

Privy Council Appeal No. 5 of 1990

Herbert Wellesley Eldemire

Appellant

v.

Peter Honiball

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
26TH NOVEMBER 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD OLIVER OF AYLERTON
LORD LOWRY
SIR MAURICE CASEY

[Delivered by Lord Templeman]

By a Writ E36/81 the appellant Mr. Herbert Eldemire, as executor of the will of Mrs. Alice Eldemire, sought possession of 37 Gloucester Avenue, Montego Bay in the Parish of St. James from the respondent Mr. Peter Honiball on the footing that Mr. Honiball was holding over after the expiry of a lease.

By a Writ E138/81 Mr. Honiball sued Mr. Eldemire described as "Executor - Estate Alice Eldemire". The endorsement on the writ claimed:-

"... specific performance of an agreement made verbally at interviews in the first half of the year 1978, 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 costs of improvements and repairs effected by the Plaintiff to the premises."

The two actions were consolidated and came on before Gordon J. on 24th February 1986. Mr. Eldemire gave evidence on 24th and 25th February 1986. He had no direct knowledge of any agreement between his mother, Mrs. Eldemire, and Mr. Honiball. On 25th February 1986, counsel for Mr. Honiball, in an opening address, indicated that:-

"Evidence will be led that there was an agreement in 1974 between Honiball and Mrs. Eldemire when Honiball offered to buy the premises. ... At that stage there was no consideration nor part performance which would have enabled him not to be caught by the statute of frauds. ... The figure Mrs. Eldemire had in mind was \$60,000.00. Nothing came to fruition. Sometime around 1975 a fire took place on the premises, then only a two storey place. Mrs. Eldemire was insured only in the sum of \$5,000.00. All she would get from insurance was \$500.00. She requested Honiball to repair the building as he was going to buy the place. He effected repairs to a tune of about \$21,000.00 made improvements of about \$19,000.00. Total \$40,000.00. She offered to take \$60,000.00 as part of price which was upped to \$100,000.00. ... Where the conduct of the party can only be reasonably referable to a prior agreement the Court will so infer especially in a case of sale of land. The statute of frauds in that event would not apply."

The defence of the Statute of Frauds had not been pleaded on behalf of Mr. Eldemire. There was no request for particulars of the agreements or acts of part performance outlined by counsel for Mr. Honiball. There was ample opportunity for reflection. The trial was adjourned on 26th February 1986 and was not continued until 8th June 1987. The trial was continued on 9th and 10th June and on 26th and 27th November 1987 and judgment was delivered on 9th March 1989. In his judgment, after a careful review of the evidence, the judge said:-

"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."

The judge found that there was a contract, that there were acts of part performance and that Mr. Honiball was entitled to specific performance at the contract price of \$60,000.00. An appeal to the Court of Appeal (Carey, Forte and Morgan JJ.) was dismissed on 30th July 1990. Mr. Eldemire now appeals to Her Majesty in Council.

Mr. Codlin, who appeared on behalf of Mr. Eldemire, complained that acts of part performance were not pleaded and should therefore not have been admitted in evidence and were in any event not proved. Carey J.A., in delivering the judgment of the Court of Appeal, pointed out that the pleadings of both parties were defective. Proper pleadings identify the issues and shorten proceedings and obviate appeals. In the instant case, for better or worse, the consolidated action proceeded as if Mr. Eldemire had pleaded the Statute of Frauds and as if Mr. Honiball had then pleaded the acts of part performance which were

outlined by his counsel on 25th February 1986 and which were given in evidence subject to cross-examination over a year later on and after 8th June 1987. In these circumstances Mr. Eldemire cannot rely on any defect in the pleadings.

Mr. Codlin's attack on the judge's findings with regard to acts of part performance was rejected by the Court of Appeal and it is not the practice of the Board to interfere with concurrent findings of fact.

Mr. Codlin next submitted that any acts of part performance must have been attributable to a 1974 agreement which had not been pleaded or to a 1978 agreement which had been pleaded but which had been concluded after Mr. Honiball had incurred expenditure of \$40,000.00. But the 1974 and 1978 agreements are inextricably bound up together. The learned judge found that Mr. Honiball had expended \$40,000.00 in reliance on a promise which he now seeks to enforce that the property will be sold to him for \$60,000.00. In these circumstances a court of equity will enforce the promise.

The trial of the consolidated action also produced an unexpected development upon which Mr. Codlin now seeks to rely. When Mr. Eldemire gave evidence he disclosed that after the specific performance action had been instituted he had been registered as proprietor in fee simple of the property. On 26th February 1986 counsel for Mr. Honiball sought, obtained and filed an "amended statement of claim" which alleged *inter alia* that Mr. Eldemire had "fraudulently caused himself to be registered as proprietor in fee simple" and claimed an order directing the Registrar of Titles to cancel the Certificate of Title and to issue a new Certificate of Title to Mr. Eldemire as executor. Mr. Codlin claims that an allegation of fraud should not have been allowed after Mr. Eldemire had given evidence and that the pleading was defective because there never had been a statement of claim. Carey J. in the Court of Appeal rightly rejected these complaints; the amendment had arisen as a result of the evidence of Mr. Eldemire and there was ample opportunity for the allegations contained in the amended statement of claim in 1986 to be dealt with when the hearings were resumed in 1987. In any event the amendment would not affect the right of Mr. Honiball to specific performance against Mr. Eldemire.

In the result, for the reasons given by the Court of Appeal and despite the gallant attempts made by Mr. Codlin to impugn the judgment of the trial judge, their Lordships are satisfied that there is no substance in any of the technical and legal objections urged by Mr. Codlin and that, on the facts found by the trial judge after a long and thorough trial, the order for specific performance was rightly made. Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed.

