JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 66 & 67/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN	RUDYARD STEPHENS	DEFENDANT/APPELLANT
A N D	EXLEY HO	PLAINTIFF/RESPONDENT
A N D	THE ADMINISTRATOR GENERAL	1ST DEFENDANT/RESPONDENT
A N D	FEDERAL INVESTORS LIMITED	2ND DEFENDANT/RESPONDENT
A N D	KRIAS LIMITED	3RD DEFENDANT/RESPONDENT

Berthan Macaulay, Q.C. with R.L. Francis for appellant

Burnham Scott, Q.C. for respondent The Administrator General

Dr. L.G. Barnett for respondent Exley Ho

23rd, 24th, 25th, 26th April & 16th May, 1990

CAREY, J.A.

These appeals which arise from consolidated actions in the Supreme Court, are against orders of Chester Orr J dated 12th July, 1989 made in respect of one of those actions viz., C.L. 1982/H220 Ho v. Stephens. The learned judge had before him two applications, viz.,-

(i) A summons to set aside summary judgment and for leave to file defence out of time;

(ii) A summons by the respondent Exley Ho for further relief.

On the summons to set aside summary judgment entered in this action for an order of specific performance, the learned

judge's order (so far as is material) read - "the application is refused." On the other summons "for further relief" consequent to the order for specific performance, the learned judge made (inter alia) the following order -

> "(i) The Plaintiff Exley Ho do pay to the Defendant Rudyard Stephens the sum of $104,336.48 being the balance due by the Plaintiff Exley Ho to the Defendant Rudyard Stephens as the sum due in respect of the Agreement for Sale of premises No. 10 Red Hills Road in the parish of Saint Andrew registered at Volume 877 Folio 12, Volume 215 Folio 79 and Volume 236 Folio 29 of the Register Book of Titles and that the interest earned on the sums placed in escrow be the Plaintiffs.
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> (ii) The Defendant Rudyard Stephens being in possession of the property 10 Red Hills Road in the parish of Saint Andrew, the subject of this action do deliver up vacant possession of the same in exchange for payment of the sum referred to in paragraph 1 above.
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> (iii) The Defendant Rudyard Stephens do prosecute Suite C.L.S. 056/1984 entitled Rudyard Stephens against The Administrator General of Jamaica, Federal Investors Limited and Krias Limited in order to obtain an order that the Administrator General do fortwith take all steps open to him to vest title in Rudyard Stephens of the lands referred to in paragraph 2 of this summons so as to enable Rudyard Stephens to carry out his obligations to Exley Ho pursuant to Suit No. C.L.H. 220/1982 entitled Exley Ho vs Rudyard Stephens and thereafter fortwith furnish the Plaintiff Exley Ho with a registrable executed and stamped Transfer for the lands registered at Volume 877 Folio 12, Volume 215 Folio 79 and Volume 236 Folio 29 and tender same to the Plaintiff."

Mr. Macaulay deployed a deal of argument in support of these appeals but with respect to the appeal against the dismissal of the summons to set aside summary judgment, he

was constrained to accept that his appeal was incompetent and could not be entertained. The record showed that a similar application had previously been made by the appellant and dismissed by an order of Reckord J dated 16th December, 1987. The affidavit in support of the later application before Chester Orr J did not disclose the fact of dismissal. These circumstances are, in my view, sufficient to have disposed of that appeal.

I must now deal with the other appeal which relates to three of the orders on the summons for further relief, prays for relief, the effect of which, would set aside the order of specific performance. Indeed Mr. Macaulay was not lacking in boldness in arguing that if he was right, the contract itself would have been discharged. He reassured the court nonetheless that he was not appealing against the order for specific performance for no appeal had been taken against that order. So startling a proposition, is, with all respect to counsel, wholly fallacious.

He filed three grounds of appeal which I set out hereunder -

> "(i) The learned Judge in making the order on paragraph one of the summons failed to take into account that the Plaintiff discharged the mortgage which was secured on the property to Krias Limited by paying Krias Limited the sum of $368,898.98.
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> (ii) The learned Judge erred in law when he found that the Plaintiff Rudyard Stephens has possession of the lands the subject of the action which he can lawfully give to Exley Ho.
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> (iii) The learned Judge erred in law when he rejected the submission of Counsel for the Plaintiff/ Appellant Rudyard Stephens that the Defendant Exley Ho was no longer entitled to have the property transferred to him."

No arguments were advanced in respect of ground (i) and I need say nothing more about it.

With respect to ground (ii), it now becomes necessary to give some background material. The appellant is the equitable owner in possession of the lands, the subject of the agreement for sale between himself and the respondent Ho. The appellant "and or his nominee" had entered into an agreement for sale with Federal Investors Limited and Gilbert Baron Jobson being the vendors of the property referred to in the pleadings as 10 Red Hills Road. The purchase price was set at $65,000.00, with $10,000.00 payable as a deposit. The agreement was executed on 11th September, 1978. Completion was expressed to be on or before 31st December, 1978. Completion did not take place but the appellant was put in possession. The vendor died 23rd May, 1980 and the Administrator General was granted letters of administration. On 29th September, 1981 the appellant and the respondent Ho entered into an agreement for sale of the said lands at a price of $200,000.00. The deposit which was paid on execution was $100,000.00 and it was stipulated that this should be payable to the vendor's attorney-at-law, as stakeholder. Completion was set for 30th March, 1982. Completion has not in fact taken place. It was as a result of the failure on the part of the appellant to complete which provoked the action filed by Mr. Ho, and in the event led to the order of specific performance on 6th April, 1983. The reason for the appellant's failure or inability to perform his contract with Mr. Ho is because he has not obtained title from the Administrator General who "possesses the means and ability to complete..... but has failed to do so." It was not until 25th January, 1984

that the appellant filed a writ against the Administrator General claiming specific performance of the agreement.

I can now return to consider the second ground of appeal filed. Mr. Macaulay contended that since his client did not have the legal estate, he could not transfer possession to Mr. Ho. He based this argument on the well-known rule that from the date of the contract, the purchaser is in equity the owner of the property sold, though not absolutely but subject to the condition that the contract be specifically enforced. Put another way, the lands sold are in equity his lands; he can sell, charge or devise them.

In the circumstances of the present case, the appellant as the equitable owner had the power to sell, mortgage or dispose of the property otherwise. He was as the evidence shows let into possession of the said property and could therefore give the possession which he had, to Mr. Ho. Logically as the appellant had the undoubted power to dispose of the property, he would have the power to confer a right less than he had. "Nemo dat quod non habet." But for the brilliance of counsel, I would have thought the point wholly unarguable.

With regard to ground (iii), the point being made therein was that the judge had fallen into error because he had rejected a submission that Mr. Ho was no longer entitled to the remedy he had obtained, of specific performance. This was so because The Administrator General as administrator of Estate Jobson (deceased) had not completed the contract made between the late Mr. Jobson and the appellant. I understood that was the point made before Chester Orr J which it is said, he wrongly rejected. That point is, in my view wholly unmeritorious. The order for

specific performance which had not been set aside by any order of any court remained good and ought therefore to be performed. No reason was advanced in the affidavits which showed that performance of the contracts by the appellant was impossible. Undoubtedly, the Administrator General was first required to act. He could be compelled to action by a suit at the instance of the appellant. He filed no action until ordered to do so in the summons.

Then contrary to the arguments of Mr. Macaulay on this ground, the evidence showed that the deposit paid by Mr. Ho had not been returned to him and he said he remained willing and able to perform his part of the bargain. The order to which Mr. Macaulay referred was in the following terms -

> "1. THAT the Defendant do return the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000:00) admittedly held by him with interest at 10% per annum from the first day of October, 1981 to date.
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> 2. THAT the full amount to be paid within fourteen (14) days of the date thereof.
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> The above sum to be paid to and lodged in the name of the Vendor's and Purchaser's Attorneys at Law as stakeholders in a joint account at an institution to be agreed by both parties, to abide the determination of the sale or suit."

Indeed one of the orders made against Mr. Ho in his summons for further relief, was that he should pay the balance of the purchase price to the appellant. This argument also was, really devoid of merit.

It was plain that Mr. Macaulay fully appreciated the decided lack of merit in these submissions and accordingly sought to put his argument on other limbs for which no grounds of appeal were filed. No amendment to the grounds filed,

however was sought. We intimated to counsel that having regard to the grounds filed, we would not entertain any submission which had not been put forward below. Mr. Macaulay sought to ignore the grounds of appeal he had filed and to put forward as the basis of his arguments, submissions which were not advanced before the learned judge. It is not to be supposed that counsel is disenabled from putting forward submissions in this court which he has not deployed in the court below but the line of argument before this court, must depend on the grounds of appeal he chooses to file. If it were otherwise, confusion would reign as counsel would be at large to roam withersoever he pleased. In an adversarial sense, it would be unfair to respondents.

Mr. Macaulay also sought to contend that the Master erred in law in ordering specific performance because he did so in circumstances where the person against whom the order was made, could not convey title. That submission plainly did not fall within the ambit of any of the grounds filed in this court. Then there was an argument that an order for the return of the deposit at the request of the respondent Ho, was a variation of the terms of the contract, and that was an order which the court could not make. When pressed to deal with the appeal before the court, counsel then canvassed the idea that the court could not make orders inconsistent with the contract between the parties. There really was no ground of appeal before us on which this argument could be raised. Nevertheless I am content to say that the orders made by the learned judge in the summons for further relief, were reasonably necessary to ensure that the court's order was put into effect by the appellant and were not in my view, inconsistent with the contract. That a court of Equity has power to ensure compliance, is not I think, in

any doubt.

Finally, I think it is quite clear that the submission as to ground (ii) which was the only ground argued, could not and did not persuade me that this court should disturb the order of the learned judge. For these reasons I concurred in the opinion of my brothers that the appeal should, as announced, be dismissed.

FORTE, J.A.

I have had the opportunity of reading the judgment of Carey, J.A., and agree entirely with the reasons and conclusions therein. Consequently, I have nothing useful to add.

GORDON, J.A. (Ag.):

I have read the draft judgment of Carey, J.A. and I agree with the reasons advanced and the conclusion. I wish to add a few comments of my own.

On 11th September, 1978, the appellant, Rudyard Stephens, agreed to purchase from Federal Investors Limited and Gilbert Baron Jobson of 10 Red Hills Road, Kingston 8 premises known as 10 Red Hills Road, St. Andrew and registered at Volume 877, 215 and 236 Folio 12, 79 and 29 respectively in the Register Book of Titles. The agreed price was $65,000, the agreed deposit of $10,000 was paid and date of completion given as 31st December, 1978. The appellant was placed in possession by the vendor, Gilbert Jobson. Mr. Jobson died on 23rd May, 1980, and the Administrator General of Jamaica obtained a grant of Letters of Administration in the estate of Gilbert Jobson. Completion has not yet taken place.

On 29th September, 1981, the appellant agreed to sell premises 10 Red Hills Road, St. Andrew to the respondent, Exley Ho, for the sum of $200,000. The agreement provided for "deposit of one hundred thousand dollars ($100,000) payable on execution hereof to the vendor's Attorney-at-law as stakeholder. Balance on completion". Completion date was set at 30th March, 1982.

On 1st October, 1981, the appellant demanded and received from his attorney-at-law, Mr. Rudolph Francis, the amount of $100,000 received by him under the agreement as stakeholder.

By letter dated 26th March, 1982, respondent's attorney advised appellant's attorney that the respondent was ready to complete the purchase. On 30th December, 1982, the respondent filed a Writ claiming inter alia specific

performance and on 10th February, 1983, he filed a Summons for Specific Performance. This summons was heard on 6th April, 1983, and an order made in terms of the summons filed. The amount due as balance of the purchase price (including the respondent's share of the costs) was determined at $104,016.68. Failure of the appellant to comply with the agreement and the order of the Court led the respondent to obtain by Summons for Further Relief, orders made on 24th May, 1984 -

> that (1) the appellant do return the sum of $100,000 admittedly held by him with interest at 10% per annum from the 1st October, 1981 to date
>
> (2) that the full amount to be paid within fourteen days
>
> (3) that the above sum be paid to and lodged in the name of the Vendor's and purchaser's Attorneys-at-law as stakeholders in a joint account at an institution agreed by both parties to abide the determination of the sale or suit.

Order (2) above was extended by summons to 1st September, 1984. When this latter order was made, the appellant undertook to pursue action in Suit C.L. S56/1984 brought by him against the Administrator General. The respondent had since 1st October, 1981, enjoyed the benefit of the use of the deposit of $100,000, contrary to the terms of the agreement for sale, in addition to the retention of the possession of 10 Red Hills Road. The respondent is still in possession of these premises.

The appellant seeks to have orders made by Orr, J. on 12th July, 1989, on a Summons for Further Relief brought by the respondent, set aside.

Order (1) requires the respondent, Ho, to pay to the appellant the sum of $104,336.48, being the balance of

the purchase price. This amount represents an upward revision in the appellant's favour on the amount of $104,016.68 ordered on 6th April, 1983, when the order for specific performance was granted.

The appellant has enjoyed possession of the premises since 1976. The second order requires him to hand over that possession he has enjoyed de facto as equitable owner to Mr. Ho, who is prepared to accept it.

The third order is that he should pursue with diligence, the suit he has instituted against the Administrator General, obtain title and transfer same to the respondent. Admittedly, there may be some obstacles to be overcome in discharging this third order. The evidence indicates that Mr. Gilbert Jobson was the registered owner of two of the three titles that comprise 10 Red Hills Road. The third title was in the name of Federal Investors Limited. Mr. Gilbert Jobson was majority shareholder in this company, holding 7,996 of the 10,000 shares issued. This company was struck from the Register of Companies by the Registrar of Companies on 13th August, 1975, some three years before Gilbert Jobson signed the agreement for sale on his own behalf and on behalf of the company as Managing Director.

Although there may be some obstacles in obtaining title, the contract can be specifically performed and all the respondent seeks is to get that which the appellant now enjoys, viz. possession until the obstacles are overcome with diligence and title is obtained.

Dr. Barnett, with great clarity, dealt tersely with the objections raised by Mr. Macaulay. He submitted that if Mr. Stephens, who has agreed to sell to Mr. Ho, has possession then he has an obligation to give up that possession to the purchaser, subject only to the limitation

that he cannot give more than he has. If th ministrator General secures a right to repossess, Mr. Mc ald be in jeopardy. Stephens cannot be heard to say he is not giving up possession by relying on some potential right which the Administrator General may exercise.

Dr. Barnett also submitted that by virtue of the appellant's sale to the respondent and his advising the Administrator General of that sale and his desire to complete the contract to the respondent the appellant had in fact sold the equitable interest which he had, as well as assigned the right to receive the legal title, to the respondent. In the absence of provisions which prevented the appellant from giving possession to the respondent, the learned judge made no error in making the order for possession, the time for completion having long passed.

I accept the submissions of Dr. Barnett as being a correct statement of the law. The appellant's submissions ignores the fact that a judge has power in Equity proceedings to work out arrangements to give effect to orders.