~~P.C.~~
~~GM4 0 3~~

Judgment
44/1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 30 of 1963

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N :-

HERBERT GEORGE WARREN (Plaintiff) Appellant

- and -

1. TAY SAY GEOK
2. LIM LIEW CHENG
3. NG LEI
4. LIM CHENG WAU (Defendants) Respondents

CASE FOR THE APPELLANT

1. This is an Appeal from a Judgment and Order of the Court of Appeal at Kuala Lumpur dated the 28th February, 1963, allowing an Appeal by the Respondents from a Judgment and Order of the High Court of Kuala Lumpur dated the 23rd June 1962 whereby the said High Court found for the Appellant in an action by him against the Respondents for the return of the sum of $90,000/- paid by him to them by way of deposit and in part payment of the purchase price under a contract for the purchase of land and ordered that the Respondents should pay to the Appellant the said sum together with interest and further ordered that the Respondents' counterclaim should be dismissed. pp.80-107 pp.39-52

2. The principal questions raised by this Appeal are:-

(1) Whether in an agreement between the Appellant and the Respondents dated the 31st May 1960 for the purchase by the Appellant from the Respondents of certain lands time was of the essence of the contract.

(2) Whether, if time was not of the essence of the contract in the said agreement, it was ever made so during the pendency of the agreement.

(3) Whether the Vendors, that is to say the Respondents, wrongfully rescinded the said agreement.

(4) Whether the Respondents were entitled to keep the $90,000/- paid to them by the Appellant by way of deposit and in part payment of the purchase price or whether the Appellant was entitled to recover the said sum.

3. Section 3 of the Malaya Civil Law Ordinance 1956 is relevant to this Appeal. The said section provides as follows :-

> "(1) Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance;
>
> Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Ordinance or any other written law in force in the Federation or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail."

pp.1-2
pp.2-5

4. The Appellant commenced his action for the return of the said deposit by writ of summons dated the 22nd November 1960. By his Statement of Claim which was dated the 21st November 1960 the Appellant alleged that by a contract in writing dated the 31st May 1960 and made between him and the Respondents he agreed to purchase from them certain lands in Malacca, in area slightly exceeding 496 acres, at a price of $1,800/- per acre, that he paid to the Respondents prior to the execution of the said contract the sum of $90,000/- in part payment of the purchase price and that there was a

provision that the balance of the purchase price should be paid on or before the 8th August 1960. The Statement of Claim also referred to a provision in the said contract that if the purchaser failed to complete in accordance with the agreement the $90,000 should be considered as liquidated damages and should be forfeited, but by paragraph 4 it was alleged that time was not of the essence of the contract and the Respondents did not by notice or otherwise make it so.

Paragraph 5 recited that the Appellant did not pay the balance of the purchase price on or before the 8th August 1960 or before the Respondents wrongfully rescinded the contract as in the following paragraphs appeared. The Statement of Claim went on to refer to proposals made by the Appellant through his Solicitors on the 10th August 1960 for the variation of the contract, which the Respondents through their Solicitors on the 11th August 1960 indicated were acceptable subject to certain additional terms, and to the forwarding on the 17th August 1960 by the Appellant's Solicitors of the proposed supplemental agreement to the Respondents' Solicitors. The pleading set out the telegram sent by the Respondents' Solicitors to the Appellant's Solicitors on the 19th August 1960 rejecting this draft agreement as containing a paragraph that had not been agreed but also demanding payment by the Appellant of certain additional sums provided for by the draft supplemental agreement before 1 p.m. on the 20th August 1960, in default of which the deposit of $90,000/- was to be forfeited "pursuant to agreement of 31st May". It was pleaded that the Appellant did not pay the said additional sums on the 20th August as demanded whereupon the Respondents wrongfully rescinded the contract and forfeited the said sum of $90,000/-.

5. The Respondents in their Defence and Counterclaim dated the 6th February 1961 alleged that time was of the essence of the contract and denied that they had wrongfully rescinded the contract. They alleged that they were entitled to forfeit the deposit of $90,000/- by reason of the default of the Appellant and by reason of the express terms of the contract and that they were not bound to repay the same to the Appellant. They referred to correspondence passing between the parties' Solicitors, in the course of which the Respondents' Solicitors informed the Appellant's Solicitors that the pp.5-10

original agreement had lapsed but offered to negotiate a fresh agreement, and alleged that the Respondents were then and continued to be willing to sell the said lands to the Appellant. If, as the Respondents denied, the contract had not lapsed they counterclaimed for specific performance.

pp.11-38

6. The case was heard in the High Court of Kuala Lumpur (Azmi J.) on the 9th, 10th, 11th and 12th April 1962.

p.40,l.46-p.41,l.13

It appears to have been agreed that the issues in the case should be as follows:-

"(1) Was time of the essence of the contract in the agreement dated 30th May 1961 (this, it is thought, is intended to be 31st May 1960)?

(2) Did time ever become the essence of the contract in course of the negotiation?

(3) Was or was not the position in law that upon failure to complete the agreement on the date stated in the contract, the contract terminated and the deposit was forfeited?

(4) Are the defendants now entitled to specific performance or damages?"

7. The salient facts of the case as shown by the evidence called on behalf of the Appellant and the Respondents were as follows :-

p.32,ll.3-11
p.36,ll.19-22
p.109,ll.1-19

On the 9th May 1960 the first Respondent gave his brother Tay Say Keng an option authorizing him to sell the said land, which was a rubber estate, and of which the second Respondent was described as the owner, at $1,800/- an acre.

p.12,ll.28-35
p.32,ll.12-15
pp.113-116

On the 31st May 1960 a contract in writing was made between the Respondents, therein described as Registered Proprietors of the said lands, and the Appellant for the purchase by the Appellant of the said lands at the price of $1,800/- per acre.

The contract provided inter alia as follows:-

"2. The Purchaser shall pay to the Vendors the sum of Dollars Ninety thousand ($90,000) upon or

before the execution of this agreement by way of deposit and in part payment of the said purchase price (the receipt whereof the Vendors hereby acknowledge) and the balance shall be paid on the date fixed for completion of the purchase.

3. The Purchase shall be completed and the balance of the purchase money shall be paid on or before the 7th day of August 1960 at the office of the Vendors' Solicitors Messrs. Allen Gledhill & Ball of Malacca. On completion the Vendors will deliver to the Purchaser a proper conveyance or conveyances and assignment of the said lands in favour of the Purchaser or his nominee or nominees free from all encumbrances and the Purchaser will pay to the Vendors the balance purchase price.

5. The Purchaser shall as from the date hereof be at liberty to enter into possession of the property hereby sold and maintain the same and all buildings and machinery thereon at his cost and expense in their present state or condition but if the said property buildings or machinery shall be damaged by fire or other inevitable accident the Vendors shall be under no obligation to restore the same nor shall such event be a ground for the non completion of purchase.

8. If the Purchaser shall fail to complete the purchase in accordance with this agreement then the deposit of Dollars Ninety thousand ($90,000) paid by the Purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the Vendors and the Purchaser shall thereupon surrender possession of the said property buildings and machinery to the Vendors and this agreement shall be at an end."

8. There was evidence that the Appellant in negotiating for the purchase of the said lands was acting on the instructions of a Mr. Jeyaraja and that a company named Austral Asia Plantations Limited, the subscribers to which were Mr. Jeyaraja and Mr. Williams, had been formed with the object of purchasing the said lands and running them as a rubber estate.

p.12,ll.8-40
p.16,ll.15-38
p.17,ll.9-25
p.110,ll.1-14
pp.151-4

p.12,l.40
p.15,ll.1-2

9. The Appellant duly paid the Respondents the deposit of $90,000/- provided for in the said contract, but did not at any time enter into possession of the property.

p.13,l.23
p.32,l.21

10. It is common ground that the Appellant did not pay the balance of the purchase price on or before the 7th August 1960.

p.13,l.25
p.24,l.7
p.37,l.5

11. On the 8th August 1960 a meeting took place at the Appellant's house at Kuala Lumpur at which, amongst others, the Appellant and Mr. Tay Say Keng acting on behalf of the first Respondent were present. At this meeting Mr. Tay Say Keng telephoned several times to the first Respondent, who was then at his house in Malacca, for instructions on matters arising at the meeting before he made any agreement as to them. At the meeting there was a discussion as to extension of time for payment and it was agreed that the Appellant should pay to the Respondents certain further sums by way of interest on the balance of the purchase price. There followed correspondence between the parties' Solicitors in which certain proposals for further payments, which had been discussed at the meeting, were formally put forward.

pp.134-5

The Appellant's Solicitors proposed by letter dated 10th August 1960.

(A) The Appellant should pay to the Respondents $12,500/-, as an addition to the purchase price, in three payments on the following dates:-

(1) $2,500/- upon the Acceptance Date, (which was the day of acceptance by the Respondents of the proposal being put forward).

(2) $5,000/- on or before the 31st August 1960.

(3) The balance of $5,000/- on or before 30th September 1960.

(B) The Appellant was to pay a further deposit of $30,000/- to the Respondents on the Acceptance Date.

(C) The Appellant was also to pay a further $3,000/- on the Acceptance Date as a deposit to cover the cost of weeding and maintenance of the land.

The Appellant's Solicitors in their letter dated the 10th August 1960 also proposed that the time for

the completion of the purchase should be extended for two months from the Acceptance Date. The Respondents' Solicitors in their reply dated the 11th August 1960 asked that time should be expressed to be of the essence of the contract and that the Acceptance Date should be deemed to have been the 8th August 1960. They asked for the Appellant's Solicitors to prepare a supplementary agreement on the above lines and submit a draft for approval, and this the Appellant's Solicitors in their reply of 13th August 1960 stated that they would do. pp.135-7 p.137

12. The Appellant's Solicitors duly sent a draft supplemental agreement to the Respondents' Solicitors on the 17th August 1960. In their covering letter they wrote:- pp.144-7 p.138

> "With regard to paragraph 4 of the enclosed draft we are instructed that this proposal has been agreed in principle with the representative of your clients. We are further instructed to suggest that the date for final completion be 18th October as stated in paragraph 5 of the enclosed draft."

The paragraph referred to read as follows:-

> "Prior to the date hereinafter fixed for the completion of the purchase the Vendors will at the request of the Purchaser execute and deliver to the Purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the first schedule to the principal agreement upon payment to the vendors of the pro rata purchase price of $1,800/- per acre or such increased price as the Purchaser shall have arranged to sell any such part or parts of the said land to a sub-purchaser and any such excess price shall be retained by the Vendors to account of the balance payable on completion but shall not be considered as further deposit." p.146,ll.21-41

13. As to whether the proposal incorporated in this paragraph had been agreed between the parties at their meeting on 8th August 1960, the evidence was conflicting.

The Appellant testified as follows:-

p.14,11.17 -25 "To my memory that paragraph 4 was agreed at the meeting and I was to hand over the purchase price of the small lots whenever I got it to the vendor. I say this was discussed at the meeting. Mr. Tay Say Keng understood this point and agreed to it. Mr. Tay Say Keng appeared certain the matter should proceed on that line."

p.25,11.2-7 Mr. Sathappan, who gave evidence for the Appellant and who was at the meeting, said that the matter stated in paragraph 4 was discussed at the meeting and that Mr. Tay Say Keng said he would speak to his brother and make him agree.

p.37.11.49-51 Mr. Tay Say Keng himself said that probably he had promised to mention this matter to his brother, the 1st Respondent, and had forgotten.

14. The draft supplemental agreement was never executed. On the 19th August 1960, on receipt of the p.139 draft, the Respondents' Solicitors telegraphed to the pp.139-40 Appellant's Solicitors in the following terms, which were confirmed by letter the same day.

> "YOUR LETTER SEVENTEEN AUGUST DRAFT AGREEMENT UNACCEPTABLE PARAGRAPH FOUR NEVER AGREED TO BY OUR CLIENT NOR HIS REPRESENTATIVE STOP UNLESS DOLLARS THIRTY FIVE THOUSAND FIVE HUNDRED PAID TO US IN CASH OR BANKDRAFT IN NAME OF ALLEN GLEDHILL AND BALL BEFORE ONE POST MERIDIEN TWENTIETH AUGUST TOMORROW IN TERMS OF YOUR LETTER TENTH AUGUST AND OUR REPLY ELEVENTH AUGUST DOLLARS NINETY THOUSAND WILL BE FORFEITED PURSUANT AGREEMENT OF THIRTY FIRST."

p. 34,11. 34-8 The evidence of the first Respondent was that despite the wording of this telegram, its sending had nothing to do with paragraph 4.

15. The evidence of the Appellant was that after p.14,11.36 -45 discussion with Mr. Jeyaraja (who was interested in the transaction), he was not prepared to accept the draft supplemental agreement as amended by the proposed p.20,1.12 deletion of paragraph 4. The Appellant's Solicitors accordingly did not reply to the telegram and letter of the 19th August 1960.

p.141 16. On the 22nd August 1960 the Respondents' Solicitors wrote to the Appellant's Solicitors in the following terms.

"Dear Sirs,

Re: Sale of 496 acres of rubber estates to H.G. Warren

In reference to our telegram and letter of the 19th instant in which we informed you that your client's deposit of $90,000 has been forfeited, we shall be glad if you will now return to us all the title deeds forwarded with our letter of the 7th June last on the usual undertaking.

Yours faithfully,

Sd. Allen Gledhill & Ball."

The Appellant's Solicitors replied to this letter by a letter dated the 25th August 1960 in which they contended that the Respondents were not entitled to rescind the agreement or forfeit the deposit. To this letter the Respondents' Solicitors replied on the 29th August 1960, reiterating that the Respondents were entitled to rescind and stating that in the Respondents' view $90,000 had been "automatically forfeited" on the Appellant's failure to complete his purchase in accordance with the agreement of 31st May 1960, but offering to negotiate a fresh agreement. pp.141-3 pp.143-4

17. Judgment was delivered in the High Court of Kuala Lumpur by Mr. Justice Azmi on the 23rd June 1962. The learned judge held, it is submitted correctly, that there were no attendant circumstances from which he could deduce that time was of the essence of the contract, and that the Respondents had never made or intended to make it so by notice. He further held that the Respondents, through their Solicitors, by their telegram of the 19th August 1960 had put an end to the contract and that the Appellant, not being in default, was entitled to the return of the deposit. He accordingly ordered that the Respondents should pay the Appellant the sum of $90,000/- with interest thereon and the Appellant's costs and dismissed the counterclaim. pp.39-51 p.47,l.10 p.47,l.33 p.50,l.25 p.50,l.34 p.50,l.41 pp.51-2

18. By Notice of Appeal dated the 10th July 1962 the Respondents appealed to the Court of Appeal at Kuala Lumpur. The Appeal was heard on the 4th and 5th December 1962, by Thomson C.J., Hill J.A. and Syed Sheh Barakbah J.A. pp.52-3 pp.56-79

pp.80-105 19. The judgment of the Court of Appeal was delivered by Thomson C.J. on the 28th February 1963. In his judgment the learned Chief Justice referred to the p.91,l.26. equitable rule that in contracts for the sale of land provisions as to the time of performance are not to be strictly construed unless time is expressly made of the p.91,l.44 essence of the contract. He expressed some doubt as to p.93,ll.7-25 how far the rule applied in Malaya but referred to previous cases in Malaya in which the rule had been applied, pointed out that neither side in the present case had suggested that it did not apply, and proceeded on the assumption that it did apply. The learned Chief Justice does not appear to have made any finding anywhere in his judgment whether in this particular case time was or was not ever of the essence of the contract, but appears to have treated the case upon the footing that the purchaser, not having completed upon the legal date for completion viz. 7th August 1960, was bound to fail in an action at common law for the return of his deposit, unless he could bring himself within some equitable p.97,l.27 principle which would induce the Court to relieve him from the consequence of his legal default, which was forfeiture. The learned Chief Justice, dealing with p.97,l.43 the matter on these lines, referred to a number of cases p.104,l.24 in which equitable principles were sought to be invoked in order to obtain relief against a forfeiture clause in a contract. These cases, it is submitted have little to do with the present case. In the same way the learned p.104,ll.25- judge devoted a part of his judgment to a consideration 37 of whether the amount of the deposit was such as to be disproportionate or unconscionable or to suggest sharp practice, holding that there were no circumstances which would support any such finding.

p.104,l.41- The learned Chief Justice said that he did not p.105,l.9 propose to deal with the Counterclaim, but said that in his opinion the Respondents were not entitled to specific performance, having from the beginning taken up the attitude that they were relying on their legal rights and the Appellant's "lack of equitable rights".

pp.105-7 The Order of the Court of Appeal was that the Appeal should be allowed and the Judgment of the lower Court set aside.

20. The Appellant submits that the Judge's approach to the case was a wrong one. The question for determination

was not whether there was to be relief against forfeiture, but what was to happen to the deposit on the termination of the contract. It is submitted that the material facts were that the contract for purchase had come to an end by the 22nd August 1960 and that, having regard to the paramount equitable principle that time was not of the essence of the contract, this was not through the default of the Appellant but through that of the Respondents. This being so, there was no ground upon which the Respondents could lawfully retain the deposit. The Appellant submits that the purpose of a deposit is to secure due performance of the contract by a purchaser, and that, when it is the Vendor who brings the contract to an end, there is nothing left for the purchaser to be made to perform and the money deposited is recoverable by him as money had and received to his use.

21. On the 28th August 1963 the Appellant was given final leave to appeal to the Privy Council by the Court of Appeal at Kuala Lumpur. pp.107-8

22. It is respectfully submitted that the said Judgment and Order of the Court of Appeal at Kuala Lumpur dated the 28th February 1963 are wrong and should be set aside and that this appeal should be allowed with costs throughout for the following among other

R E A S O N S

1. Because by the law of Malaya the equitable rule that time is not of the essence of the contract in agreements for the sale of land, unless it is expressly made so, is paramount.

2. Because time was not of the essence of the contract in the agreement dated the 31st May 1960.

3. Because time was never made of the essence of the contract at any time subsequent to the agreement of the 31st May 1960.

4. Because the Appellant was at no time in default under the said agreement.

5. Because the Respondents wrongfully rescinded the said agreement.

6. Because, on the Respondents bringing the said agreement to an end, the Appellant's deposit became money had and received by the Respondents to his use and he was entitled to its return.

7. Because, the Respondents having rescinded the said agreement, the consideration upon which the Appellant's deposit had been paid totally failed.

8. Because the Judgment of Mr. Justice Azmi in the High Court was right for the reasons given by him and the Court of Appeal were wrong in allowing the Respondents' appeal and holding that the Appellant was disentitled to the return of his deposit.

Dingle Foot

Montague Solomon

No. 30 of 1963

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT
OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

HERBERT GEORGE WARREN

- and -

1. TAY SAY GEOK
2. LIM LIEW CHENG
3. NG LEI
4. LIM CHENG WAU

CASE FOR THE APPELLANT

GRAHAM PAGE & CO.,
Whitehall House,
41, Whitehall,
London, S.W.1.