Privy Council Appeal No. 14 of 1972

John Bertram Goddard – – – – – – *Appellant*

v.

Laurent John – – – – – – – – *Respondent*

FROM

THE WEST INDIES ASSOCIATED STATES SUPREME COURT OF APPEAL (SAINT LUCIA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1974

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD CROSS OF CHELSEA]

This is an appeal from a decision of the Court of Appeal of the Supreme Court of the West Indies Associated States (Lewis C.J., Lewis J.A. and Louisy J.A. Acting), given on 10th September 1971, which reversed a decision of the High Court (Renwick J. Acting) given on 2nd April 1971 which had granted the appellant John Bertram Goddard, the plaintiff in the action, specific performance of an option to purchase five "carres" of land known as "Petit Trou" situate in the Quarter of Laborie in St. Lucia alleged to be contained in a lease by which the respondent Laurent John, the defendant in the action, let the said land to the appellant.

Paragraphs 1 and 2 of the appellant's declaration in the action filed on the 30th July 1970 were in the following terms:

> "1. By lease in writing by the Defendant to the Plaintiff executed before M. M. Mason, Notary Royal, on the 12th day of July 1965 and registered on the 17th day of July 1965 in Vol. 118a No. 80074 the Defendant granted to the Plaintiff a lease for five years over the immoveable property in the Schedule with an option on the part of the Lessee to renew the lease for a further period of five years.
>
> 2. By clause 3 of the said lease the Plaintiff has the option at any time during the continuation of the said lease to purchase the said immoveable property in the Schedule from the Defendant and to pay for the same the sum of Three Thousand Dollars as well as all arrears of rental due for the remaining period of any of the five year periods."

The declaration went on to allege that the appellant had duly exercised the said option but that the respondent wrongfully refused to honour it, and claimed specific performance of it. Paragraph 1 of the defence of the respondent delivered on 18th August 1970 ran as follows:

> "1. The defendant denies paragraphs 1 and 2 of the Declaration and states that he never executed or authorised to be executed the lease referred to in paragraph 1 of the Declaration."

After admitting that the appellant had purported to exercise the option referred to in the declaration and that the respondent had refused to transfer the land in question to him but denying that such refusal was wrongful the defence continued as follows:

> "5. In July 1965 at the home of the defendant in the Village of Laborie in the State of Saint Lucia the plaintiff and the defendant, in the presence of the defendant's wife only, orally agreed a lease of the defendant's land described in the lease referred to in paragraph 1 of the Declaration.
>
> 6. At the time and place aforesaid it was *inter alia* agreed between the plaintiff and the defendant that, in the event that the defendant determine to sell the said land, the defendant would first offer the same to the plaintiff upon whose refusal only the defendant would sell the land to another.
>
> 7. The said oral agreement was thereupon reduced to writing by the plaintiff in original form only.
>
> 8. On the day aforesaid the plaintiff and the defendant executed the said written agreement and their signatures were attested by and at the home of the late Alcide P. Testanier, Justice of the Peace, in the said Village of Laborie, whereafter the plaintiff departed with the said agreement.
>
> 9. It was not a term of the said agreement that the plaintiff was given an option to purchase the said land."

The appellant was a merchant living in or near Castries, who used to drive round the island selling goods. The respondent and his wife carried on a rum shop at Laborie and used to buy goods from the appellant. It was common ground between the parties that in July 1965 they entered into an agreement for a lease by the respondent to the appellant of the land in question. The account of the matter given by the appellant in evidence was to the following effect.

The respondent offered to sell him the piece of land in question but he told him that he was not then in a position to buy and suggested a lease with an option to purchase. He discussed the matter with the respondent and his wife in their sbop and took notes of the terms agreed. These notes he took to Mr. Mason, a Notary Royal practising in Castries, who drew up a lease embodying the terms. The lease was for five years at a rental of 60 dollars a year with an option to renew for a further five years and an option at any time during its continuance to purchase the land for 3,000 dollars. When the appellant next visited Laborie he and the respondent went together to the house of a Mr. Testanier—a retired schoolmaster and Justice of the Peace. Mr. Testanier read the document to the respondent and explained it to him and then he and the respondent and Mr. Testanier all signed it. On his return to Castries he gave the document back to Mr. Mason.

Mr. Mason and Mr. Testanier had both died before the action was brought. The original document—which was presumably among Mr. Mason's papers—was not produced at the trial; but the appellant produced a copy certified by Mr. Mason to be a true copy of the original, which was in the following terms:

" Amount Duty $60
Reg. No. 2517
Date 16/7/65
Treasurer
Dated 12th July 1965

LEASE

by

LAURENT JOHN

to

JOHN BERTRAM GODDARD

of

A small estate situate in the Quarter of Laborie and known as as " Petit Trou " being about five carres in area

For a period of five years

THESE PRESENTS made this twelfth day of July One thousand nine hundred and sixty five

BEFORE: MAURICE McLEAN MASON Notary Royal practising in the Island of Saint Lucia residing in the town of Castries in the said Island

BETWEEN: LAURENT JOHN of Laborie, Shopkeeper, (hereinafter called the Lessor) of the one part

AND: JOHN BERTRAM GODDARD of Vigie, Castries Merchant, (hereinafter called the Lessee) of the other part

WITNESS AS FOLLOWS:—

1. The Lessor hereby leases and demises unto the Lessee thereof accepting the immoveable property described in the Schedule hereto
2. The said lease shall be for a term of five years computed from the date of these presents with an option of renewal on the part of the Lessee for a further period of five years at the expiration of the initial period of five years as aforesaid
3. The Lessee has the option at any time during the continuation of the said lease to purchase the said immoveable property and to pay for the same the sum of THREE THOUSAND DOLLARS as well as all arrears of rental due for the remaining period of any of the five years periods
4. The Lessee shall have the right to erect immoveable as well moveable structures on the said property leased
5. The Lessor hereby undertakes to compensate the lessee for all improvements made on the said land if at any time the lease is terminated
6. The Lessee undertakes to pay to the Lessor by way of rental the sum of Three Hundred Dollars for the full period of five months
7. The Lessee agree to permit the Lessor to keep cows on the land during the continuation of the said lease

WHEREOF RECORD

IN WITNESS WHEREOF these presents after due reading thereof have been signed at Castries aforesaid on the day, month and year first above written by the parties and by the said Notary

SCHEDULE

A small Estate situate in the Quarter of Laborie and known as " Petit Trou " being about five carres in area bounded on the North by lands now or formerly of Heirs Budin, on the South by the Sea, on the East by lands known as Anse Noires and on the West by lands formerly of one Widow Duchaussori

TITLE:— Sale by Anne Elizabeth Raymond et. al. to the Lessor executed before Garnet H. Gordon Notary Royal on the 19th August 1931, and registered in Vol. 84 No. 49841 ".

The appellant said that this copy was given him by Mr. Mason sometime in July or August 1965 and that as a measure of precaution he signed it and got the respondent to sign it. In 1968 at the request of the respondent he obtained another copy from the Registry and gave it to the respondent.

The appellant's own evidence showed that the statement in the lease to the effect that it had been signed at Castries by the appellant and the respondent and Mr. Mason was false and at the close of the appellant's case Counsel for the respondent submitted that his client had no case to answer since the appellant had failed to prove the lease on which he was suing. Counsel for the appellant on the other hand submitted that the fact that the lease was not a valid notarial document did not matter since an agreement for a lease could be proved by an informal writing signed by the parties. The judge having heard their submissions ruled that there was a case to answer.

The respondent then gave evidence to the following effect. The appellant asked him to lease him a piece of land on which he could build a house for his children to come to in the holidays. They looked at the land at Petit Trou and the appellant suggested a rent of 60 dollars a year for five years. If at the end of five years the appellant wished to go on leasing the land they would draw up a fresh agreement and he, the respondent, agreed that if he wanted to sell the land he would give the appellant the first refusal. He said that during their talk the appellant had suggested that 2,000 dollars would be a fair price for the land but that he had said that he was not selling, and that the appellant had then said, " make it 3,000 dollars "—to which he had again replied that he was not selling. The respondent said that the appellant wrote down the terms which they had agreed on a piece of paper torn from a writing pad and that they both of them then went together to see Mr. Testanier. He told Mr. Testanier what had been agreed between them and asked him to look at the paper and " see if it was good ". Then all three of them signed the document and the appellant took it away with him saying that he would take it to Castries, have it typed and bring it back. He did not do this and though the respondent and his wife asked him for the document which had been signed the appellant did not do anything about it for three years. Eventually in 1968 he gave them a paper which purported to show that the respondent had given him an option to buy the land for 3,000 dollars. On being shown the certified copy of the notarial document which was produced by the appellant and which purported to bear his signature the respondent said that he had never seen the document before and that though the signature resembled his signature it was not in fact his signature. The respondent's wife who said that she was present when the terms were discussed gave evidence confirming her husband's account of what had been agreed. In the course of the hearing the respondent produced a document purporting to be signed by Mr. Testanier in the following terms:

" Whom it may concern.

Is to certify that I, Alcide Philip Testanier witnessed signing of this document by Messrs. Laurent John and J. B. Goddard.

A. P. Testanier, J.P."

As the document to which this certificate related was not produced it does not assist in the determination of the dispute but it suggests to their Lordships that both parties may have been mistaken in saying that Mr. Testanier signed the document—whatever it was—which contained the terms agreed and that what he signed was simply a certificate annexed to it to the effect that it had been signed by both parties.

In his judgment Renwick J. pointed out that it was common ground between the parties that the lease—whatever its terms—was not signed before Mr. Mason or signed at Castries. He then set out the effect of the evidence given on both sides and concluded as follows:

> " I have no doubt in my mind that the defendant did in fact sign the lease which was exhibited in this case. This finding, in my view, puts an end to the matter since it is admitted that all the covenants on the part of the plaintiff to be obeyed have been obeyed by him, and further that he validly exercised his option.
>
> I therefore award judgment to the plaintiff and order specific performance of the option to purchase contained in clause 3 of the lease with costs to be taxed."

The appellant had, of course, said in his evidence that the respondent signed two documents (1) the original lease which was not produced and (2) the certified copy which was produced and was an exhibit in the case. It is not entirely clear to which document the judge was referring though their Lordships incline to think that it was the original lease which he had in mind. This uncertainty is, however, of no real importance for it cannot be supposed that the judge was accepting the appellant's evidence as to the respondent's having signed one document and not accepting it with regard to his having signed the other.

The respondent appealed to the Court of Appeal which reversed the decision of Renwick J. The leading judgment was given by Louisy J.A. He pointed out that the lease on which the appellant was relying purported to be a notarial instrument and as such what the Civil Code describes as an " authentic writing ", but that the appellant's own evidence showed clearly that it was not in fact an " authentic writing ". He then continued:

> " I now refer to Article 1142.
>
> ' An authentic writing may be impugned and set aside as false in whole or in part, upon an improbation in the manner provided in the Code of Civil Procedure and in no other manner.'
>
> Paragraph 1 of the defence reads as follows:
>
> ' The defendant denies paragraphs 1 and 2 of the declaration and states that he never executed or authorised to be executed the lease referred to in paragraph 1 of the declaration.'
>
> The appellant by this paragraph impugned the lease and stated that he never executed or authorised it to be executed. This pleading is tantamount to an incidental improbation which by virtue of Article 134 of the Code of Civil Procedure need no longer be made by petition, but may be urged and relied upon by way of defence.
>
> The issue between the appellant and respondent is whether or not the document was signed by the appellant. The document having been shown to be false would, if this had been prayed for by the appellant in his defence, have been set aside; but it is clear that the Court, even though it does not formally set aside cannot give it any authenticity nor found any judgment upon it.

In the circumstances, I would allow the appeal and set aside the judgment of the court below, and order that judgment be entered for the appellant. The costs of the appeal and of the court below to be the appellant's."

Lewis C.J. and Lewis J.A. delivered judgments agreeing that the appeal should be allowed for the reasons given by Louisy J.A.

Before they come to consider the question at issue in the appeal their Lordships must first deal with two " pleading " points—one taken by each of the parties to the appeal. The appellant repeated before the Board the submission which he had evidently made—unsuccessfully—in the Court of Appeal, that because the respondent did not plead specifically that the lease referred to in paragraph 1 of the declaration was not a valid notarial instrument and ask to have it set aside he ought not to have been allowed to argue that it was invalid. Their Lordships agree with the Court of Appeal that there is nothing in this point. Article 134 of the Code of Civil Procedure to which Louisy J.A. refers enables such a point to be taken by way of defence; the respondent denied the lease pleaded in the declaration; at the close of the appellant's case Counsel for the respondent took the point, without any objection from Counsel for the appellant, that the evidence had shown that it was not a valid notarial instrument and the question of the effect of this fact was argued on both sides and decided by the judge. The preliminary point taken on behalf of the respondent was that for the appellant, who had pleaded the lease as a notarial document, to put it forward at the trial as a non-notarial " private writing " involved a radical departure from the case pleaded which he should not have been allowed to make. Their Lordships have no hesitation in rejecting this submission. It is, of course, true that if a defendant may be prejudiced by the plaintiff putting forward at the trial a case different from that which he has pleaded he will not be allowed to put it forward—unless indeed the judge gives him leave to amend his pleadings and he pays the costs of any adjournment necessary to enable the defendant to meet the new case. But in this case the respondent was not in any way prejudiced by the appellant seeking to rely on the lease as a " private writing " when it had been shown not to have been a notarial instrument. The primary defence of the respondent remained the same—namely that the document which he had signed—whether it was a notarial instrument or a private writing—did not contain any option to purchase. The fact that the lease on which the appellant relied had been shown not to be a valid notarial instrument gave him an additional ground of defence which his Counsel took at the close of the appellant's case and which was argued and decided by the judge without any request for an adjournment by Counsel for the respondent.

Their Lordships pass now to consider the real question at issue in this appeal—namely whether the lease which the parties are found to have signed being invalid as a notarial instrument can nevertheless be relied on by either of the parties to it as a " private writing ". This is a question to which the judge of first instance and the Court of Appeal gave different answers but unfortunately neither gave reasons for the differing conclusions at which they arrived.

The answer to this question depends, their Lordships think, on the construction to be placed on Articles 1153 and 1154 of the Civil Code. An agreement for a lease of real property can only be proved " by writing or by the oath of the adverse party "—see Article 1163. Proof by writing can be either by " authentic writing " which is dealt with in Articles 1138 to 1151 or by " private writing " which is dealt with in Articles 1153 to 1160. Article 1138 provides that certain writings—including notarial instruments—executed or attested with the requisite formalities by a public officer having authority to execute or attest the

same in the place where he acts are authentic and prove their contents without any evidence of the signature or seal upon them or of the official character of such officer. Article 1142 provides that an authentic writing may be impugned and set aside as false upon an improbation in the manner provided in the Code of Civil Procedure, and Article 1147 provides that copies of notarial instruments certified to be true copies of the original by the notary who has legal custody of the original are authentic and prove the contents of the original. Articles 1153 and 1154 are in the following terms:

> "*1153.* A writing which is not authentic by reason of any defect of form, or of the incompetency of the officer, has effect as a private writing, if it have been signed by all the parties; except in the case mentioned in Article 831." (Article 831—so far as relevant—provides that a revocation contained in a will which is void by reason of informality is also void.)
>
> "*1154.* Private writings acknowledged by the party against whom they are set up, or legally held to be acknowledged or proved, have the same effect as evidence between the parties thereto, and between their heirs and legal representatives, as authentic writings."

It was submitted on behalf of the respondent that Article 1153 is an exhaustive statement of the circumstances in which a document which purports to be an authentic document but is not can be treated as a private writing and that the lease which was held to have been signed by the parties in this case did not fall within the article since its invalidity was not due to any defect in form or to the incompetency of Mr. Mason who was a qualified notary. Accordingly the lease must be treated as affording no proof of the agreement between the parties. On behalf of the appellant it was submitted (1) that although the failure of the lease to qualify as a notarial document was not due to a defect of form it might well be said to have been due to the incompetency of Mr. Mason since although he was a duly qualified notary he was not "competent" to certify that a document had been signed in his presence if it had not been so signed and (2) that in any case Article 1153 only applied to documents which had been executed before persons who were or purported to be notaries and that this case fell within Article 1154. Counsel informed their Lordships that so far as they knew the question of the meaning and interrelation of Articles 1153 and 1154 had never been considered by the courts in Saint Lucia. The civil code of Saint Lucia was modelled on that of Lower Canada—Article 1221 of which is in the same terms as Article 1153 of the Saint Lucia code—and Counsel referred to several cases decided in the Courts of Quebec raising the question of the invalidity of notarial instruments. Only one of those cases—*Rimouski Fire Insurance Co. v. Cedar Shingle Co.* (1892) R.J.Q. 1 B.R. 559—was a case like this where the document in question had not been signed by the parties in the presence of the notary but was nevertheless certified by him to have been signed in his presence. Although the point was not decided it appears to have been accepted by the parties and the Court in that case that the document though not an "authentic writing" might well be valid as a "private writing". Even apart from such assistance as may be derived from that case their Lordships think that in principle this must be so. When the parties signed the document in question in this case at Laborie it was undoubtedly at that stage a "private writing" which could have been used to prove the agreement which they had made for the letting of the property and it would indeed be extraordinary if the improper action of Mr. Mason in purporting to confer on the document the higher status of an "authentic writing" should have operated to deprive it thenceforth of the lower status which it had hitherto enjoyed. For these reasons their Lordships cannot accept the submission made on

behalf of the respondent. Accordingly they will humbly advise Her Majesty that the appeal be allowed, the judgment of Renwick J. restored, and the respondent ordered to pay the costs in the Court of Appeal and before this Board.

In conclusion their Lordships would say that they fully concur with everything which was said by the judges in the Court of Appeal as to the duties of "notaries royal". When the parties live at a distance from his office and he knows their signatures or they are certified by some person of standing known to him a notary may be tempted to certify that a document has been signed in his presence when in fact it has not been so signed. It is a breach of his professional duty for him to succumb to that temptation and if as the judgments in the Court of Appeal suggest a practice may have been growing up among notaries in Saint Lucia of acting as the late Mr. Mason acted in this case the sooner such practice ceases the better.

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In the Privy Council

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LORD CROSS OF CHELSEA

Printed by HER MAJESTY'S STATIONERY OFFICE
1974