JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 49 OF 1971

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

BETWEEN - BLOCK OFFICE & SHOP INVESTMENTS LIMITED
AND
CITY & WATERFRONT DEVELOPMENT LIMITED APPELLANTS

AND - KINGSTON WATERFRONT REDEVELOPMENT COMPANY LIMITED RESPONDENT

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R. Alberga, Q.C., and H.D. Carberry for the appellants.

R. Mahfood, Q.C., and Dr. L. Barnett for the respondent.

May 7 -10, 13 - 17, 20, 1974

GRAHAM-PERKINS, J.A.:

This is an appeal from a judgment of Henry, J., setting aside an award by Mr. H. L. DaCosta, Q.C., the arbitrator named to resolve a dispute between the appellants and the respondent which had arisen in the circumstances hereinafter described.

On October 1, 1967 the Kingston Waterfront Redevelopment Company Limited (the respondent) concluded an agreement (the main agreement) with Block Office & Shop Investments Limited (the first appellant) whereby the respondent agreed to sell certain lands specified in that agreement as varied by a supplementary agreement dated November 1, 1967. By cl. 3 of the main agreement it was provided:

"Notwithstanding anything to the contrary herein contained the sale of the land shall be subject to the following conditions precedent being fulfilled, that is to say:

(a) The Government closes all the roadways within the

curtilage of that area shaded red on the attached plan A.

(b) The Government shall by legislation vest in the vendor by reference to a subdivision plan all the land within the curtilage of that area edged in red ... with power to the vendor to dispose of the said land notwithstanding the provisions of any Law or Act relating to the subdivision and sale of lands.

(c) Separate titles registered by plan under the Registration of Titles Law in respect of the said land are issued to the vendor."

By cl. 4 it was provided:

"In the event that all of the conditions precedent set out in clause 3 hereof are not fulfilled within one year from the date of this agreement then either party may by notice in writing to the other extend the time for fulfilment of the conditions precedent by up to three calendar months, and in the event that the conditions are not fulfilled within such extended period, either party may again demand further extensions of three months each up to a total extended period of one year; and if such conditions are not met within any such further extended period then this agreement shall determine."

Clause 9 of the supplementary agreement introduced into the main agreement a new clause 20 which provided that the operative date on which both agreements should be deemed to have come into force was November 1, 1967. It was, at all material times, agreed by the appellants and the respondent that the joint effect of cls. 3 and 4 was to provide that the conditions precedent should be fulfilled by November 1, 1968, and that if those conditions were not by then fulfilled the agreement should determine unless one or other of the parties by

notice in writing extended the time for fulfilment, and that the agreement in effect provided that such extension could be made for periods of three months up to the total extended period of one year. It was agreed, too, that the initial period of one year within which the conditions should have been fulfilled ended on October 31, 1968, and that two of those conditions, i.e. those identified in cl. 3 (a) and (b) of the main agreement had not, up to the time of the submission to arbitration, been fulfilled.

The main agreement as varied by the supplementary agreement provided that the first appellant should incorporate a Jamaican company to be called "The Assignees" for the purpose of taking an assignment of the agreement from the first appellant. In due course the second appellant became the assignees. The appellants asserted that on October 14, 1968 the second appellant posted to the respondent a formal demand for extension of the time for fulfilment of the conditions precedent for a period of three months from October 31, 1968.

Clause 5 of the main agreement provided:

> "The price to be paid to the vendor is £1,590,000 for the freehold title to the said land ... The price ... shall be paid to the vendor upon transfer of the areas shaded red and brown, or at the expiration of nine months from 1st November, 1967 whichever date shall later occur save and except for the relevant purchase money for the area shaded blue which is dealt with in clause 7."

On November 22, 1968 the respondent wrote to the first appellant advising that registered titles for the lands to be transferred had been secured, and that it was in a position to effect transfers in accordance with the main agreement as varied. Draft transfers and duplicate certificates of title were sent to the solicitors for the first appellant for inspection. On December 23, 1968 the respondent forwarded to the first appellant a notice requiring completion of the

purchase in accordance with cl. 5 of the main agreement. This notice made time of the essence of the contract and required compliance therewith by February 28, 1969 in default of which the respondent threatened recission of the contract and resale. It was agreed that up to March 27, 1969 the purchase price of the lands had not been paid as required by cl. 5 (supra). It was also agreed that at the time of the respondent's notice requiring completion of the purchase the conditions precedent hereinbefore noted had not been fulfilled. The appellants alleged that on January 13, 1969 the second appellant forwarded a further notice to the respondent demanding an extension of three months up to April 30, 1969 for the fulfilment of the conditions precedent. On March 27, 1969 the respendent purported to rescind the agreement, and by letter dated March 28, 1969 informed the appellants that it had resold the lands.

On April 30, 1969 the appellants again demanded an extension of three months up to June 30, 1969 for the fulfilment of the conditions precedent. This was the only notice that the respondent admitted receiving.

The main agreement provided that any dispute in respect of the agreement should be referred to an arbitrator. A dispute having arisen between the parties as to whether the main agreement continued in full force and effect on April 18, 1969, the date on which the respondent sold the lands to Town and Commercial Properties Limited of London, Mr. H. L. DaCosta, Q.C., was appointed arbitrator and the matter referred to him.

In addition to the several areas of agreement to which reference has already been made, the following paragraph in a schedule appended to the submission to the arbitrator (hereinafter called 'the second schedule') must be noted.

Paragraph 9 required the arbitrator to decide whether the notice dated October 14, 1968 demanding an extension of time for fulfilment

of the conditions precedent for a period of three months from October 31, 1968 was given to the respondent by the appellants.

Paragraph 11 noted the receipt by the appellants of the respondent's letter of November 22, 1968, and went on to allege receipt of a further letter with similar effect dated November 26, 1968 stating that "though the titles were in the name of the Urban Development Corporation, this Corporation would and could vest titles to the said land in the name of the" appellants.

Paragraph 12 made reference to the respondent's notice of December 23, 1968 making time of the essence of the contract.

Paragraph 14 read as follows:

> "Apart from the allegation contained in paragraph 9 the (appellants) contend that the effect of the letters and notices referred to at paragraphs 11 and 12 hereof, though not made in accordance with the formal terms of the main agreement, were extensions of the period for fulfilment of the conditions precedent in the said agreement."

Paragraph 16 required the arbitrator to decide whether the notice dated January 13, 1969 demanding an extension of three months up to April 30, 1969 for the fulfilment of the conditions precedent was given to the respondent by the appellants.

Paragraph 17 dealt with the notice of March 27, 1969 rescinding the contract.

Paragraph 20 read :

> "In the premises, the conditions precedent of the agreement never having been fulfilled, the (respondent) alleges that the said agreement had determined by reason of the non-fulfilment of the express conditions precedent thereof

within the time required under clause 4 of the main agreement, neither party having served notice of extension in accordance with the said clause 4."

Paragraph 21 read :

"Further or alternatively the(respondent) contends that if the said agreement had not determined as aforesaid it was rescinded by the notice referred to at paragraph 17 hereof."

Paragraph 22 read:

"The (appellants) on the other hand allege that notices of extension were given as required by clause 4 of the said agreement and that as a consequence thereof the (respondent's) sale to Town & Commercial Properties Ltd., of England was a sale made during the continuance of the said agreement and in breach thereof and are entitled to damages ... In the alternative the (appellants) contend that in any event their said agreement had not determined inasmuch as the notices requiring completion signed by (the respondent) were sent after the one year period for fulfilment of the conditions precedent had expired, and, therefore, constituted an extension of the period for fulfilment of the said conditions and a recognition that the contractual period for fulfilment had been extended , though inasmuch as there had been no fulfilment of the conditions precedent the (respondent) was not entitled to demand completion by the (appellants)."

Paragraph 23 provided:

"The arbitrator is asked in the events which have occurred to decide whether the said agreement had determined prior to the sale by the (respondent) to Town and Commercial Properties Limited of England on April 18, 1969 and if so, to find on what date the said agreement so determined; or, alternatively, to decide whether the agreement of October 1, 1967 as amended

by the supplementary agreement of November 1, 1967 still subsisted at the time of the said sale by the (respondent) on April 18, 1969, and if so, to award damages to the (appellants)."

After some twelve days of hearing and nine months thereafter Mr. DaCosta handed down his Award. In paragraph 2 he expressed himself thus;

"Having considered the evidence and arguments of the Claimants and Respondent respectively that were submitted and addressed to me by their counsel I FIND AND AWARD as follows:

(i) I find that in respect of the disputed notices no such notice as is prescribed by Clause 4 of the Main Agreement was given to the Respondent.

(ii) I find the Respondent accordingly had the option to treat the contract as at an end on the 31st October, 1968. The Respondent, however, elected to treat the contract as still continuing and, therefore, in the circumstances they must be taken to have waived their right to assert that the contract had come to an end on the 31st October, 1968.

(iii) I find that the Agreement of the 1st October, 1967 as amended by the Supplementary Agreement of 1st November, 1967 still subsisted at the time of the said sale by the Respondent on the 18th April, 1969, and that the said Agreement was breached by the Respondent.

(iv) I award the First Claimant, Block Office & Shop Investment Limited the sum of ONE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS ($175,000.00) by way of General Damages and FORTY-FOUR THOUSAND THREE HUNDRED AND NINETY-TWO DOLLARS ($44,392.00) by way of Special Damages."

Being dissatisfied with Mr. DaCosta's conclusions the respondent moved to set aside his award on two main grounds. The first was that the arbitrator had not determined all the questions he was required to resolve under his terms of reference. The second ground was that there was an error of law on the face of the award. This error, it was argued, appeared in the reasons advanced by the arbitrator for resolving the issue of liability in favour of the appellants. With respect to the first ground Henry, J., held that the arbitrator had indeed answered all the questions that he was required to answer. In relation to the second ground he found that there was an error of law on the face of the award and, in the result , set aside the award.

The real gravamen of the appellants' complaint before us was that in finding that there was an error of law on the face of the award Henry, J., misdirected himself, inter alia, on the meaning of the phrase "error of law on the face of the award", and on the precise nature and scope of the legal issues that were before the arbitrator.

This Court sat through some ten days of methodical and thoroughly informed arguments by counsel on both sides, founded for the most part on an examination of an uncommonly wide range of authorities, and reflecting the kind of research and preparation of which any court may rightly be very proud. At the end of the day two main issues emerged. (i) Was there a specific question of law referred to the arbitrator for his decision? (ii) Was there an error of law appearing on the face of the award? In attempting to answer these questions I do not propose to retrace much of the ground covered by counsel, nor do I find it necessary to consider more than two or three of the many authorities that were cited and examined during the arguments.

Was there a specific question of law referred to the arbitrator?

As a statement of general primciple it is unquestionably true to say that where parties have a dispute arising e.g. out of the provisions of some contract, and they freely, and perhaps wisely, elect to avoid the conventional judicial process and have recourse to a

tribunal of their choice they should be held bound by its decision on all questions of law and fact. More especially must this be so when parties have freely chosen the arbitration process to resolve precise and particular or specific questions of law. It is not, however, always very easy to answer the question whether a particular question of law has been specifically referred to an arbitrator for his decision. Ultimately the answer must be found by reference to an examination of the language in which the question posed for his decision is framed. Mr. Alberga argued in effect and, if I may say so, not unattractively, that in setting out their rival contentions in paragraphs 14 and 22 (the appellants'), and in paragraphs 20 and 21 (the respondent's), and in framing what I think may fairly be described as the omnibus question in paragraph 23, all of the second schedule, the parties were thereby submitting specific questions of law for the arbitrator's decision. With great respect I find it quite impossible to share Mr. Alberga's views. It is no doubt true that in his attempt to resolve the several contentions advanced by the respondent and the appellants the arbitrator would have posed for himself a goodly number of nice legal questions. But to say of paragraphs 14, 20, 21, 22 and 23 that they posed specific questions of law is, in my view, to do extreme violence to ordinary language. The most authoritative guideline that I can use in seeking an answer to the question whether it can be said that a specific question of law has been submitted to an arbitrator is to be found in the opinion of Lord Wright in F.R. Absalom Ltd. v. Great Western (London) Garden Village Society (1933) A.C. 592. After discussing the rule stated in Hodgkinson v. Fernie 3 C.B. (N.S.) 189, Lord Wright said at page 615:

> "... there is a special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to

say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quo ad that submission, in dispute. Such a case is illustrated by the Government of Kelantan v. Duff Development Company,.."

Paragraph 23 of the second schedule, by its very terms, recognized the several questions in dispute between the respondent and the appellants. Its opening words are:

"The arbitrator is asked in the events which have occurred to decide ..."

The events which had occurred (some admitted, others denied) were catalogued in several paragraphs of the second schedule. Other paragraphs set out opposing views as to the consequences of those events. It is of course perfectly plain that insofar as any allegation by one party was denied by the other the arbitrator would be required to resolve the particular conflict. To that extent therefore it is clear that the arbitrator was being asked in paragraph 23 to come to a decision on the basis of the events as he found them to have occurred. I have not the least difficluty in holding that none of the paragraphs 14, 20, 21, 22 and 23 involves any "submission of any specific question of law as such and as a specific question of law" to use the words of Lord Wright in Absalom's case (supra). In particular when paragraph 23 is read, as in my view it must be read, in the context of the other paragraphs taken as a whole, it is unmistakable that it involves a composite question of law and fact. To quote Lord Wright again, at p. 616 (ibid):

"... no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the ... contract, but the matters submitted are composite questions of law and fact; there is no express submission of the true effect of the contract on the basis of undisputed facts ... There is no reason to think that the parties had any specific questions of law in mind at all.

What was wanted was a practical decision on the disputed issues."

Was there an error of law appearing on the face of the award?

In Attorney General for Manitoba v. Kelly (1922) 1 A.C. 268 the Privy Council, speaking through Lord Parmoor, said, at p.283:

> "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award; "

I am constrained to the conclusion that there is, on the face of the award herein, an uncurably glaring error, and for that reason the judgment of Henry, J., must be hupheld.

In paragraph 2 of his award the arbitrator, having recorded his finding that "in respect of the disputed notices no such notice as is prescribed by clause 4 of the main agreement was given to the respondent" proceeded to hold that "the respondent accordingly had the option to treat the contract as at an end on the 31st October, 1968." In the ordinary use of language the word "accordingly" must be taken to mean "as a consequence of" that which precedes. The arbitrator's findings up to this point must therefore be taken to mean that consequent upon the failure of the appellants to give to the respondent the notices required by cl. 4 there arose in favour of the respondent the option above noted. For myself, I find it impossible to understand the reasoning which compelled such a conclusion, and the foundation in our jurisprudence of this option so-called. As already observed the respondent and appellants had agreed in their submission to the arbitrator that the joint effect of cls. 3 and 4 of the main agreement was that if the conditions precedent were not fulfilled by October 31, 1968 the agreement should determine unless one or other of

them extended the time for fulfilment of those conditions by notice in writing. It was agreed, too, that two of those conditions had not been fulfilled and that the initial period within which they should have been fulfilled ended on October 31, 1968. In these circumstances it is manifest that upon his finding of fact that no written notices had been given as required by cl. 4, the arbitrator was obliged, as a matter of law, to conclude that the agreement had ceased and determined at the last moment of the day of October 31, 1968. The contract had not only spoken, but had spoken quite decisively, albeit with unhappy finality. Wherefore this option in favour of the respondent "to treat the contract as at an end"? There was here no question at all concerning an option in favour of anyone. From the earliest moment of time on November 1, 1968 there was no contract in existence out of which an option could spring. Having used this demonstrably false premise as the foundation for his subsequent findings, those findings became equally demonstrably wrong. Having found an option in favour of the respondent the arbitrator continued "the respondent, however, elected to treat the contract as still continuing and, therefore, in the circumstances they must be taken to have waived their right to assert that the contract had come to an end on the 31st October, 1968." I confess extreme difficulty in understanding the relevance of the doctrines of election and waiver in the context of this case.

As to the doctrine of election this finds its most frequent application in the area of affirmation or recission of those contracts which have been induced by fraud or error of a material kind. As Lord Atkinson said in Abram Steamship Co. v. Westville Steamship Co. (1923) A.C. 773 at p.781:

> "Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the person in

> statu quo ante and restores things, as between them to the position in which they stood before the contract was entered into."

It is axiomatic that the principle enunciated by Lord Atkinson, applicable as well to the affirmation as to the recission of contracts, is predicated on the hypothesis of an existing contract in respect of which one party may exercise his right of election. In the absence of an existing contract whence the right to elect?

As to the equitable doctrine of waiver a classic statement of the principle is to be found in Birmingham & District Land Co. v. L.& N.W. Railway Co.(1888) 40 Ch.D. 268, per Bowen, L.J., at p.286:

> "If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforce or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."

Historically, the common law had consistently failed to establish an identifiable base on which to rest waiver as a valid legal principle. This imperfection of the common law was the result of the artificial distinction drawn by common law judges between waiver and variation of contractual rights and obligations. When ultimately waiver, as a more discernible equitable principle displayed confused common law thinking, two things immediately became clear. In the first place where one party to a contract granted an indulgence to the other on the faith of which the latter acted the former was held bound by the indulgence granted until such time as he made it clear that such indulgence would not be continued. Nice questions as to the absence of writing or consideration became irrelevant. In the second place the essence of the equitable doctrine was that it was pleaded as a defence or, more

precisely, in answer to a demand that the original contract must be performed according to its strict terms. It could never, in any circumstances, be employed to found an action for breach of contract. See e.g. Combe v. Combe (1951) 1 All E.R. 767, and Rickards v. Oppenheim (1950) 1 K.B. 616. Nor can it, by its very nature, have any application in the case of a contract where conditions precedent to that contract are inserted for the benefit of both parties thereto.

Again, where, as in this case, one party demands, by virtue of a provision in a contract giving him a right to extend the time for fulfilment of conditions precedent to that contract, such extension as of right, it seems somewhat paradoxical to speak in terms of waiver by the other party, at some indeterminate point of time after the contract has determined by reason of the non-fulfilment of those conditions, of some right to assert that the contract had come to an end. The jurisprudential basis of any such right completely escapes me. The truth is that, like the doctrine of election, waiver depends for its application on the existence of a valid and binding contract. In the absence of such contract there can be no question of waiver.

As a consequence of his earlier findings based, as I have attempted to show, on a fundamentally wrong premise the arbitrator was driven to conclude that "the agreement of 1st October, 1967 ... still subsisted at the time of the said sale by the respondent on the 18th April, 1969 and that the said agreement was breached by the respondent."

In my view the foregoing conclusions were totally without foundation and constituted clear errors of law appearing on the face of the award. In the result I would dismiss the appeal with costs to the respondent to be agreed or taxed.

Luckhoo, P. (Ag.) I agree.

Zacca, J.A. (Ag.) I agree.

Instructing Attorneys:

Clinton Hart & Co, for the appellants.

Myers, Fletcher & Gordon for the respondent.