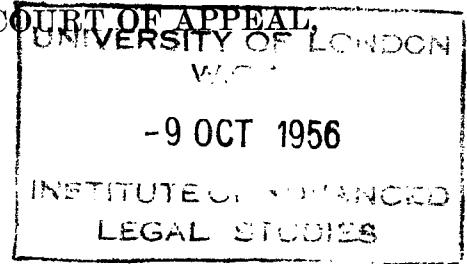


In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL,
JERUSALEM.



44486

BETWEEN

- 1. BRACHA BEN-YA'ACOV
- 2. (A) NISSIM MIRAKOV COHEN
(B) MALKIEL MIRAKOV COHEN
- 10 3. (A) DOV GUTERMAN
(B) DVORA GUTERMAN
- 4. (A) BLUMA VORTMAN
(B) YA'ACOV VORTMAN
in their personal capacity as heirs and as legal
representatives of the estate of the late
SIMHA VORTMAN
- 5. BENJAMIN MANN
- 6. ESTHER MAMANOV
- 7. REUVEN LEV
- 20 8. MEIR WIND
- 9. (A) GERSHON MABOVITZ
(B) SHIFRA GERSHONOVITZ (Defendants) *Appellants*

AND

JOSEPH FORER (Plaintiff)

Respondent.

CASE FOR THE APPELLANTS.

RECORD.

1. This is an appeal, by Special Leave, from the Judgment, given in nine consolidated actions, of the Supreme Court, sitting as a Court of Appeal, Jerusalem on the 26th September, 1945 dismissing the Appellants' Appeals from the Judgment of the Land Court, Tel-Aviv, dated the 21st December 30 1944. p. 40. p. 31.

2. The substantial questions raised in this appeal are whether the Respondent is entitled to treat as void the agreements under which the Appellants were severally let by the Respondent into possession of the flats in a building erected by him in the Tel-Aviv area and whether he is entitled to evict the Appellants from the said flats.

3. Owing to the demand for flats in Palestine the practice has grown up for a capitalist contractor to erect a building and for him to sell the land and building to a number of purchasers each of whom is allotted a separate

flat and has the use in common of such parts of the buildings as the staircase. Such houses are conveniently referred to as "houses of common ownership." Sometimes such houses are built co-operatively. In either case it is the practice when the building is fully occupied for each of the flat owners to take a registered undivided share (that is, a "musha'a share") of the land and building corresponding to the ratio the number of rooms in his flat bears to the total number of rooms in the building; alternatively, for registration of the entire property to be effected in the name of a committee of two or three of the purchasers or in the name of a co-operative society formed of them all, who would in either of the latter 10 cases hold the property on behalf of the flat owners.

4. Some time in the year 1937 the Respondent acquired a plot of building land in Tel-Aviv in order to build thereon such a house of common ownership. Over the next eighteen months or so each of the Appellants agreed to buy a flat in the building and each of them paid to the Respondent divers sums on account of the purchase price. Certain of them provided part of the materials with which the building that was erected in the year 1938 was actually constructed.

5. The circumstances in which the Appellants went into possession of their divers flats as agreed with the Respondent were described by him 20 when he gave evidence in the Land Court as follows: "I sold flat to "Bracha Ben-Ya'acov and to the other eight Defendants, in each case by "agreements in writing. By virtue of those agreements I allowed nine "Defendants to go into possession."

p. 18, l. 24.

6. The nine agreements differ in their actual terms but the general purpose of them is, it is submitted, the same, namely, to give each of the Appellants a share in the building and the land on which it stood and a right to occupy a given flat.

7. The salient clauses of the divers agreements with their respective dates are as follows:— 30

1. 21st May, 1939. BRACHA BEN-YA'ACOV.

p. 69.

The preamble recites that the Respondent has built a house of common ownership consisting of ten flats and containing 26 rooms and states that the first party, that is the Respondent, has agreed to sell to the second party, that is this Appellant, and the second party has agreed to purchase from the first party a flat in the house.

Art. 1 contains an undertaking by the first party to sell and to transfer to the second party a part of the above plot (referred to in the preamble) consisting of an area to be in proportion to the number of rooms to be owned together 40 with the other flat-owners. It further provides that the first party undertakes to sell and to hand over to the second party a specific flat containing three rooms, a kitchen, bathroom and W.C., and also, together with the other flat owners, the staircase, washing-room, the garden and the roof.

Art. 2 states that the price of the flat has been agreed at LP.500, and that the second party undertakes to pay LP.200 in cash at the time of signing the contract and LP.300 in cash at the time of transfer of the plot and the building at the Land Registry Office to the names of two or three of the purchasers of the flats in the above building of common ownership.

Art. 3 states that the second party has seen the flat and has agreed to purchase it.

10 *Art. 4* contains an undertaking by the first party to hand over to the second party the flat in good condition, repaired and arranged as requested by the second party.

Art. 6 provides that the first party undertakes to transfer the above plot and the whole building thereon to the name of two or three of the purchasers of the flats in the house of common ownership who will hold it in favour of all the purchasers of the flats in the building.

2. 8th August, 1938. COHEN.

20 The preamble recites that the Respondent has built a house p. 64. of common ownership and that the second party has agreed to purchase a flat in it.

30 *Art. 1* provides that the first party thereby undertakes to sell and to transfer to the second party, who has agreed to purchase it, part of the plot prescribed consisting of an area to be in proportion to the number of rooms to be owned together with the other flat owners. It further provides that the sale includes also part of the building erected on the plot, namely a flat as described and also together with the other flat owners, the staircase, washing-room garden and roof which the first party has to place at any time at the disposal of the purchaser as common owners.

Art. 2 states that the price of the flat is agreed at LP.600, of which LP.100 is to be paid on the date of signing the contract, LP.50 on the date of transfer of the flat in the Land Registry Office, and the balance by stated instalments beginning from the time the second party enters the flat.

Art. 3 refers to the transfer in the Tabu of the building in the name of all the purchasers.

40 *Art. 4* contains an undertaking by the first party to hand over the flat to the second party at the time the second party requires it this to be not later than two weeks from the signing of the contract.

Art. 5 contains an undertaking by the first party to transfer at the Land Registry the plot and the building to a committee or to a co-operative society of the house in

common ownership to be formed by all the flat owners at any time any of the flat owners should require him so to do. It further provides that in the event of such committee or co-operative society not being formed within one year from the date of the contract being signed the first party shall transfer to the second party his share in the plot and in the building Musha'a.

3. 6th July, 1938.

GUTERMAN.

p. 62.

The preamble recites that the first party has built a house of common ownership and that the parties have agreed on the sale 10 of a flat in the house to the second party.

Art. 1 contains an undertaking by the first party to sell and to transfer to the second party a part of the plot described, consisting of an area in proportion to the number of rooms to be owned together with the other flat owners. It further states that the contract of sale includes also parts of the building erected on the plot, namely a flat as described and other parts of the building as described in common with the other flat owners.

Art. 2 fixes the price of the flat at LP.500 and provides for the 20 mode of payment.

Art. 3 contains an undertaking by the first party to hand over the flat to the second party not later than one week from the day of the signing of the contract.

Art. 4 contains an undertaking by the first party to transfer the plot and the building to a committee or to a co-operative society to be formed by all the flat owners.

4. 9th November, 1937.

VORTMAN.

p. 57.

The preamble recites that the first party builds a house in common ownership and agrees to sell to the second party a flat in 30 it as described, that is to say, three shares out of 26 shares in which the house is divided together with the plot of land and three shares out of 26 to build a fourth floor—in accordance with the plan certified by the Municipality of Tel-Aviv.

Art. 1 is an undertaking by the second party to pay for the said flat LP.600 by stated instalments.

Art. 4 provides that in the event of default by the second party under the agreement the first party will be entitled to sell the flat to another on account of the second party.

Art. 5 provides that the first party will transfer in the Land 40 Registry all the building in the name of the committee which the partners will elect.

Art. 11 is an undertaking by the second party to obey a majority decision of the partners to the house which is owned in common.

5. 1st February, 1938.

MANN.

The preamble recites that the first party has built a house of common ownership and agrees to sell to the second party, who agrees to buy it, a flat in the house as described. p. 58.

Art. 1 provides for the payment by the second party of the agreed price, that is LP.500 by stated instalments.

10 At the end of this contract there is a paragraph stating that the first party will transfer in the Land Registry all the building in the name of a committee which will be elected by all the members at any time required, provided that they will sign the mortgages for the whole sum that will then become due from all the members.

6. 26th May, 1938.

MAMANOV.

The preamble recites that the first party has built a house of common ownership and has offered to the second party a flat in it which the second party has agreed to purchase. p. 60.

20 *Art. 1* is an undertaking by the first party to sell and to transfer to the second party, who agrees to purchase from the first party, part of the plot described consisting of an area in proportion to the number of rooms to be owned together with the other flat owners, and goes on to provide that the sale includes also part of the building erected on the plot, namely, a flat as described, and in common with the other flat owners the staircase, washing-room garden and roof.

Art. 2 fixes the price of the flat at LP.550 to be paid by stated instalments.

Art. 3 provides for the first party depositing a bill for LP.150 to be returned to him on the day of the transfer in the Tabu of the building in the name of all the purchasers.

30 *Art. 4* is an undertaking by the first party to hand over to the second party the flat at the time the second will require it not later than two weeks from the signing of the agreement.

Art. 5 is an undertaking to transfer at the Land Registry the said plot and the whole of the building erected thereon to a committee or to a co-operative society of the house in common ownership, to be formed by all the flat owners at any time that he may be required to do so by any of the flat owners.

40 It also provides that in the event of such a committee or co-operative society not being formed within one year of the date of signing, the first party is to transfer to the second party his share in the plot and the building Musha'a.

7. 6th October, 1937.

LEV.

p. 55.

The preamble recites that the first party is building a house of common ownership and that he has agreed to sell to the second party, who has agreed to purchase, a flat in the building as described.

Art. 1 fixes the price of the building at LP.550 to be paid as therein provided.

Art. 6 entitles the first party to transfer the second party to a second building and to give him a similar flat in that building.

Art. 7 provides that the first party is entitled to sell the flat 10 to another party without asking for the consent of the second party and to pay to the second party the amount which he invested in the flat.

Art. 16 provides that should the first party sell the said building and not within the stated time erecting another building, that he will return to the second party all the amount he had invested in the flat.

8. 15th May, 1939.

WIND.

p. 68.

The preamble states that the first party has built a house of common ownership and has offered to sell to the second party a flat 20 in it which the second party has agreed to purchase.

Art. 1 is an undertaking by the first party to sell and transfer to the second party, who undertakes to purchase the same from him, part of the plot described consisting of an area in proportion to the number of rooms to be owned together with the other flat-owners. It further states that the agreement of sale includes the named part of the building erected on the plot, together with the staircase washing-room garden and roof in common with the other flat-owners.

30

Art. 2 provides for the payment of the agreed price of LP.550 by the stated instalments.

Art. 3 provides that the first party is to hand over the flat not later than three months from the date of the contract.

Art. 4 is an undertaking to transfer at the Land Registry the plot and the building erected on it to the committee or the co-operative of the house owned in common, which will be formed by all the flat-owners, at any time he is required so to do by one of the flat-owners.

9. 17th February, 1939.

MABOVITZ.

40

p. 66.

The preamble recites that the first party has built a house of common ownership and has offered to the second party a flat in it, which the second party has agreed to purchase.

Art. 1 is an undertaking by the first party to sell and to transfer to the second party part of the plot described, consisting of an area in proportion to the number of rooms to be owned together with the other flat-owners, and states that the sale includes also the named part of the building on the plot, together with the staircase washing-room garden and roof in common with the other flat-owners.

Art. 2 fixes the price of the flat at LP.450 and the instalment mode of payment.

10

Art. 4 is an undertaking by the first party to transfer at the Land Registry the plot of land and the whole of the building to a committee or to a co-operative society of the house in common ownership which shall be formed by all the flat-owners at any time that any of the flat-owners require him so to do.

8. Certain other clauses *e.g.* those providing for the purchasers to be at liberty to transfer their flats to others without the consent of the Respondent and those providing for damages in the event of breach of agreement are common to all the agreements. It was under the former of these clauses
20 that the Appellant Wind took over one of the flats.

9. The Land Court found that no committee was ever formed with the consent of all the flat-owners. The evidence as to the formation of a committee was somewhat equivocal. The Respondent himself in evidence stated, "I received a notice 15th August, 1939 from Defendant Mann that
" a committee had been formed . . . This committee never opened any
" file in Land Registry. Committee gave me no documents to sign for
" transfer of land and house. Some of committee . . . told me they did
" not agree to people appointed." The agreements did not all expressly
30 require that the committee should be formed by *all* the flat-owners. In any event the Appellants submit that the provision for a possible transfer of the plot and house to a committee was an ancillary and not a necessary provision of the agreements.

10. On the 15th August, 1944 the Respondent, who by then had received divers moneys from each of the Appellants as by their respective agreements provided, commenced in the Land Court, Tel-Aviv

THESE PRESENT SUITS

to deprive the Appellants of the flats in which they were then living and which they had purchased from the Respondent as aforesaid.

11. By each of his Statements of Claim the Respondent claimed
40 that the Appellants were in possession under void agreements. The pleadings concluded with a prayer :—

That this Court do declare that the Plaintiff is sole owner of the property more fully described in Exhibit " A " and of the building thereon and do further declare that the Plaintiff is the sole person having a right in or over the said land and in the building thereon.

It is further prayed that this Court do order the Defendant not to interfere with the right of the Plaintiff in and over the said land and building.

It is further prayed that this Court do restrain the Defendant from interfering with the Plaintiff's enjoyment of the land and building in dispute.

p. 17, l. 35. 12. Separate Defences were duly filed by each of the Appellants. On the 11th December, 1944 the actions were consolidated by Judge Hubbard, who began the hearings in Court on that day.

p. 31. 13. On the 21st December, 1944 the Land Court delivered judgment 10 in the consolidated actions. The grounds for the Judgment and the contentions of the parties appear from the following extracts from the Judgment :—

These are nine consolidated actions in which the Plaintiff prays a declaration of ownership and ancillary reliefs on the ground that the nine agreements by which he undertook to sell to the Defendant nine flats in one building are all void.

Mr. Eliash, on behalf of the Defendants, contends that all the agreements, either on the face of them or on a fair and proper construction, are good, and that the Defendants are entitled to 20 resist the Plaintiff's claim, either on the ground that they have fulfilled their obligations under the agreements and being, therefore, in a position to enforce the agreements by actions for specific performance, have an equitable title to the property, or in the alternative, that they are entitled to plead in defence that they have an equitable lien on the property for the return of the purchase moneys paid under their agreements. I do not propose to go into the financial relations between the Plaintiff and the Defendants because, in my view, they are irrelevant.

The object of these nine contracts was to vest in each of the 30 purchasers a flat in the Plaintiff's building. There is no dispute that it is legally impossible to transfer a flat in the Land Registry, nor that such a disposition is illegal if made outside the Land Registry. The question is whether any of the agreements under discussion has succeeded in effecting the object aimed at.

Each of the nine agreements speaks in the preamble of the sale of a flat. The agreement in cases numbers in 16, 17, 18, 19, 23 and 24, repeat the undertaking to sell a flat in clause 1, but the same clause contains also an undertaking to sell and to transfer a share 40 in the plot on which the building stands, which share shall bear the same proportion to the total plot as the number of rooms occupied by the purchaser shall bear to the total number of rooms owned by all the flat-owners together. This is obviously what is meant, although the language of the agreements is somewhat elliptical.

This device, however, does not succeed in its objects, since, if it be regarded as the transfer of a divided share, the purchaser would be the owner of all the flats in the three floors of the building

lying immediately above his share of the plot, and not of one flat only, and if it be regarded as the transfer of an undivided share, then the purchaser would merely have a certain share in each part of the building.

10 By another clause, however, in the same six agreements it is provided that the Plaintiff will transfer the whole of the building and the plot in one case to two or three of the purchasers, and in the other five cases to a committee or a co-operative society, to be formed by all the flat-owners, to hold the same on behalf of the flat owners. This is in contradiction to the undertaking to transfer to the individual purchasers. But the contract must be construed as a whole, and if the transfer to a committee enables the Plaintiff and the Defendants to effect their object, then I see no reason why this undertaking should not be held good. On examination, however, it is clear that it is legally unworkable . . .

For these reasons I come to the conclusion that all the six agreements I have considered so far are legally incapable of performance "ab initio" and are, therefore, void. p. 33, l. 24.

20 As regards the agreements in cases 20 and 21, these are solely for the sale of a flat, without any mention of the sale of the land, although there is a reference in clause 12 of the former and clause 7 of the latter to a transfer of the building at the Land Registry into the names of the purchasers. Both these agreements are clearly void.

Finally, as regards the agreement in case 22 . . . I am of the opinion that this agreement is also for the same of a flat. p. 33, l. 47.

30 All the flat-owners are willing to take Musha shares in the plot and building instead of taking specific flats, and Mr. Eliash, relying on certain English authorities, contended that they were entitled to enforce a lesser performance of their agreements. But clearly if there are no agreements there can be no performance of them, lesser or otherwise. The same objection is valid as regards the claim of an equitable lien. An equitable lien for the return of purchase money can only arise where there is an enforceable contract . . .

Judgment is, therefore, given for the Plaintiff in all nine consolidated actions, and declarations will issue as prayed. p. 34, l. 21.

14. The Appellants appealed to the Supreme Court, sitting as a Court of Appeal, Jerusalem. The appeals were consolidated and were 40 heard by Mr. Justice Shaw who gave judgment on the 26th September, 1945 dismissing the appeals. In giving judgment he said:— p. 40.

Now it is I think, abundantly clear that in each case the Appellant has agreed to purchase a flat. That was the principal object of the agreement in each instance, and the price was fixed on the understanding that the purchaser was to have a flat which would be his property, and which he could dispose of as he pleased. In no case would the purchaser have been willing to pay the price fixed if he were only to have a musha'a share in the house and land with no certainty of getting a flat to live in. p. 47, l. 13.

If the purchaser had tried to obtain registration of a flat he would have been told by the Registrar of Lands that such registration was not allowed by law . . .

p. 47, l. 32.

The purchaser told the trial Court, and Mr. Eliash has made it equally clear to this Court, that the purchasers are quite willing to take Musha'a shares in the land and building without any stipulation as to specific flats. But it is not the case here that the vendor agreed to sell and the purchasers to take, collectively undivided shares in the whole of the land. There are nine separate agreements, made on different dates and not in identical terms, and it is not possible 10 now to convert them into one collective agreement . . .

p. 47, l. 49.

There is no suggestion that the parties did not know that they could not obtain registration of specific flats. If they had thought that they could they would have drafted the contracts differently. The principal object in each instance was to obtain possession of a flat and such a flat could not legally be transferred without the land beneath it. There was, at best an intention to effect a registration which would not disclose the real transaction, namely, the transfer of a flat.

With regard to the agreements which visualised a possible 20 transfer to persons who would, in effect, be trustees, the learned trial Judge found that no committee was ever formed with the consent of all the flat-owners, and that it is a finding of fact which I find no ground for upsetting. Furthermore, it is agreed that such persons could not, as the law stands at present in Palestine, have been registered as trustees, and I am not impressed by Mr. Eliash's argument that although they could not be registered as trustees they could in every other respect, be treated as such. It was held in High Court 77/31 (1 Palestine Law Reports, page 735) that the doctrine of private trusts has not been introduced into the law of 30 Palestine. In my judgment if such persons had asked for registration they could only have done so as nominees, in which case section 5 of the Land (Transfer) Ordinance (Chapter 81) would have required registration to be made in the name of the principals. But here again I would observe that it is not a case of one agreement to which all of the purchasers are parties but of nine separate agreements. The Appellants cannot, by combining together now, convert nine separate agreements, which were intended to put them into possession of specific flats, into one collective agreement for the transfer of undivided shares in land or into nine identical agreements 40 to each of which each of the Appellants has given his or her consent.

Certain of the agreements speak of a co-operative society, but no such society was ever formed . . .

p. 48, l. 40.

I also agree with the trial Judge that an equitable lien for the return of purchase money can only arise when there was an enforceable contract.

In the result, therefore, I find that these nine contracts are all illegal and void.

15. The Appellants submit that the Judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 26th September, 1945 p. 40. is wrong and should be reversed for the following among other

REASONS.

- (1) Because the agreements in suit are not void.
- (2) Because the said agreements had been partly performed and the Appellants were entitled to have them specifically performed.
- 10 (3) Because the Appellants were all willing to take Musha's shares in the land and building without any stipulation as to specific flats.
- (4) Because all the Appellants were agreed as to how the building should be divided among them and had contracted with the Respondent with full knowledge of the arrangements made with the other Appellants.
- (5) Because under Article 46 of the Palestine Order-in-Council the English law of Trusts forms part of the law of Palestine.
- 20 (6) Because each of the Appellants had an equitable interest in the property in question.
- (7) Because even if, contrary to the Appellants' submission, there was difficulty in giving effect to the literal wording of the agreements in suit it was the duty of the Court under the Mejlle and the Ottoman Code of Civil Procedure to interpret them so as to carry out the intention of the parties.
- (8) Because the intention of the parties was not illegal.
- (9) Because the Judgments of the Land Court and of the Supreme Court are wrong and ought to be reversed.

30

PHINEAS QUASS.

T. L. WILSON & Co.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the Appellants.

In the Privy Council.

ON APPEAL FROM THE SUPREME
COURT, SITTING AS A COURT OF
APPEAL, JERUSALEM.

BETWEEN

BRACHA BEN-YA'ACOV
and Others - - *Appellants*

AND

JOSEPH FORER *Respondent.*

CASE FOR THE APPELLANTS.

Lodged 31/3/48

T. L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the Appellants.