25, 1952

No 42. 1951

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

BETWEEN—

MARGARET YOUNG HORNE and RICHARD CLEVELAND FOX - (Defendants) *Appellants*

— AND —

RODERICK ALEXANDER FERGUSON (the Younger) and HERMAN FREDERICK LESEUR (Plaintiffs) *Respondents.*

CASE FOR THE APPELLANTS.

RECORD.

1. This is an Appeal from the Judgment of the Chief Justice of the Supreme Court of Bermuda dated 22nd June, 1951, whereby (a) the Appellants were adjudged jointly and severally liable to repay to the Respondents two deposits of £500 each paid by the Respondents to the Appellant Horne in respect of a contract for sale of certain land in Warwick Parish, Bermuda, with interest at the rate of 5 per centum per annum from 24th June, 1949, until payment (b) the Appellants were adjudged liable to pay to the Respondents by way of damages the amount (to be taxed) expended by the Respondents in investigating the title to the said land (c) the Appellants' counterclaim was dismissed (d) the Appellants were ordered to pay the Respondents' costs (e) the Respondents were declared to be jointly entitled to a lien on the property contracted to be sold for the said deposits damages and costs. Judgment, p. 38, l. 19; p. 39, l. 9.

2. By a Writ of Summons issued on 14th February, 1951, in the said Supreme Court the Respondents claimed return of £1,000 paid to the Appellant Horne as agent for the Appellant Fox as owner of certain land in the said Parish by way of deposit and in part payment of the purchase price of £5,000 under a contract for the purchase of the said land and certain incidental relief. Writ, p. 1.

Statement of Claim, p. 2.

3. By their Statement of Claim the Respondents alleged (as the Appellants by their Defence admitted) that by an oral agreement evidenced by instruments in writing dated 24th June, 1949, and 18th July, 1949, the Appellant Horne as agent for the Appellant Fox agreed to sell and the Respondents agreed to buy certain freehold property in the said Parish for £5,000 whereof £500 was paid by the Respondent Ferguson to the Appellant Horne on 18th June, 1949, by way of deposit and in part payment and a further £500 was paid by the Respondent Leseur to the Appellant Horne on 24th June, 1949, by way of deposit and in part payment and that the instrument whereby receipt of the last mentioned £500 was acknowledged stated *inter alia*, that "if the owner or owners cannot give a clear title to the "above property or proper rights of way then this contract is "cancelled and all deposits and expenses are to be refunded to the "purchasers". The Respondents further alleged that the Appellant Fox was unable to give a good title to the land.

Defence and Counterclaim, p. 4.
Reply, p. 5.

4. The Appellants by their Defence alleged (*inter alia*) that the Appellant Fox was able to give a good title to the land and claimed by way of counterclaim damages for breach of the said agreement and the right to retain the said deposits amounting to £1,000. The Respondents delivered a Reply.

5. The action was tried by the learned Chief Justice without a jury on 21st, 22nd, 28th May and 6th June, 1951. Evidence was given *viva voce*. On 22nd June, 1951, the Chief Justice delivered judgment.

6. The facts of the case stated shortly are as follows—

Will of A. H. Astwood, p. 42.

(a) By his Will dated 18th May, 1890, one Adrastus Henry Astwood (by Clause 3) devised to his eldest son Samuel Josephus Astwood "a tract of land in Warwick Parish supposed "to contain about 12 acres" in his said Will more particularly described and (by Clauses 4 and 5) devised two other adjoining parcels of land "supposed to contain about" 4 acres and 8 acres respectively.

(b) The said Adrastus Henry Astwood died on 19th June, 1901, and his said Will was proved on 12th August, 1901, in the Supreme Court of Bermuda.

Will of S. J. Astwood, p. 44.

(c) By his Will dated 6th February, 1929, the said Samuel Josephus Astwood devised the same land to his eldest son Samuel Edward Astwood (hereinafter called "Edward "Astwood").

(d) The said Samuel Josephus Astwood died in the year 1933 and his said Will was in due course proved in the Supreme Court of Bermuda.

(e) Edward Astwood by his sister the Appellant Horne acting as his attorney sold to the Appellant Fox 9½ acres of the said land so devised as aforesaid.

(f) By a Power of Attorney under his hand dated 28th October, 1947, the Appellant Fox appointed the Appellant Horne his attorney for the purpose (*inter alia*) of selling his interest in the said 9½ acres. Fox's Power of Attorney, p. 46.

(g) In about June, 1949, the parties entered into the oral agreement referred to in the Pleadings. On 18th June, 1949, the Respondent Ferguson paid £500 to the Appellant Horne by cheque and on the same day the Appellant Horne signed a written receipt for the same which was mistakenly dated 18th July, 1949. On 24th June, 1949, the Respondent Leseur paid £500 to the Appellant Horne by cheque and on the same day the Appellant Horne signed a written receipt for the same. In each of these receipts the payment was acknowledged as part payment on the purchase of land on the South Shore in the Parish of Warwick, Bermuda, belonging to the Appellant Fox and consisting of 2 acres and 17 perches measuring 550 feet on the north, 120 feet on the east, 523 feet on the south and 180 feet on the west, and the total purchase price was stated to be £5,000 of which the balance of £4,000 was to remain on mortgage for 10 years or less at the buyers' option. Cheque, p. 48. Receipt, p. 50. Cheque, p. 49. Receipt, p. 48.

(h) By letters dated 27th January, 1950, which are exhibits "C" and "I" the Attorney then acting for the Appellants, Mr. E. T. Richards, informed each of the Respondents that he had been instructed (as was the fact) that the Respondents had approved of his drawing the conveyance and its being approved by the Attorneys then acting for the Respondents, Messrs. Hallett & Whitney; and asked them whether their surveyor had yet approved the boundaries; and stated that if the matter could not be cleared up within three weeks the contract would be considered rescinded. The Respondent Ferguson in evidence stated that he realised that a survey would be necessary to discover whether the area of the land corresponded with the area bargained for. Letters dated 27th January, 1950: pp. 51, 52. p. 8, ll. 3–8.

(i) On 24th March, 1950, the said Mr. E. T. Richards, handed to the attorneys then acting for the Respondents, Messrs. Appleby Spurling and Kempe, (who were first instructed in this matter by the Respondents on 4th February, 1950), the documents of title relating to the land agreed to be sold which are listed in the receipt set out in Exhibit "L". The said Mr. E. T. Richards stated in evidence that in his view the List of documents of title, p. 54.

p. 18, l. 38. said documents of title disclosed a valid title to the property in question.

p. 14, l. 12. (j) The witness Spurling, a member of the said firm of Messrs. Appleby Spurling and Kempe, stated in evidence that he told the Appellants' said attorney that it was impossible for the witness to proceed unless he was satisfied that the boundaries of the property agreed to be sold were correct, but it does not appear that this was at any time stated in writing by or on behalf of the Respondents or that anything in the nature of a written requisition in this respect was ever delivered to the Appellants or their attorney or that it was ever indicated by or on behalf of the Respondents in what respect the boundaries were alleged to be open to question, save that in a letter dated 4th February, 1950, which is exhibit "D" the Respondents' said attorneys wrote "We understand that at the present time there "is some boundary dispute between your client and an adjoin- "ing land owner, although we are not aware of details of this "matter". On 7th December, 1950, the Respondents' said attorneys wrote to the Appellants' said attorney pressing for the transaction to be concluded and stating that they did not believe that the Appellants could make a good title, but giving no reasons for this view. The Appellants' said attorney in evidence stated that no requisitions on the title to the land were made on him after 24th March, 1950, when the title deeds were handed to the Respondents' attorneys.

p. 52.

Letter 7th December, 1950, p. 55.

p. 18, l. 25.

p. 14, l. 32. (k) The said witness Spurling in evidence further stated in evidence that he refused to pass the Appellants' title to the land on two grounds:—

(i) The question of boundaries;

(ii) He doubted whether the Conveyance by Edward Astwood to the Appellant Fox was not illegal as being a violation of the Alien Act, 1926, S.7, the said Edward Astwood having been at the relevant time a citizen of the United States of America.

It does not appear that any requisition was at any time addressed to the Appellants or their attorney regarding the second point and the witness said that he did not remember bringing up this point. Regarding the first point he said "I was not satisfied "that the alleged owner Fox did in fact own the lots of land described "in the agreement of sale. Subsequently recently I have examined "Court Records and discovered an action against Horne and Vieira "by Gibbons and found that a judgment in that action affected the "particular lot and which Mrs. Horne has subsequently admitted to "me to have formed a portion of that promised to be sold to the "Plaintiffs".

p. 15, l. 6.

p. 14, l. 34.

(l) A copy of the judgment in the last mentioned action was put in, as Exhibit "N", but there is nothing in the terms of that judgment to shew that it related to any part of the land agreed to be sold to the Respondents, and furthermore the action of *Gibbons v. Vieira and Horne* was not tried until April, 1951, after the issue of the Writ in the present action. Judgment in *Gibbons v. Vieira and Horne*, p. 60.

(m) The Appellant Horne in evidence denied that there was any dispute with any adjoining owner about the boundaries of the land agreed to be sold to the Respondents and further denied that she ever admitted to the witness Spurling that any decision regarding the boundary which was the subject matter of the action *Gibbons v. Vieira and Horne* would affect the land agreed to be sold to the Respondents. p. 22, ll. 16, 20; p. 25, l. 30; p. 24, l. 7.

(n) The witness Stovell, a surveyor employed by the Appellant Horne to survey the property agreed to be sold, stated in evidence that the land which was the subject matter of the said action does not touch the land agreed to be sold to the Respondents; that according to the judgment in the said action the western boundary of the land claimed by the Plaintiff in that action between the south coast longitudinal road and the military road shown on the plan which is Exhibit "P.1" (that is to say to the north of the land agreed to be sold) would be 150 feet to the westward of the eastern boundary of the land agreed to be sold to the Respondents, and that the eastern boundary of the last mentioned land lies 50 feet to the west of the eastward boundary of the land devised by Clause 3 of the said Will of Adrastus Henry Astwood. He agreed that if a survey made by another surveyor named Clarke (who was not called as a witness and as to whose survey no evidence was before the Court) were correct the Appellant Horne could not have sold to the Respondents as much land as she purported to have sold them. p. 29, l. 1. p. 29, l. 38. p. 30, l. 4.

7. The learned Chief Justice in his judgment said that the case depended on the simple question whether or not the Appellant Horne had the land she contracted to sell. The learned judge came to the conclusion that area of the land devised by Clauses 3, 4 and 5 of the said Will of Adrastus Henry Astwood was under 20 acres, indicating the possibility of an abatement *pro tanto* in the area of each of the three portions. Referring to Mr. Spurling's doubts about the boundaries the learned judge said "In confirmation of this "suspicion he (Spurling) had at a subsequent date examined the "Court Records and discovered that a judgment recently delivered "in a case *Gibbons v. Horne and Vieira* might very well prejudice "the particular lot, the subject of his examination. Mr. Spurling "added that Mrs. Horne had admitted this possibility to him. Judgment, p. 31. p. 32, l. 32. p. 33, l. 10. p. 36, l. 43.

p. 38, l. 8. "Mrs. Horne very emphatically denies this, but I prefer to believe "Mr. Spurling". The learned judge found:—

(i) That the Appellant Horne knew in 1945 that the eastern boundary of Edward Astwood's estate was in dispute and that until such dispute was settled his title (semble, to the land contracted to be sold to the Respondents) was uncertain;

(ii) That the Conveyance to the Appellant Fox was a stratagem and did not remove the uncertainty;

(iii) That the Appellant Horne withheld knowledge of this uncertainty from the Respondents;

(iv) That at the date of the negotiations the title to the land contracted to be sold to the Respondents was defective.

The learned judge accordingly gave judgment to the effect stated in paragraph 1 of this Case.

Leave to Appeal, p. 41. 8. On 21st July, 1951, the learned Chief Justice granted leave to the Appellants to appeal to Her Majesty's Council against his said judgment.

9. The Appellants submit that the said judgment of the learned Chief Justice is wrong and should be reversed with costs for the following among other

REASONS.

1. BECAUSE there was no evidence, or no proper or sufficient evidence, before the Court to support the learned judge's conclusion that the area of land devised by Clauses 3, 4 and 5 of the Will of the said Adrastus Henry Astwood was under 20 acres, but on the contrary the evidence of the witness Stovell (p. 28, l. 1) that this area was not the whole estate of the said Adrastus Henry Astwood which included more land to the east, was uncontroverted, and accordingly there was no basis for his view that the area and extent of the land devised by Clause 3 of that Will would or might have to abate.
2. BECAUSE even if the area of the land devised by the said three clauses were less than 20 acres. the land devised by Clause 3 would not according to the true construction of the said Will be liable to abate.
3. BECAUSE there was no evidence, or no proper or sufficient evidence before the Court, that the dispute in the action of *Gibbons v. Vieira and Horne* had any

bearing upon the boundaries of the land contracted to be sold to the Respondents.

4. BECAUSE the evidence adduced on behalf of the Appellants discharged the onus (if such onus rested on the Appellants) of shewing that the whole of the land contracted to be sold to the Respondents was comprised in the land devised by Clause 3 of the Will of the said Adrastus Henry Astwood and that the title thereto had devolved through the said Samuel Josephus Astwood and Edward Astwood to the Appellant Fox.

5. BECAUSE the onus is upon the Respondents to show that the Appellants failed to shew a good title to land contracted to be sold to the Respondents and because the evidence was insufficient to discharge such onus.

6. BECAUSE the evidence adduced on behalf of the Appellants discharged the onus (if such onus rested on the Appellants) of shewing that the Appellants were at all material times able to give a good title to the land contracted to be sold to the Respondents.

7. BECAUSE the Respondents did not nor did anyone on their behalf at any time before this action was commenced raise or make any requisition or objection to the Appellants' title in respect of the Aliens Act, 1926, S.7, or, after delivery to the Respondents' attorneys of the title deeds for inspection, raise or make any requisition or objection in respect of the boundaries of the land.

8. BECAUSE the title of the Appellants was not adversely affected by the said section.

9. BECAUSE the refusal of the Respondents to accept the title offered by the Appellants to the land contracted to be sold was a breach of the said agreement for sale.

10. BECAUSE the Appellants were accordingly entitled to such relief as they claimed by way of counterclaim.

11. BECAUSE the judgment of the learned Chief Justice was against the weight of the evidence and was wrong in fact and law.

DENYS B. BUCKLEY.

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ON APPEAL

FROM THE SUPREME COURT OF BERMUDA.

HORNE and another

v.

FERGUSON and another

CASE FOR THE APPELLANTS.

WALMSLEY & STANSBURY,
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Electric Law Press Ltd., Law & Company Printers, Warwick Court, W.C.1.
24694