

21/1962

O N A P P E A L

FROM THE SUPREME COURT OF GIBRALTAR

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N

JOHN VINCENT STAGNETTO
LEWIS RICHARD STAGNETTO and
HENRY J.S. NORTON (Defendants)

Appellants

68199

- and -

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 LOUIS ABRINES and GEORGE A.
 VERELLO and HENRY J. DURHAM,
 Trustees of the Estate of
 RICHARD ABRINES deceased
 (Plaintiffs)

Respondents

CASE FOR THE APPELLANTS

RECORD

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|----|---|---------------|
| 1. | This is an appeal by leave from a judgment of the Supreme Court of Gibraltar (Flaxman C.J.) dated the 2nd June 1959. | p.101
p.99 |
| 20 | 2. The action was brought by the Respondent Louis Abrines as Plaintiff on the 3rd December 1955 for a declaration that the Appellants are trustees of the land and buildings thereon known as Nos. 393 and 394 and R. Nos. 599 and 600, in the General Plan of the Garrison of Gibraltar situate on the East Side of Main Street for the said Respondent and other persons interested in the residuary estate of one Richard Abrines deceased who died on the 10th March 1895, an order that the legal estate in the said land and buildings thereon be vested in the said Respondent and the other persons interested or | p. 1
p. 2 |
| 30 | in the Trustees of the estate of the said deceased upon such terms as to that Honourable Court might seem just and other relief. | |
| 3. | The said land is shown verged red and coloured pink on the site plan. | p.214 |
| 4. | The Appellants are the Executors of the Will | p.140 |

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- p.148 dated the 25th May 1931 of Lewis Stagnetto deceased (hereinafter called "the Testator") who died on the 23rd May 1932 and the grantees under an Indenture dated the 21st July 1932 and made between Moses Elias Seruya of the first part Telmo John Dodero and Eugene P. Griffin of the second part Rosa Francisca Guadalupe Abrines and Maria Leocadia Abrines of the third part and the Appellants of the fourth part whereby the said land was conveyed to the Appellants in consideration of 300,000 pesetas pursuant to an Agreement in writing dated the 27th April 1932 and made between the said Rosa Francisca Guadalupe Abrines and Maria Leocadia Abrines (hereinafter called "the Life Tenants") of the one part and the Testator of the other part. 10
- p.146
- p.105 5. Prior to the sale of the said land to the Testator such land was held on the trusts declared by the Will dated the 24th November 1893 of Richard Abrines deceased of and concerning residue and the Life Tenants were at all material times tenants for life of the said residue. 20
- p.102 6. The Respondent Louis Abrines is the son and one of the executors of the Will of Louis Richard Abrines deceased who was a nephew of the said Richard Abrines and in the events which have happened one of the persons beneficially interested in the residuary estate of ~~the Testator~~ ^{LOUIS RICHARD ABRINES} expectant on the death of the said Rosa Francisca Guadalupe Abrines (who is now the sole survivor of the Life Tenants) and the Respondents George A. Laverello and Henry J. Durham are the present Trustees of the estate of ~~the Testator~~ ^{RICHARD ABRINES} and were joined as parties with their consent on the 2nd June, 1959 30
- p. 98
- p. 99 (1.29)
- p. 24 7. By an Order dated the 9th February 1959 made by Flaxman C.J. in the Supreme Court of Gibraltar the Respondent Louis Abrines was appointed to represent for the purposes of this action Adoracion Abrines and Alfred Abrines who with the said Respondent are the executors of the Will of Louis Richard Abrines deceased. 40
8. The question in issue is as to whether the Respondents are entitled to have the said sale of the said land to the Testator and the said Conveyance to the Appellants set aside and if so upon what terms.
- p. 3 9. By the Statement of Claim the Respondent Louis Abrines alleged that at all material times the Life Tenants lived in part of the premises on the said land and that another part thereof was let to a firm of grocers trading as Stagnetto Schembri & Co with
- p. 3 (1.45)

whom the Life Tenants had incurred considerable debts in 1932 and that the Testator the senior partner of the said firm of which the junior partner was the Appellant John Vincent Stagnetto offered the Life Tenants a secret consideration of 100,000 Pesetas each (which sum was by particulars delivered on the 24th January 1959 amended to 25,000 Pesetas) to keep for themselves apart from the purchase price if they agreed to sell him the fee simple of the premises and that the Life Tenants refused but later finding themselves financially embarrassed and unable to pay their debts and particularly their debts to the said firm they were so oppressed by their debts that they yielded and agreed to sell the premises. It is further alleged by the said Respondent in the Statement of Claim that at the same time that the said Agreement dated the 27th April 1932 was entered into for the sale of the said land to the Testator it was secretly and fraudulently agreed orally by the Testator and the Appellants or some or one of them with the Life Tenants that a separate sum of money would be paid to the Life Tenants. It is further alleged by the said Respondent in the Statement of Claim that the market value of the said land was well in excess of 300,000 Pesetas the amount of the consideration paid by the Appellants for the said land. It is further alleged by the said Respondent in the Statement of Claim that in pursuance of the aforesaid secret agreement and as part and parcel of the same transaction on the date on which the said purchase was completed by the Appellants the Life Tenants received a separate payment from the Respondents or some or one of them and executed a Bond the condition of which was expressed to be the payment by the Life Tenants of 25,000 Pesetas by monthly instalments of 250 Pesetas each to the first two Appellants and others and that at the completion of the said purchase and before the execution of the said Bond the Appellant John Vincent Stagnetto informed the said Rosa Francisca Guadalupe Abrines that the said 25,000 Pesetas were a gift and not a loan and that the Bond was fictitious.

p.19 (1.21)

p. 4 (1.36)

p.146

p. 4 (1.42)

p. 5 (1.38)

p.153

10. The Appellants by their Defence denied the offer of a secret consideration by the Testator, the alleged secret agreement, that the sale was at an under value and that the Bond mentioned in the Statement of Claim was fictitious.

p. 8
p. 8 (1.3)
p. 8 (1.20)
p. 8 (1.23)
p. 8 (1.40)

11. The action came on for trial before Flaxman C.J. on the 9th 10th and 11th February 1959. It was not contended at the trial that the said purchase of the said land had been procured by undue influence nor were either of the allegations that the Appellants

p. 4 (1.36)

RECORD

p. 6 (1.1)

or some or one of them were parties to the said alleged secret agreement and that the Appellant John Vincent Stagnetto informed the said Rosa Francisca Guadalupe Abrines that the said 25,000 Pesetas were a gift and not a loan supported by any evidence or put to any of the Appellants in cross-examination. There was a conflict between the evidence given by and on behalf of the Appellants and the evidence given by and on behalf of the Respondent Louis Abrines on the following main matters.

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- (A) As to whether the loan or gift of 25,000 Pesetas to the Life Tenants was a side benefit in consideration of the sale of the said land to the Testator
- (B) As to whether the sum of 25,000 Pesetas secured by a Bond dated the 21st July 1932 was a loan or a gift
- (C) As to whether the sale was at an undervalue.

p. 33
p. 43
p. 55
p. 58
and p.61

As to (A) and (B) the evidence called on behalf of the Respondent Louis Abrines was the evidence of the said Rosa Francisca Guadalupe Abrines and the evidence called on behalf of the Appellants was the evidence of the Appellants and of Albert Isola Q.C. who acted in the sale on behalf of both the Life Tenants (until shortly before completion) and the then Trustees of the Richard Abrines estate and the Testator in the said sale.

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p. 29
p. 59 and
p. 61

As to (C) the evidence of the said Respondent was that of Frederick Richard Morrison and the evidence for the Appellants was that of Paul Emmanuel Carrara and Albert Isola Q.C.

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12. At the trial it was contended for the said Respondent that the sale ought to be set aside on the ground that under the Settled Land Act 1882 which is applicable to the Colony of Gibraltar the sale was not at the best price within the meaning of Section 4 (1) of the said Act and that the Appellants were not entitled to the benefit of Section 54 of the said Act (which is for the protection of purchasers acting in good faith).

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13. The said Respondent relied on Chandler v. Bradley /1897/ 1 Ch. 315 in support of his contention that if the Life Tenants obtained a benefit from the transaction the sale was not at the best price within the meaning of Section 4 (1) of the Settled Land Act, 1882. It was contended on behalf of the Appellants that on the footing that the payment was a loan and

not a gift Chandler v. Bradley (supra) was distinguishable but that in any event the said Respondent had not discharged the burden of proving the impropriety alleged. It was further contended on behalf of the Appellants that the following principles set forth in the judgment of the Privy Council delivered by Lord Parker in Vatcher v. Paull [1915] A.C. 372 at 382 were applicable to the circumstances of this case "The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give reason to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves"

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14. On 13th April 1959 Flaxman C.J. delivered his judgment in the action. In relation to the said matters of fact Flaxman C.J. held that the said Respondent had not discharged the onus of establishing either that the sum of 25,000 Pesetas was a gift and not a loan nor that the sale was at an undervalue. In relation to the question as to whether the loan of 25,000 Pesetas was a side benefit Flaxman C.J. said of the evidence of Rosa Francisca Guadalupe Abrines "The principal witness for the Plaintiff is the surviving tenant for life, Rosa Abrines. This lady is now 86 years of age, and, not unnaturally, her recollection of the events of 1932, and even of those of more recent date, is imperfect. Within this limitation I believe that she did her best, in evidence, to give a truthful version of her transactions with the late Lewis Stagnetto, and one point that appears to be clear in her mind is that the acceptance of the payment of Pts.25000, and the agreement to sell the property, were to relieve the burden of debt which was pressing upon her sister and herself. Certainly there are inconsistencies in her evidence, but on that point she is quite unshaken. It also seems clear from her evidence that from the outset, she and her sister had doubts about the propriety of the transaction, a doubt which has been on her conscience in recent years, and which she at last confided to her cousin, the plaintiff."

p. 87

p.94 (1.21)
p.97 (1. 3)

p.89 (1.22)

"It appears that these qualms of conscience only found expression when, as she stated in re-examination, "As the sale had been already done twenty years I didn't think that anything could be done against it."

"It also appears from her evidence that she regarded the sum paid as a gift, and not as a loan, and that, although she confided in Father Dodero and Mr. Griffin, the Trustees under the Will of Richard Abrines, that she and her sister had received a payment connected with the sale, it was intended to remain a matter between themselves and the purchaser, Lewis Stagnetto. And it seems, if the plaintiff's evidence is accepted, that the knowledge of any connection between the sale and the payment to relieve the sisters of their debts was withheld from the remaindermen until it was admitted by Rosa to Louis Abrines in 1954." 10

"The plaintiff, who was about 12 years of age at the time of the sale, in referring to this admission, says that his first knowledge of anything dubious about the transaction came from the communication made to him by Rosa Abrines in 1954, when she said she intended to tell him of something which had been on her conscience for a long time. As a consequence of her disclosure an interview with her solicitor was arranged, and she made a statement before him which was reduced to writing and signed by her. At that time she was about 82 years of age. The statement reads as follows: 20

p.90 (1.24)

"My sister and myself were in debt with Mr. Luis Stagnetto and many other people. Mr. Luis Stagnetto suggested to me buying the house where the Emporium is situated belonging to the Estate of Richard Abrines deceased. My sister and myself were the life tenants. He suggested paying us a sum of 5,000 dollars (Spanish Currency) for us to keep apart from the purchase price. I refused to sell at first but when I found I was financially embarrassed and that I could not pay my debts I agreed to the sale. Mr. Luis Stagnetto died before the Conveyance was executed, but his son John paid my sister and myself the sum of 5,000-dollars (Spanish Currency) to enable us to pay our debts. This was in compliance with the suggestion of his late father in connection with the purchase of the house. The house was sold for 60,000-dollars (Spanish Currency). This amount went to the Trustees of the Estate i.e. Father Dodero and Mr. Eugene Griffin. When it was first suggested to me I did not think it was right for my sister and myself to receive an amount for our own personal benefit and that is why I rejected the offer, but later we were so oppressed with debts that I gave way. 30 40 50

DATED the 9th day of July, 1954.

Rosa Abrines".

10 "I find it difficult to doubt the sincerity of Rosa Abrines' admissions. It was clear during the course of her evidence that she, to my mind not unnaturally, places some reliance on the assistance of her cousin, the plaintiff, as a male member of the family, but there is no suggestion that there is any sort of conspiracy between them to deprive the defendants of the Emporium property. At the same time her evidence alone cannot be the sole determining factor....."

20 "Rosa Abrines' account of the negotiations which preceded the sale are in some respects contradictory. She says that the first proposal to sell came from Lewis Stagnetto, that she rejected this, and that it was only later, when further pressed by financial embarrassment, that she consented to sell. Up to this point it would appear that negotiation had been between herself and Lewis Stagnetto. His son, who was the junior partner in the business, confirms this to some extent, although he says that the original approach was made to him by the two ladies at a chance meeting in Main Street early in April, asking him if he was a prospective purchaser, the Trustees having consented to a sale. He conveyed this information to his father, who expressed surprise, the question of selling the property not having been raised before.".....

30 "Lewis Stagnetto was well aware of the ladies' financial position, and must have known that recovery of the payment was unlikely, and that the payment was in effect a gift, but I do not accept the fact that it was the out-and-out gift asserted by Rosa Abrines. I am satisfied that the payment should be treated as a loan, and the plaintiff has not discharged the burden, which is upon him, of shewing it to have been a gift, and the Bond a fiction. That inference on the facts, is not justified.".....

40 "I am satisfied that there was a "side" inducement to persuade the Misses Abrines to enter into the contract for sale with Lewis Stagnetto. Rosa is emphatic about the connection between the payment of the Pts. 25000 and the agreement to sell, and her evidence, which had every appearance of being given with truth, finds strong support in the fact that from the ladies' point of view there was no point in selling at all unless they were to receive some consideration other than the payment of the purchase price to the Trustees for the remaindermen. They derived no benefit from this, in fact, in the loss of their flat, they were put

to a disadvantage. Mr. Isola, at the later date, and possibly Mr. J.V. Stagnetto too, may not have been aware of the close connection between the transactions, but the ladies and Lewis Stagnetto were. I am satisfied that Lewis Stagnetto offered them the means of discharging their pressing liabilities as an inducement to agree to the sale, and that in doing so the ladies were obtaining an improper personal benefit as trustees, a fact to the knowledge, or which should have been to the knowledge, of both sides to the bargain." 10

p.99 15. In his formal judgment dated the 2nd June 1959
p.99 (1.15) Flaxman C.J. ordered that the sale effected by the
said Agreement and the said Indenture be set aside
with consequential relief, that accounts of rents
and mesne profits and of capital improvements be
p.99 (1.29) taken as between the parties as from the 31st July
1932 but made no Order as to payments and ordered
p.99 (1.37) that the Trustees of the Will of Richard Abrines
deceased be joined as Plaintiffs and directed that 20
the Appellants should pay to the Respondent Louis
Abrines the costs of the action except so far as
they had been increased by the unsuccessful issue of
undue influence and that the said Respondent should
pay to the Appellants the costs occasioned by and
incidental to the joinder of the Trustees of the
Estate of Richard Abrines deceased as Plaintiffs.

16. The Appellants submit that the judgment of
Flaxman C.J. should be reversed and the action 30
dismissed or alternatively that such order should be
varied so as to exclude the said account of rents
and mesne profits and so as to provide that such
order should be without prejudice to any right which
the Appellant may establish against the said Rosa
Francisca Guadalupe Abrines to the rents and profits
of the property comprised in the said sale during
her life for the following among other

R E A S O N S

1. BECAUSE it is correct as found by Flaxman C.J.
that there is no evidence available to 40
establish that the sale of the said land to
the Testator was procured by undue
influence.
2. BECAUSE it is correct as found by Flaxman C.J.
that there is no evidence available to
establish that the said sale was at an
undervalue

3. BECAUSE it is correct as found by Flaxman C.J. that the payment of 25,000 pesetas to the Life Tenants by the Appellants was a loan and not a gift.
4. BECAUSE the onus of showing that the said sale was procured by fraud is on the Respondents and there is no evidence available to enable the Respondents to discharge that onus.
- 10 5. BECAUSE the conclusion of Flaxman C.J. that there was a "side" inducement to persuade the Life Tenants to enter into the contract for sale is based on the assumption that the Testator promised to make a loan to the Life Tenants before or at the time that Mr. Isola on behalf of the Life Tenants and the Trustees of the estate of Richard Abrines deceased communicated the offer to
20 the Testator to sell the said land at a price of 300,000 Pesetas and there is no evidence to support such assumption.
6. BECAUSE at the date when these proceedings were commenced more than 23 years had elapsed since the death of the Testator and the completion of the said sale and only one of the Life Tenants was surviving and that in these circumstances the onus was upon the Respondent to rebut the presumption in favour of the validity of the said
30 transaction laid down in Vatcher v. Paull (supra) and there is no evidence to rebut that presumption.
7. BECAUSE the Testator in accepting the offer of the Life Tenants and the Appellants in completing the said sale dealt in good faith with the Life Tenants and they are entitled to the benefit of the protection afforded to purchasers by Section 54 of the Settled Land Act, 1882.
- 40 8. BECAUSE the Order of Flaxman C.J. was wrong and ought to be reversed.
9. BECAUSE the said Rosa Francisca Guadalupe Abrines concurred in the said sale.

RECORD

10. BECAUSE the order of Flaxman C.J. was wrong in that it failed to give effect to the result of such concurrence and ought to be varied so as to give effect thereto.

JOHN L. ARNOLD

JOHN MONCKTON