1988 May 12

(MALACHTOS STYLIANIDES PIKIS, JJ)

MICHALIS PARASKEVA AND OTHERS,

Appellants-Plaintiffs,

v

CHRISTAKIS LANTAS,

Respondent-Defendant

(Civil Appeal No 7122)

Contract—Time of payment—Not of the essence of the contract, unless parties otherwise agreed—The Contract Law, Cap 149, s 55—The rule is applicable and in case of a contract for the sale of land—In face of improper conduct, innocent party may make time of the essence by giving reasonable notice—Notice addressed to two of the three purchasers of land—Ineffective—Absence of evidence as to day of posting and day of receipt of notice—Renders it ineffective—Waiver of rights acquired by a notice

Contract—Breach of—Wrongful repudiation of contract—The rights of the innocent party—Rescission or damages

Contract—Remedies for breach of—Wrongful repudiation—Rescission—The rights of the party rescinding the contract

Quasi contract—Total failure of consideration—Contract of sale of land—Wrongful repudiation—Money paid by innocent party—May be recovered from total failure of consideration

The vendor sold a piece of land to two Englishmen and a Cypriot He was not the registered owner of the land, but he had agreed to buy it from the owner

The purchase price was £12,500, payable by instalments In case of delay, the contract provided for the payment of interest

The purchases paid under the contract £5,000 They did not pay the fourth instalment (£2,000) in time By a letter dated 9 10 82 addressed to the two Englishmen, the vendor invited them to pay the instalment due as well as that, which would fall due on 31 10 82,

warning that otherwise he would hold them liable for breach of contract and for damages

No evidence was adduced as to the exact day of posting of this letter or as to the day it was received However, from the fact that the two purchasers' solicitors answered back by letter dated 26 10 82, it can be gathered that the letter was received by that day

In reply to the solicitors' letter, the vendor replied by three separate telegraphs, whereby he stated, inter alia, that in the event of continued failure to make default in the payment of outstanding instalments, he would consider the contract as broken by the two purchasers

The inference from such telegraphs is that the vendor regarded the contract as extant Cheques for the instalments were sent, but due to misunderstanding the funds were not transferred and, as a result, the cheques remained unpaid They were not presented for payment On 20 11 82 the vendor informed the solicitors that the contract is at an end by reason of the purchasers' breach, he asserted his right to retain the £5,000 and intimated his intention to resell the land

The purchasers brought an action for repudiation of contract The vendor counterclaimed £6,140 by way of damages The trial Court dismissed the action and gave judgment on the counterclaim for £5,000

Hence this apeal

Held, *allowing the appeal* (1) The rule is that time stipulations for the payment of the purchase price, including a contract for the sale of land, are not of the essence of the agreement unless they are so declared to be for reasons mutually in the contemplation of the contracting parties (The Contract Law, Cap 149, section 55). In this case time was not of the essence The provision as to interest is suggestive of this fact

(2) A party to a contract cannot unilaterally vary or supplement the terms of an agreement. He may, however, in the face of improper conduct on the part of the counter-contracting party, give notice of intention to repudiate or withdraw from the agreement whereupon, provided the notice is reasonable having regard to all the circumstances, he may terminate the agreement after effluxion of the time limited by the notice

(3) In this case the notice dated 9 10 82 was wholly ineffective In the first place, it was addressed to only two of the purchasers, in the second it did not furnish the addressees with a reasonable forewarning

The absence of evidence as to posting and the date of receipt of the letter, is fatal to the case of the respondent.

(4) In any event, even if the notice was effective, it has been waived by the telegraphs of 3.11.82.

(5) Hence, the vendor had no right in law to repudiate the agreement. His conduct and action amounted to a repudiation of the agreement, entitling the purchasers to treat the contract either as rescinded or as broken by the vendor for which he could be held liable in damages for breach of contract.

(6) It is not clear what the appellants have done in this case. It appears that they have rescinded the contract. In such a case they must be restored to their pre-contract position. In any event, they are entitled to the £5,000 for total failure of consideration or as damages for breach of contract.

Appeal allowed with costs. Judgment for the appellants for £5,000.

Cases referred to:

Charalambous v. Vakana (1982) 1 C.L.R. 310;

Jamshed v. Burjorji (1916) 431 A. 26;

Stickney v. Keeble and Another [1915] A.C. 386;

Re Barr's Contract [1956] 2 All E.R. 853;

Federal Commerce v. Molena Alpha Inc. & others [1979] 1 All E.R. 307;

Woodar Investment v. Wimpey Construction [1980] 1 All E.R. 571;

Horsler & Another v. Zorro [1975] 1 All E.R. 584;

Chabbra Corp. Pte. Ltd. v. Jag Shakti [1986] 1 All E.R. 480;

C.R. Taylor (Wholesale) Ltd. & Others v. Hepworths Ltd. [1977] 2 All E.R. 784.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Paphos (Anastassiou, S.D.J.) dated the 31st January, 1986 (Action No. 885/83) whereby their action for general and special damages for breach of contract for the sale of land was dismissed.

Chr. Georghiades, for the appellants.

C. Emilianides, for the respondent.

MALACHTOS J.: The judgment of the Court will be delivered by Pikis J.

PIKIS J.: The respondent, Christakis Lantas, sold a piece of land situate at Peyia, Paphos, to the appellants, two Englishmen and a Cypriot. The land was not registered in the name of the vendor but he had covenanted to buy it from the owner. It was a land deal on the part of the respondent designed to yield profit.

The sale agreement, reduced in writing, specified the purchase price to be £12,500.-- payable in seven instalments, as follows:

(a) £1,000.-- payable on the day of execution of the written agreement;

(b) £2,000.-- payable on 31/1/82;

(c) £2,000.-- payable on 30/4/82;

(d) £2,000.-- payable on 31/7/82;

(e) £2,000.-- payable on 31/10/82;

(f) £2,000.-- payable on 31/1/83; and

(g) £1,500.-- payable on 31/3/83.

In the event of delay to meet the payment of any instalment the purchasers would be liable to pay interest fixed at 7 per centum.

After paying the first three instalments, amounting to £5,000.--, the purchasers made default in the payment of the fourth instalment due on 31/7/82. In October, 1982, Mr. Komodromos, the advocate acting for the respondent, addressed a letter to two of the three purchasers, those residing in England, inviting them to remedy their omission by 31st October, 1982, and pay on or before that day an amount of £4,000.--, that is, the instalment due and the one payable on 31/10/82. In case of failure the two purchasers were warned that they would be held answerable for breach of contract and liable to damages. The letter is dated 9th October, 1982. There was no evidence indicating when it was

posted or received in England. We can, however, infer that the letter was received prior to October 26, 1982, in view of the reply made on behalf of the two purchasers by their solicitors on that day. In their reply (given through their solicitors) the purchasers informed the vendor they had every intention of honouring the agreement and that arrangements were being made for the despatch of the monies of the outstanding instalments. However, they did express concern about the fact that the vendor was not the registered owner of the property and fears about the likelihood of inability on his part to transfer the property after payment of the purchase price. As a matter of fact, the vendor was not the registered owner of the immovable property he sold, but the purchaser of it, subject to terms and conditions that would enable him at the end of the day, so he asserted, to honour his obligations to the purchasers.

In response to the aforementioned letter the respondent addressed three separate telegrams to the solicitors of the English purchasers, indicating -

(a) that he would fulfill his commitments to the purchasers, but that

(b) he was unwilling to have the terms of the agreement varied in any way and, more significantly still that, he insisted on the enforcement of existing contractual stipulations as to payment; adding that in the event of continued failure to make default in the payment of outstanding instalments, he would consider the contract as broken by the two purchasers.

The inevitable inference is that on a date subsequent to the expiration of the period set forth in his letter of October 9, 1982, he informed the purchasers to whom the letter had been addressed, that he regarded the contract as extant and demanded payment of the outstanding instalments. As a matter of fact the amount of money due was posted to the respondent by cheque but owing to delay or misunderstanding the necessary funds were not transferred in time to make possible payment of the cheque on presentation. As a matter of fact, sufficient funds were made available for the purpose two days later. The respondent did not present the cheque for payment again and, a while later, on 20/11/82, informed the solicitors of the two purchasers that he regarded the contract as at an end for failure of the purchasers to comply with the notice contained in the letter of 9/10/82. He

adopted this stand notwithstanding the telegrams of 3/11/82 and the letters addressed by the English purchasers' solicitors, signifying the commitment of their clients to honouring their contract with the respondent. Furthermore, the vendor asserted a right to retain the amount of £5,000.-- already paid; also, the vendor intimated his intention to sell the land elsewhere.

The three purchasers joined in an action for repudiation of contract, claiming that the contract had been broken by the vendor and that in consequence they were entitled to a return of the money paid towards the purchase of the property, legal and travelling expenses, and the fees paid to architects for the preparation of plans made in contemplation of acquiring.

The vendor resisted the claim and maintained that the purchasers were liable for breach of contract entitling him to claim, as in fact he did by way of counterclaim, £6,140.- by way of damages. The loss was ascertained by reference to the difference between the value at which the property had been sold to the purchasers and the highest bid, that is £6,500.--that the auction of the property attracted a short while after alleged breach of contract by the purchasers. Be that as it may, the property was not sold to the highest bidder but returned to the registered owner upon payment to him by respondent the amount of £2,500.-- compensation.

The trial Court found for the respondent (vendor) and awarded him £5,000.-- damages on the counterclaim. It is none too clear in the judgment whether the amount of £5,000.-- was awarded additionally to the £5,000.-- already paid by the purchasers or, whether by the judgment it was intended to allow the respondent to retain the monies already received under the sale agreement. The claim was dismissed.

In his reasons for judgment the trial Judge explains that the time of payment of the instalments was of the essence and, consequently, the failure of the purchasers to meet stipulations regulating the payment of the instalments entitled the vendor to terminate the contract. It is evident that in so holding the Judge misinterpreted the decision of the Supreme Court in *Charalambous v. Vakana**, and cases cited therein, and failed to

* *(1982) 1 C.L.R. 310 (the judgment of the Court was given by Stylianides, J.)*

appreciate that equity has superseded the common law rule that contractual stipulations affecting payment are of the essence of the agreement. Now the rule is that time stipulations for the payment of the purchase price, including a contract for the sale of land, are not of the essence of the agreement unless they are so declared to be for reasons mutually in the contemplation of the contracting parties. The same principles govern the application of s.55 of the Indian Contract Act, 1872, upon which s.55 of our Contract Law, Cap. 149, is founded*. In this case not only the parties did not make the time of payment of the purchase price of the essence of the agreement but, on the contrary, they made provision for the payment of interest, a fact in itself suggestive that time was not intended to be of the essence. Therefore, time was not initially of the essence of the contract as, indeed, counsel for the respondent candidly acknowledged. Was, then, the time of payment made of the essence by the subsequent notice of the vendor?

The trial Court answered that question too, in the affirmative, holding that that was the effect of the notice of the vendor dated 9/10/82. It came to this conclusion despite the fact that the notice had been addressed to only two of the three purchasers and the absence of any indication of the length of the notice given thereby. There was no evidence indicating either the time of posting of the notice or establishing the date of its receipt; expect that we may infer that it was received not later than 26th October, 1982. Furthermore, the trial Court wholly overlooked the effect of subsequent events, noted earlier, particularly the telegram of 3/11/82, whereby the vendor had waived any right he might have acquired from the notice of 9/10/82.

A party to a contract cannot unilaterally vary or supplement the terms of an agreement. He may, however, in the face of improper conduct on the part of the counter-contracting party, give notice of intention to repudiate or withdraw from the agreement whereupon, provided the notice is reasonable having regard to all the circumstances, he may terminate the agreement after effluxion of the time limited by the notice. There is most illuminating discussion of the subject in *Re Barr's Contract***.

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* *(See, Jamshed v. Burjorji (1916) 43 1 A.26, and Stickney v. Keeble and Another [1915] A.C. 386).*

** *[1956] 2 All E.R. 853.*

Assuming the delay of the purchaser to meet the fourth instalment was inexcusable and the vendor had a right to make time of the essence by reasonable notice, we must, nonetheless, in light of the facts, conclude that the notice was wholly ineffective.

Firstly, the notice was not addressed to all the purchasers and as such was wholly abortive.

Secondly, the notice was ineffective to furnish the purchasers, be it those to whom it was addressed, of reasonable forewarning of the intention of the vendor to repudiate the contract for non compliance with stipulations affecting the payment of the purchase price. The absence of evidence as to posting and the date of receipt of the letter, is fatal to the case of the respondent.

Thirdly, the right, if any, that had accrued to the vendor following the expiration of the period limited by the notice, had been waived by subsequent conduct, particularly the telegram of 3/11/82.

Counsel for the respondent found it difficult, at the end of the day, to support the judgment of the trial Court on this point, too. In our judgment the notice dated 9/10/82 did not, for the reasons indicated, make time of the essence. Hence, the vendor had no right in law to repudiate the agreement. The intention declared in the letter of 20/11/82, no longer to be bound by the agreement, had no justification in law; it was not a bare threat either. The vendor intimated that he would look for another purchaser and, more importantly that, he would retain the amount of £5,000.-- in satisfaction of a claim to damages. His conduct and action amounted to a repudiation of the agreement, entitling the purchasers to treat the contract either as rescinded or as broken by the vendor for which he could be held liable in damages for breach of contract. We are well aware that the repudiation is a drastic conclusion not to be arrived at save where the repudiatory acts, present or anticipatory, go to the root of the agreement*.

The claim of the plaintiffs is not clearly defined in the statement of claim and does not clarify whether their action is founded on rescission or breach of contract. Judging from the items of special damage claim, one is apt to infer that the essence of their action

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* *(See, inter alia, Federal Commerce v. Molena Alpha Inc. [1979] 1 All E.R. 307 (H.L.); and Woodar Investment v. Wimpey Construction [1980] 1 All E.R. 571 (H.L.).*

was rescission; and the case was prosecuted upon that basis before the trial Court. The rights of the innocent party upon rescission of contract are explained with remarkable clarity, if I may say so with respect, by *Meggary, J.* as he then was, in *Horsler v. Zorro**.

The parties will, so far as possible, be restored to their pre-contract position which, in the case of the purchaser of land, will include the return of purchase price or the part that was paid plus legal expenses for investigating the title. The latter item of damage is to a large extent interwoven with English conveyancing practice.

Applying these principles to the facts of our case the appellants are entitled to recover upon rescission the amount of £5,000--. To the same conclusion we would be driven if the claim were treated as one for damages for breach of contract. The amount of £5,000.- is in any event recoverable by the appellants for total failure of consideration. Moreover, it can be argued on the authority of *Chabbra Corp. Pte. Ltd. v. Jag Shakti*** that the same amount is recoverable by way of damages for breach of contract although no definitive answer need be given on that aspect of the case as the claim of the plaintiffs has been treated as one for restoration upon rescission of contract following the repudiation of the respondent.

Lastly, the amount of £5,000.-- satisfies the fundamental rule governing the award of damages, applicable both in cases of contract and tort, referred to by *May, J.*, in *C.R. Taylor (Wholesale) Ltd. v. Hepworths Ltd****. that damage must, at all events, be reasonable as between plaintiff and defendant.

For all the above reasons the judgment of the trial Court is set aside. Judgment is entered on the claim for the plaintiffs for £5,000.--; the counterclaim is dismissed. The respondent will pay the costs of the proceedings on appeal and before the trial Court.

Order accordingly.

Appeal allowed.

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* [1975] 1 All E.R. 584, 588.

** [1986] 1 All E.R. 480; the immediate issue was the damage recoverable for conversion.

*** [1977] 2 All E.R. 784.