

Robert Goode - - - - - *Appellant*

v.

Murray Newton Scott - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1977**

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SIMON OF GLAISDALE
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD FRASER OF TULLYBELTON]

This appeal arises from a dispute between the parties to a sale of 13½ acres of land in the Borough of Otaki. As the sale was of farm land it was subject to the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 ("the 1952 Act"), one of the purposes of which is to prevent the undue aggregation of farm land in the hands of a single person. By section 25 of that Act the consent of the Administrative Division of the Supreme Court of New Zealand was required for the sale and the question is whether such consent had been granted by the time stipulated in the contract.

The respondent offered on 17th September 1973 to purchase the land and the appellant accepted his offer on 18th September. The agreement is contained in a printed Offer and Acceptance Form in which the names of the parties, the description of the land and other particulars, have been filled in in handwriting but nothing turns upon the form of the agreement, nor, in their Lordships' view, upon the fact that the respondent was acting as agent for an undisclosed principal. The printed form contains a number of "terms and conditions" one of which, Clause 9, provides that the contract is conditional upon obtaining "any necessary consent" under the 1952 Act and that if "such consent" where necessary had not been granted by 26th October 1973 the contract would be void. In the event, by midnight on 26/27th October the position was that consent had been given (on 19th October) by a Land Valuation Committee acting in accordance with the complicated interlocking provisions of the 1952 Act and the Land Valuation Proceedings Act 1948 ("the 1948 Act") but the Committee's order had not been sealed and therefore had not been

“deemed to be an order of the Court” under section 25(2) of the 1948 Act. The appellant maintains that the condition had not been satisfied and that the contract was therefore void. The respondent disagrees and he began the present proceedings for specific performance. In the Supreme Court Beattie J. granted a decree for specific performance. The Court of Appeal of New Zealand by a majority (McCarthy P. and Cooke J., Richmond J. dissenting) dismissed an appeal from that judgment. The matter now comes before the Board.

The facts are not in dispute and Beattie J. dealt with the application on an agreed Statement of Facts. The contract provides that the purchase price was to be \$65,000 of which \$1,000 was payable as a deposit immediately upon acceptance of the offer and the balance in cash on the date of settlement. Settlement was to be effected on or before 26th October 1973 “or 14 days after the approval shall have been granted by the Supreme Court under the Land Settlement Promotion Act whichever shall be the later”. Clause 9, which is the Clause directly material to the present dispute, provides:

“9. Any contract arising out of this offer is conditional upon obtaining any necessary consent under or otherwise complying with the provisions of [the 1952 Act] and any Regulations thereunder and each party hereto shall do all such acts and things as may be reasonably necessary or expedient for the purpose of endeavouring to obtain such consent and ensuring compliance with the provisions of the said Act and Regulations. If any such consent where necessary shall not be granted by the 26th day of October 1973 or such later date as the parties agree or shall be refused or granted subject to conditions unacceptable to the parties then such contract shall be void and the Purchaser shall be entitled to a refund of all moneys paid by him hereunder.”

The references to “otherwise complying with” the Act and to consent “where necessary” are because in certain cases specified in section 24 of the 1952 Act consent of the Court was not required, but it is agreed that section 24 does not apply to the transaction in this case.

The transaction is one to which Part II of the Act of 1952 applies by virtue of section 23(1)(a). In accordance with section 25 it required the consent of the “Court” which is defined by section 2 as meaning the Administrative Division of the Supreme Court. Section 25 (as amended at September 1973) so far as material for the present purpose is as follows:

“25. Prohibiting transactions without consent of Court—

(1) Where any transaction to which this Part of this Act applies is entered into, the transaction shall be deemed to be entered into in contravention of this Part of this Act, unless—

(a) the transaction is entered into subject to the consent of the Court and an application for the consent of the Court to the transaction is made within 1 month after the date of the transaction or, in the case of a transaction relating to land situated in the Chatham Islands, within 3 months after the date of the transaction, or in either case within such further time as may be allowed by the Court or a Land Valuation Committee; or

(2) No person shall—

(a) Enter into any transaction in contravention of this Part of this Act whether as vendor, purchaser, lessor, lessee, or other party, and whether as principal or agent; or

(b) Procure or induce any other person to enter into any transaction in contravention of this Part of this Act.

(3) No person shall be entitled to any commission, reward, or other valuable consideration in respect of any transaction entered into in contravention of this Part of this Act.

(4) Where any transaction is entered into in contravention of this Part of this Act, or where any condition upon or subject to which the Court grants its consent to any transaction is not complied with, the transaction shall be deemed to be unlawful and shall have no effect.

(5) Where any transaction to which this Part of this Act applies is entered into subject to the consent of the Court, the transaction shall not have any effect unless the Court consents to it and the conditions upon or subject to which the consent is granted are complied with.

(6) The Court or a Land Valuation Committee shall not grant an extension of time”

Clause 9 of the printed conditions in the contract was evidently drafted with section 25 of the Act very much in mind. The words near the beginning of Clause 9 “any necessary consent under” the 1952 Act evidently mean “the consent of the Court under Part II of the 1952 Act.” That must be so because section 25(1)(a) requires that a transaction of this kind shall be entered into subject to the consent of the Court on pain of being unlawful (section 25(4)), and because no other consent is necessary. The rest of the first sentence obliges each party to endeavour to obtain “such consent” and these words again must mean the consent of the Court, for which an application had to be made within one month after the date of the transaction if section 25(1)(a) were to be complied with. The first sentence of Clause 9 thus seems designed to secure compliance with section 25(1)(a). The second sentence of the clause, upon which the present dispute arises, again refers to “such consent” and it is clear that the words have the same meaning as before, that is to say, the consent of the Court. This sentence, unlike the first sentence of Clause 9, is not required in order to comply with the Act but is purely contractual. It operates as a “get-out” clause. The problem is whether the consent given by the Land Valuation Committee on 19th October is to be regarded for the purpose of this contract as the consent of the Court within the meaning of Clause 9.

The solution of the problem appears to their Lordships to depend mainly upon the relationship between the Court and the Committee. They are separately defined in section 2 of the 1952 Act and they are referred to as separate bodies at several places in the Act including particularly section 25(1)(a) and 25(6). But for many purposes the Committee is treated both by the 1952 Act and the 1948 Act as being in effect part of the Court. Thus section 27 of the 1952 Act provides that applications “for the consent of the Court” may be made in accordance with the 1948 Act, and section 28 provides:—

“ 28. **Consent without hearing in certain cases—**

If in any case the Land Valuation Committee is satisfied that, having regard to the provisions of this Part of this Act, any application for the *consent of the Court* to any transaction should be granted, *the Committee may make an order consenting* to the transaction in accordance with the application without calling on the applicant or hearing evidence”. (Emphasis added.)

There follows in section 29 a similar provision that in other cases the Committee, after hearing such evidence as it thinks fit, if satisfied of certain matters, shall "make an order consenting to the transaction", and if not satisfied shall "make an order refusing the application". The inference which in the opinion of their Lordships is strongly suggested by these sections is that the Committee, in consenting to such applications, is giving the consent of the Court. The same inference emerges from several sections of the 1948 Act, especially section 22 (1) which provides:

" 22. Proceedings to be referred to a Land Valuation Committee—

(1) As soon as conveniently may be after the filing of any claim, objection, application, or other proceeding, the Registrar in whose office the claim, objection, application, or other proceeding has been filed shall refer the matter to a Land Valuation Committee to be dealt with by that Committee in accordance with the provisions of this Act: "

Their Lordships attach importance to the words "to be dealt with by that Committee" as showing that the function of the Committee is not merely to report on, or to enquire into, the application but to determine it, by giving or refusing the consent of the Court.

There are other provisions of the Acts pointing in the opposite direction. It was submitted that provisions for the Committee's giving "its" consent to an application under the 1952 Act indicated that it was not giving the consent of the Court, see, for example, 1948 Act section 23 (1), 1952 Act section 35H (1), (2) and (3). Their Lordships do not consider that much weight should be given to this submission. The provisions mentioned recognise that consent is given by the Committee but they are relevant only indirectly, if at all, to the question of whether such consent is to be treated as the consent of the Court. The main difficulty, and one that Richmond J. regarded as insuperable, arises from the provisions of section 25 of the 1948 Act which is as follows:

" 25. Orders of Committees to be sealed—

(1) Notice of the making of every final order of a Land Valuation Committee under this Act shall forthwith be given to the parties and to such other persons, and in such manner, as may be prescribed.

(2) If an appeal is not lodged under the next succeeding section, a formal order embodying the determination of the Committee shall be sealed by the Registrar and shall thereupon be deemed to be an order of the Court."

The effect of section 25 (2) is, as Richmond J. said, that an order of the Committee by being sealed, is given "a quality in law which it did not previously possess". But in the opinion of their Lordships that does not conclude the matter in favour of the appellant. Sealing is an administrative act necessary to the formal perfection of the order but it does not alter the fact that the order was made on the date that it bears (in this case 19th October 1973) nor the fact recorded in the order that the consent was also granted on 19th October. That appears to their Lordships to be the essential point, because consent is what is required by Clause 9 of the contract. There is no provision in either the 1948 Act or the 1952 Act that an order must be sealed before it can be acted upon, although no doubt as Cooke J. pointed out a prudent solicitor would be unlikely to act upon it before it had been sealed. But sealing the order

does not render the consent immune from challenge; if consent has been obtained by making misleading statements or by failing to disclose all material facts the Court “may by order revoke the consent”, and the power of revocation is not limited to the period before the order has been sealed—see 1952 Act section 34 (3).

The precise status of an unsealed order of the Committee is nowhere defined in the Acts, and for the purposes of the Acts there is no need for such definition. The question only arises in the present case because of the purely contractual provision in the second sentence of Clause 9. As the matter is left undefined in the Acts the question has to be answered by reference to the statutory provisions as a whole. The most relevant provisions have already been mentioned and their Lordships are of opinion that, on balance, they lead to the conclusion that consent given by the Committee falls to be regarded as the consent of the Court from the moment at which it is granted although the formal order embodying the consent cannot be sealed until some time later.

The relationship of the Committee to the Court is very unusual, probably unique, being the product of this particular statutory code, and it does not seem useful to look for analogies in any of the wellknown categories such as agent and principal. Perhaps the most satisfactory approach is to regard the Court as an abstraction which has to act through its machinery, the Committee being normally the appropriate part of the machinery for giving consent to transactions under Part II of the 1952 Act, and the Registrar being the appropriate part of the machinery for sealing orders. It appears to be consistent with this view of the Committee’s function that the Court itself may at any time exercise any power or function of the Committee (1948 Act section 16) and particularly that it may in certain circumstances itself determine applications for consent (section 22 (1)). As the status of the Committee is unusual, so also is the status of its orders, and their Lordships agree with the following passage in the judgment of Cooke J. in the Court of Appeal:

“ . . . it is apparent that in the period before it is sealed a final order of a Committee granting consent is in an unusual category—perhaps a category unique to this legislation. Faced with something of a *rara avis*, the Court should try, in my view, to give a practical interpretation to the contract made by the parties in relation to it ”.

Their Lordships have accordingly concluded that the consent enshrined in the unsealed order of the Committee made on 19th October 1973 is to be treated as the consent of the Court.

Their Lordships find some support for this conclusion in the observations of several learned judges in New Zealand referred to in the judgment of Cooke J. and in the decision in *In re a proposed sale, Fisher to Pitman* [1946] N.Z.L.R. 64 where it was held that the power (at that time vested in a Land Sales Committee) to revoke an order under section 52 (3) of the Servicemen’s Settlement and Land Sales Act 1943 (the predecessor of section 34 (3) of the 1952 Act) extended to an order even after it had been sealed. The power of revocation is now, under section 34 (3) of the 1952 Act, vested in the Court but the occasion for exercising the power is if the Court considers that “all the material facts . . . were not submitted to the Administrative Division of the Supreme Court”, thus apparently assuming that the submission of facts to the Committee is equivalent to submitting them to the Court. It is also of some materiality that the conclusion at which their Lordships have arrived is consistent with the practice of the Court in New Zealand as shown by the forms of the order and of the Notice of Order sent to the parties. The operative

part of the order states that “On reading the application of Robert Goode for consent [sc. of the Court] to a sale of land . . . it is ordered that the consent of the Administrative Division of the Supreme Court of New Zealand be granted to the transaction pursuant to Part II of [the 1952 Act]”. Similarly the Notice bears that the Committee has made an order “consenting, pursuant to Part II of [the 1952 Act], to the application”. These forms clearly treat the consent as being that of the Court although it is given by the Committee. The forms, although not enjoying any statutory authority, are in accordance with the Rules of Court. *Cursus curiae lex curiae.*

In so far as the matter is one of construction of the purely contractual part of Clause 9, the get-out clause, their Lordships have little doubt that the expression “such consent” was intended by the parties to mean or at least to include consent given by the Committee. In this case, as in the normal run of cases, that is the only consent that would be required or obtained. The short time scale prescribed in Clause 9 is an indication that the parties had in view the consent of the Committee which could be obtained comparatively quickly, rather than the consent to be given by a specially convened sitting of the Court itself which would probably have taken longer to obtain. Once the consent of the Committee had been granted neither the vendor nor the purchaser, both of whom had bound themselves to endeavour to obtain consent, could have appealed against the grant. It would have been possible in theory at least for the Crown representative to appeal (section 26 (1) of the 1948 Act). But such an appeal was unlikely and in any event it might have been allowed even after the order had been sealed—see section 26 (2A) of the 1948 Act. The purpose of the get-out clause evidently was to enable parties to know how they stood at the earliest practicable date and in the opinion of their Lordships the whole circumstances make it most improbable that the parties were having regard to the formality of sealing the order.

For these reasons which as will be seen are substantially the same as those that weighed with the majority of the Court of Appeal their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the respondent in the appeal.



In the Privy Council

ROBERT GOODE

v.

MURRAY NEWTON SCOTT

DELIVERED BY
LORD FRASER OF TULLYBELTON