

25 / 1962

IN THE PRIVY COUNCIL

No. 19 of 1961

O N A P P E A L  
FROM THE COURT OF APPEAL, MALTA

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
30 MAR 1963  
25 RUSSELL SQUARE  
LONDON, W.C.1.

B E T W E E N

MICHAEL ABELA, ANTONIO ABELA  
and MARY ABELA ...

Appellants 68246

- and -

MARIA FELICIA CREMONA and  
GIUSEPPA ABELA ...

Respondents

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CASE FOR THE APPELLANTS

Record

1. This is an appeal from a judgment of the Court of Appeal of Malta dated the 27th June 1960 which reversed the judgment herein of the First Hall of the Civil Court of Malta dated the 29th January 1960.

pp. 65-78

pp. 50-53

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2. The present action was initiated by the Respondents Maria Felicia, wife of Joseph Cremona, who was then absent from Malta, as sole heiress of her father, Joseph Abela, and by Giuseppa, widow of the said Abela, as an interested party in the community of conjugal acquets, by a writ of summons issued against the defendants (hereinafter referred to as "the appellants") in the Civil Court of Malta (First Hall) on the 14th April 1959, claiming that the sale purporting to be made by contract dated the 17th April 1952 by Joseph Abela to the appellants, (his brothers and sister), of a Villa known as "Maria Teresa", (hereinafter referred to as "the villa") in the course of construction, situated at Rdum Irxew, in the limits of Saint Paul's Bay, Malta, for the price of £800 - which price was not paid on the deed - and as subject the said villa to the payment of £11 per annum as sub-groundrent, was a fictitious sale, and for this reason should be rescinded, under the directions of the said Court in view of such rescission.

pp. 1-2

pp. 89-90  
Exhibit "A"

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- pp. 5-6. 3. In their statement of defence, the appellants contended preliminarily that the suit was barred by the expiration of the period of limitation, and that on its merits and without prejudice the claim of the plaintiffs was untenable.
4. This action is based on the doctrine of simulation. This has been incorporated in the law of Malta from Roman law and it relates to documents which appear on their face to be contracts between the parties, but which in fact have another significance from that which appears. Such a purported contract may be vitiated either by absolute simulation or by relative simulation. The first exists when the parties do not want to conclude any juridical transaction, and the second when the parties wish to enter into some other obligation than that which appears from the wording of the document. Absolute simulation, when established, renders the document in question a complete nullity. Where there is a relative simulation the agreement which the contracting parties intended to conclude is valid if it is not prohibited by law. The respondents in this case have contended that the contract of sale of the 17th April 1952 relating to the villa is vitiated by an absolute simulation. 10 20
- pp. 89-90 Exhibit "A".
- pp. 7-10. 5. By a preliminary judgment of the 26th June 1959, the said Civil Court First Hall (Magri J.) disallowed the plea of prescription raised as above by the appellants, with costs against them, and appointed a legal referee to verify and report whether the plaintiffs' demands were tenable or not and to make the necessary remarks on the matter at issue. 30
- pp. 19-30. 6. The legal referee appointed as stated in paragraph 5 above (Advocate Dr. Fortunato Mizzi) made a report dated the 16th July 1959, submitting that the plaintiffs' demands should be disallowed. In the said report the said referee, after examining the legal basis of an action based on simulation, analysed in detail the evidence tendered during the hearing, and made the following among other findings: 40
- p.23.1.26. (a) As to the purchase price of the said villa, no direct evidence was brought on the point whether the purchase price was intended to be paid.
- p.23. 1.39. (b) The purchase price of £800, on which the respondents laid great stress as being ridiculously low, was in point of fact low.

(c) On the hypothesis that the price was not paid the question whether it was fictitious, as alleged by the plaintiffs, or not, could have no importance. p.24 1.24.

(d) If the price were really paid, the fact that it was derisory could not give rise to an action based on absolute simulation. p.24. 1.34.

10 (e) The appellants Michael and Antonio Abela tendered evidence as to the existence of a partnership between them and their brother Joseph Abela and that Joseph Abela was to be paid the purchase price out of partnership funds in his possession and under his control. (This evidence the legal referee by clear implication, as will hereinafter appear, accepted.) pp. 24-25.

(f) The appellant Mary Abela had no share in the partnership and did not pay any share of the purchase price of the villa. p.25. 1.35.

20 (g) The appellants and each of them used to live with their brother Joseph Abela until he died. p.26. 1.1.

(h) Joseph Pavia who was called on behalf of the respondents to testify that Joseph Abela continued to act and appear as the owner of the villa after the transfer by the contract of the 17th April 1952, gave evidence that neither he nor his brother Antonio, who both paid rent to Joseph Abela during the latter's lifetime, ever obtained receipts therefor from Joseph Abela; but that after Joseph Abela's death Antonio Pavia wrote 30 receipts for periods when Joseph Abela was still alive and signed them "Michele Abela". p.26. 1.13.

(i) Michael and Antonio Abela left all business matters to Joseph Abela during the latter's lifetime. p.27. 1.9.

(j) The testimony of Joseph Pavia in favour of the respondents was contradicted or at least blurred by other circumstances. p.27. 1.38.

40 (k) Joseph Abela had a right in law to sue the contractor Carmelo L. Zammit in respect of alleged defects in the flooring of the villa although the suit was initiated after the publication of the contract of sale of the 17th April 1952, and his doing so therefore had no bearing on the matter. p.28. 11.18-39.

(l) A statement made by Joseph Abela in the pp. 28-29.

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course of his said action against Carmelo L. Zammit to the effect that by reason of the alleged defect he had suffered damages by way of loss of rent was not conclusive because the unilateral declaration of one only of the contracting parties was not enough to invalidate a transfer of ownership of immovable property.

- p.29. 1.25. (m) The receipts for all the expenses in the villa and for the rent and for water and electricity consumption, after the date of the contested transfer (namely the 17th April 1952) were made out in favour of the appellant Michael Abela. 10
- p.29. 1.35. (n) The respondents failed to bring in any evidence of the motive which could have induced Joseph Abela and the defendants to create the alleged mere semblance of the said deed of sale.
- p.30. 1.9. (o) If there were evidence of simulation it would appear more likely that this simulation was a relative one rather than absolute and for this purpose the plaintiffs' claim should have been formulated differently. 20
- pp. 50-53. 7. The said Civil Court First Hall by a judgment given on the 29th January 1960 (Magri J.) held that "the plaintiffs did not succeed to prove that the said contract is affected by absolute simulation and, therefore, the demand on which it is based is not tenable; nor could it be maintained that that demand covers also relative simulation because, apart from the delimitations already made by the plaintiffs, the object-matter of the cause would be different; in fact, as Butera comments, while 'the judgment which declares the simulation (that absolute) of a juridical transaction makes manifest that the act itself is inexistent, devoid of any juridical value and, therefore, unproductive of any effect whatsoever, in as much as that which 'colorem habet, substantiam vero nullam' ....., in the matter of relative simulation, the judge, on the one hand, annuls the simulated act and, on the other hand, uncovers the hidden transaction" (Simulation subheading 'Juridical Transactions', para 115 page 373 and para 119 page 383) and Francesco Ferrara expresses the same concept thus: 'The action (of relative simulation) is not aimed at the declaration of the inexistence of the whole act but at the declaration of the total or partial inexistence of the apparent act with a view to its substitution by the true act done by the contracting parties which they had hidden under that form.' (Of 30 40 50

the simulation of Juridical Transactions' para 131). In view, therefore, of this diversity of the object-matter, it is not lawful to review the merits on the basis of relative simulation".

10 For these reasons, the said Court adjudged by disallowing the plaintiffs' demands, and in view of the circumstances of the case, ordered that costs should not be taxed as between the parties, but the registry fees should be paid by the respondents p.53.

8. Against this judgment the respondents entered an appeal to the Court of Appeal on the 5th February 1960, and in their petition of the 16th February 1960 prayed that the said judgment of the 29th January be reversed and their claim be allowed with costs of first and second instance. p.54. pp.57-59

20 9. In their reply of the 12th March 1960 the appellants submitted that "relative simulation" cannot be judged on a demand for "absolute simulation", and made a cross appeal on the costs as adjudged by the first Court, asking that the said judgment of the 29th January 1960 be confirmed on the merit of the case and that the Appeal Court order that the costs (except those adjudged in the preliminary judgment of the 26th June 1959) of both first and second instance be borne by the respondents. pp.61-62 p.61. p.62.

30 10. By a judgment delivered on the 27th June 1960, the Court of Appeal (composed of Mamo President, Montanaro and Harding JJ), after reviewing the evidence and the conclusions of the First Court, and making its own considerations, disallowed the cross appeal of the appellants, revoking the judgment appealed from, and allowed the demand of the respondents, declaring that the deed of sale is fictitious and therefore void: all costs of first and second instance to be borne by the appellants. pp.65-78.

40 11. The Court of Appeal, in holding that the plaintiffs had established that the contract of sale of the 17th April 1952 was vitiated by simulation, attached great importance to the minutes of evidence heard on the 14th November 1958 in another matter, namely an application by Maria Felicia Cremona filed on the 28th August 1958, and the Court emphasised certain apparent inconsistencies between the evidence tendered by the appellants and especially Michael Abela, in this application and the evidence tendered by them p.70. Exhibit "J" pp.120-124. pp.71,74 and 75.

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in these present proceedings. In view of the lapse of time between the hearing of the evidence in the application and the hearing of the evidence in these proceedings, the appellants respectfully submit that there was opportunity both for their recollections to alter and for their understanding of the transactions involved to have changed. The appellants were not cross-examined in these proceedings on the evidence previously tendered by them and in the premises the appellants will crave leave to refer to Chapter 15 (Code of Organisation and Civil Procedure) of the Revised Edition of the Laws of Malta 1942, and in particular to sections 584 and 585 thereof, and respectfully submit both that the said minutes of evidence are not admissible and that, if admitted, they cannot properly bear the significance which the Court of Appeal attached to them.

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pp.89-90.Exhibit "A"  
p.77.

12. The Court of Appeal appear to have adopted the view that once an element of simulation is established, and it is accepted that the parties to the contract of the 17th April 1952 did not intend to effect a sale inter vivos, absolute simulation is proved. If this were so, and it were necessary for a plaintiff in an action based on simulation only to establish, in order to avoid an instrument, that it is not what it appears on its face to be, there would be no room for the doctrine of relative simulation. The appellants respectfully submit that the burden lies on the respondents herein to establish (i) that the disputed contract of the 17th April 1952 was not in truth a contract of sale, (ii) that it was a mere nullity designed to have no legal effect at all. The respondents have themselves contended that the object of the simulation they allege was to deprive Joseph Abela's wife and daughter of their rights in the villa on his decease and to vest the same in the appellants, and have thereby negatived the existence of absolute simulation or of any motive therefor.

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pp. 78-80.  
p.86.

13. The appellants petitioned to the Court of Appeal for leave to appeal to Her Majesty's Privy Council, which was finally granted to the appellants on the 24th March 1961.

pp.65-78.  
pp.50-53.

14. The appellants submit that the judgment of the Court of Appeal dated the 27th June 1960 should be reversed and the judgment of the First Hall Civil Court of the 29th January 1960 restored for the following, amongst other,

R E A S O N S

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1. BECAUSE the submissions of the legal referee and the judgment of the First Judge were right and the judgment of the Court of Appeal was wrong.
  
- 10 2. BECAUSE the Court of Appeal misdirected itself in failing to formulate two distinct questions, namely (i) did the contract of sale of the 17th April 1952 involve any simulation ? (ii) if there were such simulation was it an absolute simulation or not ? and was wrong in its premise that the respondents (to succeed in their claim) need only to prove that there was not a "sale", without the need of proving that there was no other valid contract or obligation: the first Court's contention that the question of relative simulation cannot be examined in the present case (based on quoted authors) was right, and the Court of Appeal did not even comment on these authorities. p.53.
  
- 20 3. BECAUSE the Court of Appeal, whilst asserting that the question resolved itself into one of evidence, rejected the findings of the legal referee and the trial judge as to the relative reliability of witnesses, which ought never to have been disturbed by the Appellate Tribunal. p.70.
  
- 30 4. BECAUSE the Court of Appeal failed completely to give the necessary importance to the element of "motive" in the alleged simulation: if the late Joseph Abela's motive was (and no other possible motive was put forward by the plaintiffs) to deprive his estranged wife and child of the property in question, such motive must always lead to the logical conclusion that the sale was meant to be a real and effective transfer, as only in such a way could Joseph Abela deprive his wife and child and reach his intent: no advantage could possibly be gained to the respondents' claim from the fact that 40 Joseph Abela (the vendor) lived in a part of the villa together with the purchasers (the appellants), as nothing irregular and nothing suspect can be seen in a person living together with his brothers and 50 sister; nor can the allegation of witness

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p.75

Pavia that he (the witness) was kept in the dark about the transfer of the villa help the respondents' claim, not only as such allegation is evidently untrue, but because the said Pavia had no right whatsoever to be informed of the transactions of the said Joseph Abela; similarly any innocent and unimportant act done by the said Joseph Abela, which third parties might have interpreted as Joseph Abela's appearing, (or continuing to appear) as the owner of the villa cannot be construed against the rights of the appellants because Joseph Abela had no obligation to propagate to all and sundry the fact that he had sold the villa to the appellants. 10

p.70 1.29.

5. BECAUSE the Court of Appeal, (when dealing with the evidence produced before the Trial Judge) whilst declaring in its judgment that "the burden of evidence rests on the plaintiffs, and that the evidence must be sound and convincing", a) brushed aside 20

p.71, pp.74-75.

the evidence given by the appellants, in this case, but gave great importance to evidence said to have been given by them in other judicial proceedings, when such other evidence was not produced in accordance with the laws of procedure and none of the appellants was cross-examined on the said evidence in the present proceedings; 30

p.49. 1.10. and p.130. Exhibits "N" & "O"

b) made unwarranted conclusions from hypothetical intentions on trifling incidents; c) magnified unduly and unreasonably any minute incident to draw some support to the respondents' thesis; d) interpreted always in favour of the respondents a number of equivocal and indifferent incidents; e) ignored completely the irrebuttable evidence of the 40

p.49. 1.23.

photographs filed by the appellants (supporting evidence to these photographs having been dispensed by the Trial Judge, without any appeal having been made by the respondents from the relative decree and without the Court of Appeal mentioning at all the said decree); and f) ignored completely all the arguments and circumstances resulting in favour of the appellants. 50

W.T. WELLS

J. PACE.

IN THE PRIVY COUNCIL

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CASE FOR APPELLANTS

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