J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 10 OF 1967

BEFORE: The Hon. Mr. Justice Moody
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Graham-Perkins (Ag)

B E T W E E N FARMERS & MERCHANTS TRUST CO. LTD. PLAINTIFF-APPELLANT

A N D PATRICK W. CHUNG AND PATRICK CITY LTD. DEFENDANTS-RESPONDENTS

Mr. Harvey DaCosta Q.C. and Mr. Norman Hill for the Plaintiff-Appellant

Mr. V.O. Blake Q.C., Mr. D. Coore Q.C. and Mr. R.H. Williams for the Defendants-Respondents.

3rd, 4th, 5th, 6th, 7th, 10th, 11th, 12th, 13th, 14th Nov. 1969
10th February, 1970

GRAHAM-PERKINS J.A.(Ag.)

To understand the very important questions raised by the arguments and submissions herein it is desirable to set out at some length the history of the matters culminating in this appeal. Some time in 1957 the defendant-respondent Patrick W. Chung (hereinafter called "Chung") owned approximately 250 acres of land which he proposed to subdivide into some 797 lots for sale under a scheme of subdivision to be known as Patrick City. On the 1st November, 1957 he deposited a plan of the proposed subdivision with the Kingston & St. Andrew Corporation (hereinafter called "the Corporation") for its approval, as he was required to do by the Local Improvements Law (Cap.227). By a resolution of its Building Committee on the 11th December 1958 the Corporation sanctioned the subdivision.

On the 1st March 1960, all the land comprised in the subdivision was transferred by Chung to the defendant-respondent, Patrick City Ltd. (hereinafter called "the company"). Thereafter the company agreed to sell

some 80 lots to certain persons.

Prior to the 1st November 1957, the date on which Chung deposited his plan with the Corporation, and prior to the approval thereof on the 11th December 1958, Chung had entered into contracts (hereinafter called "the original contracts") with several persons for the sale of lots in his subdivision.

In January 1962 there were some 275 contracts in respect of which balances of purchase money were owed to Chung, and two in which balances were owed to the company. In certain of these contracts the balances of purchase money were payable on completion of the subdivision.

On the 12th January 1962 Chung and the company by deed assigned the balances due under the several contracts, stated to be, £142,538.12.10 to the plaintiff-appellant (hereinafter referred to as "the appellant") in consideration of the sum of £100,615.10.3 paid to the company. The assignment recited, inter alia, that:

> "the Assignor and the Company for the consideration aforesaid HEREBY JOINTLY AND SEVERALLY warrant that the amount set out in the last column of the said Schedules is legally and properly due and owing by the Purchaser named in the second column of the Schedules hereto to the Assignor and/or the Company without any right of set off or counter-claim whatsoever".

On the 16th May 1963 the solicitors for the appellant wrote to the solicitors acting for Chung and the company (hereinafter now called "the respondents") alleging, inter alia, that because of their delay in completing the subdivision the appellant had been unable to demand payment of those balances of purchase money which were payable on completion of the subdivision. Further correspondence followed and on the 17th March 1965 the appellant instituted proceedings against the respondents.

By para.6 of its statement of claim the appellant alleged that it was an implied term of the assignment that the titles and roadways of the subdivision should be completed within a reasonable period having regard to the nature of the work, and that such reasonable period would expire on or about the 31st December 1962.

By para.8 the appellant alleged that it was an implied term of the assignment that the respondents would deliver up to the appellant all

the contracts of sale in relation to the balances assigned and that they had failed to deliver up some of those contracts in spite of requests by the appellant so to do.

By para.9 the appellant alleged that it had been unable, because of the foregoing matters, to demand payment of the balances in the sum of £47,216.9.10 due to it under the assignment.

By para.10 the appellant alleged that it was an implied term of the assignment that respondents would transfer the lots sold to the respective purchasers in order to give efficacy to the assignment and would pay one-half the cost of transferring each such lot.

By para.12 the appellant alleged that several of the balances stated in the schedule to the assignment as properly due and owing were incorrect in that lesser amounts were due and owing, and further, that some of the balances stated to be due and owing were not so due and owing in fact. The actual sum proved at the trial under this head was £2,444.9.2.

By reason of the several allegations abovementioned the appellant claimed, inter alia, specific performance of the agreement referred to in para.6 to construct the roadways. This claim was not seriously pressed at the trial of the action. In the alternative, the appellant claimed damages for breach of the agreement to construct the said roadways. The appellant also claimed a declaration that the respondents were obliged to pay one-half the costs of transferring each lot to the respective purchasers thereof. A further claim involved the sum of £49,660.19.0 as liquidated damages for breach of contract, and damages for breach of warranty.

By their defence the respondents claimed that the original contracts, having been made prior to the Corporation's sanction of the subdivision, were illegal by virtue of the provisions of sections 4, 9(a) and (b) of the Local Improvements Law (Cap.227) and, consequently, no debts were due and owing thereunder. It was also alleged that the assignment was expressly and/or impliedly prohibited by, and contrary to, sections 4 and 9(b) of the Local Improvements Law and was therefore illegal, and/or void, and/or unenforceable. A further allegation was that the appellant and its solicitors knew or had notice, when the assignment was made, of the fact that the original contracts were made prior to the approval of

the subdivision by the Corporation, and that the assignment was made in respect of debts due under an illegal and void transaction.

To these allegations by the respondents the appellant by its reply pleaded that they were estopped by their warranty from saying that no sums were due and owing under the several contracts of sale. At the commencement of the trial this reply was amended by the addition of an allegation of fraud on the part of the respondents.

In this state of pleadings the action came up before Smith J. and after a trial lasting eleven days, the learned judge, in a written judgment, came to the conclusion that the original contracts were illegal. He held, however, that the appellant was entitled to enforce the assignment, provided it had no knowledge of the illegality of the original contracts, or of the facts which made them illegal, at the time the assignment was made. He found that the appellant was not affected by any such notice. Smith J. also found that the respondents, having warranted that the debts assigned to the appellant were legally and properly due and owing, were guilty of a clear breach of that warranty by reason of his finding that these debts were not legally recoverable from the purchasers. Accordingly he gave judgment for the appellant for £100,615.10.3 together with interest at the rate of 7% per annum from the date of the assignment, or the date that sum was paid to the appellant, whichever was later, up to the 6th February 1967 the date of his judgment. From this sum was to be deducted the total sum received by the appellant under the assignment. In the result final judgment was entered in favour of the appellant in the sum of £26,798.13.6.

On the 17th March 1967 the appellant filed a notice of appeal. He sought to have the judgment of Smith J. varied to the extent of having included therein the following:

> "That there should also be judgment for the (appellant) for the sum of £41,923.2.7 plus interest at the rate of 7% per annum from the date of assignment to the date of judgment."

The ground on which the appellant sought to have Smith J's judgment varied was that since the appellant "had contracted to acquire from the respondents debts totalling £142,538.12.10 for the sum of £100,615.10.3 the learned

trial judge erred in not awarding the appellant the sum of £41,923.2.7. as damages for loss of the profit which the appellant would have made had the respondents not been in breach of the said contract of assignment.

On the 31st March 1967 the respondents filed a cross-appeal. They, too, sought to have the judgment varied by (a) substituting therefor judgment in favour of themselves, or (b) substituting for the damages awarded to the appellant the sum of one shilling as nominal damages or such other appropriate sum.

Subsequent to the entry of final judgment the appellant encountered some considerable difficulty in persuading the respondents to satisfy the judgment. In the result a Writ of Seizure and Sale was issued on the 29th August 1967 on the application of the appellant's solicitors. Before this Writ was finally executed, however, the respondents applied by summons for a stay of execution. This summons came on for hearing on the 4th October 1967 when by a Consent Order it was dismissed on terms that :-

> "(a) The appellant deliver to the respondents's solicitors certain certificates of title and contracts for sale in its possession relating to certain lots at Patrick City in exchange for the respondents's solicitors undertaking to pay the judgment debt and interest within thirty days of such delivery or in default to return the said certificates and contracts; and
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> (b) The appellant's solicitors undertaking in exchange that they would not take any steps to enforce the judgment debt or any part thereof within the said thirty days, and further that if the said certificates and contracts were returned pursuant to the undertaking that as and when the judgment debt and interest were satisfied they would redeliver the certificates and contracts to the respondents's solicitors save insofar as they had to utilize the certificates or any of them for the purpose of satisfying the judgment debt and interest".

I pause here to observe that I seriously question whether the second part of that Consent Order did, as a matter of interpretation, reflect the real intention of the appellant. I think not. Be that as it may, some fifty-five certificates and a number of contracts of sale

were delivered to the respondents's solicitors by the appellant's solicitors in pursuance of the Consent Order and subsequently retained by them, the judgment debt, interest and costs, having been paid within the period of thirty days.

Thereafter there occurred an event of somewhat far-reaching significance. In August 1968 there came into existence the Local Improvements (Amendment) Act, 1968, by which the Local Improvements Law (Cap.227) was amended. By section 3 (1) of the Act of 1968 a new section numbered 9A was inserted into the principal Law. Sub-section (1) provides:

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

Sub-section (2) provides:

> "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."

The date of enactment was the 24th July 1968. The language of section 9A (2) is by no means happy. Nevertheless, it is clear, I think, that the result of the retrospective operation of section 9A on the original contracts is to leave those contracts unaffected, notwithstanding any failure to comply with the requirements of section 4 (1) (2) and (3) of Cap.227. Indeed this was common ground during the arguments advanced on the hearing of this appeal.

On the 22nd October 1969 the appellant filed a Notice of Motion by which it sought the leave of this court to amend its Notice and Grounds of Appeal, and to adduce additional evidence by way of affidavit on the hearing of this appeal. The amendment sought by the appellant was to the

effect that the judgment of Smith J. be varied by substituting therefor "judgment for the appellant for £142,538.12.0. less the total sum received by the (appellant) as a result of the assignment ..... The (appellant) will also be entitled to interest on the sum of £46,091.14.0. at the rate of 7% per annum from the 31st December 1962 to the date of the judgment ....." This amendment was undoubtedly sought by the appellant so that it might take advantage of the retrospective amendment to Cap.227, which, it was argued, destroyed the entire basis of the judgment of Smith J. Mr. Coore opposed the appellant's application to amend and, if I may say so, he did so quite vigorously. This court, however, granted the appellant's application and the appeal was argued by Mr. DaCosta on the grounds as amended. In his reply to Mr. DaCosta, Mr. Coore advanced, inter alia, the same argument as that which he advanced in opposing the appellant's application to amend its Notice and Grounds of Appeal.

Basing his submissions on the pleadings and the relief sought by the appellant before Smith J. Mr. Coore argued that the appellant had claimed to be entitled to relief in one or other of two alternative situations. Assuming the legality of the original contracts the appellant claimed to be entitled to damages for breach of an implied term to construct the roadways of the subdivision within a reasonable time. Alternatively, assuming the illegality of those contracts the appellant claimed damages for breach of the express warranty. These claims were mutually exclusive since they rested on conflicting hypotheses. Smith J. having found that the original contracts were illegal granted the appellant relief in the terms of the second alternative. In these circumstances, says Mr. Coore, the appellant having demanded and received payment of the amount awarded under the second alternative is at liberty to come to this court and ask for an increase in that award, but it cannot ask that the award under that alternative be set aside in toto and that a new award be made on a totally different basis, i.e. the first alternative. A party cannot, Mr. Coore argues, accept payment under a judgment or any other instrument and thereafter repudiate that judgment or instrument. He cannot "blow hot and cold".

There is, I think, no doubt that the real substance of Mr. Coore's submissions involved the application and scope of the principle of the common law doctrine of election. It is necessary, therefore, to examine

the doctrine in the context of the particular circumstances surrounding the Consent Order referred to above. "The doctrine of election as applicable in the law of estoppel may conveniently be summarized as follows: Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he makes his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting." See Estoppel by Representation by Spencer Bower and Turner, 2nd Ed. at p.285. I adopt this as an accurate statement of the principle.

It is the sine qua non of an election that the party electing shall be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice. As to the requirement of proof by the representee of an alteration in his position to his detriment, see the observations of Denning L.J. (as he then was) in Central Newbury Car Auctions Ltd. v Unity Finance Ltd. et al 1956 3 A.E.R. 905 at p.909, citing the judgment of Dixon J. in Grundt v The Great Boulder Pty. Gold Mines Ltd. (1937) 59 C.L.R. 675.

In the course of Mr. Coore's submissions I asked him what, in his view, were the two mutually exclusive courses of action with which the appellant was confronted on the occasion of the summons for a stay of execution when the Consent Order was made between the appellant and the respondents. His reply was, and I trust I quote him accurately, "the appellant could have (1) challenged the whole basis of the judgment of Smith J. as to the finding of illegality of the original contracts, or (2) accepted the judgment and taken the view that although it was right as far as it went it did not go far enough."

With due respect to Mr. Coore I find it quite impossible to accept this view. It is wholly divorced from reality and, in my view, founded on a non-existent premise. The authorities are clear that where a party has taken the benefit of a judgment in his favour, he is

precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such judgment was erroneous, or, though correct as to the part which was in his favour, was wrong as to the other parts. See e.g. Re Lart, Wilkinson v Blades (1896) 2 Ch. 788 and Shrager v Basil Dighton Ltd. (1924) 1 K.B. 274. The authorities are equally clear that where a party takes the benefit of an award in his favour he is not precluded from disputing the extent, as distinct from the validity, of that award. In such a case he does not "blow hot and cold", he blows hotter. See e.g. Mills v Duckworth (1938) 1 A.E.R.318, and Lissendan v C.A.V. Bosch Ltd. (1940) 1 A.E.R.425, in which Johnson v Newton Fire Extinguisher Co. (913) 2 K.B. 111 was expressly overruled.

In my view an examination of the original Notice and Grounds of Appeal filed by the appellant leads inevitably to the conclusion that what the appellant must be taken to be saying to the respondents by that document is precisely what Greer L.J. understood the appellant in Mills v Duckworth (supra) to be saying: "I say that although I have got something from the judgment, I have not had all to which I am entitled, and am going to the Court of Appeal to ask them to give me some more. I am not blowing hot and cold. I am accepting the judgment of the trial judge, as far as it goes, but I say that it does not go far enough. I want something more."

It is true that the respondents by their cross-appeal were seeking to dispute the basis of Smith J's judgment insofar as it upheld the validity of the assignment. But this is nothing to the point. What is of critical importance is that the appellant was clearly accepting that judgment but only as far as it went.

It is of the utmost importance to appreciate that the Consent Order was concluded when both the appeal and cross-appeal were pending, and there is not the faintest suggestion that those appeals were to be affected in any way by that Consent Order. In these circumstances it would, in my view, be quite impossible to regard that Order as involving any election on the part of the appellant. By demanding and accepting the sum awarded by Smith J. the appellant was doing no more than exercising a legal right to be paid that which it had been held to be entitled to receive. Can it make the least difference that the exercise of this legal

right was, by agreement, postponed on terms patently of some considerable advantage to the respondents? Neither in logic nor in principle can this be so. By filing its notice and grounds of appeal the appellant had exercised another and quite independent legal right, namely, the right to claim that the judgment of Smith J. should be varied since that judgment did not go to the extent to which the appellant claimed to be entitled. See Lissenden v Bosch Ltd. (supra) per Lord Wright at p.441. Be it noted also that the respondents by their defence had relied on the illegality of the original contracts. Smith J. found in their favour on this issue. This finding was, at all material times, accepted by the appellant. When, therefore, the appellant agreed, as part of the Consent Order, to return, and did return, to the respondents the certificates of title and contracts for sale therein mentioned, it was, in relation to those contracts, doing no more than parting with documents that had been held to be illegal and therefore quite worthless to them. That much was recognized by both parties. For these reasons I hold the firm view that there were here lacking all the essential elements of an election, and more particularly, that there never were any alternative and mutually exclusive rights or courses of action between which the appellant could choose. Such right as the appellant had to re-shape his appeal depended on the effect of the amending legislation referred to earlier.

This brings me to the powers of this court in a case where there has been a change in the law after the judgment appealed from and before the hearing of the appeal. By Rule 12 (1) of the Court of Appeal Rules 1962 it is provided that:

> "An appeal to the court shall be by way of re-hearing and shall be brought by notice of motion ...."

Rule 18 (3) provides:

> "The court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

These provisions are, by their terms, identical with those of O.58 R.3 (1) and R.9 (3) respectively, (The Annual Practice 1963), the implications of which have been examined in a fair number of cases in England. The words "by way of re-hearing" have been held to entitle the court to consider what

facts have occurred since the trial, and what relevant change has been made in the law. See A.G. v Birmingham, Tame and Rea District Drainage Board (1912) A.C.788, and Quilter v Mapleson (1882) 9 Q.B.D. 672, per Jessel M.R. at p.676. In New Brunswick Rly. Co. v British & French Trust Corporation Ltd. (1938) 4 A.E.R.747, Lord Wright, in dealing with the corresponding English provisions, said at p.763:

> "Apart from those last words (i.e. the last words of R.9 (3)), it would seem clear that the Court of Appeal is to re-hear the case and to give the judgment which the judge appealed from ought to have pronounced. This obviously would shut out any change of law between the trial and the appeal. However, the last words, 'to make such further or other order as the case may require' have to be considered. The court of appeal has power to admit, under strict conditions and limitations, further evidence, and, if it does so, that may necessitate it making a different order from that of the judge. Again, it is clear that in certain cases a change in the law since the trial may have to be regarded by the court of appeal. This has been done in various reported cases. In particular, this course has been followed where the change in the law has given to the court a power or discretion to grant remedies or rights to relief which were not within its competence at the date of the trial. Such a case was Quilter v Mapleson (supra) ....."

In my view it is clear, both on authority and on principle that this court is entitled, in the case of retrospective legislation enacted since the trial, and extending to pending proceedings, to make such order as the trial judge could have made if the case had been heard by him at the date on which the appeal was heard. And indeed this is the entire foundation of the appellant's motion to amend its original notice and grounds of appeal. What, then, is the result of allowing the appellant's application for that amendment, and indeed the respondents' application to amend their cross-appeal? The result is that this court is now in a position, in the words of R.18 (3) "to give any judgment or make any order which ought to have been made, and to make such further or other order as the case may require." Smith J., with his usual clarity, has indicated the views and facts by which he would have been guided if he had found the original contracts to be legal. In the ultimate analysis he would, it is

clear, have been constrained to award damages to the appellant on the principles laid down in Hadley v Baxendale (1854) 9 Exch.341, as re-defined in Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd. (1949) 1 A.E.R. 997, which latter case was cited with approval in East Ham Corporation v Bernard Sunley & Sons Ltd.(1966) A.C.406, (1965) 3 A.E.R. 619.

Smith J. made the critical finding that the subdivision should have been completed by the 31st December 1962. The failure by the respondents to complete by that date would have affected only certain lots. The measure of damages under this head must be calculated on two distinct bases. Firstly, in relation to the lots adjacent to those roadways which were the subject of the Corporation's resolution of the 11th July 1963, the appellant would be entitled to the interest on such balances as remained outstanding from the 1st January 1963 to the 11th July 1963 at the rate of 7% per annum. Secondly, with regard to those lots in respect of which no roadways were constructed the appellant would be entitled to the balances assigned together with interest thereon at the rate of 7% per annum from the 1st January 1963 to the date hereof. The appellant would also be entitled to receive (a) one-half of the costs of transfer of the titles as claimed in para.10 of the statement of claim, and (b) such difference as there is between the balances assigned and the amounts in fact due and owing as claimed in para.13 of the statement of claim.

I would allow the appeal, and order that the amounts to which the appellant is now entitled be assessed by the registrar.

Dunn & Orrett, solicitors for the plaintiff-appellant.

Clinhart & Co., solicitors for the defendants-respondents.