IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 86 of 1969

BETWEEN	RUBY RALL-MORGAN	PLAINTIFF
AND	PATRICK WILKINSON CHUNG	DEFENDANTS
AND	PATRICK CITY LIMITED	

K. C. Burke, Dr. Adolph Edwards and Mrs. Margaret Macaulay for plaintiffs.

Peter Millingen for defendants.

HEARD: April 18, 19, 1977
June 6, 1978

J U D G M E N T

White, J. :

This action is yet another episode in the saga of land deals initiated by the defendants who are real estate developers. I am told that this is the last of the cases which has arisen out of the development of what is now known as Patrick City, which development was undertaken by the first defendant in or about the year 1956 - 1957. At that time he was the registered owner of some 250 acres of land under Certificate of Title, Volume 865 Folio 86 in the Register Book of Titles. Sub-division plans were submitted to the Kingston and Saint Andrew Corporation for their approval, which was granted on December 7, 1958, subject to certain requirements and conditions being met.

In the meantime, however, by an agreement in writing dated May 14, 1958, made between the first defendant and one Inez Geraldine Waldron (Exhibit 1), it was agreed that one of the said lots - Lot 738 - of the abovementioned Patrick City subdivision would be conveyed to her. The purchase moneys were to be paid to the first defendant, who subsequently, on or about March 1, 1960, transferred to the second defendant all his interest and estate in the said subdivision subject to such contracts of sale of the several lots thereof as he had already made, with the rights to receive in respect

of such lots as he had already sold the outstanding balances of purchase money thereon. Notice of this assignment was given to the purchasers of such lands.

The first and/or second defendants or both of them transferred the aforesaid lands under instrument in writing dated January 1, 1962, to Farmers and Merchants Trust Company Limited. By this assignment all the rights of the defendants under the aforesaid contracts of sale, and the outstanding balances of the purchase price due on the said lots were transferred to the Farmers and Merchants Trust Company Limited. This assignment was, however, subject to the rights of the purchasers thereof in law and/or equity. Notice of this assignment was given to the purchasers of such lots.

The plaintiff acquired Lot 738 from Inez Geraldine Waldron by virtue of an instrument in writing, dated the 7th May, 1965 (Exhibit 4). By the terms of this assignment for valuable consideration viz, £271.0.0 (which was the amount paid to date on account of purchase money), the said Inez Geraldine Waldron transferred to the plaintiff all the interest legal and/or equitable derived from the original purchaser's contract with the first defendant. That the Farmers and Merchants Trust Company Limited had knowledge of the plaintiff's rights and interest in Lot 738 is shown by her evidence that Exhibit 4, evidencing the transfer was typed and signed in their office. It was alleged and not denied that a note was accordingly made on the records of the company.

It was further alleged that subsequent to this, and sometime between February 1968, and August 1968, the first and second defendants transferred their interest and estate in the Patrick City Subdivision to Prestige Homes Limited by transfer No. 234452, which was registered in the Register Book of Titles on 10th February, 1968 (see Exhibit 2).

The common vicissitudes of purchasers under this scheme were given sharp relief by a letter dated 11th April, 1967, from Farmers and Merchants Trust Company Limited to Mrs. Rall-Morgan. I quote the letter (Exhibit 5):

" Dear Madam,

Re: Lot 738 - Patrick City
Sub-Sale from Inez G. Waldron to yourself

We regret to inform you that we are unable to accept any further payment from you in respect of the purchase of the above lot based on the judgment of Mr. Justice Smith of February 6, 1967, in the Suit of Farmers and Merchants Trust Co. Ltd. vs. Patrick City Limited and Patrick W. Chung.

It is suggested that you contact Clinton Hart & Company, 58 Duke Street, solicitors for Patrick City Limited who should be in a position to advise you further on the matter. The balance shown on your account is £203.

Yours very truly,
FARMERS & MERCHANTS TRUST COMPANY LIMITED

I. B. RUSSELL. "

I quote a letter dated November 24, 1967 (Exhibit 6) which was sent by the second defendant to Mrs. Inez Waldron:

" Dear Madam,

Re: Lot 738
Patrick City, Saint Andrew

As a result of the Judgment of the Supreme Court of Judicature of Jamaica in the Action brought by Farmers and Merchants Trust Company Limited against us, the Memorandum of Sale in relation to the above lot has been found to be illegal and null and void.

We feel morally that all amounts paid on account of purchase money by you and any other person who signed agreements with us, should be repaid in full, although this Judgment creates no legal obligation on us so to do.

We have accordingly concluded arrangements which would enable us to borrow the necessary funds to repay all such persons who wish to accept same.

From our books it would appear that you have paid £230.0.0 towards purchase money, and if you will bring in this letter to us at the above address, we will be happy to hand you cheque for this amount. We emphasize that this is an ex gratia proposal.

The financial agreements which we have made to permit this, do not enable us to keep this offer open indefinitely, and so we must ask that you present this letter to us not later than Friday 23rd February 1968, as we cannot pay any amounts not claimed by that date.

Yours faithfully,
PATRICK CITY LIMITED

PER: "

I have no evidence that any moneys referred to in these letters were repaid to the plaintiff.

The decision in Farmers and Merchants Trust Company Limited vs. Chung et al. See /1970/ 15 W I R. 366 was overridden when

the Legislature in August 1968 amended the then Local Improvements Law by sec. 3(2) of the Local Improvements (Amendment) Act 1968 (the governing legislation is now s.13 of the Local Improvements Act), with retrospective effect to the 1st day of January, 1954, with the result that the original contracts were legalised notwithstanding failure by the subdivider to comply with other provisions in that law requiring local authority approval. Therefore, the rights of the plaintiff which had accrued since January 1, 1954, were protected. She therefore brought this action by which she claims:

1. Specific performance of the agreement for the sale of land aforementioned.
2. Damages in lieu of or in addition to specific performance.
3. Further or other relief.
4. Costs.
5. Damages for breach of contract.
6. Alternatively or in addition thereto, the statutory relief indicated in section 3 of the Local Improvements (Amendment) Act, 1968 (Law 26 of 1968)

I have set out those basic facts, preliminary to recording that at the hearing, Mr. Millingen, attorney for the defendants, stated that he was prepared to consent that judgment be entered for the plaintiff. He conceded all the facts at issue including the value of the land, $3,600, as stated in the statement of claim. This ~~concession~~ concession would leave for decision whether damages should be assessed as at the date of breach, viz, 10th February, 1968, or at the date of assessment, viz, 18th April, 1977. The plaintiff submitted that the latter was the material point of time; the defendants contended that the date of breach is the relevant point of time.

The defendants did not call any witness to contradict the evidence of the valuation given by Kenneth Artels Allison, a chartered surveyor of the firm Allison, Pitter & Company, Chartered

Surveyors. He is an associate of the Royal Institute of Chartered Surveyors. He said that on instructions he did a valuation of freehold Lot 738, in the Patrick City Subdivision, an area which he has known from 1958. This valuation was done on three separate days.

As a result of his inspection he discovered that the original Lot 738, which was 9,204 square feet in area, is now part of Lots 739, 739A, 740C. The present Lot 738 has nothing to do in its entire boundry with the old lot, which I was informed, in the name of Patrick City Limited, was registered at Volume 1000, Folio 32 in the Register Book of Titles. I complete the description of the original Lot 738, by repeating Mr. Allison's evidence that it is located on Mayfield Avenue and adjoins on the north, land registered at Volume 865 Folio 36; on the south, Mayfield Avenue, on the east, Lot 737, and on the west by Lot 739. Mr. Allison said that several factors assisted his valuation of the land; the location of the land, the size of the lot, the lay of the land, availability of services such as roads, water, electricity, fire protection, garbage disposal and public transport. There was also taken into account the supply and demand for lots in which was involved the question of past transactions.

With these factors operating, Mr. Allison stated that the market value of the original Lot 738, on 10th February, 1968, was $3,600.00, a figure with which Mrs. Rall-Morgan, the plaintiff, agreed, and which was the valuation before Prestige Homes Limited built houses thereon sometime in the period 1967 - 1968. The value of the original Lot 738, on the 14th July, 1969, was given by Mr. Allison as $4,600.00. His valuation of that Lot at the date of assessment was $11,000.00. All valuations given by him were of a vacant site.

During the discussion of what in the circumstances of this case should be the proper measure of damages for breach of contract for sale of land, the following authorities were brought to my attention: Russell v. Chung - Suits No. E. 55 of 1969; E. 61 of 1969; E. 91 of 1969, which were consolidated for the

> " contract has occurred, and so before any action lies for common law damages; and on the other hand the right to decree may continue long after the breach has occurred. "

Mr. Millingen's forte, nevertheless, was to assert that the transfer to Prestige Homes Limited on December 1, 1967, and which was registered in the Register Book of Titles on February 10, 1968, effectively prevented the plaintiff from any relief by way of specific performance. He said his stand was strengthened by a remark of Zacca, J., in Russell v. Chung at p. 15. The dictum reads:

> " In order to give effect to the intention of the legislature, I hold that a proper construction of the amending legislation would be that it shall operate so as to give effect to all contracts entered since 1st January, 1954, which was illegal prior to the passing of the amending legislation. In other words, the transfer of lots 107, 23 and 68 to the third defendant cannot be nullified or affected in any way, but the original contracts relating to Lots 107, 23 and 68 are nevertheless validated and are to be given effect. The plaintiff therefore, would be unable to get specific performance of the original contract but would be entitled to damages. "

In his dependence on the words underlined by me, Mr. Millingen was led to submit that the plaintiff could not get specific performance, and consequently, was not entitled to damages in substitution for specific performance. He submitted further that those words show a crucial difference between that case and the cases of Wroth v. Tyler; Grant v. Dawkins and Horsler v. Zorro, relied on by the plaintiff. He submitted that in the first two of those cases, the court held that the plaintiff was entitled to specific performance at the time of the hearing. In Wroth v. Tyler, the husband had the title to the house so that an order could have been made against him to convey the land. Similarly, in Grant v. Dawkins, the defendant had the title, but it was subject to a mortgage. It should be noted, contrastingly, that in Horsler v. Zorro, the plaintiffs had abandoned their claim for specific performance. Megarry, J., therefore held that the plaintiffs were not entitled to damages in lieu of specific performance. Nor were they entitled to other than nominal damages, for breach of contract, considering that they had elected to rescind the contract. Interestingly enough, Megarry, J., held

that in the circumstances of that case the damages to which the plaintiffs were entitled were such sums as would restore them to the position in which they would have been had the contract never been made.

The issue which was really dealt with in Russell v. Chung and which must not be overlooked, was, to quote Zacca, J., at pp 4-5:

> " At the outset of the trial counsel for the plaintiff informed the court that the plaintiffs were withdrawing all claims against Prestige Homes Ltd., the third defendant. The plaintiff also withdrew claims against the first and second defendants as set out in paragraph A(1) (2) (3) in relief claimed in the statement of claim. The plaintiff was therefore claiming in these actions as against the first and second defendants as stated in the statement of claim under paragraphs
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> (2) Alternatively, or in addition thereto, the statutory relief indicated in section 3 of the Local Improvements (Amendment) Act 1968 (Law 36 of 1968).
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> The arguments, thereafter for the plaintiff were that the contracts having been validated by the abovementioned amending legislation, the plaintiffs were therefore entitled to recover damages for breach of contract in respect of those contracts. "

A look at the statement of claim in that case shows that what in fact was abandoned were claims for (1) specific performance, (2) damages in lieu of or in addition to specific performance, (3) further or other relief. It is clear therefore that the judgment in Russell v. Chung did not have to deal with the problem with which I am now concerned.

Of course, Russell v. Chung was decided before the Wroth v. Tyler line of cases, in which damages were awarded in the jurisdiction conferred by the Chancery Amendment Act 1858, s. 2 (popularly known as Lord Cairns' Act). This jurisdiction allows the court to order specific performance together with an award of damages, or to award damages in substitution for the decree of specific performance.

When Lord Cairns' Act damages are awarded in substitution for specific performance "the court has jurisdiction to award such damages as will put the plaintiffs into as good a position as if the contract had been performed, even if to do so means awarding damages assessed by reference to a period subsequent to the date of the breach", per Megarry, J., in Wroth v. Tyler at p. 921.

Megarry, J., summarised the relevant issues which he had to decide in the following words: [1973] All E.R. at pp. 905 h - 906 a:

> " (4) If the plaintiffs have no right to specific performance, then it is common ground that they are entitled to damages. There is, however, an acute conflict as to the measure of damages. The primary contention of the defendants is that the damages are limited by the rule in Bain v. Fothergill (1874) L.R. H.L. 158; (1874 - 80) All E.R. Rep. 83 so that the defendant need only release the deposit to the plaintiffs and pay their costs of investigating title, and is not liable to them for more than nominal damages for loss of their bargain. Is this contention sound? If Bain v. Fothergill does not apply, then the defendant accepts that damages for loss of the bargain are payable; but there is a dispute as to the computation of those damages. The defendant says that the damages must be assessed as at the date of the breach, in accordance with the normal rule; the plaintiffs say that this is a case where damages must be assessed as at the date of assessment, that is, today, if I assess the damages. "

At page 918 letter g, he continued:

> " If Bain v. Fothergill does not apply, what is the measure of damage? It was common ground that the normal rule is that the general damages to which a purchaser is entitled for breach of a contract for the sale of land are basically measured by the difference between the contract price and the market price of the land at the date of the breach, normally the date fixed for completion. On the facts of this case, the damages under this rule would be of the order of £1,500. The real issue was whether that rule applies to this case, or whether some other rule applies.
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> Now, the principle that has long been accepted is that stated by Parke B., in Robinson v. Harman (1848), 1 Exch. 850; [1843 - 60] All E.R. Rep. in which incidentally the rule in Flureau v. Thornhill (1848) 1 Exch. at p. 855, [1843 - 60] All E.R. Rep. at p. 385 was considered. Parke, B., said:
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> ' The rule of the common law is that, where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. ' "

The learned judge expressed the view that on the facts, the rule of assessing damages at the date of breach would "seem to defeat the general principle rather than carry it out."

On p. 919, a - d, his full argument appears:

> " In the present case, if the contract had been performed, the plaintiffs would at the date fixed for completion have had the house then worth £7,500, in return for the contractual price of £6,000. If in lieu of the house they had been paid £1,500 damages, at that date they could, with the addition of the £6,000 which they commanded, have forthwith bought an equivalent house. I am satisfied on the evidence that the plaintiffs had no financial resources of any substance beyond the £6,000 that they could have put together for the

> " purchase of the defendant's bungalow, and that the defendant knew this when the contract was made. The plaintiffs were therefore to the defendant's knowledge, unable at the time of the breach to raise a further £1,500 in order to purchase an equivalent house forthwith, and so, as events have turned out mitigate their loss. Today to purchase an equivalent house they need £5,500 in addition to their £6,000. How then it may be asked, would the award today of £1,500 damages place them in the same situation as if the contract had been performed? The result that would have been produced by paying £1,500 damages at the date of breach can today be produced only by paying £5,000 with in each case the return of £1,500. "

It is noticeable that the learned judge adumbrated whether such an award could be made at common law. Without deciding the matter, he made these further observations:

> " It may be that it could. The rule requiring damages to be ascertained as at date of breach does not seem to be inflexible, and in any case the rule may be one which though normally carrying out the principles does on occasion fail to do so; and on those occasions the rule may be modified so as to accord with the principle. "

It will be readily recognised that these are obiter dicta particularly as in the view of the learned judge he did not have to explore that, for it seemed to him

> " that this case, in which there is a proper claim for specific performance, falls within the Chancery Amendment Act 1858 (better known as Lord Cairns' Act) and that damages assessed under that Act are to be ascertained in accordance with that Act on a basis which is not identical with that of the common law. "

Megarry, J., referred to these views in Horsler v. Zorro again without deciding the question. For completeness the remarks of Goffe, J., in Grant v. Dawkins [1973] 3 All E.R. at p. 900e -g should be quoted. This was a case in which damages in addition to specific performance were claimed. It was recognised that the plaintiff could only recover damages, if at all, to the extent that the value of the property exceeded the purchase price and the question was considered in the light of the provisions of the Lord Cairns' Act. Goffe, J., commented:

> " It seems to me clear that by virtue of (Lord Cairns) Act whatever the position was before it was passed, the court can, where appropriate grant damages and can accordingly, - and should - grant the plaintiff damages if the first defendant fails to pay off the mortgages, but the question then arises, on what principle should those damages be assessed? The common law rule generally speaking, though there may be exceptions, is that damages are assessed at the date of the breach, i.e. when the contract ought to have been performed, but it is clear from the decision of Megarry J in Wroth v. Tyler that

rendered the original contracts illegal. At the same time, ignoring this pronounced illegality the defendants sold the said lands to a third party before the situation was remedied by legislation! In deciding on the question of entitlement, I quote the remarks in Cudder v. Rutter (1720) 5 Vin. Abr. 538, pl. 21(a) White & Tudor cases in Equity, Vol. 2, 368 at p. 371. This was a case in which the court refused a decree of specific performance of an agreement of transfer South Sea Stock, Parker C., refused the decree on the view that "..... it appears that the defendant had not the stock when the contract was made, and this court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, the court would not decree a specific performance of the agreement."

Applying these comments to the present case, I find that the plaintiff was at the date of hearing entitled to specific performance. At the same time the decree for performance in specie has always been governed by discretionary considerations. To this extent, therefore, I accept the submissions by Mr. Millingen that the plaintiff in this case cannot get specific performance because the land had already been sold to a third party, which had registered its title by transfer. The fact of the matter is that as the cases of Ferguson v. Wilson (1866) L.R. 2 Ch. 77 and Seawell v. Webster (1859) 28 L.R. Ch. 21 show , specific performance will not be decreed if it is impossible for the defendant to comply with the order of the court, whether or not the impossibility arises from the defendants' acts. One of the factors in this case which occasioned me some thought was the import of the statement by Mr. Millingen when he informed the court, during Mrs. Macaulay's opening of the case for the plaintiff, that the defendants are prepared to admit all the facts in issue including the value of the land as stated in the statement of claim. I have decided that without more I could not accept this as an admission of the allegations contained in paragraohs 18 and 19 of the statement of claim. These allegations

are that consequent on the announcement in February 1968, by the then Prime Minister of Jamaica that the Government of Jamaica proposed to enact legislation amending the Local Improvements Law, the defendants in breach of the acknowledged and recognised rights of the plaintiff under the contract of sale sold the lands in question to Prestige Homes Limited. This, it was alleged, was done in fraud of the plaintiff. No submission was made to me directly on this, but the general submissions on behalf of the plaintiff were that she had been deprived of the land; the land had been confiscated from her and that Prestige Homes Limited had been benefiting from the defendants' wrongful action since February 10, 1968. The court has no evidence upon which it can definitively base such a finding. In addition, this is not a case where the defendant has by his wrongful act after the commencement of proceedings, rendered specific performance impossible. This comment relates to the submission that in considering how to measure damages, the court should take into account the delay in the matter coming to trial, occasioned by the defendants' successful application on summons for directions that the further proceedings should be stayed pending the outcome of Russell v. Chung. This would have no bearing on the assessment of damages occurring as it did after the filing of the statement of claim.

In this case the claim is for specific performance and for damages in substitution therefor. Such a claim envisages equitable damages which are granted in discretion of the court. Wroth v. Tyler illustrates one way in which the court will grant equitable damages. That is on the basis of damages being a "true substitute", for damages awarded were measured by reference to ~~the price~~ the price of land at the date of judgment rather than at the date of breach. The discretion of the court was exercised so as to allow it to depart from common law principles as to the measure of damages.

But I must point out that as far as the law in Jamaica is concerned Lord Cairns' Act has never been enacted into the statute law of Jamaica, nor is there any similar legislation on the Statute Book. The question naturally arises therefore, whether this court can grant damages in lieu of or in substitution for

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specific performance, and to the same extent as is permissible under the principles enumerated by the decision in Wroth v. Tyler. A valuable starting point must be the judgments in Gloucester House Ltd. v. Peskin /1961/ 3 W.I.R. 375. In that case the Federal Supreme Court /Hallinan, C.J., Lewis and Marnan, JJ./ enquired into the jurisdiction of the Supreme Court of Jamaica to grant specific performance for delay in completing a contract for the sale of a hotel, and damages in addition thereto. All the judges affirmed this jurisdiction, and there was a discussion of the law respecting decrees of specific performance and the award of damages before Lord Cairns' Act was passed in 1858.

Intrestingly, Hallinan, C.J., at p. 382 G - I, discussed the line of cases cited to the court where damages were, before 1858, given in lieu of specific performance and thus are/~~re~~ not relief supplemental to specific ~~performance;~~ performance, but are given for non-performance of the contract, that is to say, for the loss of the bargain. He said:

> " Of course, if the breach of contract is due to the inability of the vendor to make a good title, then the purchaser, according to the rule in Bain v. Fothergill (1874) L.R. 7 H.L. Cas. 158 can only recover his expenses in investigating title; but if the breach is for other causes, then the plaintiff is entitled, if he is not given specific performance, to full compensation for the loss of his bargain. For sometime after Denton v. Stewart (1786) 1 Cox Eq. Case 258; 29 E.R. 1156 courts of equity gave damages in this sense where they refused specific performance but after Todd v. Gee (1810) 17 Ves. 273, 34 E.R. 106, L.C. this practice was discontinued. Lord Eldon said:
> ' except in very special cases, it is not the course of proceeding in Equity to file a Bill for specific performance of an agreement praying in the alternative, if it cannot be performed, an issue, or an inquiry before the Master, with a view to damages. The plaintiff must take that remedy if he chooses it, at law; generally, he cannot have it in equity.'
> Damages of the kind to which Lord Eldon refers are, of course, an alternative remedy to specific performance, a plaintiff who gets one cannot get the other. "

At p. 387 G Lewis, J. set out the position as follows:

In the result, a court of Equity can now grant damages whenever the circumstances would have been appropriate for the grant of damages at common law. Accordingly, a plaintiff in the type of case before me is enabled by the Judicature Act provisions to submit to the court that if for any reason the Court does not award specific performance, then the court should award damages: see Elmore v. Pirrie (1887 - 88) 57 L.T. 335. And unless there are special circumstances dictating otherwise, it is not possible for the Supreme Court of Jamaica to deviate from the common law principles of the measure of damages. The passages quoted above from the Gloucester House case show that the assessment of damages was in most cases, according to common law principles. By those common law principles damages for the breach of contract for the sale of land, that is, loss of bargain, are assessed as at the date of breach. The measure of damages at that date being the difference between the contract price and the market price at the date of breach: Engell v. Fitch (1867) L.R. 4 Q.B. 659. This oft applied principle is in my view, the measure which is applicable to the instant case. The claim for equitable relief has not been made any stronger by the submissions made to me on behalf of the plaintiff, and though I have cogitated whether in the inherent jurisdiction of the court, equitable damages are available to the plaintiff, I am satisfied that this is not one of those cases in which such an award could be made (see generally ~~Spry~~ Spry, "Equitable Remedies", Ch. 5 - The Award of Damages in Equity"). In any event, it is true to say that "although the identity between the amounts of legal and equitable damages is by no means always to be found; the measure of damages in equity is generally the same as the measure of damages at common law." This was recognised by Megarry, J. in Wroth v. Tyler when he reminded that "a court with equitable jurisdiction will remember that equity follows the law, and will in general apply common law rules for the assessment of damages."

So not following the rationale of Wroth v. Tyler because of the absence from Jamaica law of the appropriate statutory basis for his decision, I made my assessment of damages as at the date of

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breach, that is, February 10, 1968. I have for a long time considered this matter from all the possible angles particularly that of making the damages equivalent to the present value of the land. But after a deep and prolonged study of this matter, I deeply regret that it is not open to this court to depart from established principles.

Applying the principles of Engell v. Fitch I cannot agree with the submissions made on behalf of the plaintiff that the damages should be assessed at $3,600, this amount being the value of the land as at the date of breach, February 10, 1968. The evidence is that the contract price was £550, which would be equivalent to $1,100. Therefore, the damages are assessed at $2,500. I order that interest at the rate of 10 per cent per annum be paid on this amount from February 10, 1968, to the date of assessment, June 6, 1978. This would make a round figure of J$2,250 interest for the intervening nine years. I also order the return of all moneys paid by the plaintiff on account of purchase price, which the evidence discloses was £347, equivalent to J$694. It is not unreasonable to assume that during the intervening years the defendants have had the benefit of this amount, and I therefore award interest on this amount at the rate of 10 per cent per annum from April 11, 1967, the date of the letter, Exhibit 5, up to the date of assessment. In round figures for 11 years the calculation of this interest amounts to $763.40. The total amount of this assessment on this claim by the plaintiff is, therefore, $6,207.40.

So that there will be judgment for the plaintiff for $6,207.40 and costs to be agreed or taxed.

Finally, I should state that provisions of s. 13(2) of the Local Improvements Act do not apply to this case seeing that the plaintiff has always maintained the continued existence of the contract and that she has always been ready and willing to perform her obligations under the contract up to and including the time of hearing.

R. O. C. White
Puisne Judge

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that in the circumstances of that case the damages to which the plaintiffs were entitled were such sums as would restore them to the position in which they would have been had the contract never been made.

The issue which was really dealt with in Russell v. Chung and which must not be overlooked, was, to quote Zacca, J., at pp 4-5:

> " At the outset of the trial counsel for the plaintiff informed the court that the plaintiffs were withdrawing all claims against Prestige Homes Ltd., the third defendant. The plaintiff also withdrew claims against the first and second defendants as set out in paragraph A(1) (2) (3) in relief claimed in the statement of claim. The plaintiff was therefore claiming in these actions as against the first and second defendants as stated in the statement of claim under paragraphs
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> The arguments, thereafter for the plaintiff were that the contracts having been validated by the abovementioned amending legislation, the plaintiffs were therefore entitled to recover damages for breach of contract in respect of those contracts. "

A look at the statement of claim in that case shows that what in fact was abandoned were claims for (1) specific performance, (2) damages in lieu of or in addition to specific performance, (3) further or other relief. It is clear therefore that the judgment in Russell v. Chung did not have to deal with the problem with which I am now concerned.

Of course, Russell v. Chung was decided before the Wroth v. Tyler line of cases, in which damages were awarded in the jurisdiction conferred by the Chancery Amendment Act 1858, s. 2 (popularly known as Lord Cairns' Act). This jurisdiction allows the court to order specific performance together with an award of damages, or to award damages in substitution for the decree of specific performance.

When Lord Cairns' Act damages are awarded in substitution for specific performance "the court has jurisdiction to award such damages as will put the plaintiffs into as good a position as if the contract had been performed, even if to do so means awarding damages assessed by reference to a period subsequent to the date of the breach", per Megarry, J., in Wroth v. Tyler at p. 921.

> " where specific performance is a proper remedy but is refused on equitable principles damages being granted instead, the court is not limited by the common law rule and may grant damages so assessed as to put the parties in the same position they would have been if the contract had been duly performed, which damages on the common law basis may fail to do because of the appreciation in the value of the property. "

I have repeated the quotations extensively from the cases cited to me, because it is absolutely necessary to clearly understand that in each case the decision in the final analysis rested upon a statutory jurisdiction in so far as the courts of England have interpreted the relevant words of the statute. As presented to the court those quotations would, without more, encourage a deceptively simple solution. When he brought those quotations to the attention of the court, Mr. Burke argued that there were several factors in the case before me which should move the court to properly assess damages at the date of assessment; and thus indubitably bring the case within the reasoning on which Wroth v. Tyler is based. It was argued that the plaintiff should be put in the same position as she would have been if the land had not been confiscated from her. In the reuslt, the argument ran, by assessing damages at $11,000 the court would have dealt fairly with the parties.

It seems to me that I have to decide firstly, whether on general equitable principles the plaintiff would be entitled to specific performance, and if so whether the court in all the circumstances of the case would grant specific performance. I have already stated the attitude of the court towards a contract for the sale of land in the doctrine of specific performance. I have in mind the fact that the plaintiff had competently entered into a contract for the sale of land by the defendants, who were the owners of the land at the time of the contract for sale and the subsequent assignment thereof to her. She was at all times ready and willing to perform her side of the bargain, but was not able to discharge her obligations under the contract, because the defendants took advantage of a decision of the court which

> " The proposition that until Lord Cairns' Act damages as such could be obtained only in a Court of common law, is well established, The foundation of the jurisdiction to grant specific performance of a contract being that an award of damages which the suitor could obtain at common law was inadequate, equity, if it refused specific performance because it considered damages adequate or for any other reason, left the suitor to his remedy at common law. "

Later in his judgment, p. 390 I, after quoting from Lord Summer's judgment, in Leeds & Industrial Co-operative Society Ltd. v. Slack /1924/ A.C. at p. 366, Lewis, J., expressed the opinion that:

> " Lord Cairns' Act was in this respect merely procedural and authorised the Court of Chancery to give damages as a remedy in cases where formerly it would have been necessary for that Court to turn the plaintiff over to law, e.g., where it dismissed his bill without prejudice to his action at law (substitution), or where it would have given him leave to go to law to have his damages assessed (addition); "

~~This~~ These commentaries on the position of Equity pre 1858, were a prelude to a discussion of the present position of the Supreme Court of Jamaica since the enactment of the Judicature (Supreme Court) Act s. 48(g), then the Judicature Supreme Court Law, Cap. 180(J). I quote the section:

> "48. With respect to the concurrent administration of law and equity in civil causes and matters in the Supreme Court the following provisions shall apply -
>
> (g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided. "

Incidentally, the provision is virtually a reproduction of the English Judicature Act 1873, s. 24(7), and its effect has been stated to be that:

> " ... there are no longer separate Courts of Chancery and common law, but one Court with power to administer both law and equity, and every remedy necessary for doing complete justice in an action whether at law or in equity is provided by s. 48(7); see Serrao v. Noel (1885) 15 Q.B.D. at p. 529 per Bagally LJ. "
>
> Per Lewis, J., in Gloucester House Ltd. v. Peskin at pp. 391I - 392A.