Privy Council Appeal No. 46 *of* 1926.

Douglas George Wright - - - - - - *Appellant*

v.

Florence Jenny Myra Morgan and others - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JULY, 1926.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD ATKINSON.
LORD PHILLIMORE.
LORD CARSON.
LORD MERRIVALE.

[*Delivered by* VISCOUNT DUNEDIN.]

Though the full story out of which the present appeal arises is a complicated one, it is possible to set forth the facts on which the appeal really depends at no undue length.

E. G. Wright died on the 12th August, 1902. He was the owner of, *inter alia*, two landed estates known as Surrey Hills and Windermere in the County of Ashburton, New Zealand. He left a will dated the 28th February, 1889, whereby he appointed as trustees and executors his wife, who survived him, and his eldest son Harry Herbert Wright.

After certain specific bequests which need not be particularised, he left the residue of his estate, which included the above-mentioned landed estates and the stock upon them, to his trustees in trust. The purposes of the trust were to convert and sell the whole residue and divide it into eight shares, which eight shares were to be conveyed as follows:—

2 shares to Harry Herbert;
1 share to his wife;

I share to Edward Fondi a son;

I to Douglas a son, and 3 shares to three daughters, but the daughters' shares not to be paid, but to be put in settlement for each daughter for life, and for her children in remainder. The trustees were empowered, if they thought fit, to delay the sale of any parts of the property for seven years.

The will also contained the following clause, on which much of the dispute in the present action turns:—

> ". . . Provided always that my said trustees shall not sell my freehold estate in the County of Ashburton or any part thereof until the same shall have been offered by my said wife if she shall then be living and if dead by my said son Edward Fondi Wright in writing under her or his hand to my said son Harry Herbert Wright at a valuation to be made by two valuers named by my said wife or the said Edward Fondi Wright as the case may be or if such valuers shall disagree then to be made by a third valuer to be named by the other two before they shall enter upon the valuation as their umpire nor until my said son Harry Herbert Wright shall have refused or omitted to notify in writing under his hand to my said wife or my said son Edward Fondi Wright as the case may be his acceptance of the offer within three months after the making thereof but no purchaser under this my will shall be obliged to take notice of this direction . . ."

By a codicil dated the 25th May, 1894, he appointed his son Douglas as an additional trustee and directed that the name of Douglas should be substituted in the above-mentioned proviso for the name of Edward Fondi. He also empowered his trustees to carry on the farming carried on by him on his estates. The trustees entered into possession and managed the estate, the practical management of the real estate being done by Douglas, who was a practical farmer. The estates were not put up for sale.

On the 10th February, 1905, Douglas acquired the share of Harry Herbert. The agreement to purchase contained a conveyance, not only of the share as such, *i.e.*, one fourth of the residue, but also contained the following words:—

> "Together with the right to purchase the Testator's freehold estate in the County of Ashburton at a valuation conferred upon the said Harry Herbert Wright by the said Will and all other benefits and advantages given to him by the said Will as a legatee of whatsoever kind or description at the price of Thirteen Thousand Three Hundred and Twenty Five Pounds."

On the same day he also acquired the interest of Edward Fondi, and in May, 1907, he acquired the interest of his mother. Thus at May, 1907, he was in right of five-eighths of the residue, the other three-eighths being the shares to be held in settlement of the daughters.

In 1905 Harry Herbert had resigned his trusteeship, and Nosworthy, who had married one of the three daughters, had been appointed trustee. In December, 1906, and the beginning of January, 1907, the trustees determined to sell Surrey Hills. Mrs. Wright then offered the estate to Douglas as in right of the option to buy conferred by the will on Harry Herbert. Douglas

accepted and valuers were appointed. There is controversy as to the formality of the offer and acceptance, but this in the view taken by their Lordships becomes immaterial and need not be enquired into. The valuers valued the stock. Their valuation dated January, 1907, was as follows :—

Land	£56,301 11 0
Stock	10,496 9 0
	£66,800 0 0

The transaction was completed as follows :—

There were outstanding mortgages to A.M.P., Ltd., amounting	£33,000 0 0
Douglas was entitled to five-eighths of the capital	18,937 10 0
Cash paid by Douglas	362 10 0
	£52,300 0 0

This left a sum of £14,500 due from the appellant Douglas.

To meet this position transfers of part only of the estate were given, and the remainder comprising 2,863 acres, which had been valued at £15,073 16*s.* 0*d.*, remained in the trustees' names being held by the appellant Douglas on the terms of an agreement for sale, which provided for completion on the 30th June, 1909, and for payment of interest at 5 per cent. per annum on the unpaid purchase-money. By March, 1909, the appellant Douglas had repaid to the trustees £4,500, leaving a balance of £10,000 due. This sum was paid by the appellant Douglas in March, 1920.

In April, 1907, Douglas resigned his trusteeship, but he had already arranged with his co-trustee that a sale should also be made of Windermere. A like offer was made of Windermere to him and accepted by him. Valuers were appointed, and Windermere was valued as follows :—

Windermere (including Chapman's Block) was valued at £4,527 for Chapman's Block, and the rest of the property at £17,444, making a total of £21,971 (which was taken as £22,000) and the stock was valued at £4,000, making in all £26,000.

No transfer of the land was taken and the appellant Douglas held the property under an agreement for sale which provided for completion on the 12th May, 1913, and for payment of interest at 5 per cent. per annum on the unpaid purchase-money.

The transaction was completed as follows :—

Mortgage to A.M.P. Society	£8,000
Deposit	800
Leaving a balance outstanding of	17,200
Total	£26,000

This balance of £17,200 was provided for as follows:—

The mortgage of £8,000 was paid off by the appellant Douglas on the 1st July, 1921, and £1,200 repaid to the trustees, leaving the appellant Douglas's liability at £16,000, of which he owned five-eighths. The balance of three-eighths is represented by £6,000, which the appellant still owes the trustees in respect of Windermere, and which is secured by portions of Windermere valued at £10,145 still held by the trustees in their own names.

The security is found to be ample. All members of the family, including the three daughters, were cognisant of these transactions.

One other matter of fact requires to be explained. There was a piece of land known as Chapman's Block above mentioned, which lay conveniently to Windermere. This was purchased by the trustees in 1905, and merged in Windermere. The purchase of real property was not authorised by the will. Since the date of the various transactions the whole of the properties have gradually risen in value.

In 1924 the present action was raised by Mrs. Morgan, one of the three daughters of the testator, and her infant children, by their guardian. It asked that it should be declared that the various sales to Douglas should be set aside, and accounts taken of the profits made, so that these might be restored to the trust estate. The Trial Judge, after enquiry, pronounced an interim judgment by which he held that the option to purchase the landed property given by the will to Harry Herbert was assignable, and was duly assigned to Douglas. Consequently, the sale of the landed properties to Douglas was good, and could not be set aside, but as regards the stock he held that as it was not covered by the option, that the sale of it by the trustees to Douglas, who himself was a trustee, it was bad, and he ordered enquiry to be made. His order was:—

> "(6) Enquiries shall be made and accounts shall be taken by the Registrar of this Court and an accountant to be appointed by the Registrar—
>
> "(1) As to the price paid for the live and dead stock the property of the trust estate, purchased by Douglas George Wright from the trustees; whether the price so paid was fair and reasonable and if not by how much it was under-paid.
>
> "(2) As to the rate of interest paid by Douglas George Wright in respect of trust moneys from time to time owing by him to the trust or sub-trust from and including the year 1908 to and including the year 1924, and as to the current rate of interest payable in respect of loans of similar nature during the same period, and as to whether, and if so to what amount, interest was under-paid during such period.
>
> "As to the securities now held by the trustees in respect of the sub-trust, and as to whether the same are in order, and as to whether they are good and sufficient securities with a margin not less than that required by "The Trustee Act, 1908," and if not which securities are inadequate and to what extent."

Appeal being taken to the Court of Appeal, that Court held that the option to Harry Herbert was not assignable to another

trustee to the effect of enabling that trustee to buy the trust estate. They therefore set aside the sales and made the following order :—

> " (1) That the defendant Douglas George Wright was not entitled to purchase either Surrey Hills or Windermere (including Chapman's Block) and he is liable to account for the purchase money received by him from the sales made by him of parts of these estates and he holds the balance of these estates upon the trusts of the will of the testator.
>
> " (2) All accounts and enquiries necessary to afford relief on this basis shall be taken and made in accordance with directions to be given hereafter.
>
> AND IT IS FURTHER ORDERED that these directions be given by the Supreme Court on the Application of the Plaintiff AND IT IS FURTHER ORDERED that the Appellants are entitled, in lieu of the first enquiry directed by paragraph 6 of the said Judgment, to an enquiry as to the profits made by Douglas George Wright in his dealings with the live and dead stock on Surrey Hills and Windermere AND IT IS FURTHER ORDERED that the Respondent Douglas George Wright pay the costs of this appeal on the highest scale as on a case from a distance."

From this judgment appeal has been taken, after leave allowed, to His Majesty in Council. The leading question accordingly is whether the option to purchase given by the will to Harry Herbert was assignable and assigned to Douglas to the effect of making him entitled to purchase the trust estate, he himself being a trustee. Technically speaking, he was not a trustee at the time of the purchase of Windermere, but their Lordships have no hesitation in holding with the Court of Appeal that although he had actually resigned, the whole scheme had been arranged by him prior to his resignation, and that in law he must be treated as being a trustee at the time of the will.

Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of assignability. Their Lordships do not doubt that Harry Herbert's option might have been assigned to a third person. There is nothing in the nature of the interest itself which points to non-assignability, nor are there any words in the will which would seem to forbid assignation. When, however, it is found that the assignation is in favour of the person who is himself a trustee, quite another question arises. The appellant argued that this right to purchase was property in the person of Harry Herbert, who was a *cestui que trust*, and that it is well settled that a trustee may purchase the interest of a c.q.t. In one sense of the word " property " it is true that this option was the property of Harry Herbert, but the quality of the property was not like the property of land or of a chattel. It was only a right to enter into a contract. If the option had been exercised by Harry Herbert himself, and the property bought, then Harry Herbert might have transferred to a trustee just as well as to anyone else. The object of the sale would, in that case, have been

no longer trust property. So also if the option had been transferred to a stranger, the resulting contract which would have been its sequel would have been between the trustees and, to use a colloquial expression, an outsider. But as it was, the option transferred to Douglas only gave Douglas a right to ask from the trustees a contract of sale, and that contract of sale was *ex rei necessitate*, a contract between the trustees and himself as a trustee, and that is what the law will not allow. It would be profitless to quote the many cases which have arisen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person, who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest. Accordingly, the real test to be applied to the circumstances is, assuming that Harry Herbert's option was validly assigned, so far as power to assign was concerned, to Douglas, did a conflict of duty and interest arise which would prevent Douglas from entering into a binding contract with the trustees? It was argued that no such conflict would arise, because by the terms of the will, which was the wish of the testator, the whole conditions of sale are regulated; valuers are to be appointed, and their decision to be accepted as to the price to be payable. There was no possibility of the higgling of the market between vendor and purchaser. Nevertheless, a conflict of duty and interest may arise although there is no direct association between the two parties as vendor and purchaser. Probably no better illustration could be found than in the old case of the *York Buildings Company* v. *Mackenzie* in the House of Lords (3 Pat. 378). It was a Scotch case, but the Scotch law is the same as the English in the matter, and was especially so stated to be in the subsequent case of *Aberdeen Railway Company* v. *Blaikie* (1 Macq. 461). In the former case the person who had bought, and whose purchase was set aside after eleven years of possession, was what is called the common agent. The case occurred in an old form of process for the realisation of the landed estates of a debtor called a ranking and sale. The common agent was appointed by the Court to look after and carry into effect the sale. He arranged the date of the sale, fixed the upset price, and answered questions to enquirers, but the actual sale was not conducted by him. It was by public auction and termed a judicial sale. The common agent Mackenzie bought at the judicial sale. It was not averred that the price was inadequate, but, although it was after eleven years, the House of Lords, reversing the judgment of the Court of Session, held that his position of common agent was a position of trust, and that his duty and interest so conflicted as to make it impossible that he should be a purchaser of the property at the sale. Now, applying the principles of that case to the present, their Lordships hold that the position of Douglas as a trustee and as the assignee of the option to purchase was one which would involve a conflict of duty and interest. It was of moment when the sale should take place, because the option could only be exercised when the trustees had decided that

now was the moment to sell. The best moment for the trust was the moment when prices generally were high. The best moment for a purchaser was when prices generally were low, and such prices would be naturally reflected in the value fixed by the valuers. So also as to the terms of payment, the best term for the trust was cash down; the best term for the purchaser was some easier arrangement. Their Lordships do not think it necessary to go into the actual terms of payment here, although it is perhaps startling to find that the whole transaction was carried out by the payment in cash of quite an infinitesimal sum. The criterion, however, is not what was done, but what might be done. Their Lordships, therefore, come to the conclusion that this case falls within the general rule, and that the sale being, as carried out, a sale of trust property to a trustee, cannot be allowed to stand, as in a question with infant beneficiaries who cannot be affected as the daughter might have been affected, by the lapse of time since the transaction was effected to her knowledge but not to theirs.

So far, therefore, their Lordships agree with the result reached by the Court of Appeal. Two subsidiary questions, however, arise. The first point is as to Chapman's Block. This is not dealt with as a separate question by the Court of Appeal. They seem to have thought that it was enough to say that it had practically been treated as part of Windermere. Their Lordships think, however, that this is not so. This is not a case of improper employment by the trustees of trust funds for the purposes of their own business and speculation. It is the case of an improper investment. Now, if a trustee has made an improper investment, the law is well settled. The *cestuis que trustent* as a whole have a right, if they chose, to adopt the investment and to hold it as trust property. But if there is not unanimity then it is not trust property, but the trustee who has made it must keep the investment himself. He is debtor to the trust for the money which has been applied in its purchase (*Parker* v. *McKenna* (L.R. 10, Ch. 96)). Now, it is admitted that there has been no unanimity on the beneficiaries' part to consider Chapman's Block as trust property. Further, it is admitted that the money used in the purchase of Chapman's Block has been refunded to the trust. The result is that the enquiry directed by the Court of Appeal must exclude enquiry as to Chapman's Block.

Finally, there is the question of stock. Now, if the stock could be looked on as a business, *e.g.* if the trustees had bought a public house with the funds of the trust, the direction of the Court of Appeal would be right, but in the view of their Lordships that is not so. The stock is not a business. There is no identity between the stock as it now exists and the stock as it was bought from the trustees. The sale was not of a business; the sale was only of individual sheep and cattle. Consequently, their Lordships think that in this matter the direction of the Trial Judge was right. It is proper to notice that though interest has been

paid to the *cestuis que trustent*, yet if the sum which might be found under the remit of Reed, J., was greater, the natural result would be that compound interest would have to be charged; but inasmuch as the sum due on interest would fall to be applied to the life interest of the daughters, and as Mrs. Morgan was fully aware of what was done, their Lordships do not think that compound interest should be charged and, therefore, that the direction of Reed, J., was right.

Their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should, in the main, be affirmed, but subject, as has been said, to the exclusion of Chapman's Block in the enquiries directed by that Court. The judgment must also be varied by setting aside so much of it as reversed the judgment of Reed, J., as to the stock. The case should, therefore, be remitted to the Supreme Court in order that the enquiries directed may be proceeded with on the basis of this judgment.

The respondents will have two-thirds of the costs of the appeal. The costs in the Courts below will remain as dealt with by the Court of Appeal so far as past costs are concerned, but the Supreme Court will deal with the costs of the enquiries directed after the result of those enquiries has been arrived at.

In the Privy Council.

DOUGLAS GEORGE WRIGHT

v.

FLORENCE JENNY MYRA MORGAN AND OTHERS.

DELIVERED BY VISCOUNT DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1926.