

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N

AMRATLAL JAMNADAS (S/O JAMNADAS)

Appellant

-and-

GULAB BEN (D/O RATANJI)

Respondent

CASE FOR THE APPELLANT

A.L.PHILIPS & CO.,

TERMINUS HOUSE,
6, HOLBORN VIADUCT,
LONDON, EC1A 2AH
01-236-7343
Ref: PS/JEL

Solicitors for the Appellant

WILSON FREEMAN,

6/8, WESTMINSTER PALACE
GARDENS,
ARTILLERY ROW,
LONDON SW1P 1RL
01-222-2393
Ref: GML/JMB

Solicitors for the Respon-
den

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N:

AMRATLAL JAMNADAS (s/o JAMNADAS) Appellant

-and-

GULAB BEN (d/o RATANJI) Respondent

CASE FOR THE APPELLANT

1. This is an appeal from a judgment, dated 31st July 1974 of the Fiji Court of Appeal (Civil Jurisdiction) (Gould V.P., Marsack J.A. and Bodilly J.A.), dismissing the Appellant's appeal from a judgment of Stuart J. dated 25th February 1974, whereby it was ordered that an agreement in writing dated 26th September 1969 made between (1) the Appellant as vendor and (2) the Respondent as purchaser, for the sale of certain property, ought to be specifically performed and carried into execution. This appeal is made pursuant to an order of the Fiji Court of Appeal dated 16th August 1974 granting final leave to appeal to Her Majesty in Council.

2. By a document ("the Memorandum") partly

printed and partly handwritten, described as a "Memorandum of Terms and Conditions of Sale", dated 26th September 1969 and signed by the Appellant and one C.V. Dass on behalf of the Respondent, the parties to this action purported to agree to enter into a sale of certain property. The terms of the memorandum relevant to this appeal are as follows:

"VENDORS: Amratlal Jamnadas (son of Jamnadas) of Suva, Businessman

PURCHASER: Gulab Ben (f/n Ratanji) of Suva, Landlady

SUBJECT MATTER OF SALE: (land, building, chattels etc.)

Certificate of Title 9077 situated at Spring St., Suva, together with all improvements thereon.

The said property is sold SUBJECT TO the following Mortgage that is No. 63056.

PURCHASE PRICE: \$18,000 (Eighteen Thousand Dollars)

.....

TERMS AND CONDITIONS:

1. OUTGOINGS: Policy to be assigned to purchaser and premium to be apportioned as from 1st Jan 1970

TOWN RATES: Paid for period ending 31st day of December 1969. Purchaser to pay from the 1st Jan 1970

OTHER OUTGOINGS:

Such as water rates, telephone, electricity etc. Vendor will pay up to 31st December 1969.

2. POSSESSION

(a) Possession to be given by the Vendor and taken by the Purchaser as from the date of execution of Transfer.

(b) Vacant possession to be given by the Vendor and taken by the purchaser as from 31st day of December 1969.

.....

5. CONSENT

(a) The consent by the following person or persons are to be obtained;

(ii) Mortgagee that is first mortgagee....."

3. In clause 10 of the memorandum, words referring to a fixed express completion date were deleted.

4. It is common ground between the parties that mortgage No. 63056 was the appropriate first mortgage on the property, and that at the date of the memorandum \$8,000 principal and \$390 interest was owing under that Mortgage, although at that time the parties did not know that that exact amount was owing. Before the trial the first mortgage was discharged by the Appellant.

5. By a letter dated 23rd October 1969 the purchaser's solicitors required the appellant to comply with the memorandum and complete within 14 days. In response to that letter, by a letter dated 3rd November 1969 the Appellant's solicitors replied that any purported agreement was null and void.

6. On 18th December 1969 the Respondent issued a writ in the Supreme Court of Fiji claiming specific performance of the agreement allegedly contained in the memorandum and damages for non-performance, or alternatively damages for breach of contract. After the statement of claim was served, the defence was filed on 9th February 1970 and the reply was filed on 7th April 1970; the summons for directions was issued four months later. The action was due to be heard in February 1971, but the day before the hearing the Appellant filed a notice of change of solicitors and by consent the case was removed from the list. The action was eventually tried before Stuart J., commencing on 27th September 1973. By an order dated 24th February 1974, the learned judge ordered that the agreement which he found to exist be specifically performed and carried into execution at the price of \$26,000, and ordered that certain inquiries be made and accounts taken. The appellant appealed, and the Respondent cross-appealed, to the Fiji Court of Appeal (Civil Jurisdiction) and on 31st July 1974 the appeal was dismissed, and the

cross-appeal was allowed as to a matter which is not relevant to this appeal.

7. The Stamp Duties Ordinance (Cap. 177) as amended by the Decimal Currency Ordinance (Cap. 200) provides inter alia as follows:

"S.37(1). Except where express provision to the contrary is made by this or any other Ordinance, any unstamped or insufficiently stamped instrument may be stamped or further stamped by the Commissioner after the first execution thereof on payment of the unpaid duty and a fine in addition to the duty as follows:-

.....(b) where such instrument is not presented to be stamped within three months after execution, a fine of fifty per centum on the amount of the duty payable, but in no case shall the last mentioned fine be less than [four dollars].....

(2). The payment of any fine shall be denoted on the instrument by a particular stamp.

S.41 Except as aforesaid no instrument executed in Fiji or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of Fiji shall except in criminal proceedings

be pleaded or given in evidence or admitted to be good, useful or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed.

S.96(1). Where property is conveyed to any person.... subject either certainly or contingently to the payment or transfer of any money or marketable security, whether being or constituting a charge or encumbrance upon the property or not, such debt, money or marketable security is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty.

S.103(1). Any contract or agreement....
....(b) for the sale of any estate or interest in any property.... shall be charged with the same ad valorem duty to be paid by the purchaser as if it were an actual transfer on sale of the estate, interest or property contracted or agreed to be sold".

The Schedule to that Ordinance provides that the appropriate ad valorem duty is to be levied at the rate of \$1 for every \$100 of the consideration of part thereof.

8. By a letter dated 24th November 1970, before which time no stamp duty had been paid, the Commissioner of Stamp Duties informed the Respondent's solicitors that stamp duty on the memorandum had been assessed at 50 cents with a fine of \$4. At the trial of the action the Respondent produced the memorandum showing stamp duty of \$260 as having been paid, with an embossed stamp showing payment of the said fine of \$4, but showing no further fine as having been paid.

9. The Appellants respectfully submit that the foregoing circumstances raise the following issues:

(1) Whether or not on its true construction the purported agreement contained in the memorandum was void for uncertainty as failing to specify

(a) a completion date

(b) the chattels sold with the land

(c) any arrangements for the apportionment of interest on mortgage no. 63056

(2) The effect of the requirement that the consent of the mortgagee of the first mortgage be obtained and the effect of any failure to obtain it.

(3) Whether or not the memorandum was validly stamped and hence admissible and available to the court.

(4) Whether or not the Respondent was guilty of such delay in prosecuting her claim as to

disentitle her to a decree of specific performance.

(5) What was the consideration for any sale for the purpose of the order.

10. As to issue (1), the Appellant respectfully submits that on its true construction the memorandum does not contain any express completion date. The deletion of the words in clause 10, together with the evidence of the Respondent's solicitor, indicate that no fixed date was intended by the parties. In the circumstances, especially with interest accruing on mortgage no. 63056, such a fixed date is essential to a valid agreement of this kind, and its absence renders any purported agreement void for uncertainty. The Appellant further respectfully submits that no implied provision for completion within a reasonable time can save any purported agreement contained in the memorandum from invalidity, because again with regard to all the circumstances and especially the provisions as to outgoings and the interest accruing on mortgage no. 63056, no such reasonable time can be ascertained. Accordingly, in failing to specify any completion date, any purported agreement is void for uncertainty.

11. The Appellant further respectfully submits that any purported agreement contained in the memorandum is void for uncertainty in failing to specify the subject matter of the sale. The subject matter is qualified as being "(land, buildings chattels etc.)"

and although the word "chattels" has not been deleted, no chattels are specified as being sold, and any agreement is therefore incomplete and uncertain.

12. The Appellant further respectfully submits that in the circumstances, provision for the apportionment of the interest accruing under mortgage no. 63056 pending completion is vital to any binding agreement of the kind alleged by the Respondent. The memorandum contained no such express provision; nor, on its true construction, can any such term be implied. Nevertheless, the evidence indicated that completion might have been delayed for some time, and therefore a provision for apportionment of interest was essential to any binding agreement for sale. Without such a provision, any purported agreement is uncertain and incomplete, and therefore not binding.

13. On issue (2), the Appellant respectfully submits that if the memorandum contains a binding agreement, on its true construction it was conditional upon the consent of the first mortgagee being obtained. Stuart, J. in his judgment stated that the point was ~~im~~material and made no finding of fact that the consent was obtained. The Appellant respectfully submits that there was no evidence that it was obtained prior to the issue of the writ herein or at all. In the circumstances, the condition was never fulfilled and accordingly it is submitted that the Appellant was

not obliged to perform any agreement.

14. On issue (3), the Appellant respectfully submits that section 41 of the Stamp Duties Ordinance (Cap 177) prevents the memorandum from being the basis of this action. At the time of the Statement of Claim it was not stamped at all, and at the time of the hearing it was inadequately stamped. The Appellant submits that the consideration for stamp duty purposes was \$26,390, and that accordingly \$264 should have been paid in stamp duty. Furthermore, the memorandum did not bear a stamp showing the fine of 50% of the duty, payable under section 37(1)(b) of the above Ordinance, to have been paid. Accordingly, the memorandum should not have been pleaded given in evidence or admitted to be good, useful or available in law or equity.

15. On issue (4), the Appellant respectfully submits that the delay of the Respondent in bringing about a hearing of the matter should disentitle her to a decree of specific performance. In his judgment Stuart J. found that the Respondent had prosecuted her action in a "leisurely manner." He also found that "her solicitors do not appear to have been particularly diligent about obtaining another fixture" and "the Plaintiff does not appear to have done very much about bringing the action to hearing."

He then distinguished that delay as being due to the fault of the Respondent's solicitors and ruled that the delay was not sufficient to disentitle the Respondent to specific performance. The Appellant respectfully submits that the learned judge erred in disregarding the delay due to the Respondent's solicitors, and submits that the Respondent did not pursue her claim with sufficient speed to obtain her decree.


16. On issue (5) the Appellant respectfully submits that if there is an agreement binding on the Appellant, then the form of order made by Stuart J. and confirmed by the Court of Appeal is wrong. On the true construction of the memorandum the Respondent was to take the property subject to a mortgage on which ~~£20,390~~^{£8,390} was owing at the date of the agreement. Accordingly, the order should have been for specific performance at the price of £26,390, in accordance with the principle in Grant v Dawkins [1973] 1 WLR 1406.

17. The Appellant respectfully submits that the judgments of the Court of Appeal and Stuart J were wrong and should be reversed, and that the Respondent's claim for specific performance and damages should be dismissed, or alternatively that the order of Stuart J should be varied by

substituting a price of \$26,390, for the following among other

REASONS

- (1) Because any purported agreement contained in the memorandum was void for uncertainty in failing to specify a completion date, the subject matter of the sale or the apportionment of interest under mortgage no. 63056.
- (2) Because the agreement was conditional upon the consent of the first mortgagee being obtained, and there is no evidence that this condition was ever fulfilled.
- (3) Because the memorandum was improperly stamped at the date of service of the statement of claim and at the trial.
- (4) Because the Respondent's delay in prosecuting her claim was too great to enable her to obtain the equitable relief of specific performance of the agreement.
- (5) Because the effective price of the property sold was \$26,390.


Anthony Mann

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London EC1A 2AY.