JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO: 7/2001

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE WALKER, J.A.

BETWEEN	**URIAH HOWELL**	**APPELLANT**
A N D	**HUBERT McLEAN** **CLAUDETTE McLEAN**	**RESPONDENTS**

Miss Kayann Balli for appellant instructed by Leon Green & Company

David Morales for respondent instructed by Gaynair & Fraser

October 29, 30, 2002 & December 19, 2003

BINGHAM, J.A:

Having read in draft the judgment prepared in this matter by Harrison, J.A., I am in agreement with his reasoning and the conclusions reached in the matter, that the appeal be allowed, the judgment below set aside and that judgment be entered for the appellant with costs both here and below. There is nothing further that I could usefully add.

HARRISON, J.A:

This is an appeal from the judgment of His Honour Mr. Courtney Daye, Resident Magistrate for the parish of Clarendon on June 30, 2002 ordering that

the appellant give up possession of 6½ acres of land which he occupied at Mount Moses, Thompson Town in the parish of Clarendon.

The respondents had filed plaint No: 910/93 seeking recovery of possession of the said land, unlawful user and occupation and mesne profits.

The appellant claimed that he had entered into an agreement for sale of the said land to him with Mahalia Levy (nee Henry), its owner.

The facts are that Mahalia Levy was the only daughter of William and Mary Henry. There is no evidence of any other children between them. Mary Henry had a son Joseph McLean who was not the son of William. Joseph was the father of Hubert McLean, one of the respondents. William Henry died in 1933 and Mary Henry died in 1938.

On October 4, 1976, Mahalia Levy (nee Henry) was granted letters of administration in the estate of her father William Henry. On September 17, 1981, Mahalia leased to the appellant the said "6½ acres of land (more or less) at Mount Moses" and put him in possession (Exhibit 12).

By an agreement for sale dated September 15, 1983, (Exhibit 13), Mahalia sold to the appellant the said land described as "6½ acres of land at Mount Moses, Thompson Town, Clarendon" for $12,000.00. The appellant paid a deposit of $5,000.00 and remained in possession as purchaser. Completion was stated to be:

> "On payment of purchase money in full".

This agreement was drafted and signed in the office of Mr. W.A. Young, attorney-at-law, who signed it as witness. Hubert McLean the respondent was then present in the said office. The balance of the purchase price of $7,000.00 was not paid by the appellant.

On July 9, 1984, Mahalia Levy, nee Henry died. Joseph McLean was granted letters of administration in her estate (Exhibit 3). He was described in the said letters of administration as:

> "the only surviving brother entitled to the residuary estate of the said intestate".

The respondent Hubert McLean in respect of Mahalia Henry Levy, in cross examination, said:

> "I know her name was on the tax roll for land for her in Thompson Town. It was 6 acres of land. <u>My father use to pay the taxes on this land on behalf of Mahalia</u> and I use to pay tax. I use to pay for my grandmother Mary Henry was my grandmother she was Mahalia's grandmother too. That was 6 acres of land. This land was bounded north by McKenzie, south by the parochial road, cost (sic) by Abraham Pinnock and south by Benjamin Haye. The 6 acres of land that I am claiming is the same land". (Emphasis added)

He admitted, in addition, that:

> "... my father (Joseph McLean) was in charge of 6 acres of land <u>on behalf of Mahalia</u>". (Emphasis mine)

On October 9, 1991, a grant of letters of administration in the estate of Mary Henry who died on November 19, 1938, the wife of William Henry, was made to Joseph McLean (Exhibit 24). The inventory filed by Joseph McLean,

who was illiterate, lists the realty of which the deceased was possessed at the time of her death as:

> "Approximately 6½ acres of land at Mount Moses, Thompson Town in the parish of Clarendon valued at $15,000.00".

In respect of this inventory the learned Resident Magistrate commented, in his finding:

> "Little weight is attached to this as it is Joseph McLean who has an interest in the 6 1/2 acres who is the declarant of this inventory. Further, the application of administration in his mother's estate was made many years after her death and this great lapse in time would affect any declaration of fact relating back to such an early period."

Joseph McLean died on July 12, 1992, and probate to his estate was obtained by the respondents on February 16, 1993.

The inventory erroneously disclosed that "6½ acres at Mount Moses" was a part of the estate of the deceased Joseph McLean.

One Alexander Bailey, a witness for the respondents was occupying the land in the 1970's along with Joseph McLean. Mahalia Levy obtained an order for recovery of possession in the Resident Magistrate's Court at May Pen against Bailey who left the said land thereafter.

On February 12, 1992, Joseph McLean had filed a plaint in the Resident Magistrate's Court, May Pen, to recover possession of the land from Uriah Howell, the appellant and purchaser from Mahalia Levy.

As executors of the estate of Joseph McLean, the respondents filed plaint No 910/93 to recover possession of the said land from the appellant. The learned Resident Magistrate found in favour of the respondents, resulting in the instant appeal.

Counsel for the appellant, leave having been granted, argued the following grounds of appeal:

> "1. That on the totality of the evidence on a balance of probability, the learned Resident Magistrate misdirected himself in giving judgment in favour of the plaintiffs.
>
> 2. The learned trial judge erred in law in finding that the plaintiff being the holder of the legal estate in the land is entitled to maintain and succeed in an action for recovery of possession and unlawful use and occupation against the defendant as the holder of the equitable estate in the said land.
>
> 3. That the judgment of the learned trial judge cannot be sustained on the facts as found by him".

Counsel for the appellant maintained that the learned Resident Magistrate having found that the agreement for sale between the appellant and Mahalia Levy was valid and enforceable, should have held that the appellant held the beneficial interest in the said 6½ acres of land and the respondents, acting as personal representatives of the estate of Mahalia Levy, the vendor, had a duty to abide by the terms of the said agreement. The respondents were entitled only to the recovery of the balance of purchase price and could not bring an action for recovery of possession.

Counsel for the respondents submitted that the learned Resident Magistrate came to the correct decision on the totality of the evidence but was wrong in stating that the fee simple was vested in Mahalia Levy. He argued that the legal estate was vested equally in Joseph McLean and Mahalia Levy, consequently she had no power to execute a valid agreement for sale. The agreement in any event, was not completed within a reasonable time and therefore may be treated as having been rescinded. Further, the agreement for sale can be set aside on the ground that the description of the land was imprecise and uncertain, completion has not been effected to date, the appellant paid no taxes upon taking possession as stipulated, nor paid the half transfer tax, nor provided money to stamp the agreement.

The learned Resident Magistrate, inter alia, found:

> "The payment of taxes in the name of Joseph McLean after the death of Mahalia Levy is not an attempt to unlawfully take away Mahalia Levy's land of 6½ acres. I accept the explanation of the witness Joseph McLean that this payment was taking steps to administer the estate of Mahalia Levy.
>
> 18. Mahalia Levy's actions during her life time of:
>
> (a) Leasing (Exhibit 12) 6½ acres at Mount Moses in 1981 and
>
> (b) executing an agreement of sale in 1983 for the said 6½ acres
>
> (c) paying taxes on the 6½ acres of land of which her name which was on the tax roll.
>
> (d) issuing an action of Recovery of Possession of the 6½ acres of land from the witness

Alexander Bailey demonstrates she was exercising sole legal ownership over the 6½ acres of land.

19. The contemporaneous action of her half brother Joseph McLean or his failure to act by demanding that actions that Mahalia took be joint is an implied agreement that the 6½ acres of land belonged to his sister.

20. I infer that Joseph McLean although he could not read and was quite elderly was nonetheless quite knowledgeable about family estate. Therefore he must have known what Mahalia Henry was doing with the 6½ acres.

21. His son Hubert McLean was present in 1983 at the attorney-at-law Mr. Young's office when the agreement for sale was prepared. Hubert McLean must have had some idea what the transaction of his Mahalia Levy was about. He would have informed his father Joseph McLean about this.

22. Joseph McLean did not protest this transaction until 1988 (Exhibit 4) after Mahalia Levy died. In 1987 Joseph McLean had an amendment to the valuation roll to merge the two pieces of land at Mount Moses. Joseph McLean paid taxes for the lease on behalf of his sister Mahalia Levy up to 1987.

23. From all these actions the court drew the inference that Mahalia Levy possessed the legal estate of the 6½ acres of land.

24. On a balance of probability, having regard to the history and dealings of the 6½ acres the court holds that Mahalia Levy, nee Henry obtained the legal estate of the 6½ acres through the estate of her father William Henry and not her mother Mary Henry".

In the instant case, the learned Resident Magistrate properly identified the main issue as being ascertainment of the person in whom the fee simple in the said land initially resided. He said:

> "The live issue and really the fundamental question in this trial is whether this 6½ acres of land at Mount Moses belongs to the estate of Mary Henry or William Henry".

The rules of intestacy, generally, and particularly in 1933, require that the descent of the fee simple in land be traced from the last purchaser, being a person who owned the land by purchase, gift or devise. Tracing backwards to a good root of title was essential for this exercise.

In the instant case, the respondents' claim to title is through Mary, the widow of William Henry. This is sought to be substantiated by the evidence of this witness Alexander Bailey, who was 88 years old in 1997 and who said:

> "When I first came to know the land Majorie Henry-Nickle was the owner of the land. At the time Majorie own the land Mary Henry and William Henry were in occupation of the land. Majorie Henry and William Henry were brother and sister. Majorie Henry sell it to Mary Henry William died first. Mary Henry died after. When Willaim died I occupy the land, Joseph McLean occupy it.
>
> Between the time I and Joseph Henry occupy the land and William and Mary Henry occupy the land nobody else occupy the land. As soon as William died me and Mr. Joseph come on the land.
>
> When William died Mary was there. I went on the land when Mary was in occupation of the land when Mary died me and Joseph occupy the land. I plant

> yam, and banana on the land. Mary Henry gave me permission to plant ..."

No documentary proof as required by the Statute of Frauds, 1677, was tendered or attempted to be tendered to substantiate, the purported sale of land by Majorie Henry-Nickle the sister of William, to Mary his wife. Consequently, this evidence is heresay and inadmissible. It was, correctly, rejected by the learned Resident Magistrate. Mary, at best, on the evidence was in occupation as the widow of William.

The actions of Mahalia, taking possession of the land, leasing and selling the land, without protest by Joseph McLean, but rather by tacit acquiescence, typifies her right of ownership, through her father William, as the sole lawful daughter of William and Mary Henry. Joseph McLean was the illegitimate son of Mary, effectively making him, in common parlance, the "brother" of Mahalia. However, he was disqualified to benefit through William. In addition, when on 9th July 1984 Joseph McLean was granted letters of administration in the estate of Mahalia Levy, nee Henry, it was erroneous for him to claim in the inventory filed that he was the "only surviving brother" of Mahalia, and he was "entitled" to her estate. He was neither. Not being the son of William Henry, Joseph McLean was neither a brother "of the whole blood ..." nor "... of the half blood of the intestate (Mahalia Levy)," in order to benefit under Item 4 of the Table of Distribution contained in section 4 of the Intestate's Estate and Property Charges Act.

The learned trial judge, having noted the actions of Mahalia and the inaction of Joseph McLean until 1988, after Mahalia had died in 1984, correctly found that:

> "From all these actions the court draws, the inference that Mahalia Levy possessed the legal estate of the 6½ acres of land.
>
> 24. On a balance of probability, having regard to the history and dealings of the 6½ acres the court holds that Mahalia Levy, nee Henry obtained the legal estate of the 6½ acres through the estate of her father William Henry and not her mother Mary Henry".

There was sufficient evidence to support this finding.

However the learned Resident Magistrate went on to find and conclude:

> "Mahalia Levy's estate passed to her personal representative Joseph McLean after her death. Her estate included the 6½ acres. Joseph's McLean estate passed to his executor and son Hubert McLean the plaintiff. He therefore would have the legal estate to the 6½ acres.
>
> 26 The defendant Austin Howell only has an equitable interest in the 6½ acres by virtue exhibit 13, the Agreement for Sale. No title has (sic) passed to him".

Regrettably, this finding and conclusion were flawed. Having found, correctly so, that Mahalia was the legal owner of the said 6½ acres of land at Mount Moses, the learned Resident Magistrate found that the agreement for sale (Exhibit 13) of the land to the appellant was valid. It is less than accurate to find that:

> "... Austin Howell only has an equitable interest in the 6½ acres ... No title passed to him".

The effect of a valid contract for the sale of land is that the beneficial ownership in the land passes to the purchaser, who, on satisfying his own obligations under the contract, can call for the legal estate to be transferred to him. Lord Jessel, M.R. in **Lysaght v Edwards** [1876] C.D. 499, at page 506, said:

> "... the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid, in the absence of an express contract as to the time of delivering possession".

The appellant therefore had the beneficial interest in the said land since the date of the agreement for sale on September 15, 1983, when he paid the deposit of $5,000.00 leaving a balance of $7,000.00. Mahalia was thereafter a trustee of the said land for the benefit of the appellant. In the **Lysaght** case (supra) Lord Jessel, M.R. at page 507, said:

> "The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract, or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. <u>Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee;</u> and

> therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity". (Emphasis added)

Although the contractual obligations of the appellant were not satisfied, there is no evidence that to date, the balance of $7,000.00 was paid and delay by itself is not necessarily a factor to cause the contract to be treated as having been repudiated.

In **Williams v Greatex** [1956] 3 All E.R. 705, the purchaser of two lots of land having made payment of deposits to the vendor in 1946, entered into possession. The purchaser began work on the land but was ordered off in 1947. The purchaser recommenced work on the lots of land in 1955. However, in 1955 the vendor entered into a contract for the sale of the lots to a third party. In 1956 the purchaser brought an action for specific performance of the contract of 1946. The Court of Appeal affirmed the decision of the trial judge granting specific performance of the contract. The headnote at page 705, reads:

> "**Held**: the purchaser was entitled to specific performance of the contract notwithstanding the ten years' delay because (i) the time for completion specified in the contract was not of the essence of the contract, (ii) he was not barred by laches since he had an equitable title to plots 3 and 4 by virtue of the contract and had entered into possession of them, and (iii) there had not been abandonment of the contract by him".

In the instant case the Agreement for S ale dated September 15, 1983, between the parties, in respect of the payment of the balance of the purchase price and the date of completion, read:

> "HOW PAYABLE – A deposit of Five Thousand Dollars ($5,000.00) to be paid on the signing of this Agreement. The balance to be paid by the purchaser to the vendor on or before the 31st day of January, 1984.
>
> COMPLETION – On payment of purchase money in full".

The appellant did not pay the balance of $7,000.00 up to "the 31st of January 1984". The vendor Mahalia Levy took no steps to enforce such payment after the said date. She therefore acquiesced in the delay in payment by the appellant. Up to the time of her death on July 9, 1984, she never sought to demand payment. The appellant was given and took possession of the land from September 15, 1983, the date of payment of the deposit. He occupied it and planted on the land continuously up to the date of judgment of the learned Resident Magistrate on June 20, 2000 - a period in excess of sixteen (16) years.

Time was never of the essence of the contract, nor was any notice served on the appellant making time of the essence.

The argument of the respondents that the said Agreement of September 15, 1983 is invalid and should be set aside on the ground that the contract was not completed on January 31, 1984, and should have been completed within a reasonable time, is without merit.

If the purchaser has not conducted himself in a manner to indicate that he had abandoned the contract, delay simpliciter cannot amount to a repudiation of the contract. In **Howe v Smith** [1881] All E.R. Rep. 201, Cotton, L.J. in dealing

with the conduct of parties, where a purchaser was accused of delay in performance at page 205, said:

> "It may well be that there may be circumstances which would justify this court in declining, and require the court, according to its ordinary rules, to refuse, specific performance, in which it would not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In my opinion, in order to enable the vendor so to act, there must be those acts on the part of the purchaser which not only amount to such delay as to deprive him of the equitable remedy of specific performance, but which make his conduct amount to a repudiation on his part of the contract".

In **Stickney v Keeble** [1915] A.C. 386, Lord Parker of Waddington, dealing with the contract for the sale and purchase of real estate acknowledged that at law the time fixed by the parties for completion had always been regarded as essential and continuing, at page 415, said:

> "In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding

> circumstances which would render it inequitable to treat it as a non-essential term of the contract".

In the instant case, because time was never made of the essence of the contract, the appellant has a valid and subsisting contract, was continuously in possession since September 15, 1983, and is entitled for this reason to have his contract specifically performed, on payment of the balance of the purchase price.

It is not without significance that after Mahalia Levy obtained letters of administration in the estate of her father William Henry on October 4, 1976, and took possession of the said land, leased it on September 17, 1981, and sold it on September 15, 1983, all her acts of ownership were acknowledged and acquiesced in by Joseph McLean, the illegitimate son of Mary Henry, her mother. His activities towards a claim to the land surfaced only after Mahalia died in 1984. The learned Resident Magistrate quite properly found that:

> "Joseph McLean did not protest this transaction (the sale in 1983) until 1988 (Exhibit 4) after Mahalia Levy died. In 1987 Joseph McLean had an amendment to the valuation roll to merge the two pieces of land at Mount Moses. Joseph McLean paid taxes for the lease on behalf of his sister Mahalia Levy up to 1987. From all these actions the Court draws the inference that Mahalia Levy possessed the legal estate of the 6½ acres of land".

The learned Resident Magistrate went on to find that the said 6½ acres of land "passed to her (Mahalia's) personal representative Joseph McLean after her death", and then passed to the respondent Hubert McLean as the executor of the estate of Joseph McLean.

However, the learned Resident Magistrate in finding that:

> "The defendant Austin Howell only has an equitable interest in the 6½ acres by virtue exhibit 13, the Agreement of Sale. No title has passed to him.
>
> The holder of the legal estate in this land of 6½ acres is entitled to maintain and succeed in an action for recovery of possession and unlawful use and occupation against the equitable holder of the estate."

is partly in error.

Being the owner of the beneficial interest in the land, sold to him, by virtue of the valid contract of sale dated September 15, 1983, the effect of the contract is that the purchase money is a part of the personal estate of the vendor (Mahalia Levy) and "it makes the land a part of the real estate of the vendee": (**Lysaght v Edwards** (supra), per Lord Jessel, M.R. at page 501).

Joseph McLean, having taken out letters of administration in the estate of Mahalia Levy on October 27, 1987, was a trustee of her estate "... sworn well and truly to administer the same". Contrary to the finding of the learned Resident Magistrate, Joseph McLean was not entitled to:

> "... maintain and succeed in an action for recovery of possession and unlawful use and occupation against the equitable holder of the estate".

As administrators of the estate of Mahalia Levy, the respondents have no right of action which Mahalia Levy did not have: (**In Re Rushbrook's Will Trusts** [1948] 1 Ch. 421). The respondents' duty, as trustees, was to give effect to the terms and the enforcement of the valid contract of September 15, 1983, and pass the legal estate to the appellant as purchaser, in exchange for the balance

of the purchase money. The balance of the purchase money belongs to the estate of Mahalia Levy, the beneficiary of which is traceable through her male ancestor, her father William Henry.

The learned Resident Magistrate was therefore wrong to find in favour of the respondents.

In the circumstances I would allow the appeal, and set aside the judgment of the Court below. Possession of the said 6½ acres of land at Mount Moses is to revert to the appellant who is entitled to the legal estate, as purchaser. I would order that the respondents pay the costs of the appellants in the court below and $15,000.00 as costs of this appeal.

WALKER, J.A:

I have read in draft the judgment of Harrison, J.A. For the reasons he gives and with which I agree I, too, would dispose of this appeal in the manner he proposes.