

Noel Courtenay Sale (Personal  
Representative of the Estate of  
Edna Veleta Laing deceased)

Appellant

v.

Sonia Allen

Respondent

FROM  
THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 8TH JUNE 1987

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*Present at the Hearing:*

LORD KEITH OF KINKEL  
LORD BRIGHTMAN  
LORD TEMPLEMAN  
LORD GRIFFITHS  
LORD OLIVER OF AYLERTON

*[Delivered by Lord Oliver of Aylmerton]*

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On 10th August 1981 the appellant, the personal representative of Edna Veleta Laing deceased, commenced proceedings in the High Court of Jamaica claiming against the respondent a sum of \$24,640 for rent or use and occupation of a property known as 8 and 10 Gladstone Drive, Kingston, possession of the property, a declaration that a Sale Agreement dated 9th April 1976 between himself and the respondent had been effectively rescinded on 5th May 1981 and forfeiture of the deposit of \$8,000 paid by the respondent under that agreement. In those proceedings the respondent counterclaimed for specific performance of the agreement with an abatement of the purchase price. On 18th June 1984 Campbell J. dismissed the appellant's claim and, on the respondent's counterclaim, ordered that the agreement be specifically performed but with an abatement in the purchase price of \$10,000, representing the value of a building which, as he held, required to be demolished and with a further abatement of \$3,000 if the appellant failed to demolish the building within one month. The appellant appealed to the Court of Appeal which, on

4th July 1985, set aside the order of Campbell J. so far as it directed an abatement of the purchase price but otherwise affirmed the decree of specific performance. From that order the appellant now appeals, with the leave of the Court of Appeal, to Her Majesty in Council. The respondent on her part claims that the judge's order for an abatement in the purchase price should be restored.

A decree of specific performance made over eight years after an agreement which declared time to be of the essence and specified a completion date of 31st May 1976 seems, at first sight, surprising, but it proves, on examination, to be merely the logical culmination of a long history of delay on the part of the appellant and his advisers. The appellant was in 1976 and remains to this day the registered proprietor of the property comprised in the sale agreement. At the date of that agreement he was the surviving executor of the will of Edna Veleta Laing who had died in 1962. The property comprised in the agreement was part of a larger block of which the testatrix had been possessed at her death but in 1968 the title was sub-divided into lots and separate registrations were effected for 8 and 10 Gladstone Drive (designated as lots 4 and 5) in the joint names of the appellant and his co-executor Percy Trevor Laing. On that occasion a restrictive covenant was imposed on the properties which was entered in the register and numbered 8. It provided that any new building erected on the land should not be less than 30 feet from the boundary of Gladstone Drive. On 9th April 1976 the appellant entered into a written agreement to sell both the properties to the respondent at a price of \$40,000 of which \$8,000 was paid by way of deposit on the execution of the agreement. The agreement provided for completion on 31st May 1976, time to be of the essence, and contained a special condition that it was subject to the approval of the exchange control authority, the Bank of Jamaica. The reason for this was, no doubt, that both the appellant and the beneficiaries under the testatrix's will were or were intending to be resident outside Jamaica. It also contained a provision that the transfer was to be prepared by the vendor's attorneys-at-law, who at that time were Messrs. Dunn, Cox & Orrett. In fact the appellant was not, at the date of the agreement, able to make title to the property because, although his co-executor had died on 2nd March 1975, his death had not yet been recorded in the register. It was not in fact recorded until 26th July 1976, well after the completion date prescribed by the agreement, and it was and is common ground between the parties that the stipulation as to time being of the essence was waived by common consent and that no alternative completion date was formally fixed.

The respondent had, prior to the sale, been the tenant of one of the buildings forming part of 8 Gladstone Drive and she remained in possession of that property, at first as tenant but after July 1976 as purchaser, she having made an arrangement with one of the beneficiaries under which she ceased to pay rent but assumed responsibility for all the outgoings on both properties. That arrangement was subsequently ratified by the appellant. She had already made arrangements with the Jamaica Mutual Life Assurance Society to raise a loan of \$30,000 on the security of the property and on 20th May 1976 the mortgagees' attorneys wrote to Messrs. Dunn, Cox and Orrett requesting them to furnish the documents of title to enable the mortgage to be prepared. They repeated their request on 2nd June 1976. That produced no response at all.

In October 1976 the appellant's attorneys sought and obtained a report on the title from some land surveyors. It appeared from that report that there were two flaws or possible flaws in the title. In the first place, one of the buildings on the plot was built so that it overlapped by a matter of a few inches the boundary of the adjoining land. Secondly, the building of which the respondent was the tenant was set at a distance of only 25 feet from the boundary fronting Gladstone Drive and, if erected after 1968, was erected in breach of the restriction numbered 8. Nevertheless on 24th November 1976 a transfer of the property was duly executed. Exchange control permission, however, had not been granted in accordance with the special condition. The transfer was not registered nor was the respondent asked to complete. Thereafter the respondent's mortgagees applied yet again for particulars of the title to be furnished. These were finally supplied at the end of January 1977.

The mortgagees then raised a requirement that the respondent should covenant in the mortgage to obtain a modification of the registered restriction numbered 8 and that was agreed. There was thus no impediment to completion of the transaction. The mortgage was duly executed and the appellant's attorneys were told on 24th August 1977 that the money to enable completion to take place was available. Nevertheless completion did not place. Exchange control permission still had not been obtained and no effort appears to have been made by the appellant's attorneys to effect completion. All that occurred was that in March 1979 they wrote to the respondent asking her to pay a nominal rent of \$10 per month pending completion and to undertake payment of the outgoings which she was, in fact, already discharging. To this she agreed.

On 9th March 1980 one of the beneficiaries wrote to the respondent acknowledging that the delay in completion had not been her fault but indicating that the contract must be completed "or the agreement to sell will be terminated". The respondent's evidence, which the judge accepted, was that she approached Messrs. Dunn, Cox & Orrett to attempt to speed up completion but was told that the minor encroachment of the adjoining property already referred to - a matter of a few inches at most if it existed at all - had been confirmed and was being cleared up. Thereafter nothing was done until 5th May 1981 when another firm of attorneys acting for the appellant sent her a letter purporting to rescind the agreement. It was on the strength of that letter that the appellant launched his proceedings. Even at that stage he had not obtained exchange control permission in accordance with the special condition nor had he or his advisers furnished the necessary documents for such permission to be obtained. Permission was in fact finally obtained by the respondent herself after the commencement of proceedings.

It is unnecessary to consider in any detail the course of the correspondence. Enough has been said to demonstrate that responsibility for delay in completing the contract lay fairly and squarely at the door of the appellant and his advisers and it is not therefore in the least surprising that Campbell J. dismissed the appellant's action, decreed that the agreement be specifically performed and ordered that the respondent should have the costs of her claim and counterclaim such costs, when taxed and agreed, to be deducted from the balance of the purchase money. As mentioned already, however, Campbell J. ordered that the purchase price payable be abated by a sum of \$10,000 in respect of the encroaching building and by a further \$3,000 in case the appellant himself failed to remove it within a month. The basis for this part of the order is far from clear. So far as the encroachment was concerned it was, on any analysis, *de minimis*. The building was, according to the evidence of the surveyor called by the respondent, an old building. The evidence called by the appellant indeed established that it had been certainly in existence in 1974 and, according to his counsel's opening statement at the trial, it had been erected as long ago as 1943. There was no evidence of any complaint by the adjoining owner. The overwhelming probability was that any possible claim for trespass was long since statute-barred. *A fortiori* is that the case now. There was registered against the appellant's title a restriction prohibiting the building of a kitchen or water closet within 5 feet of the boundary and the surveyor's evidence was that the bathroom and water closet in the building were within this distance. No evidence was called, however, to suggest that the building had been

erected after the imposition of the restriction and certainly any claim by an adjoining owner for breach of this restriction must long since have been statute-barred by the time the action came to trial, if any such claim ever subsisted. The Court of Appeal, in a very short judgment, had no hesitation in dismissing the appellant's appeal against the decree of specific performance but in allowing it so far as it ordered abatement of the purchase price. Their Lordships have been told that the court also rejected an argument on behalf of the appellant that he should receive interest on the unpaid balance of the purchase money although this is not mentioned in the judgment. A claim for interest was, however, clearly intimated in the notice of appeal.

Mr. Nield, on behalf of the appellant, has said everything that can be said in support of his client's claim that the contract was effectively rescinded by the letter of 5th May 1981. This claim, however, appears to their Lordships as, evidently, it appeared to the Court of Appeal, to be quite hopeless. Not only is the appellant faced before their Lordships' Board with concurrent findings of fact in both courts below but, in addition, it is quite unarguable on the face of the correspondence either that the respondent was in default or that any notice was ever given making time of the essence before the letter of 9th May 1981 which is relied on as a notice of rescission. Dr. Barnett's claim, on behalf of the respondent, that the order of Campbell J. for abatement of the purchase price should be restored, appears to their Lordships equally hopeless. The order of the Court of Appeal setting aside this part of the judgment of the High Court was plainly right.

The only respect in which the decision of the Court of Appeal is, in their Lordships' opinion, open to criticism is their rejection of the appellant's claim to interest on the unpaid balance of the purchase money. The evidence established and, indeed, it is not in dispute, that the respondent has been in possession of the property as purchaser under the sale agreement since July 1976. It is true that in March 1979 she agreed to pay a nominal rent of \$10 per month - seemingly because of an apprehension on the part of the appellant that she might otherwise be able to establish a possessory title. Their Lordships are unable, however, to find in this arrangement anything which would displace the ordinary rule that even where delay in completion is due to the default of the vendor a purchaser in possession and in receipt of the rents and profits of the property sold is liable, on completion, to pay interest on the unpaid balance of the purchase money from the date when he takes possession. In their Lordships' opinion there should, in the working out

of the decree of specific performance, be allowed to the appellant interest at such rate as may be fixed by the High Court of Jamaica on the unpaid balance of the purchase price but after taking into account the costs deductible under the order of the High Court from the date when the respondent took possession until actual completion. That date was never clearly established in the evidence before the judge. The respondent's testimony indicated a date in July 1976 but the last rent payment proved under the previously existing tenancy appears to have been that for the month of May 1976 and in default of agreement it will be necessary to establish the date of possession by inquiry.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed and that the working out of the decree of specific performance should be referred back to the High Court of Jamaica. Among other matters which will have to be dealt with in working out the decree are (1) the ascertainment of the date the respondent took possession of the property sold as purchaser thereof (2) the ascertainment of the appropriate rate of interest on the unpaid balance of the purchase price and (3) an account of what is due from the respondent to the appellant up to completion for such unpaid balance (after deduction therefrom of the costs payable by the appellant under the order of the High Court) and for interest thereon at the rate fixed by the court after giving credit for the monthly payments of \$10 from March 1979 onwards so far as those have been paid. In view of the fact that the appellant has succeeded in the appeal to the limited extent of establishing an entitlement to interest their Lordships consider that the appropriate order for costs is that the appellant pay three-quarters of the respondent's costs before the Board.

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