1988 September 20

(MALACHTOS, PIKIS, PAPADOPOULOS, JJ.)

MARIA STYLIANOU RODOULLI,

Appellant-Plaintiff,

v.

ANTONIOS CONSTANTINOU PAPASAVVAS & ANOTHER,

Respondents-Defendants.

(Civil Appeal No. 7270).

Contract — The Contract Law, Cap. 149, s.55 — Time of payment — The parties may make it of the essence of the contract — Agreement for sale of land stipulating for vendor's right to rescind in case of default — Time of payment is of the essence — Whether offer of payment after default remedies the default and extinguishes right to rescind — In the absence of a waiver, question determined in the negative.

Contract — Notice of rescission — Time when such notice becomes effective.

The respondents agreed to sell a share in a plot of land to the appellants for £8,000.- payable as follows, i.e. £2,000.- upon signing the agreement and the balance in two yearly instalments or within two years at 6% interest.

The agreement provided that the instalments should be paid promptly; in the event of default the vendor would be at liberty to terminate the agreement.

The appellants failed to pay the balance as aforesaid and the respondents, as a result, rescinded the agreement by a double registered letter dated 3.1.1980. The notification of arrival of the letter reached appellant's letter box on 5.1.1980, but the appellant did not collect the letter until 10.1.1980.

The trial Court, however, found that the appellant had communicated with the respondent on 5.1.1980 signifying readiness to meet his obligations under the contract. The respondents reacted negatively and informed him they had already rescinded the agreement and that a notice to that end had been sent to him.

This is an appeal from the judgment whereby appellant's action for specific performance* of the said agreement was dismissed.

Held, *dismissing the appeal*: (1) The effect of the stipulations affecting time in this case was, as acknowledged, to make time of the essence. Not only that; the parties went a step further and specified the rights of the vendor in the event of non-payment, the most prominent of which was the right to terminate the agreement.

(2) In The Brimness [1974] 3 All E.R. 88, it was decided that notice of termination, communicated through a telex machine, became effective at such time as it would, in the normal course of business, be expected to come to the knowledge of the addressee. The principle espoused in the above case is both fair and commercially sound. The implications of the application of that principle to letter communications were not explored. Arguably the wider principle involved is that written communications must be deemed to come to the notice of the addressee at such time as it would be objectively reasonable to anticipate that they would reach him.

(3) However, the exact point of that time need not be decided in this case, because the appellant was orally informed of the rescission on 5.1.1980. Her attempt to remedy the default was made after such oral communication.

(4) An offer to remedy a default after the accrual of a right to rescind, does not extinguish the right. The right remains extant unless waived by unequivocal action.

Appeal dismissed with costs.

Cases referred to:

Paraskeva and Others v. Lantas (1988) 1 C.L.R. 285;

The Brimness [1974] 3 All E.R. 88;

Mardorf Peach v. Attica Sea Carriers [1977] 1 All E.R. 545.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Hadjitsangaris, P.D.C. and Hadjihambis, D.J.) dated the 11th October, 1986 (Action No. 368/80) whereby her action for specific performance of the contract between the parties was dismissed.

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* *The agreement had been registered under The Sale of Land (Specific Performance) Law. Cap. 232.*

R. Michaelides with C. Loizou, for the appellant.

B. Vassiliades, for the respondents.

MALACHTOS J.: Having heard Counsel for the appellant, we consider it unnecessary to hear Counsel for the respondents in reply. The judgment of the Court will be delivered by Pikis J.

PIKIS J.: This is the appeal of the buyer of a plot of land against an order of the District Court of Limassol dismissing his action against the vendors for specific performance of the contract between them. The trial Court found that appellant made default in his obligations under the agreement affecting the payment of the purchase price; a default that gave the purchaser a right to terminate the contract. And as the vendor, in exercise of that right, rescinded the agreement between them, the contract lapsed or was extinguished. Consequently, the contract that the appellant sought to enforce by his suit before the District Court became inoperative and as such incapable of enforcement.

The written agreement between the parties, dated 29.12.1977, provided for the sale of a share in a plot of land for £8,000.- payable by instalments as follows:-

(a) £2,000.- upon execution of the agreement, an amount duly paid in accordance with the terms of the contract; and,

(b) The balance in two yearly instalments or within two years at 6% interest.

The agreement provided that the instalments should be paid promptly; in the event of default the vendor would be at liberty to terminate the agreement. Recently we had occasion to debate the implication of terms in a contract for the sale of land affecting the time of payment of instalments of the purchase price. The case is that of *Paraskeva and Others v. Lantas**. We pointed out that the parties may make the time of payment of the essence of the agreement, a position safeguarded by s.55 of the Contract Law, Cap. 149** that by enlarge reproduces English law on the subject. The effect of the stipulations affecting time in this case was, as acknowledged, to make time of the essence. Not only that; the parties went a step further and specified the rights of the vendor in the event of non-payment, the most prominent, of which was the

* *(1988) 1 C.L.R. 285.*

** *Modelled on s 55, Indian Contract Act, 1872.*

right to terminate the agreement. In *Paraskeva* (supra) it was explained that where a contract is rescinded the parties must be restored, so far as possible, to their pre-contract position a process that will ordinarily entail return to the purchaser of the monies paid towards the purchase price.

The trial Court found that appellant failed to pay the balance of the purchase price as provided in the agreement, whereupon the respondents acquired a right to terminate the contract. In exercise of that right they rescinded the agreement, a decision notified by a letter addressed to the appellant on 3rd January, 1980. Copy of that letter was sent to the Lands Dept. in view of the fact that the contract had been registered under the provisions of the Sales of Land (Specific Performance) Law, Cap. 232. The letter was despatched by double registered post, a process entailing notification of the arrival of the letter at the post office of the area where the addressee resides. Thereafter the recipient is free to collect the letter at his convenience. The notification of the arrival of the letter reached the letter box at the residence of the appellant on 5th January, 1980, as the trial Court found, or possibly earlier. The appellant did not collect the letter until 10th January, 1980. Nonetheless, on 5th January, 1980, the trial Court found, he communicated with the respondents over the phone signifying readiness to meet his obligations under the contract. The respondents reacted negatively and informed him they had already rescinded the agreement and that a notice to that end had been sent to him. In that way appellant gained definite knowledge of the fact that respondents had terminated the agreement. Later, in the evening of 5th January, 1980, appellant sent a telegram to the vendors, succeeded two days later by a letter of his advocate expressing readiness to pay the balance coincidentally with arrangements for the transfer of the land. Other than the above intimation, no attempt was made to pay the balance to the respondents. The trial Court found, on the authority of *The Brimness**, that the notice of termination was effective upon arrival at the letter box of the appellant of the notice of the registered letter. Therefore, the offer to pay the balance came too late, that is, after the rescission of their agreement. Moreover, the tender was illusory and not real in that at no time was the money

* [1974] 3 All E.R. 88

paid to the respondents. The action of the appellant was confined to an offer to pay; no payment was made.

Of the many grounds raised in the notice of appeal, only one was pursued before us, namely, the validity of the finding that the notice of termination became effective by 5th January, 1980, examined in conjunction with what counsel described as the tender of the balance.

In *The Brimness* (supra) it was decided that notice of termination, communicated in that case through a telex machine, became effective at such time as it would, in the normal course of business, be expected to come to the knowledge of the addressee. The principle espoused in the above case is both fair and commercially sound. The implications of the application of that principle to letter communications were not explored. Arguably the wider principle involved is that written communications must be deemed to come to the notice of the addressee at such time as it would be objectively reasonable to anticipate that they would reach him. Whether that time should be the hour at which the notice of a double registered letter arrives at the letter box or such time as it would ordinarily be reasonable to anticipate the recipient to collect the letter thereafter, need not be decided in this case. For the decision to rescind the contract and the notification of it by letter, had been duly communicated to the appellant orally. His subsequent action was pursued despite knowledge of that reality, a reality that neither the trial Court nor we can overlook. Such attempt as was made to remedy the default on the evening of 5th January, 1980, and subsequently was made after the exercise of the right of the appellant, earlier referred to, to rescind the contract, that is, after the event of rescission.

The case was argued before the trial Court and on appeal on the assumption that the tender of the balance, assuming a valid tender had been made, could remedy the default. This is not so. The implications of default to meet the payment of instalments when time is of the essence, were analysed (with great clarity, if we may say so with respect), in *Mardorf Peach v. Attica Sea Carriers**.

An offer to remedy a default after the accrual of a right to rescind, does not extinguish the right. The right remains extant unless waived by unequivocal action. In this case not only the

* *[1977] 1 All E.R. 545*

respondents did nothing to waive their right to rescind, but on the contrary asserted it without equivocation before the belated offer of the appellant to remedy his default in the discharge of his contractual obligations. Inevitably the appeal must be dismissed.

Before disposing of the appeal, we may notice that the respondents offered to refund the amount of £2,000.- representing the first instalment, and the Court ordered its return to the appellant; no doubt in order to restore the parties to their *status quo ante*.

In the result the appeal is dismissed with costs.

Appeal dismissed with costs.