UNIVERSITY
INSTITUTE C
LE
- 9 MAR 1960
25 RUSSELL
LONDON, W.C.1.

26, 1959

IN THE PRIVY COUNCIL

No. 36 of 1958

ON APPEAL

FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA

BETWEEN:

ABERFOYLE PLANTATIONS LIMITED Appellant

55480

- and -

KHAW BIAN CHENG Respondent

10

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of the Federation of Malaya given on the 18th April 1958 the Order being dated the 2nd June 1958 allowing the appeal of the Respondent from a judgment of Good J. dated the 21st October 1957. Leave to appeal to His Majesty the Yang Ni-Pertuan Agong was granted to the Appellant by an Order of Barakbah J. sitting as a single judge in the said Court of Appeal dated the 22nd October 1958.

p.61
p.28
p.64

20

2. The question for consideration in this appeal is whether or not the Respondent is entitled to the return of the deposit paid by him to the Appellant pursuant to an Agreement for the sale of land by the Appellant to the Respondent dated the 8th November 1955 and payment of his costs of investigating title.

p.83

3. The material provisions of the said Agreement for the purposes of this appeal are as follows:-

30

"(Clause 1) Subject to the condition contained in Clause 4 the Vendor will sell and the Purchaser will buy ALL THOSE pieces of land known as Harewood Estate hereinafter described in the Schedule hereto free from incumbrances"

"(Clause 2) The price for the said purchase is the sum of Dollars Five hundred and twenty five thousand ($525,000/-)..................To account of this sum of $525,000/- the Purchaser shall pay to the Vendor the sum of $50,000 on the signing of this Agreement, a further sum of $50,000 on or before the 1st February 1956 and to pay the balance on or before 30th April 1956. The Purchaser shall only be entitled to enter into possession of the Estate after the purchase money of $525,000 has been paid in full and all profits earned prior to that time shall belong to the Company." 10

"(Clause 4) The purchase is conditional on the Vendor obtaining at the Vendor's expense a renewal of the seven (7) Leases described in the Schedule hereto so as to be in a position to transfer the same to the Purchaser and if for any cause whatsoever the Vendor is unable to fulfil this condition this Agreement shall become null and void and the Vendor shall refund to the Purchaser the deposit or deposits already made under Clause 2 hereof notwithstanding anything contained in Clause 10 hereof." 20

"(Clause 9) Completion of the purchase shall take place at the offices of Messrs. Grumitt, Reid & Co. Ltd., on or before the 30th day of April 1956, and upon the Purchaser paying the balance of the purchase price to the Vendor, the Vendor shall as soon as possible thereafter execute a proper transfer or transfers of the property to the Purchaser or as he shall direct, such transfer or transfers to be prepared and perfected, save as to the execution thereof by the Vendor, by and at the expense of the Purchaser and in the meantime the Vendor agrees to allow the Purchaser to lodge a caveat against all the lands pending the execution of the said transfer or transfers. And the Vendor shall if the Purchaser so requires execute in favour of the Purchaser an irrevocable power of attorney authorising the Purchaser to execute all such transfers and documents as shall be necessary for effectually vesting in the Purchaser the said Mining Leases." 30 40

"(Clause 10) If from any cause other than the Vendor's default the purchase shall not be completed on the 30th April 1956, or the second

deposit of $50,000/- shall not be made on or before the 1st February 1956 as herebefore provided then this Agreement shall become null and void and the deposit or deposits already made will be forfeited."

"(Clause 11) Upon actual completion of the purchase the Purchaser shall be entitled to possession of the property hereby agreed to be sold and shall as from that date be liable for all outgoings".

10 4. The lands comprised in the said agreement for sale were described in the Schedule thereto. A part of them consisted of lands which had been held under seven separate leases (referred to in clause 4 of the agreement) granted by the Ruler of Perak to Harewood Estates Ltd. The said leases had expired on the 18th June 1950 but Harewood Estates Ltd. had remained in possession of the lands demised.

5. On 18th December 1950 Harewood Estates Ltd.
20 went into voluntary liquidation for the purpose of amalgamating with the Appellant and on the 16th January 1951 Harewood Estates Ltd. and its liquidator entered into an agreement with the Appellant whereby they agreed to transfer all their assets to the Appellant in consideration of the issue of shares in the Appellant to the shareholders in Harewood Estates Ltd.

p.65

6. The Respondent duly paid to the Appellant the two deposits of $50,000 provided for by clause 2
30 of the agreement.

7. The Appellant had not by the 30th April 1956 obtained a renewal of the leases referred to in clause 4 of the agreement and by letter written on 4th May 1956 to the Appellant's Solicitors the Respondent's Solicitors stated that the Respondent was entitled to rescind the agreement and recover the deposit but that he was prepared to give the Appellant until the 31st May 1956 to obtain a renewal of the said leases.

p.95

40 8. The Appellant not having obtained a renewal of the said leases this action was commenced by Plaint dated the 11th June 1956 issued by the Respondent as Plaintiff against the Appellant as

p. 1

Defendant in the High Court at Ipoh. As appears from such Plaint the Respondent claimed (among other things) return of the deposit of $100,000 paid by the Respondent to the Appellant with interest thereon by reason of the Appellant not being in a position on the 30th April 1956 which date was extended by the Respondent to the 31st May 1956 to transfer renewed Leases as provided in Clause 4 of the said Agreement. The Appellant in its Defence dated the 27th July 1956 claimed (among other things) that by reason of the failure of the Respondent to pay the balance of the purchase price on the 30th April 1956 the said Agreement became null and void and the Respondent had no rights thereunder.

p. 7

10

9. This action came on for hearing before Mr. Justice Good on the 14th and 15th February 1957. His judgment is dated the 21st October 1957 and by Order dated the 8th November 1957 it was ordered and adjudged that the Respondent's claim be dismissed with costs.

p.28
p.35

20

10. Mr. Justice Good in his judgment did not refer to Clause 1 of the said Agreement. He found that application by the Appellant for the renewal of the Leases was made on the 23rd April 1956 and that the approval of His Highness the Ruler in Council was given on the 17th December 1956 in respect of four of the Leases and on the 21st January 1957 in respect of the other three. He then said that the fundamental question in issue was whether time was of the essence of the contract and if not whether the Respondent could make it so by giving 27 days notice to the Appellant. After holding that he was entitled to look at the draft of the Agreement for the purpose of construing the Agreement as executed the learned Judge held that on its true construction time was not of the essence and that the notice given by the Respondent by their Solicitor's letter of 4th May 1956 was inadequate to make it so.

p.29
1.33

p.43
1.12

30

40

11. From the judgment of Mr. Justice Good the Respondent appealed to the Court of Appeal of the Federation of Malaya and after hearing the appeal the Court (Thomas C.J., Sir John Whyatt C.J. (Singapore) and Barakbah J.) gave judgment on the 18th April 1958 (Sir John Whyatt C.J. dissenting)

p.61

and by Order dated the 2nd June 1958 the Court allowed the appeal and did order and adjudge that the Respondent recover from the Appellant the sum of $100,000 with interest thereon at the rate of 6% per annum from the 7th June 1956 till the date of that judgment and $150 being the Respondent's costs of investigating title and with interest on the aggregate sum thereby adjudged at the rate of 6% per annum from the date of that judgment till
10 satisfaction and the Court did further order that the Appellant pay to the Respondent his costs of the suit in the Court below and of that appeal.

12. Chief Justice Thomson in his judgment after having summarised the conclusions of the learned trial Judge said as follows:- p.40

"I find myself in agreement with much of the learned Judge's reasoning, but I think he has attributed insufficient importance to Clauses 1 and 4 of the contract. p.45 l.18

20 The substance of the agreement is contained in Clause 1. "The Vendor will sell and the Purchaser will buy". The rest of the contract is ancillary to that and that is expressed in terms to be "subject to the condition contained in Clause 4". For myself I do not see how the parties could have made it clearer that the condition contained in Clause 4 is a condition precedent of the whole contract.

And what is that condition?

30 By clause 4 the Purchase is conditional on the Vendor obtaining a renewal of the leases "so as to be in a position to transfer the same" and if the Vendor is unable to fulfil this condition "this Agreement shall become null and void and the Vendor shall refund the Purchaser............ the deposit already made...........notwithstanding anything contained in Clause 10".

It is to be observed that that condition is not for transfers of the leases or of any rights
40 connected with the leases. It is that the leases must have been renewed in such a way that the Vendor is in a position to transfer them."

p.47 l.17 and at the end of his judgment he said:

"Shortly, then, the whole contract was subject to a condition. That condition was not fulfilled. In the circumstances I am of opinion that the Appellant was entitled to treat the contract at an end and to have his deposits returned."

p.48 13. Chief Justice Sir John Whyatt in his dissenting judgment after holding (rightly in the submission of the Respondent) that the trial judge was wrong in looking at the earlier draft as an aid to the construction of the Agreement, went on to say: 10

p.55 l.49 "In my opinion, the obligations imposed on the parties by this Agreement may be conveniently summarised as follows: The Purchaser was obliged to pay a deposit of $50,000 on the 8th November 1955 and a further deposit of $50,000 on the 1st February 1956, and the balance of the purchase price, namely $425,000, on or before the 30th April 1956. The Vendors, for their part, were obliged (a) to give possession on payment of the balance of the purchase price, (b) to execute a transfer of the leases "as soon as possible" after receiving the purchase price, and (c) to perform certain subsidiary obligations such as giving the Plaintiff a Power of Attorney and permitting the Plaintiff to enter caveats against the land." 20

Later he said:-

p.58 l.9 "The Plaintiff, on the other hand, misconceiving his rights and duties under the Agreement, defaulted in payment of the balance of the purchase money on the 30th April 1956 and thus committed a fundamental breach of the Agreement which became final and irrevocable when he issued his plaint on the 11th June 1956." 30

p.59 14. Mr. Justice Barakbah in his judgment after referring to Clauses 1, 4, 9 and 10 of the said Agreement and to the extension of the date for completion to the 31st May 1956 said as follows:-

p.60 l.35 "The language of these Clauses, as I interpret it, is that the Appellant should pay the balance of the purchase price and the Respondents should be in

a position to transfer the leases on or before the 31st May, 1956. But on that date the leases were not registered in the name of the Respondents. Therefore, they (the Respondents) were not in a position to transfer the leases to the Appellant on that date. The actual transfer itself need not take place immediately but "as soon as possible thereafter."

The Respondents alleged that there was a breach of Clause 10 and that in consequence the Agreement became null and void and the deposit already made should be forfeited. On the contrary, in my opinion, the Respondents had failed to fulfil the conditions of Clauses 1 and 4 of the said Agreement and the Appellant was entitled to the refund of his deposit.

10

15. The Appellant on the 2nd October 1958 obtained leave to appeal to His Majesty the Yang Ni-Pertuan Agong from the said judgment of the Court of Appeal of the 18th April 1956.

p.63

20

15A. The Respondent humbly submits that the judgment of the Court of Appeal was right and should be confirmed and that the Appellant's appeal therefrom should be dismissed for the following (among other)

R E A S O N S

1. BECAUSE upon the true construction of the said Agreement the contract of sale therein contained was subject to a condition precedent in Clause 4 upon which the whole validity of the said contract depended.

30

2. BECAUSE the absence of any promise or undertaking by the Appellant in the said Agreement that the condition would be fulfilled made the mutual obligations of the parties thereto dependent upon the due performance of that condition.

3. BECAUSE the said condition had to be performed by the Appellant before the day fixed for completion of the purchase - i.e. the 30th April 1956 - or such later date as the Respondent might agree to.

40

4. BECAUSE the Appellant failed to perform the said condition by the 31st May 1956 being the date to which the Respondent voluntarily extended the time for performance of the said condition.

5. BECAUSE the judgment of the majority of the Court of Appeal is right and should be affirmed.

GEOFFREY CROSS

T. A. C. BURGESS

No. 36 of 1958

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA

B E T W E E N

ABERFOYLE PLANTATIONS LIMITED
Appellant

- and -

KHAW BIAN CHENG Respondent

C A S E

FOR THE RESPONDENT

PEACOCK & GODDARD,
1, Raymond Buildings,
Gray's Inn,
London, W.C.1.

Solicitors for the Respondent