Privy Council Appeal No. 38 *of* 1953

Johan Josef Francois Hutt - - - - - - - - *Appellant*

v.

Booker Brothers McConnell and Company Limited and another *Respondents*

FROM

THE WEST INDIAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1954

Present at the Hearing:

LORD MORTON OF HENRYTON
LORD KEITH OF AVONHOLM
MR. T. RINFRET
MR. L. M. D. DE SILVA

[*Delivered by* LORD KEITH OF AVONHOLM]

This appeal arises out of an action brought by the respondents against the appellant in the Supreme Court of British Guiana by way of a specially indorsed writ of summons. The case came before the Acting Chief Justice who refused the appellant's application for leave to defend on the ground that his affidavit in reply disclosed no triable issue and gave judgment dated 22nd May, 1950, for the sum claimed. This judgment was affirmed by the West Indian Court of Appeal on 26th February, 1951. Leave to appeal to His Majesty in Council was granted by the Supreme Court of British Guiana on 18th September, 1951, and the appeal has now been heard by their Lordships' Board.

The circumstances in which the action arose may be shortly stated. By an agreement of 3rd January, 1949, the appellant agreed to sell and a certain Sue-A-Quan agreed to buy an hotel known as the Hotel Eldorado belonging to the appellant, with its goodwill, furniture and stock-in-trade, for a total sum of 120,000 dollars. The purchase was to take effect as from 3rd January, 1949, and apparently possession was to be given to the purchaser. A deposit of 6,000 dollars was made by the purchaser, and provision made for a further deposit of 5,000 dollars. Transport, (i.e., conveyance), of the property was to be completed within six months, or as soon as possible. It was provided that should the purchaser fail to complete the purchase within six months from the date of the agreement his deposit should be forfeited to the vendor and the agreement should become null and void. The other terms of the agreement are immaterial.

On 12th February, 1949, a further supplemental agreement was made between the same parties which made provision for the transfer of the hotel and other licences to the purchaser before payment of the further deposit of 5,000 dollars. It also contained the two following clauses:—

> 5. The Vendor having assigned the benefit of the Principal Agreement to Booker Brothers McConnell and Company Limited shall be at liberty notwithstanding the said Agreement to advertise and pass a Fifth Mortgage to the said Company for the sum of $17,000:—
>
> 6. On the passing of Transport the Purchaser shall pay to the Demerara Mutual Life Assurance Society Limited the sum of $45,000:—in respect of the First, Second, Third and Fourth Mortgages on the property sold, and to Booker Brothers McConnell and

Company Limited the balance of the purchase price, namely:— $64,000:—

These two clauses are clearly associated with the next agreement which follows. This was an agreement between the Bel Air Hotel Limited, the two respondents and the appellant. It was signed of even date with the supplemental agreement between the appellant and Sue-A-Quan. It runs as follows:—

AN AGREEMENT made the 12th day of February, 1949. Between:—BEL AIR HOTEL LIMITED, (hereinafter called "the Debtor Company") of the first part, JOHAN JOSEF FRANCOIS HUTT, (hereinafter called "the Purchaser") of the second part, LEON SCHULER, (hereinafter called "the Vendor") of the third part, and BOOKER BROTHERS McCONNELL AND COMPANY LIMITED, (hereinafter called "the Creditor Company") of the fourth part.

WHEREAS the Debtor Company is indebted to the Creditor Company in the sum of approximately $19,000:—under a First Mortgage, and in the sum of approximately $8,500:—in respect of supplies, and is also indebted to the Vendor in the sum of $17,000:—

AND WHEREAS the Vendor, who has the controlling interest in the Debtor Company, has agreed to sell to the Purchaser his shares in the Debtor Company for the sum of $17,000:—

AND WHEREAS the Purchaser is the owner of the following property, viz.:—

"Firstly,

the immovable property known as—"E½ of lot A9; W½ of lot A9 and W½ of lot A10; SE part of lot A10; South Cummingsburg, Georgetown, with all the buildings and erections thereon": as held under Transport No. 523 of 23rd day of April, 1946;

"Secondly,

the goodwill of the hotel business (including all Licences) carried on upon the property:

"Thirdly,

all the fixtures, fittings, furniture, trade utensils and other chattels in or about the hotel premises and used in or in connection with the said business and in and upon the property, save and except such furniture, personal belongings and chattels of hotel guests; and

"Fourthly,

all stock-in-trade in and upon the property":

but has agreed to sell and has delivered possession of the same under an Agreement dated 3rd January, 1949, to J. A. Sue-a-Quan for the sum of $120,000:—of which $11,000:—has been already, or will shortly be, received by the Purchaser and $45,000:—is to be paid to the Demerara Mutual Life Assurance Society Limited, in satisfaction of the First, Second, Third and Fourth Mortgages on the said property, leaving a balance of $64,000:—to be paid to the Purchaser on the passing of Transport:

AND WHEREAS the Vendor has assigned to the Creditor Company the sum of $17,000:—owing to him by the Debtor Company and the sum of $17,000:—owing to him by the Purchaser in respect of the sale of the said shares:

AND WHEREAS the Debtor Company has agreed to pass a First and Second Mortgage on its property to the Creditor Company as security for the payment of the said sum of $17,000:—with interest at the rate of FIVE per cent. per annum from the date hereof within six months from the 3rd day of January, 1949, or the passing of the Mortgage and the Purchaser has agreed to pass a Fifth Mortgage on the said property to the Creditor Company as security for the payment of the said sum of $17,000:—with interest at the rate of FIVE per cent. per annum from the date hereof

within six months from the 3rd day of January, 1949, or the passing of the Mortgage as the case may be:

NOW IT IS HEREBY AGREED as follows :—

1. The Purchaser shall forthwith deposit with the Creditor Company the Grosse Transport No. 523 of 23rd April, 1946, for the said property and hereby assigns to the Creditor Company the said balance of $64,000 :—payable to him under the said Agreement dated 3rd January, 1949, and the full benefit and advantage thereof.

2. The Debtor Company and the Purchaser shall forthwith advertise the aforesaid Mortgages to the Creditor Company, and shall pass the same whenever requested by the Creditor Company.

3. On payment of the said sums of $17,000 :—with interest as aforesaid, or on the passing of the said Mortgages, whichever shall first happen, the transfer of the said shares which has been signed by the Vendor, shall be handed to the Purchaser.

4. On receipt of the said balance payable under the said Agreement dated 3rd January, 1949, the Creditor Company shall apply the same to the payment of—

(a) the capital and interest of the said First Mortgage of $19,000 :—

(b) the said sum of $8,500 :—in respect of supplies ; and

(c) the said sums of $17,000 :—with interest as aforesaid.

5. All costs and expenses of and incidental to this agreement shall be paid by the Debtor Company.

AS WITNESS the hands of the parties the day and year first above written in the presence of the subscribing witnesses.

WITNESSES :—

1. J. Edward de Freitas.
2. Claudia Bond.

BEL AIR HOTEL Ltd..
Leon Schuler—Chairman.
Jocelyn Bostock—Secretary.
Joh. J. Hutt.
Leon Schuler.
Booker Bros., McConnell & Co., Ltd.,
by their attorney
W. S. Jones.

Seal of Bel Air Hotel, Limited.
Seal Affixed :
Jocelyn Bostock,
Secretary.

In the printed copy of the agreement placed before their Lordships clause 3 mentioned only one sum of 17,000 dollars but it is common ground that " sum " should be " sums " as set out above.

To complete the history of the matter, it would appear that Sue-A-Quan failed to implement his contract to buy the Eldorado Hotel belonging to the appellant ; the fund to which the parties to the agreement of 12th February were apparently looking to satisfy the payments contemplated by that agreement thus never materialised ; no mortgages, so their Lordships were informed, were ever passed on the property of the Bel Air Hotel Limited or on the property of the Eldorado Hotel ; and the appellant has made no payment as the price of the shares which the agreement says Schuler agreed to sell to him.

In the respondents' statement of claim indorsed on their writ of summons the respondents claim 17,000 dollars as the agreed purchase price of the shares with interest on this sum at the rate of 5 per cent. per annum from the 12th February, 1949, to the date of the summons, amounting in gross to 18,038.63 dollars. It is alleged in the claim that the plaintiff Schuler bargained and sold to the defendant 3,400 fully-paid shares of 5 dollars each in Bel Air Hotel Limited on or about the

12th day of February, 1949. The statement of claim contains various other references to the agreement of 12th February and other matters to which their Lordships find it unnecessary to refer for the purposes of their judgment.

In his affidavit of defence the appellant raised *inter alia* two questions which have been fully argued before their Lordships' Board. These were whether the agreement by the appellant to buy Schuler's shares was conditional on the performance by Sue-A-Quan of his contract to buy the Eldorado Hotel and whether, in any event the property in the shares had passed to the appellant. The Supreme Court of British Guiana and the West Indian Court of Appeal held that in these two matters the appellant had no stateable ground of defence. The matter is summed up by the Court of Appeal in the following passage:—

> "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 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."

Their Lordships will deal with these two points in the order taken in this passage. In their Lordships' view the claim of the respondents was misconceived. There nowhere appears from the documents to have been a completed sale of the shares. They support at best no more than an agreement by Schuler to sell the shares to the appellant. It is so stated in the preamble to the agreement. The only thing that respondents' counsel could point to to suggest the contrary was the passage in the preamble which runs "And whereas the vendor has assigned to the creditor company . . . the sum of 17,000 dollars owing to him by the purchase in respect of the sale of the said shares". But a contract of sale of goods under the Sale of Goods Ordinance (assuming "goods" in the Ordinance covers shares, a point on which their Lordships offer no opinion) includes both a transfer of property in goods and an agreement to transfer property in goods and there can be no sale proper until the property in the goods is transferred. It is clear in their Lordships' view that the agreement refers to an agreement to sell. The conditions for the agreement to sell becoming a sale are set out in clause 3 of the agreement of 12th February, namely the payment of the two sums of 17,000 dollars or the passing of the two mortgages whichever shall first happen in which event the transfer of the shares was to be handed to the appellant. Neither of these events has happened. The true position is revealed in the fact, as their Lordships were informed and as appears from the affidavit in reply of the respondents, that a blank transfer of the shares was signed by Schuler at the same time as the agreement and was handed to a Mr. J. Edward de Freitas with the relevant share certificates. A copy of this transfer annexed to the affidavit shows that the transferee's name is left blank and that it is not signed by the appellant. It is their Lordships' view that Mr. de Freitas was holding it if not as solicitor for the respondents at least as a neutral party for completion and delivery only on payment of the stipulated sums. In any event it is clear that no property in the shares has passed to the appellant. The learned Chief Justice who presided over the Court of Appeal, in holding that the property in the shares had passed to the appellants, says: "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 2 of the Sale of Goods Ordinance. The fulfilment of the condition was however wholly within the control of the defendant himself". The same thing, their Lordships would point out, could be said of any buyer who wrongfully neglects or refuses to accept and pay for the goods. Nothing has been shown to their Lordships to suggest that this is other than a case of a buyer, either justifiably or not, refusing to pay for something he has agreed to buy. The remedy accordingly,

if any, available to the respondents was not a claim for payment of the price but an action of damages for breach of contract. On this ground alone the appellant was entitled to leave to defend. His position in this matter is sufficiently set out in paragraphs 13 and 16 of his affidavit of defence.

But in their Lordships' view the appellant was also entitled to leave to defend on a broader ground. In his affidavit of defence he states in paragraph 15 that the fulfilment by Sue-A-Quan of the agreement to buy the Eldorado Hotel was a basic condition of the agreement of 12th February, 1949, and that the non-fulfilment of this condition released him (the appellant) from liability to make payment under the agreement of the 12th February, 1949.

A *prima facie* view of the agreement read as a whole appears to their Lordships to lend considerable force to this contention. The agreement to buy the shares is not made a stipulation of the agreement of 12th February, but it does not follow that the two agreements made at the same time, or sufficiently near in time as to be regarded as concurrent agreements, were not mutually interdependent the one on the other. It is at least a possible view that the respondents are not bound to pass the shares to the appellant unless the debts due to them and the price of the shares are met in the manner provided by the agreement. It is on the balance of the price of the Eldorado Hotel that they would seem ultimately to rely for payment as shown from clause 4 of the agreement. If the respondents are not bound except in the event of the Eldorado Hotel sale going through, neither can the appellant be bound. In the Supreme Court of British Guiana, Acting Chief Justice Boland expressed the view that the assignment of the balance of 64,000 dollars to the plaintiff company was merely by way of security. Without saying that this is not a possible view their Lordships are of opinion that on the terms of the agreement itself and other material before them it is not a necessary view. Clause 3 is also in their Lordships' view very relevant on this issue. It stipulates that the transfer of the shares is to be dependent not merely on the payment of the price of the shares but also on payment of the debt of 17,000 dollars due by the Bel Air Hotel Limited. Their Lordships have been referred to nothing to suggest that the appellant undertook to discharge this debt in any other way than out of the balance of 64,000 dollars to be received from Sue-A-Quan. Unless therefore the sale of the Eldorado Hotel went through or the Bel Air Hotel Limited itself paid or secured its debt of 17,000 dollars there was no prospect of the appellant being entitled to his shares. This agreement was an agreement to which the Bel Air Hotel Limited was itself a party and the whole tenor of the agreement suggests strongly to their Lordships that its purpose was to secure to the respondents payment of the sums due to them and to relieve the Bel Air Hotel Limited of the debts due by them, at the expense no doubt of the appellant but only in the event of the price of the Eldorado Hotel being received from Sue-A-Quan. If that was the basis on which the parties were transacting it is a short step to say that the sale of the shares to the appellant was dependent on the same consideration. The linking of the Bel Air Hotel Limited's debt with the price of the shares in clause 3 points strongly, in their Lordships' view, in that direction.

Their Lordships do not consider it expedient to express any concluded opinion on this issue in the present state of the procedure. There may be other facts and circumstances which, if competent and relevant for consideration in a properly contested case, may affect the question. But, in their Lordships' opinion, this was also an issue on which the appellant should have been given leave to defend.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the judgment of the West Indian Court of Appeal of 26th February, 1951, and the judgment of the Supreme Court of British Guiana of 22nd May, 1950, and to direct that the appellant be given leave to defend the action brought against him by the respondents. The respondents must pay the costs of the proceedings in this appeal and in the Courts below.

(39155) Wt. 8082—47 100 11/54 D.L.

In the Privy Council

JOHAN JOSEF FRANCOIS HUTT

v.

BOOKER BROTHERS McCONNELL AND COMPANY LIMITED AND ANOTHER

[DELIVERED BY LORD KEITH OF AVONHOLM]

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