JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 26 & 27 of 89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

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| BETWEEN | HERBERT WELLESLEY ELDEMIRE (EXECUTOR ESTATE ALICE ELDEMIRE DECEASED) | PLAINTIFF/ APPELLANT |
| AND | PETER HONIBALL | DEFENDANT/ RESPONDENT |

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| BETWEEN | PETER HONIBALL | PLAINTIFF/ RESPONDENT |
| AND | HERBERT WELLESLEY ELDEMIRE (EXECUTOR ESTATE ALICE ELDEMIRE DECEASED) | DEFENDANT/ APPELLANT |

Raphael Codlin & Alexander Williams
for appellant

Berthan Macaulay, Q.C. & Mrs. M. Macaulay
for respondent

28th, 29th, 30th May &
30th July, 1990

CAREY, J.A.:

Both appeals arise from rival actions which were ordered consolidated in the Supreme Court. The first related to an action on behalf of the estate of the late Mrs. Alice Eldemire for the recovery of possession of premises, 37 Gloucester Avenue, Montego Bay in St. James. The rival action by the lessee was for specific performance of a contract for sale of the said premises. These premises

had been leased by Alice Eldemire to the respondent Peter Honiball under an agreement which had expired, but the respondent had continued in possession thereof as a statutory tenant. Mr. Codlin candidly conceded that he was unable to prosecute this appeal as there was no evidence before Gordon J., who had dismissed the action, that the appellant had served notice to quit upon the respondent. This is a requirement of Section 31 of the Rent Restriction Act. In the result, that appeal was dismissed with costs at the end of submissions on 30th May last.

I can therefore turn to consider the second appeal in respect to which, we had reserved our judgment. In the action from which this appeal has its genesis, the respondent claimed specific performance -

> "of an agreement made verbally at interviews in the first half of the year 1979, when the Plaintiff agreed to buy from Mrs. Alice Eldemire (now deceased), who agreed to sell to the Plaintiff, the premises situated at 37 Gloucester Avenue, Montego Bay, St. James, for the sum of $100,000.00 less the sum of $40,000.00 the cost of improvements and repairs effected by the Plaintiff to the premises."

The defence (filed by attorneys other than those at present on the Record) was in the following form -

> " THE DEFENDANT denies the making of the alleged or any agreement for the sale of premises situated at 37 Gloucester Avenue between the said Alice Eldemire and the Plaintiff or at all as alleged in the Endorsement and each and every allegation therein are denied as if same were set out separately and traversed seriatim."

By a judgment dated 9th March, 1989, the judge found in favour of the respondent and ordered that the contract be specifically enforced. He also directed (i) that the appellant pay the contract price (ii) that the Registrar of Titles

cancel the title issued and issue a new certificate of Title on transmission with the name of the executor.

This case is remarkable for a variety of odd features, not the least of which was the conspicous lack of pleading skill displayed on both sides. The writ, although bearing the legend "Indorsement on Writ" did not evidence any such indorsement, but showed some 5 unnumbered paragraphs which could accurately be described as a kind of particulars of claim, demonstrating the sort of informality or simplicity usually associated with particulars as pleaded in the Resident Magistrate's Courts. But the defence equally, was no less distinguished for its informality and engaging simplicity. The defence as pleaded, I have previously quoted and need not repeat it. No objections were taken to these irregular pleadings prior to the close of the appellant's case. When an amendment was granted however, at the behest of the respondent to his "particulars of claim", in the course of the hearing, objections were then made to the irregularities but no ground of appeal had been put forward in that regard. The amendments have been made the basis of a ground of appeal which Mr. Codlin has earnestly argued before us and which I will deal with hereafter. But to continue the litany of curious features, when Mr. Codlin opened his case, he then made the rather startling announcement that the appellant was the "undisputed owner of the property" and was "the registered proprietor under the Registration of Titles Act." And this despite the fact that in both actions before the Court, the appellant's status was as executor of the estate of Alice Eldemire, his deceased mother. Thereafter, he produced in evidence in the course of the trial, not only the certificate of title, proving the legal ownership of the

property in the appellant but the documentation in support of the application for title. That documentation contained disclosures by the appellant which were inconsistent with his evidence in court. His application for registration under the Registration of Titles Act, it must be said, was made shortly after his defence to this action was filed.

It was these revelations which all came about in the course of the evidence of the appellant himself that prompted counsel for the respondent to apply for an amendment to the "indorsement on the writ." The appellant had admitted in evidence that his brother and himself were the beneficiaries under his mother's will and that accordingly, 37 Gloucester Avenue was property to which both were entitled. This statement in the documentation was that he was solely entitled thereto. The documentation also disclosed that the appellant having registered himself as the sole proprietor of the said property, then obtained a mortgage thereon in the sum of $250,000.00.

The learned judge granted the application for amendment and gave the appellant leave to file a defence. All these developments took place over the first three days of the hearing of the consolidated hearing that is, on the 24th to 26th February, 1986. The matter was adjourned and finally hearings were resumed on 8th June, 1987, more than one year later. The amended particulars as filed were numbered for the first time and paragraph 4 was expanded to include some additions. Originally the paragraph read -

> "Mrs. Alice Eldemire died in November or December 1978, before the documents were prepared and her son, the defendant herein, who stated to the Plaintiff that he was in charge of her estate, has repeatedly refused to complete the said sale agreement."

This was amended by adding -

> ".....rather he fraudulently caused himself to be registered as proprietor in fee simple of the said premises on his false Statements in Documents 3A of the Agreed Bundle pages 25 and 27.
>
> (i) The Plaintiff therefore claims that the Court doth make an Order directing the Registrar of Titles to cancel the Certificate of Titles Volume 1169 Folio 863 of the Registrar Book of Titles and to issue a new Certificate of Title on Transmission with the name of the Executor."

Mr. Codlin argued then, and as he did before us, that the amendment was impermissible especially because there was an absence of particulars of the fraud alleged. See Section 170(1) Civil Procedure Code Law. Moreover, it was too late to grant such an amendment as there was an introduction of new matters. Further, it was highly prejudicial in that the appellant was deprived of properly pleading to, and investigating the new allegations.

In my view, the objections raised are all misconceived. With respect to the absence of particulars of fraud, the averment was pleaded thus - "fraudulently caused himself to be registered ..... on his false statements in Documents 3A of the Agreed Bundle pages 25 and 27." The fraud was contained in an exhibit which had been tendered by the appellant himself and could be ascertained by a reference to the document. The appellant pleaded to the averment in the following manner -

> " As regards paragraph 4 of the document headed Amended Defence the Defendant denies that the Plaintiff is entitled to plead in the document the contents of paragraph 4. The Defendant will further say that pursuant to Order 14 of the Judicature Civil Procedure Code the Plaintiff is required, having made a claim in his

> "Writ based on an allegation of fraud to follow up that claim with a separate Statement of Claim and the Plaintiff cannot specially endorse a Writ with a Statement of Claim containing charge or charges based on an allegation of fraud."

The contents of that paragraph could scarcely be categorised as pleading. It was, of course, an argument but arguments can form no part of a proper pleading. Of greater importance in point of pleading, was the fact that the allegation was not "denied" or "not admitted." The result of that was that the fraud was deemed admitted. Further, it was entirely mischievous to suggest as Mr. Codlin did, that he was deprived of any opportunity to plead or to investigate the new allegation. He had more than a year to carry out these operations for the court did not resume hearing until more than twelve months had elapsed since the application to amend was made viz., on 26th February, 1986.

Finally, no new cause of action was being added. The claim for specific performance remained extant but the altered situation, with the appellant now registered as legal owner, required an order of the court to the Registrar of Titles to cancel the title and endorse the appellant in his proper status as an executor. **Crampad International Marketing Co. Ltd. & Anor. v. Thomas** (1989) 1 W.L.R. 242 was cited as authority for his submission by Mr. Codlin. In that case, the claim instituted by the plaintiff was for trespass and an injunction. Sometime after this, the (first) plaintiff wrote the landlord purporting to exercise an option to purchase. After the close of the case for the defence the judge granted the plaintiff's leave to amend their statement of claim to ask for specific performance of the contract created by the exercise of the option. Both in this court and in the Privy

Council it was held that the judge had wrongly exercised his discretion in granting the amendment. Lord Oliver in delivering the judgment of the Privy Council, expressed himself in these terms at p. 247 -

> "As regards the decree of specific performance, the principal ground relied upon by the Court of Appeal for setting this aside was that it was wrong for the judge, at the stage of the proceedings at which he did so, to allow the plaintiffs' application for leave to amend by introducing, for the first time, a claim for this relief into their statement of claim without there being any factual basis pleaded to support it and without any opportunity for the landlord to plead and adduce evidence of matters which would affect the exercise of the court's discretion to grant the decree even if an underlying basis for it had been established. Their Lordships need not devote time to any detailed consideration of this point beyond saying that they entirely agree with the Court of Appeal. To allow the amendment at that late stage of the case and without giving any opportunity for the matter to be properly pleaded and investigated was quite clearly a wrong exercise of discretion."

That case is plainly distinguishable from the instant case. The amendment was forced upon the respondent by reason of facts which only came to light because of the exhibits tendered by the appellant. The alteration in the certificate of title called for directions from the judge to correct it. No new claim was being introduced at the eleventh hour without proper pleadings. So far as investigatory opportunity went, the situations are altogether different.

The amendment granted in this case was necessary for the purpose of determining the real questions in controversy between the parties. Section 259 of the Civil Procedure Code provides as follows -

> "259. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

I think the judge acted correctly within the ambit of that provision. This is enough in my view, to demonstrate that this ground must fail.

This now brings me to the matter of substance in this appeal, and the real issue is whether there was evidence of any acts of part performance on the part of the respondent referable to a contract for the sale of the property as he alleged.

By his pleadings, the respondent averred that the agreement was made verbally at interviews in the first half of 1973. The respondent gave evidence in this regard. He said that at the time the lease was executed, Mrs. Eldemire offered the premises to him for sale. The lease was executed in 1973. It was for a period of three years and was extended to 1978. The respondent was unable to take up that offer at the time. There were subsequent conversations on this topic which culminated in a final agreement in 1975 when a fire occurred causing damage to the premises. The sale price was agreed at $60,000.

According to the respondent, Mrs. Eldemire was not in a position to repair the premises and instructed him to fix it - as she was alleged to have said - "it is your place anyway, so go ahead and fix it." With this approval, he effected repairs in the amount of $40,000. These repairs also included structural alterations and additions. Nothing appears to have been decided as to a date of completion.

The respondent stated in examination in chief that six weeks before Mrs. Eldemire's death in 1978, they had agreed on a different figure viz., $100,000. He explained this variation by saying that Mrs. Eldemire wished to receive $60,000 at all events; she was not troubling herself about the cost of the repairs viz., $40,000. He asked to be allowed to pay the purchase price by Christmas. Mrs. Eldemire acquiesced. But all this appears at variance with his evidence in cross-examination. He is recorded as testifying thus -

> " The agreement was to buy the property by the end of the lease. At end of lease I still did not have money so I was asking for a little more time until Christmas. I made final agreement to purchase property in 1975 for $100,000.00 - this was after the fire."

The learned judge resolved the matter in this way. He held that the respondent accepted Mrs. Eldemire's offer for sale of the premises at $60,000 when he offered to fix the fire damaged premises and she agreed. Completion was postponed to the expiry date of the lease in July 1978 and further to December 1978. He reasoned in this way -

> "In accepting her direction to fix it, he accepted her offer of sale and to my mind the contract was made: 'The place is yours anyway'. The time for payment of the contract price of $60,000.00 was postponed to the end of the lease period in July 1978 and further to the end of December 1978. I accept that Mrs. Eldemire told him she wanted her $60,000.00 she was not concerned with the $40,000.00 he had spent. The arrangement, if any, for the re-payment of the $40,000.00 the defendant spent was that it should be deducted from the revised price of $100,000.00 so that she would get the $60,000.00 she always insisted on from the time the offer was made in 1973. On the evidence, Mrs. Eldemire dealt fairly with everyone 'her word was her bond'."

Although the learned judge speaks of a revised price of $100,000, I am not entirely clear when he thought this revised price was arrived at. On the evidence however, the judge could find that that date was six weeks prior to her death in 1978.

There is one other aspect of the matter which I think ought to be mentioned. The rental of these premises amounted to $200 per month and this amount was paid until 1978. He testified that he offered Mrs. Eldemire to pay $300 per month until he came up with the money and she agreed. Presumably, he began paying this increased amount sometime in 1978.

When the matter was debated in the court below, Mrs. Macaulay argued that the repairs and improvements amounted to acts of part performance. The note of the proceedings by the learned judge does not show that she relied on any other act on the part of the appellant as amounting to acts of part performance.

Before us, Mr. Codlin with no disrespect to his pertinacious arguments, submitted that if the contract was made in 1978 as was pleaded, then acts prior to that could not amount to acts of part performance. The judge had found however, that the contract was made in 1975 which was thus contrary to the pleadings and he was not entitled to determine the matter in the way he did.

Mr. Macaulay submitted that on the evidence there appeared to be a principal agreement in 1975 with either a contract price of $60,000 or $100,000. The judge found the former was the case. There was a subsidiary agreement in 1978 when the figure was varied to $100,000 and the judge so found. Although the subsidiary agreement determined the final price, that subsidiary agreement was necessarily incorporated

into the principal agreement and by relation back, the principal agreement made in 1975 must be taken to be an agreement for $100,000.

This approach neatly side-steps the question whether the learned judge in the light of the pleadings was entitled to find as he did.

In the circumstances of this case, it was necessary for the learned judge to determine whether there was a contract of sale of these premises. The date of the contract was not crucial because the pleadings did not make it an issue. The defence denied the making of the alleged agreement for the sale of the premises - "or any agreement for sale." Provided there was evidence on which a finding could be made that there was an agreement for sale, the defence met it, and in my view, cannot be heard to complain on that score. The judge found the contract was not made on the date alleged but at some other time. There was evidence to support his findings.

The contention of Mr. Codlin is really concerned with whether a claim should be dismissed because there has been a departure from the pleadings. The matter was canvassed in **Waghorn v. George Wimpey & Co. Ltd.** (1969) 1 W.L.R. 1764. In that case, the plaintiff who slipped and fell and was injured claimed damages for negligence against the defendants who were his employers. He pleaded and called evidence to show that the alleged negligence caused the accident while he was crossing over an earthwork bank part of the work-site, and that the slope of the bank was dangerously slippery. It was found however, that the accident had happened by the side of a caravan, and not near the bank so that the pleaded allegations of negligence were irrelevant. It was contended on behalf of the plaintiff that he should not be prejudiced by the departure from the facts alleged.

Geoffrey Lane J (as he then was) held, that since the version of facts found was not just a variation, modification or development but was something new, separate and distinct and not merely a technicality, there had been so radical a departure from the pleaded case as to disentitle the plaintiff to succeed. He distinguished **John G. Stein & Co. Ltd. v. O'Hanlon** (1965) A.C. 890 and relied on dicta of Lord Guest who had stated at p. 909 as follows -

> " 'Although this finding was to some extent a variation or modification of the respondent's case on record, it was based upon the same ground of fault and it related to the facts as found by the Lord Ordinary upon evidence properly before him. There was not in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability. The test was well expressed by the Lord Justice-Clerk Thomson in words which I should like to adopt when he said in **Burns v. Dixon's Iron Works Ltd.** (1961) S.C. 102, 107 - 108): 'The court is often charitable to records and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realms of technicality.'"

Geoffrey Lane J., also expressed himself in this way at p. 1771 in **Waghorn v. George Wimpey & Co. Ltd.** (supra) -

> "Let me hasten to add that if matters emerge, particularly matters of technicality which, perhaps, could not be foreseen by those responsible for pleading cases, and those things emerge during a case, then it would be quite wrong to dismiss a plaintiff's claim because his pleadings have not measured up to the technical facts which have emerged. One often listens sympathetically to applications to amend in those circumstances."

In the present case, the respondent pleaded a contract coming into being in 1978 as a result of certain conversations but the learned judge found that the contract in fact came into existence in 1975. When a contract comes into being is of course a question of law. I would be inclined to categorize this as a technicality for even if the pleadings were as found, the appellant's preparation and presentation would have been no different. This leads me then to say as Lord Guest did, that the finding amounted to no more than a "variation or modification" of the pleadings and does not come within the categorization of a case which is new, separate and distinct. In these circumstances it would be wholly wrong to dismiss the claim because it is being said that the pleadings did not measure up to the technical facts.

I am therefore driven to conclude that the appellant's complaint is not well founded.

It was never Mr. Codlin's arguments as I understood them, that the act of the respondent in repairing the premises could not amount to an act of part performance. He was arguing that an act having been performed in 1975 could not support a later agreement between the parties made in 1978. Plainly, that must be right. At one time in the course of the trial, it did appear that the respondent was contending that the repairs in 1975 could be referable to a later contract as acts of performance. Whatever may have been the situation before Gordon J., Mr. Macaulay most certainly did not put that forward before us. Mr. Codlin did say however, that although the repairs carried out by the respondent could amount to part performance, the act of building a new floor did not because that act was not part of the agreement.

This case thus brings into consideration the essential character of the acts of part performance. This doctrine of part performance which was considered by the House of Lords in **Steadman v. Steadman** (1974) 2 All E.R. 977, ordains, as the head note accurately reads, that -

> "In order to establish facts amounting to part performance it was necessary for a plaintiff to show that he had acted to his detriment and that the acts in question were such as to indicate on a balance of probabilities that they had been performed in reliance on a contract with the defendant which was consistent with the contract alleged."

I do not think that anyone could confidently assert that in repairing the premises and making the structural alterations he did, that the respondent was not acting to his detriment. These repairs and indeed the alterations as well, were of a substantial a nature, that Mrs. Eldemire could not be unaware of such activity. There was no evidence that Mrs. Eldemire raised any objection to the expenditure in respect of the structural alterations. It was necessary to make this point to answer Mr. Codlin's submission that it formed no part of the agreement to repair. Equity will protect the person who makes the expenditure in building as in these circumstances. Having said that however, on the evidence adduced by the respondent, it seems to me that Mrs. Eldemire gave the respondent carte blanche approval to do as he wished with the premises either by way of repairs, alterations or improvements.

Another essential of the act of part performance of a contract, is that the act must be referred to some contract and may be referred to the alleged contract. Lord Reid in **Steadman v. Steadman** (supra) ever alert to the practicalities of life, in demonstrating that it was not necessary to show that

the acts relied on, must necessarily or unequivocally indicate the existence of a contract, observed at p. 981 -

> " I am aware that it has often been said that the acts relied on must necessarily or unequivocally indicate the existence of a contract. It may well be that we should consider whether any prudent reasonable man would have done those acts if there had not been a contract but many people are neither prudent nor reasonable and they might often spend money or prejudice their position not in reliance on a contract but in the optimistic expectation that a contract would follow. So if there were a rule that acts relied on as part performance must of their own nature unequivocally shew that there was a contract, it would be only in the rarest case that all other possible explanations could be excluded.
>
> In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shewn to be more probable than not."

It is now settled since **Kingswood Estate Co. Ltd. v. Anderson** (1962) 2 All E.R. 593 that the acts of part performance should be such as must be referred to some contract and may be referred to the alleged one. See also **Wakeham v. MacKenzie** (1968) 2 All E.R. 783 at p. 787. The respondent's repairing of the premises which obligation was on his landlord, in my judgment tended to prove the existence of a contract to sell and was consistent with it. The respondent was treating the property as his in circumstances where his conduct could be explicable only on the basis that there was some agreement between himself and Mrs. Eldemire that contract was one of sale. His conduct was also, in my view, consistent with the contract alleged.

There was no basis in the case for suggesting that the respondent was spending money not in reliance on a contract but "in the optimistic expectation that a contract would follow." Indeed as I have previously stated, that was not the tenor of the appellant's arguments.

The learned judge also relied on the payment of increased rental by the respondent as an act of part performance I must confess that I have grave doubts that the payment of the increased rental can be relied on in this case because it does not satisfy the four pre-conditions which were approved by Upjohn L.J., in **Kingswood Estate Co. Ltd. v. Anderson** (supra) at p. 604 -

> "The true rule is, in my view, stated in FRY ON SPECIFIC PERFORMANCE (6th Edn.), P. 278, s. 582:
> 'The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.'"

I am inclined to think that the payment of increased rent is the more referable to the tenancy agreement itself and is consistent with that agreement, rather than the alleged contract for sale.

I would describe this payment of increased rental as a wholly equivocal act. Put another way, the obvious explanation of this act is not that it was done in reference to the alleged contract. **Broughton v. Snook** (1938) Ch. 505. Although the learned judge appeared to rely on **Nunn v. Fabian** (1865) 1 Ch. App. 35 for the proposition that the payment of increased rental may amount to part performance, I do not think that case is on all fours with the instant case. In that case,

the specific performance averred was in respect of a lease, the circumstances being that the landlord had verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold. The landlord died before the execution of the lease. Before his death, the tenant had paid one quarters rent at the increased rate. The plaintiff filed a bill praying for specific performance of the agreement for a lease. What is being suggested in the present case, is that the fact that the respondent undertook to and did pay an increased rent after the lease had expired in July, that amounted to an act of part performance which was referable to the contract for sale. The case is plainly distinguishable and does not, in my view, assist in the elucidation of the problem raised here.

In sum, I am of opinion that there was evidence in this case of acts of part performance on the part of the respondent. The appellant, be it noted, did not plead the Statute of Frauds, he merely denied the making of any contract. In those circumstances the respondent was entitled to prove the agreement for sale by his own oral testimony. The learned judge accepted him as a witness worthy of credit, and as I am deprived of the advantage of Gordon J., of seeing and hearing the witness, I would be loath to interfere with his findings of fact. The appeal in my view, fails and I would dismiss it.

Before leaving the matter however, I must mention the respondent's notice seeking to vary the order for costs made in the court below and to substitute an order for the costs to be paid by the appellant personally. Mr. Macaulay

submitted that the appellant conducted the case as registered proprietor and not in a representative character. He pointed to the fact that the appellant had registered the property in his name and obtained a mortgage thereon. Mr. Codlin did not argue otherwise. In my view, Mr. Macaulay's arguments are well founded and I would make the order sought. To that extent the judgment of the court below should be varied accordingly.

**FORTE, J.A.**

I concur.

**MORGAN, J.A.**

I agree.