IBRAHIM *v.* SOLOMON and SOLOMON (trading as A. AND E. SOLOMON)

SUPREME COURT (Luke, Ag.J.): October 14th, 1953
(Civil Case No. 330/52)

[1] **Contract—form—note or memorandum in writing—part performance—requisites:** Where a contract is one required by the Statute of Frauds to be in writing and the defendant pleads that there is no note or memorandum in writing, the plaintiff, to take the case out of the Statute, must prove by proper parol evidence the existence of a contract between the parties and must show acts of part performance which are (a) not only referable to the contract set up by him but also referable to no other title, (b) such as to render it a fraud for the defendant to take advantage of the contract not being in writing, and (c) referable to a contract enforceable by the court in its own right; and therefore in an action for the specific enforcement of a verbal lease, mere payment of rent by the plaintiff is not sufficient part performance to take the agreement out of the Statute, but the acts of the parties must change their relative positions as to the subject-matter of the contract (page 335, lines 3–9; page 336, line 13—page 337, line 32).

[2] **Contract—specific performance—application of decree—execution of lease—payment of rent not sufficient part performance to enable enforcement of verbal lease:** See [1] above.

[3] **Contract—specific performance—matters to be proved—existence of contract and acts of part performance where contract required to be in writing:** See [1] above.

[4] **Land Law—conveyancing—leases—part performance—payment of rent not sufficient part performance to enable specific performance of verbal lease:** See [1] above.

[5] **Land Law—conveyancing—written agreement or memorandum—part performance—requisites:** See [1] above.

The plaintiff brought an action against the defendants claiming specific performance of a lease.

The plaintiff and the defendants entered into a verbal agreement whereby the plaintiff, as tenant from year to year of certain premises owned by the defendants, agreed to give up possession of the premises, so that they could be rebuilt, on the understanding that he would be granted a lease of part of the rebuilt premises on the same terms as granted to another tenant. He also undertook to forgo all claims in respect of expenditure made by him on improvements to the premises. The defendants asked the plaintiff, in the presence of another person, to confirm the arrangement, and he did

so. The plaintiff then paid a year's rent in advance but was not granted a lease on the same terms as the other person referred to. The plaintiff instituted the present proceedings for the specific enforcement of the confirmed verbal agreement. The defendant counterclaimed for specific performance in respect of a lease on different terms.

The Supreme Court considered whether there had been sufficient acts of part performance on which it could decree specific performance of either alleged agreement.

Cases referred to:

(1) *Chaproniere* v. *Lambert*, [1917] 2 Ch. 356; [1916–1917] All E.R. Rep. 1089, *dicta* of Swinfen Eady and Warrington, L.JJ. applied.

(2) *Thursby* v. *Eccles* (1900), 70 L.J.K.B. 91; 17 T.L.R. 130, *dictum* of Bigham, J. applied.

C.B. Rogers-Wright for the plaintiff;
R.B. Marke for the defendants.

LUKE, Ag.J.:

This is an action brought by the plaintiff claiming a decree of specific performance of a verbal agreement made by the defendants with him in April 1951, and confirmed by them in November 1951, for the lease of the basement and first floor of premises at No. 14 Little East Street, Freetown.

For a clearer and better understanding of the plaintiff's case it will be necessary to quote certain paragraphs in his statement of claim:

> "1. By an agreement made verbally in April 1951 the defendants agreed that if the plaintiff should then give up possession of certain shop premises at No. 14 Little East Street, Freetown, in the Colony of Sierra Leone, of which the plaintiff was then a tenant from year to year, and that the plaintiff should forgo all his claims in respect of expenditures made by him for improvements to the said premises and which were to be paid by the defendants, the defendants would on the completion of the building which the defendants then contemplated erecting on the said land grant a lease to the plaintiff of the basement and first floor of the new building for a term of five years at the yearly rent of £400 payable quarterly in advance commencing from the day the plaintiff takes possession.

2. In pursuance of the said agreement and as part performance thereof the plaintiff vacated the said premises at No. 14 Little East Street aforesaid on April 20th, 1951, and did forgo all his claims as aforesaid.

3. In or about November 1951 the defendants verbally confirmed their agreement to grant to the plaintiff a lease of the basement and first floor of the premises at No. 14 Little East Street aforesaid as mentioned in para. 1 hereof and requested the plaintiff to advance to them on loan the sum of £400 free of interest to enable the defendants to expedite the completion of the building which was then in construction, the said loan to be repaid by deductions from rent in respect of the premises as and when they fell due after the plaintiff should have taken possession of the said premises. The plaintiff made the said advance to the defendants."

The defence is a denial of the allegations contained in the plaintiff's statement of claim and that the defendants (hereinafter referred to as "the defendant") told the plaintiff that he (the plaintiff) would be considered as a tenant for the said premises when completed for a period of two years only; that the plaintiff appealed to a Mr. Rakab to intercede on his behalf when the defendant confirmed that he would let the premises to him for a period of two years at a rent of £400 per annum without any deductions for rates; that in the presence of Mr. Rakab the plaintiff agreed to take the said premises for two years, and in pursuance thereof the plaintiff handed £400 to Rakab who in turn paid it to the defendant as one year's rent for the premises when completed. The defendant further pleaded the Statute of Frauds and counterclaimed for enforcing the said agreement of two years which he has alleged.

The plaintiff in his reply joined issue with the defendant in the defence, and as regards the counterclaim also pleaded the Statute of Frauds.

What are the facts briefly in this case so far as the evidence goes? The plaintiff was tenant of the premises in question under a lease. Under this lease he had three years certain which ran from January 1st, 1947, paying rent of £72 per annum quarterly. During the period of the tenancy the defendant bought the premises, and the plaintiff continued in possession as his tenancy under the lease did not expire till December 1949. After the expiration of the period in the lease the plaintiff continued to reside in the premises and paid rent of £21 to the defendant as acknowledged by him in

Exhibit B, dated January 11th, 1951, thereby constituting the plaintiff a yearly tenant who held over. On January 24th, 1951, the defendant through his solicitor served the plaintiff with notice determining the tenancy to take effect on June 30th, 1951. By that notice the plaintiff could not be ejected from the said premises if he failed to leave it on the expiration of the said notice.

Just then the defendant started building and wanted all the premises vacated. There were four tenants in these premises, three of whom had left, leaving the plaintiff who refused to move. The defendant, realising his predicament, started to entreat with the plaintiff to move from the premises whilst it was being built and to return on its completion, but he (the plaintiff) was adamant. The plaintiff told the defendant that he would be prepared to leave if the defendant gave him an agreement. The defendant then told him that he would give him the first offer at the same terms as he gave to the tenant (Sasso) in the neighbouring premises and who had already removed. When the plaintiff was doubtful of the defendant's word, the defendant called the plaintiff's wife and his neighbours and told them the same thing. The defendant also secured the premises where the plaintiff moved to, and during the time building was under construction the defendant sent Saffu Deen to the plaintiff on two occasions to get him to relinquish his right or interest in these premises. On the first occasion he offered him £50 and on the second occasion he increased it to £100. It is significant that Saffu Deen was not cross-examined on this topic. In November 1951, the defendant called at No. 1 East Street where he met Mahmoud Saffu Deen. In the presence of Saffu Deen the defendant asked the plaintiff if he was ready to confirm the same arrangement for the premises as that under which Sasso had paid £400 a year and he (the plaintiff) replied that he was. He then told him to pay £400 a year within a week. In consequence of this request the plaintiff paid £400 to the defendant through Rakab, for which he obtained Exhibit D. The plaintiff further stated that the premises have been completed, Sasso has entered into possession of his own portion under a lease Exhibit J, but that he has not been granted the same terms. The defendant on the other hand in his evidence denies that there was this verbal agreement and goes further to say that even if it were so, no decree for specific performance can be granted as there is a non-compliance with the Statute of Frauds, which requires that there should be an agreement in writing or a memorandum or note in writing of the agreement. He further said

that the agreement which he has with the plaintiff is one for two years for which he paid £400 as a year's rent.

Specific performance is a discretionary remedy which is exercised on well-settled principles. For a plaintiff to succeed in such an action there must be (i) proof of a contract between the parties and (ii) acts of part performance, if the contract is not in writing, which are exclusively referable to the contract set up by the plaintiff, *i.e.*, such as could be done with no other view or design than to perform the agreement.

How can we apply this principle to the case in question? The plaintiff gave evidence that the verbal agreement made in April 1951 by the defendant was: "I shall give you the first offer on the same terms as I gave to Sasso who is in the neighbouring premises and has already moved." This was supported by the evidence of the plaintiff's wife and Saffa Deen and also Exhibit F, a letter written by the plaintiff in reply to the defendant's letter Exhibit E (which referred to the period of five years). Exhibit F, dated August 9th, 1952, was written after the plaintiff had become aware of the terms of Sasso's lease which was executed on February 28th, 1952, and is marked Exhibit J. That there was an existing agreement between the plaintiff and the defendant with regard to these premises is confirmed by the defendant sending Saffu Deen on those two occasions during the time when building was under construction to get him to relinquish his rights by offering him money payments. The plaintiff and Saffu Deen also gave evidence that in November 1951 the defendant called on the plaintiff when he met him (Saffu Deen), and the defendant then told the plaintiff that if he wanted to confirm the agreement for the premises he was to pay £400 as Sasso had done within a week, which the plaintiff did. There is a variance in the versions as to this payment between the plaintiff's and the defendant's, but the surrounding events show that the plaintiff's version is the more likely one.

Having thus ascertained there was a contract which was not evidenced in writing, what were the acts of part performance rendered by the plaintiff which are referable to this contract? First of all, the plaintiff was in possession of these premises and had a vested interest in them. The defendant could not have removed him from them on April 26th, 1951 when the plaintiff left had he not made this agreement with him. According to Exhibit C, which was not a valid notice, the period of notice was until June 6th, 1951. The plaintiff's payment of the sum of £400 as a year's rent was to

qualify him to get terms as Sasso had. In answer to a question by the court why the defendant was unwilling to grant the plaintiff the same terms as Sasso had, the defendant said because No. 14 was larger than No. 12 and that the defendant contemplated coming to reside there. The court visited the *locus in quo* before the addresses and it was quite clear that the defendant could not be very serious in that reason as both premises were more or less the same.

This is a case where the court, when the circumstances show that it should grant specific performance, does grant it, and the authority for that is the case of *Chaproniere* v. *Lambert* (1), where Swinfen Eady, L.J. stated the following ([1917] 2 Ch. at 359; [1916–1917] All E.R. Rep. at 1090–1091):

> "It must be remembered that the ground upon which a Court of Equity enforces specific performance of a contract affecting land is that the person to be charged is charged, not upon the contract itself, but upon the equities arising out of the changed position caused by the acts of the parties done in execution of the contract. Thus in *Maddison* v. *Alderson*, where the whole law on the subject was dealt with fully, Lord Selborne said: 'In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.' And later on: 'It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.'"

It is clear that the mere payment of money does not change the relative positions of the parties though it may give rise to an action to recover it.

In the judgment of Warrington, L.J., which sets out essential elements required to establish the part performance which will exclude the Statute, it is stated, quoting from *Fry on Specific Performance*, 5th ed., at 290 (1911), ([1917] 2 Ch. at 361; [1916–1917] All E.R. Rep. at 1092):

> "'In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing;

3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance.' Every one of these four conditions is essential to enable the act relied on to be treated as part performance. It is not sufficient to prove acts referable only to the contract alleged and no other. They must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing."

In this case the contract relied on is not only referable to the acts of part performance, but also to allow the Statute to operate will amount to nothing more than a particular case of fraud. The defendant could not have got possession of these premises when he had it on April 26th, 1951. The plaintiff has led sufficient evidence to prove that he is entitled to a decree of specific performance of this verbal contract on the same terms as Exhibit J, and I so decree.

The defendant has counterclaimed in his defence for a decree of specific performance of an agreement between himself and the plaintiff for two years. The defendant in his evidence said he received £400 from Rakab after he had agreed with Rakab to let premises to the plaintiff for two years. Apart from this evidence there is no note or memorandum of this agreement, and as the plaintiff in his reply and defence has joined issue and pleaded the Statute of Frauds the defendant must show some acts of part performance to take the case out of the Statute. There is evidence that the plaintiff has not yet been in possession. Payment of rent alone is not sufficient to take it out: see the case of *Thursby* v. *Eccles* (2), where Bigham, J., after stating the facts, continued (70 L.J.K.B. at 91; 17 T.L.R. at 131): "The contract was certainly one concerning an interest in land, and was therefore within section 4 of the Statute of Frauds. I am of opinion that the payment of the rent does not take the contract out of the Statute of Frauds."

This counterclaim, therefore, under the circumstances, is dismissed with costs. With regard to the plaintiff's claim I decree specific performance on the terms of Exhibit J with costs to be taxed.

Judgment for the plaintiff.