Privy Council Appeal No. 45 *of* 1948

Abdul Karim Basma - - - - - - - - - *Appellant*

v.

Gladys Muriel Weekes and others - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1950

Present at the Hearing:

LORD SIMONDS
LORD MACDERMOTT
LORD REID
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* LORD REID]

This is an appeal from a judgment of the West African Court of Appeal dated 8th April, 1948, which set aside a judgment of Wright J. in the Supreme Court of Sierra Leone dated 24th May, 1947. The appellant who was plaintiff in the action alleged that by an agreement dated 29th November, 1946, the first, second and third defendants and respondents agreed to sell to him two houses in Freetown for £1,900 and that thereupon the sum of £633 6s. 8d. was paid to each of these defendants in full satisfaction of the purchase price. The plaintiff further alleged that by deed of conveyance dated 2nd December, 1946, these defendants purported to convey the two houses to the fourth defendant and respondent. The plaintiff's claim was to have specific performance of his agreement with the first three defendants. The defence was a denial of this agreement. At the opening of the trial the defendants were allowed without objection to amend their defence by adding the words "If at all there was such an agreement, which is not admitted, the alleged agreement does not comply with the requirements of the Statute of Frauds". Evidence was then led and the plaintiff's case closed. At that stage the defendants' counsel, after having made an unsuccessful submission that there was no evidence of the alleged agreement, sought to amend the defence further by adding "The defendant Gladys Muriel Weekes and the defendant Ettie Spaine are married women". Objection was taken but the amendment was allowed and the defendants' evidence was then led.

The plaintiff's case was based on a document in the following terms:

> "No. 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, 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.

"(Sgd.) JOHN KABIA WILLIAMS."

Their Lordships will refer to this document as the agreement of 29th November. The defendants did not deny that they had signed this document. They relied on three different defences: first that the property had already been sold by the first three defendants to the fourth defendant before 29th November; secondly that the agreement of 29th November was not a sufficient memorandum to enable the plantiff to sue on the contract; and thirdly that the defendant Mrs. Weekes had no power to enter into the contract and that, as the contract could therefore not be performed in its entirety, there could be no order for specific performance against the other defendants. The first of these defences is not now maintained. On this matter Wright J. did not accept the defendants' evidence: he held that the agreement of 29th November had been made and signed before the first three defendants agreed to sell the property to the fourth defendant and that when this agreement was made the fourth defendant had notice of the earlier agreement to sell to the plaintiff. These findings have not been challenged. With regard to the second defence, it appears from the judgment of Wright J. that it was argued for the defendants that the only agreement proved was an agreement between Mr. Wright and the first three defendants. Wright J. rejected this argument holding that oral evidence had sufficiently proved that Mr. Wright was acting as agent for the plaintiff and that there was therefore sufficient proof of a contract with the plaintiff. The third defence was founded on the fact that before 1932 the law of Sierra Leone with regard to the capacity of a married woman was the same as the law was in England before the passing of the Married Women's Property Act, 1882, and that the Imperial Statute (Law of Property) Adoption Ordnance of 1932 preserved any right which a husband had acquired before that date. Wright J. found himself unable to deal with this defence because the evidence was insufficient and he therefore allowed further evidence to be called. In fact no further evidence was called: it is not clear what further submissions were made by the parties at that stage but in his reasons for his final judgment Wright J. said "Counsel for the plaintiff having agreed to accept judgment for specific performance the court therefore declares that the plaintiff is entitled to specific performance of the agreement dated 29th November, 1946, mentioned in the pleadings to the extent of the interests of Mrs. Spaine and John Williams with an abatement of one-third of the purchase price in respect of the interest of Mrs. Weekes." The argument before their Lordships proceeded on the footing that the respondents Mrs. Weekes, Mrs. Spaine and John Williams were tenants in common of the property in question, that Mrs. Weekes who was married in 1931 had no power to enter into the agreement of 29th November, but that Mrs. Spaine who was not married until 1944 was under no such disability. It was admitted that the sums paid to these three respondents by the appellant had been repaid to him and that if the appellant is to have specific performance of the agreement to the extent of the interests of Mrs. Spaine and John Williams he must pay the sum of £1,266 13s. 4d. It was not disputed that this sum should in that event be paid to the fourth respondent who has taken a conveyance of the property from the first three respondents with the concurrence of Mrs. Weekes' husband, and has paid to them the price of the property.

The second, third and fourth respondents appealed to the West African Court of Appeal. That court allowed the appeal on the ground that the agreement of 29th November was not a sufficient memorandum within the Statute of Frauds. Against that decision the present appeal is taken.

The agreement of 29th November apparently satisfies the requirements of the Statute of Frauds. It names the vendors and the purchaser; it specifies the subjects sold and the price; and it is signed by the vendors, the parties to be charged. Further it states that Mr. Wright, who is named as the purchaser, has paid the price and is entitled to immediate possession. Mr. Wright is a solicitor and admittedly it was proved by oral evidence that he was acting in this matter as agent for the appellant. But there is nothing in the document to suggest that Mr. Wright was acting otherwise than as principal. The first question in this case is whether it is revelant to enquire whether the vendors when they made the agreement knew that Mr. Wright was acting as agent for the appellant, and whether, if such knowledge is proved, the fact that the agreement does not identify the appellant as purchaser makes it insufficient to satisfy the Statute of Frauds. Wright J. did not deal with this question—probably the point was not taken before him—but the West African Court of Appeal held that the vendors were aware that Mr. Wright was purchasing as agent for the appellant. There is evidence to support this finding and their Lordships will assume that it is correct. After so holding the judgment of the Court of Appeal proceeds "It follows therefore that the memorandum to enable the respondent (now the appellant) to sue on it must have contained his name either as a principal or in some other way to identify him. As it clearly fails to do so we hold that the document was not a sufficient memorandum within the Statute of Frauds." The authority on which the Court of Appeal rely is the judgment of Luxmoore LJ. in *Smith-Bird* v. *Blower* [1939] 2 All E.R. 406, and there is in that judgment a passage which is directly applicable to the present case. But before proceeding to examine that judgment their Lordships must refer to certain earlier cases the authority of which has never been doubted but which do not appear to have been cited to Luxmoore LJ. In *Higgins* v. *Senior* 8 M. & W. 834, there was an agreement in writing for the sale of goods above the value of £10, which purported on the face of it to be made by the defendant and was subscribed by him: but the defendant sought to avoid liability by proving that he made the agreement as agent for a third person and that this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability. Parke B. in delivering the judgment of the court stated the principle as follows:

> "There is no doubt that where such an agreement 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 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. And this view of the law accords with the decisions, not merely as to bills of exchange signed by a person without stating his agency on the face of the bill but as to other written contracts, namely the cases of *Jones* v. *Littledale* (6 Ad. & El. 486), and *Magee* v. *Atkinson* (2, M. & W. 440). It is true that the case of *Jones* v. *Littledale* might be supported on the ground that the agent really intended to contract as principal: but Lord Denman, in delivering the judgment of the court, lays down this as a general proposition 'that if the agent contracts in such a form as to make himself personally responsible,

he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility,' and this is also laid down in Story on Agency sect. 269."

In *Calder* v. *Dobell* L.R. 6 C.P. 486, Cherry a broker contracted in his own name to buy goods from the plaintiffs, having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendant on this contract. It was argued for the defendant that there is a distinction between the case where one party is not aware when making the contract that the other is acting as an agent and the case where he is aware of that fact but nevertheless the contract is made by the agent in his own name, and that the principal could be sued in the former case but not in the latter. This argument was rejected. It was held that in this respect there is no distinction between the two cases and the authority of *Higgins* v. *Senior* was fully recognised. Kelly C.B. said "The contract was made in the name of Cherry the agent but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal at their election."

The circumstances in *Smith-Bird's* case were that the defendant wished to sell two houses, that a certain Mr. Brown who had been authorised by the plaintiffs to buy the houses was introduced to the defendant and after some negotiation agreed to buy the houses for £510, and that the document relied on as a memorandum of this agreement contained nothing to indicate that the plaintiffs were the purchasers or that Mr. Brown was acting otherwise than on his own behalf. Luxmoore LJ. having held that there was an oral contract to sell the houses said " the further question arises whether there is a sufficient memorandum of that contract to comply with the requirements of the Statute. In this connection it is necessary to determine whether the defendant was aware that Mr. Brown was acting as agent only, and not as principal, for, if the defendant knew that Mr. Brown was only an agent the memorandum, in order to comply with the statutory requirements, must either contain the names of the plaintiffs as principals or otherwise identify them, whereas if the defendant was not aware of the fact that Mr. Brown was acting as agent for anyone, but considered that Mr. Brown was contracting on his own behalf, the position is different, and the plaintiffs as undisclosed principals can rely on any sufficient memorandum in which Mr. Brown's name appears as principal, although there is no reference therein to the plaintiffs."

The learned Lord Justice cited as authority for this proposition the cases of *Lovesy* v. *Palmer* 1916 2 Ch. 233 and *Filby* v. *Hounsell* 1896 2 Ch. 737. In *Lovesy* v. *Palmer* the plaintiff claimed a declaration that there was a binding contract between the defendants and himself with regard to the lease of a theatre. One question was whether there was any memorandum of the alleged agreement sufficient to satisfy the Statute of Frauds. The facts were complicated and a number of documents were alleged to form together such a memorandum. In these documents the plaintiff's solicitor was named but he only purported to contract on behalf of unnamed "clients." Younger J. (as he then was) held that at no time could this solicitor have sued or been sued on the contract. And there was no reference in the documents to the plaintiff as a contracting party. So it was impossible to identify from the documents any person who could sue the defendants or be sued by them on the alleged contract, and Younger J. held, rightly in their Lordships' judgment, that there was no memorandum sufficient to satisfy the Statute of Frauds. It had been argued for the plantiff that *Filby* v. *Hounsell* had decided that it was enough that the solicitor purported to act on behalf of "clients" and that the "clients" were identified by parole evidence. With regard to this case Younger J. said "If it was in fact decided in *Filby* v. *Hounsell* that there could within the statute be a sufficient memorandum of an agreement where the principal was not named and the agent was not bound then I do not think that the decision can stand with the other authorities such as *Rossiter* v. *Miller* 3 App. Cas. 1124 and *Jarrett* v.

Hunter 34 Ch. D. 182 or with the Statute as I read it. But I think, when one looks carefully at the case of *Filby* v. *Hounsell*, that Romer J. really gave the judgment he did because he assumed that the agent was liable on the contract. I cannot myself see for reasons I have given that the assumption was well founded, but if that was the basis of the learned judge's decision then the case presents no further difficulty and is in entire harmony with all the authorities."

Their Lordships agree with this interpretation of the case of *Filby* v. *Hounsell* and they are unable to find either in that case so interpreted or in the case of *Lovesy* v. *Palmer* anything to justify the distinction stated in the passage quoted from the judgment in *Smith-Bird* v. *Blower*. Those cases decide that to satisfy the statute the agreement or memorandum must name or identify two parties who are contractually bound to each other. They do not decide that where two such parties are named or identified the statute ceases to be satisfied if it is proved that one of them was known by the other when the contract was made to be acting as agent for a third party. No doubt that result would follow if it were the law that an agent who contracts in his own name is not contractually bound if the other party knew at the time that he was acting as agent. If that were so the agreement or memorandum would on proof of such knowledge cease to contain the names of two contracting parties and would therefore cease to satisfy the statute. But it is clear from *Higgins* v. *Senior* and *Calder* v. *Dobell* that that is not the law. An agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew when the contract was made that he was acting as agent. So the agreement which is made in his name does not cease in that event to contain the names of contracting parties and therefore does not cease to satisfy the statute. Their Lordships are satisfied that in the present case the terms of the agreement of 29th November are such that Mr. Wright was contractually bound, and therefore the agreement satisfies the Statute of Frauds. So Mr. Wright could have sued on the agreement and if he could sue so can his principal the appellant.

The other question in this appeal is whether the appellant is entitled to have specific performance of a part of his contract. He agreed to buy two houses which were owned by the First, Second and Third respondents as tenants in common. He cannot enforce this contract against the First respondent because she had no power to make the contract. Can he enforce it against the Second and Third respondents so as to require conveyance to him of the two one-third shares which belonged to these respondents? Cases have not infrequently arisen where a single vendor has been unable to give a good title to all that he has contracted to sell. The general rule in such a case has been stated by Lord St. Leonards thus (Sugden Vendors and Purchasers 14th Edn. pp. 317-316): "a purchaser generally although not universally may take what he can get with compensation for what he cannot have. . . . In regard to the limits of the rule that a purchaser may elect to take the part to which a title can be made at a proportionate price, it has not been determined whether under any circumstances of deterioration to the remaining property the vendor could be exempted from the obligation of conveying that part to which a title could be made: but the proposition is untenable that if there is a considerable part to which no title could be made the vendor was therefore exempted from the necessity of conveying any part."

In the present case there are three vendors. One cannot convey her interest but there is nothing to prevent the conveyance of the interests which belonged to the others. This type of case is less common but one example is *Horrocks* v. *Rigby* 9 Ch. D. 180 where two persons agreed to sell a public house and it was found on investigation that one of them had no interest in it but that a moiety belonged to the other. In an action by the purchaser against the latter vendor for specific performance Fry J. said "I think that where an agreement is entered into by A and B with C and it afterwards appears that B has no interest in the property A may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle for I do not see why a

purchaser is to lose his right against a vendor who can complete because from a circumstance of which the purchaser had no knowledge he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of Lord Hardwicke in *Attorney General* v. *Day* 1 Ves. Sen. 218." This passage which is quoted by Fry J. is " On the other hand, if on the death of one of the tenants in common who contracted for a sale of the estate the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor although the contract cannot be executed against the heir of the other." Their Lordships would have no hesitation in following these authorities but for the judgment of Lindley LJ. in *Lumley* v. *Ravenscroft* 1895 1 Q.B. 683. In that case the two defendants who appear to have been tenants in common had agreed through their agent to grant a lease of certain premises to the plaintiff. The plaintiff brought an action for specific performance or alternatively for damages and applied for an injunction to restrain the defendants until after the trial of the action from leasing the premises to any other person. It appeared that one of the defendants was an infant. Day J. granted an injunction but an appeal from this order was allowed. Lindley LJ. in the leading judgment of the Court of Appeal said " Specific performance is out of the question. You cannot get specific performance against an infant: and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price* v. *Griffith* 1 D.M. & G. 80 and *Thomas* v. *Dering* 1 Keen 729, but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share. The plaintiff's only remedy is by way of damages."

Neither *Horrocks* v. *Rigby* nor *Attorney General* v. *Day* was cited to the court: indeed *Price* v. *Griffith* and *Thomas* v. *Dering* appear to have been the only authorities cited in argument, the argument for the plaintiff as reported being very meagre. Both *Price* v. *Griffith* and *Thomas* v. *Dering* were cases of an unusual character. *Price* v. *Griffith* was discussed and explained by Farwell J. in *Hexter* v. *Pearce* 1900 1 Ch. 341. In *Price* v. *Griffith* two tenants in common were alleged to have agreed to grant a mineral lease. The plaintiff failed to prove any agreement at all with one of them and, as Farwell J. points out, the case was really decided on the ground that the agreement with the other was void for uncertainty. But Knight Bruce LJ. said with regard to the claim of the plaintiff to have specific performance against only one of the two tenants in common. " If he (the tenant in common) intended to contract at all he intended to contract for a lease of the whole colliery. Cases may be conceived where a person who has contracted to convey more than it is in his power to convey ought to be decreed to convey what he can either with or without compensation to the vendee for such part of the subject matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery." That passage might be read as affording support for the general rule stated by Lindley LJ. but Farwell J. read it in a narrower sense. He said with regard to it " In a sense with great deference to the Lord Justice that is a truism: but the meaning I think is that in that case the intention of the lessor was to grant a lease of the entirety and nothing else. There would have been a certain hardship in compelling him to grant a lease of a moiety only when he did not intend it having regard to the fact that it was a lease of mineral property. I think that is all the Lord Justice meant." So interpreted *Price* v. *Griffith* is not an authority for any general rule. In *Thomas* v. *Dering* there was only one vendor and their Lordships do not think it helpful to examine the case closely as they have found nothing in it to throw light on the position where there are more than one vendor and one of the vendors cannot

complete the contract. Their Lordships have reached the conclusion that the weight which must otherwise be given to a judgment of Lord Lindley is in this case seriously diminished by the circumstances to which they have adverted and that the decision in *Lumley* v. *Ravenscroft* cannot be regarded as having impaired the authority of *Horrocks* v. *Rigby* or of the opinion of Lord Hardwicke in *Attorney General* v. *Day*. In the present case there appear to be no special circumstances which would make it wrong to grant specific performance and their Lordships hold that the decision of Wright J. was correct in principle. It was not argued that the form of the order made by Wright J. should be altered in any way.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of Wright J. restored. The respondents, other than the respondent Mrs. Weekes, will pay the costs of this appeal and in the West African Court of Appeal.

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In the Privy Council

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DELIVERED BY LORD REID

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