

10, 1950

In the Privy Council.

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UNIVERSITY OF LONDON
W.C.1.

No. 45 of 1948. 28 MAR 1951

INSTITUTE OF ADVANCED
WEST AFRICAN STUDIES

UNIVERSITY OF LONDON
W.C.1.
15 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL

BETWEEN

ABDUL KARIM BASMA ... (Plaintiff) APPELLANT

AND

GLADYS MURIEL WEEKES, ETTIE SPAINE, JOHN
WILLIAMS and HAMED MOHAMED BASMA
(Defendants) RESPONDENTS

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from the Judgment of the West African Court of Appeal, dated 8th April, 1948, setting aside the Judgment of Wright, J., in the Supreme Court of Sierra Leone, dated 24th May, 1947 whereby specific performance was ordered of a contract for the sale of certain shares in freehold premises 2 and 2A, Kissy Street, Freetown, in the Colony of Sierra Leone. p. 32 p. 27

2.—The Appellant was Plaintiff in the action and claimed to be the purchaser of the property for the sum of £1,900 under a contract for sale dated 29th November, 1946. The first three Respondents (who are sisters and brother) were co-owners in equal shares of the property. 10

The fourth Respondent Hamed Mohamed Basma, was made a Defendant to the action because on 2nd December, 1946—subsequently to the contract relied upon by the Appellant—the co-owners purported to convey the property to him in fee simple. p. 4, l. 6

3.—At the trial the Respondents disputed the contract on which the Appellant relied, alleged that on 28th November, 1946 (the day before the sale to the Appellant) they had agreed to sell the property to the fourth Respondent for £1,950, and alleged that the fourth Respondent had no notice or knowledge of any contract with regard to the property, other than the contract to sell to himself. 20 p. 3, l. 14 p. 11, l. 10 p. 12, l. 31 p. 14, l. 34 p. 17, l. 7 p. 38, Exhibit G p. 4, l. 10

The learned trial Judge, after hearing evidence, including the evidence of the Appellant and of all the Respondents, found, in the Appellant's pp. 23-4

RECORD

favour, that the contract on which he relied was made on 29th November, 1946, that there was no previous contract to sell to the fourth Respondent, and that the fourth Respondent had notice of the sale to the Appellant.

No appeal was brought against this part of his Judgment.

p. 4, l. 27

4.—By an amendment to their Defence made (by leave) at the opening of the trial, the first three Respondents set up the plea that “the alleged “agreement did not comply with the requirements of the Statute of Frauds.”

p. 24, l. 30

The learned trial Judge rejected this defence and held that there was a sufficient memorandum. On this point, however, the West African

p. 31

Court of Appeal took a different view, held that there was no sufficient memorandum and on this ground allowed the Respondents' Appeal. The question which arises on this appeal is therefore one of law namely, whether such a memorandum was established as to satisfy the Statute. 10

5.—The contract (or memorandum of contract) relied on by the Appellant was in the following terms:—

p. 35, Exhibit C

“Nos. 2 and 2A, Kissy Street, Freetown.

“We, the undersigned, the owners of the above premises hereby “agree that we have to-day sold the above premises Nos. 2 and 2A, 20
“Kissy Street, Freetown, to Mr. C. B. Rogers Wright, of 27, Liverpool
“Street, Freetown, at the price of £1,900, which he has completely
“paid in three separate sums of £633 6s. 8d. to each of us. We
“also hereby agree that we will execute the deed of conveyance to
“the said premises whenever it is prepared and that in the meantime
“Mr. Wright shall be in possession of the said premises as from the
“date hereof.

“Dated this 29th day of November, 1946.

“ (Sgd.) GLADYS WEEKES.

“ (Sgd.) HENRIETTA SPAINE. 30

“ (Sgd.) JOHN KABIA WILLIAMS.”

p. 24, l. 30

The learned trial Judge found that Exhibit C was in fact the memorandum of the contract set up by the Appellant.

p. 35, Exhibit B

p. 37, Exhibit E

p. 38, Exhibit F

6.—In addition, the Appellant put in evidence three receipts signed respectively by the Respondents on 29th November, 1946, acknowledging the receipt of £633 6s. 8d. (being one-third of the purchase price of £1,900)

p. 35, Exhibit A

from Mr. C. B. Rogers Wright in payment of their one-third shares in the purchase price of £1,900 for the property Nos. 2 and 2A, Kissy Street, Freetown, which, it was stated in the receipts, had been sold to Mr. C. B. Rogers Wright, and also a cheque for £600 signed by the Plaintiff and 40 drawn in favour of Mr. C. B. Rogers Wright with an endorsement of Mr. C. B. Rogers Wright in favour of the Respondent Williams.

7.—Evidence was given at the trial, which was accepted by the trial Judge, that Mr. C. B. Rogers Wright, who is a solicitor practising in Freetown, had authority to act and was acting as agent for the Appellant. p. 24, l. 32

8.—At the trial, in his reasons for Judgment dated 23rd May, 1947 Wright, J., held that Exhibit C was a sufficient memorandum for the purposes of the Statute. He dealt with the Respondents' contention that the contract proved (namely a contract to sell to Mr. C. B. Rogers Wright) was not that alleged in the Statement of Claim by holding that the Appellant had sufficiently proved by oral evidence that he was the principal and that it was not necessary that an agent to purchase land should be appointed in writing. He therefore decided that the Appellant had established an enforceable contract in his favour. 10

9.—The learned trial Judge had finally to consider the plea added to the Defence by a further amendment made (by leave) after the close of the Appellant's case at the trial, that "the Defendant Gladys Muriel Weekes and Defendant Ettie Spaine are married women." It was proved in evidence that Gladys Muriel Weekes was married on 19th April, 1931, and Ettie Spaine on 30th November, 1944, the one before, and the other after the Law of Property Adoption Ordinance 1932 which, in effect, enabled married women to dispose of their property without the concurrence of their husbands. From this it appeared that there was nothing to prevent the Respondent, Ettie Spaine, from effectively disposing of her share. With regard to the share of the Respondent, Gladys Muriel Weekes, the learned trial Judge held that the mere allegation that Mrs. Weekes was a married woman did not help the Court to determine whether or not she was bound by the contract, and that, the Appellant having established a prima facie case, it was for the Defendant concerned to allege and prove circumstances which prevent the contract being enforced. He accordingly adjourned the hearing to enable evidence regarding the title to the share of the Respondent Weekes to be adduced. On the case coming on for further hearing on 24th May, 1947, Counsel for the Appellant agreed to accept judgment for specific performance of the shares of Ettie Spaine and John Williams, and the learned trial Judge stated that the Appellant was entitled to specific performance of the Agreement of 29th November, 1946, to the extent of these shares with an abatement of one-third of the purchase price in respect of the share of the Respondent Weekes. 20 p. 25, l. 26 p. 25, l. 48 p. 26, l. 38 30 p. 27, l. 3

10.—By his formal judgment dated 24th May, 1947, the learned trial Judge declared that the Appellant was entitled to specific performance of the Agreement dated 29th November, 1946, in the pleadings mentioned to the extent of the interests of the Respondents, Ettie Spaine and John Williams, with proportionate abatement of the purchase money in respect of the one-third share of the Respondent, Gladys Muriel Weekes and ordered that upon payment by the Appellant to the fourth Respondent of the sum of £1,266 13s. 4d., the purchase money subject to such abatement 40 p. 27, l. 26

RECORD

the fourth Respondent should execute a conveyance to the Appellant of the shares of the Respondents, Ettie Spaine and John Williams. It was further ordered that the Respondents should pay the Appellant's costs, the Respondent Weekes only out of her separate property.

p. 28, l. 20

11.—The Respondents other than Gladys Muriel Weekes appealed against this Judgment first on the ground that the alleged contract did not satisfy the requirements of the Statute of Frauds and secondly on the grounds (in effect) that the contract was not divisible and that specific performance should not have been granted having regard to the title of the Respondents in the property. 10

p. 29, l. 35

p. 32

12.—The West African Court of Appeal dealt only with the ground of appeal based upon the Statute of Frauds holding that this was sufficient to dispose of the Appeal. By order dated 8th April, 1948, the Court of Appeal allowed the Appeal, set aside the Judgment of Wright, J., and ordered that the present Appellant pay the costs of the Respondents of the Appeal and in the Court below.

pp. 29-31

13.—In their reasons for Judgment given on 25th March, 1948, the Court (Lucie-Smith, C. J., Beoku-Bettes, J., and Kingsley, J.) after quoting from the Judgment of Luxmoore, L.J., in the case of *Smith-Bird v. Blowzer* (1939, 2 A.E.R. 407) treated the question as being whether the case was one of a disclosed principal or of an undisclosed principal. They came to the conclusion 20

p. 31, l. 4

“ that this case is clearly one of a disclosed principal. It is in our view abundantly clear whether one looks at the evidence for the Appellants or the Respondents that never for one moment did the former think, to use the words of Luxmoore, L. J., that Mr. Rogers Wright was ‘ acting on his own behalf ’ . ”

p. 31, l. 9

The Court then stated that in order for the Appellant to sue, his name must have appeared in the memorandum or have been identified by it and that as it did not do so, Exhibit C was not a sufficient memorandum. 30

14.—In the respectful submission of the Appellant the Court of Appeal came to a wrong conclusion in law. The crucial question for determination, in the submission of the Appellant, was whether the contract was one between Mr. Rogers Wright and the Respondents, on which Mr. Rogers Wright could personally sue and be sued, or whether the contract was one between Mr. Rogers Wright *as agent* and the Respondents on which Mr. Rogers Wright could not personally sue or be sued without the addition of his principal. In the latter case, but not in the former, it would be necessary for the principal to be identified by the memorandum. In considering this question in relation to a contract which was, or was recorded, in writing, the Court should have considered only the terms of the written document and should not have taken into account oral evidence not consistent with the written document. The written document, whether this 40

was Exhibit C alone or Exhibit C in conjunction with the receipts (Exhibits B, E and F), was complete, clear, and unambiguous. It referred merely to Mr. Rogers Wright as purchaser and contained no indication that he was acting as agent for any person. He was clearly liable to be sued on these documents. In these circumstances the memorandum was, in the Appellant's submission, sufficient to satisfy the Statute; there was no need, and indeed, it would not have been appropriate or consistent with the contract, as it was made, for the Appellant to have been named or referred to in the memorandum. On the other hand, the contract between the Vendors and Mr. Wright being once established, it was open to the Appellant to show by oral evidence that he was in fact the principal and to take advantage of the contract.

15.—With regard to the passage quoted by the West African Court of Appeal from the Judgment of Luxmoore, L.J. (sitting as a Judge of first instance) in *Smith-Bird v. Blower* (1939, 2 A.E.R. 406) the Appellant submits that this must be read in relation to the facts of that case. In that case the contract for sale was concluded orally and the learned Lord Justice had to consider and did consider whether the purchaser (Mr. Brown) was contracting to buy as agent or not. He came in fact to the conclusion that the Defendant dealt with Mr. Brown as a principal and accordingly that the Plaintiff, whose agent in fact Mr. Brown was, could sue. The quoted passage, in the Appellant's submission, should be read as referring to the nature and terms of the contract made between the parties and not as referring to some knowledge which was available to the Vendor dehors the contract. If, on the other hand, the quoted passage was intended to suggest that regard may be had and evidence received as to the knowledge of one party dehors the contract, then in the Appellant's respectful submission it is inconsistent with established authorities as well as incorrect in principle and ought not to be followed. The law, in the Appellant's submission was correctly applied by Younger, J. (as he then was) in the case (cited by the West African Court of Appeal) of *Lovesey v. Palmer*, 1916 2 Ch. 233, where the learned Judge treated the test as being whether on the true construction of the contract the agent was personally liable. That law, the Appellant submits, is accurately stated in the Judgment (which has been repeatedly approved) of Parke, B., in the case of *Higgins v. Senior* (1841) 8 M. & W., at page 844, as follows:—

“There is no doubt that where such an agreement (*i.e.*, one purporting on the face of it to be made by an agent) is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it *also*

RECORD

“ binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

“ But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement ; which cannot be done.”

The West African Court of Appeal, by entertaining evidence to show that the contracting party was not Mr. Rogers Wright (as appearing from the contract or memorandum) but the Appellant, did precisely that which the learned Judge, in the final sentence quoted, said could not be done.

16.—So far as the present case is concerned, whatever evidence there may have been in support of the conclusion reached by the West African Court of Appeal that the Vendors did not “ think that Mr. Rogers Wright was acting on his own behalf ” (and the Appellant does not admit that this conclusion was justified), in any event the evidence did not suggest (even assuming such evidence was admissible) that the Vendors did not intend to contract with Mr. Rogers Wright personally. In fact the Appellant, in evidence, expressly stated that the Respondent Williams said that he and his sisters wished to sell to Mr. Rogers Wright. None of the first three Respondents said in evidence or implied that they dealt with Mr. Rogers Wright as agent for or on behalf of the Appellant. In fact, the oral evidence, properly regarded, did not contradict the written documents.

17.—If (contrary to the above submissions of the Appellant) it be held that the memorandum (Exhibit C) was insufficient in that it did not contain the name of or identify the Appellant as purchaser, the Appellant submits that, at any rate as regards the Respondent Williams, a complete memorandum naming the Appellant was constituted by the following connected documents, namely—

(a) Exhibit B—a receipt signed by the Respondent Williams for the sum of £633 6s. 8d., as purchase price for the property Nos. 2 and 2A, Kissy Street, Freetown.

(b) Paragraph 3 of the Statement of Defence of the first three Defendants (signed by their Counsel on their behalf) by which the first three Defendants admitted receiving three cheques on 29th November, 1946.

(c) Exhibit A—a cheque for £600 in favour of the Respondent Williams, identified by parol evidence as one of the cheques referred to in Paragraph 3 of the Statement of Defence, which was drawn by the Appellant and endorsed in favour of the Respondent Williams by Mr. Rogers Wright, and consequently that the contract should be enforced against the Respondent Williams in respect of his share.

p. 31, l. 8

p. 5, l. 10

p. 35

p. 35

p. 3

p. 35

p. 15 l. 2

p. 8, l. 1

p. 7, l. 15

18.—On the other grounds of appeal from the Judgment of the learned trial Judge relied on by the Respondents, and which are not dealt with by the West African Court of Appeal, the Appellant's submissions would, briefly, have been as follows :—

RECORD
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10 (a) The contract, as shown by the receipts (Exhibits B, E and F) pp. 35, 37, 38 was clearly a separate contract by each co-owner to sell his or her own share for £633 6s. 8d. There was no reason why a disability on the part of one co-owner should (unless the Purchaser chose to treat it as such) constitute an obstacle to the performance of the contract as regards the remaining shares.

(b) The first three Respondents did not plead in their Defence p. 3 that there was any defect in their title (other than that which might p. 10 arise from the fact that two of them were married women) nor call evidence to that effect. It was therefore no part of the Appellant's case to prove affirmatively that the Respondents had a good title.

19.—The Appellant submits that the Appeal ought to be allowed, the Judgment of the West African Court of Appeal reversed and the Judgment of the learned trial Judge restored for the following, amongst other

REASONS

- 20 (1) BECAUSE the contract for sale of the property Nos. 2 and 2A, Kissy Street, Freetown, which was proved in evidence and established to the satisfaction of the learned trial Judge was a contract in writing or alternatively a contract all of whose terms were recorded in writing between C. B. Rogers Wright as Purchaser, and the three owners of the property as Vendors, signed by the latter, in which the property, the parties and the purchase price were set out and which therefore satisfied the requirements of Section 4 of the Statute of Frauds.
- 30 (2) BECAUSE the West African Court of Appeal was wrong in taking into account oral evidence regarding the parties to the contract which was inconsistent with the terms of the written contract or memorandum of contract.
- (3) BECAUSE the learned trial Judge was right in ordering specific performance with respect to the one-third shares of the property of the Respondents Ettie Spaine and John Williams.
- 40 (4) BECAUSE the Judgment of Wright, J., was right and ought to be restored and the Judgment of the West African Court of Appeal was wrong and ought to be reversed.

R. O. WILBERFORCE.

In the Privy Council.

No. 45 of 1948.

ON APPEAL FROM THE WEST AFRICAN COURT
OF APPEAL.

BETWEEN

ABDUL KARIM BASMA
(*Plaintiff*) APPELLANT

AND

GLADYS MURIEL WEEKES, ETTIE
SPAINE, JOHN WILLIAMS and
HAMED MOHAMED BASMA
(*Defendants*) RESPONDENTS.

CASE FOR THE APPELLANT

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