Privy Council Appeal No. 20 of 1991

Nellia Vitalis *Appellant*

v.

Wallace Domingo Sanchez *Respondent*

FROM

THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (SAINT LUCIA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 3rd April 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Mustill
Lord Lloyd of Berwick
Lord Hoffmann

*[Delivered by **Lord Hoffmann**]*

This is a dispute over the ownership of some 78 acres of land known as the Anse Cochon estate on the island of St. Lucia. In 1849 one Louis Common sold it to seven brothers and sisters, members of the Vitalis family, for £80 sterling. For more than a century it remained in the family. It was, and remains today, a tract of wild coast land on which sporadic attempts to grow coconuts, bananas and limes have left little mark. Then on 27th July 1959 Vitalis Vitalis, a descendant of one of the original purchasers, as owner of an undivided half share and claiming to act with the consent of the other heirs, agreed to sell the estate to the respondent Wallace Sanchez for $2,400 and received a part payment of $960. Three weeks later, on 14th August 1959, before anything more had been done to implement the sale, Vitalis Vitalis died. It appeared almost at once that Evans Vitalis, one of the co-owners on whose behalf Vitalis Vitalis had purported to act, who owned a one-sixth share, had no wish to sell. Furthermore, three other co-owners were not living on the island

and were unable personally to execute a deed of sale. But the remaining four co-owners went before a notary and on 5th December 1959 executed a deed of sale purporting to convey a five-sixths share in the estate to Wallace Sanchez for $2,000 of which $960 was acknowledged as having been already paid. The deed was also executed on behalf of the three absent co-owners by relatives who added after each of their names the words "who promises to obtain a ratification hereof *se portant fort*" - an expression of which their Lordships will in due course have to consider the effect. The persons by whom or on whose behalf the deed was executed were expressed to convey both their own interests and as heirs at law of Vitalis Vitalis. On the strength of this deed, Wallace Sanchez paid over the balance of the purchase price and went into possession. In 1970 he acquired the remaining one-sixth share of Evans Vitalis for $26,000. He remained in possession until his recent death.

The fact that the vendors in the 1959 deed of sale purported to convey as heirs at law of Vitalis Vitalis suggests that he was treated as having died intestate. It is true that until his death, testamentary succession had been virtually unknown in the Vitalis family. He and all the other co-owners had acquired their shares on intestacy. But Vitalis Vitalis was an exception. He left a will under which he appointed his widow Marie Vitalis sole executrix and left a quarter share in the Anse Cochon estate to the appellant, his daughter Nellia Vitalis. On 16th April 1960, some four months after the execution of the deed of sale, it was admitted to probate. This meant that upon his death his share in the Anse Cochon estate vested in his widow as personal representative. The co-owners who purported to convey as his heirs at law had no title to his share in the estate.

Despite this defect in the deed of sale, Marie and Nellia Vitalis appear to have thought that his share in the estate had been sold. On 13th August 1960 Marie Vitalis as executrix executed a vesting deed by which she assented to the vesting in Nellia of two small parcels of land which had also been left to her in the will. But there was no mention of the Anse Cochon estate. It was not until after 1984 that Nellia Vitalis claimed that the deed of sale had been ineffective to convey to Wallace Sanchez her father's share in the estate. By this time the value of the land had been greatly increased by the possibility of development for tourism. Mr. Briggs Q.C., who appeared for the appellant, told their Lordships that it was now estimated to be worth $1,500,000 in Eastern Caribbean currency.

The appellant appears to have made her claim as a result of the passing of the Land Registration Act 1984, which introduced a register of land to replace the previous system of conveyancing by registration of deeds. To facilitate the compilation of the register,

the Land Adjudication Act 1984 provided for the determination of disputes over title to land by an Adjudication Officer with a right of appeal to the Land Adjudication Tribunal. The appellant claimed before the Adjudication Officer that she was entitled to the land both as devisee of Vitalis Vitalis and by prescription arising from continuous possession. The Adjudication Officer found as facts, first, that Wallace Sanchez and not the appellant had been in effective possession of the estate since 1959 and secondly, that Wallace Sanchez had taken in good faith in reliance on the deed of sale. These findings of fact were affirmed by the Land Adjudication Tribunal and the Court of Appeal and have not been challenged before their Lordships' Board. The appellant's claim to title was rejected by the Adjudication Officer and her appeal to the Tribunal was dismissed. A further appeal to the Court of Appeal of the Eastern Caribbean Supreme Court (Bishop, A.C.J., Moe J.A. and Joseph A.J.A.) was dismissed on 28th May 1990.

Since the judgment of the Court of Appeal, three material events have happened. First, on 5th February 1991 Her Majesty in Council gave the appellant special leave to appeal against the order of the Court of Appeal. Secondly, on 6th July 1993 the appellant obtained a grant of administration *de bonis non* to her father's estate and now claims as his personal representative the whole of his share of the Anse Cochon estate. Thirdly, Wallace Sanchez has died. There has been no formal order to carry on proceedings against his personal representatives but they were by consent represented before their Lordships' Board by Mr. Michael Gordon of the St. Lucia Bar.

It is not disputed that the deed of sale of 5th December 1959 was ineffective in itself to convey the share of the late Vitalis Vitalis. None of the persons who executed that deed had any right to deal with his property. But the Adjudication Officer, the Tribunal and the Court of Appeal have been unanimous in holding that Wallace Sanchez acquired ownership by prescription under Article 2112 of the Code:-

> "He who acquires a corporeal immovable in good faith under a written title prescribes the ownership thereof and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of such title during 10 years."

It is important in applying this provision to have regard to the definition of "title" in Article 1(61):-

> "The word 'title' is used with reference to property to denote either the act or contract upon which the right to such property is founded, or the document which is the

> principal evidence of such act or contract, the meaning applicable in any particular case being determined by the context."

This meaning contrasts with the normal meanings of title in English law, namely the abstract notion of ownership or a lesser right in property or the whole of the facts (including documents) relied upon to establish such a right. "Title" in the St. Lucia Civil Code has a somewhat narrower meaning, namely the act or document upon which right to the property is immediately founded. In the case of a purchaser, it means the deed of sale between the vendor and himself, but does not include the earlier acts or deeds required to prove that the vendor had a title in the broader sense. The Court of Appeal therefore held that the deed of sale was a "written title" and that as there was now no challenge to the good faith of Wallace Sanchez or his possession of the land for a period well in excess of ten years, he had acquired ownership by prescription.

The appellant's challenge to this finding is based upon Article 2115:-

> "A title which is null by reason of informality cannot serve as a ground for prescription by ten years."

Before the Court of Appeal it was argued that the deed of sale was "null by reason of informality" because the purported vendors had no title. The Court of Appeal held that this was precisely the situation in which Article 2112 was intended to apply. Its purpose was to enable a relatively short period of prescription to cure, in favour of a purchaser in good faith, a defect arising from the lack of title (in the broader sense) of his vendor. The learned judges of the Court of Appeal explained that the words "by reason of informality" had to be construed in the context of the St. Lucia system for the registration of real rights which is contained in the Eighteenth Book of the Civil Code. The first Article of Chapter First ("General Provisions") states the general rule:-

> "1967. Registration gives effect to real rights and establishes their order of priority ..."

Chapter Second is headed "Rules Particular to Different Titles by which Real Rights are Acquired" and contains special rules for title to immovables:-

> "1980. All acts *inter vivos* conveying the ownership, *nuda proprietas* or usufruct of an immovable must be registered at length or by an abstract hereinafter called a memorial.
>
> In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the

> same property or received an onerous gift of it from the same vendor or donor for a valuable consideration and whose title is registered ...
>
> The transmission of the ownership, *nuda proprietas* or usufruct of an immovable by succession must be registered by means of a declaration setting forth the name of the heir, his degree of relationship to the deceased, the name of the latter, the date of his death, and the designation of the immovable.
>
> Provided always that all acts *inter vivos* purporting to convey the ownership, *nuda proprietas* or usufruct of an immovable shall be null and void, unless prior to the execution of such acts the title of the person or persons purporting to make such conveyance shall have been registered."

Chapter Fourth is "The Mode and Formalities of Registration." It explains the difference between registration "at length" (transcribing the whole document onto the register) and by memorial (a summary description of the real rights which the party interested wishes to preserve.) By Article 2015 a notarial deed may be registered at length and Articles 2017 to 2027 prescribe the formalities for the registration of memorials.

So Bishop, A.C.J. said that "informality" in Article 2115 meant:-

> "Not in keeping with any one or more of the formalities of registration as provided for by the relevant part of the Code."

In the later case of *Joseph St. Rose v. Lafitte* (unreported judgment delivered on 27th January 1992) the Court of Appeal confirmed this construction of Article 2115. Sir Vincent Floissac C.J. said:-

> "I therefore hold that a subsequent purchaser's title is null by reason of informality within the meaning of Article 2115 of the Civil Code of St. Lucia, if the title is void not merely because the vendor had no right to transfer ownership of the land to the subsequent purchaser but because, by reason of its nature or form, the title was legally incapable of transferring such ownership."

Remembering always that the learned Chief Justice is using the word "title" as defined in the Code, namely as meaning the deed of sale or other act or instrument under which the purchaser holds, their Lordships would respectfully adopt this statement of the law.

Before their Lordships' Board Mr. Briggs Q.C., for the appellant, accepted the statement of principle in *Joseph St. Rose v. Lafitte*. He did not contend that the deed of sale was "null by reason of informality" merely because the vendors had no title. Instead he submitted that it suffered from informality on two narrower grounds, one of which was taken in the court below and one of which was not.

In order to explain the first of these grounds, their Lordships must advert once more to the deed of sale. It purported, as has been mentioned, to convey the interests of seven members of the Vitalis family, both in their own right and as heirs at law of Vitalis Vitalis. But only four actually signed the document. The other three were absent from the island at the time of execution and their relatives signed on their behalf, adding after their own names the words "who promises to obtain a ratification hereof *se portant fort*".

The "*promesse de porte-fort*" is derived from the *Code Napoléon*, on which the Civil Code of St. Lucia is ultimately based. (An intermediary source was the Civil Code of Quebec, then Lower Canada, as adopted in 1866.) Article 1119 of the *Code Napoléon* says:-

> "On ne peut en général s'engager ni stipuler en son propre nom que pour soi-même."

But Article 1120 says:-

> "Néanmoins, on peut se porter fort pour un tiers, en promettant le fait de celui-ci; sauf l'indemnité contre celui qui s'est porté fort ou qui a promis de faire ratifier si le tiers refuse de tenir l'engagement."

In the Civil Code of St. Lucia, the effect of these Articles is contained in Article 961:-

> "A person cannot, by a contract in his own name, bind anyone but himself and his heirs and legal representatives; but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated."

There are similar provisions in Article 1028 of the original 1866 Code of Quebec (now Article 1443 of the 1991 Civil Code) and Article 1889 of the 1870 Civil Code of Louisiana (now Article 1977). Commentators on the Codes make it clear that the *porte-fort* does not purport to bind the principal. Until he has ratified the transaction, the only person bound is the *porte-fort* himself, who will be liable in damages if the principal fails to ratify or perform.

Mr. Briggs says that, this being the nature of the *promesse de porte-fort*, the deed of sale was formally defective for want of execution by all necessary parties. The signatures of the agents *se portant fort* did not purport to be on behalf of their principals and could not in law bind them.

Their Lordships consider that this submission is unsound and that, if accepted, it would destroy the commercial purpose of the *promesse de porte-fort*. This is, in French law, to enable a formally valid property transaction to be concluded despite the absence or incapacity of a necessary party. The following passage from Planiol and Ripert, *Traité Pratique de Droit Civil Français* (2nd edn. 1952, Volume VI, page 53) makes this clear:-

> "La promesse de porte-fort est en général une clause accessoire d'une opération, telle qu'un partage, une vente ou un louage de biens indivis, intéressant plusieurs personnes, parmi lesquelles il y a un absent (disparu ou non présent) ou un incapable. Afin d'éviter les formalités édictées pour la vente des biens de mineurs et le partage des successions qui leur échoient, les tuteurs y procèdent à l'amiable avec les cocontractants et cohéritiers majeurs, et ils se portent garants, seuls ou avec l'engagement mutuel des autres parties, de la ratification ultérieure par l'incapable et, éventuellement, ses héritiers. L'interessé restant libre de donner ou de refuser sa ratification, la validité du procédé du porte-fort ne soulève aucune objection."

The fact that the deed executed by the *porte-fort* is complete as to form is shown by the fact that no further formality is prescribed for ratification. As Planiol and Ripert, *op. cit.*, say at page 57:-

> "La ratification de l'acte fait par le porte-fort n'est soumise ni aux regles de l'article 1338 concernant la confirmation des actes nuls, ni à aucune autre forme spéciale, à moins qu'il ne s'agisse d'un acte ou contrat solennel; elle peut même etre tacite pourvu qu'elle soit certaine."

It follows that in their Lordships' opinion the execution by agents *se portant fort* did not make the deed of sale "null by reason of informality" within the meaning of Article 2115.

Mr. Briggs's alternative submission was that the deed of sale was formally defective because the title of the heirs at law of Vitalis Vitalis had not been registered in accordance with the proviso to Article 1980. This point was not taken in the court below and their Lordships can deal with it quite shortly. The proviso, it will be recalled, says that:-

> "... all acts *inter vivos* purporting to convey the ownership...of an immovable shall be null and void unless prior to the execution of such acts the title of the person or persons purporting to make such conveyance shall have been registered."

This provision reflects the general principle embodied in Article 1967, namely that "registration gives effect to real rights". But the nullity of the deed is not in their Lordships' opinion "by reason of informality". It is for lack of a proper registered title to convey. In this case the deed of sale was ineffective for the even better reason that the heirs at law had no title whatever, whether on or off the register. But this, as *Joseph St. Rose v. Lafitte* decided and Mr. Briggs accepts, did not make the deed of sale null by reason of informality. It would in their Lordships' view be illogical if Article 2112 did not apply to a purchase from a vendor with an unregistered title but did apply to a purchase from a vendor with no title at all.

Finally their Lordships should mention an argument submitted for the respondent in reliance on the agreement for sale of 27th July 1959. This was evidenced in writing by the terms of a receipt of that date for the part payment of $960 signed by Vitalis Vitalis. Mr. Gordon said even without Article 2112, Vitalis Vitalis could not in the face of that agreement have brought an action for the recovery of the land from Wallace Sanchez. So for example the parties for whom there had been execution *se portant fort* could within the ten year period of Article 2112 have refused to ratify the deed of sale and asserted title to their undivided shares. But Vitalis Vitalis, having unquestionably agreed to sell his share, could not. It followed that Nellia Vitalis, who claimed through Vitalis Vitalis, could be in no better position. Mr. Briggs countered that the 1959 contract was now long since statute barred. But that does not prevent Wallace Sanchez or his estate from relying upon it as a defence to a claim for possession and their Lordships think that there is considerable force in Mr. Gordon's argument. But in view of the conclusions to which their Lordships have come on the operation of Article 2112, it is unnecessary to decide the point. Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.