

Privy Council Appeal No. 62 of 1924.

Kathleen Molly Stuart and another - - - - *Appellants*
v.
Kathleen Pittar Kingston and others - - - - *Respondents*
AND
Charles Laurence McCarthy - - - - *Appellant*
v.
Kathleen Molly Stuart and others - - - - *Respondents*
[*Consolidated Appeals.*]

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 1ST AUGUST, 1924.

Present at the Hearing :

VISCOUNT CAVE.
LORD DUNEDIN.
LORD CARSON.
LORD BLANESBURGH.
MR. JUSTICE DUFF.

[*Delivered by VISCOUNT CAVE.*]

This is an appeal and cross-appeal from a judgment of the High Court of Australia varying an order of Mr. Justice Parsons, and raises questions as to the effect of certain transactions of a somewhat complicated nature connected with the administration of the estate of the late Sir George Kingston.

Sir George Kingston (who is hereafter called the testator) died on the 26th November, 1880, leaving five children, namely (1) Ludovina, (2) Hester, (3) Charlotte, (4) Strickland and (5) Charles. By his will he devised his real estates to his daughters Ludovina and Hester in trust at their discretion to sell them and to hold the proceeds (in the events which happened) in trust for his five children in equal shares. The testator's real estates included the following freehold property :—

- (a) A house and land in Grote Street in the City of Adelaide.
- (b) A seaside residence and land in the County of Adelaide called Marino, and
- (c) Section 489A, being about 58 acres of land in the hundred of Noarlunga in the same County.

In December, 1882, the trustees of the testator's will agreed to sell the Grote Street property to the testator's son Charles for £11,000, to be payable in December, 1887, with interest, and gave him possession of that property; but he paid no part of the purchase money or interest. In December, 1888, Charles agreed to become the tenant of the Grote Street property at a monthly rent, and in January, 1889, he mortgaged his share of the testator's estate to the trustees to secure payment of the purchase money of Grote Street and the interest thereon, which then amounted to £12,375; but he failed to pay anything in respect of purchase money, interest or rent, and in April, 1899 (when the agreement to be hereafter mentioned was entered into) his debt to the trustees exceeded £21,000. Meanwhile the testator's daughter Hester had died (in 1893) having bequeathed her estate to her sisters Ludovina and Charlotte in trust for them successively for their lives and afterwards (in the events which happened) in trust for the children of her brother Strickland who should attain 21 or marry; and Charlotte had been appointed a trustee of the testator's will in her place. Strickland had also died (in 1897) having executed a mortgage of his share of the testator's estate for £10,000, which mortgage had become vested in a Mr. N. A. Knox in trust for Charles Kingston's wife Lucy. There were two children only of Strickland, namely, the present appellants Kathleen Molly Kingston (afterwards Stuart) and Dorothy Kingston, who in April, 1899, were aged respectively 18 and 17, and were living with their mother the respondent Kathleen Pittar Kingston. At about the same date Charles Kingston—probably desiring to deter the trustees Ludovina and Charlotte from taking proceedings against him for his debt—accused them of having committed waste by allowing Marino to get greatly out of repair. Charles Kingston was then Prime Minister of South Australia.

It was in these circumstances that the agreement was entered into which is in question in these proceedings. That agreement, which was dated the 10th April, 1899, and was signed by Charles Kingston and Lucy his wife, the two trustees of the testator's will (Ludovina and Charlotte) and Mr. Knox, was expressed to be entered into "in order to settle family differences." Its principal provisions were (1) that Mrs. Lucy Kingston should take over the Marino estate (subject to an old mortgage for £500) and section 489A and should pay to the trustees £270 in cash, (2) that Mrs. Lucy Kingston and her trustee, Mr. Knox, and Mr. Charles Kingston should release the trustees from all claims under the will of the testator or otherwise in respect of his estate, (3) that the trustees should release Charles Kingston from all claims, and (4) that Charles Kingston and his wife should give up possession of the Grote Street property to the trustees. It is evident that the effect of this agreement was to release Charles Kingston from his heavy debt to the trust estate in consideration of his surrendering his share and giving up possession of Grote Street; to appropriate Marino and section 489A in satisfaction of Strickland's

share, of which Lucy Kingston was practically the owner, subject to the payment by her of £270 cash; and to release the trustees from any personal liability to Charles or Lucy Kingston in respect of waste. It is evident also that the agreement did not bind the share of Hester, in which the appellants (then under age) were interested, or any surplus of the share of Strickland which might remain after the payment of his mortgage; but in view of the value of the testator's estate (which was then estimated at £5,400 only) the latter interest was negligible.

Notwithstanding the above agreement Charles Kingston and his wife still refused to give up possession of the Grote Street property; and in July, 1899, the trustees brought an action in the Supreme Court of South Australia against Charles and Lucy Kingston and Mr. Knox for specific performance of the agreement. Charles Kingston, by his defence, pleaded that the agreement sued upon was a breach of trust in that it provided for a release of the trustees from their personal liability for the waste of the Marino property and for other defaults which he alleged against them, and that the trustees could not make a good title to Marino and Section 489A without the consent of all the beneficiaries, including the children of Strickland Kingston, which consent had not been obtained. The plaintiffs having applied by summons under Order LXIX of the Rules of Court 1893 for summary judgment for the relief which they claimed, Mr. Justice Boucaut on the 1st August, 1899, ordered that it be referred to the Master of the Court to enquire and report whether the infant children of Strickland Kingston were interested in the agreement for compromise sought to be enforced in that action, and, if so, whether they were benefited or prejudiced thereby and how, and whether any and what other persons were necessary parties to the action in respect of Hester Kingston's share in the testator's estate, and whether in any event the interests of the infants required that possession of the Grote Street property should be given up by the defendants Charles and Lucy Kingston to the plaintiffs. No direction was given for adding the present appellants as parties to the action or for giving notice of the enquiry to their guardian, or to anyone on their behalf. The Master, after taking evidence, certified in answer to the enquiry, as follows:—

1. Molly and Dorothy the infant children of Strickland Gough Kingston deceased are interested in the agreement for compromise sought to be enforced in this action, they being presumptively interested in the estate of the late Sir George Strickland Kingston deceased by virtue of the will of the late Hester Holland Kingston deceased.
2. The said infants are benefited by the said agreement.
3. No parties are necessary to this action in respect of the said Hester Holland Kingston's share in the said estate.
4. In any event the interests of the said infants require that possession of the Grote Street property in the claim referred to should be given up by the defendant Charles Cameron Kingston and Lucy Kingston to the plaintiffs.

The application for immediate relief was thereupon adjourned into Court, and upon the hearing of that application before

Mr. Justice Boucaut, Mrs. Lucy Kingston appeared in person and strenuously resisted the making of any order for specific performance ; but after considerable argument the learned Judge held that the compromise of April, 1899, was beneficial to all parties, including the infants concerned, and made a decree for specific performance of that agreement. The decree contained directions that the defendant Charles Kingston and his wife should give up possession of the Grote Street property, and that they and Mr. Knox should release the plaintiffs from all claims and that the defendant Lucy Kingston should pay to the plaintiffs £270 in cash on transfer to her of the Marino property and Section 489A.

This decree was duly carried out. Charles Kingston and his wife gave up the Grote Street property to the trustees, though not until a writ of possession had been issued against him. On the 27th April, 1900, the trustees, who in June, 1899, had been registered under the Real Property Act, 1886, as the owners of Marino, transferred that property to Mrs. Kingston ; and, on the 29th May, 1900, the transfer was duly registered under the Act. On the 3rd May, 1900, the trustees conveyed Section 489A to Mrs. Kingston on payment of £270 ; and on the 5th May, 1900, a mutual deed of release was executed by which Charles and Lucy Kingston and Mr. Knox released the trustees of the testator's estate from all claims and the trustees in like manner released Charles and Lucy Kingston.

After these events the matter slept for a long time. Ludovina died on the 6th May, 1908 ; Charles on the 11th May, 1908 ; Charlotte on the 20th May, 1913 ; and Lucy on the 1st August, 1919 ; and it was not until after the death of Mrs. Lucy Kingston on the last-mentioned date that the appellants and their mother, as the executrix of Charlotte and the representative of the testator, raised a question as to the validity of the compromise of 1899 and claimed to have Marino and Section 489A retransferred to the testator's estate. It is noticeable that during or shortly after the War, Marino, which in 1899 had been valued at £1,500 only, rose greatly in value, so that it is said now to be worth £30,000 or more ; but this circumstance, although it may throw light on the institution of this litigation, can have no effect on the rights of the parties.

The appellants' claim being resisted, they, on the 12th November, 1919, commenced this action against their mother as the executrix of Charlotte and the sole trustee of the testator's estate, and against the Public Trustee as the administrator of Lucy and Charles Kingston, claiming that the agreement of 1899 should be declared to be a breach of trust and void, and consequential relief. The respondent C. L. McCarthy, who is one of the persons beneficially interested in the estate of Lucy Kingston, was, on his application, added as a defendant to the action and authorised to defend it on behalf of all the persons so interested.

The action was tried by Parsons J., who held that the plaintiffs had failed to prove any breach of trust and dismissed the action

with costs. The plaintiffs having appealed to the High Court of Australia, that Court held unanimously that the agreement of 1899 was a breach of trust and not binding on the plaintiffs, and accordingly that the Public Trustee held Section 489A on the trusts of the testator's will and must be ordered to convey it to the defendant Kathleen Pittar Kingston as the trustee of that will. But the majority of the Court (Knox C.J. and Starke J.) held that, as to Marino, the Public Trustee as representative of Lucy Kingston was protected by the provisions of the Real Property Act, 1896, relating to titles registered under that Act, and accordingly that Marino was free from the trusts of the testator's will; from this view Higgins J. dissented, holding that, having regard to Lucy Kingston's knowledge of the circumstances in 1899, she was not protected by registration under the Act and that Marino also should be retransferred to the testator's estate. No order was made as to the costs of the action and appeal, except that the plaintiffs should have their costs out of the testator's estate. It is against this order that the present appeal is brought.

From the above statement it will appear that the first question to be determined is whether there was in fact a breach of trust; and upon this question their Lordships are not disposed to differ from the decision of the High Court. Figures were put before the Board by counsel for the respondents showing that, having regard to the estimated values which were put upon the several properties at the date of the arrangement of 1899, and upon the assumption that Charles Kingston was at that time (as he alleged) without funds to pay his debt, the arrangement was not unfavourable to the testator's estate; and this may well have appeared to the trustees to be the case, especially as, without some inducement, Charles would probably have persisted in his obstinate refusal to give up possession of the Grote Street property. But however that may be, it remains true that it was a term of the agreement that the trustees should be released (so far as Charles and Lucy Kingston were concerned) from all personal liability for their alleged waste in connection with Marino and from other charges in respect of alleged breaches of trust; and it appears plainly from contemporaneous documents, and especially from a case which was put by the trustees before counsel at or about that time, that this release was at least one of the inducements which led the trustees to enter into and enforce the agreement. Knox C.J. in his judgment, put this point as follows:—

“Part of the consideration for the agreement consisted of a release of the trustees from their personal liability in respect of this claim, so far as the shares of C. C. Kingston and S. G. Kingston were concerned. It follows that the consideration for the disposition of the trust property included a personal benefit or advantage to the trustees, and this fact alone is, in my opinion, sufficient to dispose of the contention that the transaction was authorised either by the trusts for sale contained in the will or by the power of the trustees to appropriate trust property in satisfaction of the share of a beneficiary or by the power conferred by the ‘Trustee Act’ to compromise claims relating to the trust estate.”

Their Lordships agree with this view and are satisfied that if the transaction had been impeached at the time it could not have been held to be binding upon the appellants.

But the case does not end there. In order that the decision of the High Court as to Section 489A may be supported it is necessary to hold that Lucy Kingston, who in the year 1900 obtained conveyances for value of the legal estate in both Section 489A and Marino and became the registered owner of the latter property, took that legal estate with notice that the properties were conveyed to her in breach of trust; and upon this question their Lordships find themselves unable to agree with the decision of the High Court. No doubt it may be assumed that at the date of the agreement of the 10th April, 1899, Mrs. Lucy Kingston was acquainted with the trusts of the testator's will and with the fact that the trustees were being charged by her husband with waste and breach of trust; and if nothing more had happened except a conveyance of the properties to her in pursuance of the agreement, it may well be that her title would have been open to serious attack. But between the date of the agreement and the execution of the conveyances in her favour there had intervened the action of 1899; and in that action, the question of breach of trust having been clearly raised and having been considered both by the Master and by Boucaut J., the Court had held in effect that the agreement could not be impeached on the ground of breach of trust, and notwithstanding the vigorous opposition of Mrs. Lucy Kingston had ordered that it should be carried into effect. Whether, as a matter of law, the decree for specific performance should have been granted in the absence of the present appellants or of some person appointed to represent them, may be doubtful. It is true that Ludovina Kingston, one of the plaintiffs in that action, was at that time executrix and trustee of the will of Hester through whom the infants claimed; but she did not sue in that capacity and, having regard to her adverse interest as a trustee against whom a charge of breach of trust was being made, she cannot be held to have represented her beneficiaries in the transaction. It is true also that the South Australian Rules of Court provide (by Order LXXIII, Rule 14) that where a compromise is proposed between some of the beneficiaries in a trust and a trustee sought to be charged, a Court or a Judge may, if they or he consider the compromise to be for the benefit of all such beneficiaries, order that the compromise shall be binding upon any of such beneficiaries who are not before the Court; and it may be that Boucaut J. had that provision in mind when he referred the matter to the Master and acted on the Master's certificate. But however that may be, the rule was not in fact applicable to the case, and the order did not follow the terms of the rule. But assuming that the order was not binding on the infant beneficiaries, the present appellants, it was undoubtedly binding upon the parties to the action, including Mrs. Lucy Kingston, and was a sufficient assurance to her that the con-

veyances which the Court directed to be made and accepted would be free from objection. In these circumstances Mrs. Lucy Kingston, who merely obeyed the order of the Court, cannot possibly be held to have been guilty of wilful participation in a breach of trust, still less of fraud; and it appears to their Lordships that the transaction did not give rise to any equity against the properties in her hands. No doubt the decree for specific performance was founded on the agreement which Mrs. Lucy Kingston had made, but Boucaut J. in granting the decree did not treat the agreement as sufficient to conclude the case. He rightly assumed that, if the agreement had been made in breach of trust, it could not be enforced against the defendants; and his decision that there had been no breach of trust, and that the agreement was therefore binding upon Mrs. Lucy Kingston, was properly and necessarily accepted by her. In short, if her knowledge of the trust matters in 1899 was sufficient to put her upon enquiry as to a breach of trust having been committed, the decree in the action of 1899 was sufficient to satisfy that enquiry.

Upon the above view of the facts Mrs. Lucy Kingston was entitled in respect both of Section 489A and of Marino to the protection given by the Courts to a purchaser for value taking the legal estate without notice of any equity in favour of other persons; and, this being so, it is unnecessary to consider the questions which have been raised as to the effect of the plaintiffs' delay in taking proceedings and as to the construction and effect (as regards Marino) of sections 69 to 72 and 249 of the South Australian Real Property Act, 1886. Their Lordships, therefore, express no opinion upon these questions.

For the above reasons their Lordships will humbly advise His Majesty that the appeal of the plaintiffs' fails and should be dismissed, and that the cross-appeal should be allowed and the order of Parsons J. restored. The appellants will pay the costs of all parties (other than Kathleen Pittar Kingston) of the appeal to the High Court and of the present appeal and cross-appeal, except that, as it was unnecessary that the Public Trustee should be represented on the hearing before the Board, no order will be made as to the costs of his appearance on these appeals. The respondent Kathleen Pittar Kingston will take her costs as between solicitor and client out of the trust estate.

In the Privy Council.

KATHLEEN MOLLY STUART AND ANOTHER

v.

KATHLEEN PITTAR KINGSTON AND OTHERS

AND

CHARLES LAURENCE MCCARTHY

v.

KATHLEEN MOLLY STUART AND OTHERS.

(*Consolidated Appeals.*)

DELIVERED BY VISCOUNT CAVE.

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