

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S139 OF 1981

IN CHAMBERS

BETWEEN	NOEL SALE PERSONAL REPRESENTATIVE OF ESTATE EDNA VELETA LAING (DECEASED)	PLAINTIFF
AND	SONIA ALLEN	DEFENDANT

Richard Millingen for Plaintiff-Respondent

Miss Hilary Phillips and Mrs. Denise Kitson for Defendant-Applicant

HEARD: NOVEMBER 4, 5, 1991

CORAM WOLFE J.

By summons dated September 11, 1991 which was amended without objection on November 5, 1991 the Defendant-Applicant sought the following Order.

1. This Honourable Court give direction on the following questions of law in order for the Registrar to approve an account of sum due and payable in settlement of the balance purchase price, half costs and interest therein.

(a) Should costs be ~~deductible~~ under Order of the High Court prior to calculation of interest on the unpaid balance of the purchase money or after interest has been calculated and added thereto.

(b) At what rate of exchange should costs ordered by the Privy Council be paid i.e. whether at the prevailing rate at the time when judgment was delivered or at the rate prevailing when payment is made.

2. Upon payment of the sum so approved, the Plaintiff Respondent by his attorney-at-law, Mr. Richard Milligen, shall deliver to the Defendant's Attorneys-at-Law the original stamped Agreement for Sale for premises, the subject of this action, original certificate of payment of Transfer Tax in relation thereto, Registerable Instrument of Transfer duly executed by the Plaintiff-Respondent and the Duplicate Certificates of Title registered at Volume 1050 Folio 16 and Volume 1050 Folio 17 respectively of the Register Book of Titles for the premises, the subject of this action, stamped Discharge of Mortgage and Release of Caveat in respect of Mortgage or other interest, if any, which may be endorsed

on the said Certificate of Title.

3. That failing delivery as aforesaid the Registrar of the Supreme Court shall be entitled to execute an instrument of Transfer for and on behalf of the Plaintiff in relation to the said property and the Defendant shall be entitled to tender the same for stamping at the office of the Commissioner of Stamp and Estate Duty as a stamped copy upon production of a photocopy of the stamped Agreement for Sale and shall thereafter be entitled to seek registration of the said Instrument of Transfer by dispensing with the production of the Duplicate Certificate of Title.

This matter relates to an agreement between the Plaintiff and Defendant, vendor and purchaser respectively, made in April 1976. The Agreement ought to have been completed in May 1976. The matter was not completed ~~timely~~ consequently action was commenced by the Plaintiff to recover possession in 1981. Worthy of note is the fact that the agreement remains uncompleted up to this point in time.

The matter was heard before Campbell J. as he then was, and on the 18th day of July 1984 he ordered as follows:

1. That the Agreement be specifically performed.
2. That the purchase price be ~~abated~~ in the sum of Ten Thousand Dollars (\$10,000.00) and a further \$3,000.00 to cover the cost of demolition of a building which encumbered the property.
3. That the costs of the action be paid by Plaintiff both in respect of the claim and Counter Claim and that the Defendant is entitled to deduct the said sum when it is agreed or taxed from any balance of the purchase money payable to the Plaintiff.

Costs were taxed at Eleven Thousand Eight Hundred and Twenty Four Dollars and Twenty Seven Cents (\$11,824.27).

The Plaintiff appealed to the Jamaica Court of Appeal and on Appeal the Judgment of Campbell J. was affirmed as at 1 and 3 above. It was further ordered that each party should have one-half of his own costs of Appeal.

The Defendant's costs were duly taxed at Five Thousand and Eighty Dollars and Forty Cents (\$5,080.40). To date the Plaintiff's costs have not been taxed.

The battle continued and Plaintiff appealed to the Judicial Committee of the Privy Council. The Privy Council affirmed the Judgment of the Court of Appeal of Jamaica as to

1. The order for Specific Performance.
2. The removal of the Abatement Order made by Campbell J.
3. The Order for costs made by Campbell J. was affirmed by the Privy Council.
4. It was ordered by the Privy Council that interest be paid by the Defendant purchaser in possession on the unpaid balance of the purchase money from the date of possession.

The rate of interest was to be determined by the High Court of Jamaica. The interest payable on the unpaid balance of the purchase money was to be ascertained after taking into account the costs deductible under the order of Campbell J. and from the date when the Defendant took possession of the premises and until the agreement is completed.

The Privy Council referred the matter to the High Court of Jamaica for the following to be done.

1. To ascertain the date of possession in working out the decree of Specific Performance.
2. To ascertain the appropriate rate of interest which was to be paid on the unpaid balance.
3. To take an Account of what is due from the Respondent (Purchaser) to the appellant (Vendor) up to completion for such unpaid balance (after deduction therefrom of the costs payable by the appellant under the order of the High Court) and for interest thereon at the rate fixed by the court after giving credit for the monthly payments of \$10 from March 1979 onwards so far as those have been paid.

The Privy Council costs were agreed at Three Thousand Eight Hundred and Seventy One Pounds and Seventy Eight Pence in favour of Defendant. The said amount representing three quarters of the costs as ordered by the Privy Council.

On August 13, 1991 the Defendant Purchaser obtained an order of taxed costs in the Court of Appeal in the sum of Three Thousand and Sixty One Dollars and Thirty-Five Cents (\$3061.35) being three-quarters of the costs incurred by the Defendant in the Court of Appeal in respect of the Appeal to the Privy Council.

Pursuant to the Order of the Privy Council, referring the matter to the High Court Downer J., as he then was ordered as follows:

1. Rate of interest payable on the unpaid balance of the purchase price fixed at 16% and adjudged the date of possession as July 30, 1976. Interest ordered to be paid from July 30, 1976 to February 29, 1988.
2. The Registrar was ordered to take Accounts as to what was owed and deduct therefrom the costs payable by the Appellant under the order of the High Court.

Two issues arose for resolution, namely:

- (1) At what stage should the deduction of costs payable to the Defendant purchaser, in respect of the Order made by Campbell J., be made before or after the interest is added thereto.
- (2) At what rate of Exchange should the amount of £3871.78 be converted. Is it at the rate of exchange existing at the time the costs were taxed or agreed or is it at the time when they are being paid.

Re Issue No. 1.

What did the Court order? It is necessary to resolve this question before the issues can be resolved. Campbell J., in his Judgement, ordered as follows:

"The Defendant will have her costs against the Plaintiff both as regards the claim and the Counter-Claim and is entitled to deduct this sum when agreed or taxed, from any balance of the purchase money payable to the Plaintiff."

This order of Campbell J. was made on the 18th day of June 1984. The order was affirmed both by the Court of Appeal of Jamaica and the Privy Council hence it takes effect as from that date.

The language of the Judgment is clear and unequivocal namely that the costs are to be taxed or agreed and when they have been so taxed they are deductible from the unpaid balance as at the date of completion, to wit, May 1976.

At this stage the matter of interest on the unpaid balance did not arise. Interest on the unpaid balance was ordered by the Privy Council. On the 8th day of June 1987. This interest by the Privy Council on the unpaid

balance was ordered as follows:

- "(3) An Account of what is due from the Respondent to the appellant up to completion for such unpaid balance (after deduction therefrom of the costs payable by the appellant under the order of the High Court) and for interest thereon at the rate fixed by the Court after giving credit for the monthly payments of \$10.00 from March 1979 onwards so far as those payments have been made.

What does the order mean?

I interpret the order as follows in sequence of what has to be done.

- (a) Ascertain the unpaid balance up to date of completion.
- (b) Deduct from that amount the costs ordered by Campbell J. on 18th June 1984.
- (c) Credit the amount of \$10.00 paid monthly from March 1979 until such payment ceased.
- (d) Interest at the rate ordered by the High Court of Jamaica is then to be computed on the balance arrived at in (c) above.

Upon an examination of the Orders made by Campbell J. and their Lordships of the Privy Council it is patently clear that the costs which are deductible from the unpaid balance are the costs ordered by Campbell J. and no other costs and that interest is to be computed thereafter, having giving credit for such sums as have been paid by way of monthly payments of \$10.00 from March 1979.

Re Issue 2

Miss Phillips submitted that the rate of conversion to be used when the costs are being paid is the rate of conversion existing at the time of payment and not at the time the order for costs was made.

Mr. Millingen submitted the contrary namely that the relevant rate was that existing at the time of Judgment.

In Miliangos v George Frank (Textiles) Limited. [1975] 3 A.E.R. 801 at p. 8136 Lord Wilberforce said:

"As regards foreign money obligations (defined above), it is first necessary to establish the form of claim to be made. In my opinion acceptance of the argument already made requires that the claim must be specifically for the foreign currency as in this case for a sum stated in Swiss Francs. To this may be added the alternative or the sterling equivalent at the date of (see below). As regards the conversion date to be inserted in the claim as in the judgment of the Court, the choice, as pointed out in the Havana Railways case, is between (i) the date of action brought, (ii) the date of judgment (iii) the date of payment. Each has its advantages, and it is to be noticed that the Court of Appeal in Schorsch Meier and in the present case chose the date of payment

meaning, as I understand it, the date when the court authorises enforcement of the judgments in terms of sterling. The date of payment is taken in the convention annexed to the Carriage of Goods by Road Act 1965 (Schedule Art 27 (2)). This date gets nearest to securing to the creditor exactly what he bargained for. The date of action brought, though favoured by Lord Reid and Lord Radcliffe in the Havana Railway case seems to me to place the creditor too severely at the mercy of the debtor's obstructive defences (cf this case) or the law's delay. It may have been based on an understanding of the Judgment of Holmes J. in the Deutsche Bank now seen to be probably mistaken: see Mann on the Legal Aspect of Money and cases cited. The date of Judgment is shown to be a workable date in practice by its inclusion in the Carriage by Air Act 1961 which gave effect to the Hague Convention 1956 varying, on this very point, the Warsaw Convention 1929, but, in some cases, particularly where there is an appeal, may again impose on the creditor a considerable currency risk.

So I would favour the payment date, in the sense I have mentioned."

Lord Cross of Chelsea supported the dictum of Lord Wilberforce at page 838 (letters i and f). After dealing with the question of whether the Court was empowered to give judgment in a foreign currency the noble and Learned Lord went on to say:

"In that case if the defendant fails to deliver the foreign currency the date for its conversion into sterling should be the date when the Plaintiff is given leave to levy execution for a sum expressed in sterling."

In the instant case the Plaintiff has failed to deliver the costs ordered in Sterling by the Privy Council so by parity of reason the conversion date into Jamaican dollars must be the date when the Defendant is given leave to levy execution for a sum expressed in Jamaican Dollars or the date of payment.

In Barclays Bank International Limited v Levin Bros. (Bradford)

Limited [1976] 3 A.E.R. 900 at p 912 Mocatta J expressed the view.

"As regards his final point, with which he dealt very shortly, I need only say that in certain circumstances it is possible to recover as unliquidated damages a currency loss due to the change in the relevant rates of exchange occurring subsequently to a failure to make payment on the due date. For this proposition counsel for the Plaintiff relied on what was said by Donaldson J in Ariena Mills Ltd. v Dhanrajmal Gobindram and on paragraphs 792 and 793 in McGregor on Damages. The submission might seem to be contrary to what was said in Banque Populaire de Bienne v Cave but the preservation of the Common Law right to unliquidated damages held in Re Gillespie exparte

Robarts to continue to exist under s. 97 of the 1882 Act notwithstanding the language of s.57 might perhaps enable something to be made of counsel for the Plaintiff's fourth point were it necessary to give a decision on it."

Mocatta J. then went on to say:

"In my judgment, therefore, for the reasons given, the Plaintiffs are entitled to judgment on each of the four bills of exchange expressed in the dollar amount of each such bill totalling in all \$92,548.70. If the Plaintiff's so desire, the judgment can add or the equivalent thereof in sterling at the date of payment of this judgment or its enforcement."

I am satisfied that both the Williamson case and the Barclay's Bank case put the issue beyond doubt that the relevant date for conversion is the date of payment or the date when the judgment is enforced.

In suit No. C.L. 1982/F089 Jerome Farrell v Gordon Townsend and Gordann Limited dated December 18, 1985 (unreported) the Plaintiff claimed an amount of U.S. \$10,72.07 for medical expenses. For purposes of calculating the Special Damages I used a rate of exchange which existed at the time of Judgment and not at the time when the expenses were incurred and I said.

"Finally on the question of the conversion rate to be applied, I used a rate of exchange at the time judgment was delivered. I took the view that this was the only sensible approach to be adopted if the Plaintiff were not to be out of pocket. If the rate of exchange to be used was that which obtained at the time the expenses were incurred then clearly the Plaintiff would be recovering less than he actually expended."

The matter went on Appeal and one of the grounds of Appeal was that.

"The Learned Trial Judge was wrong in law in allowing the Plaintiff's claim at conversion rates not pleaded and different from the rates which existed at the time the sums were paid and the claim made."

The Court of Appeal was denied the opportunity of deciding the point as the Appellant did not pursue it. I am still of the view expressed in Farrell's case.

In the light of the foregoing I hold that the relevant date of conversion would be the date of payment or the date when the order is being enforced.

I therefore order as follow:

1. That the costs which are deductible from the balance of ^{the} unpaid purchase money are those ordered by Campbell J. on the 18th June 1984 and that they are

deductible before the interest ordered by the Privy Council on the unpaid balance of the purchase money is taken into account.

2. That the relevant date of conversion of the amount of £3781.79 ordered as costs to the Defendant by the Privy Council is the date of payment or the date when the order is being enforced.
3. Order in Terms of amended paragraph 2 of summons.
4. Order in terms of paragraph 3 of summons.
5. Costs of Summons to Defendant Applicant.
6. Certificate of Counsel granted.
7. Matter referred to Registrar for Accounts to be taken.