IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 15 of 1965

Between:

FONG LEE — Appellant (Original Plaintiff)

- and -

1. MITLAL son of Samalia — Respondent (Original Defendant)

2. RAM KISSUN son of Ori — Respondent (Original Third Party).

A.H. Sahu Khan for Appellant
R.A. Kearsley for 1st Respondent
R.I. Kapadia for 2nd Respondent

JUDGMENT OF GOULD, J.A.

This is an appeal from a judgment of the Supreme Court of Fiji in an action in which the appellant was plaintiff, the first respondent was the defendant and the second respondent was third party, arising out of a dispute relating to leasehold land described as Allotment 8 of Section 3 of Raki Raki Township. It will be convenient, I think, to refer to the parties by their names.

In 1957 Mitlal was the lessee of Allotments 7 and 8 of Section 3 and on the 20th February, 1957, he agreed in writing to sell Allotment 7 to Ram Kissun, the sale being completed by registration of a sublease to Ram Kissun. The agreement of the 20th February, in which the parties were described as "vendor" and "purchaser" without reference to assigns or personal representatives, contained the following clause:

> "7. The vendor undertakes not to sell allotment no. 8 being part of lease no. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser and shall give the purchaser right to first refusal."

In March, 1963, Mitlal mortgaged Allotment 8 to one Shiu Shankar and the mortgage was duly registered. By August, 1963, Shiu Shankar was threatening to exercise his power of sale under the mortgage and advertised in a newspaper inviting offers, to be received up to the

31st August, 1963. During the argument on appeal counsel for Ram Kissun called attention to a passage in his evidence in which he denied that he had seen this advertisement. In order to avoid a forced sale Mitlal sought out Fong Lee and offered Allotment 8 to him for sale. They reached agreement and on the 30th August, 1963, they signed a Sale Note prepared by a solicitor, Mr. A.H. Sahu Khan. The price was £1,400 which was to be deposited with Mr. Sahu Khan "forthwith upon the execution thereof to be held on trust pending the necessary consents being obtained". Mitlal undertook to apply for the consent of the Director of Lands and the agreement was made subject to that consent. The learned Chief Justice in his judgment held that the reference to the Director of Lands was a mistake and that the appropriate authority was the Native Land Trust Board the consent of which was subsequently given, as will appear. No question on this aspect of the matter arises on the appeal and it will not be necessary to refer to it again.

On the 2nd September, 1963, Mr. V.R. Sharma, the solicitor who had drawn up the agreement of February, 1957, wrote on Ram Kissun's behalf to Mitlal pointing out that any contemplated sale to Fong Lee was in contravention of clause 7 of that agreement and threatening proceedings. On the 3rd September, 1963, Fong Lee's son journeyed to Suva, lodged a caveat to protect Fong Lee's interest under the agreement of the 2nd September, and obtained the consent of the Native Land Trust Board in writing. On the 4th September Mr. V.R. Sharma lodged a caveat on behalf of Ram Kissun.

Fong Lee commenced proceedings in the Supreme Court in October, 1963, for specific performance of his agreement with Mitlal (or damages in the alternative) - later Ram Kissun was joined on his own application, claiming to restrain the contract of the 2nd September from being carried into effect and claiming specific performance of clause 7 of the agreement of February, 1957. At the conclusion of the proceedings the learned Chief Justice made an order to the following effect. There was an injunction restraining Mitlal from completing the sale to Fong Lee without first offering it to Ram Kissun at £1,400. Three months (or such extended period as the parties might agree) was allowed for offer acceptance and completion of the sale to Ram Kissun. If that sale was duly completed Fong Lee could prove his damages; if it was not, he could ask for specific performance. From that judgment Fong Lee has brought the present appeal, in which all three parties were represented by counsel, but counsel for Mitlal took no part in the argument and stated that his client would abide by such order as the Court might make.

In arriving at his decision the learned Chief Justice considered a number of matters. He held, first, that clause 7 of the agreement of February, 1957, read as a whole, and construed ut res magis valeat quam pereat was not void for uncertainty but granted a right of pre-emption or first refusal being "intended to bind Mitlal, in the event of his receiving an offer for the property from a third party, to offer it to the 2nd defendant, at the same price". I would interpolate that I take it to be implied that the offer from the 3rd party must be one which Mitlal was prepared to accept. That was, in the

view of the learned Chief Justice, enough to overcome the difficulty of the ascertainment of the purchase price.

Secondly, he found that the rule against perpetuities presented no impediment to a finding that clause 7 of the agreement of February, 1957, was enforceable, as Mitlal was an immediately contracting party to a contract taking effect in personam - it was immaterial in those circumstances whether an interest in land had passed or not.

Next, the learned Chief Justice referred to an argument that as Ram Kissun acquired his right or interest first, it prevailed over the interest of Fong Lee. He said:

> "In my view the maxim has no application. Assuming that the 2nd defendant acquired an interest in the property under the contract of 1957, and not a mere equity, this is not a case of equitable interests competing for priority. And if he acquired but a mere equity, it is not a case of the plaintiff being a purchaser for value of an equitable interest without notice of the equity."

At that stage the learned Chief Justice summarized the position he had arrived at and held that a valid right of pre-emption or 'first refusal' was vested in Ram Kissun, and at the same time Fong Lee had a valid contract binding Mitlal.

The learned Chief Justice next considered passages from the judgments in Manchester Ship Canal Company v. Manchester Racecourse Company (1900) 2 Ch. 352, and on appeal (1901) 2 Ch. 37. He concluded that, while he was satisfied that Fong Lee, when he entered into his agreement, had no knowledge of the contents of the agreement of February, 1957, that did not disentitle Ram Kissun from having enforced the express negative provision contained in clause 7, although it was to the detriment of Fong Lee as an innocent third party.

The learned Chief Justice, in his final order which I have summarized earlier, devised a method of giving effect to the view set out in the last paragraph; but before doing so he considered an argument that Fong Lee should have priority because Ram Kissun had failed to register a caveat before Fong Lee entered into his agreement. His view, as expressed in the judgment, was that section 29 of the Land (Transfer and Registration) Ordinance (Cap. 136) had no relevance "if the case is viewed, as I think it substantially ought to be viewed, as a claim by Ram Kissun to restrain Mitlal from carrying into execution his sale to the plaintiff in breach of the right of pre-emption". That argument failed.

I have set out in summary the points which were considered and decided by the learned Chief Justice, as they have all been put in issue on the appeal by Mr. Sahu Khan, counsel for Fong Lee. I will take the questions, so far as I am able, in the same order.

I respectfully agree with the interpretation placed by the learned Chief Justice on clause 7 of the agreement of February, 1957. Read as a whole it can only have been intended to create a right of pre-emption. This interpretation was in fact not challenged on the appeal, but it was submitted that the clause could not be enforced by reason of the absence of an essential term - the price - either specifically or by the provision of machinery for its ascertainment. Counsel relied upon cases relating to agreements for the sale of land, and though in my opinion an agreement giving a right of pre-emption is not an agreement for the sale of land, it is closely allied thereto, and in any event under the general law of contract if there is no way of supplying an omitted and essential term, it is an incomplete contract.

The learned Chief Justice quoted the following passage from the judgment of Farwell, J. in first instance in Manchester Ship Canal Company v. Manchester Racecourse Company (supra) at p. 363:

> "In this case the price is ascertainable by the fact that it is to be the same as that offered by any other company or person."

That passage indicated the learned Chief Justice's own view and was quoted by him as lending it a measure of support. That is because the contract before Farwell, J. had been given statutory validity and shortly before the passage quoted, he had said:

> "I, therefore, find myself in this position. I have an agreement which the Legislature has declared valid, and I have to construe it. In so doing I must avoid, of course, coming to any conclusion which would render it void for uncertainty. I must, therefore, find, if possible, a meaning for the words used."

Whether Farwell, J. would have expressed the same view on the question of price in the absence of such statutory validity cannot of course be ascertained: but the method of ascertaining the price which he indicated is a reasonable one.

In the case of Ryan v. Thomas (1911) 55 S.J. 364 however, Warrington J. distinguished the Manchester Canal case on the ground of the statutory validity which the agreement in that case enjoyed. The report of Ryan v. Thomas in the Solicitors' Journal (which appears to be the only report available) is, unfortunately, brief and the complete facts are difficult to ascertain. The plaintiffs sought to set aside a lease to one Thomas (acting on behalf of a defendant, Manley) on the ground of fraud. The learned judge held that there was fraud and proceeded to examine a defence by Manley that the plaintiffs were not entitled to relief because they were in breach of an obligation to him. The obligation arose out of an agreement made some four years earlier "to give the defendant Manley the 'first option' of purchasing any premises that might be designated for the purpose of a dairy on the south side of the road"; the plaintiffs were the owners of land on the south side of the road. There were attempts to put the option into more specific terms but they fell through. The report of the judgment reads as follows:-

"Warrington J. reviewed the facts and held that the lease had been obtained by fraud. The question now to be decided, his Lordship continued, is whether the words of the agreement of the 19th September 1906 constitute a contract. The subsequent statements of the parties contained in the correspondence and draft conveyances throw no light on, and have nothing to do with, the original agreement. The plaintiffs' case is that there was no contract, as the parties never came to terms as to the conditions of the option; the defendants' case is that the agreement really amounts to this, that the plaintiff is to give us first refusal of the premises at a fair and reasonable price, or at a price that another has offered, or at a price he is willing to take from another purchaser. In the absence of authority I should have held that such an agreement was too uncertain for any court to enforce. Even now the defendant will not pin himself down to any one view as to the meaning of the option. But it is alleged on the defendants' behalf that the case is decided by authority, and that the meaning of such an expression is that you shall at all events make a fair and reasonable offer to the person in whose favour the option has been granted. The case cited to this effect is Manchester Ship Canal C. v. Manchester Racecourse Co. (1900 2 Ch. 352) confirmed in the court of appeal (1901 2 Ch. 37). In this case an agreement between the two companies was scheduled to the Act of Parliament incorporating the plaintiff company, and the case wholly turned upon the fact that the agreement was equivalent to a statute. This is made perfectly plain in the judgment of Farwell, J., who, dealing with the question whether the agreement could be void for uncertainty said, 'If the Legislature has declared the contract valid, how can I declare it void?... Unless the words were so absolutely senseless that I could do nothing at all with them I should be bound to find some meaning, and not to declare them void for uncertainty'. And, again P. 363, 'I must find, if possible, a meaning for the words used'. In the court of appeal the case was dealt with on the same footing. Now, in dealing with an ordinary contract, the court is not bound to find some meaning for the words used. It is not my business to expand the words of a contract; if a contract does not contain certain stipulations it is not for me to make them. I must let the actual words stand. The case cited has no bearing on the case before me. Here people have purported to come to an agreement; but, in fact, have not come to any agreement at all; because the terms of the agreement are not expressed. The words 'first option' by themselves have no meaning; there is no mention of price, or time, or anything else. I hold that there was no contract, and therefore the defence fails, and the plaintiff is entitled to have the lease set aside."

The distinction made there on the basis of statutory validity is, of course, a perfectly proper one and the same distinction was referred to in the present case in the judgment of the learned Chief Justice. The case of Ryan v. Thomas was not mentioned by counsel either in the Supreme Court or on the appeal, and while the agreement under consideration there bears some measure of resemblance to the present one, each case must be examined on its own merits. It will be helpful, I think, to look at the judgment of the court of appeal in the Manchester Canal case in some detail.

The judgment (delivered by Vaughan Williams L.J.) did not deal with the question of uncertainty until a late stage and then merely by the observation that for the reasons given by Farwell J. every clause had statutory validity and no objection could be taken on that score. The court did not indicate, in dealing with the other aspects of the case, whether in any particular respect it might in other circumstances have considered that an "uncertainty" argument would have prevailed, and indeed the question appears not to have received much attention in the arguments for the two appellants as reported. The clause which had to be construed, so far as material, was -

> "If and whenever the lands .... shall cease to be used as a racecourse .... or should the lands .... be at any time proposed to be used for dock purposes, then ... the racecourse company shall give to the canal company the first refusal of the ... lands."

Their Lordships said that the lands did not seem to have ceased to be used as a racecourse and had therefore to decide what was meant by "proposed to be used for dock purposes". On the question of first refusal their Lordships said, at pp. 46-7 :

> "There appear to be two possible meanings of the words 'first refusal'; one is that they mean the opportunity of refusing a 'fair and reasonable offer' by the racecourse company to sell the lands en bloc to the canal company; the other is that they mean the opportunity of refusing the land at a price acceptable to the racecourse company offered by some person other than the canal company, which is what we understand by the term 'right of pre-emption'."

It was the second of these two meanings which commended itself to Farwell J. The Court of Appea next considered the case in the light of the first of their two alternatives as being the view most favourable to the defendants, and found that no fair and reasonable offer had been made. Then follows a passage which appears to me to express the more basic view of the court. It is at p.48:

> "We think that the very words 'first refusal' in clause 3 import that the price at which the racecourse company give the canal company the 'first refusal' is a price at which the racecourse company will offer the land to other would-be buyers in the event of the

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"refusal of the canal company to buy at that price. If there is no person negotiating a purchase it may not be easy to prove that the land offered to the canal company is above the price which the race-course company are willing to take from persons other than the canal company; but whenever this can be proved it seems to me that there is a clear infraction of the right of pre-emption given to the canal company by clause 3. In the present case however there is no difficulty of proof."

In the same way there was no difficulty of proof in this case and that brings me to a factor which I think distinguishes this present case from both the Manchester Canal case and Ryan v. Thomas. In both those cases the right of first refusal arose upon the happening of some event extraneous to any proposal of sale - in the Manchester Canal Co. case it was when it was proposed to use the lands for dock purposes and in Ryan v. Thomas it was that the land should be designated for the purposes of a dairy, both extremely vague concepts in themselves. Thus the right of first refusal might crystallize without there being any other possible purchaser in the background and this would give rise to the difficulties mentioned by their Lordships; there would be no machinery by which the price was to be ascertained except under the "fair and reasonable" approach.

The meaning of the present clause, as interpreted by the learned Chief Justice, is quite different. There is no extraneous event and everything is centred upon the possibility that Mitlal would wish to sell the property. What he undertook to do was not to sell it at any price without first offering it to Ram Kissun at the proposed price. That might occasion practical difficulties in Mitlal's negotiations with a prospective buyer but he chose to make clause 7 part of his bargain with Ram Kissun and must accept the difficulty. One of the two alternatives considered in the Manchester Canal Co. case is eliminated because there was no obligation to make a "fair and reasonable" offer at any stage; except in the sense that what someone else is prepared to pay may be an indication of what is fair and reasonable, that question does not arise. If Mitlal at any stage offered to sell to Ram Kissun at a certain price and the offer was refused Mitlal would no doubt be at liberty to sell to anyone else at that price or more - but not at a lower figure without a prior offer to Ram Kissun at that figure.

Apart from the two cases mentioned there appears to be little direct authority on this question. There are a number of cases in which the right of pre-emption arose by statute but in those the price was to be settled by arbitration. The meaning of "first refusal" was discussed in an Australian case Woodroffe v. Box (1954) A.L.R. 474; the following is taken from the Australian Digest, 1954, Col. 95 -

> "The term 'first refusal' which occurs in such phrases as 'have the first refusal' 'give the first refusal' 'have the right of first refusal' etc, is not a technical term; it is a colloquial term of fairly flexible import. A mere promise to give the first refusal should be taken prima facie as conferring no more than a pre-emptive right. The whole burden of justifying this interpretation rests on the word 'first'."

A similar meaning was attached to the phrase 'first option' in a case mentioned in the American publication "Words and Phrases" (3rd series) where it is stated -

> "Where a lease provided that should the lessors desire to sell the property, the tenant should have the 'first option' to purchase, the words 'first option' indicate that, if the lessors should desire to sell the property to any person during the term, they should give the tenant the opportunity of taking the property on the same terms, and, where an acceptable offer is made, the tenant should be given his chance to purchase: Jorgenson v. Morris 185 N.Y.S. 386, 387: 194 App. Div. 92."

I do not consider that Ryan v. Thomas is to be taken as authority for the statement that every case of a right of pre-emption apart from statute is to be regarded as void for uncertainty unless a price is stated. On the interpretation placed upon clause 7 by the learned Chief Justice Ram Kissun was entitled to have the property offered to him at £1400 before Mitlal closed with Fong Lee and I find myself in agreement with the learned Chief Justice that the maxim "id certum est quod certum reddi potest" applied in the circumstances of the present case.

The next submission is that clause 7 of the 1957 agreement is void as infringing the rule against perpetuities. On this point I have no reason to doubt that the case of Hutton v. Watling (1947) 2 All E.R. 641, correctly summarises the effect of the authorities in relation to an option to purchase. The reasoning would apply equally, if not a fortiori to a contract of pre-emption. Jenkins, J. whose judgment it was, said that the state of the authorities was not wholly satisfactory: he considered London & South Western Railway Company v. Gomm (1882) 29 Ch.D. 562 and South Eastern Railway Company v. Associated Portland Cement Manufacturers (1910) 1 Ch. 12 in detail and found (at p.645 of the report) that the latter provided clear authority:

> "... to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option and that the rule against perpetuities has no relevance to such a case as distinct from a case in

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"which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement."

Hutton v. Watling went to the Court of Appeal (see (1948) 1 All E.R. 803) but not on the point of the perpetuity rule; the appeal was dismissed. In his judgment in the court of first instance Jenkins, J. referred to the fact that the correctness of the decision in the Associated Portland Cement Manufacturers case (supra) had been doubted in Williams on Vendor and Purchaser (4th Edn.) Vol. 1 p.424 and Gray on Perpetuities (4th Edn.) 366-7: Jenkins, J. gave his reasons for considering the doubts ill founded. Those reasons are reproduced in Cheshires Modern Real Property (7th Edn.) 298 which quotes Hutton v. Watling as authority for the proposition of law it purports to decide, as also does "The Rule against Perpetuities" by Morris & Leach (2nd Edn.) 221. None of the authorities quoted is in any strict sense binding on this Court but I see no reason to come to a different conclusion and respectfully agree with the judgment of the learned Chief Justice that clause 7, as between the immediate parties, can be relied upon without regard to the rule against perpetuities.

I now approach the problem of what relief should be granted and to which party, on the basis that Ram Kissun had a valid right of pre-emption and Fong Lee a valid contract. It is hardly necessary to add that the right of pre-emption was a contractual right no less than that of Fong Lee. I am in some doubt as to what the learned Chief Justice meant when he said that the maxim which he quoted as "potior in tempore, potior in jure" did not apply. The effect of the final decision was in fact to give Ram Kissun specific enforcement, not, of course, of any agreement for sale, as none existed, but of his contractual right to pre-emption (leaving Fong Lee to resort to damages) and the only reason for preferring Ram Kissun was that he was first in time. It is probable that what the learned Chief Justice had in mind was that the maxim refers to equitable estates while he was applying rules evolved in relation to the discretion to grant specific performance, such as that in Willmott v. Barker (1880) 15 Ch.D. 96, though the result was the same as if the maxim had been applied.

Specifically, in this phase of the case, the learned Chief Justice followed the course taken in Manchester Ship Canal Company v. Manchester Racecourse Company (supra). I have already referred to the judgment in that case, but the basic facts were that the Canal Company had, in respect of certain land, a right of first refusal or pre-emption against the Racecourse Company, and the latter, without making an offer to sell it to the Canal Company at a commensurate or fair and reasonable price, agreed to sell the land to the Trafford Park Company. It was held (all three companies being parties to the action) that the "first refusal" involved a negative contract not to part with the land to any

other company or person without giving that first refusal. That negative contract was enforced by injunction. The difference between that case and this, as has been pointed out, is that the Trafford Park Company had full knowledge of the right of first refusal and Fong Lee did not. The learned Chief Justice did not consider this difference material.

On that question there is much that is helpful in the case of Morland v. Hales and Somerville (1911) 30 N.Z.L.R. 201, decided by the Court of Appeal of New Zealand. The facts in essence were that M. held an option for valuable consideration from H. to purchase a piece of land at a stated price, valid for ten days. During the currency of the option, H., under the impression that M. had abandoned his option, agreed to sell the property to S. Then, still within the 10 day period, M. exercised his option. The court held that the option created an interest in land and the holder had a superior equity to that of S. and was entitled as between himself and S. to specific performance of his contract. Williams, J., one of the member of the Court, held further that even if no interest in land passed to the holder of the option, yet the option was a contract affecting the land which the court would enforce in priority to the subsequent contract with S.

In his judgment Williams, J. considered in detail London & South Western Railway Company v. Gomm (supra), the South Eastern Railway Company v. Associated Portland Cement Manufacturers (supra) and the Manchester Ship Canal Company v. Manchester Racecourse Company (supra). In relation to the last-mentioned case Williams, J. said, at p.210:

> "As the Trafford Park Company could not have obtained a decree for specific performance of their contract for purchase, and as the carrying-out of that contract would be a breach of a prior contract by the vendor affecting the land in equity, the Court restrained the carrying-out of the contract. The effect of that decision was that the right of refusal the canal company originally had was preserved to them in its integrity."

At p.211-2 he said:

> "I do not think that either in Lumley v. Wagner 1 DeG. M. & G. 604 or in the Manchester case it was an essential element for the success of the plaintiff that the third person with whom the subsequent contract was entered into should have had at the time he entered into it knowledge of the first contract, or that the Court in the Manchester case intended to base its judgment on that circumstance. In the Manchester case, as in the present, although an interest in the land may not have passed, there was an equity attaching to the land. Where there is an equity relating to the land which binds the owner

"of the land, there is an equity attaching to the land. Equity acts in personam. It was contended that the contract for sale vested an equitable estate in the purchaser, and that the purchaser was entitled to hold the estate discharged from all equities which existed at the time of his contract but of the existence of which he was then unaware. I do not think this is so. Mr. Dart (Vendor and Purchaser (7th Edn.) 288) says:

> 'It is sometimes stated in general terms that by the contract the purchaser becomes in equity the owner of the property; but this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect the purchaser cannot, as against a stranger to the contract, enforce equities attaching to the property.'

Where there is an equity as distinguished from an equitable estate, and the owner of the land contracts to sell in derogation of that equity, the purchaser can only protect himself if he completes his purchase without notice of the equity. As was said by Lord Westbury in Phillips v. Phillips 4 DeG. F. & J. at p.218:

> 'Where there are circumstances which give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud or rectify it for mistake, the plea of purchase for valuable consideration without notice is a good defence.'

"It is abundantly clear that, although a purchaser at the time he makes his contract is unaware of a prior equity, yet, if he has notice before he pays the whole of his purchase-money, he is bound in the same manner as if he had notice before the contract: Kerr on Fraud 3rd Edn. p.331; Story's Equity Jurisprudence 13th Edn. p.63, para. 64(c); Fitzgerald v. Burk 2 Atk. 397; Story v. Lord Windsor 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304. No case can be found where this principle has ever been called in question."

That passage supports the opinion of the learned Chief Justice in the present case that the absence of knowledge on the part of Fong Lee of the earlier contract was not material. For completeness I would add that while the finding of the court in Morland v. Hales and Somerville (supra) was that a valid option at a fixed price passed an interest in land, a mere right of pre-emption, in the sense of first refusal, did not. Williams, J. at p. 208 said:

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> "The distinction between the above case (i.e. the Manchester Canal case) and a simple option to purchase is clear. In the former case the vendor is under no obligation to sell at all. The only effect of the right of pre-emption is that the vendor, if he does sell, must give the owner of the right the opportunity of buying at the same price at which the vendor proposes to sell to a third party: see Dart on Vendor and Purchaser (7th Edn.) at p.275. Whether there shall be a sale or not, and the price at which the land is to be sold, rests with the vendor. In the case of an option for valuable consideration to purchase at a named price, the matter is altogether out of the vendor's hands, and it rests with the holder of the option alone whether he will exercise the right to purchase the lands which the option gives him. The holder of the option has a vested right to take the land from the owner without his consent. It is difficult, on the one hand, to see how an interest in land could pass to a third person under a contract which does not compel the owner of the land to sell at all unless he chooses; and, on the other, how it could not pass where there is an absolute right to purchase, and it rests entirely with the owner of that right to decide whether he will purchase."

There is yet one more passage in this very comprehensive judgment of Williams, J. which has relevance to the present circumstances. It appears at pp.208-9:

> "If an interest in the land passed in the present case by virtue of the option, the estate in equity, which passed to Somerville under his contract with the syndicate, would necessarily be subject to that interest. Somerville cannot claim as a purchaser for value without notice, as his contract has not been completed by payment of the purchase-money and a conveyance of the legal estate. The appellant, therefore, if he properly exercised an option which he had not abandoned, would be entitled to specific performance of the contract which his exercise of the option created."

Following what is expressed there and in the last portion of the quotation from pages 211-2 of the judgment of Williams, J. I take the view that Fong Lee could not claim to be a purchaser for value without notice, as he ***had not become the registered proprietor of the leasehold,*** the equivalent under the Torrens System of getting a conveyance of the legal estate. Further support for this proposition is to be found in Cheshire's Modern Real Property (7th Edn.) p.61:

"The one person, therefore, whose conscience was unaffected and against whom the equitable estate became unenforceable was the purchaser for value of the legal estate without notice of the rights of the cestui que use."

The matter must, however, be taken a step further. The requirement that Fong Lee had to become the registered proprietor before he could successfully rely on a plea of purchaser for value without notice applies only if Ram Kissun's right amounted to an equitable interest in land. If he had no more than what is called a mere equity (see Snell on Equity 25th Edn. p.18) Fong Lee's interest would prevail, even though he did not obtain the legal estate, provided he was the purchaser for value of an equitable interest without notice: Snall on Equity (op. cit.) P.18; Phillips v. Phillips (1861) 4 DeG. F. & J. 208 at 215-218; Cave v. Cave (1880) 15 Ch.D. 639. The learned Chief Justice considered, but without enlarging on the topic, that this was not a case of Fong Lee being a bona fide purchaser for value of an equitable interest without notice of the equity. I have been in some doubt on the question. Certainly Fong Lee acquired an equitable interest as soon as he agreed to buy the leasehold. But was he a purchaser "for value" before he received notice of Ram Kissun's claim? The facts found were that he had notice, after signing the agreement, but before his son went to Suva on the 3rd September 1963, to lodge a caveat and obtain the necessary consent. Paragraph 2 of the agreement of the 30th August, 1963, indicates that the purchase money was paid to the solicitor to be held in trust pending the consent being obtained. Before that happened therefore, Fong Lee had notice, which he admitted in his pleadings to be notice of an option to purchase. He also pleaded that on the 4th September, 1963, Mitlal refused to sell and purported to treat the agreement as null and void so there can be no doubt that the purchase money remained available for Fong Lee if he was prepared to take it.

I do not think that in the circumstances Fong Lee had parted with his money in a sense which made him a purchaser for value, before he received notice, particularly as it was through efforts made on his behalf after he received notice, that the necessary consent was forthcoming. In a sense the money was secured to Mitlal by being held by the solicitor as stakeholder, but it was decided in Hardingham v. Nicholls (1745) 3 Atk. 304 that security for payment given before notice was not enough; there must be actual payment. I conclude therefore, though not without hesitation, that a plea of purchase for value without notice cannot be supported on any ground.

That being my opinion I do not find any ground for holding that the learned Chief Justice erred when he treated the matter, not as a case of competing equities, but on a purely contractual basis, and applied the principles laid down in the Manchester Canal Co. case which were followed in Morland v. Hales. I respectfully agree with the conclusions he arrived at on that aspect of the case and it remains only to consider the arguments based on the failure of Ram Kissun to protect his rights under clause 7 of the agreement of February, 1957, by registering a caveat;

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I will assume for the purpose of discussion that Ram Kissun had what is called a "caveatable interest" by virtue of that clause. The facts relevant to this part of the case are that Ram Kissun, between February 1957, and the date of Fong Lee's agreement did not lodge a caveat: Fong Lee made no search of the title before entering into his agreement, though his son may have done so before lodging Fong Lee's caveat. In Abigail v. Lapin (1934) A.C. 491 the Privy Council described, at p.500 the system of registration in force in Australia, which is similar to that in Fiji. Having said that no notice of trusts may be entered in the register book their Lordships continued that it has long been held that equitable claims and interests are recognised and -

> "for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed."

As to the position where there are conflicting equities the maxim Qui prior est tempore potior est jure applies unless "that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose" - see Abigail v. Lapin (supra, at p.504). To overcome the priority in time rule the later equity must be what has often been called a "superior" equity and, as it was put in Abigail v. Lapin, at p.504 -

> ".... the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim."

The essential facts in Abigail v. Lapin were that registered proprietors of land transferred the same in December, 1923, to a second party, by way of absolute transfer though the real nature of the transaction was one of mortgage. The second party became the registered proprietor and in September, 1925, mortgaged the land to a third party, but the mortgage was not registered; the third party had no notice of the prior equitable interest of the original owners but had not searched the title. The original owners

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had lodged no caveat. The Privy Council found that the equity of the third party prevailed, because the original owners had armed the second party with power to deal with the land as owner. The majority judgment of the High Court of Australia was reversed: that judgment had proceeded largely upon the view that the absence of a caveat by the original owners can have had no effect in inducing the third party to lend the money because no search had been made. The Privy Council thought that the majority of the High Court might have taken the view that there must be something in the nature of a direct representation by the original owner to the third party. To this their Lordships said, at p. 507:

> "It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as for instance in King v. King (1931) 2 Ch. 294. But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the indicia of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the appellants to succeed in this appeal."

In their judgment their Lordships referred to Butler v. Fairclough (1917) 23 C.L.R. 78 and it is necessary to look at that case. On the 30th June, 1915, G., the registered proprietor of a lease, agreed to charge it to the plaintiff. On the 2nd July, 1915, G. agreed to sell the lease to the defendant and on the same day the consideration was paid and a transfer executed. Before paying the consideration the defendant caused a search of the title to be made and found no notice of the plaintiff's charge - no caveat having been lodged at that stage. The defendant had in fact no notice, express or implied, of the existence of that charge. The plaintiff lodged caveat before the defendant's transfer was lodged for registration, but in very unusual circumstances it was later registered without fraud on the defendant's part. This fact, I think, played a major part in the decision of the majority of the High Court of Australia, but it was the aspect of the judgment in relation to the priorities between equities which was considered by the Privy Council in Abigail v. Lapin, and stated to have been rightly decided.

In Butler v. Fairclough, Griffiths, C.J., treated the problem as being whether the plaintiff having acquited his equitable right took or failed to take all

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reasonable steps to prevent G. from dealing with the land without notice of the plaintiff's title. He considered that he had not, was unable to draw any line as to the time within which a caveat should be lodged, and said that a person who does not act promptly loses the advantage which he would have gained through promptitude. Isaacs, J. said (at p. 97) -

> "In my opinion, in the absence of some clear explanation justifying or excusing this failure it is one which, at all events in so simple a case as an equitable mortgage, postpones the mortgagee to the person bona fide misled by the result of a search as in the present case. The protection given by the Act to an unregistered and, perhaps, unregistrable transaction is coupled with the price of diligence in guarding others against loss arising through ignorance of the transaction."

In addition to stating that they considered Butler v. Fairclough was rightly decided their Lordships in Abigail v. Lapin said that the only distinction between the two cases was that Abigail was not proved to have made any search before lending the money. They went on to hold that in Abigail's case the absence of a search was not material. I do not understand that the true meaning of their Lordships in so holding was that the absence of a search is never material. It was certainly held to be material in Butler v. Fairclough which their Lordships held was rightly decided, and I would make bold to say that had no search been made in that case (which already appears to place upon the holder of the earlier equity a requirement of promptitude of the highest degree) Butler v. Fairclough would have been differently decided. On this question, in Abigail's case their Lordships referred also to the New Zealand case Honeybone v. National Bank of N.Z. Ltd. (1890) N.Z.L.R. 102 in which the facts were very similar, in that the true owner of land had enabled another to obtain a registered title and thereby to hold himself out as full owner and so to mortgage the property. Their Lordships observed that no question was raised in that case whether the second incumbrancer (the bank) made any search or inquiries. It is in fact an open question whether the bank did cause the title to be searched but there is a clear indication in the judgment of Denniston, J. (at p.105) that he would have considered a search by the true owner at a certain stage of the events as a material factor.

My understanding of this aspect of Abigail's case is that it holds, that on facts such as were being considered and which also obtained in the Honeybone case, a search was not material. I apprehend that decision to arise from the fact that in each case a decision could be arrived at upon equitable principles without particular regard to the land registration legislation, and because in both cases the earlier equitable incumbrancer had by a positive act created a false situation and thereby enabled another to deal with the second incumbrancer on that false basis. The difference between those cases on the one hand, and the instant case and Butler v. Fairclough on the other is that in the latter there were no positive acts on the part of the earlier equitable incumbrancers

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which changed the position of the true owner in any way. He was always registered as the proprietor of the land and did not acquire such registration because of any act of the earlier incumbrancers. The only way in which the position could be expressed in terms of Abigail's case is that the earlier incumbrancer, by failing to register a caveat, had enabled the registered proprietor to hold himself out as an owner who had created no equitable interests. But how can that failure have any effect on the mind of a later incumbrancer who does not know whether there is a registered caveat or not, because he has not bothered to search? It is true that in Abigail's case the Privy Council held that there need be no direct representation from the earlier to the subsequent incumbrancer where the act of the earlier had enabled another to cloth himself with the indicia of title and so make the representation, but there was no such enabling act in the present case. It seems to me that, where the only failure on the part of the one arises out of a neglect to take advantage of machinery provided by the land registration legislation, neglect by the other to search the title is equally a failure to take advantage of the same machinery and it would be difficult to separate the degrees of culpability or negligence of the two parties. Certainly on an attempted balance of the two I would not say it was weighed down adversely to the earlier incumbrancer by "something tangible and distinct, having grave and strong effect to accomplish the purpose".

For the reasons I have given, if the interests of Ram Kissun and Fong Lee were regarded as competing equitable interests, I do not consider that in the circumstances the failure of Ram Kissun to caveat was sufficient to displace the effect of the maxim qui prior est tempore potior est jure. Had Fong Lee searched the register before entering into his agreement and found no caveat I would have been of the contrary opinion. I am aware that in certain Canadian cases much greater effect has been given to the registration of a caveat than has been the case in Australia or New Zealand. For example, in Clark v. Barrick (1950) 1 D.L.R. 260 an equitable interest protected by a caveat was held to prevail over an earlier equitable interest the caveat in respect of which was lodged later to the one first mentioned; no party had acted other than innocently. That decision seems to have been influenced by a different approach to the position of equitable estates under the Canadian legislation, and to amount to saying that registration of a caveat will of itself confer priority. That has not been the case in Australia or New Zealand and was not urged in Abigail's case. In a comparatively recent case, Miller v. Minister of Mines (1963) 1 All E.R. 109, the Privy Council said, in relation to New Zealand legislation, which is similar in this respect to that of Fiji (pp.112-3) -

> "The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument."

It has not been claimed in the present case that Fong Lee's caveat of itself afforded him any priority.

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I have discussed the last question on the assumed basis that Ram Kissun had by virtue of clause 7, an interest in land. This approach seemed necessary because if on that basis Fong Lee's interest would have prevailed in the absence of a caveat, it would be difficult to deny him specific performance if Ram Kissun's interest were in fact less than an interest in land and not such as to entitle him to lodge a caveat. It would have appeared paradoxical that a mere equity should prevail in Ram Kissun's favour where a full equitable interest would not. On the view I have expressed, that position does not arise. It emerges with some clarity, however, from the Manchester Canal Case (supra) and Morland v. Hales (supra) that Ram Kissun's right of pre-emption did not in fact give rise to an interest in land and was therefore not caveatable: (see Adams' Land Transfer Act (1958) pp. 297-301 and Staples & Co. v. Corley & D.L.R. (1900) 19 N.Z.L.R. 517 at 536-7). On this basis Fong Lee's failure to search the title was immaterial but Ram Kissun was guilty of no default in failing to lodge a caveat, as he had no caveatable interest. (For the purpose of the argument I think the fact that the Land Office, at a later stage, did not reject a caveat is immaterial). The resulting position is that the rights of Ram Kissun and Fong Lee fall to be decided without regard to the Land (Transfer and Registration) Ordinance (Cap.136) which was the approach adopted by the learned Chief Justice.

To summarize my conclusions, I agree that Ram Kissun's right is not too uncertain to be enforceable, that it is not void by reason of the rule against perpetuities, that Fong Lee cannot validly claim to be a purchaser for value without notice and that he can derive no assistance from the fact that Ram Kissun did not register a caveat when his right arose. In the result the learned Chief Justice was entitled, in my judgment, to apply, so far as the circumstances would allow, the principles of the Manchester Canal Company case.

I would therefore dismiss the appeal with costs.

T.J. GOULD

JUDGE OF APPEAL.

SUVA,

14th January, 1966.