

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 22/2014

**BEFORE: THE HON MR JUSTICE PANTON P
 THE HON MR JUSTICE DUKHARAN JA
 THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)**

BETWEEN	GRETEL SURF	1ST APPELLANT
	CLIVE FOSTER	2ND APPELLANT
AND	SHELLY ANN RUSSELL	RESPONDENT

**Miss Audrey Clarke instructed by Judith M Clarke & Co for the appellants
Ewan Thompson for the respondent**

3 February 2015 and 20 December 2016

PANTON P

[1] On 29 April 2014, Her Honour Mrs Sonya Wint-Blair, who was then acting Senior Resident Magistrate for the parish of Saint Elizabeth, entered judgment in favour of the respondent for the sum of \$305,000.00, with costs to be agreed or taxed. The plaint note and summons indicate that the claim by the respondent against the appellants was for "restitution/damages for breach of contract or inducing breach of contract". This

decision did not please the appellants so they filed notice and grounds of appeal on 14 May 2014.

[2] In their grounds of appeal the appellants have complained that:

- i. The learned Resident Magistrate erred in finding that the claim had been proven;
- ii. There was no evidence to support the decision;
- iii. There was no evidence that the appellants entered into and/or breached any contract with the respondent; and
- iv. The learned Resident Magistrate did not properly analyze the evidence.

By these grounds, they hope to have the appeal allowed and judgment entered in their favour.

The evidence

[3] The appellant Foster and the respondent had a common law relationship which lasted several years and produced one child. The appellant Surf, a retired teacher, inherited a parcel of land at Rockfield in the parish of Saint Elizabeth. On 1 April 2011, she had a transaction with the appellant Foster and the respondent in respect of this land. She signed a receipt indicating that Mr Foster and Miss Russell had paid her the sum of \$240,000.00 for the land, and there was a balance of \$45,000.00 owing thereon. That receipt was admitted into evidence as exhibit 1. The balance due was

subsequently paid by Mr Foster and Miss Russell who took possession of the land and proceeded to live on it. They also operated a bar on the premises, first from a container and then from a concrete structure that they erected. The structure was completed in June 2012, but by August 2012 Mr Foster and Miss Russell were no longer together. Like so many other such relationships, they went their separate ways.

[4] As a result of the failed relationship, the bar was closed. Mr Foster denied Miss Russell the opportunity to continue to operate the bar. However, he subsequently resumed bar operations there in conjunction with his new lady friend. Miss Russell has received no compensation for her contribution to the price of the land or her expenditure in the construction of the building housing the bar. Consequently, the instant suit was filed.

[5] There is also another reason for these proceedings. Miss Surf issued another receipt to one Mrs Annie Moxam for \$285,000.00 in respect of the said parcel of land. That receipt, like the earlier one, bears the date 1 April 2011, although it was not really issued to Mrs Moxam until January 2013. According to Miss Surf, the land was sold to Mrs Moxam, not Mr Foster and Miss Russell. Indeed, Miss Surf's evidence was that Mr Foster was acting as Mrs Moxam's agent and Miss Russell's name was added to the earlier receipt merely because Miss Russell had requested that that be done.

[6] Mrs Moxam gave evidence that the second appellant, Mr Foster, was her agent and that it was she who was purchasing the land from Miss Surf. However, she said that she had no problem with the name of the appellant Russell being placed on the

receipt. According to her, Miss Russell had never worked a day in her life and it was she, Mrs Moxam, who had built the shop on the land. Mrs Moxam, when challenged on portions of her evidence, responded that she was a woman of integrity and that she wouldn't pay her "fare from the United States of America [where she lives] to come here and lie". It is noteworthy however that at the commencement of her evidence she said, "I live here in Southfield, St Elizabeth".

[7] The learned acting Senior Resident Magistrate made several findings of fact. The critical findings so far as the suit is concerned were the following:

- i. The respondent Russell had her own source of income and paid \$120,000.00 from her bank account towards the purchase of the land;
- ii. The respondent operated a bar on the premises and shared the proceeds with Mr Foster;
- iii. Mrs Moxam paid Mr Foster's share of the purchase price for the land;
- iv. At the time of the money transaction, there was no mention of Mrs Moxam being involved in the purchase of the land;
- v. The credibility of the first appellant, Mrs Surf, was "seriously undermined"; and
- vi. The evidence of Mrs Moxam was contrived.

[8] Although the skeleton submissions filed by Miss Audrey Clarke indicate that they were filed on behalf of the first appellant Mrs Surf, the fact is that they included submissions on behalf of the second appellant Mr Foster as well. Miss Clarke submitted that there was no contract between the second appellant Mr Foster and the respondent; nor was there evidence of a breach of contract by any of the parties. Any deprivation of interest, she said, would not be attributable to the first appellant Mrs Surf. In all the circumstances of the case, she submitted, if anyone is liable to the respondent it would be the person now claiming the land, that is, Mrs Moxam.

[9] It is difficult to agree with these submissions by Miss Clarke. Those advanced by Mr Ewan Thompson for the respondent are more in keeping with the facts as presented, and as found by the learned acting Senior Resident Magistrate. There was a clear and valid agreement for sale between the respondent and the second appellant on the one part, and the first appellant on the other part. The property, parties and sale price were identified in the receipt signed by the first appellant. And there is no doubt that money passed from the respondent and the second appellant to the first appellant in respect of the transaction. The purchasers, that is, the respondent and the second appellant, duly took possession. There is no doubt about that either. It was only left for the property to be formally conferred in a document. Alas, there appeared an "Indenture" dated 2 January 2013 purporting to convey the said property to Mrs Moxam, and it was bolstered by a receipt dated 1 April 2011 signed by the first appellant. Incidentally, the "Indenture" was marked "certified" by a justice of the peace for the parish of St Elizabeth. It is not clear however what was being certified.

[10] In the circumstances, the first appellant has created a situation where she facilitated and encouraged a disregard of the interest of the respondent in the property, by advancing what the trier of facts found to be a contrivance. The first appellant has falsified the situation and has provided written material that falsely indicates that her dealings were really with Mrs Moxam and not with the respondent and the second appellant.

[11] The appellant Foster has given full support to the efforts of Miss Surf to deprive the respondent of her equitable rights in the property. He has also effectively barred her from possession of it. In the circumstances, he shares responsibility and liability with Miss Surf.

[12] The learned acting Senior Resident Magistrate made certain findings of fact that were highlighted earlier. An appellate court does not lightly overturn a trial judge's findings of fact. In the instant situation, nothing has been advanced that would warrant a disturbance of the findings of fact. Indeed, there is ample evidence to support them. In my view, the findings are unimpeachable.

[13] The claim by the respondent was stated thus in the following paragraphs of the particulars of claim:

"20. The Plaintiff contributed a total of One Hundred and Thirty Five Thousand Dollars (\$135,000.00), towards the purchase of the said land and One Hundred and Forty Thousand Dollars (\$140,000.00), towards the construction of the shop building. This being a total contribution of Two Hundred and Seventy Five Thousand Dollars (\$275,000.00).

21. The Plaintiff further claim [sic] One Thousand Five Hundred Dollars (\$1,500.00) per day for thirty (30) days or Forty Five Thousand Dollars (\$45,000.00), for her time and effort spent in the construction of the shop building."

[14] The learned acting Senior Resident Magistrate said she accepted the respondent's evidence that she paid \$120,000.00 towards the purchase of the land, and \$140,000.00 towards the construction of the shop. On that basis, along with the claim of \$1,500.00 per day for 30 days, she awarded the respondent the sum of \$305,000.00 to be paid by the appellants. She cannot be faulted for making that order.

[15] In the circumstances, I would dismiss this appeal with costs of \$15,000.00 to the respondent.

DUKHARAN JA

[16] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. This was clearly a question of fact for the learned acting Senior Resident Magistrate (as she then was) and I also see no reason to disturb those findings. I too would dismiss the appeal with costs to the respondent.

SINCLAIR-HAYNES JA (AG)

[17] Findings of fact are entirely within the purview of the trial judge. An appellate court ought not to interfere with the findings of a trial judge unless the decision is plainly wrong. In that regard an appellate court ought not to substitute its own view of

the facts for that of the trial judge. I can find no grounds to conclude that the learned Senior Resident Magistrate (acting as she then was) was plainly wrong in her decision. I therefore agree with the conclusion of the learned President.

PANTON P

Appeal dismissed with costs of \$15,000.00 to the respondent.