecht

These Reasons are supplemental to my Reasons delivered on April 7, 2003 and May 27, 2003.

On May 29, 2003 I ordered that the Plaintiff be given an opportunity to file further written submissions on the questions of:

1. Was the quit claim deed dated June 19, 1984 capable of conveying title of lot 80 to Elery Smith?
2. Should Elery Smith pay interest on the amount due?
3. Who should pay the costs of these proceedings?

Those written submissions and reply were completed and filed on December 10, 2003.



- 2 -

The Plaintiff (defendant by counterclaim) advances six arguments why the quit claim deed is not capable of conveying title. They are:

1. **The counterclaim for specific performance is time barred**

This defence to the counterclaim was never pleaded. The Plaintiff did not seek to amend its defence to counterclaim and the first time it was raised, was after the Reasons for Judgment were first delivered. The Plaintiff may or may not have had a good defence based upon the limitation issue. The Defendant may have had an answer to that defence. If it had been plead, the evidence may have materially changed at trial. I do not know the answer to any of those questions. However, in order for those questions to have been answered the limitations defence should have been pleaded to give the Defendant an opportunity to deal with it in evidence and argument. Since it was not, I cannot allow it to be argued now and accordingly the argument cannot properly be considered at this stage.

2. **Mistake**

Again mistake was not pleaded or raised until after the judgment was delivered and the Plaintiff should not be entitled to argue it now. However, even if it could argue it now, there was insufficient evidence to sustain a defence of mutual mistake. The evidence was that Alvey Jr. believed that he was the owner of the land.

It had been quit claimed to him in June of 1970 and he carried his house papers with him at all times. He always referred to the property as his house or his land.

While Alvey Jr. believed that he was the owner of the land, Elery also believed he had a claim because he had obtained provisional title to it under the adjudication process in 1974. The quit claim deed in June 1984 was perhaps executed to resolve the disputed claims between Alvey Jr. and

Elery. Alvey Jr. would get \$33,000 under the agreement and Elery would get undisputed ownership of the land with vacant possession when he demanded it.

In these circumstances it cannot be said that there was a mutual mistake.

3. **There was no valid consideration: the agreement did not legally bind the Defendant**

I am satisfied that this defence to the counterclaim was pleaded.

I am also satisfied that the Agreement provided that in exchange for giving up possession on demand from Elery, he would be obliged to pay Alvey Jr. \$30,000. That constitutes proper consideration.

4. **No actual consideration/Breach of agreement**

I am again satisfied that the Plaintiff has plead a failure of consideration and is entitled to rely on this agreement in defence of the Counterclaim. I am also persuaded that this defence to the counterclaim must fail. There was a promise by Elery to pay \$30,000 upon Alvey Jr. giving up possession of the land. That constitutes valid consideration. Alvey Jr. never gave up possession and cannot claim that Elery failed to provide actual consideration because the \$30,000 was not payable until vacant possession was delivered.

5. **Agreement not capable of specific performance**

The agreement acknowledges Elery's ownership of the land. It requires Alvey Jr. to vacate the land upon demand and he was to receive \$30,000 from Elery. As I previously indicated, this agreement was perhaps intended to resolve the competing claims of Alvey Jr. and Elery. It is capable of being specifically performed by Alvey Jr. giving up possession and the payment of the amount owing. The difficulty, however, is that the document itself requires Alvey Jr. to give up possession of the land but it does not require him to transfer title since he acknowledges that Elery has

- 4 -

ownership of the property. The difficult and perhaps impossible question for the Defendant to answer is even if specific performance is ordered, is that sufficient to convey title? Looked at another way, is this document, which acknowledges Elery's ownership, sufficient to transfer title, if specific performance is ordered. I will consider this further in submission #6 below.

However, turning to the other arguments that the Plaintiff has advanced regarding specific performance, the Plaintiff is not entitled to rely on the defence of laches since it was not pleaded.

Further, the Defendant did not initiate these proceedings. After the Defendant demanded vacant possession, the Plaintiff did not deliver up the property. The Plaintiff knew of the dispute. He did not take any action for approximately eight years. When he did, the Defendant counterclaimed for specific performance and sought to have the Plaintiff's claim struck on the basis of delay. That application was unsuccessful.

In these circumstances, it would not be just or equitable to allow the Plaintiff to rely on laches as a defence when both parties seemed content to simply let matters rest.

The Plaintiff further asserts that the Agreement was not mutually enforceable and was void for mistake. I have already dealt with these issues above.

The Plaintiff also argues that the Defendant did not have clean hands. For the reasons advanced by Mr. Helfrecht this argument is rejected.

6. Form of Agreement

In its supplemental submissions the Plaintiff relies upon section 37 of the *Registered Land Law* which provides:

"Section 37

(1) No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this Law, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

- 5 -

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised:

Provided that such an action shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract:

- (a) has in part performance of the contract, taken possession of the property or any part thereof; or
- (b) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

I am advised by the Plaintiff's counsel that the relevant provisions of the *Registered Land Law* came into force in 1971 which was after the quit claim from James Smith to Alvey Jr. on June 25, 1970 but before the quit claim signed by Alvey Jr. in favour of Elery in 1984. In other words, the 1971 provisions of the *Registered Land Law* referred to above, did not apply to the quit claim deed from James Smith to Elery Jr. in 1970 but did apply to the quit claim deed of June 18, 1984 from Elvey Jr. to Elery.

The Plaintiff also referred to Section 105 of the *Registered Land Law* which provides:

"Section 105.

(1) Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.

(2) Leases and charges shall be presented for registration in triplicate.

(3) Instruments shall contain a true statement of the amount or value of the purchase price, loan or other consideration (if any), and an acknowledgement of the receipt of the consideration."

It seems conceded by the Defendant that the document in question did not meet the requirements of Section 105. The Defendant argues however, that even if the document itself is not

- 6 -

sufficient to convey title, then the payment of \$525.00 constitutes part performance of the agreement and the Defendant invokes that equitable doctrine, to seek specific performance of the agreement.

Initially, I conclude that the quit claim deed does not comply with the provisions of the *Registered Land Law* as amended in 1994, in particular Section 105 and is, therefore, not capable of conveying title pursuant to Section 37.

Given that a document may not be capable at law of transferring title, the agreement may nevertheless, still be enforceable by specific performance with the application of the doctrine of part performance.

Even assuming that the agreement is enforceable with the application of the equitable doctrine of part performance, I do not think that an order of specific performance could convey title. An order of specific performance would only require delivery of possession and it is not possession that Elery seeks. He seeks title. Accordingly, I conclude that an order of specific performance cannot grant that which Elery now seeks and should be declined on that ground.

I also am persuaded that even if specific performance could convey title to Elery it should not be granted in this case. Section 34 (2) (a) and (b) make it clear that an order for the doctrine of part performance to apply, the person claiming it must be in possession. This legislative requirement of Section 34 (2) is different from the Law of England which provided in Section 40 of the *Law of Property Act of 1925*; inter alia:

“40. (1) No action may be brought upon any contract for the sale of other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized.

(2) This section applies to contract whether made before or after the commencement of this Act and does not affect the law relating to part performance, or by sale by the Court.”

I am again advised by the Plaintiff's counsel that Section 40(2) of the *Law of Property Act 1925* has subsequently been repealed in England in 1989, however, even prior to that, it was not a

- 7 -

requirement that the person in England claiming entitlement to specific performance using the doctrine of part performance be in possession of the property. As indicated by Section 34 (2) (a) and (b) of the *Registered Land Law* the legislative requirement of the Cayman Islands is for the person claiming part performance to be in possession of the property and that has not occurred here.

Accordingly, the Defendant is not entitled to claim specific performance to require title to this property on the basis of part performance of the agreement since neither Section 34 (a) and (b) have been satisfied.

For the foregoing two reasons, the Defendant's counterclaim for specific performance which would convey title to him is dismissed. The Plaintiff is entitled to have the property registered in her name and entitled to the relief set out in paragraphs A & B of the prayer for relief.

7. Interest and Costs

Since the Plaintiff has been successful, she will be awarded costs of the action. The previous order that the amount of \$32,475.00 be paid by the Defendant to the Plaintiff is varied. That money does not have to be paid. Accordingly, the question of whether interest on that money should be paid is a moot point and need not be decided.

DC Sanderson

THE HONOURABLE JUSTICE SANDERSON

Dated the 5th day of January, 2004

