Privy Council Appeal No. 30 of 1977

Donn Alexander Dickens and Muriel May Dickens – – – – – – – *Appellants*

v.

Keith James Neylon and Jean Agnes Neylon – – – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER 1978

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
LORD SCARMAN

[*Delivered by* LORD FRASER OF TULLYBELTON]

This appeal is concerned with an agreement for sale and purchase dated 24th December 1975, by which the appellants ("the Vendors") agreed to sell to the respondents ("the Purchasers") their farm property consisting of about 1,980 acres in Southland, New Zealand. One of the terms of the agreement was that it would be "void" if any necessary consent of the Court was not granted by 26th January 1976. In the event consent was not granted until 12th February 1976. The question is whether, in all the circumstances, the fact that consent was not given until after 26th January entitled the Vendors to refuse to perform the contract. In the Supreme Court of New Zealand Roper J. decided that issue in favour of the Vendors. The Court of Appeal of New Zealand unanimously allowed an appeal from his judgment and made an Order against the Vendors for specific performance of the contract. Against that Order they have appealed to this Board.

The agreement was in a standard form applicable to the sale of farm land. Two clauses of the agreement are directly relevant to the question in dispute. These are as follows:—

"11. If the land affected by this Agreement exceeds five acres in area this contract is subject to any necessary consent of the Administrative Division of the Supreme Court and the purchaser will within fourteen days from the date of signature of this Agreement either:

(*a*) Complete and deposit with the District Land Registrar a Declaration in conformity with Section 24 of the Land Settlement Promotion and Land Acquisition Act 1952 and deliver a copy to the Vendor, or

(*b*) Deliver to the Vendor any statement declaration or other document required by regulation or otherwise to be completed by the Purchaser for filing with an application to the Administrative Division of the Supreme Court and the Vendor shall within one month from the date hereof unless such declaration shall have been deposited as aforesaid make application to the Administrative Division of the Supreme Court for any necessary consent to this transaction

and each party hereto shall do all such acts and things as may be necessary or expedient for the purpose of endeavouring to obtain such consent or ensuring compliance with the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 and any regulations for the time being thereunder. . .

. . . . .

" 13. If any such consent where necessary shall not be granted by the 26th day of January 1976 or such later date as the parties agree on or shall be refused or shall be granted subject to conditions then this Agreement subject as hereinafter mentioned shall be void PROVIDED HOWEVER . . ."

Before the Court of Appeal a submission was made on behalf of the Vendors that the words " any such consent " in Clause 13 did not apply to the consent of the Administrative Division of the Supreme Court referred to in Clause 11 (but only to another consent referred to in Clause 12) but that submission was rejected by the Court and it was not repeated before their Lordships.

In addition to the contractual time limit under Clause 13, there was also a statutory time limit imposed by section 25 of the Land Settlement Promotion and Land Acquisition Act 1952. In terms of section 25(4) of that Act the contract would be deemed to be unlawful and of no effect unless application for approval by the Administrative Division of the Supreme Court was filed, as required by section 25(1)(*a*), within one month from the date of the contract—that is by 24th January 1976. These time limits were awkward because the contract was signed on Christmas Eve and the offices of the Purchasers' solicitors, like those of other solicitors in the district, were closed from 24th December 1975 to 20th January 1976 for the Christmas vacation. During that period the Purchasers did not complete the statutory declaration in conformity with section 24 of the Act which was required before the consent of the Court could be obtained; they therefore failed to comply with their obligations under Clause 11 of the agreement to complete the declaration within 14 days from the date of signing.

When the offices opened on 20th January 1976 (a Tuesday) the Purchasers' solicitor, Mr. Smith, was faced with a difficult situation. The application to the Court had to be filed by 24th January if the agreement was to escape being deemed of no effect. That date was a Saturday, when the Court office would be closed, so the last effective date for filing was Friday 23rd January. It was impossible for him to obtain the signature of the first-named Purchaser to the declaration in time for it to be filed by 23rd January. This difficulty was apparent to Mr. Smith and caused him concern. On 22nd or 23rd January therefore he telephoned to the Vendors' then solicitor (Mr. Broughton) and asked him to file the application to the Court. (The application could be filed by either party. Provided it was filed within one month that was enough to comply with the Act, and the statutory declaration could be filed later.) Mr. Broughton agreed to Mr. Smith's request and on 23rd January he filed the necessary application with the Court under cover of a letter addressed to the Registrar in the following terms:

> " We enclose herewith Application for Consent to this Transaction. Messrs. Macalister Bros. [Mr. Smith's firm] are acting for the Purchasers and they confirm that the Purchasers' Declaration has been forwarded to their client at Haast for completion. We confirm that the Purchasers' Declaration will be filed in support of the application when it is returned from Haast ".

The Purchasers signed the declaration on 28th January and it was filed with the Court on that date or within a few days thereafter.

The sole question at issue is whether Mr. Broughton's action in filing the application on 23rd January amounted in the circumstances to a waiver of the Vendors' right to treat the contract as void when 26th January passed without the Court's consent having been received. It is not suggested that Mr. Broughton ever expressly agreed to waive the deadline. If there was a waiver, it was effected simply by the filing of the application. The word " waiver " has been used by judges in various senses, some of which overlap with " estoppel " or " variation " or " election ". The uncertainty created by the indiscriminate use of these different words is reflected in the variety of reasons set out in the respondents' printed Case, but it is of no practical importance for the purposes of this appeal. The kind of waiver that is in question here is substantially the same as that considered in *Mardorf Peach v. Attica Sea Carriers* [1977] 1 All E.R. 545, 551g where Lord Wilberforce said this : —

> "Although the word ' waiver ', like ' estoppel ', covers a variety of situations different in their legal nature, and tends to be indiscriminately used by the courts as a means of relieving parties from bargains or the consequences of bargains which are thought to be harsh or deserving of relief, in the present context what is relied on is clear enough. The charterers had failed to make a punctual payment but it was open to the owners to accept a late payment as if it were punctual, with the consequence that they could not thereafter rely on the default as entitling them to withdraw. All that is needed to establish waiver, in this sense, of the committed breach of contract, is evidence, clear and unequivocal, that such acceptance has taken place. . . ."

In the present case breach of the contractual deadline had not actually been committed on 23rd January, but it had become clearly inevitable. What is required to establish waiver is evidence that the Vendors' solicitor, by lodging the application on 23rd January was representing unambiguously that the Vendors were treating the deadline of 26th January as being not of the essence of the contract. In the opinion of their Lordships such a representation is established here. There are two preliminary considerations. First, it is clear that during the period from 20th to 23rd January (immediately before the application was lodged) both parties were willing, and even anxious, to proceed with the contract. On the Purchasers' side that was shown by Mr. Smith's action in telephoning to Mr. Broughton on 22nd or 23rd January and asking him to lodge the application. On the Vendors' side it was shown by their overlooking the Purchasers' failure, which had already occurred, to comply punctually with Clause 11 of the agreement. There is nothing to indicate any change of view by either party up to the time when the application was filed, or indeed until long afterwards. Second, Roper J. said that solicitors in Southland " rarely if ever " insisted on strict compliance with a contractual deadline for obtaining the Court's consent to a sale of land, although he held, and the Court of Appeal agreed, that no custom to that effect sufficiently notorious to deprive the deadline in the contract from its binding effect had been proved. Their Lordships see no reason to depart from that finding. Nevertheless the fact that

contractual time limits were habitually waived makes it easier to infer a waiver in this case than if the practice had been to insist upon strict punctuality.

Against that background their Lordships have to consider the effect of lodging the application on 23rd January. By that date the Purchasers were not only in breach of their obligation under Clause 11 of the agreement, but they were so seriously in default that there was no longer any possibility of obtaining the consent of the Court by Monday 26th January as required by Clause 13. It may well be that, as Cooke J. thought, the Vendors would have been entitled to rescind the contract on 23rd January. In any event if the lodging of the application on that day had been merely to comply with the statutory deadline it would have served no practical purpose. It would only be useful if it were also intended to keep the contract alive in spite of the (by then inevitable) failure to comply with the contractual deadline. The only reasonable inference is that the Vendors intended it to serve both these purposes and that the lodging of the application was a representation to that effect.

In their Lordships' opinion that inference is amply confirmed by other evidence. In the first place the letter of 23rd January 1976 from Mr. Broughton to the Registrar, contains a statement in the last paragraph " that the Purchasers' Declaration will be filed in support of the application when it is returned from Haast ". Mr. Broughton must have been aware that it was most unlikely to be returned by 26th January so the letter shows that he was contemplating its being filed after the deadline had passed, which would be absurd if the agreement were then void. No copy of this letter was sent to Mr. Smith at the time, and it can therefore only be relied on as an indication of Mr. Broughton's understanding of the position. Further confirmation is to be found in events which occurred after the 23rd January. Evidence of these subsequent events could not be relied on to remove ambiguity in the events of 23rd January, if such ambiguity had existed, but it is admissible to confirm the proper inference to be drawn from the events of 23rd January. On 5th February 1976 Mr. Smith wrote to Mr. Broughton's firm confirming that the Purchasers had been able to arrange for the necessary finance to declare the contract unconditional, and on 16th February 1976 he wrote enclosing a Transfer for execution by the Vendors. So the Purchasers were treating the contract as still in force at least up to 16th February. On 18th February 1976 a Mr. Halstead, who was an executive officer with a firm of stock and station agents employed by the Vendors, spoke to the first-named Vendor on the telephone and arranged with him that a clearing sale of his stock and plant should be held on the farm on the 26th February. The implication seems to be that on 18th February the Vendors still regarded the contract as being in force.

Finally on 23rd February 1976 Mr. Broughton wrote to Mr. Smith acknowledging receipt of his letter enclosing the Memorandum of Transfer for execution and proceeding as follows:—

> " We confirm our telephone advice that our clients have instructed us that they are not proceeding with the sale of the farm property and under these circumstances have refused to call and execute the Transfer ".

That curt statement, or strictly the " telephone advice " which preceded it, was the first intimation that the Vendors were refusing to carry out the contract. No reason for refusal was then given, but it is significant that on 8th April 1976, when a reason was given for the first time in their defence to the present action, it was a reason which had nothing to do

with the failure to meet the deadline of 26th January. The plain inference is that, even as late as 23rd February 1976, they were not seeking to withdraw from the contract on the ground that the deadline of 26th January had not been complied with.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs to the Respondents.

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In the Privy Council

DONN ALEXANDER DICKENS AND MURIEL MAY DICKENS

v.

KEITH JAMES NEYLON AND JEAN AGNES NEYLON

DELIVERED BY

LORD FRASER OF TULLYBELTON

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