~~P.C.~~ ~~44 of 62~~

Judgment
44/1964

IN 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

BETWEEN :

HERBERT GEORGE WARREN — Appellant (Plaintiff)

- and -

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

Respondents (Defendants)

CASE FOR THE RESPONDENTS

RECORD

1. This is an Appeal from an Order of the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur (Thomson C.J. Hill and Barakbah JJ) dated the 28th February 1963 allowing an Appeal by the Respondents from a judgment of Azmi J. in the High Court of Kuala Lumpur on the 23rd June 1962 whereby it was ordered that the Respondents pay to the Appellant a sum of $90,000/- with interest thereon at the rate of 6% per annum from the 28th August 1960 to the date of realisation and the Respondents' counterclaim for specific performance or alternatively rescission and a declaration that the sum of $90,000/- had been forfeited by the Appellant was dismissed. pp.105-7 pp.39-56

2. The action was brought by the Appellant as Plaintiff against the Respondents to recover a sum of $90,000/- dollars paid by the Appellant to the Respondents as deposit and by way of part

payment of the purchase price of certain lands of an aggregate area of 496 acres or thereabouts in the State of Malacca which had been planted and were used as a rubber estate and which the Appellant had by a contract in writing dated the 31st May 1960 (hereinafter called "the contract") agreed to purchase from the Respondents at a price of $1800/- per acre. It was admitted that the Appellant did not complete the contract on the date fixed for completion thereof and the question raised by this appeal is whether consequent upon the Appellant's failure to complete the said deposit of $90,000/- was properly forfeited by the Respondents.

3. The contract was negotiated in the following circumstances:- At all material times the
p.80, ll.6-20 Respondents were between them the owners of the land comprised in the contract (hereinafter called "the land") which consisted of seven individual parcels held under different titles and the first Respondent Tay Say Geok acted on behalf of all the Respondents. In the year 1960 the Respondents
p.32 l.3. were minded to sell the land and on the 9th May 1960 the first Respondent gave to his brother Tay Say Keng (hereinafter called "Keng") a written document authorising him to sell the land at a price of $1800/- per acre. Such document (which
p.109. was referred to at the trial as an "option" and is
Exhibit P.1(1). hereinafter called "the option") was expressed to remain operative until the end of May 1960 and provided (inter alia) "if this sale is put through the buyer has to pay 10% deposit down first and the balance to be paid within one (1) month."

p.36, ll.36-8 Keng approached the Appellant (who is a Chartered Accountant in Kuala Lumpur) and the Appellant stated that he had a buyer and handed Keng a sum of $1/- in return for the option.

p.12, ll.1-14 4. The Appellant's evidence at the trial was that he introduced Keng to one Williams and that he (the Appellant) suggested to Williams that Williams should get in touch with one Jeyaraja (who was then in England) with a view to interesting Jeyaraja in the purchase. On the 17th May 1960 the
p.109 Appellant received a telegram from Williams
Exhibit P.1(2). authorising him to bid for the land and shortly afterwards he received instructions to form a Company to be called Austral Asia Plantation Limited (hereinafter called "the Company") to
p.12,ll.15-23. acquire the land. On the Appellant's instructions his solicitors wrote on the 19th May 1960 to the Respondents' solicitors enclosing a draft contract

for the purchase of the land by the Appellant in which the date for completion was expressed to be the 20th July 1960 but this was subsequently altered to the 7th August 1960. p.110. Exhibit P.1(4).

5. On the 31st May 1960 there was executed and exchanged a written contract for the sale and purchase of the land expressed to be made between the Respondents as Vendors and the Appellant as Purchaser the material provisions of which were as follows:- p.113. Exhibit P.1(5-8)

(a) By clause 1 the Vendors agreed to sell and the Purchaser agreed to purchase the land at a price of $1800/- per acre.

(b) Clause 2 provided that the Purchaser should on or before the execution of the contract pay to the Vendors a sum of $90,000/- by way of deposit and in part payment of the purchase price and that the balance of the purchase price should be paid on the date fixed for completion of the purchase.

(c) Clause 3 provided that the purchase should be completed and the balance of the purchase price paid on or before the 7th August 1960 at the office of the Vendor's solicitors.

(d) By clause 5 it was provided that the Purchaser should as from the date of the contract be at liberty to enter into possession of the land.

(e) Clause 8 of the contract was in the following terms:-

"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."

6. On the 20th July 1960 the Respondents' solicitors wrote to the Appellant's solicitors reminding them of the date fixed for completion p.132 Exhibit P.1(24)

of the contract (erroneously stated as the 8th August 1960) and requesting a draft Conveyance. At the trial before Azmi J. the Appellant stated in evidence that it was apparent to him at that time that there might be delay in completion. His evidence was to the effect that in signing the contract he was acting as agent for Jeyaraja and that he personally never had any prospect of completing the contract either on the date fixed for completion or at any other date. He gave evidence of negotiations for the sub-sale of the land to the Company at a price of $2300/- per acre to which end a valuation was obtained and efforts made to raise the purchase price on loan. Accordingly by his solicitors the Appellant requested a meeting with the first Respondent which was (according to the evidence given on the Plaintiff's behalf by Jeyaraja) for the purpose of obtaining an extension of time so that part of the purchase price could be raised by sub-sale of parts of the land.

p.18.11.5-11.
p.16, 11.36-7
p.18, 11.14-20
p.17, 11.10-32.
p.124.
Exhibit P.1(18-23).

7. In the event the contract was not completed on the 7th August 1960 but on the following day a meeting took place at the Appellant's house at which were present the Appellant and one Sathappan on the one hand and Keng one Gan Lye Gee and one Madam Cheng on the other. It is common ground between the parties that at this meeting it was agreed in principle that two months' extension of time for completion would be granted subject to the following conditions which were stated by Azmi J. in his judgment as follows:-

p.42, 11.24-42.

"(a) The Plaintiff to pay to the Defendants $12,500/- in three payments on the following dates

(i) $2500/- on acceptance date;

(ii) $5000 on or before the 31st August 1960;

(iii) $5000/- on or before 30th September 1960.

These sums are interest on the balance of the purchase price.

(b) The Plaintiff to pay a sum of $30,000/- by way of further deposit and the

balance of the purchase price to be paid on the extended date:

(c) The Plaintiff also to pay a deposit of $3000/- on acceptance date by way of deposit to cover cost of weeding and maintenance of the rubber lands."

8. The foregoing conditions were embodied in a letter dated the 10th August 1960 from the Appellant's solicitors and were accepted by the Respondents by letter from their solicitors dated the 11th August 1960 subject to (a) the two sums of $5000 being paid in any event even if default were made in payment of the balance of the purchase money (b) time being expressed to be of the essence of the contract and (c) the acceptance date being deemed to be the 8th August 1960. p.134. Exhibits P.1(2) and P.1(27)

9. On the 17th August 1960 the Appellant's solicitors sent to the Respondents' solicitors a letter enclosing a draft of a supplemental agreement to give effect to the foregoing terms but which contained the following clause:- p.138. Exhibit P.1(29).

"4. Prior to the date hereinafter fixed for the completion of the purchase the Vendors will at the request of the Purchasers 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 $1800/- 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. Exhibit P.1 (35-37).

10. On the 19th August 1960 the Respondents' solicitors sent to the Appellant's solicitors a telegram in the following terms:-

"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 bank-draft in p.139. (Exhibit P.1(30).

name of Allen Gledhill and Ball before one post meridian 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 May."

p.141. Exhibit P.1(32).

11. The Appellant did not comply with the request contained in the said telegram and accordingly the Respondents by letter dated the 22nd August 1960 claimed that the contract was at an end and the deposit of $90,000/- forfeited. The evidence of the Appellant at the trial with regard to the non-payment of the sum of $35500/- was as follows:-

p.19, ll.36 et seq.

"To my recollection a cheque was drawn for $35,500/- and signed by me and Mr. Williams but was not presented to the lawyer. The cheque was drawn on Saturday morning the day following the receipt of the telegram.

p.20, ll.1-17.

After discussion with Mr. Jeyaraja and Mr. Sathappan after the amendment of the Supplemental Agreement we found it was unacceptable. They decided that if they could not dispose of the small acreages, it would be difficult for the Company to operate. Without the opportunity of selling small acreages we would find it difficult to get finance. Mr. Jeyaraja Mr. Sathappan, myself and Mr. Rawson were present at the meeting. The cheque for $35,500 would have been a good cheque. Afterwards it was torn up. We did not get in contact with the defendant's solicitors after receiving the telegram because there would be no point in proceeding with the matter."

p.142. Exhibit P.1 (33).

12. On the 25th August 1960 the Appellant's solicitors wrote to the Respondents' solicitors claiming that the deposit had been wrongfully forfeited and that the contract was still in existence. By letter dated the 29th August 1960 the Respondents' solicitors replied affirming that the deposit had been properly forfeited but offering without prejudice to such contention to negotiate a fresh agreement and enclosing a draft of the supplementary agreement amended in accordance with the terms of their letter of the 11th

p.143. Exhibit P.1 (33).

August 1960 and providing for the sum of $35,500 to be paid on the execution thereof or on the 3rd September 1960 (whichever should be the earlier) and for completion of the contract on the 18th October 1960. Such offer was not accepted and on the 22nd November 1960 the Plaintiff commenced proceedings against the Respondents for recovery of the deposit.

13. In his judgment Azmi J. stated the issues as follows:-

"(1) Was time of the essence of the contract in the agreement dated 31st May 1960? p.41, ll.1-13

(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?"

After stating the facts His Lordship dealt with the conflict between the evidence of the Appellant and evidence called by the Respondents as to whether the provisions of clause 4 of the draft Supplemental agreement had been discussed at the meeting on the 8th August and concluded:-

"In view of Mr. Sathappan's evidence and the fact that nothing was mentioned in the plaintiff's solicitor's letter of the 10th August of this very important matter, I have come to the view that this matter had not yet become, at the time of the meeting of 8th August, a condition to be embodied in the Supplemental agreement." p.44, ll.32-40

14. His Lordship also found as a fact that "the sum of $35,500/- would not become payable until the date of the execution of the supplemental agreement though it was apparent that the defendants would prefer that date to be 19th or 20th August 1960." p.45, ll.27-31.

15. As regards the first issue, namely whether time was of the essence of the contract His Lordship said:-

p.47, ll.10-23

"In my opinion, there are no attendant circumstances from which I could gather and hold that time was of the essence of the contract. The rubber trees were still immature and, indeed, according to the valuer it would not be until 1964 that the estate could be brought to full tapping. I am inclined to agree with Mr. Rintoul that the fact that the defendants wished to make time of the essence of the contract in their solicitors' letter of the 11th August 1960 would negative their suggestion that time had been of the essence of the contract from the beginning. I would, therefore, come to the conclusion that time was not of the essence of the contract."

His Lordship also held against the defendants on the second issue. He said:-

p.47, ll.24-36.

"Now with reference to the second issue namely whether time ever became of the essence of the contract during the course of the negotiations, Mr. Rintoul maintained that it never did and he said if it was contended that time did become of the essence of the contract by reason of the notice given in the telegram he would say that the time given being less than 48 hours was unreasonable.

I would put the answer to the question also in the negative. I do not think it was the intention of the defendants to make time of the essence of the contract by notice."

16. As regards the third issue, namely whether the position was that upon failure to complete the contract on the date stated the contract terminated and the deposit was forfeited, Azmi J. again held against the Respondents on the ground that since (as he had previously held) time was not of the essence, the Appellant would have had a good case for specific performance against the Respondents. He said:-

p.50, ll.25-40

"In my view there is no doubt at all that the defendants, through their solicitors, by their telegram of the 19th August 1960, had put an end to the contract probably under clause 8 of the contract, and mainly, I think, because of the plaintiff's attempt to include clause 4 of the Supplemental Agreement. I have held that time was not of

the essence of the contract and has never been so and also that there has been no unreasonable delay by the plaintiff in that he expected that he would be given time, on certain terms, until the Supplemental Agreement has been executed. He would, if he had asked for specific performance, undoubtedly have a good case."

17. His Lordship accordingly held that the Appellant was entitled to the return of the deposit with interest from the 20th August 1960 and dismissed the Respondents' counterclaim.

18. The Respondents appealed to the Court of Kuala Lumpur and the Appeal was heard on the 4th and 5th December 1962. On the 28th February 1963 the Court of Appeal allowed the Appeal and the judgment of the Court was delivered by Thomson C.J.

In his judgment His Lordship reviewed the facts and continued:-

"Now this is not an action for specific performance, it is an action for return of a deposit and, as Cotton L.J. observed in the case of Howe v. Smith that 'is essentially a claim at Common Law' . . . . . The obligation of the purchaser under the contract of 31st May was to pay 'the balance of the purchase money' which was approximately $800,000, at the office of the Vendor's solicitors on or before 7th August 1960. If that obligation was not discharged then, by reason of Clause 8, the contract was at an end and the deposit of $90,000 became forfeited to the Vendor . . . . . On the 7th August 1960 the purchaser either did not have $800,000 or he did have it but was not prepared to pay it to the vendor. His attitude was that he wanted either a new contract or a modification of the old contract (it is immaterial in which way it is regarded) which would include a provision which would in effect allow him to sell some of the land piecemeal and so acquire some of the money to pay for the balance. For such a contract he was prepared to pay an additional monetary consideration . . . . . In the circumstances the vendor was entirely within his legal rights in treating the contract at an end and the deposit as forfeited and the only question which calls for consideration is how far the legal rights of the parties are modified by the rules of equity." p.90, ll.20 et seq.

19. His Lordship then referred to section 41 of the Law of Property Act 1925 and stated that although he entertained some doubt whether the equitable rule as to time applied in the Federation of Malaya he proposed to
p.93, ll.22-25 deal with the case on the assumption that the rule did apply and referred to the statement
p.93, ll.37 et seq. of the rule in the speech of Lord Parker in Stickney v. Keeble [1915] A.C. 386 at p.415.

> "In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.
>
> That is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract."

His Lordship said:-

p.95, ll.8-29.

> "The present case, however, is not a straightforward case as to the application of that rule.
>
> What the purchaser was asking for here was not specific performance of the contract, it was the return of his deposit and that depends on the question of whether in all the circumstances a Court of Equity would have relieved him from forfeiture of his deposit.
>
> Now, with great respect, I cannot accept the view of Azmi J. that if the purchaser had asked for specific performance he would have had a good case. He would have had a bad case for the simple reason that at no time was he ready or willing to perform his own obligation under the contract which, apart from any question of time, was to pay some $800,000. It is true he was prepared to make arrangements which were designed to ensure that the

vendor would eventually receive the whole of the purchase money but he was not ready or willing to put the money on the table.

It may be that if after the dispute in August 1960 the purchaser had taken up the attitude that if he could not have the original contract varied in accordance with his wishes he insisted on standing on that contract as it stood and if he had been willing to pay the balance of the purchase money he would have been successful in obtaining specific performance. p.97, ll.19-42.

But that is not what has happened. He is not asking for specific performance. He is asking in effect to be off with his bargain, to be relieved from forfeiture of the security he has given for its performance and to get back the money that has already been paid in part payment. This demand has been based on the ground that the Vendor was not entitled to treat the contract at an end by reason of his failure to comply with his legal obligation under it because in equity so much of that obligation as consisted in payment on a fixed day was not binding on him. But clearly his real case is that a Court of Equity would and should relieve him from the forfeiture which he had incurred in law."

20. His Lordship then considered the question whether the Appellant had shewn any ground upon which equity would have given or should give relief against forfeiture of the deposit and concluded that no such ground had been shewn. He said:-

"The truth here is that ever since he failed to comply with his legal obligation to pay the purchaser has in effect wanted indulgence not only as to time (which equity might have given him) but as to the very nature of that obligation. He has throughout insisted that he is entitled to some relief as to the very nature of his obligation and that he is not prepared to go on with the contract unless he gets it. In the circumstances I do not think he is entitled to rely on the argument that he might have been entitled to relief as to time alone to support his present claim to the return of the money paid as part p.99, ll.8-32.

payment and deposit, which is what he is asking for. This is really based on the contention that although the vendor may have been justified by law in treating the contract as at an end when the purchaser made it clear that he was not prepared to go on unless not only in his own time but also in his own way which involved a material variation of his own obligation nevertheless the vendor's action in doing so was so unconscionable as to invoke the interference of equity".

In considering that contention His Lordship referred to Musson v. Van Dieman's Land Co. /1938/ 1 A.E.R. 210; Stockloser v. Johnson /1954/ A.E.R. 630 and Steadman v. Drinkle /1916/ A.C. 275 and concluded:-

p.104, ll.25-41. "In all that I can find nothing to support the purchaser in the present case. The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the Vendor's action in retaining the money is unconscionable.

For these reasons I would allow the appeal with costs and order judgment to be entered for the appellants (that is the vendor) with costs . . . ."

21. The Respondents submit that the judgment of the Court of Appeal at Kuala Lumpur was right. Whether or not time was of the essence of the contract the Appellant's own evidence was that
p.18, ll.14-19 he was never in a position to complete the
p.20, ll.13-17. contract either on the date fixed for completion or on any other date and that neither he nor his associates were prepared to complete the contract unless they could dispose of the small acreages
p.30, ll.1-7. before completion and this was confirmed by the
ll.26-28. evidence of Jeyaraja himself on whose behalf the Appellant alleged that he was acting. The Appellant was not therefore in a position to claim and did not claim specific performance of the contract but on the contrary by insisting upon a condition which (as Azmi J. found) had never been

agreed himself repudiated the contract.

22. The Respondents further submit that the stipulation in the contract as to the date fixed for completion was in fact of the essence of the contract. The land the subject-matter of the contract consisted of a rubber estate and the evidence of the valuer called by the Appellant established that the price of a rubber estate varies to some extent with the price of rubber. Prior to the contract the Appellant having seen the option was aware that time was of importance to the Respondents and the contract when executed contained provisions enabling the Appellant to go into immediate possession without any stipulation for interest pending completion or in the event of delay in completion. Furthermore the completion date in the original draft of the contract submitted by the Appellant's solicitors was altered at the Appellant's request from 20th July 1960 to the 7th August 1960 and the Appellant himself stated in evidence "It was of great importance that I should find money before date fixed for its payment." The Respondents further submit that the fact that the Appellant felt it necessary to negotiate terms for an extension of the time for completion is consistent only with an underlying assumption by both parties to the contract that the time fixed for completion was of the essence of the contract.

p.115. Exhibit P.1 (5-8) 11.7-19

p.15, 11.22-32

p.19, 11.30-33

23. Accordingly the Respondents submit that the judgment of the Court of Appeal at Kuala Lumpur appealed from is correct and should be affirmed for the following (among other)

R E A S O N S

(1) BECAUSE on the Appellant's own admission he had no prospect of completing the contract on the 7th August or any other date.

(2) BECAUSE on the Appellants' own admission he was unable and unwilling to complete the contract unless the Respondents agreed to permit the sub-sale of the smaller acreages prior to an extended completion date.

(3) BECAUSE time was of the essence of the contract and the deposit became forfeited on the failure of the Appellant to complete on the date fixed for completion.

(4) BECAUSE even if time was not of the essence of the contract the Appellant was never willing or able to complete the contract except upon terms to which the Respondents were not bound to and did not agree and the Appellant shewed no grounds upon which he was entitled in equity to be relieved from forfeiture of the money paid as a guarantee of fulfilment of his obligation under the contract.

(5) BECAUSE on his own admission the Appellant had prior to the date on which he was notified that the deposit had been forfeited already determined to withdraw from the contract.

(6) BECAUSE the Respondents were at all material times willing and ready to perform their part of the contract and the Appellant was not and the Appellant could not by his own default acquire a right to rescind the contract and recover his deposit.

(7) BECAUSE the reasoning in the judgment appealed against is correct.

W.H. SAULT

PETER OLIVER

No. 30 of 1963

IN THE PRIVY COUNCIL

ON APPEAL

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- v -	
TAY SAY GEOK and OTHERS	Respondents (Defendants)

CASE FOR THE RESPONDENTS

COWARD, CHANCE & CO.,
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Respondents' Solicitors.