

Privy Council Appeal No. 3 of 1999

Yambou Development Company Limited

Appellant

v.

**Sally Helena Kauser (as executrix of the will of Helen
Hadley, deceased)**

Respondent

FROM

**THE COURT OF APPEAL OF ST. VINCENT AND
THE GRENADINES**

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

Delivered the 25th October 2000

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Clyde
Lord Hutton
Lord Millett
Sir Anthony Evans

[Delivered by Lord Millett]

On 9th August 1989 the appellant Yambou Development Company Limited issued a writ against Helen Hadley for specific performance of a contract for the sale by Mrs. Hadley of a property at Villa in St. Vincent (“the property”). The appellant sued as assignee of the benefit of the contract and also claimed damages in addition to specific performance and further or other relief. Mrs. Hadley died in the course of the proceedings and the respondent is her executrix. The action was dismissed by Mitchell J. and an appeal from his judgment was unanimously dismissed by the Court of Appeal (Singh, Redhead and Matthew JJ.A.) on 20th April 1998. The appellant now appeals to the Board.

The original contract for sale was made on 13th November 1981 between Mrs. Hadley (acting through an

estate agent) as vendor and Norton and Lesline Bess as purchasers. The purchase price was EC\$400,000. Mr. and Mrs. Bess paid an agreed deposit of EC\$23,000. The balance of the purchase price amounting to EC\$377,000 was to be paid on completion. This was fixed for 13th December 1981, and time was expressly made of the essence of this date. Mr. and Mrs. Bess were unable to raise the balance of the purchase price by 13th December 1981 and were granted successive extensions of time, first to 15th January 1982 and finally to 15th March 1982. The terms of the second extension of time were recorded in a document dated 15th November 1981 and signed by both parties. Again time was made of the essence of the date for completion.

Mr. and Mrs. Bess were, however, still unable to raise the finance to enable them to complete, and Mrs. Hadley offered to assist them. On or about 29th January 1982 it was orally agreed that, provided Mr. and Mrs. Bess made an immediate further payment of EC\$107,000, the balance of the purchase price, amounting to EC\$270,000, would be left outstanding on mortgage. The terms of the mortgage were agreed. Repayment was to be made by fixed but increasing yearly instalments of principal over a period of five years together with interest at the rate of 1% per month on the balance of the purchase price for the time being outstanding.

These terms were confirmed by Mrs. Hadley's solicitor Mr. Commissiong in a letter addressed to Mr. and Mrs. Bess and dated 30th January 1982. The letter contained a repayment schedule which showed the amount of principal to be repaid in each of the five years and correctly recorded the rate of interest as 1% per month. The schedule also purported to show the combined amount of principal and interest which were "thus" to be repaid in each of the five years, but unfortunately the interest element of each payment was incorrectly calculated at the rate of 1% per annum. The letter concluded by stating that the offer of mortgage finance which it contained would remain open up to and including 15th March 1982, when the life of the contract of sale would expire.

The judge found that Mr. and Mrs. Bess were aware of Mr. Commissiong's mistake, but instead of doing the honest thing and pointing it out they hastened to accept the terms of his letter. They then hurried to make the further payment

of EC\$107,000 and to demand a copy of the abstract of title. On 25th February 1982 their solicitor Mr. Sylvester wrote to Mr. Commissioning informing him that he had investigated the title to the property on behalf of his clients and enclosing a Deed of Conveyance and an executed Mortgage Deed in respect of the EC\$270,000 to be left outstanding. Their Lordships have not seen a copy of the Mortgage Deed, which may not have been in evidence, but it seems likely that it contained a repayment schedule in the same terms, and containing the same erroneous calculations, as Mr. Commissioning's letter. Mr. Sylvester asked that early steps be taken to have the Conveyance executed so that the transaction might be completed without further delay.

On 9th March 1982 Mr. Commissioning wrote to Mr. Sylvester pointing out the error which he had made in his previous letter. He explained that the interest had been wrongly calculated, but that there was never any doubt that the rate of interest was correctly stated. He concluded by saying that Mrs. Hadley felt that she had sufficiently accommodated Mr. and Mrs. Bess by the offer of a five year mortgage which she was not prepared to extend, but that "she is prepared to refund your clients' money in full if by March 15th, 1982 they are unwilling to accept the mortgage with its correct rate of interest, or cannot find alternative sources of finance".

Mr. Sylvester replied on 12th March 1982 that Mrs. Hadley evidently did not intend to conclude the transaction in accordance with the letter of 30th January 1982 and that his clients "would be guided accordingly". He asked for the return of the documents he had sent to Mr. Commissioning on 25th February 1982, that is to say the Deed of Conveyance and the executed Mortgage Deed. Mr. Commissioning duly returned them on 16th March 1982.

On 24th March 1982 Mr. Commissioning wrote again to Mr. Sylvester, noting that Mr. and Mrs. Bess had not indicated their intention to complete the purchase. He referred to Mrs. Hadley's offer of mortgage facilities and the arithmetical error in the calculation of the interest payments. He explained that, now that the completion date of 15th March 1982 had passed, his client had instructed him to return the full down-payment, and he enclosed a

cheque for EC\$130,000 made payable to Mr. and Mrs. Bess.

Mr. and Mrs. Bess had by then issued a writ against Mrs. Hadley claiming specific performance of the contract on the terms of the letter of 30th January 1982. Accordingly Mr. Sylvester returned the cheque and enquired whether Mr. Commissiong would accept service of the proceedings. In due course Mrs. Hadley served a defence and counterclaim, in which she sought rectification of the letter of 30th January 1982 and specific performance of the agreement as rectified or alternatively a declaration that she was entitled to treat the contract as no longer binding on her by reason of the plaintiffs' failure to complete on the date fixed for completion. This action has never come to trial. It is currently stayed pending the outcome of the present proceedings.

Mr. Bess died on 17th June 1982. On 9th June 1983 Mrs. Bess assigned the benefit of the contract of sale to the appellant. On 9th August 1989 the appellant commenced the present action against Mrs. Hadley. In her Defence Mrs. Hadley took an unnecessarily wide variety of points, but these included the critical fact that Mr. and Mrs. Bess had failed to complete the transaction by the date fixed for completion, of which time was of the essence, and that she had therefore refused to proceed further with the contract. Their Lordships understand that in 1986, that is to say after the assignment to the appellant but before the writ in the present proceedings was issued, Mrs. Hadley had repaid the EC\$130,000 to the executor of Mrs. Bess (or possibly of Mr. Bess).

In both courts below there was much discussion of the question whether the contract of sale and the mortgage offer were separate transactions or formed part of a single "package deal". Their Lordships do not consider this question helpful. The outcome of the appeal can be decided by a careful examination of the parties' legal rights and obligations on the various relevant dates taken chronologically.

On 13th November 1981 Mrs. Hadley contracted to sell and Mr. and Mrs. Bess contracted to buy the property for a sum of EC\$400,000. The balance of the purchase price

amounting to EC\$377,000 was to be paid on completion on 13th December 1981. Time was of the essence of this date. The date for completion was twice extended at the request of Mr. and Mrs. Bess, and was ultimately fixed for 15th March 1982. Time was again made of the essence of this date.

By January 1982, therefore, Mr. and Mrs. Bess were contractually committed to complete the purchase by paying the whole balance of the purchase price on or before 15th March 1982 at the latest. If they failed to do so, Mrs. Hadley would be entitled to treat the contract as at an end and forfeit the deposit of EC\$23,000.

On or about 29th January 1982 Mrs. Hadley orally agreed that, if Mr. and Mrs. Bess made a further payment of EC\$107,000, she would allow them to leave the balance of the purchase price outstanding on mortgage for a period of five years on agreed terms. This agreement did not affect the existing contract of sale. Mr. and Mrs. Bess were still obliged to complete on or before 15th March 1982 at the latest, and time was still of the essence of that date. They were entitled to avail themselves of Mrs. Hadley's mortgage terms, but they were not obliged to do so. Once they had paid the further EC\$107,000, they had a choice. They could continue their efforts to obtain cheaper finance elsewhere and complete the purchase by paying the balance of the purchase price in full. Or they could avail themselves of Mrs. Hadley's offer and complete the purchase by tendering an executed mortgage to secure the outstanding balance of the purchase price on the terms which had been agreed. If they did neither by 15th March 1982, Mrs. Hadley could forfeit the deposit and treat the contract as at an end.

Mr. Commissiong purported to set out the agreed terms of the proposed mortgage in his letter of 30th January 1982. Unfortunately, they were self-contradictory. The rate of interest was stated to be 1% per month, but the interest element of the combined instalments was calculated at 1% per annum. They could not both be correct. Their Lordships consider that, had completion taken place and a mortgage been executed in this form, the contradiction could probably have been resolved by a simple process of construction and without resort to evidence. The calculated figure of the

combined amount of principal and interest payable at the end of each year, introduced by the word “thus”, was illustrative only and subject to arithmetical error. It must yield to the figure correctly calculated in accordance with the rate of interest previously stated. This would merely be an application in an unusual context of the well-known principle of construction *falsa demonstratio non nocet cum de corpore constat*.

But even if this were not the case, evidence of the terms which the parties had orally agreed would be admissible in order to identify the error in reducing them to writing. The judge found that Mr. Commissiong was right when he wrote that the rate of interest was correctly stated; his error lay in calculating the amount of the combined instalments. Accordingly, if the error had gone unnoticed and Mrs. Hadley had completed on the mistaken terms, she would have been entitled to have the mortgage deed rectified. The judge found that Mr. and Mrs. Bess were aware of the mistake and dishonestly tried to take advantage of it. But even if they had not noticed the mistake and were wholly innocent, they could not have resisted Mrs. Hadley’s claim to have the mortgage deed rectified to accord with the terms which the parties had agreed. Mrs. Hadley was not obliged to accept the terms of a mortgage which differed from those which she had agreed with Mr. and Mrs. Bess merely because her solicitor had made a mistake in recording them.

Fortunately the mistake was noticed in time. Once it came to light, Mrs. Hadley was entitled to have the transaction completed on the agreed terms. She was not obliged to buy a lawsuit by completing on the terms which her solicitor had incorrectly recorded and bringing proceedings for rectification. On her instructions Mr. Commissiong gave Mr. and Mrs. Bess a choice. They could either complete on the correct terms of the mortgage which had been agreed or withdraw and recover the full EC\$130,000 which they had paid. (In fact, they had a third choice: to complete by paying the balance of the purchase price in full. Mr. Commissiong did not mention this, perhaps because it was known to be unrealistic.)

This was a generous offer. Mrs. Hadley would have been entitled to insist on Mr. and Mrs. Bess completing, by one means or the other, on pain of losing their deposit if they

did not. But she was willing to return the whole EC\$130,000. Mr. Sylvester's letter of 12th March 1982 was a mistaken attempt to hold Mrs. Hadley to the terms wrongly recorded in Mr. Commissiong's letter of 30th January 1982. It may or may not have evinced an intention not to be bound by the contract of sale, but nothing now turns on this. Mr. and Mrs. Bess failed to complete on 15th March 1982, either by paying the balance of the purchase price or by tendering an executed mortgage in the correct form, and Mrs. Hadley became entitled to treat the contract as at an end. She did so by the letter dated 24th March 1982, when she returned the EC\$130,000 to Mr. and Mrs. Bess.

Thereafter Mrs. Hadley was discharged from all further obligation to convey the property to Mr. and Mrs. Bess. They had no right to have the contract specifically performed, and after Mr. Bess' death Mrs. Bess had no such right to assign to the appellant. Mr. and Mrs. Bess refused to accept the fact that the contract was at an end, and returned the EC\$130,000 to Mrs. Hadley. But that made no difference. They could not revive a contract that they had already lost.

That is enough to dispose of the present appeal. In a Supplementary Case lodged on the eve of the hearing, however, the appellant asked for an order that the respondent repay the sum of EC\$107,000 with interest from February 1982 to the present.

Had such a claim been made by Mr. and Mrs. Bess in the original proceedings which they began in 1982, it might have had reasonable prospects of success. The original deposit of EC\$23,000 was plainly liable to forfeiture, but the same is not obviously true of the further sum of EC\$107,000. But the claim was not made in those proceedings, and it has not been made in the present action either. While the prayer for further or other relief might be sufficient to encompass such a claim if pleaded, it never has been.

If such a claim were made in the present proceedings, however, it would face formidable difficulties. Even if the EC\$107,000 was not liable to forfeiture, it is far from clear that the right to claim its return passed by the assignment to

the appellant and that the claim was not already statute-barred by 1989. In relation to both points their Lordships would observe that, while a vendor's right to forfeit a deposit is a contractual right derived from the terms of the contract of sale, a purchaser's right to the return of other money paid on account of the purchase price where the contract has failed is not a contractual right at all. It arises outside the contract and is restitutionary in character. It is by no means obvious that Mrs Hadley would be unjustly enriched by the retention of money paid as a condition of receiving an offer of a mortgage advance which Mrs Hadley duly made.

Quite apart from this, the respondent may be entitled to rely by way of defence on the repayment made by Mrs. Hadley before the present proceedings were brought. The circumstances surrounding the repayment, which may be crucial, have not been explored because, in the absence of a claim to repayment of the EC\$107,000, they have not been relevant.

Their Lordships are not willing to entertain the claim in the absence of proper pleadings and evidence, without the benefit of the judgments of the local courts, and in circumstances in which counsel for the respondent has had insufficient opportunity to give proper consideration to the claim and present argument upon it.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must bear the costs of the proceedings before the Board.

