IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 475 OF 1989

BETWEEN:

NORSE INTERNATIONAL LIMITED.....PLAINTIFFS

- and -

G A GAUNT.....DEFENDANT

CORAM: MTEGHA, J.
Mbendera, of Counsel, for the Plaintiffs
Mvula, of Counsel, for the Defendant
Kadyakale, Official Interpreter
Gausi (Mrs), Court Reporter

J U D G M E N T

The Plaintiffs in this case are claiming damages arising from breach of agreement for the sale of land.

The Plaintiffs are a Civil Engineering Company carrying on business in Malawi, and the Defendant was at all material times the Receiver and Manager for Ricci and Durante (Pvt) Limited.

The Plaintiffs' evidence is that in May 1984, there appeared an advertisement in the papers advertising the sale of land at Plot Number BE 159. As a result of that advertisement, the Managing Director of the Plaintiffs, Mr Rainer Erich Franzel (PW1), contacted Mr Gerry Gaunt, the defendant, who was Receiver and Manager responsible for the property. After some discussions, PW1 made an offer to purchase the plot for K100,000.00. This was on the 15th May 1984. This offer contained some conditions and the relevant conditions for purposes of this case are (1) and (3). Condition (1) stated:

> "We would deposit K10,000.00 (ten thousand kwacha) upon acceptance of our offer...."

Condition (3) stated:

> "We would have beneficial occupation from the date of acceptance of our offer."

This offer was accepted by the Defendant on 17th May 1984, subject to some conditions, the relevant ones being conditions (2) and (4) which stipulated that the Plaintiffs

should deposit K10,000.00 immediately and that the Plaintiffs would have beneficial occupation from the date of acceptance.

On 29th May 1984, a deposit of K10,000.00 was made and the letter accompanying the cheque had, **inter alia**, this to say:

> "Please note that we have started to clean up the place and the electriciain is working on repairs job as required by E.S.C.O.M. Water supply has been connected and an application has been made for transfer of telex and telephone...."

It was the evidence of PW1, Mr Franzel, that they started clearing up the place and moving machinery and vehicles on to the plot. However, they could not go into the offices and storerooms because these were locked. Furthermore, it was his evidence that the deposit was accepted by the Defendant without any recriminations and that there was no mention that the sale was subject to third-party rights.

According to Mr Franzel, they had been asking Mr Gaunt for the keys to the storerooms and offices. The keys were not brought. Consequently, they wrote on 5th June 1984 in the following terms:

> "Please note that we are still awaiting the keys to the main office which you promised. Should this not arrive immediately, we might be obliged to force open the door, and in that case we feel the cost of reinstatement must be for your account.
>
> Whilst writing we also confirm, our telephone conversation of yeterday when we advised you that we had to snap the lock where belongings of the previous tenants are kept. This was essential to enable the electrician to carry out the work as proposed by E.S.C.O.M. Whilst every possible care will be taken for security, we cannot be held responsible for any alleged loss at a later date. We might even be obliged to shift all the contents under open shed in order to enable us erect shelvings for our Stores Department."

It was further his evidence that at this time they were not aware of the third-party, and when they snapped the door, they found there were filing cabinets in the rooms, but they did not know that they belonged to Steel Fabrications, the third-party until on the 9th June, when they were approached by Steel Fabrications. This development was reported to the Defendant on 11th June 1984, through Exh.P12. The Defendant then realised that the issues were getting out of hand. On 18th June 1984, the Defendant wrote to Steel Fabrications. In that letter, he stated:

> "I note that the month's notice given to you expires tomorrow, 19th June and that certain of your assets remain on the premises. This is despite assurances that they would be moved quickly. Please keep me informed of your plans to remove your equipment. I also note that you are many months in arrears with your rent payments and would appreciate receiving payment before end of June."

It would appear, therefore, at this juncture, that the Defendant had given notice to Steel Fabrications on 17th or 18th May 1984, asking them to vacate by the 19th June 1984. The question whether this fact was communicated to the Plaintiffs or not is a matter which will be dealt with later on in this judgment.

According to Mr Franzel, they were served with a Court Order prohibiting them from occupying the premises and later on Steel Fabrications sued them for trespass. They were found liable and had to pay damages as well as legal costs. On 18th July 1984, by their letter of same date, the Plaintiffs gave notice that they would claim for any loss suffered by them.

Eventually, they handed over the matter to their lawyers to seek the following remedies:

1. Damages paid to Steel Fabrications for Trespass: K10,330.00.

2. Party and Party Legal Costs: K9,700.00.

3. Solicitor own Client Costs: K9,500.00.

4. Payment to Deloitte Haskins: K1,000.00.

These expenses were paid by the Plaintiffs and they are now seeking to recover them from the Defendant.

In cross-examination, PW1 maintained his evidence that they did not know that there was a sitting tenant at the time the agreement was made, and despite several reminders, the Defendant did not give them the keys to the storerooms. It was his evidence that after they were made aware that there was a sitting tenant, the sitting tenant asked for an extension of one week, which extension was granted.

The evidence of the Defendant is that in 1984 he was Manager/Receiver of Ricci and Durantee, and advertised Plot Number BE 159 for sale. An offer was made by the Plaintiffs and he accepted their offer, and in the conditions attached to the sale of the property there was no mention of third-party rights. It was his evidence that he did inform Mr Lalsadagar, Manager for the Plaintiffs, that there was a sitting tenant, but the Plaintiffs took a relaxed view. It

was further his evidence that the deposit was paid on 29th May 1984; it was not paid in accordance with the agreement that it should be paid immediately. It was further his evidence that when the Plantiffs asked for the keys, he could not hand them over to the Plaintiffs because the keys were never handed over to him by the sitting tenant. He, therefore, did not authorise the Plaintiffs to break the locks, and the expenses arising out of the proceedings brought by the third-party against the plaintiffs could not be attributed to him.

In cross-examination, the Defendant stated that he did not know that third-party rights were involved; that he expected the Plaintiffs to notice their presence. Further, it was his evidence that as soon as he realised there was a sitting tenant, he communicated to the Plaintiffs and gave notice to the tenant to move out within one month. He admitted that there was no beneficial occupation.

It is quite clear, from the evidence, that there was an agreement between the parties, the Defendant to sell and the Plaintiffs to buy, the premises in question.

It is also quite clear from the evidence, Exhs.1 and 2, that the offer stipulated that the Plaintiffs would have beneficial occupation and that payment of a deposit of K10,000.00 would be paid upon accpetance. The acceptance was done on 17th May 1984 and confirmed that the Plaintiffs would have beneficial occupation, except that the K10,000.00 would be deposited immediately. I also hold it as a fact that there was a sitting tenant, by the name of Steel Fabrications. It is also a fact that the K10,000.00 was depcsited on 29th May 1984. The Plaintiffs were entitled to have beneficial occupation.

It has been submitted, on behalf of thge Defendant, that since the Plaintiffs were aware that there was a sitting tenant, it was not necessary for the Defendant to include a term in the contract that the sale was subject to third-party rights. It was also his submission that as negotiations and steps to discharge the contract progressed, the Defendant became aware that the third-party would not be able to vacate within time and he orally communicated this state of affairs to the Plaintiffs. This, it was submitted, is allowed by law. **Charlesworth's Mercantile Law, 13th Edition**, p87, was cited. The passage relied upon states:

> "Exceptionally, however, in the following cases, a party is under duty unasked to disclose all material facts:

> 1. When in the course of negotiations a party makes a representation of fact which is true when made but which, before contract is concluded, becomes untrue to the knowledge of the party who made it, that party is bound, without being asked, to correct his former representation to the other party."

I fail to understand how this passage supports the Defendant's case. The passage as it is exposes the correct position of the law; but the facts of the instant case are not in conformity with the passage. The passage clearly stipulates that a party is under duty to disclose in the course of negotiations and before the contract is concluded. In the present case, the offer was accepted on the 17th May 1984. It was at that time that the contract had been concluded. There was no mention of third-party rights by that time. It was only subsequently that the Plaintiffs were aware of third-party rights. In fact, by 5th June 1984, **vide** Exh.P8, the Plaintiffs were waiting for the keys to the main office as promised by the Defendant. The Plaintiffs were aware of third-party rights on 9th June. It cannot, therefore, be said that the Plaintiffs were aware of the third-party rights before that date. Until the 9th of June 1984, the Plaintiffs were of the view that they had taken beneficial occupation of the premises. If the provisions are clearly expressed or reduced into writing, and there is nothing to enable the Court to put upon them a construction different from that which the words import, the words must prevail. It is also well-settled that under an open contract for the sale of land, there is an implied condition that the vendor will convey the land free from incumberances: **Timmins -v- Moreland Street Property Co Ltd (1958), Ch.110.** Again, if the purchaser is aware of a removable defect at the time of contract, he is entitled to assume that it will be removed before completion. He is not deemed to have waived his right to object to the defect by entering into the contract with the knowledge of it: **Re Gloag and Millers Contract (1883), 23 Ch.D320.** In that case, **Fry, J, at p327**, had this to say:

> "But if the contract expressly provides that a good title shall be shown then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such notice would be unavailing, and whatever notice of a defect in title might have been given to the purchaser, he would still be entitled to insist on good title."

It would appear to me, in the instant case, that whether notice of the third-party's presence was given or not, the agreement clearly stipulated that the Plaintiffs would get beneficial occupation. The Defendant cannot, therefore, avail himself of this defence.

It has been argued further, on behalf of the Defendant, that the requirements as to when the Plaintiffs could avail themselves of beneficial occupation was relaxed, so was the time for payment of the deposit. The Plaintiffs could, therefore, have waited for the third-party to vacate the premises. Their unilateral act of breaking and changing locks in the storeroom, because of their impatience and disrespect of the law, could not be attributed to the Defendant. They should have waited.

I do not think that the time for beneficial occupation was relaxed. I do not think so on the evidence which is available before me. Exhibit P3 dated 29th May 1984, which accompanied the deposit cheque, clearly stipulated that:

> "Please take note that we have started to clean up the place and the electrician is working on repairs job as required by E.S.C.O.M. Water supply has been connected and an application has been made for transfer of telex and telephone."

Exhibit P8 says:

> "Please note that we are still waiting for keys to the main office which you promised. Should this not arrive immediately we might be obliged to force open the door and in that case we feel the cost of reinstatement must be for your account."

This was on the 5th of June 1984. It cannot be said that the time for beneficial occupation was relaxed.

Counsel for the Defendant has said that time for making the deposit was also relaxed, since on the 17th May, when the Defendant accepted the Plaintiffs' offer, he stated that the deposit should be paid immediately, yet it was paid by the Plaintiffs on 29th May, some twelve days later.

I think Counsel for the Plaintiffs has rightly pointed out that the word immediately means such convenent time as is reasonable. Indeed, **Stroud's Judicial Dictionary, 4th Edition, Vol.3, pl283**, defines the word "immediately":

> "The word "immediately" although in strictness it excludes all meantimes, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing" - **(Pybus -v- Mitford, 2 Lev. 77)**...., but "immediately" implies that the act should be done with all CONVENIENT SPEED."

The circumstance of this case is that the deposit was paid immediately, and in conformity with the agreement.

It is, therefore, not true that the Plaintiffs were at fault in breaking the locks to the premises in order to obtain beneficial occupation. This action must, therefore, succeed.

I now turn to the question of damages. These have been adequately proved. They were incurred in Court proceedings in which the Plaintiffs were properly defending themselves against an action by the third-party. However, the item of £350.00 as loss of earnings in England whilst in Malawi has not been proved to the requisite standard. Neither has the claim for K392.60 for witness accommodation whilst in Malawi. I, therefore, enter judgment for the Plaintiffs in the sum of K30,930.00 and £1,400.00 Sterling at the current bank rate. I also award the costs for these proceedings to the Plaintiffs.

PRONOUNCED in open Court this 22nd day of March 1994, at Blantyre.

H M Mtegha
JUDGE