DHANPAL MUDALIAR & ANOTHER

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v

INVESTMENT CORPORATION OF FIJI LTD.

[HIGH COURT, 1993 (Fatiaki J), 27 July]

Civil Jurisdiction

B *Land- option to purchase contrasted with contract to purchase- whether mere option granted to non-resident breaches the provisions of Land Sales Act (Cap 137) Section 6.*

Upon motion to discharge a caveat over land the Defendant claimed a valid option and contract to purchase. The High Court considered the differences C between an option and a contract to purchase land and HELD: that a mere option does not breach the Act.

Cases cited:

Household Fire Insurance (Ltd) v Grant (1879) L.R. 4 Ex. D. 216
Hunter v Apgar (C A 923/86)

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Interlocutory application in the High Court

P. Sharma for the Plaintiffs
T. Fa for the Defendant

Fatiaki J:

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On the 11th June, 1992 the defendant company lodged a Caveat No. 321284 in the office of the Registrar of Titles against the title of a piece of land belonging to the plaintiffs. The caveatable interest claimed was pursuant to an option to purchase the said land granted for valuable consideration to Nadi Bay Beach Corporation and which was purportedly exercised by the defendant company F on or about the 4th of May, 1992.

I say "purportedly exercised" because there is some dispute as to whether the manner in which the option was exercised was effective to make it binding on the plaintiffs but in any event the present application is brought by the plaintiffs seeking the discharge of the caveat.

G By way of a preliminary argument learned counsel for the plaintiffs raised the provisions of Section 6 of the Land Sales Act (Cap. 137) which in clear terms prohibits "any contract to purchase ... any land" by a non-resident" ... without the prior consent in writing of the Minister responsible for land matters".

In Hunter v Apgar Suva Civil Action No. 923 of 1986 Palmer J. had occasion to consider the purpose of the Lands Sales Act (Cap. 137). The learned judge

said at p. 8 para. 2 of his judgment:

> "The Lands Sales Act ... aims directly at the non-resident. It provides a mechanism to ensure that a non-resident cannot obtain any enforceable right in relation to land until right at the outset, the Minister has had the opportunity of prohibiting any such transaction or imposing terms and conditions for his consent to the same."

Counsel for the plaintiffs argues that the grant of an option to purchase land has more than a mere contractual operation and confers upon the grantee and equitable interest in the land. As such, it is, in the words of Palmer J. "an enforceable right in relation to land" and therefore within the prohibited transactions (to adopt a neutral term) contemplated by the Land Sales Act.

Clearly if the defendant company's option is a contract to purchase land and if the defendant company is a non-resident for the purposes of the Lands Sales Act, then, in the absence of any prior consent in writing by the Minister, the option is illegal and unenforceable and in my view incapable of founding or supporting a caveatable interest.

In regard to the first limb counsel for the plaintiffs referred to the definition of a "dealing" in the Land Sales Act which expressly includes an "option to purchase". The particular phrase to be found in Section 6 however is a "contract to purchase ... land" not "any dealing with land" or "... any enforceable right in relation to land".

I would respectfully adopt as correct the description of the nature of an option to purchase to be found in Halsbury's Laws of England (4th edtn) Vol. 42 at paragraph 25 which reads (in part):

> "An option to purchase is, in effect, an offer to sell, irrevocable for a stated period ... made by the grantor of the option to the grantee is entitled to convert into a concluded contract of purchase on giving the prescribed notice and otherwise complying with the conditions on which the option is made exercisable in any particular case. There must be a binding contract to keep the offer open which requires either a deed or valuable consideration."

Clearly then an option to purchase being in law merely an offer to sell unless and until it is properly exercised or accepted, is incapable on its own without more of giving rise to a concluded "contract to purchase" whatever the subject matter of the option might be.

Accordingly the plaintiffs preliminary argument must fail on this first limb and I hold that an option to purchase land unlike a sale and purchase agreement is not a "contract to purchase ... land" within the contemplation of the phrase

in Section 6 of the Lands Sales Act (Cap. 137).

A That is not to say however that the exercise or acceptance of an option to purchase land does not convert it into an enforceable agreement to purchase the land over which the option was given. It clearly does. Accordingly it is still necessary to consider the applicability of Section 6 of the Land Sales Act at that particular point in time at which there undoubtedly was made between the parties a contract to purchase land.

B In this latter regard it is common ground that the purported exercise of the option by the defendant company as the designated nominee of the grantee of the option was effected by letter dated the 4th of May, 1992.

It is also common ground that the exercise or acceptance of the option by the defendant company was never consented to by the Minister responsible and C therefore prima facie the contract to purchase the land created by the exercise of the option would be illegal, null and void if the defendant company at that date was a non-resident for the purposes of the Land Sales Act.

A non-resident company is defined in negative terms as being "... a company not a resident ..." and a resident company as defined in the Act may be described D as being "a company the controlling interest in which is held by an individual who is a Fiji citizen or a ... Fiji resident of not less than 7 years duration."

The evidence in regard to the controlling interest (s) in the defendant company has not been placed before the Court as it could have been since it is a company incorporated in Fiji with a local registered office, and, although a director of the defendant company appears to be a non-resident and the correspondence E address of the defendant company is a postal box in Sydney, learned counsel for the plaintiffs did not appear to press the point.

Nevertheless even assuming that the defendant company was non-resident for the purposes of Section 6 of the Land Sales Act learned counsel for the company submits that the transaction would be saved by the proviso to the Section F which reads:

> "Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making such a contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre."

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In this instance the land in question has an area well short of an acre and again there is no evidence that the defendant company has any other land holding in Fiji which would take it outside the protection of the proviso. Indeed learned counsel for the plaintiffs appeared to concede as much during the course of argument.

In all the circumstances and for the foregoing reasons the preliminary argument must fail on all accounts.

I turn next to the principal substantive ground raised by learned counsel for the plaintiffs and which is:

> "Whether or not the option to purchase was validly exercised so as to create a binding contract between the plaintiffs and the defendant company?"

In answering the question it is necessary to consider the terms of the option to purchase which was granted by the plaintiffs of which the following relevant terms may be extracted:

> OPTION TO PURCHASE
>
> IN CONSIDERATION of the sum of ten dollars ($10) paid to me by you (the receipt whereof is hereby acknowledged) I GRANT to you or your nominee an option to purchase from me the below described property for the sum of Forty Thousand dollars ($40,000) upon the following terms and conditions.
>
> (1) This option may be exercised by you or your nominee by notice in writing addressed to me and delivered personally or posted by pre-paid post to my address shown below at any time within ninety (90) days from the date hereof.
>
> Lot 42 Street Nadi bay Road District Wailoaloa Municipality NADI Volume 18460 Folio _ D.P. 4651 Additional items, size etc, ¼ acre.
>
> DATED this 6th day of February 1992.
>
> Owners signature ... (Sgd) ... (Sgd) .....
>
> Address P.O. Box 9556
> NADI AIRPORT FIJI"

From the above it is clear that the grantee (i.e. the defendant company's predecessor) was given a 90 day option which began to run from the 6th of February 1992 and was to expire on or about the 6th of May 1992. It is also clear that any exercise of the option, to be valid, had to be made within the 90 day period.

In this latter regard is not seriously disputed that by a letter addressed to the plaintiffs and dated 4th May 1992 (i.e. within the 90 days) the grantee of the option gave notice of its nomination of the defendant company as its nominee in terms of Clause (1) of the option.

Further and in a letter of the same date also properly addressed to the plaintiffs, the defendant company as the nominee of the option gave written notice of its exercise of the option to purchase the property for the price and on the terms contained in it.

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There is also annexed to the opposing affidavit of a director of the defendant company, a photocopy of what is deposed to be a page from a mailing book which bears the following relevant entry under the date : "MONDAY 4-5-92

Mr. & Mrs. Mudaliar FIJI 80c"

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Learned counsel for the plaintiffs submits however that the option was not validly exercised within the 90 day period granted under it ostensibly because by the 6th of May 1992 (i.e. the expiry date) the plaintiffs had not received either personally, or through the mail, any notice in writing accepting or exercising the option.

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With all due regard to learned counsel for the plaintiffs the submission blatantly ignores the clear provisions of Clause (1) of the option to purchase in which the mode of exercise of the option is clearly set out, as follows:

> " ... by notice in writing ... delivered personally or posted by pre-paid post to my address ..."

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No mention is made in the clause as to the receipt of the notice in the event that it was posted as it could have provided.

I accept at once it is a fundamental principle of the law of contract that acceptance of an offer must be communicated to the offeror, but by way of an exception to this general principle, the common law recognises what is commonly referred to as the postal rule which says that, if in any given case, the true view of the contract is that the parties contemplated that the postal service might be used for the purpose of forwarding an acceptance of the offer, so as to constitute a contract even if the letter goes astray and is lost.

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In this case there can be no denying that Clause (1) of the option clearly contemplates two acceptable, alternative and different modes of forwarding an acceptance or exercise of the option i.e. by personal delivery or by post.

The defendant company has elected to adopt the second alternative mode of forwarding its acceptance of the plaintiffs' offer and accordingly I find that a binding contract was concluded between the parties upon the posting of the letter of 4th May 1992. Needless to say the plaintiffs do not deny ever receiving the letter and their solicitor's faxed letter of 13th May 1992 (i.e. 7 days after the expiry date) does not in my opinion alter the position in any way.

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As was eloquently put by Thesiger L.J. in Household Fire Insurance (Ltd) v. Grant (1879) L.R. 4 Exch. D. 216 at p. 223 and 224:

> "An offeror, if he chooses, may always make the formation of the contract which he proposes dependant upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offeror, the door would be open to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination."

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The application is dismissed with costs to the defendant company to be taxed if not agreed.

(Application dismissed)

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