26, 1959

IN THE PRIVY COUNCIL No. 36 of 1958

ON APPEAL

FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA

BETWEEN

ABERFOYLE PLANTATIONS LIMITED (Defendant) Appellant

- and -

KHAW BIAN CHENG (Plaintiff) Respondent

10. CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from an Order of the Court of Appeal of the Federation of Malaya dated 2nd June 1958 allowing (by a majority) an appeal from an Order of the High Court of the Federation dated the 8th November 1957 dismissing the action brought by the Respondent against the Appellant. Leave to appeal from the said Order of the Court of Appeal was granted to the Appellant by an Order of the said Court of Appeal dated the 2nd October 1958. pp. 61-63 p. 35 p. 63

2. The question for consideration in this Appeal is whether on the true construction of a Sale Agreement between the parties and in the events that have happened the Respondent is (as he claims but the Appellant denies) entitled to repayment of the aggregate sum of $100,000 which he paid to the Appellant by way of deposit under the provisions of the said Sale Agreement.

3. The Appellant was at all material times in occupation of and (subject to renewal of the Leases hereinafter mentioned) in a position to dispose of the rubber estate known as the Harewood Estate. This estate has an area of some 1336 acres and consists as to

some 1154 acres of land held under Certificates of Title or Grants and as to the remaining 182 acres or thereabouts of land which had been held under seven several Leases from the State which (as the Respondent well knew) had expired on 19th June 1950. The matters in dispute in this Appeal arise in connection with the said 182 acres of leasehold land.

4. The Appellant's predecessors in title had in the year 1952 applied for a renewal of the leases under which the said leasehold land had been held, but the application had been and at the date of the Sale Agreement hereinafter mentioned still was held up pending the decision of the Government on certain matters
p. 74 of policy. Pending such decision, the Appellant was with the permission of the Collector of Land Revenue allowed to remain in occupation. The facts stated in this Paragraph were known to the Respondent prior to the date of the said Sale Agreement.

pp. 83-88 5. On the 8th November 1955 an Agreement (hereinafter called "the Sale Agreement") for the sale and purchase of the Harewood Estate was entered into between the Appellant as Vendor and the Respondent as Purchaser. The material provisions of the Sale Agreement are as follows:-

By Clause 1, subject to the condition in Clause 4 the Appellant agreed to sell and the Respondent to purchase the Harewood Estate.

By Clause 2 the price was fixed at $525,000, of which $50,000 was to be paid on the signing of the Sale Agreement, a further $50,000 was to be paid on or before the 1st February 1956 and the balance was to be paid on or before the 30th April 1956. The Respondent was not to be entitled to enter into possession until the purchase money had been paid in full and all intermediate profits were to belong to the Appellant.

By Clause 4 it was provided as follows:

"The purchase is conditional on the Vendor

"obtaining at the Vendor's expense a "renewal of the seven (7) Leases described "in the Schedule hereto so as to be in a "position to transfer the same to the "Purchaser and if for any cause whatsoever "the Vendor is unable to fulfil this "condition this Agreement shall become "null and void and the Vendor shall refund "to the Purchaser the deposit or deposits "already made under Clause 2 hereof "notwithstanding anything contained in "Clause 10 hereof."

By Clauses 9,10 & 11 it was provided (so far as material) as follows:-

"9. Completion of the purchase shall take "place at the offices of Messrs. Grumitt, "Reid & Co.Ltd. on or before the 30th day "of April 1956, and upon the Purchaser "paying the balance of the purchase price "to the Vendor, the Vendor shall as soon "as possible thereafter execute a proper "transfer or transfers of the property to "the Purchaser or as he shall direct,such "transfer or transfers to be prepared and "perfected, save as to the execution "thereof by the Vendor, by and at the "expense of the Purchaser and in the mean- "time the Vendor agrees to allow the "Purchaser to lodge a caveat against all the "lands pending the execution of the said "transfer or transfers. And the Vendor shall "if the Purchaser so requires execute in "favour of the Purchaser an irrevocable "power of attorney authorising the Purchaser "to execute all such transfers and documents "as shall be necessary for effectually "vesting in the Purchaser the said Mining "Leases.

"10. If from any cause (other than the "Vendor's default) the purchase shall not be "completed on the 30th April 1956, or the "second deposit of $50,000/- shall not be "made on or before the 1st February 1956 as "hereinbefore provided then this Agreement "shall become null and void and the deposit "or deposits already made will be forfeited.

"11. Upon actual completion of the purchase

"the Purchaser shall be entitled to
"possession of the property hereby agreed
"to be sold and shall as from that day be
"liable for all outgoings and shall repay
"to the Vendors all moneys expended by it
"complying in whole or in part with any
"requirements of the Government or of any
"local authority in respect of the property
"or any roads, ways, sewers adjoining the
"same or otherwise, of which notice may be
"given to the Vendor after the date of
"this Agreement.

By Clause 13 it was provided as follows:-

"Upon any default of the Purchaser to
"observe any stipulation on their part
"hereinbefore contained the Vendor may by
"notice in writing limit a time not less
"than fourteen days for making good such
"default or neglect, and if the same shall
"not be made good within seven days from
"the date of such notice may by a like
"notice rescind this Agreement and forfeit
"the deposit as agreed liquidated damages.
"In connection with this clause time shall
"be deemed to be of the essence of the
"contract."

6. In the course of the negotiations which led up to the execution of the Sale Agreement, the Respondent had submitted a draft Agreement which does not differ materially from the Sale Agreement in its final form save that in Clause 4, after the words "so as to be in a position to transfer the same to the Purchaser" there were included the words "before the date hereinafter fixed for completion". The Appellant refused to agree to the inclusion of those words and the Respondent agreed to their deletion. Evidence of the existence of the said draft and of the agreement for the deletion of the said words was tendered to the High Court, but objected to on behalf of the Respondent. The learned Judge held that such evidence was admissible under Section 92 (f) of the Evidence Ordinance 1950, but his decision on this point was reversed by the Court of Appeal. The Appellant will submit that the said evidence was properly admitted and that it is entitled to rely upon it.

7. The first deposit of $50,000 provided for by Clause 2 of the Sale Agreement was duly paid, and the second deposit of $50,000 thereby provided for was (by mutual consent) paid in two instalments of $25,000 each on the 30th January and 28th February 1956.

8. On the 25th April 1956 the Collector of Land Revenue wrote a letter to the Appellant's Solicitors informing them that the Ruler in Council had approved the issue of new leases comprising the whole of the said leasehold land and by letter dated the 26th April 1956 the Appellant's Solicitors so informed the Respondent's Solicitors. The said leases were however not issued until long after the 30th April 1956 and until issue no transfer of the leases to the Respondent was possible. In these circumstances the Appellant's Solicitors by letter to the Respondent's Solicitors dated 2nd May 1956 requested payment of the balance of the purchase price in accordance with Clause 4 of the Sale Agreement and offered on such payment to execute the Power of Attorney provided for by Clause 9 thereof. In reply the Respondent's Solicitors wrote to the Appellant's Solicitors a letter dated the 4th May 1956 refusing to pay the said balance "until your clients have a registered title to all the lands and are in a position to transfer a registrable title thereto" and continuing as follows:- p. 95 pp.95 to 97

" We refer you to Clause 4 of the Agree-
"ment under which our client is entitled to
"rescind the contract and claim back the
"deposit. But, before doing so, our client
"is prepared to give your clients time till
"the 31st day of May, 1956 by which date
"they should produce to us the issue
"documents of title in respect of all the
"lands contracted to be sold and satisfy
"us that they are in a position to make a
"good title and give a registrable
"transfer. It must be understood that the
"extension hereby granted is the utmost
"that our client agrees to and such time
"must be deemed to be of the essence of
"the contract. If a good title to convey
"all the lands capable of registration is
"made out by 31st May, 1956 our client will

"pay over the balance of purchase price and "complete the transaction. Otherwise, the "contract will stand cancelled and your "clients must pay back the deposit with "interest together with our client's costs "of investigating the title."

9. The said new Leases not yet having been issued, the Appellant was not on the 31st May 1956 in a position to transfer to the Respondent a registrable title to the said leasehold land, and on the 11th June 1956 the Respondent issued the Plaint in this action claiming repayment of the said deposit of $100,000 with interest at 6 per cent. per annum from the dates of payment to the date of satisfaction, and damages.

pp. 1 to 7

pp. 7-10

The Defence was delivered on the 27th July 1956.

10. The case was argued before the Honourable Mr. Justice Good on the 14th and 15th February 1957, when judgment was reserved. Good J. delivered his judgment dismissing the Respondent's action with costs on the 21st October 1957, and an Order to that effect was made on the 8th November 1957.

p. 35

pp.28 to 34

11. In his judgment Good J. summarised the facts and said that the fundamental question was whether time was of the essence of the Contract and, if not, whether the Respondent could, by unilateral action, make it so by giving 27 days' notice to the Appellant. He then went on to examine the Sale Agreement in detail.

As to Clause 4 he said

"It will be observed that this, the vital "operative clause in the Agreement, makes no "stipulation for the transfer of the property "by any particular date; it operates in the "other direction, and provides for the "payment of the balance of the purchase money "by the Plaintiff on or before the 30th "April, 1956."

As to Clause 9 he said

"The intention of this Clause seems to me "perfectly clear: the balance of the purchase "money was to have been paid on or before the

"30th of April, but it was not stipulated
"that the Defendants would necessarily
"execute a transfer on that date: they
"engaged to do so "as soon as possible
"thereafter", for the very good reason
"that both parties well knew that the
"Defendants might not be in a position
"to dispose of the leasehold on the date
"fixed for the payment of the purchase
"price. It is in my opinion immaterial
"whether the safeguards designed to
"protect the Purchaser, by way of caveat
"and power of Attorney, were of any
"practical value or not. One must seek
"the intention of the parties, which
"manifestly was directed to the execution
"of a transfer at a date later than that
"on which the purchase was completed by
"the payment of the balance of the
"purchase money by the Plaintiff."

As to Clause 10 he said

"The meaning of the words "If the purchase
"shall not be completed ....." is
"important. Looking back to Clause 9, it
"is clear that what is meant is, "If
"the balance of the purchase money shall
"not be paid ...", because the words "the
"Vendor shall as soon as possible
"thereafter execute a proper transfer or
"transfers of the property to the
"Purchaser ....." show that a distinction
"was deliberately drawn in the minds of
"the parties between the completion of
"the purchase by the payment of the
"balance of the purchase money, and the
"conclusion of the transaction by the
"transfer of the property. This view of
"the intention of the parties is
"fortified by the wording of Clause 11".

The learned Judge then read Clause 11 of the Sale Agreement and continued

"This clause is clearly designed to make
"transitory provisions to bridge the
"period between the payment of the pur-
"chase price and the transfer of the
"property. As Mr. Hume for the Defendant
"Company aptly said, the parties

"contracted out of the rule that at the "date of completion of the purchase the "Vendor must give a good title. The "Plaintiff did so with his eyes open, "knowing that the Defendants might not, "and in all probability would not,be in "a position to assign the leases by the "date agreed as the date of purchase.

" In short, therefore, I hold that the "parties intentionally and willingly "avoided making time of the essence of "the contract."

He then examined the question whether 27 days' notice making time the essence of the Contract was reasonable and he concluded

"Manifestly it was not, since the "Plaintiff must have been well aware that "the Defendants could not control the "proceedings of the Ruler in Council,with "whom lay the decision to issue fresh "leases. We know that in fact eight "months elapsed between the date "stipulated in the Agreement and the date "on which the approval of the statutory "authority was obtained. This was pro- "vided for by mutual consent, and, "whatever his reasons for withdrawing from "the bargain, the Plaintiff is bound by "Clause 10 of the Agreement.

" I accordingly dismiss the claim and "give judgment for the Defendants, with "costs."

pp. 35 & 36 pp. 36 to 40

11. The Respondent served Notice of Appeal on the 8th November 1957 and delivered a Memorandum of Appeal on the 3rd January 1958. The Appeal was heard on the 24th, 25th and 26th February 1958 by a Court of Appeal consisting of Thomson C.J. (Malaya), Whyatt C.J. (Singapore) and Barakbah J. Judgment was reserved and delivered on the 26th March 1958.

pp. 40 to 47

12. Thomson C.J. in his judgment examined the facts and the judgment of Good J. and said that he found himself in agreement with much of the learned Judge's reasoning but that he thought he had attributed insufficient importance to Clauses 1 and 4 of the Sale Agreement. He went on to say that the substance of the

contract was in Clause 1 and was expressed to be subject to the condition contained in Clause 4, which he construed as being "that the leases must have been renewed in such way that the Vendor is in a position to transfer them".
He went on to say that the question then arose as to the date on which one had to inquire whether or not the condition has been fulfilled and said that the answer was to be found in Clause 9 which fixed completion for 30th April 1956, though this date was later extended to 31st May 1956. He agreed with Good J. that the words "completion of the purchase" in Clause 9 did not include transfer of the property because that was to take place "as soon as possible thereafter", but he held that those words included payment of the purchase price. He then said

> "What Clause 4 means, then, is that if "on 30th April, 1956 (subsequently "extended to 31st May, 1956) the Leases "had not been renewed and the Vendor was "not in a position to transfer then the "contract became null and void and the "Purchaser was entitled to have his "deposits refunded."

and held that since the leases had not been renewed by the 31st May 1958 the condition to which (in his view) the contract was subject had not been fulfilled and that the Respondent was therefore entitled to treat the contract as at an end and to have his deposits returned. He would therefore allow the Appeal with costs.

13. Whyatt C.J. in his dissenting judgment examined the history of the matter and pointed out that the Sale Agreement did not provide expressis verbis that the Purchaser's obligation to pay the balance of the purchase price and the Vendor's obligation to transfer the property should be interdependent obligations to be performed on the same day. He went on pp.48 to 58

> "This is, of course, quite different "from the normal provision in a contract "for the sale of land, where the "contract almost invariably provides that

"the payment of the purchase price and
"the execution of the transfer of title
"shall be performed at one and the same
"time. The reason for this departure
"from common form in the present contract
"was, no doubt, due to the fact, well-
"known to both parties to the Agreement,
"that the title to 180 acres out of the
"total 1,340 acres comprised in the sale
"was awaiting a decision by the State
"Government regarding the terms for the
"issue of new leases. The Vendor knew
"that this question had been pending since
"1951 and the Purchaser was aware that it
"had been pending for some considerable
"time. To expect that a matter which had
"been pending with the State Government
"for the past six years would be decided
"within the next six months might be
"regarded as optimistic, and to contract
"on the basis that it would be so
"decided might be said to be unrealistic.
"Hence, with this knowledge of the
"surrounding circumstances in their minds,
"the parties provided in Clause 9 of the
"Agreement, not that the title should be
"transferred on the day the balance of the
"purchase money was paid, namely, on or
"before the 30th April 1956, but "as soon
"as possible thereafter". The Agreement,
"thus construed, does not appear to me to
"be an unreasonable or improbable bargain
"for the parties to make in the
"circumstances existing at the date of the
"contract."

After discussing the construction of the Sale Agreement he summarised his views as follows:-

" In my opinion, the obligations imposed
"on the parties by this Agreement may be
"conveniently summarised as follows: The
"Purchaser was obliged to pay a deposit of
"$50,000 on the 8th November 1955 and a
"further deposit of $50,000 on the 1st
"February 1956, and the balance of the
"purchase price, namely $425,000, on or
"before the 30th April 1956. The Vendors,
"for their part, were obliged (a) to give
"possession on payment of the balance of the

"purchase price, (b) to execute a "transfer of the leases "as soon as "possible" after receiving the purchase "price, and (c) to perform certain "subsidiary obligations such as giving "the Plaintiff a Power of Attorney and "permitting the Plaintiff to enter "caveats against the land. There was "some argument as to the meaning of ""as soon as possible" in this context. "The phrase has frequently been con- "sidered by the Courts and may be taken "to mean within a reasonable time, with "an undertaking to do it in the shortest "practicable time. In my opinion, when "the parties used this phrase on the 8th "November 1955, at which date a decision "regarding the terms of the new leases "had been outstanding for six years, they "must have contemplated that it might be "several months after the 30th April 1956 "before the leases could be issued and "transferred to the Plaintiff; in "other words, "as soon as possible" in "this context might well be several "months after the 30th April 1956.

The learned Chief Justice then examined the conduct of the parties after the date of the Sale Agreement and said that "it will "be seen from the foregoing that the "Defendants were throughout seeking to fulfil "their obligations under the Agreement, "construed in the manner I have outlined "earlier in this judgment.... The Plaintiff "on the other hand, misconceiving his rights "and duties under the Agreement defaulted in "payment of the balance of the purchase- "money and thus committed a fundamental breach "of the agreement, which became final and "irrevocable when he issued his Plaint on the "11th June 1956". He then held that the consequence of the Respondent's breach was that the deposits were forfeited under Clause 10 of the Sale Agreement and said he would affirm the judgment of Good J. and dismiss the Appeal.

14. Barakbah J. delivered a short judgment agreeing with the conclusions reached by pp.59 to 61

Thomson C.J.

pp.61 to 63.

15. By an Order of the Court of Appeal dated 2nd October 1958 the Order of Mr. Justice Good was set aside and it was ordered that the Respondent do recover from the Appellant $100,000 and $150 being the Respondent's costs of investigating the titles with interest thereon as therein mentioned, and that the Appellant should pay the Respondent's costs to be taxed in the Court below and of the Appeal.

16. The Appellant humbly submits that the Order made herein by Good J. was correct and that the Order of the Court of Appeal allowing the Appeal was wrong and ought to be set aside for the following among other

R E A S O N S

1. Because on the true construction of the Sale Agreement (proper regard being had to the facts known to the parties at the date of its execution) time was not of the essence of the condition contained in Clause 4 thereof.

2. Because in considering the manner in which the language of the Sale Agreement was related to facts existing at the date thereof, it is open to the Court under Section 92 (f) of the Evidence Ordinance 1950 or otherwise to receive evidence of the draft Sale Agreement submitted by the Respondent and to give due weight to the revisions of such draft agreed upon between the parties.

3. Because if the Respondent was entitled to give notice making time of the essence of the condition contained in Clause 4 of the Agreement, he was bound to allow the Appellant a time for the performance thereof which was reasonable in all the circumstances and the period of 27 days limited by the letter of May 4th 1956 was unreasonably short.

4. Because when the Sale Agreement was

executed it was well known to and in the contemplation of both parties that the leases under which the leasehold portion of the Harewood Estate were held might well not be renewed or new leases thereof issued by the date thereby fixed for payment of the balance of the purchase money; and it was the intention and effect of the Sale Agreement that such balance should be paid on the 28th April 1956 whether or not such leases had been renewed or new leases issued.

5. Because the renewal of the said leases or the issue of such new leases was (as the Respondent was well aware) a matter for Government action which the Appellant could not control and it was neither the intention nor effect of the Sale Agreement that the Respondent should be entitled to withhold payment of the balance of the purchase money, much less to demand repayment of his deposit, by reason of delay in such renewal or issue.

6. Because the failure of the Respondent to pay the balance of his purchase money on the 28th April 1956 constituted a breach of the Sale Agreement entitling the Appellant to forfeit the Respondent's deposits.

7. Because if the said breach was previously capable of remedy it became final and irrevocable by the issue of the Plaint herein and upon such issue the Appellant (if it was not therebefore so entitled) became entitled to forfeit the said deposits.

8. Because the Appellant at all times down to the date of the Respondent's breach thereof fulfilled or was ready, willing and able to fulfil all its obligations under the Sale Agreement, whereas the Respondent committed fundamental breaches thereof by failing to pay the balance of the purchase money and issuing the Plaint herein.

9. Because the judgment of Good J. and the dissenting judgment of Whyatt C.J. were right and ought to be followed.

10. Because Thomson C.J. and Barakbah J. incorrectly construed the Sale Agreement.

11. Because the Order of the High Court was right and ought to be restored.

12. Because the Order of the Court of Appeal in Malaya was wrong and ought to be set aside.

MILNER HOLLAND

J. A. WOLFE

No. 36 of 1958

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- and -

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SHELTON COBB & CO.,
3, New Court,
Lincoln's Inn,
W.C.2.