

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT  
COMMON LAW AND EQUITY SIDE**

**2004/CLE/gen/FP71**

**BETWEEN**

**GAIL ROGERS-KNOWLES**

**Plaintiff**

**AND**

**JOHN PRATT**

**AND**

**PRATT FITCH AND JONES LIMITED**

**Defendants**

**BEFORE: The Honourable Mrs Justice Estelle Gray Evans**

**APPEARANCES: Ms. Constance McDonald for the plaintiff  
Mrs Paulette Roache for the defendants**

**2010: 7 and 8 June; 22 November**

**2011: 8 February**

**R U L I N G**

**Gray Evans, J.**

1. This action was commenced on 30 March 2004 by a specially indorsed writ of summons in which the plaintiff claims:

- (1) Damages for breach of contract by reference to the 21 June 1996 and 29 June 1998 letter agreements or alternatively to the 12<sup>th</sup> May 1999 settlement agreement.
- (2) Interest pursuant to the Civil Procedure (Award of Interest) Act 1992 or alternatively at such rate and for such period as the court thinks fit.
- (3) Costs.
- (4) Any further or other relief which to the court seems just.

2. The only witnesses at the trial were the parties themselves and the facts are, for the most part, not disputed.

3. At all material times, the plaintiff was a sales representative with Coldwell Banker/Apple Realty Limited and the second defendant was owner and operator of a golf course business known as Bellevue Golf Course and other business affairs and real estates holdings. The second defendant, a company incorporated in Canada and therein carrying on business, was at all material times beneficially owned and controlled by the first defendant.

4. The parties hereto entered into an agreement, in Canada, evidenced by a letter dated 21 June 1996 from the plaintiff to the defendants whereby the plaintiff was engaged to act as project coordinator in the development of certain of the defendants' property in Canada.

5. On or about 24 June 1996, the first defendant granted an exclusive listing agreement to the plaintiff to sell or exchange his "said corporation or all or part of the assets thereof at the price of \$5,500,000 share sale or \$6,000,000 asset sale or as such other price or terms to which [he] may agree." The agreement was set to expire at midnight on 30 October 1998 and the agreed commission was 6%.

6. By another agreement dated 29 June 1998, the defendant granted the plaintiff another exclusive listing authority to sell or lease the business known as "Bellevue Golf Course". That agreement was set to expire on 31 July 1998.

7. The plaintiff says pursuant to that agreement she secured an offer from IntraCorp Properties Limited for the sum of \$4,000,000.00. That offer dated 1 July 1998 was set to expire at 11:59 p.m. on 10 July 1998. The defendant did not accept that offer but counter offered to sell at \$4,750,000.00 on 22 July 1998. The sale to IntraCorp did not materialize.

8. The parties eventually entered into an amended settlement agreement and full and final release ("the settlement agreement") dated 12 May 1999 whereby they agreed to settle all issues relating to their past business dealings, including the aforesaid exclusive listing agreements dated 21 June 1996 and 29 June 1998 ("the 1996 and 1998 agreements"), and to compensate the plaintiff for all services rendered to the defendants pursuant to the aforesaid listing agreements and as project manager.

9. The settlement agreement expressly provided for the following:
1. "Pratt (defendant) shall transfer to Rogers (plaintiff) a condominium, specifically, Condominium number 206, Lucayan Towers North, Freeport, Bahamas, on or before September 1, 1999;
  2. Pratt shall pay to Rogers the sum of ten thousand dollars (\$10,000.00) in U.S. funds within 60 days of the date of this Agreement and Release is executed by Rogers;
  3. Pratt shall enter into a new listing agreement with Rogers with respect to the Cottam Subdivision Property at a list price of \$300,000.00, which listing shall be for a period of 60 days.
  - 3a. It is further understood and agreed that if Pratt does not meet its obligations pursuant to paragraphs 1, 2 and 3 above, this entire agreement shall be null and void and of no force or effect and all rights, claims, demands, actions, causes of action of every kind and nature whatsoever that Rogers hereto before had shall be restored to her without limitation as if any release granted herein had never been given by her".
10. The parties are Canadian citizens and each of the aforesaid agreements was executed in the Province of Ontario, Canada.
11. It is not disputed that pursuant to the settlement agreement, the defendant:
- (1) paid to the plaintiff the sum of \$10,000.00;
  - (2) granted to the plaintiff the listing agreement re the Cottam Subdivision property at a price of \$300,000.00 by virtue of a listing agreement – exclusive authority to sell - executed by the defendants dated 12 May 1999, which listing was open to 11:59 p.m. on 18 July 1999; and
  - (3) conveyed his interest in the said apartment to the plaintiff by a conveyance dated 27 September 1999 and recorded in the Registry of Records of the Commonwealth of The Bahamas in volume 7801 at pages 119 to 127.
12. Nevertheless, the plaintiff says that the defendants are in breach of the settlement agreement, and she is therefore entitled to rely on the 1996 and 1998 agreements as provided for at clause 3a of the settlement agreement.
13. The plaintiff alleges that the defendants are in breach of the settlement agreement for two reasons.
14. Firstly, the plaintiff says that although the defendants did grant her an exclusive listing agreement to sell the Cottam Subdivision property, the defendants did not complete the sale to the buyer introduced by her. She contends that by failing to complete the sale to a purchaser introduced by her, even though the defendants had

entered into an agreement for such sale with the proposed purchaser, the defendants are in breach of the settlement agreement.

15. Secondly, the plaintiff says that the defendants have breached the settlement agreement by conveying to her a condominium apartment with a defective title and for failing or refusing to assist her in rectifying the defect.

16. The defendants deny having breached the said settlement agreement and contend that they have fully performed their obligations thereunder. The defendants also deny that the title to the said apartment is defective.

17. The issues that fall to be determined are as follows:

- (1) Whether or not the defendants' failure to complete the sale of the Cottam Subdivision property constitutes a breach of the settlement agreement?
- (2) Whether or not the alleged defect in the title to apartment unit 206, Lucayan Towers North aforesaid constitutes a breach of the settlement agreement on the part of the defendants?
- (3) Whether or not the defendants have complied with the terms of the settlement agreement?
- (4) If not, is the plaintiff entitled to rely on the 1996 and 1998 agreements?

**Whether or not the defendant's failure to complete the sale of the Cottam Subdivision property constitutes a breach of the settlement agreement?**

18. Although the plaintiff in her statement of claim alleges that the defendant breached the settlement agreement by failing to complete the sale of the Cottam Subdivision property, no where else in the statement of claim is there any mention of the Cottam Subdivision property or the events which transpired after the defendant executed the said exclusive listing agreement with respect thereto.

19. However, at paragraph 28 of her witness statement the plaintiff, with respect to the Cottam Subdivision property states, inter alia:

"28. I was ultimately successful in attracting Mr. Bill Loyens, London's largest developer...we met with Mr. Pratt and Ms. Hanes over lunch at the golf course to negotiate the terms of agreement. With about a month to deadline it would be impossible to arrange bank financing in such short a period compelling Mr. Pratt to agree to take back the finance by way of a mortgage with an agreement to postpone to builders' financing requirements as is usual, with the provision that all profit from the sale of all lots be paid first to Mr. Pratt to retire his mortgage before any profits would be taken by Mr. Loyens. Once agreed, Mr. Loyens handwrote a skeleton agreement which each signed and executed and I witnessed with the understanding that their respective attorneys would formalize the agreement...a week later.... Mr. Pratt informed he would not be completing the sale. And that was it.... Time had run out and there would

no longer be any development... I submitted my time and expense invoice totaling \$12,675 added to my portion of the initial retainer 60% of \$6,500 being \$3,900 produced a grand total of \$16,575 for nine years of work that should have produced my retirement security income of about \$692,400 plus.

20. A copy of the "skeleton agreement" to which the plaintiff referred was included amongst the documentary evidence. It reflected a purchase price of \$200,000.00 and stated, inter alia:

"Wm Loyens to make his best effort to get all the difficulties resolved with the authorities and get started post haste. The final agreement to be worked out between both parties lawyers and accountants."

21. And, although the plaintiff during her evidence suggested that the first defendant deliberately failed to complete the sale to Mr Loyens, that case was not put to the first defendant and there is no evidence to substantiate such an allegation.

22. In any event, I accept the submission of counsel for the defendants that the agreement was that the plaintiff would be provided with the exclusive listing, which the defendants did, and there was no obligation on the part of the defendants to sell the property to a buyer introduced by the plaintiff. Further, the evidence is that once the first defendant notified the plaintiff that he would not be proceeding with the sale to the buyer introduced by her, the plaintiff submitted an invoice for her services rendered and to my mind, her cause of action, if any, with respect to that agreement would be with respect to her unpaid invoice.

23. Moreover, it appears from the plaintiff's statement of claim as well as the evidence adduced at the trial and the submissions of her counsel that her main issue with the defendants is the alleged defective title to the said apartment.

**Whether or not the alleged defect in the title to Apartment Unit 206, Lucayan Towers North aforesaid constitutes a breach of the settlement agreement on the part of the defendants?**

24. The plaintiff in her statement of claim pleads, inter alia, as follows:

14. By a written agreement dated the 12<sup>th</sup> May 1999 the defendant agreed to settle all issues relating to past services rendered to the defendant by the plaintiff...

15. It was an express term of the agreement that the defendant would inter alia convey to the plaintiff apartment 206 in the Lucayan Towers North, Freeport, Grand Bahama

16. ...

17. Pursuant to the said agreement the plaintiff used the said apartment as collateral to obtain a mortgage and subsequently obtained a title search over the property which disclosed that the title to the said apartment was not clear.

18. The defendant breached the said May 12, 1999 agreement. Such breaches include:-

(a) Transfer of encumbered title over apartment 206 Lucayan Towers North, Freeport, Grand Bahama to the plaintiff...

19. By numerous telephone calls and by letter dated the 9<sup>th</sup> January 2004 the plaintiff advised the defendant of the said breaches but the defendant has failed and or refused to make good his agreement with the plaintiff.

25. In their amended defence filed 14 September 2005, the defendants deny that the plaintiff informed them of the alleged defect in the title to the said apartment and, save for admitting that by a letter dated 9 January 2004 the plaintiff made a demand of the defendants alleging breach of the settlement agreement, the defendants deny paragraph 19 of the plaintiff's statement of claim.

26. The evidence is that the first defendant conveyed his interest in the said apartment to the plaintiff as agreed by the settlement agreement in September 1999, which conveyance was subsequently stamped and recorded at the Registry of Records. At the time, according to the plaintiff's evidence, the law firm of Wells-Carmona, Gottlieb & Co., "acted for both sides of the conveyance", although the first defendant paid "for the agreement."

27. Indeed, in an affidavit of loss sworn by Mrs Sandra Carmona on 28 November 2003, Mrs Carmona deposed, inter alia, that pursuant to instructions given to her in that behalf by the first defendant she prepared the aforesaid conveyance, which was later lodge for recording by her firm.

28. So, by 27 September 1999, the first defendant had, in my judgment, complied with the terms of the settlement agreement. Further, on the plaintiff's own evidence, she was, at the date of the said conveyance, represented by counsel, and it was the duty of the plaintiff and/or her attorney to ensure that the title to the said apartment was good and marketable and free from encumbrances.

29. It is not clear from the evidence whether a title search was conducted at the time of the plaintiff's acquisition of the said apartment, perhaps because at the time Mrs Carmona was in possession of the title deeds, having, apparently, recently represented the first defendant when he acquired the apartment from Mr Collin Gollert. In her affidavit, Mrs Carmona avers that at the time of her receipt of the said instructions and preparation of the said conveyance she "saw among the title deeds to such apartment...."

30. In any event, as pointed out by counsel for the defendants, the plaintiff not only took delivery of the conveyance and the apartment, but she also accepted the vendor's title and, in fact, went on to obtain a loan some four years later, in 2003, using the said apartment as collateral for such loan. Indeed, the plaintiff has, since taking delivery of the conveyance, by her own evidence, in June 2009, almost ten years since she acquired the apartment, entered into an agreement for the sale thereof.

31. It seems to me that the first defendant did all he ought to have done to have the apartment conveyed to the plaintiff in compliance with the settlement agreement and in the circumstances outlined above and on the evidence before me, I am unable to find

that the first defendant has breached the settlement agreement by conveying to the plaintiff a condominium with a defective title.

32. However, even if the title were defective, in my judgment, once the plaintiff accepted the first defendant's title, and completed the transaction by taking delivery of the conveyance and the apartment, her right to object to the title was effectively extinguished. See *Wilde and Another v Gibson* [1843-60] All ER Rep 494.

33. Although I have concluded that the defendants have not breached the terms of the settlement agreement and that the plaintiff's claim must therefore fail, because so much of the evidence, documentary and otherwise, related to the issue of the defective title, and in the event I am incorrect in my findings regarding the settlement agreement, I have also considered the issue of the defective title.

34. It appears that the alleged defective title consisted of missing title documents. Amongst the plaintiff's documentary evidence is a letter dated 12 November 2003 from Norris R. Carroll & Company to the plaintiff in which Mr Carroll wrote:

"12 November 2003

Mrs. Gail Knowles  
P.O. Box F-40285  
Freeport, Grand Bahama  
Bahamas

Dear Mrs. Knowles,

**Re: Apt. 206, Lucayan Towers North**

I have spoken to the Attorney for the Condominium Association and asked, theoretically, if the Association would be prepared, he thought, to co-operate in the way you and I discussed as a possible solution. He does not remember that Association ever having done one but he saw no reason why it wouldn't do so. He said, however, that – as I expected him to think – they would have to be shown the chain of title leading to you as the present owner. Otherwise, if they were to file a lien they'd have to "sell" at its market value.

As I've been telling you, I have found the record to contain the following:-

- (1) A conveyance from the developer to George Scullion, Hugh Duke, Alex Cox, Colin Gollert and Arthur Joron.
- (2) A conveyance from Scullion, Duke and Cox to Gollert and Joron (as Tenants in Common)
- (3) Deed of Assent in the estate of Arthur Joron to Mary T. Schiavone Joron (wife of the deceased)
- (4) Conveyance from John Pratt to Gail Christine Rogers.

**You will see that there is nothing on the record to show that Mrs. Joron conveyed her undivided half (?) interest to Gollert or to Pratt, or whomever.**

Nor is there any transaction shown on the record as to how Pratt got the title in order to be able to transfer it to you.

**That chain of title is only useful, however, [sic] who is entitled to call on Lawrence Investments Ltd. for a necessary Confirmatory Conveyance, which, you will remember, your "deed" claims was given to John Pratt. Maurice Glinton's office, last I spoke to them, only found a partially executed Confirmatory conveyance to Colin Gollert, not the one that your deed purports was delivered to Pratt.**

As far as the record is concerned, the title remains with Lawrence Investments Limited, since the First Declaration being invalid, nothing was achieved by all the documentation seen on the record and referred to above.

There is, as I mentioned to you, one microfilm that I have not yet been able to check because it could not be found at the Registry. That contains a debenture from Lawrence Investments to a local/bank/lender. I don't know what it says but there is the possibility that it might affect the Unit as well. There is another such document on the record, too; but it does not affect your unit.

**Whatever solution is pursued, it appears that the documents evidencing the transaction that, presumably, took place between the conveyance to Gollert and Joron and that to you, must be found; and if not, some creative, fundamental thinking has to be done to craft an answer.**

Yours faithfully,  
NORRIS R. CARROLL & COMPANY

Norris R. Carroll"  
(emphasis added)

35. It seems from Mr Carroll's letter that the missing documents that created the alleged defect in title were the:

- (1) confirmatory conveyance from Lawrence Investments Limited, recited in the conveyance to the plaintiff
- (2) document(s) between the conveyance to Joron and Collert and the conveyance to the first defendant, which from the evidence would be:
  - (a) Conveyance from Mary T. Schiavone Joron to Colin Gollert
  - (b) Conveyance from Colin Gollert to John E. Pratt



36. Well, it appears from a "receipt" included in the documentary evidence that one Olivia Armbrister received those documents along with several others from Wells-Carmona, Gottlieb & Co on 16 February 1998. The documents listed on the said receipt are as follows :

1. Conveyance dated 16<sup>th</sup> February, 1983 from Mary T. Schiavone Joron to Colin D. Gollert (unstamped and unrecorded);
2. Undated, unstamped and unrecorded Conveyance from Colin D. Gollert to John E. Prart.
3. Power of Attorney dated 30<sup>th</sup> day of March, 1976 from Alex J. Cox, Colin D. Gollert and Arthur P. Joron to George A. Scullion recorded in Book 2566 at pages 318 to 320;
4. Conveyance dated 30<sup>th</sup> April, 1976 from Lawrence Investments Limited to George A. Scullion, Hugh D. Duke, Alex J. Cox, Colin D. Gollert and Arthur P. Joron recorded in Book 2566 at pages 321 to 329;
5. Conveyance dated 30<sup>th</sup> November, 1977 from George A. Scullion, Hugh D. Duke and Alex J Cox to Colin D. Gollert and Arthur P. Joron recorded in Book 2883 at pages 285 to 290;

37. Although the first defendant avers that he had obtained a copy of the above-mentioned receipt, he does not say how or from whom he obtained the same and the parties nor their attorneys seem to know who Olivia Armbrister is or why, or on whose behalf, she would have received the said documents.

38. It appears that the "undated, unstamped and unrecorded conveyance" from Gollert to the first defendant mentioned in the above-mentioned receipt, that that document was subsequently dated 20 April 1998 as evidenced by a photocopy of the backing page thereof included in the defendants' documentary evidence.

39. Also amongst the defendants' documentary evidence was a photocopy of the backing sheets to the Confirmatory conveyance dated 17 February 1998 from Lawrence Investments Limited to Colin D. Golbert which leads me to believe that Olivia Ambrister may have worked with Maurice O. Ginton & Co., who would, no doubt have required sight of the title deeds in order to prepare the confirmatory conveyance to Mr Gollert, which confirmatory conveyance is dated 17 February 1998, the day after the date of the aforesaid receipt signed by Olivia Ambrister and which Mr Carroll noted was recited in the conveyance to the plaintiff, but apparently could not be found.

40. Also included in the defendants' bundle of documents is evidence of payment of invoices issued to the first defendant with respect to the preparation, stamping and recording of the confirmatory conveyance as well as the conveyance to the plaintiff.

41. Finally, in his affidavit of 7 June 2010 the defendant avers, inter alia, that:

20. By letter dated the 28<sup>th</sup> day of October, 2005, my then Attorney Mr. Robert K. Adams wrote to David Thompson & Co., who I was informed and verily believe inherited the practice of Messrs. Wells-

Carmona Gottlieb & Co. with respect to the whereabouts of the original documents for Apartment 206.

21. By letter dated the 16<sup>th</sup> day of November, 2005, Mr. David Thompson wrote to Mr. Robert K. Adams confirming that the original documents which included a Conveyance dated the 17<sup>th</sup> February 1998 to Colin D. Gollert and a Conveyance dated the 20<sup>th</sup> April, 1998 to John Pratt were still in the files in his office...I am informed and verily believed that this information was passed onto the plaintiff's attorneys at that time. That I am uncertain as to whether the plaintiff's attorneys would have written to David Thompson & Co. as I am advised and verily believe that it is common knowledge that Mr. Thompson "took over" the practice of Mrs. Wells-Carmona.

42. The contents of the correspondence passing between Messrs. Adams and Thompson are set out hereunder:

"Mr David C. Thompson  
Etc

Dear Mr Thompson:

Re: John Pratt

We act for Mr John Pratt.

A Supreme Court Action has been commenced by one Gail Rodgers against Mr Pratt for damages for breach of the terms of a settlement agreement.

Specifically, it is alleged that Mr Pratt conveyed to Gail Rodgers Condominium Unit No. 206 of Lucayan Towers North Condominium in pursuance of the settlement agreement in circumstances where he did not hold legal title to the unit.

We are instructed by Mr Pratt that he was represented by Messrs. Wells-Carmona Gottlieb in his acquisition of the said Condominium. Would you kindly advise whether you are able to assist Mr Pratt in ascertaining whether Messrs. Wells-Carmona Gottlieb are in possession of his original documents to title relative to the acquisition of Condominium Unit No. 206 Lucayan Towers North Condominium.

Yours etc.  
(sgd) Robert K. Adams

Mr Robert K. Adams  
Etc"

\*\*\*\*\*

"Dear Mr Adams:

Re: Mr John pratt

Our search of Mrs Carmona's files show the following:

1. Conveyance dated 17 February 1998 to Collin D. Gollert
2. Conveyance dated 20 April 1998 to Mr John Pratt
3. Copy of back page of Conveyance dated 20 September 1999 to Gail Christine Rodgers; and
4. Copy of letter dated 22 August 2002 showing documents delivered to Mr Pratt.

On your client's instructions in writing to us we would forward the two (2) original conveyances to you.

Yours etc.

(sgd) David C. Thompson"

43. I note here that although copies of the backing pages to the two conveyances mentioned in Mr Thompson's letter were included in the defendants' documentary evidence, no copy of the letter dated 22 August 2002 showing the documents delivered to Mr Pratt was included therein.
44. Further, although it is unclear whether the information from Mr Thompson was passed to the plaintiff or her attorney prior to June 2010, certainly on or about 7 June 2010, the plaintiff and her attorney were made aware of the above-mentioned letter from Mr Thompson and the fact that certain documents had been sent to the first defendant in 2002. However, notwithstanding the above-mentioned letters being forwarded to the defendants' previous attorneys since 2005 and exhibited to the first defendant's affidavit and their contents made known to the plaintiff and her counsel in June 2010, if not before, approximately five months later, at the date of the continuation of the trial in November 2010, none of the parties had attempted to obtain those documents from Mr Thompson nor was the first defendant questioned about the documents he would have received in 2002 to determine whether they were in fact the documents which were received by Olivia Armbrister in 1998.
45. I also note here Mrs Carmona's averment in her affidavit sworn on 28 November 2003 that she surmised that when Mr Pratt later collected the files from her office the confirmatory conveyance "must have still been lodged in one of such files and taken with it." However, from Mr Thompson's letter, clearly the confirmatory conveyance is with his firm and according to the first defendant's affidavit, it was common knowledge in the Grand Bahama community that Mr Thompson "took over" Mrs Carmona's practice.
46. The plaintiff says that although she has sold the apartment such sale was on the condition that she "quiet" the title thereto, presumably because of the missing documents. However, it seems to me that with a bit of due diligence all of the so-called "missing documents" can be located or accounted for by the various affidavits of loss. In any event, it appears that the critical documents, because

they are unrecorded, are the confirmatory conveyance and the conveyance to the first defendant, and according to Mr Thompson's letter of 16 November 2005, they are with his firm.

47. It appears to me, that it is clear from the above that the "missing" documents are not really missing, which suggests that if the only defect in title was the alleged missing documents then there is no defect and it is merely left to the attorneys to make the proper inquiries and make use of the information which such inquiries yield to locate the "missing" documents.
48. It is unfortunate for the plaintiff that the events have turned out as they have, but on the evidence before me I have no choice but to dismiss the plaintiff's claim and to order that judgment be entered for the defendant with costs to be taxed if not agreed.

DATED the 8<sup>th</sup> day of February 2011

Estelle G. Gray Evans  
Justice