Privy Council Appeal No. 15 of 1975

Amratlal Jamnadas (s/o Jamnadas) – – – – *Appellant*

v.

Gulab Ben (d/o Ratanji) – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST DECEMBER 1976

Present at the Hearing:
LORD SALMON
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN
[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal stems from a purchaser's action for specific performance of a contract dated 26th September 1969 for the sale by the appellant to the respondent of land at Spring Street, Suva, Certificate of Title No. 9077. Specific performance was ordered at first instance and that was upheld on appeal. The contract was partly in typescript or print designed as a basis for various types of sale, and partly in writing inserted by one Parshotam then solicitor for both parties at his office on that date, when it was signed by the appellant and by one Das as agent on behalf of the respondent.

After stating the parties, the agreement proceeded in type or print— " Subject Matter of Sale: (land, buildings chattels etc.) " and in the space below this is written " Certificate of Title 9077 situated at Spring St. Suva together with all improvements thereon ". One of the points argued for the appellant is that the agreement is bad for uncertainty because there is no definition of the chattels said to be part of the subject matter of the sale. Their Lordships consider that this is wholly misconceived: the words in the parenthesis are nothing but a guide to what is to be filled in, depending on what the subject matter of the sale is: the subject matter of this sale was simply the real property Title 9077.

The agreement next has in print provision for stating that the property is sold either free from encumbrances or subject to leases mortgages charges or encumbrances. After deletion and addition it reads " the said property is sold subject to the following mortgage that is No. 63056 ". That was in fact a first mortgage for $8,000 and at the time $390 was due for interest. The purchase price was stated as $18,000. It was stated that the sum of $500 was then paid to Parshotam as solicitor for the vendor and " the balance shall be paid upon execution of transfer subject only to above mortgage ". Under the heading of " Outgoings " it was provided that the

insurance policy premium was to be apportioned as from 1st January 1970: rates having been paid for period ending 31st December 1969 the purchaser was to pay them from 1st January 1970: " other outgoings such as water rates, electricity, telephone etc. Vendor will pay up to 31st December 1969 ". Next is under the heading of " Possession "—thus—

> " (*a*) Possession to be given by the Vendor and taken by the Purchaser as from the date of execution of transfer
>
> (*b*) Vacant possession to be given by the Vendor and taken by the Purchaser as from the 31st day of December 1969 "
>
> (*c*) Details of the tenant in occupation were then given and rents under his lease of part and tenancy of the other part.
>
> " (*d*) Purchaser to receive rents from the 15th day of October 1969 ".

The underlinings in the above quotations indicate manuscript. Clause 5 is a provision for consents to be obtained: after deletion and addition it provides that the consent is to be obtained of " mortgagee that is first mortgagee ". Clause 7 is headed " Special Covenants and Conditions ", and reads (in manuscript) " Vendor will occupy one flat now occupied by him free of rent until 31st December 1969 ": this explains the double provision for possession and vacant possession. The only other point to be noticed is that at the end of clause 10 a printed provision for a completion date is deleted, and so is clause 8 stating time to be of the essence.

The second head upon which the appellant attacks the agreement on the ground of uncertainty is that there is no sufficiently certain provision for a date for completion. Their Lordships consider that on its true construction the agreement sufficiently clearly indicates that completion is to take place not later than 31st December 1969: the fact that when completion takes place the purchaser is entitled to claim the rents as from 15th October 1969 does not throw doubt upon this: it may well be that completion was *expected* earlier than 31st December 1969, and that here was some *quid pro quo* for the vendor's occupancy of his flat rent free until 31st December.

The second point taken for the appellant was that the condition of consent by the mortgagee was never fulfilled, and reliance was placed upon the *Aberfoyle* case ([1960] A.C. 115).

The evidence showed that the mortgagee through his solicitor was perfectly agreeable to the sale going through, but wanted in place of his $8,000 mortgage a payment of $2,000 and a fresh mortgage for $6,000. But this, the appellant contended, was not the consent upon which the agreement was conditional: for the agreement was for a particular sale *subject to the existing mortgage.* It appears from the evidence that the mortgagee did agree to the sale subject to the $8,000 mortgage provided that simultaneously the *purchaser* (who through her agent was prepared to do it) paid $2,000 and gave a fresh mortgage for $6,000: the purchaser's agent in evidence said (Record p. 14, line 13) that at the meeting with the mortgagee's solicitor and agent " An agreement was made that $2,000 would be paid by *me* and *I* would give a fresh mortgage for $6,000." By " me " and " I " he referred of course to the purchaser for whom he was acting.

The mechanics of this agreement would require the purchaser first—substantially simultaneously—to have the land vested in her subject to the $8,000 mortgage. But in any event their Lordships cannot accept that the consent could only be to the sale subject to the $8,000 mortgage: it suffices that it should be consent to sale by the mortgagor. Their Lordships reject this ground of appeal.

The next point taken was that the agreement should not have been admitted in evidence because it was insufficiently stamped. It was originally stamped in 1970 with a wholly incorrect 50 cent stamp and the minimum penalty stamp ($4) for late stamping. In 1973 shortly before the trial it was resubmitted for stamping and stamped to a total of $260 by the relevant office: no further penalty was exacted, there being power to remit. The point taken was that the true figure on which the stamp duty was chargeable was not $18,000 plus $8,000=$26,000, but an additional figure of $390 the interest due under the mortgage at the time. Their Lordships do not propose to pursue this matter further. A stamp objection was suggested at first instance and at once dropped: it found its place among 21 grounds of appeal to the Court of Appeal, but no trace of it having been argued is found in the judgments. But in any event if the objection were sound and sustainable at this stage in the case their Lordships would have dealt with it by inviting an undertaking to stamp properly. That was forestalled by evidence that shortly before the hearing the extra stamp to cover the $390 had been impressed and paid for and that the appropriate official had remitted any further penalty. And that is the end of that point.

The next point taken for the appellant was that the remedy of specific performance should not have been granted, leaving the purchaser to her remedy in damages, on the ground of delay by the plaintiff. Neither Court below considered that the delay was such as to disentitle the purchaser from the remedy of specific performance, and their Lordships are not minded to disagree with them. The delay complained of is in not prosecuting the action after February 1971. At that stage a date for trial had been fixed but the vendor changed his solicitors who naturally required the trial to be postponed. It was sought to blame this postponement on the purchaser because the change of solicitors came about when the vendor's solicitors finally gave way in face of objections by the purchaser's solicitors that they should not act because a partner had acted for the mortgagee in the matter of consent: but their Lordships cannot accede to that proposition. The trial came on eventually in 1973. No evidence was led on the causes of delay, nor on prejudice to the vendor: and the exchange of correspondence is inconclusive. Their Lordships were very properly referred to the Australian case of Lamshed ((1963) 109 C.L.R. 440): but it does nothing to persuade them that the views of the Courts below were erroneous on this matter in the present case.

A point was made for the first time in the appellant's case that the order made at first instance omitted the figure of $390 already mentioned. What had happened was that in the course of these proceedings, before trial, the vendor paid off the $8,000 mortgage. In those circumstances the order stated the purchase price at $26,000. It is not now disputed that this should have been $26,390: $2,000 was paid to the vendor: the order will therefore be varied by substituting for " $26,000 " the phrase " $26,390 less $2,000 already paid on account ".

A final point not even taken in the appellant's case, let alone below, was that the order should have provided for interest on the purchase price to be set against the rents and profits and occupation rent for which the vendor is to be made accountable. If the point had been taken it may well be that it would have been properly included in the order. Their Lordships do not however propose to allow the point to be taken at this stage. They note however that in his judgment (Record p. 41) the learned judge said:

> " There will be liberty to apply for any further order or direction in carrying out the decree for specific performance, and, indeed, liberty to apply generally ".

Whether an application to introduce an offset of interest in the manner suggested comes within the liberty to apply must be for the learned judge to decide.

Accordingly their Lordships are of opinion that, subject to the amendment referred to, the appeal must be dismissed with costs, and will humbly advise Her Majesty accordingly.

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In the Privy Council

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