

33, 1969

9 OF 1969

IN THE PRIVY COUNCIL

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
- C.M.A. 370  
25 RUSSELL SQUARE  
LONDON, W.C.1.

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE LOAN INVESTMENT CORPORATION  
OF AUSTRALASIA LIMITED

Appellant

AND

MANUS BONNER

Respondent

CASE OF APPELLANT PURSUANT TO RULE 25.

10

"THE CIRCUMSTANCES OUT OF WHICH THE  
APPEAL ARISES"

RECORD

1. This Appeal (from an appeal to the New Zealand Court of Appeal on Grounds of Law only) concerns an Agreement for Sale and Purchase a copy (representation) of which is set out in full in the Judgment of North P. in the New Zealand Court of Appeal. It consisted in the adaptation of a one-page printed form of Land Agent's Agreement. The principals involved never met before the Supreme Court hearing.

NZLR 1030  
1.41 to  
1031 1.26

20

2. The facts as found are set out in the Judgment of Wild C.J. in the Supreme Court. The effect is that the evidence of the Respondent (Vendor) was rejected and against his the evidence of his Land Agent Mr. Lochore and of the Appellant (Purchaser) was accepted. The Respondent (Vendor) was a Mathematics Teacher and was described on the Title to the property as a Building Supervisor. The purchasing company dealt in real property. The agreement for the sale of two dwellings was drawn up by the Vendor's Agent and signed by both parties as

NZLR 1025  
1.51 to  
1027 1.8  
and 11.26-33

30

RECORD

NZLR p.1026  
1.2

appears in the said copy. The dwellings sold were near to the central part of Wellington and to a redevelopment area under the Town and Country Planning Act 1953. As is found in the Supreme Court Judgment the Vendor's Agent considered the properties were worth £11,000 and the Vendor was prepared to leave £4500 mortgage on each of them. Under the contract however they were sold to the Appellant purchaser at £13,300 with a provision that £11,000 be deposited with the purchasing company for 10 years at 7½% per annum payable quarterly. 10

Statement  
of Defence  
pages 4-7  
NZLR 1026  
1.30 to  
1.36

3. The only objection ever taken by the Vendor to the contract was that he considered he was selling to and leaving money on deposit with "one of the Companies in the Lamphouse Group of Companies"; although this was a group of companies of which he knew nothing material. He had no objection in principle to leaving moneys so on deposit. His only objection was to the identity of the purchaser. To establish his allegation he alleged solely the false and fraudulent conduct of his own agent Mr. Lochore; his evidence being rejected and that of Mr. Lochore accepted. The Purchaser was ready and willing to settle. Michael Gavin Francis named in two places in the contract was before the Court and gave evidence. 20 30

4. The Vendor appealed to the Court of Appeal from the Judgment of Wild C.J. in favour of the Purchaser. Judgments in the Court of Appeal in the Vendor's favour were: North P. and Turner J. In favour of the Purchaser: Richmond J

5. The effect of the Judgments in the Court of Appeal briefly summarised is:

North P: (a) The interpretation placed by the Judge of first instance on the contract was not correct. There were two separate and distinct stipulations but "in one sense interdependent". 40

(b) Even if the contract is to

be regarded as one and indivisible specific performance should have been refused.

Turner J: (a) There were two though inter-dependent obligations.

(b) The Chief Justice did not purport to exercise his discretion

(c) Specific performance should be refused.

10 Richmond J: (a) The contract is (as submitted on behalf of the Vendor), an entire as opposed to a divisible contract. It is a composite and indivisible undertaking and there is an "indivisible consideration"

(b) Any question of discretion should be decided against the background of the real effect of the transaction and the Chief Justice has not approached the exercise of his discretion on a basis wrong in law.

20 None of the three Judges considered that the Respondent (Vendor) could succeed on lack of mutuality. Turner J. and Richmond J. both considered there was sufficient evidence to justify a finding of "readiness and willingness" on the part of the purchaser to perform the contract.

6. "CONTENTIONS TO BE URGED BY THE APPELLANT"

(1) The Respondent is bound by his pleadings.

(2) The Judge of first instance correctly dealt with the case as presented before him.

40 (3) The general rule is that a party to the contract for a sale of land is entitled to specific performance.

(4) The Judge of first instance did in fact, as is clear from the record, exercise his discretion in granting specific performance.

RECORD

(5) The Court will not interfere with the exercise of discretion of a Judge unless it is clearly satisfied that he was wrong.

(6) The conduct of both parties in relation to the case is relevant where an equitable remedy is sought; and the failure of the Respondent (Vendor) in his basic allegation of defence is not indicative of frankness and honesty.

(7) In reference to the Judgments of the Court of Appeal: even if there were any grounds for the Vendor fearing for the financial stability of his Purchaser (which is nowhere established) that is no ground for refusing a decree of specific performance.

10

(8) If it is necessary to go further and interpret the contract: the Judge of first instance correctly interpreted the contract in truth and substance "as a contract for the sale of land".

20

(9) On an appeal on grounds of law a point of law cannot be raised for the first time in the Appellate Tribunal except in very exceptional circumstances.

It is respectfully submitted in support of the above contentions as follows:

7. As to Submission (1): The case proceeded in accord with the pleadings. No amendments were sought. The pleadings were drawn by Counsel and are an instrument of art.

30

8. As to (2): In a full but concise Judgment the Chief Justice has covered in his findings of fact all relevant aspects of the case. Everything possible is covered including a reference to the financial standing of the purchasing company. The legal principles are reviewed. Nothing objectionable is found to exist in the nature and the circumstances of the contract.

40

9. As to (3): The general rule is that a party to a contract for sale of land is entitled to specific performance. Halsbury 3rd Ed. Vol. 36. p.263 (Para. 359) under head "Specific Performance" and cases cited in notes (h) and (i). Hall v. Warren (1804) 9 Ves. 505 at p.608: 32 E.R. 738. Haywood v. Cope (1858) 25 Beav. 140: 53 E.R. 589 (Romilly M.R.). Seton "Judgments and Orders": 7th Ed. Vol. III, p.3129 (top).  
 10 Williams "Vendor & Purchaser" 4th Ed. 40 (K).

10. As to (4): It is clear that the Judge at first instance has covered and found clearly as to facts upon all matters involved in the exercise of his discretion. By his adopting the quotation from Halsbury he has, by clear implication (at least), but, it is submitted, expressly, held that this contract was "unobjectionable as to its nature and circumstances". Having so held he proceeds to the decree of specific performance.  
 20

11. As to (5): The Vendor seeks to have the exercise of the discretion interfered with on grounds of law. Evans v. Bartlam [1937] A.C. 473: Charles Osentin & Co. v. Johnston [1942] A.C. 130: Cannons v. v. Sparrow [1955] N.Z.L.R. 33 (C.A.) at p.38, 1.25.

12. As to (7): The case of Jennings Trustee v. King [1952] Ch. 899 (Harman J.), cited in Hanbury "Modern Equity" 8th Ed. page 560, deals with a purchaser company so insolvent as to have committed an act of bankruptcy before completion of a sale. The Judgment at page 911 (last paragraph) states regarding a Vendor "in any event he is no worse off than other creditors and ought in my own judgment to be no better off". This case has no relevance to the  
 30 facts here but it sets out the proper remedy: and the Vendor here can ask for nothing  
 40 more.

13. As to (8): If it is necessary to go further and interpret the contract: the Judge of first instance correctly interpreted

RECORD

the contract in truth and substance as a contract for the sale of land with a provision for part of the purchase money to remain on loan to the purchaser.

(a) The drawing of the contract consisted in the filling-in by the Land Agent Mr. Lochore of a printed form making the terms fit the available spaces. It is not an instrument of art. It was prepared by the Agent of the Vendor. He and both the signatories were all before the Court. It is not to be expected that the Agent would have used the precision of language which might have been used by a Solicitor in drawing a document. Roughness of draftsmanship, and the vernacular approach of dealers ought, it is submitted, reasonably be considered by a Judge in arriving at the intention of the parties before him. 10

(b) As regards the expression "settlement" the parties established their own dictionary. The word is used in five places in the short agreement but only one "settlement" is contemplated. It is submitted that these expressions taken together throughout connote one single contemporaneous process between the parties and not two independent acts. "On Settlement" is equated to and means "as part of the settlement". A settlement statement as mentioned in (c) following would properly show a credit in respect of the £11,000. 20 30

(c) There is no difference between this case and that where a vendor leaves some of the purchase money on mortgage of the property sold. All such mortgages are expressed by Solicitors to secure moneys "advanced", that is "loaned", however the words of the preliminary contract may read. In fact the mortgage moneys invariably become a loan on settlement of the transfer and contemporaneously therewith. This is so well understood everywhere by persons dealing in property that the words "loan" and "leave owing" are, it is submitted, interchangeable. 40

P.43,1.22.

The settlement statement asked for in the letter of 6th March 1967 was in the circumstances not delivered to the Purchaser's

Solicitors. It would be strange indeed if, between the same parties, £11,000 was not shown as a credit therein; or that two busy Solicitors' offices would clutter up their books and Trust Accounts with unnecessary entries. The Company's Deposit receipt was available to hand over on settlement.

10 In Starkey v. Barton [1909] 1 Ch.284 (at p.290 Para. 4) (Parker J.): An order was made for specific performance of a contract of sale containing a stipulation that part of the purchase money be left on mortgage.

Fry on "Specific Performance" 5th Ed. p.24, para. 54.

Williams "Vendor and Purchaser" 4th Ed. at p.1046, last paragraph, Note C.

20 There could be no objection in principle to a contract for sale even where on getting a high price a Vendor in his wisdom were to leave all the purchase money owing and unsecured and payable at the end of a term. It is submitted that it is beyond the function of a Court to be wiser than he. In the present case the Vendor had no objection to leaving moneys owing. His only objection, in regard to "the Lamphouse" idea, failed.

30 14. As to Submission (9): On an appeal on grounds of law a point of law cannot be raised for the first time in the Appellate Tribunal: Oscroft & Others v. Benabo [1967] 2 All E.R. 548, C.A. at p.552, letter A; p.554, letter I; p.557, letter H.

A point not raised in the Court below can be raised on appeal only in very exceptional circumstances: Perkowski v. Wellington City Corporation [1959] A.C. 53 at p.69 etc.: Kabaka's Government v. Att.Gen. of Uganda [1966] A.C. 1 at p.14, para. 3.

40 14. The Appellant respectfully submits that this Appeal should be allowed and that the Order of specific performance should be affirmed

RECORD

and that the Respondent should be ordered to pay the Appellant's costs and disbursements for the following among other

R E A S O N S

- (a) BECAUSE the Chief Justice in the Court below was right in the manner in which he dealt with the case.
- (b) BECAUSE the majority of the Court of Appeal were wrong in:
  - (i) Not taking due cognisance of the pleadings and of the findings of fact in the Judgment of the Court below. 10
  - (ii) In their interference with the exercise of the discretion of the Court below.
  - (iii) In their construction of the contract.
  - (iv) In the grounds on which they state such discretion should have been exercised 20
- (c) BECAUSE Richmond J. was right in his view of the case both as to his interpretation of the contract and as to the exercise of the discretion in the Court below.

B. CAHILL.