

IN THE PRIVY COUNCIL

No. 10 of 1973

## O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

ROSE HALL LIMITED (Defendant) Appellant

- and -

ELIZABETH LOVEJOY REEVES (Plaintiff) Respondent

## CASE FOR THE APPELLANT

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- 10 1. This is an appeal from a judgment of the Court of Appeal of Jamaica (Luckhoo Ag. P. and Smith J.A., Graham-Perkins J.A. dissenting) dated 24th March 1972 dismissing with costs the Appellant's appeal from a judgment of Zacca J. in the Supreme Court of Jamaica dated 24th October 1968 whereby it was ordered (on the Respondent's application for summary judgment by summons pursuant to section 86A of the Civil Procedure Code, Cap. 177 of the Revised Laws of Jamaica) that an agreement in writing (hereinafter called "the Reeves' Contract") dated 4th April 1961 and made between (1) the Appellant as vendor and (2) the Respondent as purchaser for the sale of 2 parcels of land (hereinafter called "the Property") situate in the Parish of St. James, Jamaica, ought to be specifically performed and carried into execution. This appeal is made pursuant to an order of the said Court of Appeal of Jamaica dated 11th April 1973 granting Final Leave to Appeal to Her Majesty in Council.
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2. The Property is described in the Reeves' Contract as

"ALL THOSE two parcels of land part of the Estate situate in the Parish of St. James ....referred to as Block C and Block D delineated and outlined in red on the Plan No. F. 51 signed by or on behalf of the parties ....."

It is common ground that, before sub-dividing the said Estates for the purpose of selling the same in lots the Appellant ought to have deposited with the Parish Council of St. James the map and specifications described in section 4 of the Local Improvements Law, Cap 227 of the Revised Laws of Jamaica, and ought to have obtained the sanction of the said Parish Council to such sub-division pursuant to section 6 of that Law. It is common ground that no such deposit was made, and no such sanction obtained, before 4th April 1961, the date of the Reeves' Contract. It was conceded on behalf of the Respondent before Zacca J. and before the Court of Appeal of Jamaica that, by reason of the failure to comply with the provisions of the said sections, the Reeves' Contract was illegal and void at the time when it was made. It is submitted that the Reeves' Contract remained void at all times from 4th April 1961 until 22nd August 1968, when there was enacted the Local Improvements (Amendment) Act, 1968.

3. On some date between 4th April 1961 and 17th September 1963 a map and specifications for the sub-division of the said Estates were deposited with the Parish Council of St. James in accordance with section 4 of the Local Improvements Law. On 17th September 1963 the said Parish Council resolved to approve the sub-division subject to certain conditions.

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4. At all material times the Property was comprised in certificates of title in the name of the Appellant duly registered and entered in the Register Book kept by the Registrar of Titles pursuant to section 54 of the Registration of

10 Titles Law, Cap. 340 of the Revised Laws of Jamaica. On 11th December 1967 there was lodged with the Registrar of Titles, Jamaica, on behalf of the Respondent, a caveat against dealings with the Property. By reason of the matters referred to in paragraph 2 above, the Respondent was not, at any time before 22nd August 1968, a person entitled under the provisions of section 133 of the Registration of Titles Law, or under any other statutory provisions, to lodge a caveat against dealings with the Property. It is submitted that the said caveat was void when it was lodged.

20 5. By an agreement in writing (hereinafter called "the North Western Contract") dated 25th May 1968 but made on 26th June 1968 between (1) the Appellant as vendor and (2) North Western Enterprises Limited (hereinafter called "North Western") as purchaser the Appellant agreed to sell the Property to North Western. It was conceded before the Court of Appeal of Jamaica that the whole equitable interest in the Property (subject only to the lien of the Appellant as vendor) became vested in North Western pursuant to the North Western Contract on 26th June 1968. It is submitted that, at no time before 22nd August 1968, was the equitable interest of North Western in the Property subject to any right or interest of the Respondent.

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30 6. On 22nd August 1968 there was enacted the Local Improvements (Amendment) Act 1968. By section 3(1) of that Act the Local Improvements Law was amended by the insertion therein of the following provision as section 9A (1)

40 "The validity of any sub-division contract shall not be affected by reason only of failure, prior to the making of such contract, to comply with any requirement of sub-sections (1), (2) and (3) of section 4 or to obtain any sanction of the Board under section 6....as the case may be....."

By section 3(2) of that Act it is provided that

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"This section shall be deemed to have come into operation on the 1st day of January, 1954 hereinafter referred to as the "operative day" so, however, that as respects transactions which took place between the operative day and the date of enactment of this Act, the amendment effected in the principal Law by virtue of this section of this Act shall not operate so as to nullify or affect any transfer or conveyance of land effected pursuant to any contract of sale made prior to the date of enactment of this Act".

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7. On 12th September 1968 the Appellant executed a Transfer (in the form required by section 84 of the Registration of Titles Law) transferring to North Western all its estate and interest in the Property. On 13th September 1968 the said Transfer was produced for registration at the Office of Titles, Jamaica. It is provided by section 84 of the Registration of Titles Law that

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"The proprietor of land...., may transfer the same, by transfer in.....the Form A ....in the Fourth Schedule hereto..... Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof....."

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It is provided by section 57 of the Registration of Titles Law that

"....every instrument purporting to affect land under the operation of this Law shall be deemed and taken to be registered at the time when produced for registration, if the Registrar shall subsequently enter a memorandum thereof....in the Register Book..."

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8. It is provided by s. 136 of the Registration of Titles Law that RECORD

10        "...so long as any caveat shall remain in force prohibiting any registration or dealing with the estate or interest in respect to which such caveat may be lodged, the Registrar shall not enter in the Register Book any change in the proprietorship or any transfer or other instrument presented for registration subsequent to the date on which such caveat was lodged purporting to transfer or otherwise deal with or affect the estate or interest in respect of which such caveat may be lodged....."

20        On 25th September 1968 the Registrar of Titles gave notice to the Respondent, pursuant to section 134 of the Registration of Titles Law, that the Appellant had applied for the registration of a transfer or other dealing with the Property. By virtue of the provisions of that section the caveat lodged by the Respondent must be deemed to have lapsed upon the expiration of 14 days after such notice (which, in the event, was not later than 13th October 1968); and thereupon (if the said caveat had been valid) the Registrar of Titles would have been under a duty to register the transfer executed on 12th September 1968 unless a Judge (on an application by the Respondent under the said section) had directed  
30        the Registrar of Titles to delay registration thereof for a further period.

40        9. On 1st October 1968 the Respondent applied to the Supreme Court of Jamaica by summons in this action for an order restraining the Appellant from (inter alia) transferring the Property until judgment in this action (and until after any decree for specific performance in any such judgment shall have been complied with) and for an order addressed to the Registrar of Titles prohibiting him from registering any dealings under the Registration of Titles Law with respect to the Property until

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further order. On 9th October 1968 Zacca J. (by consent) made an order on that summons in the terms sought. On 24th October 1968, by the order which was the subject of the appeal to the Court of Appeal of Jamaica from whose judgment therein this appeal is made, Zacca J. ordered that the Registrar of Titles be prohibited from registering any dealing under the Registration of Titles Law with respect to the Property until the terms of his order for specific performance had been complied with. 10

10. The Appellant submits that the circumstances set forth in the foregoing paragraphs raise the following issues

I. Whether the transfer or conveyance of the equitable interest in the Property which was effected on 26th June 1968 pursuant to the North Western Contract was nullified or affected by the enactment of the Local Improvements (Amendment) Act 1968. 20

II. Whether (if the transfer or conveyance of the equitable interest was so nullified or affected)

(a) there was any valid caveat against dealings lodged with the Registrar of Titles which would, on 13th September 1968, have prohibited him from registering the transfer executed in favour of North Western on 12th September 1968, and 30

(b) (if there was no valid caveat so lodged) the transfer of the legal estate in the Property was effected for the purposes of section 3 (2) of the Local Improvements (Amendment) Act 1968 on 12th or on 13th September 1968.

III. Whether (if the transfer or conveyance of the equitable interest was not so nullified or affected) Zacca J. was right in ordering, and the Court of Appeal of Jamaica were right in upholding his order, 40

(a) that the Reeves' contract be specifically performed and carried into execution

and (b) that the Registrar of Titles be prohibited from registering the transfer executed in favour of North Western on 12th September 1968.

10 IV. Whether it was appropriate for the issues set out above to be decided on an application for summary judgment in proceedings to which North Western was not joined as a party

11. On issue I, the Appellant submits that the question whether or not the vested equitable rights of North Western were nullified or affected by section 3 of the Local Improvements (Amendment) Act 1968 must be resolved by the true construction of subsection (2) of that section. The Appellant  
20 submits that, in construing that subsection, it is essential to appreciate that the legislature intended to make provision for saving vested rights which would otherwise be destroyed or made valueless by the retrospective operation of section 9(A)(1) of the Local Improvements Law. The Appellant submits that the clear intention of the legislature was to protect all rights (whether legal or equitable) which arose under transactions which took place between the operative day (1st  
30 January 1954) and the date of enactment (22nd August 1968); because transactions entered into on the basis of the law in force at the time of the transaction should not be nullified or affected without good reason. There is no good reason why the legislature should have intended to protect legal rights but not to protect equitable rights. The Appellant submits that Zacca J. and the Court of Appeal of Jamaica should have approached the construction of the saving provisions of section 3(2) of the Local Improvements (Amendment)  
40 Act 1968 with proper regard to the improbability that the legislature intended to protect legal rights but not to protect equitable rights, and with a consequential desire to give a wide

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meaning to the expression..... "any transfer or conveyance of land effected pursuant to any contract of sale".....The Appellant submits that, in the Court of Appeal of Jamaica Luckhoo Ag.P. and Smith J.A. were wrong in holding that that expression could refer only to the transfer or conveyance of a legal estate in land: the expression is capable of referring also to the transfer or conveyance of an equitable estate, and the context requires that it be given that wider meaning. 10

12. On issue II, the Appellant submits that, on 13th September 1968, there was no valid caveat against dealings lodged with the Registrar of Titles which prohibited him from registering the transfer executed in favour of North Western on 12th September 1968. It is submitted that the caveat lodged on 11th December 1967 was void, and could not properly have been received by the Registrar of Titles under the provisions of section 133 of the Registration of Titles Law, in that, on 11th December 1967, the Respondent had no estate or interest in the Property capable of supporting a caveat. The provisions of section 9(A)(1) of the Local Improvements Law do not validate retrospectively a caveat which was void when it was lodged. The Appellant submits that, in order to protect the interest under the Reeves' contract which arose on 22nd August 1968, the Respondent was obliged to lodge a caveat after that date: this was not done. If there was no valid caveat lodged on 13th September 1968, then the Appellant submits that, for the purposes of section 3(2) of the Local Improvements (Amendment) Act 1968, the transfer of the legal estate in the Property was effected on 13th September 1968: by that date the Appellant and North Western had done everything which they were required to do for the purpose of effecting the transfer: there was nothing to prevent the Registrar of Titles from carrying out his statutory duty to register the transfer: if he had done so the transfer would have taken effect from 13th September 1968. If it had taken effect from that date, then, being a transfer effected 20  
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10 pursuant to a contract of sale made prior to the date of enactment of the Local Improvements (Amendment) Act 1968, the transfer would not have been nullified or affected by the operation of section 9(1)(A) of the Local Improvements Law. It is submitted that neither the Appellant nor North Western ought to be prejudiced by the mistaken view taken by the Registrar of Titles as to the effect of the caveat lodged on 11th December 1967.

20 13. On issue III, the Appellant submits that Zacca J. was wrong in ordering, and the Court of Appeal of Jamaica were wrong in upholding his order, that the Reeves' Contract be specifically performed and carried into execution. On the hypothesis adopted (that the transfer or conveyance of the equitable interest in the Property effected on 26th June 1968 was not nullified or affected by the enactment of the Local Improvements (Amendment) Act 1968) any interest taken by the Respondent under the Reeves' Contract was subject to the prior interest of North Western. That prior interest comprised the whole equitable interest in the Property. In its discretion, a court of equity will not order specific performance of a contract to transfer a bare legal estate. It is further submitted that, if the whole equitable interest in the Property was vested in North Western, 30 Zacca J. was wrong in ordering, and the Court of Appeal were wrong in upholding his order, that the Registrar of Titles be prohibited from registering the transfer executed in favour of North Western on 12th September 1968. There was no good reason why the North Western Contract should not have been carried into effect by the Registration of that transfer.

40 14. On issue IV, the Appellant submits that it was not appropriate for the issues I, II and III to be decided on an application for summary judgment in proceedings to which North Western was not joined as a party. It is provided by section 86A of the Civil Procedure Code that a plaintiff in an action commenced by a writ of

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summons indorsed with a claim for specific performance of an agreement for the sale or purchase of property

".....on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the Court or a Judge for judgment, and the Court or Judge may thereupon give judgment in the action unless the defendant....satisfies the Court or Judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the Court or Judge, to entitle him to defend".

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An affidavit verifying the cause of action and stating that, in the deponent's belief there was no defence thereto was sworn by Brian Charles O'Brien Nation on 1st October 1968.

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As appears therefrom, and from an affidavit sworn herein on the same date by Douglas Ian Brandon, the Respondent was then well aware that the Appellant had entered into the North Western Contract and had produced the transfer executed on 12th September 1968 to the Registrar of Titles for registration. In these circumstances it ought to have been plain to the Respondent that the Appellant had an arguable defence to the action, and that any order made in the action would affect North Western. The Appellant submits that Zacca J. was wrong in holding that there was no merit in the defence. That holding was based on his view that.....

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"that only possible interpretation of section 3(2) is that it means that a transfer is effected when it is registered".... The Appellant submits that whether or not that is the correct interpretation of a difficult sub-section, it is plainly not the only possible interpretation. The Appellant further submits that Luckhoo Ag.P. was wrong in accepting the submission for the Respondent that...."where a point of law involves the construction of a statute and its application to the facts which

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are agreed or established then the judge on a summons such as the one in this case has a duty to make up his mind even if it takes him a little time....": and that Smith J.A. was also wrong in accepting that submission. The Appellant submits that the true question for a court on a summons for summary judgment is whether, on the facts disclosed, the defence is unarguable. In the circumstances that no order could be made in favour of the Respondent without affecting the rights and interests of North Western, North Western were necessary parties to the action. The Appellant submits that Zacca J. was wrong in giving judgment in favour of the Respondent, and that the Court of Appeal of Jamaica were wrong in upholding that judgment, without having all necessary parties before them. The Appellant will, if it be necessary, ask leave to introduce this point on appeal.

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15. The Appellant humbly submits that the judgment of Zacca J. in the Supreme Court of Jamaica and the judgment of the majority in the Court of Appeal of Jamaica were wrong and should be reversed and that the Appellant should be entitled to defend this action and have such other relief in the premises as may seem just for the following among other

R E A S O N S

30 (1) BECAUSE the issues raised in this action ought not to have been decided on an application for summary judgment

(2) BECAUSE the issues raised in this action ought not to have been decided in the absence of a necessary party thereto, North Western Securities Limited

40 (3) BECAUSE, upon the true construction of section 3(2) of the Local Improvements (Amendment) Act 1968, the transfer or conveyance of the equitable interest in the Property which was effected on 26th June 1968 pursuant to the North Western Contract was not nullified or

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affected on the enactment of that Act by the Reeves' Contract

(4) BECAUSE, upon the true construction of the said section, and in the events which happened, the transfer or conveyance of the legal estate in the Property was effected on 13th September 1968 pursuant to the North Western Contract and was not nullified or affected by the Reeves' Contract

(5) BECAUSE at all times after 26th June 1968 the whole equitable interest in the Property was vested in North Western and accordingly it was a wrong exercise of the discretion of a court of equity to order specific performance of the Reeves' Contract or to prohibit the performance of the North Western Contract.

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A.J. BALCOMBE

J.M. CHADWICK

No. 10 of 1973

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE COURT OF APPEAL OF  
JAMAICA

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B E T W E E N :

ROSE HALL LIMITED  
(Defendant) Appellant

- and -

ELIZABETH LOVEJOY  
REEVES (Plaintiff) Respondent

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CASE FOR THE APPELLANT

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CHARLES RUSSELL & CO.  
Hale Court,  
Lincoln's Inn,  
London.

Appellant's Solicitors