

**ASANTE v. COMPAGNIE FRANCAISE DE L'AFRIQUE OCCIDENTALE**  
**JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**  
**28<sup>TH</sup> FEBRUARY, 1961**

**CORAM: LORD REID, LORD TUCKER AND LORD MORRIS OF BORTH-Y-GEST**

*Sale of goods / Proof of ownership / Attachment / Whether innocent purchaser / Whether alienation in fraud of creditors.*

**CASE SUMMARY**

Abire bought goods from C.F.A.O. He also leased certain property from them, including premises known as the Coronation Bar. On the 5th April, 1954, the appellant became a partner in the Coronation Bar with Abire, Manu and Awuah (agreement A.) On the 1st June, 1954, the appellant bought out his partners and became the sole owner of the business and its goods (agreement B.) Neither of the agreements was then stamped. There was a clause in Abire's lease which precluded him from assigning or sub-letting etc., but Abire did not inform C.F.A.O., the respondents herein, of the transaction. The appellant paid the purchase price to Abire and received a receipt dated the 5th November, 1954. On the 11th November, Awuah and Manu sued the appellant in the local court for £G100, which per agreement B was to have been paid to them before the 1st July, 1954. Abire subsequently admitted that the appellant had in fact paid the £G100 to him and the action was discontinued.

In December, 1954, C.F.A.O. issued a writ against Abire claiming money due for goods supplied. They sought and obtained attachment of the Coronation Bar and its contents. The appellant applied unsuccessfully for discharge of the order of interim attachment. He then brought a successful action before Quashie-Idun, J., claiming as an innocent purchaser, an order releasing the Coronation Bar and its contents from attachment and substantial damages.

The Court of Appeal reversed this judgment holding that the alleged sale to the appellant was to his knowledge in fraud of Abire's creditors and a fictitious transaction. It was therefore void by the provisions of the Statute of Fraudulent Conveyances, 1571, (13 Eliz. 1, c.5). On appeal to the Privy Council,

Held:

(1) it was for the appellant to prove that he owned the goods. On the evidence in this case, he discharged the burden;

(2) Abire's failures as a tenant to apply for permission to sublet could not of themselves refute the testimony of the appellant;

(3) the learned trial judge, who had advantages possessed neither by the Court of Appeal, nor by their Lordships, concluded that the appellant owned the goods which had been attached and that he was an innocent purchaser for value. Upon a consideration of the documents produced, and as a result of careful reasoning and of drawing legitimate inferences from the ascertained facts, this conclusion cannot be shown to be erroneous. The Court of Appeal was therefore not entitled to set aside the findings of the trial judge, and replace them with their own;

(4) if a party is not cross-examined in respect of an existing fact, his failure to explain that fact ought not be held against him. As the appellant was not cross-examined as to why the documents he tendered, (agreements A and B) had not been stamped, nor why on allegedly purchasing the business he had not taken out a spirit licence in his name, nor indeed about the receipts for rents and as to the state of his knowledge regarding the terms of Abire's tenancy, it is unfair to infer from the circumstances that the alleged purchase was fictitious, or that appellant deliberately kept the purchase secret with a view to assisting Abire to defraud his creditors.

Judgment of the Court of Appeal reversed.

#### NATURE OF PROCEEDINGS

APPEAL (No. 33 of 1959) from the judgment of the Court of Appeal reported at (1956) 2 W.A.L.R. 177, reversing the decision of Quashie-Idun, J., on the 25th October, 1955, in the Divisional Court, Ashanti Judicial Division, in an action claiming release of goods from attachment and damages.

#### JUDGMENT OF LORD MORRIS

Lord Morris delivered the judgment of their Lordships. [His Lordship referred to the facts and continued:] The evidence adduced at the trial by the appellant was to the effect that the Coronation Bar and its contents had belonged to three people, viz., Abire, Manu, and Awuah: that he became a partner with them on the terms of an agreement (agreement A) of the 5th April, 1954; that he later bought them out (thereby becoming sole owner) on the terms of an agreement (agreement B) of the 1st June 1954; and that he had paid all the purchase price as was acknowledged by a receipt dated the 5th November, 1954: Evidence was given at the trial by the appellant himself and on his behalf by Abire, by Ama Adade (the mother of Awuah), by Harrison Tuburu, a police corporal and by Awuah. On behalf of the respondents evidence was given by Robert Christian Yeboah, their chief clerk.

The learned judge gave judgment on the 25th October, 1955. He held that the appellant had bought the business and was an innocent purchaser for value. In the course of his judgment he said:

"I have carefully considered the evidence of the plaintiff and of the other witnesses he has called to prove that he had bought the business before it was attached. I have considered the conduct of Abire in the whole transaction and I have come to the conclusion that whatever the conduct of Abire has been towards the defendants, I accept the evidence that the plaintiff bought the business and was an innocent purchaser for value. I am satisfied that after buying the business he made an application for the licence to be transferred into his own name. The transfer was not made before the attachment."

He awarded the appellant the sum of £G669 for loss of profits in respect of the period during which the business was attached.

The respondents appealed to the West African Court of Appeal. Leave was given to the respondents to adduce as further evidence (a) the notice of motion of the appellant (of the 26th January, 1955) for the discharge of the interim attachment order and the affidavit in support of it dated the 28th January, 1955, (b) the respondents' affidavit in opposition dated the 3rd February, 1955, and (c) the minutes of the court dated the 5th February, 1955. It would seem that the respondents intended to advance and did advance some contention based upon the fact that the appellant's claim had, before the trial of the action, already been brought before the learned judge (by way of motion and affidavit) upon the same set of facts and had been dismissed. It is sufficient to say that the respondents did not raise before their Lordships' Board any point to the effect that the claim of the appellant in the action was adversely affected by his failure in the application which he made before he commenced his action. It is also to be recorded that no issue as to the measure or quantum of the damages awarded by the learned trial judge has been raised before their Lordships.

The appeal was heard before Coussey, P., Korsah, C.J. and Verity, Ag. J.A. The appeal succeeded and the judgment in favour of the appellant was set aside. The reasons for judgment, which were concurred in by the other members of the court, were given by Coussey, P. The learned President referred to the two agreements (A and B) which have been mentioned above and also to the receipt (C) of the 5th November. He also referred to an action of the 11th November, 1954, which now calls for mention.

That was an action brought by Awuah and Manu against the appellant for the sum of £G100. The alleged agreement of the 1st June, 1954, (agreement B) was one between Abire, Awuah and Manu of the first part and the appellant of the second part and was for the sale to the appellant of "all the properties in the first party's Coronation Spirit and Chop Bar in house No. K.O.21/22, Kumasi, at £G837 6s. (Eight hundred and thirty-seven pound six shillings)." That agreement further recorded that the three persons had received £G500 from the appellant "out of the said amount of £G837 6s. 0d." and that the balance of £G337 6s. 0d. was to be paid to the three

persons by the appellant as to £G100 at the end of July, 1954, and as to £G237 6s. 0d. at the end of November, 1954.

The writ issued by Awuah and Manu against the appellant claimed £G100 from him "being all the properties in the Coronation Spirit Chop Bar belonging to the plaintiffs and bought by defendant and defendant promised payment on instalment basis as per Agreement in hand." That action never went to trial. Awuah said, when giving evidence in the present case: "Plaintiff informed Manu and me that he had paid an amount of £G100 to Abire. We sued him at native court. Later Abire admitted plaintiff had paid £G100 to him. We discontinued the action."

The alleged earlier agreement of the 5th April, 1954, (agreement A) certified that the four persons had "agreed to form as Company of making a chop bar and drinkables in the premises of K.O.21/22, Antoa Road, Kumasi as styled `Coronation Bar.'" It recorded that the appellant had already paid £G610 15s. 0d. "as a capital to the Company for the business" and it provided that any profit should be divided equally between the four persons and that "same shares shall be given to each person if any deficit arises in the business".

Both agreements A and B as well as the receipt C purported to contain words showing that licensed letter-writers, whose licence numbers were recorded, had been concerned with the documents and had been witness to the marks of Abire, Manu and the appellant and to the signature of Awuah. All four persons had been parties to agreements A and B. The receipt of the 5th November, was that of Abire alone. That receipt had been stamped on the 3rd January, 1955, which was within two months of the date it bore. The alleged agreements A and B were produced by the appellant when he gave evidence on the 16th June, 1955.

They had not then been stamped but they were admitted in evidence upon an undertaking to have them stamped and to pay the appropriate penalty: the markings on the documents of the commissioner of stamps dated the 28th December, 1955, show that the undertaking was honoured. Other documents which were before the learned trial judge and the Court of Appeal included alleged receipts for rent purporting to show that on the 16th June, 28th July, 30th August, 29th September, 30th October and the 31st November, 1954, Abire had received £G10 from the appellant in respect of store rent for each one of the respective months named.

The conclusion reached by the Court of Appeal was that the appellant's claim to have purchased the contents of the Coronation Bar was a deliberately fictitious claim. There was also an alternative conclusion to the effect that if there was a transaction of purchase it was embarked upon with intent to delay and hinder the creditors of Abire and (pursuant to the Statute 13 Elizabeth, c.5) should be deemed to be void as against the respondents.

In the course of his judgment the learned President said:

"A careful examination of the documents referred to and of the receipts for rents produced by the plaintiff-respondent satisfies me without going into further details, that these are all fictitious documents and badges of the fraud designed to shield the

debtor Abire who in fact owned the goods and to defeat his creditors of whom the defendant company were pressing their claim in December 1954, Abire being perfectly aware long before that date that proceedings against him were imminent."

In reference to the conduct of the appellant the learned President further said:

"In failing to stamp the Agreements, Exhibits `A' and `B', assuming that they were made on the dates they bear, which I do not believe, the plaintiff was keeping secret the purchase of the business. Exhibit `C' was clearly prepared and was accepted by the plaintiff in anticipation of a claim against and seizure of Abire's goods, while the action in the Kumasi Municipal Court was designed to cloak the fraud with a semblance of circumstantial truth, and was badly timed.

He also said:

"I think the transaction set up by the plaintiff in support of his claim is entirely fictitious to his knowledge and, if it is not fictitious, that it was embarked upon with intent to delay and hinder the creditors to Abire and had that effect and that it is therefore clearly fraudulent and void under the Statute of Elizabeth and with the principle of Twyne's case 3 Reps. 80b."

It will be seen that whereas the learned trial judge who saw and heard the appellant and the other witnesses came to the conclusion that the appellant did purchase as he alleged and was an innocent purchaser for value the Court of Appeal felt able to decide that he had fraudulently asserted an entirely fictitious transaction which he had sought to establish by a series of fictitious documents. Upon the appeal now brought to their Lordships' Board it becomes necessary to consider whether any critical testing of the validity of the alleged documents or any analysis of the evidence and the contentions of the parties warranted the conclusion of the Court of Appeal that the learned judge ought not to have held that the appellant had made out his claim and ought not to have held that he was an innocent purchaser for value.

There is no doubt that Awuah and Manu did sue the appellant on the 11th November, 1954. They sued him for £G100. They used the somewhat strange language "being all the properties in the Coronation Spirit and Chop Bar belonging to the plaintiffs and bought by defendant and defendant promised payment on instalment basis as per Agreement in hand." Awuah said in evidence that he, Abire, Manu and the appellant had entered into an agreement (B) in June, 1954. A provision of that agreement was that the appellant was to pay £G100 at the end of July, 1954. As stated above Awuah gave evidence that after he and Manu had brought the action against the appellant, Abire admitted that the appellant had paid the £G100 to him and so the action was discontinued.

The view of the Court of Appeal was that the action "was designed to cloak the fraud with a semblance of circumstantial truth and was badly timed". This involves that Awuah and Manu were on the 11th November, parties to a rather twisted move designed to lend verisimilitude to a fabricated story. If the suggestion is that Abire on that date was the sole owner of the Coronation Bar and its contents and that the concocted scheme was to seek to prove that the appellant had by purchase become

the owner, then the commencement of an action by which it was asserted that the appellant had not paid what as a purchaser he owed on an instalment basis, seems a very inapt way of seeking to create evidence to support a firm title in the appellant.

Furthermore it might be asked why Abire was not also made a plaintiff in that action if it was only begun as a move in a conspiracy to concoct some form of proof that he (Abire) was no longer the owner? If the plan in November was to invent a sale to the appellant and then to set about to produce spurious supporting documentary evidence it would seem probable that some reasonably clear and straight forward documents would be created.

As it is the figures in agreements A and B and in receipt C are not easy to reconcile: they can only be understood if the oral testimony is accepted. If the purpose to be achieved was to bring documents into existence which would create the delusion that the appellant had bought the Coronation Bar and its contents it would seem to require a strange and almost perverted subtlety to suppose that agreements A and B and receipt C were the best instruments for the purpose.

If the suggestion is that those three documents (agreements A and B and receipt C) were not in existence on the 11th November, 1954, but were later concocted with the respective earlier dates of the 5th April, the 1st June and the 5th November, ascribed to them, a measure of freakish inventiveness in the conspirators must be assumed. These suggestions involve possibilities which in the setting of this case do not appear to their Lordships to be probable. Furthermore it would be difficult to condemn any witnesses who were not questioned on these lines in cross-examination. If, as the Court of Appeal have held, the goods belonged to Abire and if the purpose was to defeat his creditors, it seems strangely elaborate and far-fetched to invent in the first place a partnership in four persons with a later buying-out by one of the interests of the other three.

Both the appellant and Abire gave evidence that agreements were made to the effect recorded in agreements A and B. Each of those agreements purports to record that a letter-writer of stated address and given licence number was a witness. That could have been a complete fabrication. If it was it was a somewhat daring one for the efforts of the alleged conspirators would have been destroyed if enquiry had revealed either that there were no such letter-writers and no such licence numbers or that such letter-writers existed but that their signatures had been forged. The possibility that there was some willing complicity of actual letter-writers in fraudulent conduct ought not to enter into the reckoning in the absence of evidence supporting so serious a suggestion. It is to be observed that the decision of the Court of Appeal makes it necessary to consider the varying possible manifestations of fraud because though there has been a finding of fraud there is no reasonably precise finding as to what it was and as to when and in what way it was effected.

A study of the documents and in particular of agreements A and B shows that some technical and legal terms are employed. It is clear that the parties to the alleged agreements (most of whom could not write) could not have drafted the agreements. If they were concocted and were not made on the dates which they bear then some knowledgeable person must have been willing to help in concocting them.

The terms of the writ issued by the respondents against Abire are not recorded in the proceedings. It was stated that the claim was for £G1,739 15s. 2d. and was for the balance due for goods supplied. The evidence did not, however, clearly establish what the goods were which were sold. The appellant said that after he bought the Coronation Bar he himself bought the drinkables for running the bar. Abire said that amongst the goods he bought from the respondents were iron sheets, cement and sugar, and he said that he did not sell in the Coronation Bar any of the goods he bought on credit from the respondents: he said that on the premises that he rented from the respondents he had what he called "a wholesale" where he kept goods. Awuah testified that Abire was trading on his own and consequently neglected the Coronation Bar: it was that circumstance which led to the sale to the appellant. The witness called for the respondents, their chief clerk, said that the goods which they sold to Abire were delivered by lorry, on Abire's instructions, to his customers. The witness did not assert that the goods which were the subject of the attachment order (which he valued at about £G400) were goods which had been bought from the respondents.

The evidence last referred to above—in respect of which however there are no express findings—seems to show that Abire had trading activities which were unrelated to the business of running the Coronation Bar. The respondents undoubtedly thought, quite honestly, that Abire was the owner of the Coronation Bar and its contents and accordingly, when they could not get payment of money which Abire owed them, they decided to resort to interim attachment procedure. If, however, contrary to what they understood, the appellant had become the owner of the Coronation Bar and its contents and if his purchase did not offend against the Act of 13 Elizabeth, c.5, then the respondents had no right to attach his goods and to have the premises sealed up.

The respondents' witness said in his evidence that he used to go to the Coronation Bar to demand payments from Abire and he said that he often saw Abire, Awuah, Manu and the appellant at the bar. He believed that the last three were assistants to Abire. This may have made it reasonable for the respondents to think that Abire was or continued to be the owner. None of this evidence, however, was such as to refute the appellant's evidence that he had become owner or to make it unreasonable for the learned judge at the trial to hold that the appellant was an innocent purchaser for value.

It was for the appellant to prove his ownership. In doing so to the satisfaction of the learned judge at the trial he produced the various documents which have been referred to. For reasons which have been indicated their Lordships are not prepared to accept the theory—for such it is - that the action begun on the 11th November, 1954, was a collusive proceeding instituted for the purpose of bolstering a false claim. As an effort for such purpose it seems ill-designed and maladroit.

The opinion of the Court of Appeal was that the receipt of the 5th November, 1954, "was clearly prepared and was accepted by the plaintiff in anticipation of a claim against and seizure of Abire's goods" and that the writ of the 11th November, 1954, "was designed to cloak the fraud with a semblance or circumstantial truth." If the

writ of the 11th November was "designed to cloak the fraud with a semblance of circumstantial truth" then it is to be observed that what it purports to show is that the appellant owed £G100 on that date. That does not seem to fit in with the view that the receipt of the 5th November which purports to be a receipt in respect of "full payment of the cost" was prepared and was accepted by the appellant in anticipation of a claim against Abire which would result in a seizure of his goods.

The Court of Appeal were additionally influenced in forming a view unfavourable to the appellant by certain conclusions which they drew from the evidence. Some examples may be given. While not accepting that agreements A and B were made on the dates which they bore they considered that assuming that they were so made the appellant was keeping secret the purchase of the business. This matter requires consideration on the basis of the finding of the Court of Appeal which is alternative to their finding that the documents were not genuine but were fictitious. The alternative finding as their Lordships understand it is that there was an actual sale to the appellant but that it was embarked upon with intent to delay and hinder the creditors of Abire.

As has been stated above, agreements A and B when produced in evidence were not stamped. The view of the Court of Appeal was that the failure to stamp them was deliberate and that the reason for this was that the appellant wished to keep his purchase secret and presumably was willing to keep it secret in order to help Abire and in order to hinder and delay his creditors. Their Lordships do not feel able to assume from the mere fact of a failure to have documents stamped that there was the purpose of cloaking a transaction with secrecy. The appellant does not appear to have been cross-examined as to this matter or as to his knowledge at the relevant times of the stamping requirements.

The Court of Appeal were impressed adversely to the appellant by the circumstance that he had not taken out a spirit licence on the 1st July, 1954. It does not, however, appear that the appellant was invited in cross-examination to deal with this matter and it is to be noted that Abire in his evidence said: "After we had sold the business to the plaintiff we applied for a transfer of the business in the name of the plaintiff. We were told to come in January."

The Court of Appeal observed that the appellant claimed to have been a sub-tenant of Abire though the latter was not entitled to underlet or part with possession and they concluded that the receipts for rent given by Abire to the appellant were fictitious.

In regard to the receipt and to the documents A, B and C, the learned President expressed his view (in the language set out above) that a careful examination of them satisfied him that they were all fictitious. As Abire had to pay £G60 a month for the premises he rented and received £G10 a month for the alleged sub-letting it would seem that the sub-letting, if there was one, was of part only of the premises. It does not appear that the appellant was cross-examined in regard to the receipts for rent nor as to the state of his knowledge as to the terms of Abire's tenancy. From the point of view of the respondents it can readily be appreciated that in the absence of some request for permission to sub-let they considered that the Coronation Bar and

its contents belonged to Abire. But Abire's failures as their tenant cannot of themselves refute the testimony of the appellant.

Other matters were mentioned by the Court of Appeal and have been considered by their Lordships but on this part of the case it is to be remembered that the appellant not only gave evidence as to all the transactions but said that before he bought he did not know that Abire was indebted to the respondents. The learned judge who tried the case and who had advantages possessed neither by the Court of Appeal nor by their Lordships came to the conclusion that the appellant owned the goods which the respondents had attached and was an innocent purchaser for value.

Though it can be recognised that there were many circumstances in the case which justified a reluctance on the part of the respondents to accept the appellant's claim to ownership, the question which now arises is whether upon consideration of the documents and as the result of processes of reasoning or drawing inferences from ascertained facts the Court of Appeal was warranted in replacing the learned judge's acceptance of the appellant's case by findings of fraud. With every respect to the careful judgment of the learned President their Lordships have been unable, for the reasons indicated, to share the view that the decision of the learned judge at the trial was shown to be erroneous.

## DECISION

Their Lordships will report to the President of Ghana as their opinion that the appeal should be allowed and that the judgment of the Court of Appeal should be set aside and the judgment of Quashie-Idun, J., in the Supreme Court restored and that the respondents should pay the appellant's costs in the Court of Appeal and before their Lordships' Board.

## **COUNSEL**

**MISS BISSCHOP FOR THE APPELLANT.**

**DINGLE FOOT, Q.C., R. K. HANDOO AND B. KUMARACKULASINGHE FOR THE RESPONDENT.**