

western boundary extending eastwards along the Old Harbour-to-Spanish Town main road, on the south and property belonging to the plaintiff on the north, and to a dimension required on the eastern boundary to obtain not less than three-quarters of an acre of land. At the time of entering into the agreement there was an outstanding mortgage on the said land and it was orally agreed between the appellant and the deceased that upon a registered title being obtained for the portion of land sold the appellant would pay to the mortgagee the sum of four hundred pounds against the said mortgage.

The terms of the agreement were, as set out hereunder:

- "(2) Purchase Price: One Thousand Three Hundred Pounds (£1,300.00) sterling.
- (3) Deposit: Ten Pounds (£10). Balance to be paid on completion of registered Title.
- (4) Title: Registered.
- (5) Possession: On completion of survey and defined boundaries.
- (6) Water Rates & Taxes: To be adjusted proportionally as from the date of possession.
- (7) Costs: Costs of Survey and Transfer etc. to be borne equally by Vendor and purchaser."

The deposit was duly paid and subsequent payments were made towards the purchase price amounting to the sum of nine hundred pounds leaving a balance of four hundred pounds to be paid to the mortgagee. Subsequently the survey was done and a pre-checked plan obtained from the Survey Department whereupon the appellant was let into possession of the three-quarters of an acre of land, in accordance with the agreement.

Having been let into possession by the deceased Hubert Thompson, the appellant erected a fence along the boundaries shown in the pre-checked diagram and commenced occupation thereof. In 1970 the appellant erected a billboard on the land advertising "Buy a home in beautiful Laiba Gardens." The services of Messrs. Clinton Hart and Company, attorneys-at-law, acting on

behalf of both parties, were engaged for the purpose of obtaining sub-division approval from the St. Catherine Parish Council and getting out separate registered title of the said three-quarters of an acre of land. Sub-division approval was secured on the 23rd day of September, 1975.

Prior to the granting of the sub-division approval the vendor was unfortunately killed in a motor vehicle accident on the 13th March, 1973. The executor of his estate renounced his right to probate and it was not until 1981 that the respondent was granted Letters of Administration with Will annexed.

The appellant testified that after the sub-division approval was obtained he spoke to the respondent on numerous occasions about completing the sale and on each occasion he was assured that the matter was being given attention. He only became aware of the respondent's intention to avoid the sale in 1987 when the respondent informed him that he had changed his mind about completing the sale as he had been advised by his sister not to do so.

The evidence disclosed that the appellant and the respondent had an extremely cordial relationship. The respondent at one time was employed to the appellant and the appellant likened the relationship between them as that of father and son. The significance of this evidence will be made clear when the ground of appeal is examined.

At the trial the respondent did not give evidence and elected to rely on his submission in law.

By way of history, Hubert Leston Thompson's interest in the land, the subject-matter of this action, was acquired in 1942 and by way of gift he transferred all his estate in the said land to Maria Angella Ruddock on the 8th May, 1963. On the 19th day of June, 1964, Maria Angella Ruddock divested herself of all her estate in the land by way of gift to Hubert Leston Thompson and John Carlyle Thompson, the respondent, as tenants-in-common. It is, therefore, clear that at the time

Hubert Leston Thompson entered into the contract with the appellant he and the respondent were tenants in common in respect of the land which he was purporting to sell. It is also clear that the respondent was not a party to the agreement entered into by the appellant and Hubert Leston Thompson on the 11th day of September, 1968. However, with his concurrence the situation could be regularised.

During the course of the hearing Mr. Morrison for the appellant applied to have the Notice of Appeal amended by deleting the following:

"That the learned judge's order that the Judgment be entered for the Defendant against the Plaintiff be set aside"

and substituting therefor the following:

'That Judgment be entered for the Plaintiff Appellant against the Defendant Respondent.'

and at (b) to delete the words 'prima facie' in the third line and to add after the word 'case' in the last line the following words 'and to enter Judgment for the Defendant Respondent.' "

No objection was raised to the amendments sought. Accordingly, the amendments were granted as prayed.

With the amendment granted at (b) the lone ground of appeal filed reads as follows:

"(a) That the learned judge erred in law in upholding the submission made by counsel on behalf of the defendant that there was no case for the defendant to answer at the close of the plaintiff's case and to enter judgment for the defendant respondent."

In arguing the ground of appeal, Mr. Morrison identified the issues as:

- i. What was the legal effect of the contract dated 11th September, 1968?
- ii. Did the appellant acquire a title by adverse possession against the respondent in his personal capacity?
- iii. Was the appellant's claim statute-barred and was he guilty of laches?

**LEGAL EFFECT OF CONTRACT
DATED 11TH SEPTEMBER, 1968**

The learned trial judge in dealing with this question said:

"Now the law relating to tenants in common establishes that tenants in common hold property in undivided shares and as such there is unity of possession (see A manual of the Law of Real Property by R. E. Megarry at page 211). It follows therefore that in order to sell the property in its entirety all tenants in common must join in the sale. Each co-tenant may however, contract to sell his undivided share without the consent of his other co-tenant." [Emphasis mine]

It cannot be doubted that this is a correct statement of the law. However, what the co-tenant was contracting to sell was not the entire property or his undivided share but three-quarters of an acre of the entire property. Was he entitled so to do without the consent of the other tenant in common?

For the appellant, Mr. Morrison submitted that one tenant in common can sell his undivided share in the property without either the determination of the other tenant in common or partition. Where, as in the instant, one tenant in common purports to sell as though he was the sole owner of the entire property that agreement is not entirely without effect and a court of equity may require him to convey that which he is legally able to convey, that is, his undivided share. Continuing, he further submitted that it is a well established principle that on a contract for the sale of land the purchaser becomes upon execution of the agreement of sale and the payment of the deposit the beneficial owner in equity of the property. Consequently, he contended, that as of the date of the contract the appellant became the beneficial owner in equity as regards the undivided half share of Hubert Leston Thompson in the three-quarter acre, the subject matter of the contract and stood thereafter as tenant in common with the defendant in his personal capacity as co-owner of the entire estate.

This submission is seriously flawed. The tenant in common's interest in the estate is in an undivided share. He can dispose

of that undivided share but he has no interest in the land which can be quantified as three-quarters of an acre. The term "undivided" is self explanatory. What it means is that the interest of the parties has not been allocated in terms of acreage. The interest is an undivided share in the entire estate. So when Hubert Leston Thompson purported to sell three-quarters of an acre, without the consent of the other tenant in common, he was virtually selling an estate which he did not possess.

For his proposition counsel relied upon three decisions which I propose to examine.

In Harrocks v. Rigby (1878) Ch. D. Vol. IX page 180, the headnote reads as follows:

"Where two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest:

Held: that a judgment for specific performance with abatement might be made against the former."

Fry, J. said (at page 182):

"The plaintiff is, therefore, incumbered with several difficulties in respect of this contract. In the first place, he has entered into a contract with two persons as tenants in common for the sale of the entirety. It is found that one of those supposed tenants in common has no interest whatever in the property and the question then is whether the plaintiff can enforce against the other a conveyance so far as it relates to his moiety.

In my opinion the plaintiff can enforce it. I think that where an agreement is entered into by A and B with C, and it afterwards appears that B has no interest in the property, A may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete."

It will readily be recognised that the cited case is easily distinguished from the instant case. Firstly, the vendor in Harrock's case contracted to sell the entirety. He was unable to convey the entirety, because he did not possess the entire

estate. "Nemo dat no quod habet". However, he was able to convey all of his undivided share for which he did not require the consensus of the other tenant in common. He was, therefore, able to complete. In the instant case, Hubert Leston Thompson contracted to sell the appellant an estate which he could not convey without the consensus of the other tenant in common. He was unable to complete - by himself he did not possess three-quarters of an acre. Had he contracted to sell his undivided share as in Harrock's case the outcome would have been otherwise.

In Basma v. Weekes and others (1950) A.C. 441, the appellant entered into an agreement to purchase two houses which were owned by three persons as tenants in common each being entitled to one-third share in the property. The appellant sued for specific performance. One of the respondents, the court found, was unable to convey her interest to the appellant as she was a married woman and could not do so without the permission of her husband. A decree of specific performance was granted against the other two ordering them to convey their two-thirds share to the appellant.

Mr. Morrison relied on this decision to say that this court in the circumstances of the instant case could decree specific performance of the agreement between the appellant and Hubert Leston Thompson.

Properly examined, it will be readily understood that the basis of the judgment is that the respondents in Basma's case were able to complete. They were capable of conveying the interest which they had contracted to sell. In this case, as I have already pointed out, Hubert Leston Thompson possessed no interest which could be identified as three-quarters of an acre. He possessed an undivided share in the entirety.

In Mortlock v. Buller 10 Ves. Jun. [292] page 857 at 866

Lord Chancellor Eldon expressed himself thus:

"If a man having a partial interest in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not com-

"petent to him afterwards to say, though he has a valuable interest, he has not the entire, and therefore the purchaser shall not have the benefit of his contract."

This principle of law is not open to doubt, but the circumstances of this case make it easily distinguishable from Mortlock's case. Buller sought to sell the whole property, the court ordered him to convey that which he could. Here again the vendor was able to complete. In the instant case, if the court were to order the vendor to complete, that is, to convey his undivided share in the entire property then the court would be compelling the vendor to convey more than the purchaser had contracted for. This would be a completely new contract as the contract price would have to be adjusted upwards.

However, careful attention must be given to the conduct of the respondent subsequent to the death of Hubert Leston Thompson. The respondent obtained Letters of Administration to the estate of Hubert Leston Thompson so that he is now tenant in common in his own right and administrator for his deceased co-tenant in common. It is contended that in that position he so conducted himself as to lead to the irresistible conclusion that he tacitly adopted and approved the contract between the plaintiff/appellant and his deceased father, his co-tenant.

The unchallenged evidence of the appellant is that he paid one quarter of the taxes in respect of the property to the respondent for a period of four years from 1977 to 1980. The respondent assured the appellant "that his sister Mamsie was in town with the lawyer looking after the matter." When the title was not forthcoming the appellant again spoke to the respondent and once again he was assured that the matter was being looked after. In 1987 the respondent told the appellant that he personally was going to look after the matter.

Whether the taxes were paid on demand or in concurrence with the appellant's desire to pay the same, the acceptance by the respondent of the taxes, the appellant being then in

possession of the land and had openly enjoyed such possession since 1968 was, in my opinion, an unequivocal admission of the appellant's entitlement to the land with the concomitant responsibility to pay taxes for the said land. Accordingly, the contract which was unenforceable without his participation was now rendered enforceable. It is, therefore, now too late for the respondent to be heard to say anything to the contrary the more so that he must have acted with the knowledge that the portion of the land occupied by the appellant was comprised of the undivided half share of his deceased co-tenant as well as his own undivided half share. The learned trial judge failed to give consideration to this aspect of the case and in so doing he fell into error when he concluded that there was no valid contract.

It was contended by the respondent that even if a valid contract existed the claim by the appellant was statute-barred in that the cause of action arose six years prior to the date of the action. The validity of this submission depends on the date of the adoption of the contract by the other tenant in common. The writ was filed on the 11th day of April 1988. It was not until after 1987 that John Thompson manifested his intention not to complete the contract. We are, therefore, of the view that the cause of action did not properly arise until then. The submission that the cause of action was statute-barred therefore fails.

The question arises, is the appellant entitled to Specific Performance? The respondent contends that the appellant is not entitled to Specific Performance because he has been guilty of laches. This submission is premised on the basis that since no date was stipulated for the completion of the contract the Court will imply a reasonable time for the completion of the contract. In such circumstances, the respondent contends, time begins to run from the expiration of reasonable time.

Where a party to a contract has done all that he is obliged to do under a contract the question of reasonable time is, in my

view, not relevant. In the instant case the appellant has paid all of the purchase price save and except £400 which would be paid to the mortgagee, upon the obtaining of a registered title, to liquidate an outstanding mortgage on the said land. This was an oral agreement arrived at between the appellant and Hubert Leston Thompson. It would be most unreasonable for a Court to deny the party the equitable remedy of Specific Performance where the party has faithfully performed the conditions of the contract. There is absolutely no act that the appellant could have done to expedite the performance of the contract. The respondent, having adopted the contract, the ball was in his court to effect the completion of the contract. This he refused to do. In such circumstances the appellant is entitled to Specific Performance.

In Parker v. Taswell 2 DE G & J 559 at 571 Lord Chelmsford L.C. said:

"It must be borne in mind that this agreement has been partly executed by possession having been taken under it, and there are many authorities to show that in such a case the Court will strain its power to enforce a complete performance."

I am of the view that these words are most appropriate in the circumstances of the instant case.

The respondent, a co-tenant, was not unaware of the appellant entering into possession of lands of which he was a tenant in common. He raised no objections at any time, certainly not during the lifetime of his deceased father Hubert Leston Thompson, the other tenant in common. Upon the death of his father he endorses the contract made between his father and the appellant by endeavouring to obtain a registered title on behalf of the appellant in keeping with the terms of the contract entered into between the appellant and Hubert Leston Thompson. It is only upon the advice of his sister that he decided not to complete the contract. This Court feels obliged to give effect to the dictum of Lord Chelmsford (supra).

For the reasons adumbrated herein I would allow the appeal and order that the Judgment of the Court below be set aside and decree specific performance of the contract with costs here and below to the appellant to be taxed if not agreed.

WRIGHT, J.A.:

I agree.

PATTERSON, J.A. (Ag.):

I agree.

- Cases referred to in the opinion*
- ① Hannock v. Rye (1878) 12 Q.B. 100
 - ② Barnes v. Woodward (1950) A.C. 241
 - ③ McLachlan v. Buller 10 Ves. 241
 - ④ Parker v. Taswell 2 D. & W. 241