Privy Council Appeal No. 45 of 1985

Raphael Horatius Edwards *Appellant*

v.

Olive Grace Cowan and Helen Joy Marlene Cowan *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Oliver of Aylmerton**]*

The appellant is, and was at all material times the registered owner of a freehold property consisting of a dwelling house and land at No. 7 Beethoven Avenue in the parish of Saint Andrew at Kingston, Jamaica. By an agreement in writing which is undated, but was made on or about 9th October 1980, he agreed to sell that property to the respondents for a sum of $75,000.00, completion to take place on or before 8th January 1981. The contract was subject to a special condition that it was to be considered terminated if, by 19th November 1980, the purchasers failed to notify the vendor that they had raised a loan of $35,000.00 to enable them to complete the purchase on 8th January 1981. Before that date arrived, however, on 16th December 1980, the appellant's wife made a claim to a beneficial interest in the property and lodged a caveat with the Registry, the effect of which was to inhibit any dealing with the property without prior notification to her. The appellant thereupon got in touch with the respondents and told them that he would be unable to go on with the sale. His evidence, which does not appear to have been contradicted, was that one or other of the

[10] respondents told him that he could not be released

from the contract unless he paid some compensation, which he agreed to do in principle, subject only to the amount being determined. On 30th December 1980 the respondents' attorneys notified the appellant's attorneys that they were ready and willing to complete the sale.

On 5th January 1981 the appellant's wife commenced proceedings against him, claiming an undivided share in the property. Those proceedings had not been determined when the proceedings giving rise to this appeal were commenced. She also started proceedings for custody of the children of the marriage in the Family Court and on 8th April 1981, the appellant was awarded the custody of the children, who have since resided with him at the property.

On 28th May 1981 the respondents commenced proceedings against the appellant in the Supreme Court of Judicature of Jamaica for specific performance of the contract and for damages in lieu of or in addition to specific performance. A defence filed on 30th June 1981 admitted the contract, pleaded the caveat and the subsequent action by the appellant's wife, denied that he had wrongfully failed and refused to complete and in any event pleaded that damages were an adequate remedy.

Thereafter, on 1st June 1981, the respondents issued a summons under section 86A of the Judicature (Civil Procedure Code) Act claiming summary judgment for specific performance and damages. The claim for specific performance, however, was not, at that stage, proceeded with and on 20th November 1981 a consent order was made in the proceedings that the respondents recover damages against the appellant to be assessed.

Thereafter a summons for leave to enter interlocutory judgment for damages to be assessed was issued on 29th January 1982, supported by an affidavit of the respondents referring to the appellant's evidence on the original application for summary judgment in which he had expressed his willingness to pay damages, subject to the quantum being established, and referring also to the acknowledgement in the defence of the respondent's right to damages. On 3rd March 1982 an order was made on that summons for interlocutory judgment for damages to be assessed on the admissions contained in the affidavit referred to and in the defence. That order was made by the Master in Chambers.

Some two years later, the respondents brought the original summons for summary judgment on for hearing before the judge. It was heard by Wolfe J. in Chambers on 25th and 26th June 1984 when he made an order for specific performance of the contract in accordance with minutes which directed the execution

of a transfer, payment into Court of the purchase money, and delivery of possession. From that order the appellant appealed to the Court of Appeal for Jamaica, the grounds of appeal being, broadly, first, that the appellant's liability had been finally determined by the consent judgment for damages and the subsequent summons and order for interlocutory judgment and that the respondents were thereafter debarred from seeking specific performance, and secondly, that by reason of the caveat lodged by the appellant's wife, specific performance had, in any event, become impossible. Both these contentions failed before the Court of Appeal which confirmed Wolfe J.'s order. Final leave to appeal to Her Majesty in Council was granted on 29th July 1985.

The notes of the findings of Wolfe J. in the Record of Proceedings indicate that the primary matter with which he was concerned was whether the specific enforceability of the contract was affected by the assertion of the Caveator's claim, which had still not then been determined. They contain no reference at all to the prior consent judgment for damages to be assessed nor is that mentioned in the order made at first instance. When the matter came before the Court of Appeal however, the primary argument was that the liability of the appellant was finally determined by the consent order which thus precluded any further order for specific performance alternatively, that the respondents were estopped by the consent order from seeking the further remedy of specific performance.

This was rejected by the Court of Appeal (Carey J.A., Ross J.A. and Wright J.A. Acting) in a judgment delivered by Wright J.A. Acting on 15th March 1985. They held that the fact that the judgment of 20th November 1981 was a consent judgment was superfluous because the plaintiffs were in any event entitled to enter judgment, the right to damages having been conceded by the appellant, and they observed that it was impossible to assess the quantum of damages until an order had been made on the claim for specific performance. The judgment, they held, was no more than a judgment on a part of the claim and did not constitute an acceptance by the respondents of a repudiation by the appellant. It is evident, therefore, that the Court of Appeal treated the consent order, and the subsequent judgment for damages to be assessed, as an order supplemental to a decree of specific performance which had not then yet been made and as directed merely to assessing the quantum of damages for delay in completing the sale, an assessment which could not be made until an order for specific performance had been made and complied with. Their Lordships find themselves unable to agree with the Court of Appeal. An interlocutory judgment for damages to be assessed for delay, entered at a time

when it could not be known when, or even whether, a decree of specific performance would be made (for the appropriateness of such a decree was one of the matters squarely put in issue on the pleadings in the action), simply does not make sense and the course which the proceedings took is, in their Lordships' view, consistent only with the acceptance by the respondents of the appellant's repudiation of the contract.

The statement of claim in the action, in addition to the claim for specific performance, claimed "damages for breach of contract in lieu of or in addition to specific performance". It is thus clear that at that stage, the respondents were keeping their options open whether to proceed for specific performance and damages for delay or to accept the appellant's repudiation and claim damages for loss of bargain. The summons for summary judgment issued by them on 1st June 1981 asked for judgment to be entered both for specific performance and for damages for breach of contract. Again, this could embrace damages for delay, but if and so far as it was a claim for general damages for breach of contract, the respondents were seeking two inconsistent remedies and preserving their election to proceed in the way which suited them best. What happened next, however, is not readily explicable except upon the footing that the respondents had determined to elect to accept the appellant's repudiation of his contractual obligations and to proceed for damages. On 30th June 1981 the appellant served a defence in which he denied that he had wrongfully failed to complete the contract and in paragraph 8 of which he asserted (1) that the respondents would be adequately compensated by "the Common Law remedy of damages" and (2) that the remedy of specific performance would create great hardship on him. At this time he had already, on 2nd June 1981, sworn an affidavit in opposition to the application for summary judgment in which he explained his reasons for his alleged inability to complete the sale and which contained these three significant paragraphs:-

> "6. That despite my telling Miss Cowan this, she told me that she was not willing to release me from the contract unless she received some compensation and I agreed in principle leaving only the amount to be decided.
>
> 7. That I discussed this situation on more than one occasion after this with the purchasers offering compensation and they were reluctant to accept same.
>
> ...
>
> 16. That I humbly pray that this Honourable Court may be pleased to award damages in lieu of

specific performance in respect of the above-mentioned premises."

Nothing appears to have been done to bring the summons for summary judgment on for hearing, although the return date mentioned in the summons was 2nd July 1981, and the next step in the proceedings is consistent only with the acceptance by the respondents of what was, in effect, the offer of damages in lieu of specific performance put forward in the appellant's affidavit.

The consent order of 20th November 1981 signed by the attorneys of both parties, records that "by and with the consent of the parties, it is this day adjudged that the Plaintiffs recover against the Defendant damages to be assessed". That it was intended to have the effect stated, is underlined and confirmed by the subsequent application made by the respondents on 29th January 1982 for leave to enter interlocutory judgment for damages to be assessed, and which was supported by an affidavit of the respondents sworn on the previous day. Their Lordships were puzzled by what appears on its face to be a superfluous step having regard to the previous consent order but were told that this was in the nature of a summons to proceed under the consent order. However, that may be, the respondents' affidavit made it perfectly clear that what was relied on was the appellant's express acknowledgement of his liability to pay damages for what he acknowledged to be a repudiation of the contract. In paragraph 2 of their affidavit, the respondents refer to paragraphs 6 and 7 of the appellant's affidavit quoted above and point out that the appellant had agreed "to pay same subject to a decision on quantum" and in paragraph 3 they observe that in his defence - and this can only be a reference to paragraph 8 of the defence - the appellant "again acknowledged the plaintiffs' neglect (sic) to recover damages". "Neglect" is clearly a typing error for "right". On that summons the order made was for interlocutory judgment for damages to be assessed "on admissions contained in paragraphs 6 and 7 of the Affidavit of the Defendant sworn to on the 30th June 1981 and paragraph 8 of the Defence".

Mr. Macaulay Q.C. for the appellant puts his case in two ways. First, he claims that the consent judgment was a final and conclusive judgment which operates by way of estoppel, a submission which he supports by reference to the following passage from Spencer Bower and Turner on "The Law relating to Estoppel by Representation" 3rd Edition (1977) paragraph 310 at page 313, which was quoted with approval by the Board in *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] A.C. 511 at page 521:-

> "Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting."

The difficulty about this in the instant case, is that there is no clear evidence of any alteration of position by the appellant to his detriment, unless it is to be inferred from the fact that he thereafter remained for the next two years in possession of the premises without, presumably, making any arrangements to obtain alternative accommodation. But it is, in their Lordships' view, unnecessary for the appellant in this case to rely upon an estoppel, for the facts which have been recited above lead inexorably to the conclusion that, in obtaining and acting upon the consent order and in entering judgment for damages on the basis of the paragraphs of the affidavits and the defence already referred to, the respondents unequivocally elected in favour of their remedy by way of damages and thus precluded themselves from further proceeding for specific performance of a contract which had, as a result of such election, then been discharged. The matter cannot be better expressed than it was by Lord Blackburn in *Scarf v. Jardine* (1882) 7 App. Cas. 345 at pages 360 and 361 where he said:-

> "The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act - I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way - the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

In the instant case the election, unequivocally expressed, to proceed with a judgment for damages on

the basis of the statements by the appellant in his affidavit, and his defence necessarily involves an acceptance of the repudiation by the appellant of his contractual obligations arising from his expressed inability and unwillingness to complete the sale. It is not, either as a matter of construction of the documents or of the common sense of the matter, consistent with the notion that what was being obtained was a judgment for damages for delay supplemental to a decree of specific performance to be obtained at some indefinite time in the future. One has only to ask oneself how, if the parties had proceeded immediately with the assessment of damages under the judgment, as they were clearly entitled to do, the Master could have assessed the damages. It could only have been on the basis of the appellant's continued inability or refusal to complete the contract; that is, on the basis of an accepted repudiation. Once that point is reached, as, in their Lordships' view, it clearly was here, the contract is discharged and there is nothing of which specific performance can then be ordered (see *Johnson v. Agnew* [1980] A.C. 367 per Lord Wilberforce at page 392 E-G).

Accordingly, their Lordships will humbly advise Her Majesty that this appeal should be allowed and that the order for specific performance should be discharged. The respondent must pay the appellant's costs here and below.