IN THE SUPREME COURT OF QUEENSLAND No. 875 of 1973
EDWARD STREET PROPERTIES PTY LTD (Plaintiff) Appellant

-v-

JOHN RONALD COLLINS (Defendant) Respondent

The Chief Justice (Wanstall C.J.)

Douglas J.

Sheahan J.

Reasons for Judgment delivered by Douglas J. on the First November, 1977. The Chief Justice and Sheahan J. concurring.

"APPEAL DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND No. 875 of 1973

BETWEEN

EDWARD STREET PROPERTIES PTY. LTD. (Plaintiff) Appellant

AND

JOHN RONALD COLLINS (Defendant) Respondent

JUDGMENT - DOUGLAS J.

This is an appeal from a judgment delivered in a suit for specific performance. The suit was dismissed on the ground of laches, and the alternative remedy of damages in lieu of specific performance was refused. During the course

of his address counsel for the plaintiff, the appellant in this appeal, adverted to the proposition that, if the defence of laches had been made out, it was no answer to say that the plaintiff ought not to have damages, but that an appropriate order would be for damages to be assessed. The learned trial judge found that there was no evidence before him which would enable him to make an award of damages. In his judgment he did not mention the matter of a directed separate assessment of damages. An application under the slip rule seeking such an order was refused. There is an appeal also against this refusal.

The argument, in brief, for the appellant is that the relief of specific performance claimed should not have been refused because of laches, alternatively, that the court should have ordered an inquiry as to damages, and given judgment for the appellant in accordance with the result of that inquiry.

On the other hand it is argued for the respondent that time was of the essence of the particular contract, and the settlement was not effected on the date stipulated, and that the repudiation by the respondent of the contract on the day after the date for settlement had been effective to terminate the contract. This argument was pressed with considerable force. In the circumstances I do not propose to traverse it. It involved the determination of a pure matter of fact. The learned trial judge held that the requirements of the time clause had been waived, and there is nothing in the evidence to suggest that he was wrong in so doing.

On the findings of fact the situation appeared that the defendant was in breach, and it was a case which ordinarily would have attracted a remedy.

I set forth the chronology of the matter. The contract was dated 13 April 1974, and on that date a deposit was paid. The balance of the purchase price was to be paid on 14 June 1973. There is a finding by the learned trial judge, which I have referred to above, that there was by

implication a waiver of the provision with respect to time. On 15 June 1973 the defendant gave notice of rescission on the ground of the plaintiff's failure to tender the balance of the purchase money. On the same date the writ was issued. The statement of claim was delivered on 9 August 1973; the defence and counter-claim on 5 September 1973. There were abortive attempts to settle the matter until 24 April 1973 when the plaintiff's solicitors were made aware that there would be no settlement except on the defendant's terms. The plaintiff's by a series of letters terminating on 2 December 1974 tried unsuccessfully to re-open negotiations. A further attempt was made on 24 April 1975. On 2 September 1975 a notice requiring discovery on oath was served on behalf of the plaintiff. This notice, of course, under the Rules of Court, was abortive as the action was stale. It was ignored, although two letters were written the last on 28 October 1975 threatening proceedings to enforce discovery. On 25 January 1977 a notice of intention to proceed was given. On 2 March 1977 the defendant's solicitors threatened that, unless the plaintiff moved to prosecute the action by 7 March 1977, they would move to have the action struck out. On 8 March 1977 the plaintiff delivered a reply and answer. Subsequently the plaintiff filed a summons for leave to proceed. On that summons leave was granted, and a speedy trial ordered.

It was in the background of the above that the learned trial judge refused to exercise his discretion to grant specific performance on the ground of delay. In my opinion he was correct in so doing. He has discussed the principles applicable in his judgment, and for my part I do not wish to add to what he has said.

The next point is as to whether an inquiry as to damages should have been ordered.

It is argued for the respondent that there is no power to order an inquiry. Lord Cairns Act first gave the right to damages in addition to or in substitution for specific

performance. In Conroy and another -v- Lowndes (1958) Qd.R. 375 @ 383 Philp J. said -

> "In Queensland, s. 62 of the Equity Act of 1867 enacted Lord Cairns' Act. This section was abrogated by the Repealing Rules of 1900 and repealed by The Statute Law Revision Act of 1908. Both the Repealing Rules and the Statute Law Revision Act have saving clauses similar to that of the English Act 46 & 47 Vic. cap. 49 which repealed Lord Cairns' Act so that the Queensland law and the English Law as to the survival of the principles flowing from Lord Cairns' Act are the same."

Section 62 of the Equity Act of 1867 concluded with these words "and such damages may be assessed in such manner as the court shall direct". Does the court have the power to direct? It is argued that the writ of inquiry has been abolished by O 39 r 51 as gazetted in 1965, and this is undoubtedly correct. However the same series of amendments produced O 39 r 52(1) and O 39 r 53B. Those rules are as follows:—

"52. Assessment of Damages by a District Court Judge or registrar.

(1) Where judgment is given for damages to be assessed, and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by a District Court Judge or a registrar, at the option of the party entitled to the benefit of the judgment, and the party entitled to the benefit of the judgment may, after obtaining the necessary date for hearing from the District Court Judge or the necessary appointment from the registrar, as the case may be, and, at least 10 days before the date of the hearing or appointment serving notice thereof on the party against whom the judgment is given, proceed accordingly.

53B. Court or Judge may order assessment before Judge, Officer of the Court, etc.

> The Court or a Judge may, in the case of any such judgment as is mentioned in Rule 52 of this Order, order that the assessment of damages shall be referred to a Judge or to any officer of the Court or to any Magistrates Court, or shall be made in any other way which the Court or a Judge may direct, and save as is otherwise provided in such order the provisions of Rules 52 and 53 of this Order shall mutatis mutandis apply."

Clearly these rules were in substitution for the old writ of inquiry. If the court still has the power to direct damages to be assessed, in the manner provided by sec 62 of the Equity Act of 1867, and on the authority of Conroy and another -v- Lowndes (supra) it has, it would seem that the method provided by the two Rules above set out is that to be used.

Had the learned trial judge desired to order an inquiry as to damages in lieu of specific performance, he had the power to do so.

As to whether an inquiry as to damages was relevant, it was put to us without elaboration that there was a statement in Cheshire and Fifoot on the Law of Contract (3rd Australian Edition) p. 757 to the effect that there was some doubt as to whether equitable damages would be recoverable if the relief of specific performance was refused on the ground of laches. It is true that there is inconsistency in the authorities (on the one hand see Boyns -v- Lackey (1950) S.R. (N.S.W) 395, on the other McKenna -v- Richey (1950) V.L.R. 360). However the learned author of Spry on Equitable Remedies at p. 534 has this to say -

> "It is clear on the balance of authorities that it is not necessary to show, in order that a Lord Cairns' Act provision should be applicable, that a court of equity would, in the absence of a special power to grant damages, have exercised its discretion in such a way as to grant an injunction or specific performance, as the case may be. Admittedly there are some statements to the contrary; and thus it has been affirmed that provisions

> of this nature do 'not, however, extend the jurisdiction of the court; and damages will not, therefore, be given in cases where, previously to the Act, the court would not have ordered an injunction, or decreed specific performance'. But the view which is most consistent with the authorities, and which accords more nearly with the words of the material enactments, is that the statutory power of awarding damages subsists whenever at the material time the contract in question is susceptible of specific performance or the right in question is susceptible of protection or enforcement by injunction, whether or not relief might be refused on a discretionary ground."

See the same work at p. 552. See also Meagher, Gummow and Lehane on Equity p. 521.

Certainly this is a case which comes directly within the ambit of the above discussion but I do not intend to deal with the matter in detail as I do not deem it necessary to the determination of this appeal. However I think I should say that I agree with that statement of Dr Spry, above quoted.

The matter which arises primarily is as to whether there was any necessity for the ordering of an inquiry.

In this respect I draw attention to the wording of O 39 rs. 52(1) and 53B of the Rules of the Supreme Court (quoted above) Rule 52(1) commences with the phrase "Where judgment is given for damages to be assessed...." From this I gather that for an inquiry to be ordered it, at least, must be apparent to the trial judge there are damages such as may be assessed. True it is argued that such an inquiry could be ordered even if only nominal damages are apparent (Sayers -v- Collyer (1885) L.R. 28 Ch.D. 103 @ 107). But it must be shown that there are damages. Kekewich J. in Foster -v- Wheeler (1887) L.R. 36 Ch.D. 695 @ 700 said -

> "The admitted facts of the case point to the conclusion that the Plaintiff has sustained appreciable damage by endeavouring to fulfil his part of the agreement when the

> Defendant has not fulfilled hers. But I have no means of assessing the amount, and I can only direct an inquiry."

In his judgment the learned trial judge made the finding -

> "This leaves, of course, the claim for damages in lieu of a decree. No evidence is before me which would enable me to make an award of damages."

Mr. Merritt the general manager of the appellant company was cross-examined thus -

> "And yet you company took no steps, certainly in the last two years, to bring the action on for trial or to bring it----?-- Our company was always ready to settle. I can't say any more than that, that we wanted to settle the transaction so we owned the piece of real estate.
>
> But you were not prejudiced by sitting and waiting it out, were you?-- How can I answer that? The circumstances might have been - had we been asked to settle we would have dealt with it as a current day proposition, no matter what the time.
>
> With inflation the value of the land may or would go up?-- I dispute that at this stage of the real estate industry which I am very involved with.
>
> You say the value of the land has not gone up?-- But we are still prepared to settle the contract which we contracted to transact."

There was evidence that interest was being paid on the deposit monies, but I do not apprehend that in the circumstances this would sound in damages. There was no evidence of expenses of investigation of title or anything similar. The deposit being in the hands of a stakeholder was paid into court in accordance with the provisions of section 83 (5)(b) of the Auctioneers and Agents Act 1971-1974, and, in turn, ordered to be paid out.

It seems to me that the learned trial judge did not have evidence before him on which he could say the

appellant company was entitled to damages. There was nothing to be pointed to. He was correct in not ordering an inquiry, and in making the order he did.

I would dismiss the appeals.