

COURT BROS. (FURNISHERS) LTD.

v.

SUNBEAM TRANSPORT LTD.

[COURT OF APPEAL*, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.),
3rd, 7th November]

Civil Jurisdiction

Crown land—leasehold—option to purchase protected Crown leasehold—whether consent of Director of Lands essential to validity of option—Crown Lands Ordinance (Cap. 113) s.13(1)—Native Land Trust Ordinance (Cap. 115) s.12—Land Clauses Consolidation Act 1845 (8 & 9 Vict., c.18) (Imp.) s.68.

Option—option to purchase protected lease—whether dealing in land—Crown Lands Ordinance (Cap. 113) s.13(1).

The respondent company gave the appellant company an option (for a consideration of £1) to purchase its interest in a protected Crown lease, to be exercised by the 30th June, 1968. On the 14th June, 1968, the respondent company purported to cancel the option, but the appellant company refused to accept the cancellation and (having obtained the consent of the Director of Lands to the transfer) it exercised the option on the 26th June, 1968. The respondent company refused to complete, claiming that the option was null and void in that it amounted to a dealing in land within the meaning of section 13(1) of the Crown Lands Ordinance and therefore itself required the consent of the Director of Lands, which had not been applied for or obtained.

Held: The option in question did not amount to a dealing in land within the meaning of section 13(1) of the Crown Lands Ordinance. Per Marsack J.A.: No transaction or negotiation can be a dealing in land unless it creates an immediate interest. Per Gould V.P.: An option to purchase creates an executory interest in land, but it is an exceptional type of interest, inchoate in nature and not within the mischief aimed at by section 13(1).

Cases referred to: *Harnam Singh v. Bawa Singh* [1958-59] F.L.R.31; *Griffith v. Pelton* [1958] Ch.205; [1957] 3 All E.R.75; *Oppenheimer v. Minister of Transport* [1942] 1 K.B. 242; [1941] 3 All E.R. 485; *London and South Western Railway Co. v. Gomm* (1882) 20 Ch.D.562; 46 L.T. 449; *Chalmers v. Pardoe* [1963] 3 All E.R.552; [1963]1 W.L.R.677.

Appeal against a judgment of the Supreme Court refusing specific performance of a contract to sell leasehold land.

D. M. N. McFarlane and C. L. Jamnadas for the appellant company.

F. M. K. Sherani for the respondent company.

The facts sufficiently appear from the judgment of Marsack J.A.

The following judgments were read:

MARSACK J.A.: [7th November 1969]—

* Special leave to appeal from this judgment was refused by the Privy Council — Ed.

A Both the facts and the legal point involved in this appeal lie within a very narrow compass. On 28th May, 1968, respondent gave appellant for valuable consideration an option in writing to purchase the interest of respondent in a Crown leasehold property situated at King's Road, Samabula. Although it was pleaded by respondent that the document in question was not in itself a valid option to purchase the land, this was not contended at the hearing of the appeal and, in my opinion, the validity of the option must stand. The option was to be exercised by the 30th June, 1968. On 14th June, 1968, respondent through its solicitor purported to cancel the option and returned the cheque for £1 which was the consideration for granting it. Appellant refused to accept the notice of cancellation and sent back the cheque. The consent of the Director of Lands was not sought or obtained to the granting of the option.

B On 17th June, 1968, appellant registered a caveat against any dealings with the land, having first obtained the consent of the Director of Lands to this. On 24th June, 1968, appellant applied to the Director of Lands for consent to the transfer to itself of all respondent's leasehold interest in the property concerned; and consent was given by the Director on 25th June, 1968. The following day appellant gave notice to respondent that it exercised the option to purchase the leasehold interest, and a formal transfer was sent to respondent for signature.

C On 17th June, 1968, appellant registered a caveat against any dealings with the land, having first obtained the consent of the Director of Lands to this. On 24th June, 1968, appellant applied to the Director of Lands for consent to the transfer to itself of all respondent's leasehold interest in the property concerned; and consent was given by the Director on 25th June, 1968. The following day appellant gave notice to respondent that it exercised the option to purchase the leasehold interest, and a formal transfer was sent to respondent for signature.

D Respondent refused to complete the sale on the ground that if the option were valid it comprised a dealing in land; and that, as the prior consent of the Director of Lands has not been obtained to it, the option was null and void under the provisions of section 13(1) of the Crown Lands Ordinance, Cap. 113, and appellant was not entitled to act on it.

E The learned trial Judge accepted the contention of respondent and in his judgment held that the granting of an option was a dealing in land in that it created an equitable interest in the land. Accordingly he found that the prior written consent of the Director of Lands was required before the option could be lawfully and validly granted. As it was common ground that the consent of the Director of Lands had not been obtained to the granting of the option in the first place, he held that the option was null and void and appellant was not entitled to the decree for specific performance which he sought.

F Section 13 (1) of the Crown Lands Ordinance reads as follows:—

"13. (1) Whenever in any lease under this Ordinance there has been inserted the following clause:—

"This lease is a protected lease under the provisions of the Crown Lands Ordinance"

G (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

H Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."

The lease in question is a protected lease.

The question for determination by this Court is thus a very short one: was the learned trial Judge right in holding that the option of 24th May, 1968, was a dealing in land within the meaning of the Crown Lands Ordinance? A

The question of what amounts to a dealing in land has been considered by this Court in several cases involving the interpretation of a similarly worded section in the Native Land Trust Ordinance, Cap. 115, section 12. These cases were, however, decided on their own facts, and they offer no general principle which might be applicable to the present case with the exception of *Harnam Singh and Anor. v. Bawa Singh* (1957) 6 Fiji L.R. 31. In that judgment it is held that preliminary negotiations for the sale of land do not amount to a "dealing in land", and accordingly do not require the prior consent of the Native Land Trust Board. It is pointed out that otherwise the absurd position would arise whereby a written agreement, being null and void from the time it was executed, could not be submitted to the Board at all. B
C

If the granting of the option in this case could be classed as merely part of the preliminary negotiations between the parties, then, applying the principle of *Harnam Singh's* case, the consent of the Director of Lands would not be required to the option at that stage in the negotiations. D

Mr. McFarlane contends that a "dealing in land" must be such as to create an immediate interest in the land, and not merely a contingent interest, that is to say an interest which may arise in the future if some particular action is taken by one of the parties. This argument is, I think, well founded. In *Stroud's Judicial Dictionary*, 3rd Ed. this statement appears under the heading Option:— E

"An option is defined to be a right acquired by contract to accept or reject a present offer within a limited, or it may be a reasonable, time in the future (*Paterson v. Houghton*, 19 Marc. R. 168)."

It is of the essence of an option, in my view, that any interest in the land, other than a contingent or an executory interest, which it may confer on the holder of the option can arise only when that holder has given notice of acceptance of the option; that is necessarily at some future time. If that is so, the holder of the option does not acquire any immediate interest in the land at the time of the granting of the option. If there can be no "dealing in land" until such an interest is acquired by the other party from the vendor, then no dealing in land can arise until the further act of acceptance is performed by the holder of the option. F
G

This appears to me consistent with the judgment of the Court in *Griffith v. Pelton* (C.A.) [1958] Ch. 205 at p.225:—

"An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, upon giving the prescribed notice and otherwise complying with the conditions upon which the option is made exercisable in any particular case." H

A If the granting of an option such as that involved in these proceedings cannot be regarded as a dealing in land, there is no provision in the Ordinance under which the consent of the Director of Lands is required to make such an option valid and of legal effect.

B Counsel for respondent relied on the authority of the judgment in *Oppenheimer v. Minister of Transport* [1941] 3 All E.R. 485 where it was held, following *L. and S.W. Railway Co. v. Gomm* (1882) 20 Ch. 562, that a covenant giving another person an option over land must give that other an interest in the land. But both those cases were decided under the provisions of the Land Clauses Consolidation Act 1845, concerning the compulsory purchase of land by the Minister of Transport; section 68 of that Act makes provision for the payment of compensation to any person having an interest in the land. In *Oppenheimer's* case the holder of a ten years' option to purchase at a low price was, for the purpose of the payment of compensation, held to have an interest in the land. This judgment in my opinion does not lay down the general principle that in every set of circumstances the holder of an option over land must be held to have acquired, by the mere granting of that option, an immediate interest in the land.

C It was further contended by respondent that appellant was entitled to enter a caveat, and in fact did so; and that must necessarily be an action taken to protect the interest of appellant in the land concerned. But what the caveat protects is not an interest in land as I understand it. It is registered for the purpose of restraining respondent from entering into a dealing in land with any other person while appellant has a right *in personam* against respondent which may, within a specified time, be converted into an interest in land by a further action on appellant's part, namely the acceptance of the option. As has already been shown, there is an express provision in section 13(1) that a caveat affecting a lease cannot be registered without the prior consent of the Director of Lands; and it is common ground that this consent was obtained to the registration of the caveat by appellant.

E Put shortly, my view is that no transaction or negotiation can be held to be a dealing in land unless it creates an immediate interest in land in some person other than the owner; that the mere giving of an option does not, of itself and in the absence of special circumstances, create any such interest; and that the validity of this option did not depend on the prior consent to it of the Director of Lands.

F Accordingly, as this is the only issue involved, I would allow the appeal and remit the case to the Supreme Court with a direction to enter judgment in favour of appellant for an injunction as prayed. I would also order that respondent pay appellant's costs here and below.

G GOULD V.P. :

The facts are set out in the judgment of Marsack J.A. and I agree that the short question is whether an option to purchase a protected lease is a dealing with the land contrary to section 13 (1) of the Crown Lands Ordinance (Cap. 113).

H I agree with the learned Justice of Appeal that it is not. I think it is correct to say that an option to purchase land creates an executory interest in land and the learned Judge in the Supreme Court appears to have been guided by this consideration in coming to his decision. In most cases the passing of an interest in land would, in my opinion, be

sufficient to constitute a dealing with the land but consideration of the mischief at which section 13 was aimed seems to indicate that an option to purchase does not fall within that category. It is an exceptional type of interest in land which does not touch the land when it is entered into. By that I am not to be taken as saying that no transaction resulting in a future interest in land could be a dealing. On the contrary, I think the option to purchase is an exceptional type of interest, inchoate in nature, which has no positive effect on the land. It is negative, in that it binds the owner to nothing except that he may not without breach of contract deal with his land contrary to its tenor during its currency. It confers no possessory or other rights upon its holder until it is exercised, at which stage it becomes a fully fledged agreement touching the land and consequently a dealing with it. At that stage the land becomes irrevocably the subject matter of a transaction directly affecting it and until that stage arrives I do not consider that the land is "dealt with" within the scope and intention of the Ordinance. The negative obligation of the owner not to deal with it meanwhile cannot have been a mischief at which the legislation was aimed.

I do not think that the provision in section 13 (1) that (except with consent) the Registrar of Titles shall not register any caveat "affecting such lease" is material one way or the other. When it is considered that a caveat merely prevents the registration of a dealing (which would be invalid without the consent of the Director of Lands) the necessity for or object of the provision is not easy to see. The provision is in general terms and there is no reason to believe that the legislators intended to make the issue whether or not a caveat is properly registrable under section 123 or 124 of the Land (Transfer and Registration) Ordinance (Cap. 136) a test of whether or not a transaction is a dealing in land within the earlier part of section 13 of the Crown Lands Ordinance.

For these reasons I agree with the conclusions of Marsack, J.A. and, as proposed by him, the appeal is allowed and the case remitted to the Supreme Court to enter judgment in favour of the appellant for an injunction as prayed, the respondent to pay the appellant's costs here and below.

The record on appeal discloses that subsequently to the judgment in the Supreme Court judgment was entered for the respondent on a counter-claim for damages for loss resulting from the lodging of the caveat and for costs of the action and counter-claim. This judgment on the counter-claim should have been more specifically covered by the Notice of Appeal herein but obviously it cannot stand having regard to the result of the appeal and that judgment is also set aside.

HUTCHISON J.A. :

The point in the case is the very narrow one, whether the giving of an option to purchase a "protected lease" is, for the purposes of section 13 (1) of the Crown Lands Ordinance, a dealing with the land comprised in the lease.

Looking at the question free of authority I do not think that it is. Sale, transfer or sublease or mortgage, charge or pledge, the precise words used in the subsection, all appear to me to indicate a transaction in which an immediate interest in the land is created in the other person to the transaction. The words "in any other manner whatsoever" may certainly widen the scope of the subsection to cover transactions that do not necessarily fall within the particular words used in it, and so,

- A in *Chalmers v. Pardoe* [1963] 3 All E.R. 552, the Privy Council said that a licence to occupy coupled with a giving of possession would be a dealing within the subsection. But that does not mean that something that does not confer an immediate interest in the land falls within that word. Surely, with an agreement for sale and purchase, intended to be followed by a transfer, it is after the agreement has been entered into and before the transfer is made that the Director has to consider the matter and grant or withhold his consent. (Of course, it would be different if possession were to be given on the agreement for sale and purchase and the agreement were to be relied on as the purchaser's title to the land so to speak.) And so also, with an option. Until it is exercised and becomes a contract for sale and purchase it is, in my opinion, not a dealing in the land. That was clearly enough the view taken by the Director himself when he gave his consent dated the 25th June, 1968, to the transaction when the appellant advised him that it was proposing to exercise the option; and in my opinion his view was the correct one. Indeed, I think that, even if the option had been exercised before his consent was sought, the consent could still have been properly obtained prior to the transfer. It may be significant, as supporting this view, that appellant's application to the Director was not for consent to exercising the option, but for consent to the actual transfer, and that the Director's formal consent names the dealing to which consent is given as "Transfer £9,500".
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- C
- D

Since writing the foregoing, I have had the opportunity of reading the judgments of my brethren. Neither refers to any authority that could affect my opinion. The learned Vice President reserves his view as to whether some transaction resulting in a future interest in land might not be a dealing. I am prepared to reserve my view on that too; but it does not affect what I have written on this particular matter.

- E I agree that the appeal be allowed, and that the order of the Court be as proposed by the Vice President.

Appeal allowed.