Privy Council Appeal No. 13 of 1984

Samuel Ayoung Chee *Appellant*

v.

Diaram Ramlakhan *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER 1985

Present at the Hearing:

LORD KEITH OF KINKEL
LORD WILBERFORCE
LORD BRANDON OF OAKBROOK
LORD MACKAY OF CLASHFERN
SIR ROBERT MEGARRY

*[Delivered by **Sir Robert Megarry**]*

This appeal concerns an option in a lease of land and buildings in Trinidad and Tobago. The lease was granted under seal on October 8th 1973 for a term of four years from November 1st 1973. The lease is relatively short, and for the most part it is in familiar terms. After the tenant's covenants in clause 2 and the landlord's covenants in clause 3, clause 4 begins:-

> "PROVIDED ALWAYS and it is hereby expressly agreed and declared as follows:-"

There then follow a forfeiture clause, a provision suspending the rent if the premises become unfit for occupation from fire or earthquake, and a provision enabling the tenant to determine the demise on giving six months' notice or paying six months' rent in lieu thereof. There is then the sub-clause in question:-

> "(4) 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 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."

After the term had run to within some four months of its date of termination, the tenant's solicitor sent the landlord a letter, headed with the name of the property and a reference to the lease. The letter, which was dated June 29th 1977, ran as follows:-

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

Although the option made no express provision for the tenant to give notice exercising it, the letter has been accepted as sufficing for this purpose, subject to the landlord's contentions based on the tenant's obligation to pay the $120,000.00.

The letter appears to have evoked no response from the landlord until some time late in August or early in September 1977, when the term still had some two months to run. The landlord went to see the tenant's solicitor and told him that he could no longer sell the property at that price (namely, the option price), and that the price was too low as values of properties had risen. The solicitor told the landlord that he had given an option to purchase at a specified price, but the landlord said that in spite of that he could not sell for that sum. The solicitor suggested that he should see his counsel, as counsel had prepared the deed of lease. Whether or not the landlord did this does not appear.

In that state of affairs the tenant issued a writ on September 29th 1977, over a month before the expiration of the term, claiming specific performance

of the agreement and damages. On October 10th 1977 the statement of claim was delivered. This recited the option and the letter of June 29th 1977, with its assertion that the tenant was ready and willing to complete the purchase, and its invitation to call at the office of the tenant's solicitors to execute the deed of conveyance; and the statement of claim asserted that the tenant had been at all material times, and was then, ready and willing to fulfil all his obligations under the option. The statement of claim then asserted that the landlord "has neglected and/or refused to complete the said purchase".

Not until three months after the expiration of the lease on October 31st (or November 1st 1977: it matters not which) did the landlord deliver his defence, and a counterclaim as well. The defence admitted the basic facts but denied the tenant's willingness to complete and the landlord's neglect or refusal to complete. The substantial ground of defence was that the tenant was requiring the landlord to convey to him a strip of land not included in the 5880 superficial feet that were demised. The counterclaim was for possession, arrears of rent, mesne profits, rescission of the option or a declaration that it had been rescinded, and so on. No point now arises on the strip of land or on the counterclaim.

At the trial, the main bone of contention was the meaning of the option, and in particular the words "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". On behalf of the landlord it was contended that these words created a condition precedent, so that until the money was paid no contract for sale came into existence; and Mr. Justice Braithwaite accepted this submission. On appeal, the Court of Appeal reversed this decision, holding that the words in question created no condition precedent, but merely constituted one of the terms on which the purchase was to be made. Furthermore, the landlord's proclaimed refusal to carry out the sale at the option price excused the tenant, who was suing for specific performance, from tendering the option price before the term expired. From this decision the landlord now appeals.

Authority apart, the framework of the option clause is unpromising for the landlord. It begins by conferring a right on the tenant, namely, the right to purchase the property. It continues by providing, very much in outline, what the terms of the purchase are to be. The purchase is to be "subject to good title" and also "free from encumbrances". The option then states that the tenant's right is to purchase "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". It then concludes by providing that on the tenant paying the price and any arrears of rent, the landlord "shall forthwith" execute the conveyance. The provision for the time of payment is thus embedded in provisions prescribing how the sale is to be carried out; there is nothing to suggest that it is to form a condition precedent to the coming into existence of any obligation to sell. In other words, on a straightforward reading of the language, the requirement as to the time of payment is worded not as one that must be satisfied before the option is exercised, but as one which regulates what is to be done once the option has been exercised.

Certain authorities were cited; and although they do not appear to govern the present case in any direct way, they do illustrate two different types of clause. The line of authority which appealed to the trial judge is exemplified by *Lord Ranelagh v. Melton* (1864) 2 Drew. & Sm. 278 and *Weston v. Collins* (1865) 12 L.T. 4, before Sir Richard Kindersley V.-C. and Lord Westbury L.C. respectively. It is unnecessary to set out the options in those cases *in extenso*. In each case the framework was similar. In the former case, the clause began with the words "In case ...", followed by various acts to be done by the lessees, including giving notice of their desire to purchase the fee simple and paying the sum of £210 for each plot included in the notice; and the clause then continued with the words "then the lessor shall and will convey", and so on. In the latter case, the clause began with the word "If", followed by words referring to the lessees being desirous of purchasing the inheritance, giving six months' written notice to the lessor and paying £2,000 to the lessor, and so on; and it then continued by saying that the lessor "will ... sell, convey and surrender" the land in question to the lessees. By using the words "if" and "will" in apposition (or "in case" and "then", which produce substantially the same effect) each clause made it plain that it was only if various things were done, including the payment of a stated sum, that there was to come into being an obligation by the lessor or lessors to convey the property to the tenants. This clearly contrasts with the unqualified declaration of entitlement at the outset of the option in the present case, stating that at any time before the four years expired "the Tenant shall be entitled to purchase the freehold ...", and the subsequent provisions stating the terms of the purchase.

In the Court of Appeal, the main weight was put on the decisions in *Mills v. Haywood* (1877) 6 Ch. D. 196

and *Cockwell v. Romford Sanitary Steam Laundry Ltd.* [1939] 4 All E.R. 370. In the former case, clause 4 of an agreement for a lease for ten years by a Mr. Austin to a Mr. Mills provided that "Mr. Mills to have the option at any time during the said term to purchase the above premises for £3,500, and such an amount as Mr. Austin shall pay for law and other expenses attendant upon the purchase and resale thereof; and upon payment thereof, and of the other sums due under this agreement as hereinafter mentioned, to Mr. Austin, the said term of ten years and the said rent of £1,000 per annum shall thereupon cease, and the said Mr. Mills shall thereupon be entitled to an assignment of the leases". Mr. Mills duly gave notice in July 1867 exercising the option. In the words of Cotton L.J., delivering the judgment of the Court of Appeal, it had been contended that

> "until payment of the purchase-money there was no contract. But the 4th clause of the agreement ... does not, in our opinion, make payment of the purchase-money a condition precedent to the existence of a contract. It is an offer of the property to the Plaintiff with liberty to him to accept it at any time during his term. When he sent the letters of July, 1867, already referred to, the acceptance therein contained made with the offer in the 4th clause of the agreement a complete contract ..." (p. 201).

In *Cockwell v. Romford Sanitary Steam Laundry Ltd.*, *supra*, the option was of the "If ... then" type, but with the important difference from the older cases that the only provision lying between these two words related to giving written notice of the lessees' desire to exercise the option. The provision for payment of the option price of £2,000 followed the "then", and did not precede it. In delivering the judgment of the Court of Appeal, Luxmoore L.J. held that for all practical purposes the words of the option were "indistinguishable from those considered in *Mills v. Haywood*". On the true construction of the option, "a binding contract to purchase came into existence when the notice exercising it was given to the plaintiffs" (p. 375).

Both on the ordinary meaning of the words of the option in the present case and on the reasoning to be found in the authorities, it seems to their Lordships to be impossible to treat the payment of the sum of $120,000.00 prior to November 1st 1977 as being a condition precedent to any contract of sale coming into being. The obligation to pay that sum was instead one of the terms of the contract which arose once the option had been exercised. Indeed, during the argument, Mr. Harvie, on behalf of the landlord, was ultimately constrained to accept that this was so; and on the footing stated in the Case for the landlord that was really the end of the appeal.

Mr. Harvie, however, resourcefully fell back on a contention based on the tenant's admitted failure to pay or tender the $120,000.00 by November 1st 1977. He accepted that if a tender had been made before that date, he would have had no case. But, he said, the tenant's failure to make such a tender was a breach by the tenant of one of the terms of the option that bound him, a term that constituted a condition subsequent. On the footing that the landlord's assertion that he would not sell the land at the option price was a fundamental breach of the provisions of the option, it was open to the tenant either to treat the contract as having been repudiated by the landlord and to sue him for damages for breach of contract, or else to affirm the contract, despite the breach. If he did the latter, he ought to have carried out the terms of the contract that he was seeking to enforce, in particular by paying or at least tendering the price of $120,000.00 before the expiration of the term. This the tenant did not do, and so he had disabled himself from enforcing the contract by seeking a decree of specific performance. The mere fact that before the expiration of the term the tenant had issued a writ claiming specific performance did not relieve him from the obligation of complying with the terms of the option by paying or tendering the option price in due time, or, perhaps, paying it into court. In this respect time was of the essence of the obligation, since the object of the provision was to ensure that the relationship of vendor and purchaser replaced that of landlord and tenant before the expiration of the term of the lease.

Their Lordships cannot accept this contention. The landlord had made it plain to the tenant's solicitors that he would not sell the land at the option price. The tenant's response, within about a month, was to commence proceedings for specific performance. Of all the acts which may be treated as an affirmation of a contract, the issue of a writ claiming specific performance must be one of the most conclusive. Within a fortnight the statement of claim followed, with its assertion of the tenant's past and present willingness to fulfil all his obligations under the option. The landlord is in effect contending that although he has never given any indication of resiling from his refusal to carry through the sale, and although he knew for the last three weeks of the term that the tenant was professing his willingness to comply with the terms of the option that he was seeking to enforce, the tenant's failure to pay or tender the option price before the end of the term was a breach by the tenant that prevents him from enforcing the contract. The landlord, it is contended, was entitled to stand by and watch the tenant destroy his case by failing to perform the essential act of tendering the money in time. This

is so, it is said, even though the landlord's defence, delivered three months after the term expired, says not a word about the tenant's omission to make any tender, thereby demonstrating the lack of importance that the landlord attached to the omission.

In those circumstances, it appears to be plainly unreasonable for the landlord to require the tenant to pay or tender the money to him. Further, by his conduct the landlord has precluded himself from requiring the tenant to do this. The tenant was under no obligation to go through the futile process of attempting to pay or tender the contract price to a landlord who was refusing to convey the land in return for that contract price. When a contract is for A to pay a sum of money upon the execution of certain documents by B and C, and A releases B and C from executing them, A cannot thereafter advance their failure to execute the documents as a defence to their action on the contract. In such a case, Lord Mansfield C.J. said: "Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shown to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he meant not to pay the money, discharges the plaintiffs from executing it:" *Jones v. Barkley* (1781) 2 Doug. K.B. 684 at 694.

That case was applied in *Laird v. Pim* (1841) 7 M. & W. 474. If a purchaser refuses to complete the purchase and is then sued on the contract, it is no defence that the vendor, who had been ready and willing to execute the conveyance, and had offered to do so, had in fact not executed it. As Parke B. said at page 485, the purchaser "having discharged him from doing that, it is the same as if it had been done". In the absence of some remarkable contractual provision, it ought not to lie in the mouth of a vendor who has proclaimed his refusal to convey his land to the purchaser at the contract price to say to him: "You are in breach of contract because you have failed to pay or tender to me the agreed price that I said I would not accept". A person should not be allowed to complain about a failure to perform an act which he has rendered futile.

Subject to one point, this appeal accordingly fails. That point relates to the order of the Court of Appeal dated January 26th 1983, allowing the appeal and ordering the contract to be specifically performed. The order is in what appears to be an exceptionally short form. This may accord with the procedural requirements of this particular

jurisdiction, but in one respect the brevity is plainly excessive. The order requires the landlord to execute the conveyance within 28 days, and in default it directs the Registrar to do so; but it makes no mention of the corresponding obligation of the tenant to pay the agreed price. Indeed, the order does not provide for the tenant to do anything. The order should therefore be varied so as to include at least some provision for payment by the tenant, drafted in whatever is the appropriate form for the jurisdiction.

Their Lordships accordingly dismiss the appeal with costs and remit the matter to the Court of Appeal to vary its order of January 26th 1983 in accordance with this judgment.