Privy Council Appeal No. 3 of 1989

James Harewood and Estina Rampersad *Appellants*

v.

McLeod Retese *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER 1989

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This is an appeal from the judgment of the Court of Appeal of Trinidad and Tobago (Bernard C.J., Edoo and Davis JJ.A.) delivered on 20th May 1988 and dismissing the appellants' appeal from a judgment of Persaud J. in the High Court which ordered specific performance of an oral agreement for the sale by the appellants to the respondent for the sum of $18,000 of a house and land ("the property") situated at Princes Town in the Ward of Savana Grande in Trinidad comprising 14,266 superficial feet.

The main questions for decision by their Lordships were:-

(1) whether there was a concluded agreement for the sale of the property; and, if so,

(2) whether a letter dated 7th May 1974 from the appellants to the National Housing Authority contained a description of the property sufficient to satisfy section 4 of the Conveyancing and Law of Property Ordinance (Chapter 27 No. 12). If the answer to either question was No, the appeal had to be allowed.

On 18th November 1972 the respondent became, under an oral agreement, a monthly tenant of a house (where he has lived ever since and which is comprised in the property) owned by the second appellant and situated on land owned by both appellants at Princes Town. In 1973 the first appellant orally suggested to the respondent that he should buy all of the appellants' land at Princes Town, which was comprised in a deed dated 23rd June 1962 and registered as no. 7894 of 1962, together with the two houses thereon (one of which was the house let to and occupied by the respondent), but the respondent said that he could not do this. Later in 1973 the first appellant again approached the respondent, suggesting that he should buy the house he was living in and the land on which it stood. The respondent accepted this proposal and agreed to buy a plot of land which measured 14,266 superficial feet at a price of $18,000 and applied to the National Housing Authority ("the NHA") for the loan of that amount.

In order to support his application the respondent drafted and brought to the appellants the following letter, addressed to "The Secretary, National Authority, Port of Spain" and dated 7th May 1974, which they signed at his request:-

> "Sir,
>
> We the undersigned beg to inform you that we are willing to convey unto McLeod Retese a parcel of land situate at Princes Town in the Ward of Savana Grande in the island of Trinidad comprising 14,266 sup. feet. being a portion of land described in a deed Registered as No. 7894 of 1962 and dated the 23rd day of June 1962 together with a building thereon.
>
> That at the convenience of your office I will and us be willing to sign a deed of conveyance in favour of the said McLeod Retese.
>
> The consideration of the said premises is $18,000.00.
>
> Respectfully yours,
>
> /s/ James Harewood.
>
> /s/ Estina Rampersad."

The respondent then took that letter to the NHA and was given the loan of $18,000.

On 1st August 1974 the appellants wrote as follows to the respondent:-

"

1/8/74.

Kingsley Street,

Princes Town.

Dear Mr. ?

I am informing you that we are discontinuing the sale of the property because of the big increase of property elsewhere that we are not able to cope with, there was two places that I was banking on one was for 22,000. Now 40,000 the other from 10,000 to 19,000. No very sad for Mr. to do so, but I just can't throw myself in the sea.

/s/ James Harewood

/s/ Estina Rampersad."

On 19th February 1975 the respondent issued a writ claiming:-

"... specific performance of an oral agreement made between the plaintiff of the one part and the defendants of the other part and dated some time in April 1974."

for the sale of the property (which was described as in the letter of 7th May 1974) and in his Statement of Claim he referred to the 7th May letter and further stated that in pursuance of the agreement he sought and obtained from the NHA a loan "for the purchase of the said dwellinghouse" and that by letter dated 1st August 1974 "the defendants wilfully refused to complete the said contract".

By their Defence delivered on 5th November 1975 the appellants admitted that they had informed the NHA by letter that they were willing to convey in the terms of the letter, but denied that "any or any firm arrangement was made" or that they had made the alleged or any agreement with the respondent. At the trial, the respondent not objecting, they were given leave to amend the Defence so as to contend that there was no sufficient memorandum to satisfy section 4 of the Ordinance.

In the meantime the appellants had on 10th July 1976 served on the respondent notice to quit on 31st August 1976 the dwellinghouse in which he was living and which was comprised in the property and had issued a writ on 8th September 1976 claiming possession. The respondent delivered a Defence which relied on the agreement pleaded in his own action. The two actions were by order dated 6th July 1977 consolidated and the respondent was given conduct of the consolidated proceedings. Nothing more need be said of the

appellants' action which was admittedly to be ruled by the outcome of the respondent's claim for specific performance.

At the trial the first appellant when giving evidence relied, without objection from the respondent, on a point which had not been pleaded in the Defence, namely, that the oral agreement to sell the property was subject to two conditions precedent which were not fulfilled: (1) that the appellants' land in Princes Town would be surveyed and divided into three portions and that a purchaser must be found who would buy each of the other portions while the respondent would buy the third; and (2) that the appellants would be able to negotiate successfully for the purchase of lands in Valencia. The trial judge found that the agreement for sale of the property was not subject to either alleged condition. This defence was not argued in the Court of Appeal and may be dismissed from further consideration.

The problem, having reverted to the simple form in which it first arose, may therefore be stated thus: did the appellants as the proposed vendors and the respondent as the proposed purchaser merely agree that the respondent would buy the house he was living in and an unidentified area of land (which was never specifically identified) on which the house stood or did the parties, as the respondent claims, make a concluded contract by agreeing upon the specific identifiable property which was to change hands? And, if they did make a concluded contract, did the letter of 7th May 1974 sufficiently identify the property for the purpose of section 4? (It is conceded that the letter, if otherwise a sufficient memorandum, would be none the less effective by reason of being addressed to a third party, the NHA.)

Their Lordships would first refer to the evidence, which is recorded in note form and not verbatim. This means that one is not reading the exact words used or all that has been said by the witness and that some distortion of the sense is bound to arise, particularly in the course of cross-examination, from the inevitable conflation of counsel's questions and the witness's answers. The extracts from the judge's note are reproduced subject to that comment.

The respondent stated in evidence:-

(1) "I know defendants since I was a child. I became a tenant of theirs on the 18th November, 1972 of the house I now occupy. Some time later, I was approached by the first defendant to purchase the entire parcel of land with two houses. I am now occupying one of those houses. I told him that I could not. In 1973, he approached me again and offered to sell me one of the houses and the land on which that house stood and measuring 14,266

superficial feet. I decided to buy; and I applied to the National Authority for a loan. I told the defendant that I will buy. I applied for a loan of $18,000.00. That was the sum Harewood and I agreed as the purchase price."

With reference to the letter of 7th May:-

(2) "Harewood at my request gave me the deed, the house plan and the land plan and a letter signed by both defendants. I took those documents to the National Authority."

Under cross-examination he said:-

(3) "In 1973, I was first asked to purchase the whole parcel of land. I was unable to do so. The second offer was also made in late 1973. When the second offer was made I did not have the money to purchase. I was not aware that in 1973, Harewood was considering leaving the area."

(4) "I did not discuss with Harewood purchasing one-third of the land. I did not know what portion of the whole I was going to buy, nor did I know how much the whole comprised. I was not aware that the land was to be divided in three parcels to be sold."

(5) "I had the document for the NHA prepared and the defendant Harewood signed it. I took it to him and he signed it."

Referring to the 7th May letter:-

(6) ".... I told him it needed a signature, and if he signed it, the loan would be approved in a short time. I do not think that I then had the title deed. The defendants did not sign the letter in my presence. I got it back from them a few days after the 7th May when I had taken it to them."

The first appellant's evidence included the following passages:-

(7) "I know Retese very well and for a long time. On 18th November 1972, he became a tenant of a house belonging to Rampersad, on land belonging to her and to me. In 1973, I spoke to Retese about purchasing the entire parcel of land. We spoke citen. We discussed my problems. I have sought and received advice from him. I told him that I was about to sell out the property to buy one in Valencia. I had seen an advertisement of the Valencia property in the Guardian newspaper. I showed Retese the advertisement. He told me that it was a good bargain. It was 25 acres of land for $28,000. The land was abandoned with

fruit trees here and there. He said he could not buy the entire parcel of land at Kingsley Street, Princes Town. He suggested that I could divide the land in parts and he would buy a lot or two and the house in which he was living. I got the land surveyed and divided into three portions. A plan was prepared by a surveyor. I then spoke to Sabai and Constable Joseph about purchasing portions of the property. They agreed to purchase and I told the plaintiff this. Within a month, Sabai paid an advance of the purchase price. This was after I had spoken to the plaintiff. I had entered into a written agreement with Sabai. His down payment was $2,000 which he paid. This is a copy of that agreement."

(The man referred to as Sabai is Persad Ramsahai to whom, by an agreement in writing dated 9th August 1973, the appellants agreed to sell a portion of their land for the sum of $4,000. Their Lordships will refer to this agreement later in the judgment.)

(8) "The plaintiff and I had agreed that he would buy the land on which the house in which he lived stood, and the house. I told him that I wanted the transaction to be done quickly as I wanted to buy the land at Valencia. I told both Sabai and Joseph that I was selling to purchase at Valencia. The plaintiff did not pay me any money by way of advance. We did not sign a contract. I did not own any land or house anywhere else. The agreement JH1 was made after the survey plan was given to me."

(The agreement "JH1" was the written agreement with Ramsahai dated 9th August 1973.)

In cross-examination the first appellant said:-

(9) "After signing the letter "(of 7th May)" I returned to the property agent. I discovered that the property was sold. I had gone on the third day after signing the letter, I spoke to plaintiff. I told him that the Valencia property had sold and I could not carry through the sale. He turned his back on me. On the next day, I returned to the plaintiff. I asked him to return the documents he had. These included the survey plan, a copy of the deed of the property and the house plan."

(There was a dispute as to when this conversation took place but, as the case turned out, the only importance of this passage lies in its reference to the survey plan.)

(10) "The surveyor had made one plan only, not three separate plans. The plan I lent to the plaintiff showed the entire property. That plan showed the portion that the plaintiff was to buy and the two

other portions. The plaintiff still has that plan. There is a plan of the property attached to my deed which has been deposited with the Bank of Nova Scotia. That plan was made in 1962. The plan which sub-divided the property was prepared in July or August, 1974. The surveyor is a Mr. Recile. He gave me one copy of the plan. I told him that I had intended to sell to three persons."

Their Lordships would only observe at this point that the first appellant is here saying that the plan which he lent to respondent (not later than 7th May 1974) showed the portion that the respondent was to buy and the two other portions. Therefore the statement that the plan which sub-divided the property was prepared in July or August 1974 (assuming it to be correct and to refer to a different plan) would be likely to mislead, if taken by itself out of context. Later in his cross-examination the first appellant said something which may clarify the position:-

(11) "Mr. Recile did not do a survey, what he did was to mark out the areas on the place of the entire area. Retese's area was marked out, it should have been 14,266 sq. ft. in area."

Bearing in mind that the figure of 14,266 had been established before the respondent drafted the letter which he took to the appellants for their signature on 7th May 1974, Mr. Recile, if he drew a plan in July or August 1974, must have been producing a new plan based on measurements which were already known and agreed before 7th May 1974.

The witness then said something which was inconsistent with extract (9) above:-

(12) "When I sign Ex. 'MR1' the Valencia property was still available. In April, I had checked with the property agent. I was anxious to get the property agent sold when I signed the letter. I returned to the property agent about two or three days after I signed the letter, Valencia land was still available. It was not until July or August that I discovered that it was no longer available."

(Exhibit "MR1" was the letter of 7th May.)

Finally the first appellant said:-

(13) "The land which I had intended to sell to the plaintiff was not measured. Retese and I had not discussed the dimension of the land. Two lots would be 10,000 sq. ft. One lot is 5,000 sq. feet. I did not notify any boundaries. It was after that Mr. Recile came in. I cannot remember the area Recile had marked out for the plaintiff. I intended to submit Recile's plan to the Planning & Housing Dept for its approval."

Their Lordships again note the inconsistency of this evidence with the witness's earlier evidence and with the proved facts in relation to the specific measurement of 14,266 superficial feet.

Coming back to the agreement of 9th August 1973 for the sale of part of the appellants' land to Ramsahai, their Lordships note as being significant the way in which the properties to be sold are described in the schedule to the agreement:-

> "ALL AND SINGULAR that certain piece or parcel of land situate at Kingsley Street Princes Town in the ward of Savana Grande Trinidad aforesaid comprising ONE LOT measuring 41 feet 9 inches in frontage along Kingsley Street by 197 feet in depth (being portion of 37,151 Superficial Feet described in deed registered as Number 7894 of 1962) and bounded on the North by lands formerly of Mahamdali on the South partly by a public Road called Middle Ridge Road now called Kingsley Street and partly by lands of Powell described in the assessment rolls as lands of heirs of Vincent but now partly by Kingsley Street and partly by lands of the heirs of Lee on the East and West by lands of the Vendors."

The frontage and the depth of the plot are stated precisely; the plot is part of the appellants' land comprising 37,151 superficial feet and described in deed No. 7894 of 1962; and the plot is bounded on the East and West by lands of the appellants. When one remembers that before making the agreement with Ramsahai the first appellant got the land surveyed and divided into three portions and that a plan was prepared by the surveyor (extract (7) from the evidence) and that, according to the first appellant, the respondent had agreed to buy the land on which the house he lived in stood and that the first appellant said he did not own any land or house anywhere else (extract (8)) and that the agreement with Ramsahai was stated by the first appellant to have been made after he received the survey plan (extract (8)) and that the plan which the first appellant lent the respondent showed the entire property, that is, the portion the respondent was to buy and the two other portions (extract (10)), it becomes obvious that the property to be sold to the respondent (the precise superficial area of which was known before 7th May 1974 to be 14,266 feet) was contiguous to the Ramsahai plot (which was in the middle) and was identifiable by the further fact that it included the respondent's dwellinghouse.

In these circumstances their Lordships are satisfied that there was a concluded oral contract prior to 7th May 1974 and, like the courts below, reject the contention that the parties had not by that time reached an agreement which defined the property to be sold. Their Lordships regard the fact that the

respondent included in the draft 7th May letter the exact measurement of 14,266 superficial feet as very strong evidence, and clearly more cogent than a round figure such as 15,000, that a definite parcel of land had been identified and agreed.

For the appellants a quite unjustified reliance was placed on the respondent's statement in cross-examination that he did not know what portion of the whole land he was going to buy and that he was not aware that the land was to be divided in three (extract (4)). This statement obviously referred to an early stage in the negotiations, and its supposed effect on the case is clearly refuted by the facts recited above and by the first appellant's own evidence. The fallacy inherent in the contention based on extract (4) is that it disregards the way in which a broad agreement which is initially too vague to be enforceable can develop into a firm contract.

It is pointless for the appellants to rely on such cases as *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester)* [1970] A.C. 583 and *F.L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 for the principle that in general an agreement cannot be construed in the light of subsequent actions of the parties: the proved facts leave no room for the application of this rule. Nor do their Lordships consider the difficult case of *Bushwall Properties Ltd. v. Vortex Properties Ltd.* [1976] 1 W.L.R. 591 to require discussion since its facts and the problems to which they gave rise were far removed from those of the present appeal.

There being, in their Lordships' view, a concluded agreement, the next question was whether the letter of 7th May constituted a sufficient memorandum. It contained the names of the parties and the price and was signed by the parties to be charged, but it was contended that it failed to satisfy the statute because it did not contain an adequate description of the property agreed to be sold. Their Lordships do not agree, since they consider that the answer is provided by a line of cases of which *Plant v. Bourne* [1897] 2 Ch. 281 is an example.

The Court of Appeal in that case applied the principle of *Ogilvie v. Foljambe* (1817) 3 Mar 53 and *Shardlow v. Cotterell* (1881) 20 Ch.D. 90 to the effect that, since the property the subject of the contract has been described with sufficient certainty, parol evidence is admissible to identify the property, on the basis of the maxim *id certum est quod certum reddi potest*. *Plant v. Bourne* was itself applied by Astbury J. in *Averbach v. Nelson* [1919] 2 Ch. 383. It would not be helpful to set out the facts of these cases, since the situations to which the principle can be and has been applied are infinitely various. All the facts

already noted in this judgment are relevant to the second stage of the inquiry and their Lordships are satisfied that those facts fall well within the principle exemplified by the cases cited above and by the further examples given in Megarry & Wade's "The Law of Real Property" 5th edition at page 583.

In *Shardlow v. Cotterell* Sir George Jessell, M.R. put it thus at page 93:-

> "What, then, is a sufficient description in writing? No one can say beforehand. You cannot have a description in writing which will shut out all controversy as to parcels, even with the help of a map. I have known a most bitter and long-continued litigation in a case where both sides had most beautiful maps, the contest being between two neighbouring proprietors as to the ownership of a ditch. No description can be framed that will prevent all dispute, and the framers of the *Statute of Frauds* knew very well that they could not prevent perjury altogether, but could only go some way towards it; and it was considered that to require a note in writing was a useful check. It could be nothing more: it could not entirely prevent perjury, for parties may suborn witnesses to swear to the existence, destruction, and contents of a memorandum which never in fact existed. Looking at the statute in that light, what is a sufficient description? I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, 'the estate of A.B. in the county of C.,' or 'the estate of A.B. which he bought of C.D.,' or 'the estate of A.B. which was devised to him by C.D.' would be sufficiently specific. If so, why should not 'the property which A.B. bought of C.D. on the 29th of March, 1880,' be sufficient? Would anybody doubt that in a will 'the property which I bought of C.D. on the 29th of March, 1880,' would be a sufficient description? If it is so in will why not in a contract?"

In *Plant v. Bourne* Lindley L.J. said (*inter alia*) at page 286:-

> "As long ago as 1817 Sir William Grant had before him *Ogilvie v. Foljambe*, a case of some difficulty, in which property agreed to be sold was spoken of as 'Mr. Ogilvie's house', and Sir William Grant said this: 'The subject-matter of the agreement is left, indeed, to be ascertained by extrinsic evidence; and, for that purpose, such evidence may be received. The defendant speaks of "Mr. Ogilvie's house", and agrees "to give 14,000*l*. for the premises"; and parol evidence has always been admitted, in such a case, to shew to what house, and what premises, the treaty related.' Now, when once parol evidence is admitted to shew to what twenty-four acres of land this agreement related, it appears to

> me the whole difficulty vanishes. The evidence sought to be adduced, and to which the learned judge objected, was this, that there were only twenty-four acres at Totmonslow in the parish of Draycott belonging to the vendor as to which the purchaser had any treaty at all. There was no ambiguity about it. There was a field of about 24A.1R.26P., which was perfectly well known to both of them. They had been walking round this land some time before this agreement was drawn up, and it was that property about which they were negotiating. That is the evidence which the plaintiff is seeking to introduce. We have Sir William Grant's authority for introducing it; and if it is introduced it appears to me that nothing further can possibly be desired.
>
> Now, the decision of Sir William Grant has always been considered by everybody as a leading authority on the Statute of Frauds. It was never appealed, and it was commented upon and adopted in the case of *Shardlow v. Cotterell*, to which our attention has been called. There the question was about identifying some 'property' which was sold. It was a public-house, and the judgment of Lush L.J. conveys and expresses the principle which is applicable to the present case. After referring to *Ogilvie v. Foljambe*, and to the statement of Kay J. in the case then before him, that he was not prepared to carry the law on the subject one hair's breadth beyond the decided cases, and that he thought he should be doing so if he held the description in the case before him sufficient, Lush L.J. says this: 'I cannot help thinking that this conclusion is opposed to legal principle. The general rule is, Id certum est quod certum reddi potest, and I am of opinion that this maxim applies here. In *Ogilvie v. Foljambe* parol evidence was wanted just as much as here to shew what was the subject-matter of the contract, and the judgment below, if carried to its legitimate results, would establish that no contract can be good within the statute unless it describes the property in such a way that it is wholly unnecessary to resort to parol evidence.'"

There is no point in further citation of authority, but one of the points made by the Master of the Rolls in *Shardlow v. Cotterell* reminds their Lordships of the regrettable fact that neither side produced or relied on any map or plan at the trial of this action. If, however, parol evidence becomes necessary for the purpose of identifying the property, then maps can be produced or, if none are available, secondary parol evidence can be given of their contents and of the facts on which they were based.

The final argument for the appellants (which was closely linked to the other two and must meet with the same fate) was that there was no way of identifying the boundaries and thereby making an order for specific performance which could be enforced. The short answer is that, in the unlikely event of the parties' further disputing the boundaries of the property, an inquiry can and ought to be held in order to resolve the remaining difficulty.

It was not and could not be argued that damages were an adequate remedy. Accordingly, their Lordships affirm with costs the order of the Court of Appeal and grant liberty to apply to the High Court both generally and so far as may be necessary to ascertain the boundaries of the property to be conveyed.