

**Universal Leasing and Finance Limited**

*Appellant*

v.

**Montego Vacations Limited**

*Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 24th January 2002

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*Present at the hearing:-*

Lord Hope of Craighead  
Lord Browne-Wilkinson  
Lord Nolan  
Lord Scott of Foscote  
Sir Christopher Slade

*[Delivered by Lord Scott of Foscote]*

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1. This is an appeal from the Court of Appeal of Jamaica. The litigation arises out of a sloppily drafted contract for the sale of property in the parish of St. James. The contract was dated 18 February 1982. The vendor was Montego Vacations Ltd. ("Montego"), the respondent before the Board, and the contract was signed on Montego's behalf by a Mr Edgar Watson and a Mr James Shroff. They were expressed to sign as directors of Montego. The purchaser was Universal Leasing and Finance Ltd. ("Universal"), the appellant. A Mr Finzi signed the contract on behalf of Universal.

2. The property to be sold consisted of a hotel and its curtilage. Items of furniture, fixtures and equipment specified in an inventory were included in the sale. The contract price was

Jamaican \$1,400,000. The contractual provisions as to payment were expressed as follows:

“O

n the signing hereof the Purchasers shall pay a deposit on account of the purchase price of ONE HUNDRED AND FORTY THOUSAND DOLLARS currency of Jamaica to the Attorneys-at-Law having the carriage of sale hereinafter named. Within fourteen days of the date hereof the Purchasers shall pay to the said Attorneys a further amount of FOURTEEN THOUSAND DOLLARS currency of Jamaica on account of the purchase price. The balance of purchase price together with the Purchasers' share of costs hereinafter defined shall be paid not later than twelve months from the date upon which the Vendors certify in writing to the Purchasers that they are in a position to deliver to the Purchasers vacant possession of the property sold.

To be apportioned as at the date of possession.”

3. The contract makes clear that the purpose of the sale was that the purchaser, Universal, would take over and run the hotel as a going concern and that the parties contemplated an early completion. The following four paragraphs are relevant:

- “3. The Purchasers agree to pay half of the cost of refurbishing the building situate on the property sold subject to a maximum liability on the part of the Vendors of One Hundred and Twenty-Five Thousand Dollars currency of Jamaica.
4. As at the date hereof the Vendors shall dismiss all and every member of staff employed by it at the property sold and the Vendors shall be responsible for all termination and redundancy payments due to such staff as a result of such dismissal.
5. The Purchasers shall be responsible for insurance on the property sold as from the date hereof.
6. All reference herein as to time shall be of the essence of the Contract.”

4. Unfortunately the contract omitted to specify a completion date save, inferentially, by reference to the date on which the

vendors certified that they were in a position to give vacant possession.

5. The parties' contemplation of an early completion was, as events showed, not realised and by writ dated 17 October 1985 Universal commenced an action for specific performance. The Statement of Claim dated 17 October 1985, as amended, pleaded the contract, the contractual provisions regarding payment of the purchase price and that the sums of \$140,000 and \$14,000 had been duly paid.

6. Paragraph 8 of the amended Statement of Claim pleaded as follows:

"8. By letter dated September 15, 1984 the Defendant certified to the Plaintiff that it was in a position to deliver vacant possession of the said premises to the Plaintiff as of October 1, 1984 and in effect fixed the completion date for the said Agreement at no later than October 1, 1985."

The letter of 15 September 1984 referred to in paragraph 8 was a letter to Mr Finzi from the same Mr Watson who had signed the Agreement purportedly on Montego's behalf.

7. The amended Statement of Claim went on to plead that the plaintiff had been at all material times ready, willing and able to complete and that the defendant was refusing or failing to complete. Specific performance and damages were sought.

8. At some point a Mr Ralph Mairs was added as a second defendant to the action. Mr Mairs was a shareholder (it may be he was the controlling shareholder) and director of Montego. It seems he was personally living at the hotel and was refusing to vacate it.

9. Montego's amended defence and counterclaim dated 1 December 1986, put forward a number of specific defences -

- (i) it denied it had entered into any agreement with Universal for sale of the hotel (see paras. 3 and 4A);
- (ii) it pleaded that Watson and Shroff had no authority from Montego to enter into any such contract for sale (paras. 4-6, 7 and 8);
- (iii) it pleaded that if there was a contract of sale, the written agreement of 18 February 1982 did not accurately record what

had been agreed in that the purchase price was agreed to be US\$800,000 to be converted to Jamaican currency at the exchange rate prevailing on the date of completion (para. 4B).

10. These specific defences were followed by a general traverse –

“9. Save as is hereinbefore expressly admitted, the First Defendant denies each and every allegation contained in the Statement of Claim as if same [were] herein set out and traversed seriatim.”

The allegation in paragraph 8 of the amended Statement of Claim was not specifically pleaded to.

11. Montego’s counterclaim sought rectification of the contractual provisions regarding the price so as to comply with the terms pleaded in paragraph 4B of the defence, and sought an order for specific performance of the contract as rectified. It was implicit in this specific performance prayer that the contractual date for completion had either arrived or could be fixed by the court.

12. The allegations of lack of authority on the part of the individuals who had purported to sign the contract on behalf of Montego led Universal to commence a second action naming them, and others, as defendants and claiming damages for breach of warranty of authority. The two actions were later consolidated and tried together.

13. The defence in the second action of Mr Watson, one of the two signatories of the contract on behalf of Montego, is relevant to the issues argued before the Board. As well as disputing the alleged want of authority and making various other points, Mr Watson pleaded as follows:

“12. ... that the aforementioned Ralph Mairs refused to vacate the said property notwithstanding his agreement on or about the 15th day of September, 1984 to vacate the said premises by the 1st day of October, 1984 and that consequently, the said contract of sale could not be completed.”

14. The two actions came on for trial before Chester Orr J on 18 February 1992. Various procedural applications were made by counsel on behalf of the defendants in the second action and Universal’s case was opened by Mr Miller. The judge’s notes

show that Mr Miller made an express reference in opening to paragraph 8 of the amended Statement of Claim. The note reads "Para. 8. Defendant fixed completion date 1/10/85". This is a clear reference to the effect of the letter of 15 September 1984 that had been pleaded in paragraph 8. The existence and effect of this letter had never been denied, save to the extent that Montego's general traverse might constitute such a denial. Their Lordships were told that the rules of discovery applicable in Jamaica are much the same as they are, or were prior to the Civil Procedure Rules, in this country. It is a legitimate inference therefore, that the letter of 15 September 1984, or a copy of it, would have been listed at least in Montego's and in Mr Watson's respective lists of documents.

15. The hearing continued until 20 February 1992 when, part heard, it was adjourned to a date to be fixed. On 22 June 1992 the actions were, on the plaintiff's application, taken out of the list and on 27 November 1995 they were by consent adjourned *sine die*. The hearing resumed on 28 October 1996. On 4 November 1996 an agreed bundle of documents was produced by junior counsel for the plaintiff. Their Lordships have not been shown a list of the documents comprised in the agreed bundle but it seems almost inconceivable that it would not have included the letter of 15 September 1984.

16. Mr Finzi, managing director of Universal and the person who had signed the 18 February 1982 agreement on behalf of Universal, then gave evidence. He referred to his dealings with Mr Mairs and Mr Watson. The judge's notes of Mr Finzi's evidence-in-chief contain this:

"When Agreement signed Mairs was occupying the hotel.

Vendors did not certify to Plaintiff Company that they were in a position to deliver vacant possession of property.

Question: Did you require in writing certificate from Vendors that they were in a position to deliver vacant possession of property?

Answer: No.

Plaintiff Company had received correspondence from Watson in this regard.

I visited the hotel several times since Agreement signed. On all visits Mair (sic) and his family occupied hotel."

17. Mr Finzi was cross-examined by Mr Sharschmidt QC, counsel for Montego. Mr Sharschmidt did not ask any questions about the letter of 15 September 1984 and very few about vacant possession. The following passages from the judge's notes are the only ones of any relevance –

“Don't remember if question of vacant possession discussed at meeting when US\$800,000.00 was discussed.

Question: Suggest when vacant possession discussed Ralph Mairs was not at the meeting?

Answer: I don't recall this.

Question: Suggest Gergel told you at that meeting he would speak to Mairs about vacant possession?

Answer: It is possible.”

Other witnesses were called and on 7 November 1996 Mr Miller closed Universal's case. On 8 November 1996 first counsel for Mr Mairs and then Mr Sharschmidt for Montego submitted there was no case to answer and elected to stand on that submission. The judge accepted the submission made on behalf of Mr Mairs and dismissed the action against him with no order as to costs.

18. As to Montego, Mr Sharschmidt concentrated on paragraph 8 of the amended Statement of Claim. The judge's notes of his submission record the following:

“Para. 8. Most important paragraph. Defendant certify in position to deliver vacant possession on October 1, 1984.

Evidence of Frinzi (sic) that Vendors did not certify in writing that they were in position to deliver vacant possession.

Destroys plaintiff's case. Completely contrary to para. 8 of Statement of Claim.

It means plaintiff brought an action before the Contract could be completed.”

And, later:

“Evidence of Finzi totally destroys that pleadings. [Reference to *Johnson v Humphrey* 1946 1 All ER 460].

Instant case express provision regarding completion. No room for anything to be implied. Plaintiff in his Pleading relied on the express provision and has failed to support the pleading with evidence. It follows that plaintiff has failed to establish a breach.”

19. Mr Miller, in his reply, pointed out that by its counterclaim Montego was suing on the contract, as rectified, and seeking specific performance. He referred also to the letter of 15 September 1984. The judge’s notes read:

“Asks Court to infer that plaintiff having said willing and able to complete and had notified defendant and had visited property and seen it occupied and that being subsequent to having received letter from Watson, that it was on that basis why action brought on 17/10/85 for Specific Performance.”

And:

“Court to infer that letter of certification was sent.”

20. Chester Orr J gave judgment on 11 November 1996. The notes of his judgment start with a citation of paragraph 8 of the amended Statement of Claim. The notes continue as follows:

“Mr Finzi has denied that the defendant gave any such certificate in writing. Mr Sharschmidt submits that the plaintiff has not established a breach of the Agreement. However, Mr Finzi states in evidence that the Plaintiff Company had received correspondence from Watson in this regard.

He stated that Watson said he was a Director of the defendant Company, that Watson conducted the negotiations on behalf [of] the Company and actually signed the Agreement as a Director of the Company.

Although the 1st Defendant pleaded that Watson was not a Director, Mr Finzi’s evidence on this point was not challenged. In addition Finzi said that he had visited the premises and found it occupied by Mairs, that the plaintiff Company had sent a letter of Commitment from the Bank indicating its readiness and ability to pay the balance of the

purchase price. The Writ was filed on the 17th October 1985. On this evidence on a balance of probabilities I draw the inference that the 1st defendant through Watson certified that it was in a position to deliver vacant possession of the property.”

21. The judge ruled, accordingly, that Universal had established its case. He made an order for specific performance and awarded damages for delay in the sum of US\$1,101,000. He dismissed the breach of warranty action.

22. In the cited passage from the notes of the judgment the judge, in referring to the correspondence from Watson, was addressing himself to the question whether Watson had authority to bind Montego. It was the vendor, Montego, that had to give the vacant possession certificate. The correspondence referred to had come from Watson. Watson’s authority to act on behalf of Montego was one of the main issues in the case. The judge was addressing himself not to the contents of the letter but to the question whether the letter from Watson could be treated as a letter from Montego. He concluded on a balance of probabilities that it could.

23. In these circumstances their Lordships think it safe to conclude that the judge knew what the contents of the letter were. He would, of course, have known the contents if, as their Lordships think likely, the letter was in the agreed bundle.

24. Montego appealed against the order of Chester Orr J. The grounds of appeal prayed in aid Mr Finzi’s evidence that the vendors did not certify in writing that they were in a position to deliver vacant possession. As to paragraph 8 of the amended Statement of Claim and the letter of 15 September 1984, the grounds of appeal said that “no evidence was led in that regard”. The notice of appeal was dated 15 October 1997.

25. The appeal was heard on 14 and 15 June 1999 by Forte P and Walker and Langrin JJA. Judgment was given on 27 October 1999 by Langrin JA with whose judgment the other two members of the court agreed. The appeal was allowed. Langrin JA said that:

“The averment in the pleading that a letter dated 15th September, 1984 was tendered to the plaintiff certifying that the vendors were in a position to deliver vacant



possession as of October 1, 1984 was not proved. Indeed, the evidence of the plaintiff through its own witness denies this allegation.”

And:

“Inferences must be drawn from proven facts. There are no facts proved from which an inference could be drawn that the 1st defendant/appellant through Watson had certified by letter dated September 15, 1984 that the appellant was in a position to give vacant possession. The fact that the plaintiff/respondent had received correspondence from Watson in this regard does not in any way prove the contents of that correspondence. Moreover, the admission of Winston Finzi leaves no room for any inference to be drawn.”

26. As to the failure of Montego in its defence to deny specifically the allegations in paragraph 8 of the amended Statement of Claim, Langrin JA held that the general traverse sufficed. He cited from Lord Denning MR in *Warner v Sampson* [1959] 1 All ER 120 at 123 where Lord Denning said:

“But when [the pleader] has no instructions on a particular allegation, he covers it by a general denial of this kind; so that he can, if need be, put the plaintiff to proof of it at the trial.”

This passage can, in their Lordships’ view, have no application to the letter of 15 September 1984. How can the lawyers acting for Montego have had no instructions about the letter? It would have figured in the lists of documents. It was a letter from a director of Montego to the managing director of Universal. It was referred to inferentially in that director’s own pleading in the breach of warranty action.

27. Mr. Watson’s authority to act on behalf of Montego in relation to the sale had been put expressly in issue but, subject to that authority point, the failure of Montego to plead to paragraph 8 constituted, in their Lordships’ view, an implied admission of the letter.

28. Langrin JA went on to consider a third point which he expressed as follows:

“Did the vendor breach the contract by not giving to the purchaser such certification within the three years from the

signing of the agreement in February, 1982 to the commencement of the purchaser's suit against the vendor?"

As to this point Langrin JA, in reliance on *Johnson v Humphrey* (which had been referred to by Chester Orr J), concluded that under the 18 February 1982 agreement completion was wholly dependent upon the vendor's willingness to specify a date by which vacant possession would be given and that, accordingly, "the contract in the instant case is unenforceable against the vendor, there being no date by which the vendor is bound to complete the contract".

29. Their Lordships doubt the correctness of this conclusion. The 18 February 1982 agreement, unlike the informal oral agreement in issue in *Johnson v Humphrey*, was a commercial agreement for the sale of business premises. It should be construed with that in mind. There would be much to be said for the implication of a reasonable time term into the provision relating to the time for vacant possession to be given. But their Lordships were not addressed by counsel on this issue and, if such term were to be implied, have no means of judging by what date the reasonable time should be taken to have expired.

30. But their Lordships consider that there was no sufficient ground for rejecting the trial judge's inference that the pleaded letter of 15 September 1984 had been written by Mr Watson on behalf of Montego and with authority to bind Montego and that, as pleaded in paragraph 8 of the amended Statement of Claim, the letter's effect was to require completion not later than 1 October 1985. Moreover, as Chester Orr J observed, Universal's bank had provided a letter of commitment confirming that the balance of the purchase money would be available on completion. It is unlikely that the bank would have done so in the absence of a letter from, or on behalf of, Montego confirming that vacant possession would be given on completion.

31. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal set aside and paragraphs 1, 4 and 5 of the order of 11 November 1996 of Chester Orr J restored. The case must be remitted to the Supreme Court of Jamaica for directions to be given for the purpose of carrying the order for specific performance into effect. The respondent must pay the costs of the appeal to the Court of Appeal and of the appeal to the Board.

32. At the opening of the appeal the Board heard a petition from Universal seeking leave to introduce further evidence including, in particular, the letter of 15 September 1984. In the event the petition is not necessary, and their Lordships make no order on it. The appellant must bear its own costs of that petition.

