

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 98/94

COR: THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE PATTERSON J A (AG)

BETWEEN LLOYD BENT PLAINTIFF/APPELLANT
A N D MAURICE FONG DEFENDANT/RESPONDENT

Carol Davis instructed by O G Harding & Co
for appellant

Cwen Crosbie & Debayo Adedipe instructed by
Robertson Smith Legister & Co for respondent

5th 6th 7th 8th December 1994 &
27th February 1995

FORTE J A

I have read the judgment of Downer J A and I agree with it.

DOWNER J A

In these proceedings Reckord J dismissed a summons for an interlocutory injunction sought by the appellant Bent. The relief requested was as follows:

- "1. An interlocutory injunction restraining the Defendant from dealing or disposing with lands registered at Volume 815 Folio 55 of the Register Book of Titles and in particular from registering a mortgage on the said lands, until the trial of this action or until further Order.
2. An order that the costs of this application be costs in the cause.
3. Further or other relief as may seem just to this Honourable Court."
(Emphasis supplied)

The appellant Bent entered into a sales agreement with the respondent Fong on 29th March 1989 to purchase a parcel of land at Rhudd's Corner in the parish of Manchester. The agreement records the sale price of \$900,000 with a deposit of \$150,000. This deposit was subject to special conditions as set out hereunder which states:

- "Special
Conditions
- 1.(a) The Purchaser to pay
FOUR THOUSAND FIVE
HUNDRED (\$4,500.00)
DOLLARS to tie the
business which is not
refundable, but to be
treated as a part of
deposit, if deposit
is made.
 - (b) Deposit of ONE HUNDRED
AND FIFTY THOUSAND
(\$150,000.00) DOLLARS
less the FOUR THOUSAND
FIVE HUNDRED (\$4,500.00)
DOLLARS aforesaid at
1(a) to be paid twenty-
one (21) days from the
date hereof."

There was no dispute that the deposit was paid as the evidence of the respondent Fong discloses. His affidavit reads:

"3. That the Plaintiff breached special condition 1(b) of the said Agreement in failing to pay the deposit of \$150,000.00 within 21 days from 29th March 1989 when the sum of \$4,500.00 was paid in accordance with special condition 1(a) and on which said 29th day of March 1989 the contract otherwise referred to as the agreement commenced. In this connection the Plaintiff paid the sum of \$100,000.00 on the 3rd day of May 1989, on the 12th day of May 1989 \$25,000.00 and on the 15th day of May 1989 \$21,000.00."

It is odd that the respondent Fong should now assert that the special condition had been breached as he made no protest when the monies were paid. The appellant Bent was equally odd when he stated the concluding line of his copy of the agreement, the following words were missing:

" ... (\$4,500.00) DOLLARS aforesaid at 1(a) to be paid twenty-one (21) days from the date hereof."

Nothing turns on that issue.

Another aspect of the special conditions in agreement of importance was that the vendor promised to provide a mortgage and the condition was as follows:

- "Special
Conditions
- (c) The Vendor will provide a Mortgage for the balance of purchase money and such mortgage to include among its terms and conditions, the following -

- (i) no interest will be charged on any balance for a period of six months from the payment of the deposit, and the execution of the mortgage which shall be executed or deemed to be executed upon payment of the deposit in full."

Once the deposit was accepted on May 15 1989 it could be argued that the mortgage ought to have been executed. The other special condition reads:

- " (ii) after the period of six months aforesaid, interest shall be charged at the rate of not less or more than 12½% per annum, but the rate of interest is always subject to increase in terms of the mortgage instrument to be executed

- (d) Principal and interest to be paid by equal monthly instalments for ten (10) years. The draft mortgage instrument to be applied is attached hereunto, and is subject to the necessary modification/s as will be necessary to give effect to this instrument."

Here it should be noted that there was some alteration to rate of interest on the mortgage agreement which does not raise an issue in those proceedings. However, a clause of importance pertains to the carriage of sale. It stated that Owen Crosbie attorney-at-law, 3 Hotel Street Mandeville, Manchester had the carriage of sale so he was therefore responsible to present the appellant with necessary statement of costs. There is no evidence that this was done. One other feature to note was that the agreement provided for the appellant Bent to enter into possession "upon execution of the mortgage" and he did enter into possession when he signed and returned the draft mortgage instrument.

After entering into possession of the premises the appellant made a number of mortgage payments during the period 18th December 1989 to 6th October 1992. Many of the receipts were drawn by D. Fong the wife of the respondent. Mr. Crosbie raised the issue of the absence of stamps on these receipts although the court

discouraged him from so doing. In this connection he cited section 36 of the Stamp Duty Act which reads:

"36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

He then argued that the receipts ought not to be accepted in evidence. The appellant does not seek to enforce the receipts. In any event, a construction of the section which allowed the respondent Fong to benefit from his own wrong doing would be absurd. That that would be so, may be gleaned from the following passage In re Coolgardie Goldeields, Ltd [1900] 1 Ch 475 at p. 480: It reads:

"... On the other hand, I think it is not just that the applicants who have, by their own evidence, established a title to relief, should be prevented from obtaining relief by reason of the failure of their opponents or of their opponents' solicitors to stamp documents which were put in, not by the applicants, but by the opponents."

Mr Crosbie seems unaware that he was exposing the wife of the respondent Fong to a possible prosecution for breach of section 65 of the Stamp Duty Act. He ought to advise his clients to have the receipts stamped.

It is now necessary to refer to certain paragraphs of the appellant's Bent affidavit. They read:

4. I have paid the deposits in full and have executed the Transfer and the Mortgage instrument to effect the Vendor's mortgage and I was put into possession on the said lands in accordance with the provisions of the Agreement for Sale.
5. The said lands include a dwelling house and commercial building premises and I operate Bar and a Liquor Store in the latter building.
6. That I have carried out extensive works on the said commercial premises to the value of approximately \$1.4 million.
7. Pursuant to the said mortgage I have paid to the Vendor approximately \$160,000.00 on account of the mortgage debt and I exhibit photocopy of receipts totalling \$108,000.00 and marked 'LB2' for identity."

It is against the foregoing that the respondent Fong wrote this letter to the appellant on 11th December 1992:

"Mr Lloyd Bent
Rudd's Corner
Newport P.O.
Manchester

Dear Sir,

Re: Sale of land and mortgage at
Rudd's Corner Maurice Fong to Lloyd Bent

I am directed by Mr Maurice Fong to inform you that he treats the sale and mortgage to you as aborted. You are obviously not serious about the transaction and unable to give effect to it as expressed by you over the years.

Please consider yourself a monthly tenant of the Commercial premises effective from the date hereof at a clear monthly rental of \$5,000.00 payable as follows:

Three months in advance, thereafter payment to be made on the 11th of each month.

This agreement will be renewed annually on the date of the anniversary and will be treated as forfeited if you fail to pay 3 consecutive months.

Mr Fong will collect rent in respect of the dwelling house with immediate effect. The question of improvement which you have made to the premises have been considered against the background of the damages you have done including the massive and expensive water tank.

This is in evidence of Mr Fong's signature appearing below mine.

Yours truly

sgd/ Owen S. Crosbie

sgd/ Maurice Fong"

As to whether this letter could cancel the agreement at that stage is an important issue to be resolved at the trial. See American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 505. It is fair to say that at that stage there was no basis for denying the appellant Bent interlocutory relief. It was agreed by counsel that the learned judge so found. However, it was also agreed that the basis for his refusal to grant the interlocutory injunctive relief was that the appellant was guilty of laches.

Was Reckord J correct to refuse the application below on the basis of laches?

The conduct of the appellant Bent must be measured against the background of respondent Fong's letter of December 11 1992 and the earlier oral threats to cancel the contract of sale. Here is how the appellant Bent responded at that stage:

"9. I engaged the services of O. G. HARDING & COMPANY Attorneys-at-Law in December 1992 consequent on the Vendor's verbal advise that he would be cancelling the sale and that the monies paid towards the mortgage would be applied towards rental.

10. My Attorneys by letter dated December 7, 1992 requested information on the payments made by Mr Bent in connection with the purchase of the premises and outstanding matters and I am informed by my Attorneys O. G. Harding & Company and verily believe that to date the Defendant has not responded to the said letter.

When the crucial letter of December 11 1992 was received, the appellant Bent responded with promptitude. Here is his narrative:

"11. The Defendant purported to cancel the said Agreement for Sale by letter dated December 11, 1992 and I exhibit hereto letter dated December 11, 1992 from the Defendant's Attorney to the Plaintiff marked 'LB3' for identity.

12. The Defendant has been collecting rental from the Tenants of the dwelling house on the said premises.

13. I instructed my Attorneys to lodge a Caveat to protect my interest as purchaser and I am informed by my Attorneys Messrs O. G. Harding & Company and verily believe that they have been notified by the Registrar of Titles that the Defendant has lodged a Mortgage No. 750772 in favour of Dulcie Fong for registration against the said premises comprised in Certificate of Title registered at Volume 815 Folio 55 and that consequently the Registrar of Titles has given notice of intention to register the said mortgage in favour of the said Dulcie Fong unless I serve on the Registrar of Titles an Order from a Judge forbidding such registration and I exhibit hereto copy of said Caveat and Notice marked 'LBA' for identity.

14. That I have known and been acquainted with the Defendant for over four years and the said Dulcie Fong is the wife of the Defendant."

In this regard, it is to be noted in the proposed amendment to the statement of claim, Dulcie Fong was joined as a party to the action and charged with fraud. Then in a further affidavit the appellant discloses his further efforts to protect his interest. Here is how he puts it:

"23. That I am informed by my attorney O. G. Harding & Company and verily believe that the Notice of the Registrar of Titles referred to in my affidavit sworn to on the 10th day of June, 1994 was received by my said attorneys on or about the 28th day of April, 1994 and further that an application for an Ex parte Interim Injunction was filed in this Honourable Court which was heard on the 9th day of May, 1994 in an effort to satisfy the provisions of section 140 of the Registration of Titles Act."
(Emphasis supplied)

The appellant Bent sought both equitable and statutory relief and to suspend dealings in the property until the issues are resolved at trial. So far he has failed. It is therefore necessary to refer to section 140 of the Registration of Titles Act to recognize the provision there to protect his interest so as to supplement the equitable relief which acts in personam. The relevant section reads:

" A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest, but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge, and gives such undertaking or security, or lodges such sum in court, as such Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such Judge may direct the Registrar to delay registering any dealing with the land, lease, mortgage or charge, for a further period to be specified in such order, or may make such other order as may be just, and such order as to costs as may be just."

The relevant dates and conduct by the appellant are important in determining the issues of laches. On February 11 1993, two months after the letter of December 11 1993 a caveat was lodged pursuant to section 140 of the Registration of Titles Act. Because this caveat can be reinstated, it must now be cited:

" CAVEAT against the REGISTRATION
OF CHANGE IN THE PROPRIETORSHIP
OR OF ANY DEALING

TO THE REGISTRAR OF TITLES

TAKE NOTICE that I, LLOYD BENT, Businessman of Newport in the parish of Manchester claim an estate or interest as Purchaser under an Agreement for Sale dated the ----- day of ----- One Thousand Nine Hundred and Eighty-nine re purchase of land part of Rudd's Corner in the parish of Manchester from MAURICE FONG in the land comprised in the Certificate of Title registered at Volume 815 Folio 55 of the Register Book of Titles and he forbid the Registration of any person as Transferee(s) or Proprietor(s) and of any Instrument affecting such estate or interest until after notice of the intended registration or dealing be given to him, or unless such instrument be expressed to be subject to my said claim.

I, APPOINT Messrs. O. G. HARDING & COMPANY, Attorneys-at-Law of No. 1, Melmac Avenue, Kingston 5 in the parish of Saint Andrew as the place at which notices and proceedings relating hereto may be served.

DATED this 11th day of February 1993.

O.G. HARDING & COMPANY

Attorneys-at-Law & Agents
for LLOYD BENT."

That caveat remained in force until around the 15th May 1994. Then it lapsed because of the Registrar's certificate. It reads:

"WHEREAS MAURICE FONG the registered Proprietor of the land abovementioned being ALL THAT parcel of land part of GLASGOW situate at RUDD'S CORNER in the parish of MANCHESTER containing by survey One Acre Two Roods Six Perches and Five-tenths of a Perch of the shape and dimensions and butting as appears by the plan thereof thereunto annexed and being the land registered at Volume 815 Folio 55 of the Register Book of Titles - has applied for the registration of a Mortgage numbered 794015 of all the land to DULCIE FONG:

I HEREBY GIVE YOU NOTICE that upon the expiration of fourteen days from the service of this Notice on you the Caveat numbered 750772 and lodged by you on the 11th February 1993 will be deemed to have lapsed and I shall proceed to register the said Mortgage in accordance with the provisions of the Registration

of Titles Act unless you sooner obtain and serve on me an Order from a Judge forbidding me so to do.

DATED this 21st day of April 1994

sgd/ C.M. Trowers (Miss)
Registrar of Titles (Acting)"

The next crucial date is May 9 when Patterson J refused the application for an ex parte injunction. It was in those circumstances that the appellant Bent issued a summons for an interlocutory injunction on June 10 1994, together with a claim for such other relief that seemed just. Had either or both of these injunctions been granted, the caveat would have remained in force.

The law relating to laches

Miss Carol Davis in her helpful submissions referred to the classic statements on laches in two leading cases from the House of Lords and the Privy Council. These are conveniently cited by Pennycook J in Re Jermyn Street Turkish Baths Ltd [1970]

3 All ER 57 at 68(d):

"... In the result the only ground upon which the appellants can found their argument against relief is delay or laches, which for present purposes I treat as synonymous terms. The principle applicable to a case where long delay is set up as a defence to equitable relief is stated in the following well known passage in the judgment of the Privy Council in Lindsay Petroleum Co v Hurd [1870] LR 5 PC 221 at 239 'Now the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay that delay of course not amounting to a bar by any statute of limitations, the validity of that defence substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts

done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' "

Then the learned judge continues thus:

"In Exlaner v New Sombrero Phosphate Co [1878] 3 App Cas 1218 at 1279 Lord Blackburn, after quoting the above passage, says:

'I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry. ...'"

In the light of these principles and the facts of this case, particularly the dates adverted to previously, there was no laches. It would not be prudent at this stage to make any comment as to the transactions which have been attempted in this case on behalf of the respondent Fong. Sufficient to say that from the affidavit of the appellant Bent and the summons for the interlocutory injunction, it was necessary to resort, during the course of the hearing, to section 140 of the Registration of Titles Act to reinstate the caveat of 11th February 1993 so as to meet the justice of this case and that order still stands. The Registrar of the Supreme Court is further directed to see that the appellant Bent lodges \$5,000 into court in accordance with section 140 of the Registration of Titles Act to prevent any disposition or dealing in the property and to indemnify every person against damage sustained by reason of any such disposition of the property being delayed. Additionally, to direct the Registrar of Titles to delay any dealings in the land until the issues are resolved at a trial.

When the hearing was completed the order of Reckord J was set aside and an interlocutory injunction granted in terms of paragraph 1 of the notice and grounds of appeal which reads:

"1. The Defendant be restrained from dealing or disposing of lands registered at Volume 815 Folio 55 of the Register Book of Titles until the trial of this action or until further order."

It was also ordered that there be the usual undertaking as to damages. The respondent should pay the agreed or taxed costs of the appellant both here and below.

PATTERSON J A (AG)

After hearing the submissions, I agreed that this appeal should be allowed, and we promised then to put our reasons for so doing, in writing. I have had the opportunity of reading the judgment of Downer J A in draft. I respectfully agree with it, and find it unnecessary to add anything.