IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 15 of 1965

Between:

FONG LEE	Appellant (Original Plaintiff)
- and -	
1. MITLAL s/o Samalia	Respondent (Original Defendant)
2. RAM KISSUN s/o 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 MARSACK, V.P.

For the purpose of this judgment it is not necessary to repeat the findings of fact which appear in the judgment appealed from, and which are fully dealt with in the comprehensive judgment of Sir Trevor Gould, J.A. which I have had the advantage of reading. All that needs to be stated here is that part of those findings upon which what may be referred to as the contending equities of Fong Lee and Ram Kissun are founded. This may be shortly summarised as follows:

(a) In the agreement dated 20th February, 1957, whereby Ram Kissun agreed to purchase Mitlal's leasehold interest in Allotment 7, the following clause occurs:

> "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."

That clause is the source of any equity in favour of Ram Kissun affecting the adjoining Allotment 8.

(b) On the 30th August, 1963, Mitlal agreed to sell his leasehold interest in Allotment 8, together with the wood and iron shop building thereon, to Fong Lee for

the sum of £1400. An agreement to this effect was prepared by Mr. Sahu Khan, Solicitor acting for both parties, and signed on that day. The full purchase price of £1400 was lodged by Fong Lee with the solicitor pending the granting of the necessary consent. The authority whose consent was required in order to validate the transfer was the Native Land Trust Board, and the consent of that Board to the transfer to Fong Lee was granted on the 4th September, 1963.

(c) No search of the title was made by Fong Lee prior to the completion of the contract for the sale to him of Allotment 8, but the title in fact was free from any memorial which would have given Fong Lee notice of Ram Kissun's claim. Fong Lee became aware of this claim only after the contract for sale had been signed and the purchase price paid in full to the solicitor acting for the parties. He thereupon lodged a caveat on the 3rd September, 1963, to protect his interest. On the following day, 4th September, a caveat was lodged on behalf of Ram Kissun.

In the view I take of the case it is necessary to examine these facts for the purpose of ascertaining firstly if Ram Kissun had a good and valid contract affecting Allotment 8, and secondly what equity or equitable interest was acquired by each of the contending parties, Fong Lee and Ram Kissun.

The wording of Clause 7, which forms the basis of any rights acquired by Ram Kissun, differs considerably from the wording of the options and pre-emptive rights considered by the Courts in the cases quoted in the very full and careful judgments both of the learned trial Judge and of Sir Trevor Gould. The trial Judge has held that the clause granted a right of first refusal to Ram Kissun, and that this necessarily implied a provision that before agreeing to sell Allotment 8 to any third person he must first offer it to Ram Kissun at the price which that third person was prepared to pay and Mitlal to accept. I agree that if it is necessary to find some meaning for the phrase "first refusal" then this interpretation would be reasonable. But with respect I feel that this would be to take the phrase out of its context. Under Clause 7 Mitlal covenants unequivocally that he will not sell the property to anyone other than Ram Kissun; and his agreeme to give a right of first refusal to Ram Kissun must be examined in the light of his agreement not to sell to anyone else. The clause, in my opinion, must be considered as a whole and not in two separate and possibly inconsistent parts. As he is restrained from selling to any person other than Ram Kissun, then it is to my mind clear that he cannot enter into bona fide negotiations with another possible purchaser for the purpose of ascertaining the price at which Mitlal should make his offer to Ram Kissun. A possible interpretation of the clause therefore would, in my opinion, be this: if Mitlal desired to sell the property at a certain price he must first

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offer it - without negotiations with a third party - to Ram Kissun at that price, and Ram Kissun would be at liberty to accept or refuse. It might well be contended that if Ram Kissun refused, Mitlal would still be bound by his covenant not to sell to anyone else.

Another possible interpretation might be, by analogy with what was said in Manchester Shipping Canal Company v. Manchester Racecourse Company (1901) 2 Ch. 37 at page 46, that Ram Kissun is thereby granted the opportunity of refusing a fair and reasonable offer; if, but only if, Ram Kissun desires to sell the property.

It was strongly urged by counsel for the appellant that Clause 7 in any event was unenforceable in that it does not either state the price or provide machinery for its ascertainment.

In my opinion Clause 7 was not a contract of which specific performance could be ordered; this is consistent with the view expressed by the learned trial Judge, where in the course of his judgment he says:

> "I think it is clear that in any event Ram Kissun cannot as matters now stand have specific performance."

Before specific performance of any contract will be granted by the Courts it is necessary, as pointed out by Lord Hardwicke in Buxton v. Lister 3 Atk. 386, that the agreement must be certain, fair and just in all its parts. If any of those ingredients were wanting the Court would not decree specific performance.

It is, of course, not necessary that the contract should in the first instance determine the price. It may either appoint a way in which the price is to be determined or it may stipulate for a fair price. As is said by Grant, M.R. in Milnes v. Gery 33 E.R. 574 at p.577:

> "Upon the principle, that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted, whether an agreement, that did not settle the price, was at all binding. Justinian's Institutes and the Code state that doubt; and resolve it by declaring, that such an agreement should be valid and complete, when and if the party, to whom it was referred, should fix the price: otherwise it should be totally inoperative: "quasi nullo pretio statuto"; and such clearly is the Law of England."

In view of what I regard as the uncertainties in the terms of Clause 7, I am of opinion that it is incapable of enforcement on the basis set out in the judgment from which this appeal is brought. The law, as I understand it, is that in a suit for specific performance - and under Clause 3 of the claim which Ram Kissun has filed in these proceedings he asks for an order for specific performance of Clause 7 - the Court is not entitled to read into the agreement any clause which is not there, which is not expressed or which does not logically and inevitably follow from the wording of the agreement itself. As is said by Lord Esher in Hamlyn v. Wood (1891) 2 Q.B.D. 488 at 491:

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> "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

The principle is stated in Fry on Specific Performance 6th Edn. at p.173:

> "The Court, however, will not imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied."

I am in full agreement with the learned trial Judge and also with Gould, J.A. that it would be convenient to read Clause 7 in the way set out in the judgment appealed from, and thus give full validity to a contract which might otherwise lack the certainty necessary to make it enforceable. But I am not convinced that this interpretation must necessarily follow as a matter of law.

Both in the judgment appealed from and in the New Zealand case of Morland v. Hales and Sommerville (1911) 13 N.Z.L.R. 201, which is referred to at some length in the judgment of Sir Trevor Gould, great reliance is placed on the decision in the Manchester Canal case (supra). But that case is in my view distinguishable on two grounds. In the first place the wording of the agreement which there had to be interpreted, differed materially from that of Clause 7 which is in issue in this case. In the second place, there the contract had been given statutory validity; and Farwell, J. made it clear that, as the Legislature had declared the agreement valid, the Court must avoid coming to any conclusion which would render the agreement void for uncertainty. The Manchester Canal case was considered by Warrington, J. in Ryan v. Thomas (1911) 55 S.J. 364, cited in the argument in the Court below. In the course of his judgment he says, after referring to the fact that the Court in the Manchester Canal case was bound to find a meaning for the agreement under consideration there:

> "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

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> "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."

That, in my respectful opinion, is an accurate statement of the law applicable to cases such as the present one.

In the result I am of opinion that Clause 7 is void for uncertainty. With respect I do not feel that the interpretation of that clause adopted by both the learned trial Judge and Sir Trevor Gould follows logically and inevitably from the words used in that clause. I am fully aware of the desirability of giving effect to a contract where the terms of that contract are clear from the express wording of the contract or necessary inference from the words used. In the present case I feel that it would be possible to place several interpretations upon the clause considered as a whole. As the clause is drawn it is obscure and lacking in the essentials of a clear and ascertainable contract. No doubt the agreement between the parties concerning Allotment 8 could have been ascertained and correctly set out in the document. But this has not been done. The only method of making Clause 7 a binding contract between the parties would, in my opinion, be for the Court itself to supply the missing terms, by choosing among the available possibilities. But that is not the function of the Court. It is not a question of what would be reasonable. It is a matter of deciding by the express terms of the contract, or necessary inference therefrom, exactly what was agreed, and what it is that the Court is asked to enforce. That to my mind cannot be done here. It is for these reasons that I would hold Clause 7 void and unenforceable on the ground of uncertainty.

If I am right in this conclusion then it follows that there is no foundation for Ram Kissun's claim that Mitlal be restrained from selling to Fong Lee, and Fong Lee is entitled to a decree of specific performance.

If, however, I am wrong in holding that the contract sought to be established by Clause 7 is void for uncertainty, then it will be necessary to decide exactly what equities or equitable interests were acquired by Ram Kissun and Fong Lee respectively, and which of those equities or equitable interests is to be held to override the other.

It is, I think, clear that Clause 7 did not create an interest in land, and in this respect it is to be distinguished from an option to purchase. As is pointed out by Williams, J. in Morland v. Hales and Sommerville (supra) at p.208, the holder of an option has a vested right to take the land from the owner without his consent; while a right of pre-emption does not compel the vendor to sell if he does not choose to do so.

At its best, the right acquired by Ram Kissun can only be an equity which, as Sir Trevor Gould indicates, may be an equity affecting land but which confers no interest in the land. In my opinion the effect of

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Clause 7 at most is to create an equity in favour of Ram Kissun, but one which operates in personam only and does not pass any interest in land.

Turning now to the position of Fong Lee. Under the agreement of the 30th August, 1963, Fong Lee acquired an equitable interest in the land, and, leaving out of account for the moment any possible rights of a third party, the granting of the consent of the Native Land Trust Board on the 3rd September established the unquestionable right of Fong Lee to specific performance of his contract as against Mitlal. As is stated in Williams on Vendor and Purchaser 4th Edn. p.59:

> "As from the date of the contract for sale (but subject to the condition that the contract be duly performed) the property shall in equity belong to the purchaser."

The principle is set out in 14 Hals. 3rd Edn. p.558 para. 1040:

> "Upon the signing of a contract for sale of land a change takes place in the equitable, but not the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed. In equity, however, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser."

It is true that the legal estate in the land does not pass by the contract itself; but in equity the property in the land sold is considered as being vested in the purchaser from the date of the contract for sale. Here the purchaser has carried out all his obligations under the contract and has paid the full amount of the purchase price into the hands of the solicitor authorised by the contract to receive it. The consent of the Native Land Trust Board has been given and as between Fong Lee and Mitlal, leaving out of consideration for the moment any rights of the third party Ram Kissun, the purchaser Fong Lee is entitled to specific performance against the vendor Mitlal.

It is generally accepted that the rule to the effect that upon the execution of a contract of sale the purchaser becomes in equity the owner of the property applies only as between the parties to the contract, and cannot of itself necessarily put an end to any rights which a third person may have acquired affecting the land which is the subject of the contract for sale. But if the test suggested by Isaacs, J. in Lapin v. Abigail 44 C.L.R. 166 is applied there is no doubt in my mind that Fong Lee has a better equity and one that may be considered more meritorious. I quote from the judgment of Isaacs, J. at p.185:

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> "In Taylor v. London and County Banking Co. (1901) 2 Ch., at p.260 Stirling, L.J., with the approval of the other members of the Court, said that priority in point of time would govern as between purely equitable titles, "unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest". In my opinion those enunciations are not exhaustive: they state rather a working rule, which applies in the great majority of instances, but do not state the principle. The principle is that the Court seeks, not for the worst, but for the best equity. And the best equity - for there may be several claimants - is that which on the whole is the most meritorious, it may be because the others are, by reason of circumstances indicated in the passages quoted, lessened in relative merit, or because one is, by reason of some additional circumstance, not attributable to any act or omission of the others, rendered in the eye of equity more meritorious than the rest."

Although the decision of the High Court of Australia was reversed by the Privy Council, this dictum of Isaacs, J. was not referred to in their Lordships' judgment.

It has been found as a fact that Fong Lee was an innocent purchaser, in that he had no notice, actual or constructive, of any prior equity in favour of Ram Kissun. No caveat was lodged by Ram Kissun until after a binding contract had been entered into by Mitlal and Fong Lee, the whole of the purchase money paid by the purchaser, the consent of the Trust Board obtained and a caveat lodged by Fong Lee against the registration of any other dealing prior to his own.

The question then arises whether Fong Lee can be considered a purchaser for value without notice. If so it is clear that he is entitled to a decree of specific performance. In the New Zealand case of Morland v. Hales and Sommerville (supra) reference is made in the judgment of Williams, J. to the dictum of Lord Westbury in Phillips v. Phillips 4 DeG. F. & H. 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."

Williams, J. points out in his comment on this that if a bona fide purchaser has notice of a prior equity before he pays the whole of his purchase money he is bound in the same manner as if he had notice before the contract. If that were the only criterion then I would hold that Fong Lee could be considered a bona fide purchaser for value without notice as he has in fact paid the whole of the purchase money to the person appointed by the contract to hold it. No doubt it would follow from the

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terms of that contract that as soon as the consent of th Native Land Trust Board had been obtained the solicitor would hold the purchase money as trustee for the vendor Mitlal. It must, therefore, in my opinion be treated, as between vendor and purchaser, as payment of the whole of the purchase money by the purchaser to the vendor.

It may be contended that a further step must be taken before the purchaser is entitled to claim release from any prior equitable interests on the ground that he is the bona fide purchaser for value without notice. There is authority for the proposition that an innocent purchaser without notice is not protected against prior equities unless and until the legal estate in the land has passed to him. In Templeton v. Leviathan Prop. Ltd. 30 C.L.R. 34 at p.55 Knox, C.J. quotes with approval this passage from Hogg on the Registration of Title to Land:

> "The immunity which the purchaser is to enjoy from the effect of notice is only to be afforded him if and when he does become registered, and not before. Before he does become registered it is open to any adverse claimant to step in and assert his claim, and for the purpose of trying his claim registration may be stayed - by caveat or otherwise . . . . The doctrine of notice is not, in fact, affected by these enactments except as regards registered interests, and any questions of priority between unregistered interests that depend on that doctrine will have to be decided on general principles of equity jurisprudence."

In my view, however, that principle applies only when the prior interest amounts to an equitable interest which could be regarded as of equal standing to that acquired by the subsequent purchaser. In this case that is not so. The most that Ram Kissun acquired under Clause 7 was an equity as distinguished from an equitable interest in land. As I understand the position, it was at best an equity giving him a personal right of action against Mitlal in the event of a breach of contract, but not such an equity as could be pleaded to defeat a subsequent purchaser for value even though the subsequent purchaser had acquired not the legal estate but an equitable estate in the land.

The law with regard to this aspect of the case is set out in 14 Hals. 3rd. Edn. p.534, para. 1005:

> "The plea of "purchase for value without notice" is looked upon with favour in equity. Under the former practice it was frequently effectual in defeating claims against a purchaser who could set it up; and though, since the Supreme Court of Judicature Act, 1873, and still more since the Law of Property Act, 1925, its use has been greatly restricted, it is still available for a purchaser who has got in the legal estate, and will usually give him priority over equitable claims which rank before him in point of time; and it is also available, without the legal estate, against equities as distinguished from equitable interests."

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Two cases are quoted as authorities for this proposition. The first is Rice v. Rice 2 Drew. 73, 61 E.R. 646. At p.648 Kindersley, V.C. states the rule as to priority of equities thus:

> "To lay down the rule therefore with perfect accuracy, I think it should be stated in some such form as this:- "As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or qui prior est tempore potior est jure".
>
> I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i.e. that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial."

The second case is Westminster Bank Limited v. Lee (1955) 2 All E.R. 833. I quote from the judgment of Upjohn, J. at p.887:

> "The Court of Equity has been careful to distinguish between two kinds of equities, first an equity which creates an estate or interest in the land and secondly an equity which falls short of that. An equitable mortgagee takes subject to all prior equitable estates or interests in the land whether he has notice of them or not, but in relation to a mere equity the defence of purchaser for value without notice may be available even as between the owners of equitable estates."

If this principle is applied then it seems to me inevitable that the equitable interest in the land acquired by Fong Lee under the contract for sale must be preferred to the equity granted to Ram Kissun by Clause 7 of the agreement dated 20th February, 1957. Moreover this view is consistent with what was said by Isaacs, J. in Lapin v. Abigail (supra) to the effect that the determining factor must be rather the best equity than the first equity. The principle is expressed in Snell's Principles of Equity 24th Edn. p.54:

> "If the moral claims of the plaintiff and the defendant are not on an equality, the one who has the better claim will be preferred, although his interest arose after the other's."

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For these reasons I am of opinion that Fong Lee's equitable interest is to be preferred, in all the circumstances of the case, to the equity of Ram Kissun, as being a better equity and an equitable interest in land as opposed to what is at best an equity giving rise to purely personal rights.

In view of my conclusions on the two points with which I have tried to deal, the uncertainty of the terms of Clause 7, and the priorities as between Fong Lee's equitable interest in the land and the possible equity acquired by Ram Kissun, I have not found it necessary t consider two other points which received some attention at the hearing of the appeal. The first of these was that Clause 7 is in any event void as infringing the rule against perpetuities. The second concerned the extent to which Ram Kissun may have forfeited any priority he had by his failure to take the necessary steps to protect his equity, in that he did not lodge a caveat against the title during the whole of the period between the signing of the agreement on the 20th February, 1957, and the 4th September, 1963, after he had become aware of the sale to Fong Lee and Fong Lee had already lodged his own caveat. It may well be that in accordance with the well-known doctrine of equity vigilantibus, non dormientibus jura subveniunt Ram Kissun's failure to protect his equity could result in its postponement to the equitable interest acquired by Fong Lee. However, in the view which I take of the case I do not find it necessary to express a considered opinion on either of these points.

Accordingly I would allow the appeal, set aside the judgment of the Supreme Court, and remit the case to that Court to make an order granting specific performance to Fong Lee of the contract of sale dated 30th August, 1963, as consented to by the Native Land Trust Board on the 4th September, 1963. There should be an order in that Court for the payment of the costs of the appellant Fong Lee by the 1st and 2nd respondents jointly. If Ram Kissun seeks, under his claim for further and other relief, to recover damages against Mitlal for breach of the covenant not to sell Allotment 8 to any other person, that matter should in my opinion be left for the Court below to decide, with power to hear further evidence or argument thereon if the learned trial Judge thought fit. This Court is not called upon to make any finding as to whether such a right to damages exists or not.

The appellant Fong Lee should have his costs in this Court as against the 2nd respondent Ram Kissun. Although Mitlal was cited as 1st respondent, he took n part in the argument in this Court.

C.C. MARSACK

VICE PRESIDENT

SUVA,

14th January, 1966.