IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

G U Y A N A

CIVIL APPEAL NO. 11 OF 2001

BETWEEN:

ELROY GARRAWAY

Appellant/Plaintiff

- and –

1. **NESHA WILLIAMS**
2. **THE REGISTRAR OF DEEDS**
3. **ALVIN RAMBARRAN**

Respondents/Defendants

BEFORE:

Hon. Madame Justice Desiree Bernard - Chancellor
Hon. Mr. Justice Nandram Kissoon - Justice of Appeal
Hon. Mr. Justice Ian Chang - Justice of Appeal

Mr. C.M.L. John with Mr. R. Forde for Appellant.

Mr. R. Poonai for first-named Respondent.

No appearance for second-named Respondent.

Mr. A. Chase, SC for third-named Respondent.

2001: November, 8, 20

2002: January, 28

J U D G M E N T

BERNARD, C.:

On 14th September, 1973 the Appellant, the first-named Respondent and one Bibi Shirah also known as Betty Kalloo entered into an agreement purported to be an agreement of sale under which the Appellant purported to purchase from the first-named Respondent and Bibi Shirah property situate

at lot 4 James Street, Albouystown, Georgetown, with all of the buildings and erections thereon for the sum of $15,000.00. Of this amount a sum of $1,025.00 was paid by the Appellant to the first-named Respondent and Bibi Shirah allegedly as a loan, but if not repaid by 14th December, 1973 would be regarded as a deposit on the purchase of the property. The agreement stated that a formal agreement of sale was to be entered into by the parties, and time was made of the essence of the agreement.

On 25th May, 1996 sale of the property in question to the third-named Respondent was advertised in the Official Gazette, and the Appellant filed an action against the Respondents claiming specific performance of the agreement of 14th September, 1973, damages for breach of contract, and a declaration that he is the owner of the property. At the hearing of the action the learned trial judge found that the agreement was not an agreement of sale and refused the orders sought. The Appellant has appealed to this Court against this finding.

The validity of the Appellant's claim rests solely on whether the agreement entered into between him and the first-named Respondent and Betty Kalloo was an agreement of sale or an agreement for a loan. To constitute an agreement of sale there must be certain essential terms and conditions – description of the property to be purchased, a purchase price, provision for a deposit or part payment, time for completion of the sale and for payment of the balance of the purchase price if part payment was made.

Under **Section 3(d) (iv) of the Civil Law of Guyana Act, Cap. 6:01** no action shall be brought to charge anyone upon any contract or agreement for the sale of immovable property unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged. This provision is similar to the English **Statute of Frauds**.

On the face of the agreement in dispute it seems to satisfy the requirements of the aforementioned Act in that it is signed by the first-named Respondent and Betty Kalloo as well as the Appellant and describes the property to be sold. However, even though a purchase price is mentioned a deposit of $1,025.00 was dependent on whether this sum is repaid; if not repaid it becomes a deposit, and presumably if repaid there will be no deposit and no sale. This gives rise to uncertainty as to whether the agreement was in fact an agreement of sale.

A very important and vital term of the contract was that "a formal agreement of sale shall be entered into by the parties." The question arises as to whether the parties intended to be bound by the terms of the agreement immediately or the sale of the property was subject to a formal agreement being entered into.

Conditional contracts for the sale of land have always presented the courts with difficulty in determining the intention of the parties. In England the well-known phrase giving rise to problems is "subject to contract", and several cases have been decided as to the meaning of this phrase – some in favour of upholding the terms of the provisional contract, others denying its intention to create legal relations. In **Branca –v- Cobarro (1947) 2 AER, 101** where an agreement concluded with the words "this is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed" was held to imply by the use of the word "until" that the agreement was intended to be immediately fully binding and to remain so unless and until superseded by a subsequent agreement of the same tenor but expressed in more precise and formal language.

Lord Greene, MR in the course of his judgment commented on the fact that throughout the document there was no question that it was a contract, and if that final paragraph had not been there no question could have been raised about it. He determined that the sole question was whether that paragraph introduced an element which destroyed any contractual efficacy in the rest of the document.

A perusal of cases involving conditional contracts with words "subject to a formal agreement being entered into" or others ejusdem generis indicates that they were not intended to be binding agreements until a formal agreement was executed. In **Riley and Another –v- Troll (1953) 1 AER, 966, Omerod, J.** held that in the case of an agreement which was made subject to formal contract no action would lie on it, and expressed the view that this was well established law.

The more recent cases of **Hillas & Co. Ltd. –v- Arcos Ltd. (1932) 38 Com-Cas., 23**, and **Scammell –v- Ouston (1941) 1 AER, 14** involved commercial transactions, and turned on the previous dealings of the parties or accepted business practice in seeking to determine the intention of the parties where there was difficulty in ascertaining whether a contract was binding.

In "**Cheshire, Fifoot & Furmston's Law of Contract**", 13th Edn., at page 41 on a discussion of such contracts posited the view that where there is no particular trade in question and no familiar business practice to clothe the skeleton of the agreement the task of spelling out a common intention from meagre words may prove too speculative for the Court to undertake.

Dicta expressed by **Lord Wright** in **Scammell v. Ouston** (supra) is also very instructive, and is to this effect: