

order.

Such enquiry may be taken before the Registrar.
There will be no order as to Costs.

MICHAEL

V

BROWN

[ANTIGUA - High Court, Suit No. 6 of 1946
May 26, August 29, 1950; January 8, 1951]

Contract - Sale of land - Oral agreement - Exchange of correspondence - Specific performance - Fraud and Perjury Prevention Act (Statute of Frauds) - Whether there is sufficient memorandum - Whether specific performance can be ordered of a portion of the property contracted to be sold.

The plaintiff and the defendant agreed orally for the sale to the plaintiff of a property in St. John's for US\$5,000.00. Both parties instructed the same solicitor to act for them, which fact was known to each party. The correspondence that passed between the parties and the solicitor clearly identified the parties, the property, the consideration and the promise. Subsequently, the defendant repented of the bargain and essayed to stop the sale. She also sold a portion of the property to a third party who had no notice of the pending dispute. The plaintiff claimed specific performance of the contract.

Held: (i) That the documents together with the evidence of the plaintiff established the contract of sale, and the documents constituted a sufficient compliance with the *Statute of Frauds*;

(ii) that specific performance of a contract can be ordered of a portion of the property contracted to be sold with compensation for what is not available.

(iii) that specific performance of this contract would be ordered save for the portion already conveyed to the third party, with diminution of the purchase price of the amount paid by the third party.

Cases referred to:

Basma v. Weekes [1950] 2 All E.R. 146.

Horrocks v. Rigsby (1879) 9 Ch. 180.

Huggins v. Senior 151 E.R. 1278.

Smith-Bird v. Blower [1939] 2 All E.R. 406.

Also referred to:

Sudgen on *Vendors and Purchasers*, 14th ed., p. 316.

M.H. Davis for the plaintiff.

E.E. Harney for the defendant.

JACKSON C.J.: The plaintiff's claim is for specific performance of an oral agreement alleged to be entered into between the plaintiff and the defendant in the United States of America on or about 6th August 1945 in respect of "certain lands and premises" in the City of St. John's, Antigua.

The plaintiff is a British citizen who lives in St. John's, Antigua. The defendant once lived in Antigua and owns real property there; she at all times material in this case live in the United States of America. In the year 1945 she owned and still owns "certain" lands and premises known as the "Bargain House" situate in Redcliffe Street, St. John's Antigua: that is the only property she owned in Antigua.

The defence denies the oral agreement and states in effect that even if there had been agreement, section 4 of the Statute of Frauds had not been complied with.

On the 27th of June, 1944, the defendant executed in New York, United States of America, a power of attorney in favour of Mr. S.T. Christian, Barrister-at-Law, practising as a solicitor in these islands to manage her affairs as is more particularly stated in the power, in respect of the said Bargain House premises. This power omits any authority to sell or to conclude any arrangements for the sale of these premises. Mr. Christian who gave evidence said that a power of sale was specifically left out of the instrument by the defendant and that he had no power even to lease the premises for any period beyond two years; his letter to the defendant (S.T.C. 2) of the 10th October 1944 bears this out. Several letters passed between him and the defendant and these will be dealt with later. Mr. Christian said that he had always been solicitor to the plaintiff which fact he had communicated to the defendant and which she well knew; that although he had no standing retainer from the plaintiff that a year never passed without his having some work to do for him. Mr. Christian further stated that he had seen the defendant in New York in 1944 and that was the time the subject matter of the power of attorney was discussed. He said he never discussed any legal work whatsoever and his only duty was that of an agent as anyone else could have been for the purposes set out in the power of attorney. He said he did write to her in respect of her title deeds but he did that as he was interested in seeing that his client the plaintiff got a clear title. In answer to counsel for the defence Mr. Christian said he and the plaintiff had been discussing the question of the purchase of the property for several months and it was a long time after that he wrote to the defendant about the title deeds.

The plaintiff's story is that on the 6th August, 1945, while he was in New York, U.S.A. he spoke to the defendant on the telephone asking whether she was interested in selling the Bargain House and that if she was he would call and see her. She replied in the affirmative and as a result he went to her house in New York on that same day; that after a long discussion she agreed to sell the property to him for five thousand dollars (\$5,000.00) United States currency. He informed her that Mr. Christian was his lawyer and that he would like her to cable him immediately letting him know that she had closed the sale with him. She agreed and wrote a telegram at the plaintiff's dictation. The telegram is in evidence as S.T.C. 7 and the text is "Hon. Sydney Christian St. John's Antigua. Seen Michael. Deal closed. Five thousand dollars (\$5,000.00). Document follows by air. LUCILLE BROWNE"

It would appear that two days after on or about the 8th of August the defendant repented of her bargain and telephoned to the plaintiff saying that she had since got an offer of six thousand dollars (\$6,000.00) and that she was no longer willing to carry out her contract with him. The defendant however, on the 7th of August telegraphed Mr. Christian in these terms: "Ignore previous cable Union preferred" and on the 20th of August 1945 she telegraphed again to him "Sale to Union preferable." This was followed by another telegram from her "Desire to sell property to Union please prepare papers accordingly. Accept retainer at once."

The plaintiff has said that he was at all times ready and willing to perform the terms of the contract and that he never agreed to relinquish same.

The question was raised as to the admissibility of the telegrams and several of the letters produced on the ground that the communications from the defendant to Mr. Christian were communications between solicitor and client and therefore privileged. Whatever may be the conclusions reached as to the admissibility of the several documents, it does not seem open to question that the document S.T.C. 7 is clearly admissible, to put it as favourably as possible for the defendant, as at the moment of its despatch, the least that could be said is that Mr. Christian was then acting for both the plaintiff and defendant in a non-contentious matter.

It is fair to state that counsel for the defendant conceded that the telegram S.T.C. 7 in the circumstances by the evidence adduced by the plaintiff should be admitted if the circumstances to which he deposed be believed. Counsel however, further submitted that although the telegram may be said to be sent to Mr. Christian in a joint capacity that the letters were not in that capacity and should be excluded. In reply, the plaintiff's counsel claimed admissibility for the undated letter S.T.C. 13 which followed the telegram of August 6th S.T.C. 7, and that of August 7th S.T.C. 8. He also is in accord with the submission of the defendant's counsel who said "When defendant

becomes aware, if at any time she did, that Mr. Christian was acting for the plaintiff then correspondence thereafter in relation to the transaction would be admissible" and he urged that the defendant at the time of writing the letter S.T.C. 13 must have had that awareness, not to let alone the fact that she must have known that the contents would have been communicated to the plaintiff. In fact the letter S.T.C. 13 is an explanation of the telegram. I do not consider it necessary to set out all the correspondence in full: I set out Mr. Christian's letter S.T.C. 4 of 31st May 1945 to the defendant and the defendant's letter of the 17th July, 1945 to him:

"Chambers,
St. John's,
Antigua, B.W.I.
31st May, 1945

Mrs. Lucille Hector Brown,
108-16 Pinegrove Street,
Jamaica, Long Island, N.Y.

Dear Mrs. Brown:

I have received an offer of £1,000 for the Bargain House, provided a clear title can be obtained. If you are at all interested kindly send me a cable as follows: "Interested". The intended purchaser may be travelling to the States soon, and if I get your cable I will instruct him to call to see you, and you may be able to close with him during the period of his visit, and make arrangements for payment.

Please act promptly if at all interested. I will write soon in answer to your letter.

Very truly yours,

(Sgd.) S.T. Christian.

STC:FMC

July 17th 1945
108-16 Pinegrove St.

Dear Mr. Christian

I have received your letter in which you mentioned your client Mr. Michael. I had a letter from him on the 16th (July); he said he would be detained in Rochester a little longer than he expected but hope to see within three weeks

from date; he mentioned his generous offer of £1,000 but I wrote to tell him that I had a better offer but was held up because you had not furthered the papers which I asked you to. I told him you seemed rather anxious for him to procure the property and that's why you were slow in sending me the papers, anyway I shall be awaiting his visit to see if we can't reach an amicable agreement.

To tell you the truth Mr. Christian, the price that I learnt properties are being sold for down there at this present time I expected at least about £1,400. You may make the necessary procedure for I am sure he will agree to pay me a little more than what he has already offered: he asked me to get in touch with you immediately after receiving his letter and so I have done.

I trust that everything will work out satisfactorily.

Sincerely yours,

(Sd.) LUCILLE H. BROWN.

P.S. My nephew is with me he arrived safely."

I accept the evidence of Mr. Christian in regard to the transactions in relation to the property and I find that the references to "my client" in Mr. Christian's letter S.T.C. 5 of the 26th of June, 1945 to defendant and also "your client" in the defendant's letter S.T.C. 14 of the 17th July 1945 are to the plaintiff. These letters along with the undated letter S.T.C. 13 and the telegram S.T.C. 7 are admissible in evidence so also are the telegrams S.T.C. 8 of the 7th of August 1945, S.T.C. 10 of the 20th August. I should also refer to the letter A.A.M. 1 of 13th July 1945 from the plaintiff to the defendant in which the plaintiff referred to Mr. Christian as "your lawyer". These documents along with the evidence of the plaintiff establish without doubt the contract made between the plaintiff and the defendant, and the documents constitute a sufficient compliance with the Statute of Frauds. I find that the contract has been proved; and in the light of the evidence there has been a breach. The defence led no evidence but relies purely on its legal position.

At a late stage in the trial the plaintiff testified that he was buying the property for a brother-in-law who lives in Guadeloupe but who has his home in Paris and that the brother-in-law is married to his sister who is still of British nationality and travels on a British passport. This brother-in-law is a native of Lebanon and does not possess a licence to hold land in this island. The plaintiff said that he had told the defendant that he was buying for his brother-in-law. I can find no supporting evidence for the statement that the defendant was

aware that the plaintiff was acting either as agent for a disclosed or for an undisclosed principal and I cannot feel any confidence in the statement that that fact had been made known to the defendant even though I am not in a position to reject the plaintiff's testimony that the property was intended for his sister or his brother-in-law. In any event, however, whatever the true position may be the plaintiff is nevertheless entitled to sue on his own as a principal or to be sued as such in respect of the contract.

If the statement of the defendant were to be accepted in its entirety the question as to whether the memorandum was sufficient to satisfy the Statute of Frauds must be examined. This question received attention in the case of *Basma v. Weekes* [1950] 2 All E.R. 146 and I quote from the judgment of the Board in that case at page 150 as follows:

"In *Huggins v. Senior* (1841), 8 M and W. 834; 151 E.R. 1278; there was an agreement in writing for the sale 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 providing that he made the agreement 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 (8 M & W.) at p. 844.

"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 show 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.

"The circumstances in *Smith-Bird's* case [1939] 2 All E.R. 406 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. Luxmore, L.J., having held that there was an oral contract to sell the

houses, said [1939] 2 All E.R. at 407 and 408:

"..... 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."

Next comes the question, can specific performance be decreed? The evidence establishes that damages would not be a sufficient remedy. Proof has been given by the defence that during the pendency of this action the defendant sold and conveyed a part of the Bargain House premises to one Cox Coates, the deed evidencing the conveyance bears the date 27th of January, 1947, and was registered in the registry as No. 902 of 1947 on the 3rd of February 1947. There is no satisfactory evidence to enable me to conclude that the purchaser, Cox Coates, was a purchaser with knowledge of the pending dispute. He paid £72.18s.4d. (\$350.00). Can specific performance of the contract be ordered when the whole of the property contracted to be sold cannot be conveyed?

The case of *Basma v. Weekes and Others* [1950] 2 All E.R. 146 is in point. In that case three defendants had contracted to sell to the plaintiff-appellant two houses which they held as tenants in common. It was contended that a purchaser could not maintain an action for specific performance of an agreement to the extent of the interest of two defendants with an abatement of a portion of the purchase price in respect of the interest of the third defendant who could not properly have contracted. This contention was rejected by the Privy Council and Lord Reid in delivering the judgment of the Board at page 152 expressed himself thus:

"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 (Sudgen on *Vendors and Purchasers*, 14th ed., p. 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 of them 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 *Horrock v. Rigby* (1878) 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 (9 Ch. D. 182):

"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 *A-G v. Day* 1 Ves. Sen. 218, 27 E.R. 992."

The plaintiff's counsel asked that specific performance of the contract be decreed but that the purchase price of \$5,000.00 in American currency should stand at the rate in respect of English money as it was at the date of the contract; no sufficient authority was supplied to support this request. The plaintiff has himself sought that the contract be enforced that payment should be made in American currency as an integral part of the contract, since any attempt to remove or vary that could be

likened to the removal of the coping stone which keeps a main arch in position.

The court must however not make an order which cannot be carried out. The financial regulations applicable to this colony require permission to be obtained before any substantial sums of money may be sent out of the colony to the United States of America; the plaintiff has not yet received such permission nor has he supplied any evidence that he has sought it. It emerges however that this money will be supplied by his brother-in-law and may be for the benefit of his wife, (the plaintiff's sister), who is still of British Nationality. While as is stated above I cannot find that the defendant had any knowledge that the plaintiff was contracting as agent for an undisclosed or for a disclosed principal I cannot justifiably make a positive finding that the property sought to be purchased was or was not for the benefit of the plaintiff or of his sister or of his brother-in-law, the documentary evidence clearly shows that the plaintiff contracted as principal. If however the money is being supplied by the plaintiff's brother-in-law in any circumstances, I do not in the absence of fraud, see in this act an avoidance of the colony's financial regulations. Whether or not the plaintiff will be holding in trust for his brother-in-law is not a matter for the Court at this stage.

The plaintiff is entitled to specific performances of the contract in respect of the premises save and except that portion already conveyed to Cox Coates on the 27th January 1947 and registered as No. 902 of 1947 on the 3rd February 1947, and I so order. The obligation of the plaintiff to pay \$5,000.00 U.S. currency to be diminished by £72.18s.4d the amount paid to the defendant by Cox Coates. Upon receipt of the sum due by the plaintiff, the defendant is to convey the Bargain House premises to the plaintiff, each bearing the costs of conveyance equally, upon failure of the defendant to execute the conveyance the Registrar shall, upon proof being made to his satisfaction that the sum due by the plaintiff was duly paid, convey, at the expense of the plaintiff who shall be entitled to recover a moiety from the defendant, to the plaintiff the said Bargain House premises.

The plaintiff shall have his costs of the action against the defendant.

ST. KITTS SUGAR ASSOCIATION LTD. V THE A.G. 735

ST. KITTS SUGAR ASSOCIATION LIMITED

V

THE ATTORNEY GENERAL

[ST. KITTS. High Court. Suit No. 65 of 1973

June 28, July 1, 6, August 30, 1974]

Contract - Sugar Industry Rescue Operation Agreement - Whether agreement created relationship of landlord and tenant with right to assign.

On the 19th December 1972 the parties entered into an agreement whereby the general control of the sugar industry lands would throughout the continuance of the agreement rest in the Minister responsible for agriculture. For the purpose of restoring the sugar estates to a proper condition he was empowered to authorise the cultivation, rehabilitation and proper care of all cultivable sugar industry lands. But the agreement provided that the ownership of those lands and all rights in and over the same remained in the plaintiffs.

By letter dated the 25th July 1972 the Minister gave notice that he had rented five acres of those sugar industry lands to a company at a rental of \$10.00 per annum. The plaintiffs replied that it was an unwarranted incursion into their proprietary interests and warned the Minister not to proceed further. The Minister however rejoined that he was advised that it was no breach of the agreement for him to act through organizations committed to the same ends. The plaintiffs accordingly instituted proceedings seeking declarations that upon a true construction of the agreement the Minister had no such power.

At the trial, the plaintiffs contended that the agreement gave the Government nothing more than a right to operate, manage and control the sugar industry lands, that no proprietary interest passed and that the Government's interest was no more than a licence granted to the Minister to go on those lands by himself, his servants or agents to see that the agreement is being implemented. On the other hand the Attorney-General contended that the agreement created the relationship of landlord and tenant and that it gave the Minister a licence which was in its nature assignable and transferable.

Held: The Minister was not competent to rent or grant exclusive possession or in any way alienate any interest in the said lands to any third party.

Cases referred to:

Clapham v. Edwards [1938] 2 All E.R. 507.

London Borough of Hounslow v. Twickenham Grounds, Dev. [1969] 1 All E.R. 1172.