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- Using for the purpose of performance and...
- specific performance - Actions considered - Injunction
Honiball in both cases (also p. 4)
Cases referred to (p. 14 (end))

JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT C.L.E. 36/81

HERBERT ELDEMIRE
(Executor - Estate
Alice Eldemire)

PLAINTIFF

and

PETER HONIBALL

DEFENDANT

SUIT NO. E. 138/81

PETER HONIBALL

PLAINTIFF

and

HERBERT ELDEMIRE
(Executor - Estate
Alice Eldemire)

DEFENDANT

HEARD: 24,25,26/2/86, 30/3/87, 8/6/87, 9,10/6/87, 26/11/87, 27/11/87, 9/3/89

Raphael Codlin and Mrs. B. Lee for Plaintiff, Eldemire

B. Macaulay, Q.C. and Mrs. Margaret Macaulay for Defendant, Honiball

GORDON J.:

By Suit No. C.L.E. 36/81 the plaintiff, Herbert Eldemire as executor of the estate of Mrs. Alice Eldemire sought to recover from the defendant, Peter Honiball premises situated at 37 Gloucester Avenue, Montego Bay in the parish of St. James. The said premises had been leased by the defendant from Mrs. Alice Eldemire under an agreement which expired on June 30, 1978 or July 15, 1978 but the defendant continued in possession as a statutory tenant. The plaintiff in addition claimed mesne profits.

The defendant by Suit No. E138/81 claimed Specific Performance of an agreement made verbally between Mrs. Eldemire and himself for the purchase by him of the demised premises for \$100,000.00 less \$40,000.00 expended by the defendant in repairing and improving the premises. This agreement the defendant alleged was made in the first half of 1978.

In his defence to Suit No. C.L.E. 36/81, the defendant claimed he entered into possession of the premises by assignment of a lease in October 1973 and on July 15, 1975 he agreed with Mrs. Eldemire for the lease to be extended for 3 years to expire on July 15, 1978. He repeated the claim made in E138/81 and said that on the expiration of the lease by agreement he continued in occupation as a monthly tenant at a rental increased from \$250.00 to \$300.00.

The defendant further stated he never received a notice to quit and deliver up possession of the premises. He said he informed the plaintiff of the agreement he had with Mrs. Eldemire but the plaintiff refused to honour it and that he is willing and able to complete the contract.

The plaintiff in his defence to Suit No. E138/81 denied the existence of a contract for sale between Mrs. Eldemire and the defendant and denied the allegations in the endorsed claim.

Both actions were consolidated by order of the Master on January 15, 1984.

The sole witness called on behalf of the plaintiff was the plaintiff himself. He said he was a Registered Medical Practitioner residing and practising in Montego Bay, St. James. He was the younger son of Mrs. Alice Eldemire who was in her life-time the person who managed the Eldemire enterprises in the parish of St. James. Mrs. Eldemire died on December 6, 1978 and in her Will executed on November 27, 1978 he was appointed the sole executor. Her Will was admitted to probate on July 3, 1979. (Exhibit 1). Premises 37 Gloucester Avenue he knew was his father's, his father died in 1948. Although he knew the premises were his father's he 'always understood property to be his mother's'. He was 'not sure if 37 Gloucester Avenue was let on a Tenancy but I have seen tenants occupying it' and in mid 1970's he became aware that Honiball was carrying on business there; his mother was the landlord. Towards the end of 1977, he said he became aware of the existence of a lease (Exhibit 2). This he said came up at one of the daily meetings he had with his mother.

The Eldemire holdings were surveyed in 1977. He said, 'these properties had been in the family a long time, we had diagrams we wanted to get proper titles. There was at that time no registered title for 37 Gloucester Avenue'. A duplicate certificate of title for these premises was issued by the Registrar of Titles on July 13, 1982 in the name of the plaintiff. After the death of Mrs. Eldemire, he took over as landlord. The rental the defendant paid had been increased to \$300.00 per month. After his mother's funeral he spoke to the defendant in his dining room telling him that the rental his mother charged 'was a bit ridiculous and it would have to be increased because things were different now-- He said we would speak later on'.

Continuing in examination in chief he said, 'I can't remember specifically if Honiball said he was going to buy the property but I remember hearing it said. I think my brother mentioned it to me'----- I cannot remember if Honiball told me that my mother had agreed to sell him the property. I had heard so, I can't say if Honiball said so, he might have. I think the first time I heard it, it was from my brother; this was some time after my mother's death. I never paid it much attention '.

He further said he was closely associated with his mother in the running of the business and he cannot recall her ever telling him of an agreement to sell 37 Gloucester Avenue to the defendant. When he heard of Honiball's assertion he thought it laughable. He recalled he had heard of a fire and his mother had told him Honiball did the repairs.

In cross-examination, he said the documents filed in support of his application to bring the premises - 37 Gloucester Avenue under the operation of the Registration of Title Act contained declarations that were true. The value he placed on the premises is \$2,000,000.00. This was based on the current state of the buildings.

'37 Gloucester Avenue is property to which myself and my brother are entitled'. He continued - 'He (defendant) might have told me the figure he and my mother had agreed but I find it impossible knowing my

mother to accept that figure. I agree there might have been discussion between himself and my mother. They were good friends. I believe there were discussions'. ----- 'My belief that defendant and mother had discussions is based on what my brother told me'.

In re-examination the plaintiff said, 'my mother did mention that there were discussions with defendant en passant, - price was laughable. She told me Honiball had offered to buy the place, I can't recall the year she told me so maybe 1976 or 1977'.

The defendant and himself through their lawyers sought to arrive at an agreement for sale of the premises to defendant but in vain. He admitted receiving rental from the defendant and returning it and of the defendant lodging rent in an escrow account. The bank's pass book he was sent, he passed over to his Attorneys.

That was the evidence given in support of the plaintiff's case. He claimed mesne profits of \$1,500.00 per month. A bundle of documents was admitted exhibits by consent:

The Probate and Will of Mrs. Eldemire - Exhibit 1;

The original lease - Exhibit 2;

Duplicate Certificate of Title - Exhibit 3;

Application to bring land under the operation of the Registration of Titles Act - Exhibit 3A;

Correspondence Exhibit 4-9 and photographs of the building at 37 Gloucester Avenue - Exhibits 10A-E.

On February 26, 1986, Mr. Macaulay obtained leave to file amended particulars of claim in Suit E138/81 and amended defence in Suit C.L.E.36/81. This he submitted was as a result of matters raised in the evidence of the plaintiff. In his defence the defendant claimed:-

"The Plaintiff in breach of his trust in returning rental, further fraudulently caused himself to be registered as proprietor in fee simple of the aforesaid premises by false statements in documents 3A of the agreed bundle pages 26 and 27."

In the amended statement of claim, the above was repeated and in addition the defendant claimed:-

"(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 860 of the Register Book of Titles and to issue a new Certificate of Title on Transmission with the name of the Executor.

- (ii) The Plaintiff therefore claims Specific Performance of the aforesaid agreement of sale and that the Defendant as Executor may be ordered to execute proper transfer documents of the proprietorship of the said premises to the Plaintiff to be duly registered."

On June 8, 1987 additional amendments to the statement of claim and the defence were granted.

The first witness called by the defence was Mr. Albert Sharpe. He was a building contractor, now a consulting engineer. He had been in that business (a contractor) over fifty (50) years and had constructed residences, offices, hotels, bridges, roads. He was in his 80th year. He owned Sharpe Construction Limited, a firm well-known in Western Jamaica. In 1953/54, he erected the building on 37 Gloucester Avenue for Mrs. Alice Eldemire at a cost of £6,000 (sterling). In 1977 at defendant's request he appraised the building. He had erected a 2 storey building, he now found a 3 storey building with other buildings flanking it. He valued the property then at \$250,000.00.

In 1983, he again looked at the premises. He found 2 additional building there at the back, he valued the additional buildings at \$40,000.00.

In cross-examination he said the additions had been made by defendant who had from time to time borrowed a ladder from him. The 3rd floor had been erected after the fire. He lived in Montego Bay and knew when the fire occurred. He had built 'hundreds of thousands of houses in Jamaica' and had visited the premises unofficially many times between 1953 and 1983. He said Mrs. Eldemire was a very pleasant person to deal with; she paid her obligations. In re-examination he said:-

"I knew Mrs. Alice Eldemire very well. I knew her over 60 years. She was very kind. She dealt honestly with people, her word was her bond."

The plaintiff's evidence was that in 1973 he leased the premises 37 Gloucester Avenue then known as 'Au Refuge' from Mrs. Eldemire. He said at the time the lease was executed, 'she wanted to sell me (the premises); I told her I had no money to buy it at the time. She wished \$60,000.00 then'.

In 1975 the premises were damaged by fire, he spoke to Mrs. Eldemire about the repairs, she replied, 'I don't have any money to fix it son so go ahead and fix it, it is your place anyway so go ahead and fix it'. He spent \$40,000.00 in repairing the building in the course of which he made structural alterations and additions. He added a 3rd floor and 2 rooms also a new building was erected at the back.

The defendant said he spoke to her several times about the sale of the premises and they reached a final agreement.

"The first time we had an agreement was after the fire and then the week before she got sick, about 6 weeks before her death we came to a different figure. The final figure we agreed on was \$100,000.00. We arrived at that figure because she still wanted her \$60,000.00. She was not concerned with the \$40,000.00 I had spent, I should give her \$100,000.00 less the \$40,000.00 I had spent she would end up getting her \$60,000.00. I promised to pay her by Xmas 1978. She said that would be O.K. I should go and bring the money to her."

In July 1978 when the lease expired, he offered to pay \$300.00 per month instead of \$250.00 hitherto paid until he came up with the purchase price and Mrs. Eldemire agreed.

Mrs. Eldemire died and he attended the funeral. The plaintiff spoke to him then asking him when last he had paid the rent and the amount. He replied and plaintiff said:-

"That \$300.00 can't work anymore, everything is different now and your rent is doubled."

Defendant said he told plaintiff he was buying the premises and further he did not consider it an appropriate time or place to discuss the matter. The following week he visited the plaintiff in his office, told him of the agreement he had with his mother and plaintiff said

'that is a lot of damn nonsense' and walked out of the office.

The defendant said he was never served with a notice to quit the premises either by Mrs. Eldemire or by the plaintiff.

The plaintiff was a politician - he was Minister of Health and spent very little time in Montego Bay, he never visited the premises. Mrs. Eldemire visited the premises during her life-time while he occupied it. He took her to the premises after the fire and after he had completed the repairs.

The plaintiff, he said, did not know of the agreement he had with Mrs. Eldemire but as far as he knew Dr. Arthur Eldemire knew of it. The plaintiff was away in Kingston much of the time between 1970-76. His brother, Dr. Arthur Eldemire had his office on his mother's premises and he and his mother maintained daily contact before he went abroad in 1976/77. 'I did not seek to get a written agreement from Mrs. Alice because I had her word. Mrs. Eldemire did not like to write documents. I did not press her for something in writing, she would have been annoyed if I had pressed. I did not find it necessary to'.

The plaintiff commenced proceedings in Suit C.L.E. 36/81 as executor of the estate of Alice Eldemire. He said the premises are part of the estate of the testator and under the Will it devolved to himself and his brother. He averred that the contents of the declaration he filed in support of his application to bring the premises under the operation of the Registration of Titles law are true. These documents are listed as Exhibit 3A. In the declaration he said:-

1. 'I am the owner of an estate in fee simple' of the premises described.
2. That such land, including all buildings and other improvements thereon is of the value of FORTY THOUSAND DOLLARS (\$40,000.00).
3.that there are no documents or evidence invalidating my title to the said land.
4. That I am not awarethat any other person has any estate or interest therein at Law or in equity.

This declaration was made before a Justice of the Peace on November 24, 1981.

In another declaration of even date he said:-

3. When I first knew the land it belonged to my father, Arthur Wellesley Eldemire.....
4. That on the death of my father in 1948 my mother, Alice Eldemire entered into possession of the said land and in 1958 put me in possession of the said land. She died on the 6th of December, 1978.
5. That since 1958 I have remained in peaceful and undisturbed possession of the said land exercising all the usual and customary acts of ownership and I have never heard of any claim adverse to myself or any predecessors in possession.

The evidence given by the plaintiff is at variance with that contained in the documents cited and it is on the basis of these documents the registered title was issued to him on July 13, 1982. It is blatant that the documents supporting the application for the issue of the title contain declarations that are false. This being so the title issued thereon was in my view fraudulently obtained. What the plaintiff was entitled to as executor of his mother's estate was a title on transmission. The title he obtained excluded the just claim of his brother to whom the estate was left jointly with the plaintiff. It is worthy of note that the title Exhibit 3 was issued on July 13, 1982 during the pendency of these cases and on October 16, 1984 a mortgage for the sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00) was entered thereon.

The plaintiff is the executor of the estate of Mrs. Alice Eldemire and as such he instituted proceedings for recovery of possession of the premises which undoubtedly form part of the estate of the testator. The defendant said that at no time was he served with a notice to quit in terms of Section 31 of The Rent Restriction Act nor was he served with a notice indicating that the premises were exempt from the operation of The Rent Restriction Act (vide Section 22). There has been no evidence in the case to contradict the evidence of the defendant on these points. The failure of the plaintiff to serve notice to quit on the defendant

effectively decides the fate of his case. He, the plaintiff cannot succeed. See Crampad International Marketing Company Ltd and Clover Brown vs Val Benjamin Thomas, P.C. Appeal No. 37 of 1987 (25/1/89) (Unreported).

The defendant claims he took assignment of the lease from the original Lessee in 1973 and he obtained from the Lessor a document of assignment which he lodged with the bank to secure a loan. He said he executed another lease in 1975 which expired on July 15, 1978 this also is with the bank, his copy was destroyed in the fire. The original lease that was assigned is in evidence and by Condition 3c 'The landlord will repair any damage caused by fire'. This condition placed an obligation on the owner of the premises, Mrs. Eldemire to repair the damage caused by the fire in 1975. The damage was outside the ambit of the Tenants Covenant to keep the premises in tenantable repairs. [See Clause 2(c) and (d)]

In Clause 2(e) the defendant covenanted 'not (without the previous consent in writing of the landlord) to erect or permit or suffer to be erected any other building upon the leased premises nor to make or to permit to be made any alterations in or additions to the leased premises which consent must not be unreasonably withheld'.

The defendant said that with the knowledge and approval of the landlord he repaired the building after the fire and made structural alterations thereto. This evidence was not challenged, although the plaintiff sought to suggest that the building was originally a 3 floor building. I find that the plaintiff did not know much about the premises save that it was a part of his mother's estate. He had never visited it. The defendant said that Mrs. Eldemire visited the premises after the fire and after the repairs and alterations had been effected with her authorisation. There is no evidence that up to the time of the death of Mrs. Eldemire she disapproved of anything that the defendant did on the premises. Plaintiff said that his mother and the defendant were good friends.

In 1973 before the fire, Mrs. Eldemire asked the defendant \$60,000.00 for the premises. After the fire the defendant spent \$40,000.00 repairing and improving the premises. On what basis did he indulge in this expenditure? He did not intend it as a gift to the landlord. I accept that she told him 'I don't have the money to fix it so go ahead and fix it, it is your place anyway'. What does this mean? She had offered the premises to him for \$60,000.00, he indicated he did not have the money then to pay for it. They reached a final agreement after the fire he said.

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'.

In Inwards and Others v Baker (1965) 1 All ER 446 Lord Denning at page 448 said:-

"We have had the advantage of cases which were not cited to the county court judge, cases in the last century, notably Dillwyn v. Llewelyn (1861-73 All ER Rep. 384; (1862), 4 De G.F. & J. 517 and Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699. This latter was a decision of the Privy Council which expressly affirmed and approved the statement of the law made by LORD KINGSDOWN in Ramsden v. Dyson (1866), L.R. 1 H.L. 129 at p.170. It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity."

At page 449C, he concluded -

".....the plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case that it can be satisfied by holding that the defendant can remain there as long as he desires to use it as his home."

(Emphasis supplied)

The attitude of the plaintiff was not helpful to the cause he propounded. He said his belief that defendant and his mother had discussions was based on what his brother told him. In re-examination, he said his mother did mention that there were discussions with the defendant. She told him defendant had offered to buy the place, this was in 1976 or 1977. The price he said was laughable. It is a well-known fact that property values slumped in the latter part of the '70's. If he considered \$60,000.00 laughable in 1976 or 1977 why did he declare on oath on November 24, 1981 that the value of the premises was \$40,000.00. Was he being truthful or honest?

On the day of his mother's funeral, plaintiff spoke to the defendant about the tenancy and said:-

"that \$300.00 can't work anymore, everything is different now and your rent is doubled."

In a subsequent conversation, the defendant told him of the agreement he had with Mrs. Eldemire and plaintiff replied 'that is a lot of damned nonsense'. The attitude of the plaintiff showed he was not prepared to accept or honour nor felt himself bound by any arrangements made by his predecessor in title.

The defendant's case is for specific performance of a contract not made in writing as is required by the statute of frauds but is by parol and supported by acts of part performance. An act of part performance relied on was the payment of an increased rental when he arranged a further postponement of the date for payment of the contract price.

Among the cases cited by the plaintiff in support of this proposition was that of Nunn v. Fabian (1865) 1 Ch. App. 35. In that case:-

"The tenant had spent a considerable sum of money on the premises in addition to the payment of increased rent."

In Thursby v. Eccles 49 W.R. 281 Bingham J. said at p.282:-

"When the Court of Chancery gives relief from the operation of the statute it does so upon the equities which have arisen out of the acts of the parties."

In Fry on Specific Performance (5th Edition) at p.283 it is said:-

"Courts of Equity hold that, notwithstanding the express language of the statute a case may be taken out of its operation by any one of the following circumstance.

(4) 'by a parol contract and part performance, which is, as we shall see, but a particular case of fraud'."

On page 290 the learned author states:-

"This exception seems to be based on the view that if a man has made a bargain with another, and allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of formality in the evidence of the contract out of which the equity in part arose.

In order thus to withdraw a contract from the operation of the statute several circumstances must concur. First the acts of part performance must be such as not only to be referable to a contract such as that alleged, but be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the court; and fourthly, there must be proper parol evidence of the contract which is let in by the Acts of part performance."

The learned author of Chitty on Contract 23rd Edition Volume 1 at p.91 paragraph 183 dealt with the first proposition thus:-

"In his work on Specific Performance Fry L.J., further stated that the acts of part performance must be referable to 'no other title' than the alleged contract; but this view 'has long been exploded'. (Kingswood Est. Co. Ltd. v. Anderson [1963] 2 Q.B. 169, 189). If the obvious explanation of the acts is that they were done with reference to the alleged contract, the doctrine of part performance applies although some ingenious alternative explanation for them

"can be suggested (Broughton v. Snook [1938] Ch.505). It is only required that the acts relied on should not be wholly equivocal."

The defendant's evidence is that from the time he got the assignment of the lease he had a firm agreement with Mrs. Eldemire. Not having the money to pay the price she asked, payment was deferred. Subsequent discussions further postponed the completion date. Acting in good faith on the basis of the agreement bolstered by her directions after the fire to undertake the repairs as the 'place is yours anyway'. The defendant indulged in substantial expenditure of \$40,000.00 and subsequently carried out further improvements with the knowledge, and, inferentially, the approval of Mrs. Eldemire. He was led to believe that all that remained for him to do was to pay the sum of \$60,000.00 to Mrs. Eldemire. I accept the defendant's evidence that when the lease ended in July he offered and commenced paying rental at the increased rate of \$300.00 until he could complete the contract by paying the sum agreed. His evidence is that he attempted to obtain a loan to meet the payment of the purchase price but was unsuccessful. His evidence otherwise was that he spent much to improve the value of the premises.

Mrs Eldemire managed the various facets of the Eldemire business consisting of clinics, properties, cinemas. There was a considerable amount of real estate. The plaintiff was involved in politics up to the mid-1970's and was once a Minister in the political directorate. The evidence is that his involvement meant he was based in Kingston and not seen much in Montego Bay. It was submitted that in managing the affairs of the Eldemires, Mrs. Eldemire was a careful person who reduced things to writing and if there was such a contract it would have been in writing. Balanced against that is the evidence that the defendant and herself were very good friends who communicated regularly. The defendant's evidence is that he ran errands for her regularly. In addition, despite the submission made by the plaintiff, the defendant said she never gave him a receipt for rental paid. She never had a registered title for the property - 37 Gloucester Avenue. The evidence

Is that survey of the Eldemire properties commenced in 1977 with a view to Registration. The Will exhibited was executed while she was ill and nine (9) days before her death, and while she was at the house of the plaintiff to which she had been removed during her illness, is signed by her mark, yet the lease bears her bold signature. For a person who controlled such vast wealth, one could think her Will was made late in the day.

I am not persuaded that the plaintiff is a credible witness. I find that there was a contract entered into between the deceased, Mrs. Alice Eldemire and the defendant. This contract was oral and there were acts of part performance as indicated above.

On my findings, there will be Judgment for the defendant on Suit C.L.E. 36/81 with costs to be taxed, if not agreed. On Suit E 138/81, there will be Judgment for Mr. Honiball. I order that the contract for the sale of premises 37 Gloucester Avenue be specifically performed and that the defendant Eldemire as executor, executes the proper documents of transfer to the plaintiff, Honiball of an unencumbered title. The plaintiff, Mr. Honiball is to pay the contract price of \$60,000.00. The Registrar of Titles is to cancel the title issued and exhibited herein registered at Volume 1169 Folio 860 of the Register Book of Titles and issue a new certificate of title on transmission with the name of the executor.

Costs to be the plaintiff, Mr. Honiball, to be taxed, if not agreed.

Cases referred to

- ① Grampad International Marketing Company Ltd and Cloues Brown v. Val Begamun Thomas P.C. Ashwal 37/87 (25/1/89) (unreported)
- ② Inwards and Others v Baker (1965) 1 ALLER 446.
- ③ Nunn v Fabian (1865) 1 Ch. App 35
- ④ Thursby v Eccles 49 W.R 281.