Privy Council Appeal No. 147 *of* 1923.

William Joseph Mayson - - - - - - *Appellant*

v.

A. G. Clouet and another - - - - - *Respondents*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1924.

Present at the Hearing:

LORD DUNEDIN.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD DUNEDIN.]

On the 11th September, 1919, the respondents, who were owners of a piece of ground in Singapore, where buildings were being erected by them, entered into an agreement with one Sim Choon Kee for the sale of the same. The terms of the contract, so far as is material to the questions which have arisen, are as follows :—

> "*Clause* 1.—The vendor agrees to sell and the purchaser agrees to purchase free from encumbrances the premises described in the schedule hereto at the price of $250,000 to be paid as follows, that is to say the sum of $25,000 as a deposit immediately after the signing of this agreement, the further sum amounting to 10 per cent. of the balance within three months from this date and a further sum amounting to 10 per cent. of the then balance within six months from this date, and the balance of the said purchase money within 10 days of the production by the vendor to the purchaser or his solicitors of the Municipal certificate of completion of the buildings now in course of erection on the said land.

" *Clause* 3.—In the event of either of the two instalments of 10 per cent. above referred to not being paid by the purchaser in terms herein stated the vendor shall be at liberty to cancel this agreement and all moneys paid to them under this agreement shall forthwith become forfeit to the vendors and for this purpose time shall be deemed of the essence of the contract. In case the purchaser shall make default in completing his purchase when the Municipal certificate has been issued as aforesaid he shall pay to the vendors interest on the balance then owing at the rate of 12 per cent. per annum from such date until the actual completion of the purchase.

. . . . . .

Clause 13.—If the purchaser shall neglect or fail to comply with the above conditions his deposit may be treated as forfeited and the vendor shall be at liberty with or without notice, and notwithstanding any pending negotiation proceeding or litigation to re-sell the property either by public auction or private contract at such time and under such conditions as he may deem proper and all expenses attending any such re-sale or attempted re-sale and any deficiency in the price obtained on a re-sale shall immediately thereafter be made good and paid to the vendor by the purchaser and shall be recoverable by the vendor as liquidated damages."

The deposit was duly paid. So also were the two instalments, so that no question could arise under the first portion of Clause 3. On 4th November, 1920, the vendors intimated that the buildings had been completed and a certificate of fitness for occupation received from the municipal authorities and called on the purchaser to complete in 10 days. He did not do so. On the 7th December the vendors made some fresh proposition, but without prejudice to their rights. On the 14th December they wrote as follows :—

" We are instructed by Mr. Clumeck to say that completion of the purchase must take place before the 31st instant and in this respect time is made of the essence of the contract. In default of completion the deposit will be forfeited and our client will re-sell and hold you liable for any damages he may suffer."

Further correspondence followed with certain new proposals on the part of the purchaser, but on the 31st December as the contract had still not been completed, the vendors wrote as follows :—

". . . . The title is one with which we are acquainted and we are quite prepared to advise Mr. Sim Choon Kee to complete but he has continually put the matter off clearly with a view of finding the money, as is very evident from your letter in which you say that he would complete if the $350,000 is advanced on mortgage. Our client much regrets that he cannot allow any more delay and must consider the matter at an end and the deposits forfeited."

Further proposals of new terms of settlement were made but came to nothing.

Sim Choon Kee then died and the matter was taken up by his executors, who took the point that, as the matter had been declared closed by the vendors, they were entitled to a return of the instalments, though they admitted that the deposit must remain with the vendors as forfeited. The vendors contended

that the instalments were just additional deposit. Eventually the present action was raised for return of the instalments. It was found that Sim Choon Kee's estate was truly bankrupt and subsequently the Official Assignee of Bankrupt Estates substituted the present plaintiff for himself.

The case depended before Shaw C.J. He found that the instalments were not additional deposit, that the contract was put an end to by the letter of 31st December, but that the plaintiff as representing Sim Choon Kee could not recover the instalments in respect that he was himself under breach of contract.

Appeal was taken to the High Court. That Court affirmed the finding that the instalments were proper instalments and not additional deposit but the learned Judges considered that the contract was not brought to an end by the letter of 31st December. At the same time they indicated their opinion that the judgment of the Trial Judge was right, even though they had come to an opposite conclusion as to the ending of the contract.

It has not been contended before their Lordships that the instalments were anything but proper instalments. The idea that they were extra deposit is, therefore, and as their Lordships think rightly, out of the case. Their Lordships may say at once that they agree with the Trial Judge that the contract was put an end to by the letter of the 31st December. The view of the learned Judges of the Court of Appeal is truly rested on the fact that further negotiations took place. These negotiations, however, were all in the nature of proposals for a new and different contract. They came to nothing and accordingly the parties were remitted to the status of December 31st.

Now the letter of 31st December is perfectly clear and explicit. "The matter is at an end." The purchaser had been warned that the only extension of time over the 10 days from 4th November, which was the strict date under the contract, was till 31st December. On the 31st December he had failed to complete but was in breach and, therefore, said the vendors, the matter is at an end. Now what is the meaning of this ? Their Lordships do not think it necessary to enquire as to a matter on which there was much argument, whether the word "rescission" is used in various judgments in a settled or a varying sense. The law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance ; or he may elect to hold the contract as at an end, *i.e.*, no longer binding on him, while retaining the right to sue for damages in respect of the breach committed. The test in this case as to whether such an election had been made is a very simple one. Could the vendors on the 1st January have sold to someone else without subjecting themselves to action at the instance of Sim Choon Kee for specific performance ? Their Lordships are of opinion that they clearly could.

There remains, however, the question decided by the learned Chief Justice as to whether the instalments can be recovered and various authorities were quoted to their Lordships.

Their Lordships think that the solution of a question of this sort must always depend on the terms of the particular contract. In *Howe* v. *Smith*, 27, Ch.D. 89, £500 was paid as deposit and part payment of the purchase money. The contract was to be completed by a certain date and it was not so completed and the vendors sold to someone else. The purchaser sued for specific performance, which was refused as he himself had been in default and then, being allowed to amend his pleadings, he sued for return of the deposit. It was held that the deposit being of the nature of a guarantee that the contract should be performed, was forfeited and could not be returned.

Cotton, L.J. says "the first thing one must look at is the contract," and Bowen L.J., "the question of the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract," and Fry, L.J. to the same effect. Now, all the elaborate argument that followed as to whether the condition attached to that particular deposit was quite unnecessary if the case could have been solved by the simple proposition sought to be applied here, to wit, you are in default as to the contract and the party not in default may keep anything that he has got from the partial fulfilment of the contract. *Howe's* case clearly comes to this, that if the learned Judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return. Fry L.J. put this very simply :—

> "It (the deposit) is not merely a part payment, it is also in earnest to bind the bargain."

It is true that in that case the property had been sold by the vendor to someone else but the position here where the vendor stated that the contract was at an end, is precisely the same. He was free to sell and it is immaterial whether he has actually sold or not.

Their Lordships' attention was called to a dictum of Bankes, L.J., in *Harrison* v. *Holland*, 1922, 1, K.B., at 213. In that case there was provision for a deposit of £50,000 and a further sum of £100,000 as part payment of the price to be paid within a fortnight. *Ex abundanti cautela* the contract provided that in the event of non-completion the £50,000 should be forfeited and the £100,000 should not ; but the Lord Justice, speaking of the £100,000 as a part payment says "If nothing more had been said about it and the contract came to an end in consequence of the purchaser's own default, neither they nor the assignees would be able to get the money back." This remark is obviously obiter as the contract did say something more about it. It is not in any way assented to by the two other Judges of the Court of Appeal and it is, their Lordships think, in conflict with

what Lush J., who tried the case, had said, doubtless also obiter, in the Court below. "The £100,000 is not called a deposit. It is expressly stated to be in part payment of the purchase money and so it is not necessarily paid as a guarantee for the performance of the contract. It is, therefore, not forfeitable." In any view their Lordships think the dictum of Bankes, L.J., is unsound. They, therefore, turn to the contract. This specially distinguishes in terms between deposit and instalments. It then specially deals in Clause 13 with what is to happen if the purchasers are in default. The deposit is forfeited and that is all. It would seem to their Lordships quite clear that the instalments are not to be forfeited. The truth is that the defendant's contention really amounts to a claim to keep the instalments as liquidated damages for the breach of contract for which they are entitled to sue. This was the proceeding unsuccessfully attempted in the case of *Harrison* v. *Holland* already cited.

Their Lordships will humbly advise His Majesty to allow the appeal and enter judgment for the appellant with costs in both Courts. The respondents will pay the costs of the appeal.

In the Privy Council.

WILLIAM JOSEPH MAYSON

v.

A. G. CLOUET AND ANOTHER.

DELIVERED BY LORD DUNEDIN

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

1924.