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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 13 of 1984

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

SAMUEL AYOUNG CHEE — Appellant (Defendant)

- and -

DIARAM RAMLAKHAN — Respondent (Plaintiff)

CASE FOR THE APPELLANT

1. This is an appeal from the judgment of the Court of Appeal of Trinidad and Tobago (Sir Isaac Hyatali C.J., Kelsick J.A., and Clinton Bernard J.A.) delivered on 26th January, 1983 allowing the Respondent's appeal from the judgment of Braithwaite J. in the High Court on 28th November, 1980, whereby the learned Judge ordered the Respondent to deliver up possession to the Appellant of 66, First Avenue, Mt. Lambert, in the Ward of St. Anns, Trinidad ("the premises") and to pay to the Defendant various sums by way of arrears of rent and mesne profits. In allowing the appeal, the Court of Appeal ordered judgment to be entered for the Respondent and ordered specific performance of clause 4(4) of a Deed dated 8th October, 1973, made between the Appellant and the Respondent ("the Deed") by which the Respondent was given an option to purchase the premises.

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pp 19-33

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pp 63-64

2. Clause 4(4) of the Deed provided : Record

> At any time before the expiration of the term of FOUR (4) YEARS hereby created the Tenant shall be entitled to purchase the freehold property described in the SCHEDULE hereto subject to good title and free from encumbrances p 70 for the sum of ONE HUNDRED AND TWENTY THOUSAND DOLLARS ($120,000.00) and on condition that the said sum of $120,000.00 shall be paid in full by the Tenant to the Landlord before the expiration of the term of FOUR (4) YEARS hereby created; and upon payment by the Tenant as aforesaid of the said purchase price as well as all arrears of rent hereunder (if any), the Landlord shall forthwith execute a Deed of Conveyance vesting the said freehold property in the Tenant in fee simple or as he shall direct.

3. By a letter dated 29th June, 1977, the Respondent's solicitors wrote to the Appellant in the following terms :

> Re : No. 66 First Avenue Mount Lambert leased to Diaram Ramlakhan by lease dated the 8/10/73 registered as No. 14159 of 1973
>
> We are instructed by our client Diaram Ramlakhan the lessee in the above mentioned lease to notify you that he is desirous of exercising the option to purchase the above numbered property contained p 72 in the said deed of lease for the sum therein stated.
>
> Kindly note that our client is ready and willing to complete the said purchase and we should be glad if you will call at our office at any time to execute the deed of conveyance.

10. We may mention that after the expiration of the month of July, 1977 no further rents will be paid under the deed of lease. Record

4. At the trial the Respondent's solicitor Mr. Wong gave evidence which was accepted by the trial Judge that : p 13

> "The (Appellant) came to see me a month/two after the letter was written. Mr. Ayoung Chee told me that he could no longer sell the property at that price - that the price was too low as values of properties had risen. I told him that he had given an option to purchase at a specified price. He said in spite of that he could not sell for that sum. I suggested his seeing his Counsel as Counsel had prepared the Deed of Lease." p 30 ll 16-26

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5. It appears to have been common ground throughout the proceedings that following the letter of 29th June, 1977 the purchase price of $120,000.00 was never paid or tendered to or on behalf of the Appellant by the Respondent.

30. 6. This appeal raises two issues :

(i) Upon the true construction of clause 4(4) of the Deed, was the option to purchase validly exercised by the terms of the letter of 29th June, 1977? If so, the Appellant concedes that he is bound to fail in this Appeal; and

(ii) if the answer to (i) above is no, was the conduct of the Appellant, in telling the Respondent's solicitor that he was not prepared to sell the

premises at the option price, such as to entitle the Respondent to specific performance of the option to purchase? Record

7. Braithwaite J. disposed of the first issue in favour of the Appellant in the following terms :

> "In the instant case the entitlement of the (Respondent) to purchase clearly depended on his doing the act of paying the sum of $120,000.00 to the (Appellant) before the expiration of the term of the lease. But this act has not been done within the prescribed period or at all." p 26 ll 25-30

> "In the instant case, the relation of vendor and purchaser could not have come into being until the sum of $120,000.00 was paid, tendered or offered by the (Respondent) to the (Appellant). It seems to follow, therefore, that the payment, tender or offer of this sum by the (Respondent) was a sine qua non of the coming into being of the cause of action upon which the (Respondent) purported to sue - in other words "the essence of the cause of action." p 31 ll 38-46

8. It is implicit in the judgment of Braithwaite J. that although he found that the Appellant wanted to take advantage of rising land prices in Trinidad and Tobago, his conduct did not amount to a waiver of the Respondent's obligation to pay or tender payment or otherwise to disentitle the Appellant from relying on the Respondent's failure validly to exercise the option.

9. The Respondent appealed to the Court of Appeal on the grounds, inter alia, that the trial Judge :

(a) Erred in law in holding that the relationship of vendor and purchaser would not arise between the

(Appellant/Respondent) until payment in full by the Respondent) of the agreed purchase price.

(b) Erred in law in holding that no contract to purchase ever existed between the (Appellant) and the Respondent) in relation to the land, the subject matter of the lease dated 8th October, 1973.

(c) Failed to give any or sufficient consideration to the effect in law of the conduct of the Appellant between the date of receipt of the Respondent's letter of 29th June, 1977, and the date of the delivering of his Defence and particularly to his refusal any longer to abide by the stated purchase price.

10. In the Court of Appeal judgments were delivered by Clinton Bernard J.A. and Kelsick J.A. with which Hyatali C.J. concurred. Clinton Bernard J.A. construed clause 4(4) in this way : pp 39-54 pp 53-62 p 65

> " ... it did not create a contract between the parties. Although it formed part of the lease it was collateral too but independent of the lease itself. The option gave the appellant a choice in action or equitable interest in the freehold reversion of the demised premises with the right to have the said freehold reversion conveyed to him at a later stage if he so wished. This right to the freehold reversion would immediately vest in the appellant upon the exercise by him of his option provided that he exercised it at any time before the expiry date of the lease itself - that is to say - by October the 31st of 1977, at least. However, it p 45 ll 1-18

was also a condition precedent to the Appellant's right to the conveyance of the freehold reversion in the demised premises that he would pay to the Respondent the sum of $120,000.000 therefor as agreed between the parties at some time before the expiry of the lease though not necessarily at the same time when the Appellant exercised his option of purchase."

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He continued later :

"in my opinion, having regard to the terms of clause 4, the letter of 29th June, 1977 (D.R.2) and the evidence for the Appellant which the trial judge believed and accepted, the Appellant having accepted the Respondent's offer which the option was current, a binding and irrevocable contract for the sale to the Appellant of the Respondent's interest in the freehold reversion, to with the fee simple, was created between the parties. In my judgment, the relationship of vendor and purchaser arose between them at that stage - see in this connection Hill & Redman - op. Cit - paras 83 and 85 - pages 157 - 159; Halsbury's Laws of England - 4th Edition Vol. 27 - paras 110 and 112 - pages 89 - 90. The fact that the Appellant neither made payment nor a tender thereof at that time was immaterial because at that stage he was by the terms of clause 4, under no compunction so to do in order to create the particular relationship. What was necessary to create the relationship was the due and proper exercise by the Appellant of the notice of option. As I see it, if despite the exercise of the option the Appellant took no effective steps later during the currency of the lease to acquire the freehold reversion, the option would have lapsed.

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(while)

As I said earlier, caluse 4 in my view contemplated the possibility of the payment of the purchase money either at the time of the exercise of the option or at some time subsequent thereto. That being so, then it follows that the non-payment of the purchase money at the time of the exercise of the option would not have affected the relationship that had been created by the exercise of it. It cannot, in my view, be contended that if a condition is not precedent to the validity of the exercise of an option, failure to honour that condition at the time of its exercise could, even remotely, affect the validity of the option itself or the relationship that may have been created by the due and proper exercise of it."

11. As to the issue of the Appellant's conduct Clinton Bernard J.A. was of the opinion : Record

> "that the clear and unequivocal refusal by the Respondent to honour his side of the bargain unless he was paid more was effective, in the circumstances to deprive the Appellant unjustifiably of his entitlement to the freehold reversion in the premises at the stipulated price as agreed and that his resilement therefrom amounted to a repudiation by him of the contract. In this connection it seems to me that from the evidence of the Respondent's conduct as found by the trial judge it would have been futile for the Appellant's solicitor - Wong - to attempt thereafter to have any further dealings with the Respondent in the matter. The Respondent was not prepared to budge! The solicitor did what to my mind was the logical thing in the circumstances. He caused his client to issue a writ promptly to invoke the jurisdiction of the court for the equitable remedy of specific performance of the contract in light of the Respondent's behaviour." p 48 ll 9-25

12. Kelsick J.A. similarly concluded in the following terms :

(1) That on a true construction of clause 4(4) of the Deed of Lease it was not a condition precedent to the valid exercise of the option that the purchase money should be paid or tendered; p 61 l 16 p 62 l 6

(2) that clause 4(4) conferred on the Appellant an irrevocable offer to purchase the property;

(3) that clause 4(4) constitutes an agreement binding on the Respondent whereby the Appellant bought the right to purchase the property at any time during the continuance of the lease, subject to the performance by the Appellant of the conditions subsequent - that is, giving notice of his intention to purchase at any time during the continuance of the lease and paying the purchase money on or before the last day of the lease;

(4) that by the letter of 29th June, 1973, the Appellant effectively exercised his option under the clause, whereupon he was entitled to a conveyance of the property;

(5) that the refusal of the Respondent to complete the contract for sale was an anticipatory breach of the agreement, which excused the Appellant from further performance by way of tendering the purchase money;

(6) that the Appellant was then entitled either to accept the repudiation, whereupon the agreement provided in the lease came at an end, and to sue for damages for breach of contract; or alternatively, as he did, not to accept the repudiation, and to regard the contract as continuing and to sue for specific performance of same.

13. The Appellant respectfully submits that upon the true construction of clause 4(4) of the Deed the Respondent was obliged to pay the sum of $120,000.00 to the Appellant before the obligation upon the Appellant to execute a Deed of Conveyance arose. By the letter of 2nd June, 1977, the Respondent neither paid nor offered to pay the said sum before the Appellant was to execute a Deed of Conveyance. It is respectfully submitted that Braithwaite J's construction of clause 4(4) is to be preferred to that of the Court of Appeal.

14. Secondly it is submitted that following the failure of the Respondent validly to exercise the option to purchase, the conduct of the Appellant neither provides the Respondent with a good cause of action, nor deprives the Appellant of his Defence to the action as pleaded in the Statement of Claim. Once the Appellant

had indicated that he was unwilling to sell at the option price, the Respondent had a choice. He could treat the Appellant's conduct as amounting to a renounciation of the option and as discharging him from the outstanding obligation of paying the purchase price or he could pay the purchase price and wait for the time for performance to arrive (before 7/10/77). On the facts of the present case it is submitted that the Respondent, having failed to accept the Appellant's conduct as bringing the option to an end, was under a continuing obligation to pay the purchase price before the expiration of the terms of the lease as a condition precedent to the Appellant's obligation to execute a Deed of Conveyance and that his failure so to do is fatal to his claim for specific performance.

15. Thirdly it is respectfully submitted that the only relevant issue on the pleadings was whether by the terms of the letter of 2nd June, 1977, the Respondent had complied with the requirements of clause 4(4). The Respondent never amended to plead waiver or estoppel against the Appellant notwithstanding the denial in the Defence that the Respondent had complied with the requirements of clause 4(4).

16. The Respondent finally respectfully submits that (Appellant) this appeal should be allowed with costs and that the

10. Order of Braithwaite J. should be restored by the following amongst other

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REASONS

1. BECAUSE on the construction of clause 4(4) of the Deed Braithwaite J. was correct and the Court of Appeal in error;

2. BECAUSE the Respondent failed to plead at any stage that the conduct of the Appellant was of any legal significance;

3. BECAUSE (without prejudice to 2. supra) the Respondent did not treat the Appellant's
20. conduct as discharging him from his obligation to pay the Appellant $120,000.00; and

4. BECAUSE on the pleadings and on the evidence, the judgment of Braithwaite J. was correct.

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