BROWN (APAULA) v BANK OF WESTERN SAMOA

Supreme Court Apia
Lowe J
22 May, 3 July 1986

CONTRACT - Breach of contract - failure to complete purchase of land - whether purchaser entitled to recover deposit on failure to complete - deposit sought based on misrepresentation by agent - remedies of vendor in event of purchaser failing to complete.

CONTRACT - agency - when did the auctioneer cease to act in his capacity as an agent.

PROPERTY - sale of land - mortgagees right to find another buyer when initial sale failed to be completed - remedies available under paragraph 18 of the conditions of sale - interpretation of "without prejudice to the other remedies may at his option exercise all or any of the following remedies".

Plaintiff attended auction of land where conditions of sale were read out. Plaintiff purchased 3 out of 4 plots of land unseen, signed Memo of Contract and paid deposit. Plaintiff later refused to complete.

HELD:

(1) Representations failed to be proved, therefore the provision in cl. 18 of Conditions of Sale that deposit be forfeited if the sale was not completed applied.

(2) Auctioneer ceased to act in capacity of agent for Defendant (if ever) after the auction sale was completed.

(3) The interpretation of "without prejudice to the other remedies may at his option exercise all or any of the following remedies" meant that where the Defendant elects to exercise one of its options as to remedy and gives notice of that option, its rights in respect of the breach of contract are exhausted.

CASES CITED:

- Wright and others v NZ Farmers Co-operative Association of Canterbury Ltd [1934] N.Z.L.R. 1037
  on appeal [1935] N.Z.L.R. 614
  to the Privy Council [1939] N.Z.L.R. 388
- Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79

LEGISLATION:

Property Law Act 1952 (NZ)

L S Kamu for Plaintiff
R Drake for Defendant

Cnr adv vult

On 25 January 1985 the Plaintiff read a notice in the Samoa Times of a mortgagee's sale of various pieces of land at Afiamalu, near Apia to be conducted by auction on 14 March 1985 under the supervision of the Registrar of the Supreme Court. At the foot of the notice was the statement "Particulars and conditions of sale may be inspected at the office of Drake & Company, solicitors for the Mortgagee, WSLAC House, and at the office of the Registrar of the Supreme Court at any time prior to the sale without payment of any fee". That statement suggested that particulars and conditions comprise written documents as otherwise inspection would not be possible.

The Plaintiff's evidence was that she went (with, I think, her husband) to the offices of Drake & Company, asked to see the solicitor handling the sale, and was told by the receptionist that the solicitor was not available but the receptionist could give information as to where a map could be obtained so that they could look at the property. She was given particulars of the properties, then obtained a copy of a plan of subdivision (Ex. 2) from the Lands and Survey Department, could not locate the land from the information on that plan, went back to Drake & Company's office and asked the receptionist to accompany her to the land; the receptionist said she had no other information and that the Plaintiff should study the map and go to the land.

The Plaintiff did not go to the land nor did she ever ask to see the conditions of sale. Forty-eight (48) days after publication of the notice she attended the public auction conducted by Afoa Faalaga Lakisoe at Courtroom No. 2 of the Courthouse, Apia. The conditions of sale were read by the auctioneer; I am satisfied

beyond doubt of that, and if the Plaintiff did not hear it can only be because she was not listening, as there seems to be no doubt of her attendance throughout the auction. She bid for all four of the pieces of land which had been advertised in the notice; but John Mauala was the successful bidder, at $5,300, for lot 205, and she for lot 206 at $6,000, lot 207 at $5,700 and lot 224 for $6,200. Her offers totalled $17,900 and she paid the sum of $1,969 to the auctioneer, representing a 10% deposit and stamp duty of $179, and signed memorandum of Contract dated 14 March 1985 (Ex. 5) agreeing to complete the purchase of the three lots.

She later refused to complete, and the vendor forfeited her deposit, and she claims to be entitled to a refund of her deposit on the grounds of false representations having been made, presumably by the Defendant or the Defendant's agents. The matters of which she complains appear to be as follows:

(a) para. 4 of the statement of claim ends with the words "and therefore there was no need for the Plaintiff to see the land"; the Plaintiffs own evidence does not support that pleading.

(b) para. 5 says that the Plaintiff was not able to see the advertised parcels of land for sale; the evidence does not establish any good reason for that inability; certainly the enquiries made by the Plaintiff could hardly be called comprehensive, and even a person who chose not to seek the advice of a solicitor could have been expected to do more than the Plaintiff did.

(c) para. 6 also says that the Plaintiff relied on "the facts on" (sic - I read it as "and") "representations of the Defendant's agent" but the Plaintiff's evidence does not establish that there were any such representations.

(d) paras. 7 and 8 - after completing the agreement to purchase the three lots she went to the land on which the lots were situated with Mr Lakisoe an agent of the Defendant and was unable to locate the exact positions of the lots due to lack of pegs. Mr Lakisoe was appointed by the Registrar of the Supreme Court to act as auctioneer; I doubt if he was any more the agent of the Defendant than of the Plaintiff, but if he was he had certainly ceased to act in that capacity after the auction sale was completed, and indeed his evidence made it clear that he spent a whole afternoon, without reward, some days after the auction, showing the Plaintiff the location of the lots she had agreed to purchase, as far as he was able taking into account the fact that the subdivision had been effected 12 years earlier and nature had overgrown many identifying features of the land. Of course, when land used to be defined by description, such

as "bounded on the North East by Farmer Giles turnip field, on the West by the Churchyard, and on the East by the three elms on Widow Smith's boundary" it was not unusual, and probably necessary, for the metes and bounds of a property to be pointed out and perhaps walked, but in these days of trig points, theodolites, and survey plans such an exercise is neither necessary nor contained in an agreement.

(e) para. 9 - lot 224 is not situated where the plan of subdivision shows it on Semi Road. The evidence does not support that averment. Mr Lakisoe's evidence, which I accept, was that he found two pegs, and could have located the 3 lots from those 2 pegs, but darkness was approaching and his offer to return and locate the other pegs was not accepted by the Plaintiff. The Plaintiff's evidence was that one peg between lots 224 and 205 was found, and as, according to the plan of subdivision, lots 224 and 205 are divided only by a right of way leading to lots 206 (which backs onto lot 205) and 207 (which backs onto lot 224), I have no evidence that lot 224 is not bounded by the overgrown Semi Road.

(f) para 10 - that the plan of subdivision which the Defendant's agent told the Plaintiff to obtain and use is misleading and misrepresented. In support of that the Plaintiff referred to the difficulty of locating the lots and their boundaries, and also to the fact that Semi Road was not in existence. It is, of course, a paper road, and is not described as a public road, although there is a public road shown running past the end of Semi Road which apparently joins the Vailima/Apia Road. I regret that I can find no substance in the Plaintiff's allegation of misrepresentation.

The remedy of the Plaintiff so far as the sum of $179 paid in respect of stamp duty is concerned (and I note that the memorandum of contract is duly stamped) does not lie in the hands of the Defendant.

Although the evidence does not support the Plaintiff's objections as to title (if that is what they are), if they were in fact established the provisions of clause 15 of the conditions of sale requiring such objection to be made within 7 days of the date of the contract, time being of the essence in that respect, would be a sufficient answer.

Clause 18 of the conditions of sale sets forth the remedies of the vendor in the event of the purchaser failing to complete the purchase, and it is to be noted that the vendor "without prejudice to his other remedies may at his option exercise all or any" of the remedies stated. The first remedy is to rescind the contract and to forfeit the deposit to the vendor as liquidated

damages. The Defendant was certainly patient in that respect, and it was not until 3 July 1985 that notice of rescission and of forfeiture of the deposit was given. It seems likely, having regard to the Defendant's solicitor's letter of 21 April 1985 to the Plaintiff, that the Defendant intended to sue for specific performance but was successful instead in effecting a resale. It follows from all of the above findings that the Plaintiff must be unsuccessful in her claim for refund of her deposit of $1,790 and there will be judgment for the Defendant on the claim accordingly with witnesses expenses according to scale to be fixed by the Registrar.

I turn now to the counter claim. The Defendant's loan officer gave evidence of his attendance at the mortgagee's auction sale, of subsequent events, of the Defendant's decision to try to find another purchaser, when the Plaintiff refused to complete, and in order to avoid further costs not to conduct a further mortgagee's auction sale. I do not think there can be any doubt as to a mortgagee's right to act in such a manner. The provisions of the Property Law Act 1952 (N.Z.) are applicable, and as I understand it, the decisions in Wright & Others v N.Z. Farmers Co-operative Association of Canterbury Ltd [1934] NZLR 1037; on appeal [1935] NZLR 614; on appeal to the Privy Council [1939] NZLR 388 are still good law. And so the Defendant re-sold the three lots, 206, 207 and 224, to the purchaser of lot 205, John Mauala, for the sum of $12,000. That re-sale, together with the forfeited deposit, produced sufficient to pay all expenses of sale, plus the principal sum owing under the Defendant's mortgage, leaving a small surplus of $7.29 which was paid to the mortgagor. Two questions occurred to me at the end of the hearing, and it was for that reason that I did not deliver an oral decision. The first question was whether the Defendant owed any duty to the Plaintiff to sell the three lots to the best advantage so as to mitigate his loss, which would reduce the liability, under clause 18 of the agreement, of the Plaintiff to the Defendant. The evidence was skimpy and did not satisfy me that anything more than was expedient was done to effect a re-sale. The second question was whether the Defendant was entitled to recover more than sufficient to repay expenses and its mortgage, and if it was, whether it was under a duty to recover the excess for the mortgagor. Those questions have, however, been supplanted by another which resulted from further consideration of the notice of default and forfeiture (Ex. 6) and of paragraph 18 of the conditions of sale. It seems to me that the answer to that question will be decisive as to the outcome of the counter-claim.

At common law, which applies in Western Samoa, the remedies for breach of contract include damages and specific performance, and those remedies apply to contracts for the sale of land as well as to any other contract. The parties to the contract may agree upon other remedies for any breach, however. Paragraph 18 of the conditions of sale is as follows:

"18. IF the purchaser shall make default in payment of any instalment of the purchase money hereby agreed to be paid or of interest thereon or in the performance or observance of any other stipulation or agreement on the part of the purchaser herein contained and such defaultshall be continued for the space of 14 days then and in such case the vendor without prejudice to his other remedies may at his option exercise all or any of the following remedies namely:

(a) Rescind this contract and thereupon any monies paid by way of deposit or instalments of purchase price (but not exceeding in all 10% of the purchase price) shall be absolutely forfeited to the vendor as liquidated damages.

(b) Re-enter upon and take possession of the said lands and property without the necessity of giving any notice or making any formal demand.

(c) Re-sell the said lands and property either by public auction or private contract for cash or on credit and conditions as he may think proper with power to vary any contract for sale buy in at any auction and resell and any deficiency in price which may result and all expenses attending a re-sale or attempted re-sale shall be made good by the purchaser and shall be recoverable by the vendor as liquidated damages the purchaser receiving credit for the deposit and any payments made in reduction of the purchase money.

Any increase in price on re-sale after deduction of expenses shall belong to the vendor.

(d) Sue the purchaser for specific performance."

In the present case, the Defendant served a notice (Ex. 6) on the Plaintiff, describing the pieces of land and saying:

"WHEREAS you have made default under a certain Memorandum of Contract dated the 14th March 1985 in that you have failed to pay a balance of purchase moneys due namely the sum of SIXTEEN THOUSAND ONE HUNDRED AND TEN TALA ($16,110.00) which pursuant to the said Memorandum of Contract fell due on the 15th day of April 1985 TAKE NOTICE that the said BANK OF WESTERN SAMOA HEREBY RESCINDS the said memorandum of contract in accordance with paragraph 18 of the Particulars and Conditions of Sale of Auction and FORFEITS all moneys paid thereunder as liquidated damages."

"Liquidated damages" means a sum assessed by the parties to a contract and agreed upon by them to be payable as damages in the event of a breach of the contract by one of the parties. In the present case, the Defendant elected to exercise that remedy; that is, the Defendant elected to forfeit the 10% deposit as liquidated damages; that was one of its options, but once the election was made and the notice given, its rights in respect of the breach of contract were exhausted. It could, instead, have acted under 18(b) (c) or (d); it could have availed itself of its common law rights, which were preserved by the words "without prejudice to his other remedies" in paragraph 18. But where an election is made to exercise a remedy which is agreed to be a comprehensive one, then the words "the vendor may at his option exercise all or any of the following remedies" do not give the elector another bite of the cherry. It has not been suggested that the sum agreed upon, the 10% deposit, was a penalty, and the almost invariable agreement on a 10% deposit in land sales, and the various types of breach which could produce a forfeiture, would make it impossible for this Court, on the evidence, to regard the forfeiture as a penalty. In saying that, I have considered the propositions put forward by counsel in Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co Ltd [1915] AC 79 at pp.86-88. In fact, in the present case, where a subsequent re-sale of the pieces of land showed the Defendant's loss to be greater than the amount forfeited, such a consideration is of academic interest only.

It follows that the Defendant must be unsuccessful on the counterclaim, because of the remedy it elected to avail itself of. There will accordingly be judgement for the Plaintiff on the counterclaim.

I have awarded witnesses expenses to the Defendant in paragraph 7 of this decision. I do not propose to make any other order for costs on either claim or counterclaim; but the parties may make submissions in respect of costs if they wish within 7 days of delivery of this decision.