

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ON MONTSERRAT

CASE MNIHCV2019/0037

BETWEEN

JAMES COOPER	Claimant
AND	
OSWALD WEST	Defendant/Ancillary Claimant
AND	
PAUL PAYNE	Ancillary Defendant

APPEARANCES

Mr Jean Kelsick of Counsel for the Claimant
Ms Chivone Gerald of Counsel for the Defendant/Ancillary Claimant
Mr Fitzroy Buffonge of Counsel for the Ancillary Defendant

2020: NOVEMBER 16
NOVEMBER 27

JUDGMENT

On whether an excision from land of an access road means refund of value of the land excised

- 1 **Morley J:** Concerning what used to be plot 13/20/80, I am asked to decide whether Paul Payne should pay monies to Oswald West to the value of a strip of land turned into an access road, which has had to be cut through what West claims was land he bought from Payne in 2015, to grant access to the home of James Cooper.

- 2 Cooper used to have access to his landlocked home by driving across what was then Payne's property, but when West acquired it access was stopped, and so Cooper sued West¹. In turn, West sued Payne, who helpfully arranged with the Public Works Department to construct an access road over an L-shaped strip at the west and south extremity of what had been plot 80, but was mutated pre-sale. In this action West claims the strip should have been his land and is claiming its value, as a discount on the 2015 purchase price. The primary question is did West contract to buy the strip.
- 3 Concerning the land, plot 80 when acquired by Payne in 2005 was 0.45 acres. On 03.07.15, a few days before the sale was completed, plot 80 was mutated by Payne into plots 88 and 89, where plot 88 was 0.40 acres, and plot 89 was the strip, being 0.05 acres. West says he thought he was buying plot 80, but in fact it is on record he acquired plot 88. The reason Payne mutated was to create Cooper's access road, which it appears Payne has always accepted he should do for Cooper. When Cooper sued West, who then sued Payne, this motivated Payne to urge public works to construct the road on the strip, plot 89, which topographically was mostly a narrow overgrown ghaut, over which concrete has now been laid for car access.
- 4 Cooper filed his action against West on 31.07.19, and West joined Payne as an ancillary defendant on 26.08.19. There was later a site visit by the court. Finally Cooper settled his action on 07.11.20, as the access road had by now been built, led by Payne, receiving costs of \$4125ec, paid evenly by Payne and West. There was then a trial on the issue between West and Payne on 16.11.20 with judgment reserved to today, 27.11.20, submissions being filed in the interim, where West is seeking from Payne \$10890ec as the strip's value, \$3294.50ec as the interest paid on that sum in the mortgage since 2015, and \$2062.50 as the contribution to Cooper's costs, totaling \$16247ec.

Details

- 5 To delve into detail, documents reveal:

¹ The parties will be referred to by their names so, for ease of reading, and no disrespect is intended by not using formal titles, full names, or the legalese of whether claimants, defendants, or ancillaries.

- a. On 15.06.05, Payne was registered the owner of plot 13/20/80, being 0.45 acres.
- b. In April 2015, Payne resolved to sell plot 80, and there was a valuation report by Joel Osborne dated 13.04.15, in which the standard price of the land and building was calculated as \$271504ec, with the land of 0.45 acres, being 19602 sqft, payable at \$6.50ec per square foot (psf) totaling \$127614ec, though as a firesale the price would be \$228000ec, with the land payable at \$5ec psf, totaling \$98010ec. There is no reference in the report to the need to excise an access road for Cooper.
- c. On 27.04.15, Payne received \$23000ec from West, as a deposit to secure the sale of plot 80, as recorded on the receipt.
- d. On 28.04.15, Payne wrote a letter for West, addressed *'to whom it may concern'*, to assist West raise a mortgage, reporting Payne had agreed to sell *'parcel 13/20/80 consisting of one two bedroom concrete dwelling house of approximately 900sqft on approximately 0.45 acres of land to Oswald West for the sale value of \$228000ec'*.
- e. On 04.06.15 Counsel Gerald acting for West received correspondence from the Bank of Montserrat, in preparation of West receiving a mortgage, anticipating he would acquire title to *'block 13/20 parcel 80'*, for which funds were later released for *'block 13/20 parcel 80'* to Counsel Gerald for the balance \$205000ec by cheque payable to Payne enclosed in a letter to Counsel Gerald of 29.06.15.
- f. Also on 29.06.15, the mortgagor's charge over the land, witnessed by Counsel Gerald, countersigned by West and two bank officials, was then registered against plot 88, not plot 80.
- g. On 30.06.15, it appears Payne raised an invoice to West, 36/2015, for the sale of *'lot 13/20/080'*, being for \$228000ec, where he recorded the land worth \$98010ec, but being 17325sqft, payable at \$5.66ec psf, (said in evidence by West to have been received on 05.07.15).

- h. On 03.07.15, the Land Register recorded plot 80 mutated into plots 88 and 89, where 88 was 0.40 acres and 89 as 0.05 acres.
 - i. On 05.07.15, per the evidence at trial of West, he received Payne's invoice, as above.
 - j. It was agreed at trial between the parties Payne received the cheque on 06.07.15, attending on Counsel Gerald, so that the sale was completed on that date.
 - k. On 17.07.15, certificate of title to plot 88 was issued by the Land Registry to West, and of plot 89, being the strip, to Payne.
- 6 It seems beyond argument that at the time the sale was being completed, with Counsel Gerald instructed for West, in the period 29 June to 6 July when the balance of monies were paid to Payne, the Land Registry paperwork shows an intention for West to acquire plot 88, not plot 80, noting plot 88 was mentioned on 29.06.15 on the land registry documents recording the mortgagor's charge, and known to Counsel Gerald the mutation of plot 80 into plots 88 and 89 was formally recorded on 03.07.15 pre concluding the sale on 06.07.15, leading to West receiving a certificate of title to plot 88 dated 17.07.15.
- 7 As between the parties there was argument, explored at trial:
- a. West said Payne raised mutation for access road after receiving the deposit in April 2015, and West sought a reduction which was refused, but he continued with the sale believing, per para 14 of his affidavit, Payne would settle with him later and 'do the 'right thing'.
 - b. Countering, Payne said he kept West appraised of the access road, telling him it was why he was agreeing a firesale price of \$228000 rather than \$271504ec.
- 8 Having heard the parties, weighing neither party has been wholly frank, on balance what probably happened is this:
- a. Payne was cautious discussing with West the access road, but raised it after the deposit was paid and the mortgage was in process.
 - b. West then wanted a reduction, was refused, but in the end reluctantly came round to accepting the firesale price was because of the access road.

- c. Though the agreement in April 2015 was to purchase plot 80, recorded for the bank in the letter of 28.04.15, the agreement between Payne and West however changed over time to be sale of plot 88.
 - d. By the time of completing the sale, on 06.07.15, West and Payne both knew, as did Counsel Gerald, the plot acquired would be plot 88, mutated from plot 80, and the reason West did not press for plot 80, nor cancel the sale, is because he had settled on having the house, probably reasoning the access road would be excised anyway, at some time, consisting of a strip at the west and south border, overgrown in a ghaut and of no practical use to him.
 - e. However, West expected Payne to action the access road, and so West denied Cooper what had been the previous route to his home when Payne had been in ownership of plot 80.
 - f. Cooper sued West for loss of access, and West then drew in Payne whose tardy development of the access road West and Payne had agreed could be excised from plot 80 was now causing litigation by Cooper.
- 9 In short, West went along with the mutation of plot 80, to acquire 88, and indeed said as much at trial when questioned by this Judge, his real irk he said being Payne has caused him the expense and worry of litigation with Cooper.
- 10 In sum, the case turns on its facts, there is no legal complexity, such that it is right Cooper's suit against West was because Payne did not turn plot 89 into access, but it is not right West expected on 06.07.15 to own plot 80. The one party which may have been in the dark was the Bank of Montserrat, who may have thought the mortgage was against plot 80, and may not have appreciated it is in fact registered against plot 88, (notwithstanding the countersigned charge document of 29.06.15, unexplored at trial), though this may not matter as the Osborne valuation report showed the land in plot 80 could have sold at \$6.50 psf, and as plot 88 has notionally sold at \$5.66 psf, so that the bank's investment remains likely sound.
- 11 It follows West did not buy the strip, and deep down knows it, as when the paperwork was processed between 29 June and 17 July there was no contract to own plot 80, by agreement it had evolved into a contract to own plot 88 for \$228000ec, and so he cannot ask to be

compensated for loss of the strip to the value of \$10890ec, with \$3294.50ec interest, or to any value.

- 12 However, Payne should have actioned the access road sooner, and knows it, leading unhappily to Cooper's suit of West. In my judgment, while Payne is to be commended for pressing to complete the access road, nevertheless West should be compensated by Payne for the \$2062.50ec West has had to pay toward Cooper's costs awarded on 07.11.20, payable by 27.02.21, being a suit that would not have arisen had Payne actioned access earlier.
- 13 Turning to costs in this ancillary action, where West has failed in his action against Payne for the value of the strip, there will however be no order as to costs, each side to bear their own. The reason is, while the court finds West knows in the end he did not buy the strip, it also finds Payne pushed him into this situation, and it is gently surmised neither wished clearly to warn the bank and bring clarity for fear it undid the sale, or mortgage, or raised the cost of further valuations: in short, fudging by both caused this unnecessary litigation.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

27 November 2020