

Privy Council Appeal No. 17 of 1990

Basiru Jawara

Appellant

v.

Gambia Airways

Respondent

FROM

THE COURT OF APPEAL OF THE GAMBIA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
6TH APRIL 1992  
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*Present at the hearing:-*

LORD TEMPLEMAN  
LORD GRIFFITHS  
LORD JAUNCEY OF TULLICHETTLE  
LORD MUSTILL  
SIR CHRISTOPHER SLADE

*[Delivered by Lord Jauncey of Tullichettle]*

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The issue in this appeal is whether the plaintiff/respondent is entitled to an order of specific performance of a contract of sale of the freehold premises, 5 Leman Street, Banjul ("the property"). The action was raised against the first to fourteenth defendants who were the former owners of the property and the fifteenth defendant/appellant who all averred that the premises had been sold not to the respondent but to the appellant.

The circumstances giving rise to the action were as follows:-

In January 1986, Mr. Sourahata Janneh, a barrister and solicitor of the Supreme Court of The Gambia, was approached by a friend, Joseph Cates, who asked him whether he would be interested in acting for the owners of the property in perfecting their title thereto and thereafter in selling it by private treaty. Janneh replied that he would and in February 1986 he again met Cates who told him that the owners had agreed to appoint him as their solicitor and agent to perfect their title and sell the property and that Edward Leese, who was known to Janneh, would be sending him written authority. Cates also told Janneh that the owners would be meeting again in order to inform him of the minimum price. Thereafter Leese handed over to Janneh

the document set out below and it was agreed that his fees would be 2½% of the price for the declaration and 7½% of the price for the sale:-

" A meeting of the representatives of the beneficiaries of the last will and testament and the codicil of Mary Fye deceased of number five Leman Street, in Banjul, The Gambia, was held at the aforesaid address on Saturday the eight day of February in the year one thousand nine hundred and eighty-six and present at the said meeting were the following who had the consent of all concerned: Edward Leese, Marie Cates, Joseph Cates and Therese Eunson nee Bass.

Having the interest in common to administer number five Leman Street in Banjul, The Gambia, all present do hereby declare that all the aforesaid parties appoint Mr. Surahata Semega Janneh, Solicitor and Barrister at Law to administer by Court declaration and sale by private treaty the premises situated at number five Leman Street in Banjul, The Gambia, the price of the latter to be confirmed at another subsequent meeting of the representatives of the beneficiaries now agreeing considering the availability of another place of abode of the beneficiaries presently living on the property a point raised by Therese Eunson nee Bass.

IN WITNESS WHEREOF, we the said Edward Leese, Marie Cates, Joseph Cates and Therese Eunson nee Bass have to this minute of meeting set our hands this tenth day of May one thousand, nine hundred and eighty-six.

Signed by

(Sgd) Edward Leese Witnessed by:	(Sgd) R E L Sylva
	6/8/68
(Sgd) M V Cates "	(Sgd) ? ?
	13 Leman St
	2/9/86
(Sgd) Joseph Cates "	(Sgd) A B Frazer
	13 Leman St
	18/8/86
(Sgd) Therese Eunson nee Bass	(Sgd) M E Eunson
	6/8/86"

Janneh was later told that the owners were looking for a minimum of D800,000 and on 12th February 1987 he obtained a declaration perfecting their title to the property. In the meantime two events had occurred namely (1) towards the end of 1986 he had been approached by the appellant who offered to pay D800,000 for the property and also stated that if anyone else offered more than D800,000 he would be prepared to pay 20% in excess of that offer. Janneh informed Cates of the offer and was led to believe that the representatives of the owners were pleased

about it; and (2) The Gambia National Insurance Company had offered D1,500,000 subject to board approval. On 19th February senior officers of the respondent called on Janneh and offered D1,600,000 payable on that day. Janneh told them that he must confer with the owners and asked them to call him the next day.

Bearing in mind the appellant's offer to cap any other offer by 20%, Janneh went to see Cates and invited the appellant by telephone to come and discuss the matter. On being told by Janneh of the respondent's offer the appellant expressed some surprise and said that he would require time to think about the matter and undertook to make contact with Janneh before 2.00 p.m. on the following day. After the appellant had left, Cates telephoned Leese who whistled with surprise on being told of the respondent's offer. During the course of a tripartite telephone conversation involving Cates, Leese and Janneh it was agreed that the latter should wait until 2.00 p.m. on the following day and if, by that time, the appellant had not paid he should accept the respondent's offer. On the morning of 20th February 1987 the respondent's manager telephoned Janneh and after some discussion agreed to increase the offer by paying D50,000 of the owners' capital gains tax. Shortly after 2.00 p.m. the respondent's managing director telephoned Janneh who informed him that "the deal was on". At about 2.30 p.m. the respondent paid to Janneh the sums of D1,600,000 and D50,000 and was given a receipt therefor. Immediately thereafter Janneh informed Cates of the payment.

Janneh had heard nothing from the appellant on 20th February and on the following day he went to Janneh's office and asked whether there really was an offer of D1,600,000. Janneh told him that a sale had taken place. Later on that day Janneh saw Cates who informed him that he and Leese had been offered D20,000 by the appellant "if they would make him have the property". Cates stated that he thought this offer was despicable.

On 23rd February 1987 Janneh executed a memorandum recording that pursuant to his authority he had sold the premises to the respondent and received the purchase price therefor.

On 28th February Cates wrote to Janneh the following letter:-

"RE: NO. 5 LEMAN STREET, BANJUL

I am directed by the interested parties who appointed you in May 1986 in the matter of the Administration by way of Declaration of No. 5 Leman Street, Banjul.

You will recall that you were authorised to apply to the Supreme Court for a Declaration for good possessory title. The instrument of your said appointment made it clear that upon the Court making the declaration sought the property would be sold by private treaty to the highest bidder who would be approved at a subsequent meeting of the beneficiaries.

It has come to our notice that the Supreme Court has made the Declaration sought but you have not thought it fit to notify us of this fact.

It has also come to our notice that you have agreed to sell the said property to Gambia Airways without any reference to us.

We are amazed at the news of your agreement to sell the property to Gambia Airways as you and all of us have always had the common understanding that the property would be sold to Alhagy Basiru Jawara whom as you are well aware has made a bid of D1,600,000.00 and has in addition always been willing to be responsible to pay on our behalf the capital gains tax which automatically makes him the highest bidder. Quite apart from his agreeing further to allow the present occupants of the said premises to continue living in there for a period of 150 (one hundred and fifty) days of his possessory entitlement. Alhagy Basiru Jawara has always made it known that he would pay an additional 20% on any bid made for the property. We are not aware of any offer which is better than Mr Jawara's.

In the circumstances we regard Alhagy Basiru Jawara to be the highest bidder for the property and we have bound ourselves to him for the sale of No. 5 Lemam Street, Banjul. We have no intention of selling the property to Gambia Airways.

I should be grateful if you would hand over our documents in your possession concerning No. 5 Lemam Street particularly the Original Copy of the Supreme Court Declaration and also let me have your bill as contracted for legal professional work done in this matter."

Not surprisingly Janneh was very annoyed by the allegations in this letter and replied at some length on 3rd March 1987. It is unnecessary to set out the whole terms of his letter, suffice it to say that Janneh *inter alia* reminded Cates of his discussion with him and the appellant on 19th February 1987.

At the trial there was produced a document dated 20th February and signed by four of the owners of whom three, including Cates and Leese, had signed the memorandum of appointment of 10th May 1986. There

was no evidence as to whether this document was executed before or after Janneh informed Cates that the property had been sold to and paid for by the respondent. The document was in the following terms:-

"Having settled by way of declaration the property situated at number five (5) Lemman Street, Banjul, The Gambia and having in view to sell to the highest bidder, the representatives of the beneficiaries who appointed Lawyer S B Janneh to settle by way of declaration have, after consideration of the offer in all respects made by Alhaji Basiru Jawara proprietor of Adonis, Wadner Beach and Fajara Hotels, decided his offer to be acceptable as the highest bidder and have appended our signatures hereunder."

There was also produced an offer bearing the date 21st February 1987 which was in the following terms:-

"I Alhaji Basiru Jawara, proprietor of Adonis, Wadner Beach and Fajara Hotels, hereby undertake to pay the sum of one million six hundred thousand dalasis and whatever the amount payable for capital gains tax is chargeable in full settlement of purchasing 5 Lemman Street, in the city of Banjul, The Gambia. Offer made this twenty first day of February in the year of our Lord one thousand nine hundred and eighty seven."

There was no evidence as to the circumstances in which this document came to be executed. By an indenture dated 25th February 1987 the owners purported to convey the property to the appellant on the narrative that he had paid D1,600,000 therefor. In fact payment was not made by the appellant until 12th March 1987. The Chief Justice concluded in relation to these three documents that the defendants in the action had executed them in the knowledge that a sale had been effected to the respondent and in an attempt to defeat its claim. This view was concurred in by the Court of Appeal.

At the trial before Ayoola C.J. evidence was given on behalf of the respondent by Janneh and by two formal witnesses. No evidence was led on behalf of the appellant or the other defendants. The Chief Justice accepted the evidence of Janneh as credible.

The Chief Justice in a carefully reasoned judgment held that the memorandum of 10th May 1986 empowered Janneh to sell the premises at any price higher than the minimum price without conferring with the owners and that he had acted within his authority. He further held that the appellants were not entitled to rely on section 4 of the Statute of Frauds and that the respondent was entitled to specific performance. The Court of Appeal upheld the Chief Justice on these three matters concluding that Janneh had not exceeded

his authority. The appellant is thus faced with concurrent findings in fact on this crucial issue. The only issue before this Board is whether Janneh exceeded his authority in selling the property to the respondent.

Mr. Martin, for the appellant, submitted that as a matter of construction the memorandum of 10th May 1986 did not authorise Janneh to accept an offer for the property without first obtaining approval from the representatives of the owners. If there was any doubt about the construction Janneh, in relation to the sale, was acting as an estate agent, there being none in Gambia, and the following dictum of Lord Greene M.R. in *Wragg v. Lovett* [1948] 2 All E.R. 968 at page 969 was in point:-

"While accepting the learned judge's conclusion upon the particular facts of this case, we must not be understood as suggesting that when a vendor merely authorises a house agent to 'sell' at a stated price he must be taken to be authorising the agent to do more than agree with an intending purchaser the essential (and, generally, the most essential) term, i.e., the price. The making of a contract is no part of an estate agent's business, and, although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language."

Furthermore Mr. Martin argued that if Cates and Leese did authorise Janneh to accept the respondent's offer they could only do so with the consent of the other two signatories of the memorandum and there was no evidence that they had consented.

In developing his argument on construction Mr. Martin pointed to a number of words and phrases which, he argued, indicated that any price negotiated by Janneh had to be confirmed by the representatives of the beneficiaries. He also pointed out that Janneh had by his own actings shown that he did not consider that he had power to complete a sale without a reference back to the owners.

Their Lordships can see that there may be some force in Mr. Martin's arguments on construction. However they do not find it necessary to reach a decision on this matter. Whether or not the memorandum authorised Janneh to conclude a bargain of sale at a price in excess of D800,000 without reference to the representatives of the owners, there was overwhelming uncontroverted evidence to the effect that he kept the owner's representatives fully informed throughout the negotiations with the respondent and that he understood that he had authority to complete the bargain.

Towards the end of 1986 Janneh informed Cates of the appellant's initial offer of D800,000. On 19th February 1987 he informed Cates of the respondent's offer and discussed this with Cates and the appellants. Thereafter, during the tripartite telephone conversation, he informed Leese of the respondent's offer and it was agreed between the three of them that he should wait until 2.00 p.m. on 20th February to see whether the appellant would top that offer. If, as happened, he did not, Janneh was to accept the respondent's offer. In pursuance of this arrangement Janneh accepted their offer and informed Cates immediately after he had received the purchase price. Janneh was never cross-examined on the basis that he had no authority to accept the respondent's offer because he had only spoken to two of the four signatories of the memorandum of 10th May 1986 and there was, of course, no evidence from the defendants to support such a suggestion. Indeed Cates' letter of 28th February 1987 simply stated that Janneh had sold the property to the respondent "without any reference to us", a statement which was demonstrably untrue. In giving the judgment of the Court of Appeal Olatawura J.A. said:-

"On the weight of evidence, there is overwhelming and uncontradicted evidence that the Appellants knew of the action taken by the agent, he also told them of every step he took with regard to the sale."

Their Lordships entirely agree with these observations and have no hesitation in concluding that Janneh, whatever general authority was conferred upon him by the memorandum, was fully justified in thinking that he had the specific authorisation and approval of the owners to accept the respondent's offer.

It only remains to mention one further matter. Janneh was cross-examined on the basis that he had sought a fee from the appellant in the event of his obtaining the property for him, the appellant. There was here a clear suggestion of impropriety for the basis of which not a shred of evidence was adduced by any of the defendants. Their Lordships have no doubt that throughout the transactions above-mentioned Janneh acted honestly and properly and that all of the not inconsiderable impropriety was on the part of the appellant and the other defendants.

Their Lordships accordingly dismiss the appeal. The appellant must pay the respondent's costs before the Board.