ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 2003

BETWEEN:

PATRICIA VON LEVERN

Appellant

and

OWEN CLASHING

Respondent

Before:

The Hon. Mr. Adrian Saunders	Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Ms. Suzie d'Auvergne	Justice of Appeal [Ag.]

Appearances:

Mr. Gerald Watt QC with Mr. Norris Scholar for the Appellant
Ms. Ann Henry with Ms. Deborah Burnette for the Respondent

2004: November 29; 30;
2005: February 14.

JUDGMENT

[1] SAUNDERS, C.J. [AG.]: Mrs. Patricia Von Levern and Mr. Owen Clashing had known each other from about 1995. He was a horticulturist from whom she used to purchase plants. In 1996 they both agreed that Mrs. Von Levern would sell to Mr. Clashing a property of hers located at Crosbies. After differences arose between them about the transaction, Mr. Clashing instituted proceedings claiming specific performance of the agreement. The matter went to trial and the learned judge, Mr. Justice Ian Mitchell QC, gave judgment for Mr. Clashing. Mrs. Von Levern has appealed to this court.

[2] Originally, Mrs. Von Levern had been seeking a purchase price of $400,000.00 for her property. The property was at the time mortgaged to a bank. The mortgage had been taken out in August, 1994 for the sum of $275,000.00. As at May, 1996, Mrs. Von Levern estimated that the balance owing on the loan was $265,000.00.

[3] After some discussion between the parties, Mr. Clashing made a written offer to Mrs. Von Levern for the purchase of the property. The proposal came in the form of a note addressed to "Pat & Von". It stated:

> "Thanks for your confidence. Here are my suggestions:
>
> 1. Sign sale agreement now
> 2. Assume full loan payment June
> 3. Sign agreement to take over loan within 3 years
> 4. Payment of $100,000 – what is convenient for you? Your best offer!
> 5. Title transfer at loan takeover a full payment of $100,000.

Mrs. Von Levern wrote "Agreed" on this note and dated her agreement 28th May, 1996.

[4] After this agreement was made, the parties discovered that the bank was not prepared to release Mrs. Von Levern from her obligations under the mortgage. Mrs. Von Levern therefore instructed her lawyer to prepare an agreement that would accommodate the intent of the parties.

[5] The lawyer prepared a formal document for the execution of both parties and the parties attended in Chambers to execute it. Mrs. Von Levern admits seeing this document even before Mr. Clashing did. Fundamentally, the new document was a lease of the property with an option to purchase. It expressed that the property was to be leased to Mr. Clashing for a term of two years from 1st July, 1996 at a monthly rent of $3,300.00. The lease described very carefully worded obligations to be fulfilled by Mr. Clashing. He was, for example, to pay the utilities and all rates, taxes and charges on the property including land tax. He was obliged to reimburse Mrs. Von Levern all insurance premiums paid in respect of insuring the

house. He had to keep the entire property in good repair failing which Mrs. Von Levern was at liberty to undertake the repairs herself with Mr. Clashing refunding her all expenses incurred by her in so doing. The parties also agreed that Mr. Clashing would make his lease payments directly to Mrs. Von Levern's bankers. The lease payments were roughly equivalent to the mortgage loan repayments and, everyone agrees, they exceeded the economic rental of the property.

[6] Clause 3.6 of the Lease contained the option to purchase. Mr. Clashing was given the right to purchase the property for the sum of $365,000.00 at any time during the currency of the lease. If he chose to exercise that right Mrs. Von Levern would reimburse him all rent paid by him up to the date of the sale.

[7] This Lease of course went way beyond the original 28th May, 1996 agreement of the parties. With its elaborate, carefully worded clauses, it represented an entirely new proposition that was being placed before Mr. Clashing. It emanated from Mrs. Von Levern and her lawyer. Mr. Clashing was unrepresented throughout the transaction.

[8] After the lease was prepared, the parties appeared before Mrs. Von Levern's lawyer. The latter explained the contents of this new document. Mrs. Von Levern was happy with it. She had previously seen and examined the document. She signed it right away. Mr. Clashing wanted to study it. He took away with him a copy of the lease. He returned to the lawyer's chambers some 2 weeks later and then placed his signature on the document.

[9] Some time towards the end of 1997 it was discovered that Mr. Clashing was in arrears of rent, a breach of the lease that was subsequently satisfactorily remedied. In the course of making this discovery, Mrs. Von Levern came fully to appreciate that the agreement she had executed might not work to her advantage. She claims that she had always believed that if and when Mr. Clashing exercised the option to purchase, irrespective of what sums were then owing to the bank,

she would receive a cash payment of $100,000.00. This was not about to happen. Mr. Clashing's payments to the bank were offsetting both principal and interest and, despite his monthly payments, the pay-out figure on her loan was being reduced at the same pedestrian rate as it had been before her agreement with Mr. Clashing. If and when Mr. Clashing chose to exercise his option to purchase pursuant to the agreement, Mrs. Von Levern would receive in her hand the difference between the balance due on the loan and the sum of $365,000.00 *less all the sums paid by Mr. Clashing to the bank as rent.* When Mrs. Von Levern did the math she realized to her horror that she would receive in her hand considerably less than the $100,000.00 she had originally hoped she would get.

[10] Upon this discovery being made, Mrs. Von Levern's lawyer then sought Mr. Clashing's consent to a replacement of clause 3.6 (that is, the option to purchase clause) of the agreement. The proposed new clause 3.6 stipulated that in the event Mr. Clashing opted to purchase the property "the purchase price shall be the balance due to … [the bank] … together with the sum of $100,000.00". This formulation had the effect of carrying the amount to be paid by Mr. Clashing for the property beyond the sum of $365,000.00 originally stated in the "Lease" as the purchase price.

[11] Mr. Clashing rejected the proposed amendment and served notice that he was desirous of exercising his option to purchase. The parties had arrived at a clear impasse and it was at this point that Mr. Clashing commenced this action seeking specific performance of his agreement.

[12] The submissions of Counsel for Mrs. Von Levern were premised on the notion that the only valid contract the parties had concluded was the scribbled note of Mr. Clashing on which Mrs. Von Levern had stated "agreed". Counsel submitted that the Lease Agreement did not accurately set out the real agreement between the parties and therefore could not be specifically enforced. Counsel argued that the Lease was fraught with mistake and should be rectified to reflect the 28th May,

1996 agreement. Specifically, counsel urged that because the original agreement made no reference to a purchase price of $365,000.00 but only to a payment of $100,000.00 after assumption of the loan, the Lease did not contain the true agreement of the parties.

[13] I think counsel is wrong in each of these respects. The trial judge interpreted the course of events in this manner. He took the view that in light of the Bank's refusal to allow Mr. Clashing to assume or take over Mrs. Von Levern's loan, the original agreement had been replaced by a new agreement. I cannot fault that reasoning. It was Mrs. Von Levern and her lawyer who proposed the device of a lease coupled with an option to purchase. The Lease Agreement was an entirely new offer that was placed before Mr. Clashing for his acceptance. This offer emanated from Mrs. Von Levern. It clearly stipulated a purchase price of $365,000.00 and the setting off of the monies paid by Mr. Clashing to the bank as rent. Mr. Clashing considered this new agreement, with all the obligations it imposed upon him, and then ultimately agreed to it. Both before and after these proceedings were instituted, Mrs. Von Levern scrupulously held Mr. Clashing to strict observance of the terms of the new agreement. I see absolutely no reason why Mr. Clashing ought not to be able to do the same.

[14] Mrs. Von Levern's lawyer testified at the trial that she (the lawyer) had made a mistake in the manner in which the Lease Agreement was drawn up. But the Judge in my view was entitled and right to reject the plea of mistake and the application to the court to rectify the agreement. In seeking rectification counsel for Mrs. Von Levern cited a number of cases including Paget v. Marshall[1] and Aircool Awning Co. Ltd. v Silvera[2].

[15] Neither of these cases avails Mrs. Von Levern. In Paget v Marshall the defendant was fully aware that the lease was granting him more than the lessor intended to

[1] (1884) 28 Ch. Div. 255
[2] (1966) 10 W.I.R. 14

give. Yet, the lessee kept quiet and sought to take advantage of this mistake in the lease. The court would have none of that. In Aircool Awning Co. Ltd. v Silvera the parties had agreed on the supply of awnings to cover a carport and verandah but the drawn up and executed documents mistakenly referred to awnings whose measurements could only cover the verandah. The supplier sued for the cost of the awnings supplied. The defendant sought to avoid the contract. The evidence indicated that the supplier was fully aware what the true measurements were supposed to be. It was held that the supplier was not entitled to recover as there had been a fundamental mistake that had vitiated the contract.

[16] One cannot help but observe that in both of these cases less than good faith was demonstrated by the person seeking to uphold the efficacy of an obviously erroneously drawn up document. The courts found that it was inequitable for that party to take unfair advantage of a mistake on the part of the other party to the contract. In Solle v. Butcher[3] Lord Denning stated this principle in these terms:

> "While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained".

[17] In Joscelyne v Nissen et al[4], Russell LJ, writing for the full Court of Appeal, did an analysis of many of the cases on rectification. After going through the authorities he agreed with the law as stated by Simonds, J. in Crane v. Hegeman-Harris Co. Inc.[5] that, for rectification of a written document to be obtained, it is not first necessary to prove some antecedent concluded and binding contract. It is sufficient to show a continuing common intention of the parties in regard to a particular aspect of the agreement. However, with respect to the impugned provision or aspect of the agreement, there must exist some outward expression of this common intention. Both parties must have arrived at that prior common

[3] (1949) 2 A.E.R. 1107 @ 1119
[4] (1970) 1 AER 1213
[5] (1939) 1 A.E.R. 662

intention even if such accord might not in law have amounted to a legally enforceable contract.

[18] Lord Russell in Joscelyne v Nissen et al [6] also reaffirmed the high burden of proof on those who seek rectification. The party seeking to set aside or rectify an executed agreement must have convincing proof that the written document does not represent the common intention of the parties. For courts of law willy-nilly to rectify written agreements will throw the law of contract into disarray and beset business transactions with such lack of certainty that the wheels of commerce would be completely jeopardised.

[19] Halsbury's Laws of England[7] notes that "if the evidence shows that the parties have changed their intentions and the instrument represents their altered intentions, there is no scope for rectification". I accept this statement of the law which is particularly apt in this case. It is clear here that the original common intention that Mr. Clashing should assume Mrs. Von Levern's loan had to be and was indeed modified. The modification came in the form of new proposals from Mrs. Von Levern and her lawyer to Mr. Clashing. The old agreement did not require him to come up with a lump sum greater than $100,000.00. The new Lease Agreement required him, if he wanted to exercise the option to purchase, to find a lump sum to clear the loan balance and to pay Mrs. Von Levern the difference between the loan pay-out figure (plus the sums paid as lease payments) and the purchase price of $365,000.00. Mr. Clashing considered and then accepted this new contract. Rectification is not available in these circumstances. There was no mistake here, far less a mistake in Mr. Clashing's favour. Here, in my view, the written document expressed exactly what the parties intended it to express even though Mrs. Von Levern later discovered that she had mis-calculated the effect of the bargain that she herself had proposed.

[6] (1970) 1 AER 1213
[7] Fourth Edition Volume 16 Para 682

[20] In all the circumstances I would dismiss this appeal with costs to the respondent in the sum of $8,333.33.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Brian Alleyne, S.C.
Justice of Appeal

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]