~~115.92~~ 36/1954

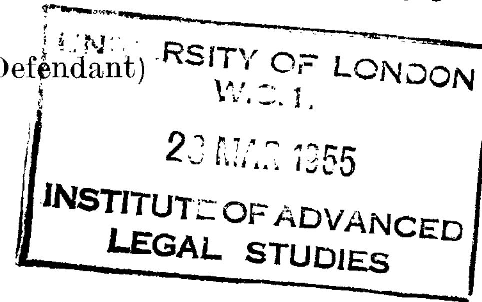
No. 38 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST INDIAN COURT OF APPEAL

38065



BETWEEN

JOHAN JOSEF FRANCOIS HUTT . Appellant (Defendant)

and

BOOKER BROTHERS McCONNELL & COMPANY, LIMITED whose duly constituted attorney in this colony is HENRY GEORGE SEAFORD, and LEON SCHULER . . . . . . Respondents (Plaintiffs).

Case for the Respondents.

RECORD.

1. This is an Appeal from a judgment of the West Indian Court of Appeal dated the 26th February 1951 which dismissed an appeal of the Appellant from a judgment of the Supreme Court of British Guiana (Boland, C.J., ag.) dated the 22nd May 1950 whereby it was adjudged (*inter alia*) that the Respondents should recover against the Appellant the sum of $18,038.63 with interest on $17,000 at the rate of five per centum per annum from the 4th May 1950. p. 39. p. 31.

2. The question in issue in this Appeal is whether the Judge ought to have given to the Appellant leave to defend the action brought by the Respondents against the Appellant.

3. The events out of which the litigation arose are as follows.

4. On or before the 12th February 1949 the Appellant entered into an oral agreement with the Respondent Schuler for the purchase of the latter's shares (3,400 in number) in a Company known as Bel Air Hotel Limited (hereinafter called " Bel Air ") at the price of $17,000. It was a term of the agreement that the purchase money should bear interest at the rate of 5 per cent. per annum from the 12th February 1949. p. 4.

5. At the date of the said agreement Bel Air was indebted to the Respondents Booker Brothers McConnell & Company Limited (hereinafter

called "the Respondent Company") in a sum of approximately $27,500 (whereof approximately $19,000 was secured by a First Mortgage) and to the Respondent Schuler in the sum of $17,000. The Respondent Schuler had a controlling interest in Bel Air.

p. 9, l. 18.

p. 24.

6. Previously to the said Agreement, namely on the 3rd January 1949 the Appellant had entered into a written agreement with one J.A. Sue-A-Quan for the sale by the Appellant to Sue-A-Quan of the Eldorado Hotel in Georgetown. The total purchase price was $120,000 of which $5,000 was recorded as having been paid by way of a deposit. A further deposit of $5,000 was to be paid on the advertising of the transport; and the balance was to be paid on the passing of the transport which was to be within six months of the date of the agreement or as soon as possible. 10

7. On the 12th February 1950 Bel Air and the parties to these proceedings entered into a series of arrangements which were connected with the provision of finance by the Respondent Company. These arrangements were effected by or recorded in four documents prepared by and executed at the office of Messrs. Cameron & Shepherd the Solicitors then acting for all the parties, and included the deposit of the certificates for the said shares and a blank transfer thereof by way of equitable charge in favour of the Respondent Company. 20

p. 18.

8. By the first of these documents the Respondent Schuler assigned to the Respondent Company first the debt of $17,000 owing to him by Bel Air as mentioned in paragraph 5 of this Case and all interest due and to become due for the same and the full benefit and advantage thereof, and secondly the debt of $17,000 owing to him by the Appellant as mentioned in paragraph 4 of this Case and all interest due and to become due for the same and the full benefit and advantage thereof. This assignment is not printed in the Record.

pp. 9–10.

9. The second document (hereinafter called "the Security Agreement") was an agreement dated the 12th February 1950 and made between (1) Bel Air (2) the Appellant (3) the Respondent Schuler and (4) the Respondent Company. 30

The provisions of the Security Agreement cannot easily be summarised but they may be stated as follows :—

(A) There were five (un-numbered) recitals :—

(1) That (as stated in paragraph 5 of this Case) Bel Air was indebted to the Respondent Company in the sum of $19,000 under a first mortgage and in the sum of approximately $8,500 in respect of supplies and was also indebted to the Respondent Schuler in the sum of $17,000 (this latter sum was the sum referred to in paragraph 5 of this Case). 40

(2) That the Respondent Schuler had agreed to sell his shares in Bel Air to the Appellant for the sum of $17,000 (this was the agreement referred to in paragraph 4 of this Case).

(3) That the Appellant was the owner of the Eldorado Hotel and that on the passing of the transport of the Hotel under the agreement with Sue-A-Quàn (referred to in paragraph 6 of this Case) the Respondent Company was to be paid the sum of $64,000 being the balance of the purchase price of $120,000 payable under that Agreement after deduction of sums already paid and of the amounts due under First Second Third and Fourth Mortgages.

(4) That the Appellant had assigned to the Respondent Company the sum of $17,000 owing by Bel Air (i.e. the sum referred to in (1) above) and the sum of $17,000 owing to him by the Appellant in respect of the sale of the shares.

(5) That (a) Bel Air had agreed to pass a First and Second Mortgage on its property to the Respondent Company as security for the payment of the said sum of $17,000 (by which was meant the $17,000 owed by Bel Air) with interest at 5 per centum per annum from the date thereof within six months from the 3rd January 1949 or the passing of the Mortgage and (b) the Appellant had agreed to pass a Fifth Mortgage on his said property to the Respondent Company as security for the payment of the said sum of $17,000 (by which was meant the $17,000 the purchase price of the shares sold by the Respondent Schuler) on the same terms.

(B) The operative part of the Security Agreement contained the following main provisions :—

(1) By Clause 1 the Appellant assigned to the Respondent Company the said balance of $64,000 :

(2) Clause 2 provided for the advertisement and passing of the mortgages referred to in the fifth recital :

(3) Clause 3 provided that on payment of the said sum of $17,000 with interest as aforesaid or on the passing of the said mortgages whichever should first happen the transfer of the shares which had been signed by the Respondent Schuler should be handed over to the Appellant :

(4) Clause 4 provided that the Respondent Company on receipt of the said balance of $64,000 should apply the same in payment of (a) the capital and interest of the $19,000 Mortgage (b) the said sum of $8,500 due in respect of supplies and (c) the said sums of $17,000 with interest as aforesaid.

(C) The Security Agreement was signed on behalf of Bel Air by the Respondent Schuler as chairman and by one Jocelyn Bostock as secretary of the Company and the seal of Bel Air was thereto affixed and witnessed by the said Jocelyn Bostock. The Security Agreement was also signed by the Appellant, by the Respondent Schuler and by the Respondent Company's attorney on its behalf.

10. Concurrently with the execution of the Security Agreement the Respondent Schuler executed a blank transfer of his shares also dated the 12th February 1949. This transfer together with the relevant share p. 23.

p. 13, l. 44.

certificates was thereupon handed to J. Edward de Freitas (a partner in the firm of Cameron & Shepherd already referred to) as solicitor for and agent of all parties.

pp. 26–27.

11. By another Agreement also dated the 12th February 1949 it was agreed between the Appellant and Sue-A-Quan that on the passing of the Transport of the Eldorado Hotel Sue-A-Quan should pay the $64,000 already referred to direct to the Respondent Company.

12. Following upon the execution of the Security Agreement the Appellant was given control of Bel Air.

13. The Appellant failed and refused to advertise or pass a Fifth Mortgage as provided in the Security Agreement ; nor did the Respondent Company ever receive any payment in respect of the $64,000 due from Sue-A-Quan. 10

14. Payment of the purchase price of the said shares not having been made or secured by the Appellant, the Respondents on the 4th May 1950 instituted

THE PRESENT SUIT

pp 3–4.

by Writ which was specially endorsed with a statement of claim under Order IV Rule 6 of the British Guiana Rules of Court 1900 as amended by paragraph III of the Rules of Court 1932. The relevant amendment 20 together with the new Order XII of the Rules is printed at the end of the Record.

p. 4.

15. By their Statement of Claim endorsed on the Writ the Respondents claimed payment of the sum of $18,038.63 made up of $17.000 as the agreed purchase price of the shares and $1,038.63 representing interest on $17,000 at 5 per cent. per annum from the 12th February 1949 down to the issue of the Writ. They also claimed further interest until judgment or payment together with costs. The said claim was verified by the joint affidavit of Carlos Fernandes and the Respondent Schuler sworn on the 12th May 1950. 30

p. 6.

pp. 7–8.

16. On the 13th May 1950 the Appellant swore an Affidavit under Order XII Rule 3 of the Rules of Court claiming that he had a good defence, and by Order dated the 15th May 1950 it was ordered that the Respondents (Plaintiffs) be at liberty to file an affidavit in reply and that the further consideration of the Appellant's (Defendant's) application for leave to defend the action be adjourned to the 22nd May 1950. On the 19th May 1950 a joint affidavit of the said Carlos Fernandes and the Respondent Schuler was sworn on behalf of the Respondents, to which was exhibited certain correspondence between the parties' legal advisers.

p. 12.

pp. 13–14.

pp. 15–17.

17. The grounds on which the Appellant supported his application 40 under Order XII of the Rules of Court for leave to defend appear from his affidavit and from the Judge's Notes at the trial. They are also stated in a more elaborate form in the Appellant's Notice of Appeal to the West Indian Court of Appeal.

pp. 7–8, 28.

pp. 32–33.

These grounds can be summarised as follows :—

(1) The Security Agreement did not represent the true agreement of the parties in that it was never intended that the Appellant should become liable to pay more than one sum of $17,000 : and the Agreement ought to be rectified.

(2) The fulfilment of the Agreement with Sue-A-Quan was a basic condition of the Appellant's liability towards the Respondents ; and since that condition was never fulfilled the Appellant was released from his agreements with the Respondents.

10 (3) The Appellant had never signed or received or seen any transfer for the shares ; and the Respondents' true claim was for unliquidated damages which could not properly be the subject of a specially endorsed writ.

(4) That the Security Agreement had not been validly executed by Bel Air.

18. The Respondents' application for final judgment was heard by Boland, C.J., ag. on the 22nd May 1950, when the Appellant and the Respondents appeared and pursuant to Order XII Rule 2 (*a*) it was adjudged that the Respondents should recover the sum of $18,038.63 with interest on $17,000 at the rate of five per centum per annum from the 4th May 1950 until the date of the Judgment. It was further ordered that no steps should be taken to enforce the judgment until the 1st June 1950 and if the Appellant filed a counter-claim on or before that date until the counter-claim had been adjudicated.

p. 31.

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19. The Appellant did not deliver any counter-claim.

20. On the 21st June 1950 the learned acting Chief Justice gave his reasons for his decision. These can be summarised as follows :—

pp. 29–30.

(1) It was clear to him from the Appellant's affidavit and from the correspondence between the parties' legal advisers (printed on pages 15 to 18 of the Record) that the defence was impeaching not the Appellant's liability to pay the $17,000 and interest in respect of the shares but the liability to pay any other sum of $17,000.

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(2) There was no substance in the ground of defence that the Appellant had never signed or received or seen any transfer of the shares. The Appellant could not avail himself of his own failure to sign the transfer. The transfer had been signed by the transferor and was thereupon handed to the solicitor Mr. de Freitas who prepared the agreement for both parties and that was sufficient for the purposes of the claim.

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(3) There was no substance in the claim that the Appellant's liability was conditional upon the fulfilment of the purchase by Sue-A-Quan of the Eldorado Hotel. The assignment by the Appellant to the Respondent Company of the $64,000 payable by Sue-A-Quan was merely by way of security.

pp. 32–33.

21. By Notice of Appeal Motion dated the 6th June 1950 the Appellant appealed to the West Indian Court of Appeal. The Appeal was heard on the 19th, 20th and 21st February 1951; and on the 26th February 1951 the Court of Appeal (C. Furness-Smith, N. A. Worley and D. E. Jackson, C.JJ.) dismissed the Appellant's appeal with costs. The Court delivered judgment in the following terms :—

p. 38.

p. 34.

" We are satisfied that the property in the shares passed to the " appellant on the execution of the agreement of the 12th February, " 1949, and the signing of the transfer form by the vendor ; and " that the sale of the shares was thereby effectuated. We are also 10 " satisfied that the part of the agreement which imposed upon the " appellant the obligation of paying for the shares was correctly " regarded by the trial judge as separate and divisible from the " remainder of the agreement. It follows that there was no triable " issue upon which leave to defend might be granted to the " appellant, and that the present appeal must be dismissed with " costs."

22. Each of the learned Chief Justices gave Reasons for Decision :—

pp. 34–35.

(1) Chief Justice C. Furness-Smith in the course of his Reasons expressed his agreement with the reasons given by the Chief Justice 20 of British Guiana (N. A. Worley, C.J.) for dismissing the appeal, and further stated :—

pp. 15, 21–27.

" . . . It is clear both from the admission of the defendant- " appellant in paragraph 3 of his affidavit of defence and from the " terms of the agreement of 12th February 1949—in particular " the 2nd and 4th Recitals and paragraph 3—that the intention " of the agreement was, *inter alia*, to evidence the sale of the " shares by Schuler to the defendant, and the assignment of the " agreed price therefor by Schuler to the plaintiff-respondent. " It was common ground that on the date of the agreement the 30 " vendor of the shares (Schuler) deposited a signed and stamped " transfer of the shares (pages 62 and 63) with Mr. de Freitas " who acted as solicitor for both vendor and purchaser. By " virtue of paragraph 3 of the agreement this transfer was to be " delivered to the Purchaser either on the payment by him of " two sums mentioned in the agreement (that is to say the " purchase price of the shares and the sum of $17,000 due by " the Bel Air Hotel Limited to the Vendor and assigned by him " to the Plaintiff) or on the passing of the mortgages mentioned " in paragraph 2 of the agreement whichever should first happen. 40 " I appreciate that the effect of the provisions of paragraph 3 " of the Agreement is to make the sale of the shares a conditional " rather than an absolute contract within the meaning of Section 3 " of the Sale of Goods Ordinance (Laws of British Guiana " Volume II Chapter 65). The fulfilment of the condition was " however wholly within the control of the defendant himself. " Whether or not he had good grounds for repudiating his " obligation under the agreement to pay the additional sum of " $17,000 due by the Bel Air Company to the vendor (Schuler),

p. 47.

"he had, by virtue of the transfer of the shares in that Company "by Schuler to himself, a controlling interest in the Bel Air "Company, and could at any time fully effectuate the condition "mentioned in paragraph 2 of the agreement. It is not, in "my opinion, open to the purchaser to repudiate the contract "by reason of the non-fulfilment of a condition which was in "his own power to fulfil. That contention was not, in my view, "a triable issue, nor was it presented as such in the proceedings "before the trial judge. The gravamen of the appellant's case
10 "has always been that the agreement required him to pay a "sum additional to the purchase price, but this sum is not "claimed in the present proceedings . . ."

(2) Chief Justice N. A. Worley agreed with the reasons of the trial judge and in the course of his Reasons stated :— p. 36.

". . . It became apparent in the course of the argument before "this Court that the Appellant's real intention is to dispute the "validity of the debt of $17,000 said to be due to the Respondent "Schuler from the Bel Air Hotel: that however is a quite "different case from the case put forward by the Appellant in
20 "his affidavit asking for leave to defend and is, as we were informed "by counsel for the Appellant, the subject of other proceedings "in the Supreme Court of the Colony. But it is not, in my "opinion, a matter of defence to the present claim."

(3) Chief Justice D. E. Jackson expressed concurrence with the Reasons for Decision given by the other two learned Chief Justices. p. 37.

23. By Order of the West Indian Court of Appeal dated the 18th September 1951 the Appellant's appeal to Her Majesty in Council was finally admitted. p. 41.

24. The Respondents' claim was founded upon the agreement by the
30 Appellant to buy the shares from the Respondent Schuler for $17,000 and the assignment by the Respondent Schuler to the Respondent Company of the purchase price payable under that agreement. The Respondents did everything required on their part to complete the contract and to vest in the Appellant the title to and property in the shares. The Respondent Schuler had executed a blank transfer in respect of the shares and had deposited this transfer together with the relative share certificates with Mr. de Freitas who was the solicitor for and agent of both parties. The Appellant was also given control of Bel Air. Nothing therefore remained to be done for the purpose of completing the contract except that the
40 Appellant should procure the release to himself of the blank transfer and the share certificates and his registration as shareholder in Bel Air both of which he had the right and the power to effect. By virtue of his control of Bel Air it was open to him to pass the mortgages stipulated for by Clause 2 of the Security Agreement : alternatively he could have paid the moneys owing by him. The Appellant cannot take advantage of his failure to carry out one or other of these two steps either of which would necessarily have resulted in the release to him of the blank transfer and the share certificates.

The Respondents further submit that there was a contract for the sale of specific shares, that shares are " goods " within the meaning of the Sale of Goods Ordinance of British Guiana, that there was an absolute contract of sale of goods, and that under Part III of that Ordinance it was the duty of the Appellant to pay the price so soon as the transfer and share certificates were delivered to his solicitor the said J. Edward de Freitas.

The Respondents accordingly claim that their action was for the recovery of a debt or liquidated demand in money within the scope of Order IV Rule 6 of the Rules of Court.

25. In the further submission of the Respondents the Appellant failed to show cause why he should have been given leave to defend. 10

The Appellant has never denied that he contracted to purchase the shares for $17,000 or repudiated the said contract. Such contract preceded and was independent of the Security Agreement which only provided a method of financing the transactions entered into by the Appellant. The Appellant did not adduce any evidence sufficient to justify a claim for rectification of the Security Agreement in any manner which would relieve him from his obligation to pay the purchase price of the said shares or at all nor did he deliver a counter-claim. The Appellant's liability under the contract for the sale of the shares was not in any way conditional 20 upon the fulfilment of Sue-A-Quan's agreement to purchase the Eldorado Hotel from him.

26. None of the judgments appealed from dealt with the Appellant's claim that the Security Agreement had not been validly executed by Bel Air: but it is submitted that there is no substance in this claim and that it could not in any event affect the Respondents' claim for payment of the purchase price of the shares. Apart from the evidence of the Respondent Schuler in the joint affidavit sworn on the 19th May 1950 that he and the said Jocelyn Bostock were authorised to sign the Security Agreement on behalf of Bel Air, it appears from paragraphs 9, 11 and 12 of the 30 Appellant's affidavit sworn on the 13th May 1950 that the Appellant was a director of Bel Air and intended to contract on its behalf and that on the 1st May 1949 Bel Air at a meeting of the directors including the Appellant ratified the Security Agreement.

p. 14.

p. 7.

27. The Respondents humbly submit that this appeal should be dismissed with costs and the judgment of the West Indian Court of Appeal should be affirmed for the following amongst other

REASONS

(1) BECAUSE the Respondents' claim was for the recovery of a debt or liquidated demand in money within the 40 scope of Order IV Rule 6 of the Rules of Court and was properly made the subject of a specially endorsed writ.

(2) BECAUSE the Appellant did not have a good defence to the Action and there were no grounds why under Order XII of the Rules of Court he should have been given leave to defend the Action.

(3) BECAUSE the Appellant has never denied that he contracted to buy the said shares for $17,000 and the Respondent Schuler fulfilled his part of the contract by signing a transfer of the said shares and depositing the same with the relevant share certificates with the Appellant's solicitor.

(4) BECAUSE the Security Agreement which the Appellant claimed to be entitled to rectify was independent of and collateral to the contract for sale of the shares.

10 (5) BECAUSE the payment of the purchase price of the said shares was not by the Security Agreement made conditional upon the payment by Sue-A-Quan of the $64,000 therein referred to or upon any other event.

(6) BECAUSE the Appellant has shown no grounds for rectifying the Security Agreement or alternatively no grounds for rectifying the Security Agreement in any manner which would relieve him of his obligation to pay the purchase price of the said shares.

(7) BECAUSE the Judgments of the learned Acting Chief
20 Justice of British Guiana and of the West Indian Court of Appeal were right and ought to be upheld.

C. MONTGOMERY WHITE.

G. C. D. S. DUNBAR.

No. 38 of 1953.

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ON APPEAL

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AND

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Case for the Respondents

SIMMONS & SIMMONS,
1 Threadneedle Street,
London, E.C.2.
Solicitors for the Respondents.

The Solicitors' Law Stationery Society, Limited, Law and Company Printers, 5 Dove Court, Old Jewry, E.C.2. CL3519-78726