

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 OF 1991

BETWEEN:

PHOEBE BOATSWAIN

- Appellant

and

GEORGE FIGOTT

- First Respondent

and

IAN PARKER

- Second Respondent

Before: The Honourable Mr. Justice Dennis Byron-Justice of Appeal
The Honourable Dr. Nicholas Liverpool - Justice of Appeal
The Honourable Mr. Justice Satrohan Singh - Justice of Appeal

Appearances: Mr. G. Collins for the Appellant
Mr. S. Christian for the First Respondent
Miss K. DeFreitas for the Second Respondent

1992: November 25, 27;
1993: February 22.

JUDGMENT

LIVERPOOL, J.A.

The appellant and her family have been in possession of the parcel of land which is the subject matter of this dispute for many years. After her father died she took over the tenancy and paid the rent annually until 1987. This parcel of land is part of the Jennings Estate of which the first respondent is the lawful attorney on behalf of the owners. Late in August or early in September 1988, the appellant returned from the United States of America and went to visit with the first respondent at his office. The purpose of the visit was to arrange for the sale to her by the first respondent of the parcel of land which her family had been occupying. The first respondent had long maintained a policy of selling off portions of the Jennings Estate to persons who were tenants of the estate; and he agreed to sell to the appellant that parcel of land which she occupied. No price was agreed on at that meeting.

On the suggestion of the first respondent, the appellant commissioned Mr. Felix Farquhar a land surveyor to undertake a survey of the parcel of land in order to ascertain the exact area involved. Before embarking on the survey, Mr. Farquhar consulted the first respondent who confirmed that he (Mr. Farquhar) could

undertake the survey provided that he surveyed only that portion of land which had been occupied by the appellant and her family. It was understood between the parties that the appellant would pay Mr. Farquhar for undertaking the survey. She then returned to the United States of America leaving her daughter, Sylvia Boatswain, to continue with the transaction on her behalf.

In May 1989 Mr. Farquhar carried out the survey. He was shown the boundaries of the land by the appellant's son. He produced a plan based on the survey and submitted it to the Chief Surveyor's office for verification. In September 1989, after the plan was authenticated by the Chief Surveyor, Mr. Farquhar made two copies and delivered them to Sylvia Boatswain, who paid him. In accordance with the prevailing practice he caused a parcel number to be placed on the survey diagram for the purposes of registration under the provisions of the Land Registration Act. According to the survey the parcel of land measures 1.73 acres.

Sometime in November 1989, Sylvia Boatswain took the plans to the first respondent, and left both copies with him. The appellant returned to Antigua in December, 1989 and paid several visits to the office of the first respondent to enquire about the price of the land. It was not until the morning of 18th January, 1990 the day on which she was due to return to the United States of America, that the first respondent quoted her the price of \$1.25 per square foot.

Acting on the instructions of the appellant, Sylvia Boatswain visited the first respondent and tendered the sum of \$10,000 as part payment for the parcel of land. The first respondent then indicated to her that he was not intending to transfer the entire parcel of land to her mother, as he had already commissioned another surveyor, Mr. Denfield Matthew to hatch off one-half acre from the parcel of land which Mr. Farquhar had surveyed for her mother. The first respondent accepted the deposit and issued a receipt to Sylvia Boatswain on which he wrote the words ".....balance depends on survey done by Mr. Matthew". This was a clear indication to Sylvia Boatswain that the first respondent was not minded to transfer to her mother the parcel of land as surveyed by Mr. Farquhar.

In the meantime parallel activities were taking place in respect of the land. In December 1989 the first respondent instructed Mr. Matthew to sub-divide the parcel of land already surveyed by Mr. Farquhar by hatching off one-half acre therefrom. The plans for that parcel of land had been given to the first respondent by Sylvia Boatswain in November, 1989. According to the first respondent he had accepted the plan as a plan of the area

but that he did not agree to sell it; the reason being that he was under an obligation to provide for thirteen acres for Mr. Matthew and a Mr. Dubery; and a portion of land (then unspecified) to Mr. Parker. Mr. Matthew carried out his survey in December, 1989. On 22nd March, 1990 he completed his drawing but it was not until 15th June 1990, that he was able to obtain an authentication of his plan from the Chief Land Surveyor.

In March, 1990 Sylvia Boatwain observed that a mechanical grader was operating on the land, and later saw the second respondent carrying blocks on the land. She complained to the first respondent and he arranged to meet with her on the land as a result of her complaint, together with Mr. Matthew and others. After many attempts at which it proved impossible to get all the parties together the first respondent rejected the protests of the appellant and declared that the parcel of land which Mr. Matthew had surveyed on his instructions was to go to the second respondent, and that the appellant could have the remaining 1.23 acres.

By her writ dated 7th June, 1990, the appellant claimed for a declaration that she is entitled to the entire parcel of land (1.73 acres) as beneficial owner; an order for specific performance of the agreement for sale against the first respondent; and an injunction and damages for trespass against the second respondent together with the necessary consequential relief. Thereafter events proceeded with commendable speed, thereby demonstrating a very good example of the efficiency with which the legal system can function in a situation in which urgency was undoubtedly required. On 13th June, 1990 the appellant obtained an injunction against the second respondent from committing acts of trespass over the land.

This was extended on June 29 until further order. Affidavits were filed by the parties and on 1st August the learned Judge ordered, with the consent of the parties, that the action be tried without further pleadings after an agreed statement of issues was filed. This was done on 3rd September. The trial started on 17th December and ended on 16th January, 1991. Judgment was delivered on 14th February, 1991.

The matter was heard by Redhead J. who found that no contract had been concluded between the parties because neither the area of the land nor the price had been agreed on. He accepted the evidence of Mr. Denfield Matthew, a surveyor, who stated that some time in December 1989, armed with the plan which had been drawn by Mr. Farquhar, he visited the land and told the appellant that the first respondent had requested him to hatch off one-half acre from the land which had been surveyed by Mr. Farquhar, to be transferred to the second respondent. And that despite the objections of the appellant he had proceeded to survey as directed by the first

respondent. In so far as the price was concerned the learned Judge found that it was not until 18th January, 1990 that the second defendant had committed himself to a price, at which stage there was no agreement on the area of land to be sold.

The learned Judge also stated that if he was wrong and that it could be held that a contract had been concluded, there were no sufficient acts of part performance by the appellant to satisfy the requirements of the provisions of section 37 of the Registered Land Act. He did not make any findings of fact in respect of the claim against the second respondent, but he proceeded to give judgment in favour of both respondents. He made orders to the following effect: (a) the discharge of an injunction which had been obtained against the second defendant; (b) the Registrar to hold an inquiry as to the damages suffered by the second defendant; (c) the return of the plaintiff's deposit with interest at the rate of ten per cent; and (d) the plaintiff to pay the costs of both defendants.

He however expressed the hope that the parties would be able to "work something out" based on an offer in writing from the first defendant to the effect that he was quite prepared to consider a refund of the expense to which the plaintiff had been put in getting the land surveyed by Mr. Farquhar, and to replace the land hatched off for the second defendant by another piece of land.

The plaintiff appealed on the following grounds:

"1. The learned trial Judge erred in law in finding that there was no contract between the Appellant/Plaintiff for the sale and purchase of land having regard to the manner in which the survey was commissioned and done and the part payment of the consideration.

2. The learned trial Judge erred in law in failing to hold that the fact that the survey done by Felix Farquhar was commissioned by the first respondent represented in law a sufficient act of part performance.

3. The learned trial Judge erred in law in failing to hold that the payment of \$10,000.00 by the appellant constituted in law a binding contract for the sale of the land.

4. The learned trial Judge erred in law in that he placed the wrong construction on the words "balance depends on total area of survey by Mr. Matthew" endorsed by the first-named respondent on the receipt for the payment of the deposit of \$10,000.00.

5. The learned trial Judge erred in finding contrary to the evidence that the first-named respondent gave instructions to Denfield Matthew to hive-off one half acre of the land to be

exchanged with the second-named respondent before any price was mentioned by the first-named respondent to the appellant and before any contract of sale came into operation."

The learned trial Judge approached the matter by enquiring first whether a contract was concluded between the parties and then, having come to the conclusion there that there was no concluded contract went on to consider, in case it was held that he was wrong on the first point, the possible application of the doctrine of part performance, where he found several elements of that doctrine lacking. This in my view was tantamount to reversing the order of contention. The proper approach is first to seek to establish such acts of part performance as must necessarily imply the existence of a contract, and then to proceed to ascertain its terms (*Maddison v Alderson* (1883) 8 A.C. 467). In other words the question of the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached. The principle of the cases is that the acts of part performance must be of such a nature that would of themselves infer the existence of an agreement for the purchase of land; and the oral evidence is admitted to show what the agreement is (*Frame v Dawson*, 14 Ves. 387 cited in *Maddison v Alderson*).

In *Steadman v Steadman* (1976) A.C. 536, Lord Reid expressed the rule thus (at page 541):

"You must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. You must first look at the alleged acts of part performance to see whether they prove that there must have been a contract and if it is only if they do so prove that you can bring in the oral contract..... It may well be that we should consider whether any prudent reasonable man would have done those acts if there had not been a contract but many people are neither prudent nor reasonable and they might often spend money or prejudice their position not in reliance of a contract but in the optimistic expectation that a contract would follow..... In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract that will be proved if it is shown to be more probable than not."

In the same case Lord Simon discussed the issues which arise at the trial where the defendant has pleaded the Statute of Frauds or its equivalent in answer to the plaintiff's claim, and stated (at page 565):

"A plaintiff alleges an oral agreement. If the defendant does not plead the statute, the plaintiff may prove the agreement by any relevant evidence, including oral testimony. But if the defendant does plead the

statute, the plaintiff is barred unless he can establish that the defendant's plea of the statute should not be admitted because its maintenance would be unconscionable. To do this the plaintiff has to prove that: (i) on balance of probability he acted to his detriment; (ii) it was more probable than not he so acted because he was contractually obliged to the defendant to do so; (iii) such actions were consistent with the oral agreement which he alleges. But if all three requirements are satisfied, an equity arises in his favour which precludes the defendant from relying on the statute; and the plaintiff can then lead evidence (including oral evidence) to establish the oral agreement on which he based his claim for relief, as if the statute had never been pleaded."

But as Viscount Dilhorne pointed out in the same case, in a court of law the facts and the manner in which they are adduced in evidence are not generally compartmentalised. He said (at page 556):

"The acts of part performance must be of part performance of that contract and whether they are or not cannot be determined without regard to the contract. The party seeking to rely on such a contract has to prove it and to prove such acts. But at a trial the matters are not dealt with separately. Such a party does not first have to prove such acts and the court has first to decide whether they can be so regarded and then, if the court holds that they can, the party does not have to produce evidence of the contract and the court to determine whether or not there is any contract. The court is not required to operate in blinkers. If the contract is proved, it does not prevent the court from considering and deciding whether the alleged acts of part performance are unequivocally and of their own nature referable to a contract of the character alleged."

"The true ground of the doctrine of part performance in equity" stated Colton L.J. in *Britain v Rossiter* (1879) 11 Q.B.D. 123 at 131, "is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, *prima facie*, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken."

Fry, on *Specific Performance*, 6th Ed., p. 276 states the law thus "In order to withdraw a contract from the operation of the statute, several circumstances must concur: first the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the court; and fourthly, there must be proper parol evidence of the contract which is let in by the

acts of part performance."

The statute referred to in Fry is the Statute of Frauds of which the modern equivalent, which is to be applied in this case is section 37 of the Registered Land Act, the operative provisions of which read as follows:

"37(1) No land, lease or charge registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

(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 -

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act which is exclusively referable to and in furtherance of the contract."

The learned Judge found that the receipt, which was the only document signed by the first respondent, could not be a sufficient memorandum in writing. This finding was not challenged on appeal, since even at the trial Counsel for the plaintiff did not contend that it was. He then went on to consider the question of possession and any other act which may have been done by the plaintiff. On the question of possession the learned Judge found that the plaintiff was a tenant of the land for a number of years and had remained as a tenant of the land but this was not as a result of any agreement with the first-named defendant to sell the land to her; and he concluded "Her continued possession is solely as a result of her tenancy and nothing more". It is true that the appellant was a tenant of the land and that her continued possession, which by itself is an equivocal act, would be an insufficient act of part performance; but as the learned Judge himself pointed out in addition to possession the plaintiff was required to prove that she had done some other act or acts exclusively referable to and in furtherance of the contract. In my view the requirements are cumulative. In other words one

should not look at the act of possession in isolation from the other acts. That must be so otherwise it could prove extremely difficult, if not impossible, for any plaintiff who was an existing tenant to prove when the character of his possession changed from that of tenant to that of purchaser. In so far as possession is concerned the plaintiff duly paid her rent until 1987 and it is not without significance that she ceased paying rent, and none was demanded of her, although she remained in possession, after the discussions were held with the first respondent in September 1988. This single act is, however, not decisive of the matter, for the appellant remains a tenant until it can be proved that there was a binding contract for sale of the land to her.

I turn now to look at the other acts which the appellant claims support her possession and thus amount to part performance to satisfy the requirements of the Land Registration Act. As soon as the discussions about the sale of the property to her were concluded, she engaged a land surveyor approved by the first respondent to survey the land, she paid the surveyor for his services, the completed plans were taken to the first respondent and he accepted them as representing the area and extent of the land occupied by the appellant. I pause here to ask to what agreement could such acts by a tenant be referable if not to an agreement for sale? In addition the first respondent accepted part payment from the appellant. Taking all these factors into consideration I have no hesitation in finding that cumulatively they amount to a sufficient act of part performance and that the plaintiff had discharged the onus placed on her on a balance of probabilities. It goes without saying that it would be a fraud on the plaintiff to take advantage of the contract not being in writing; and that this contract is one which is enforceable by the court.

One must now examine whether the fourth requirement stated by Fry has been met, namely, has it been proved by proper oral evidence that the parties had entered into a legally binding contract. In order that such a contract may exist there must be a final and complete agreement between the parties on the terms, which must include the parties, the property, the consideration and the interest to be granted (*The Law of Real Property* by R.E. Megary and H.W.R. Wade, 4th edition, page 543; and *Halsbury's Laws of England*, 4th edition, Volume 42, paragraph 35).

The learned trial Judge found that two essential elements of the contract were absent, as the price of the land was never given and the area of the land to be transferred to the plaintiff was never agreed on. It was not disputed by the first respondent that the parties to the contract were the appellant and himself; and that the interest to be conveyed to the appellant would have been

the fee simple interest in the land. The agreement of the parties must state the agreed consideration or the agreed means of ascertaining it. This could have been ascertained as soon as the area of the land from Mr. Farquhar's survey was known. It was 75,324 square feet. I would therefore hold that three of the terms mentioned by Hegarty and Wade were satisfied.

On the question of the area of land to be transferred the learned Judge stated:

"The crucial issue to my mind however, is have the parties agreed on what was to be transferred? Clearly, as I have found, when the first named defendant gave Matthew the survey plan drawn by Farquhar to take off half of an acre out of that lot in order to exchange with Parker, he could not have been thinking of transferring the whole 1.7 acres to the plaintiff. This to my mind is quite clear. It is important to me, to note that this was done before price was mentioned to the plaintiff before any semblance of a contract came into operation between the plaintiff and the first named defendant. This was done long before any money was paid down on the land by the plaintiff. Even up to the down payment of \$10,000 by the plaintiff, the first named defendant demonstrated his intention that he would not be transferring all of the land to the plaintiff by writing on the receipt "balance depends on total area of survey by Mr. Matthew". An intention which he had, in my view, as long as in December, 1989. If he had intended to transfer the whole 1.7 acres to the plaintiff when the plaintiff's daughter made the down payment, there would have been no need to write what he did on the receipt because he was in possession of Farquhar's survey and would have been in a position to calculate the price of the land from the survey, the survey diagram having given the area of the land as 75,324 square feet.

At that stage, when the contract would have been concluded, the parties' minds were not *ad idem*. Because even if the plaintiff was of the view that the defendant would have sold her the 1.7 acres of land the first named defendant was thinking of selling her less. In that regard their minds did not meet. Moreover, it is my view that the plaintiff knew that the first named defendant did not intend to sell her the 1.7 acres of land, even before she paid the deposit.

I accept Denfield Matthew's evidence when he said:-

"He (George Pigott) gave me a plan surveyed by Felix Farquhar and instructed me to subdivide it by taking off half (1/2) acre. Mrs. Boatswain met me on the spot. She indicated to me that the land was hers, having occupied it for a period and that Mr. Pigott had planned to sell her the land. I told her that I had specific instructions from Mr. Pigott to survey half (1/2) acre for Mr. Parker. This was sometime in December 1989. I inquired of her what part of the land she would prefer me to take the half (1/2) acre from. She did not do so. She said she wanted all. I proceeded with the survey'."

I believe that this case can only be resolved in favour of the appellant if it can clearly be shown that at the time when the

first respondent told the appellant on 18th January, 1990 that the price of the land was \$1.25 per square foot, the appellant was not aware that the first respondent was no longer minded to sell her the entire portion of land surveyed by Mr. Farquhar. This was a question of fact to be determined by the learned Judge. Having seen and heard the parties he accepted the evidence of Mr. Denfield Matthew that he had told the appellant quite clearly in December, 1989 that the first respondent had instructed him to hatch off 0.5 acres of the portion of land surveyed for the appellant by Mr. Farquhar, and that he proceeded to do so in her presence despite her protests. Although there was no direct communication from the first respondent to the appellant, I agree with the learned trial Judge that when the first respondent communicated the price of \$1.25 per square foot to the appellant she knew that the area of land which the first respondent was then minded to sell to her was not the entire portion which Mr. Farquhar had surveyed. For this reason I would hold that the oral contract pleaded by the appellant has not been proved.

I turn now to the case against the second respondent. Unfortunately we do not have the benefit of the reasons behind the learned Judge's conclusion that because the plaintiff's action against the first defendant failed, there should be judgment for both defendants. One is not able to find on the record any attention having been paid to the case for trespass against the second defendant which was clearly set out in the plaintiff's statement of claim, her affidavit and her evidence. Counsel for the second respondent submitted mildly that the question of the second respondent's trespass was neither raised nor argued at first instance. But even a cursory examination of the record will reveal that not only was that claim raised as I have pointed out earlier, but that it was the alleged acts of trespass by the second respondent which brought this matter into the open. Further if such a claim had not been made, there would have been no justifiable reason for the learned Judge to have granted an injunction against the second respondent on 13th June, 1990 and to continue it on 29th June, 1990. In fact in his affidavit dated 28th August 1990 the second respondent admits preparing a portion of the land which the appellant occupies for the purpose of building a concrete house. This Court is not, however, in a position to assess the damages occasioned to the appellant by the second defendant's acts of trespass.

In the event, for the reasons which I have stated I would dismiss the appellant's appeal against the first respondent, and allow her appeal against the second respondent. I would as a consequence vary the Orders made by the learned trial Judge as follows:

1. The Registrar is directed to hold an inquiry as to the damages suffered by the appellant as a result of the acts of trespass committed by the second respondent.

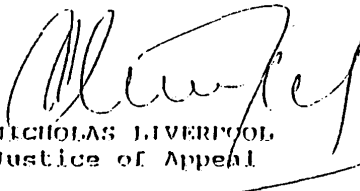
2. The Order granting the injunction granted on 13th June, 1990 and continued on 29th June, 1990 be maintained.

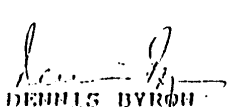
3. The cost of the survey by Mr. Farquhar and the deposit paid by the appellant to the first respondent be returned to the appellant with interest at the rate of 10% per annum.

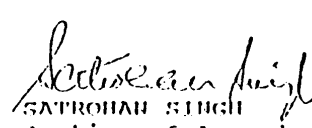
4. The costs of the first respondent here and in the court below to be paid by the appellant.

5. The costs of the appellant as against the second respondent here and in the court below to be paid by the second respondent.

In conclusion I would like to thank Counsel for their industry and research, and to endorse the hope expressed by the learned trial Judge that the parties and especially their attorneys will leave no stone unturned in an effort to ensure a satisfactory resolution of this matter.


NICHOLAS LIVERPOOL
Justice of Appeal


DENNIS BYRON
Justice of Appeal


SATBHAJAN SINGH
Justice of Appeal