Privy Council Appeal No. 34 of 1936

William Allan Chapple - - - - - - - - *Appellant*

v.

The Tongariro Timber Company, Limited, and others - *Respondents*

FROM

THE SUPREME COURT OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1936

Present at the Hearing:

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the Supreme Court of New Zealand in an action in which the plaintiff made a claim against the two defendants, the Tongariro Timber Co., Ltd., who do not appear on this appeal, and the Aotea District Maori Land Board, who do appear. The plaintiff claims as mortgagee of the first defendants, to have a charge on the rights which he says the Timber Company still possess against the Board, in respect of certain agreements made for the sale of timber under a large timber concession to the Timber Company, whom it will be convenient to call the company.

It appears that the company, having had some dealings with the native owners of timber lands in the North Island, eventually made an agreement with the Board, who are a statutory Board incorporated for the purpose of regulating the rights of native owners. The main and principal agreement was made in 1908. It provided that the Board agreed to sell, and the company to buy, for the purpose of cutting the timber, all the trees of a certain description situated on certain blocks which are set out in the schedule, and then there was an option given upon further blocks, which is immaterial to this case. The provisions for the payment were contained in clause 6 of the agreement and, roughly speaking, they provided that, as part of the consideration, the company were to pay to the Board for any of the trees sold certain rates per acre, increasing in different periods, for the first period of 15 years £10, for the next period of

10 years £12 10s., and so forth. The parties contemplated that the agreement might, at any rate, continue until the year 1956. There was a further agreement that the moneys so payable were to be paid on 1st March in every year, and there was also a further provision that the company were to pay to the Board, to begin with, until the agreement was finally executed, the sum of £2,500 per annum, and that afterwards it should pay to the Board a sum of £5,000 per annum during the continuance of the agreement " on account and in anticipation of such consideration whether or not the royalties or moneys payable under such clause shall amount to such sum or not in any year." There was a further provision that the company was to construct a railway in a substantial manner and on a certain specification, which is set out in the agreement, and it was to be completed within five years from the date of the agreement.

Before dealing with the clause on which this action is brought, it is necessary to state that over a period of years certain modifications were made in this agreement. The agreement itself had statutory authority, but the Board had the right to modify it, and originally in 1910 there was a modification as to the prices and the periods, a modification which was much to the advantage of the purchasing company. The date of the completion of the railway was postponed until 1916. In 1913 there was a further modification as to the building of the railway, which provided that it should be built in sections, and different times were given for different sections of the railway, and the date of the final completion was to be at a later stage also. The company never seem to have been able to proceed satisfactorily with their concession; they made certain payments; they fell into default as to other of the payments, and they never were able to construct the railway at all; apparently, they were never able to finance it.

In 1915 after the war broke out, the remedies of the Board for default by the company were suspended, subject to the consent of the Governor-General in Council, and the period for the completion of the railway was to end at a date which should be fixed by the Governor-General in Council. In 1921 an Order in Council was made extending the time for the railway for several years, but subject to the condition that all the arrears of advance payments were to be paid within 12 months. They then seem to have amounted to some such sum as £28,000 or more; and there was a further condition that the railway was to be reconstructed within a certain time and made of a more substantial nature. When the agreement was approved by Parliament, Parliament imposed a further condition that £16,000 of the arrears were to be paid within a short period, on the 20th June, 1922. These things are mentioned for the purpose of indicating how the plaintiff came into the case because, apparently, he advanced sums of money which were necessary

to fulfil these conditions, so that he has now advanced altogether to the company about £35,000, taking as security their rights under this agreement. Eventually, the railway never was built. The restrictions on the right of the Board to cancel the agreement were removed. In 1930 final notice to cancel the agreement was given, and as is admitted rightly given, by the Board, and the agreement is now at an end, subject to the question that arises on the clauses now to be mentioned.

The two clauses in question are these. Clause 31 provided:—

> "If this agreement shall be cancelled and determined either by mutual agreement or through the default of the company or of the Board the Board shall grant to the company free of cost such an area of the said trees on Hauhangaroa, Waituhi, Puketapu, Waimanu or Waione and Whangaipeke Blocks to be selected by the company as shall be equivalent in value to the amounts actually advanced or paid in cash by the company to the Board and native owners under the provisions of this agreement or of the said recited agreement and in respect of which amounts the company shall not have cut and received timber provided that in estimating such value it shall be calculated on the basis of fifty pounds per centum advance on the rates specified in paragraph 6 hereof."

That is subject to the proviso:—

> "Provided that the company's rights under this paragraph shall determine upon the expiration of fifteen years from the date of these presents."

The question turns upon the proviso, because the 15 years have expired and the plaintiff is now seeking to say that he still has the right given by that clause against the company. The other clause it is necessary to read in order to understand the argument of the appellant is clause 34, which provides—the whole of it need not be read—If the company makes default in any material matter in the performance of the contract, then the Board may serve upon the company a notice, and if there shall be default for a further period of six months, the Board "may cancel and determine this deed without being liable to pay any monies received by them under the provisions hereof and without prejudicing or affecting any liability or obligation to the Board incurred by the company under this deed antecedent to such cancellation or determination. Provided always that such cancellation or determination shall not affect the title of the company to any lands and rights transferred to it pursuant to paragraph 11 hereof"—which need not be read—"or to any area of the said trees granted or which the company may properly claim to be granted under paragraph 31 hereof."

The plaintiff having brought his action and having claimed that there were still rights under clause 31, an order was made by the learned Chief Justice for the trial of two preliminary questions, the first being:—

> "Whether the Aotea District Maori Land Board is freed and discharged from the obligation created by paragraph 31 of the deed

of agreement dated 23rd December, 1908, by reason of the fact that the said deed of agreement was cancelled by notice dated 29th day of July, 1930, and served on the company on the 1st day of August, 1930?"

Then there was a second question, whether, if the first question was answered in the negative, the Board could counterclaim against the claim of the plaintiff as assignee of the company's right under paragraph 31, any claims by the Board against the company. The learned Chief Justice answered the first question in the affirmative. The 15 years had run and he said the Board were freed and discharged from the obligation. That decision was affirmed by the Supreme Court, and the question before this Board is whether that decision is right.

Their Lordships find it unnecessary to enter into a full discussion of this case, because they are satisfied with the judgments which have been given in the Courts of the Dominion, and they find it unnecessary to deal at any length with the contentions which were made and announced in those Courts. Speaking generally, it is sufficient to say that there are three arguments which were adduced before their Lordships by Mr. Henn Collins the learned Counsel for the appellant. The first is that on the construction of clause 31 the reference to 15 years only applied to over-payments which had been made within 15 years, the other rights continuing without limitation after the expiration of the 15 years. Their Lordships do not find it necessary to say anything further about that contention except that, as was said by the New Zealand Courts, the words of the clause will not support that contention, and they appear to their Lordships to be quite inconsistent with it.

The next contention is that clause 34, standing by itself, merely amounts to a forfeiture of the amount of advance payments already paid. It is said that the only consideration that would prevent that from being a forfeiture is the reference in that clause to the right given by clause 31 to have timber from additional timber lands to the value of the payments made in advance, and not so far utilised by the purchaser. It is said that inasmuch as it is the proviso to clause 31 which alone saves clause 34 from amounting to a forfeiture, the two clauses must be read together as co-relative and co-terminous, and that therefore—their Lordships have all found difficulty in appreciating this part of the argument—for some reason, the proviso to clause 31 in itself is only part of a forfeiture machinery and must be put on one side when considering what the rights of the mortgagee are in respect of the purchasing company.

The Dominion Courts have held that clause 34 does not amount to a forfeiture at all, and their Lordships see no reason to differ from that conclusion, but they find it unnecessary to express a final opinion upon that, because in their

opinion clause 31 is an independent clause which has nothing to do with forfeiture; so far from being a forfeiture, it is intended to give a special right of relief to the purchasing company, in the event of there being a determination of the agreement, whether the agreement is determined for breach or whether it is determined by mutual consent. It is a substantially advantageous clause for the purchaser, and it seems to their Lordships to be impossible to set it aside on any known principle as amounting to a forfeiture.

The other contention was that the time of 15 years must be deemed to have been extended by implication from the agreements and the statutory provisions that were made afterwards dealing with the times within which the Board might exercise their right of determining the agreement. On that matter it is obvious that such an implication could not be made, unless there were the plainest grounds for it, and their Lordships are quite satisfied with the reasons which were given by the learned Chief Justice and by the Court of Appeal for holding that no such implication could be read into the provisions which are relied upon by the appellant.

For these reasons their Lordships are of opinion that the judgment below was right and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. It being a case *in forma pauperis* there will be no order as to costs.

(37050—3A) Wt. 8136—2 90 7/36 P. St. G. 338

In the Privy Council.

WILLIAM ALLAN CHAPPLE

v.

THE TONGARIRO TIMBER COMPANY, LIMITED, AND OTHERS

DELIVERED BY LORD ATKIN

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