

12 of 1977

IN THE PRIVY COUNCIL

No. 28 of 1976

O N A P P E A L  
FROM THE COURT OF APPEAL OF NEW ZEALAND

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BETWEEN:

ROBERT GOODE

Appellant

= and =

MURRAY NEWTON SCOTT

Respondent

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CASE FOR APPELLANT.

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1. This is an appeal from a Judgment of the Court of Appeal of New Zealand (McCarthy P., Richmond J., Cooke J.) given on 30 October 1975 ([1976] 1 N.Z.L.R. 293) dismissing by a majority an appeal from a judgment of the Supreme Court of New Zealand (Beattie J.) given on 26 November 1974. RECORD
2. The question in this appeal is whether, in terms of clause 9 of the contract between the parties, the consent of the Supreme Court of New Zealand (Administrative Division) to the parties' transaction was granted by 26 October 1973. If such consent was not granted by 26 October 1973 the parties' contract is avoided.

RECORD

pp.3-6  
[photocopy  
thereof,  
pp.10-11]

3. On 17 September 1973 the respondent submitted to the appellant a formal offer in writing to purchase certain rural land owned by the defendant. The respondent submitted the offer as agent for an undisclosed principal. The offer was accepted in writing according to its terms by the appellant on 18 September 1973.

4. The respondent's formal offer contained, inter alia, the following terms and conditions:

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p.4.  
[photocopy,  
p.10]

Clause 4

"SETTLEMENT shall be effected on or before the 26th October 1973 or 14 days after the approval shall have been granted by the Supreme Court under The Land Settlement Promotion Act whichever shall be the later."

pp.4-5  
[photocopy,  
p.10]

Clause 9

"ANY contract arising out of this offer is conditional upon obtaining any necessary consent under or otherwise complying with the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 and any Regulations thereunder and each party hereto shall do all such acts and things as may be reasonably necessary or expedient for the purpose of endeavouring to obtain such consent and ensuring compliance with the provisions of the said Act and Regulations. If any such consent where necessary shall not be granted by the 26th day of October 1973 or such later date as the parties agree or shall be refused or granted subject to conditions unacceptable to the parties then such contract shall be void and the Purchaser shall be entitled to a refund of all moneys paid by him hereunder."

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5. The transaction was one to which Part II of the Land Settlement Promotion and Land Acquisition Act 1952 applied (s.23(1)), and accordingly the parties' transaction, pursuant to s.25(4) of that Act, would have been unlawful and would have had no effect unless, pursuant to s.25(1)(a) of that Act, it was entered into subject to the consent of the Supreme Court of New Zealand (Administrative Division). In addition, s.25(5) of that Act provides that:

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"Where any transaction to which this Part of this Act applies is entered into subject to the consent of the Court [i.e., the Supreme Court of New Zealand (Administrative Division)], the transaction shall not have any effect unless the Court consents to it ...."

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6. An application for the consent of the Court was duly filed in the office of the Supreme Court and was (pursuant to the Land Settlement Promotion and Land Acquisition Act 1952, s.27, and the Land Valuation Proceedings Act 1948, ss.21 and 22) referred by the Registrar to a Land Valuation Committee. The Committee, as it was empowered to do by the Land Settlement Promotion and Land Acquisition Act 1952, s.28, made an order giving its consent to the transaction in accordance with the application without calling on the applicant or hearing evidence.

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7. The Committee's order consenting to the transaction was, on 29 October 1973, sealed as an order of the Supreme Court of New Zealand (Administrative Division) pursuant to the Land Valuation Proceedings Act 1948, s.25 of which Act provides:

"(1) Notice of the making of every final order of a Land Valuation Committee under this Act shall

RECORD

forthwith be given to the parties and to such other persons, and in such manner, as may be prescribed.

"(2) If an appeal is not lodged under the next succeeding section, a formal order embodying the determination of the Committee shall be sealed by the Registrar and shall thereupon be deemed to be an order of the Court" [i.e., the Supreme Court of New Zealand (Administrative Division)].

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8. The time-limit provided by clause 9 of the contract (see ante, para. 4) was not extended by agreement of the parties.

9. On 26 October 1973 the respondent by his solicitors tendered a Memorandum of Transfer for execution by the appellant under cover of a letter dated 26 October 1973.

p.15

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10. The appellant by his solicitors declined to execute such or any Memorandum of Transfer, or to complete the contract, contending by letters dated 26 and 29 October 1973 that the condition in clause 9 of the contract (see ante, para. 4) could not be and had not been complied with in that the consent of the Supreme Court (Administrative Division) could not be and had not been granted by 26 October 1973, in that the order granting consent could not be and was not sealed, (thereby being deemed to be the order of the Supreme Court (Administrative Division)) before 29 October 1973, and the appellant by his solicitors contended that the contract was therefore void.

pp.16, 17-18

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pp.1-6

11. On 9 January 1974 the respondent commenced an action in the Supreme Court claiming a decree of specific performance.

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12. On 19 February 1974 the appellant filed and served his Statement of Defence. RECORD  
p.7
13. The trial of the action in the Supreme Court before Beattie J. on 24 October 1974 proceeded, by consent, solely on the basis of an Agreed Statement of Facts, and exhibits annexed thereto. No oral evidence was adduced. pp.7-19
- 10 14. In the Supreme Court Beattie J. granted a decree of specific performance . p.30
15. (a) Beattie J. in his reasons for judgment noted that it was a fundamental submission for the respondent that the expression "any necessary consent under the Land Settlement Promotion and Land Acquisition Act 1952" in the context of clause 9 of the contract meant and was intended to mean the consent of the Land Valuation Committee. p.24, 1.42 -  
20 p.25, 1.4
- (b) Beattie J. then noted that at the time when the parties entered into their contract they were respectively a willing buyer and a willing seller. (Beattie J. did not advert to the fact that the respondent had made the offer as agent for an undisclosed principal). They had agreed, by clause 9 of the contract, to take all reasonably necessary steps to obtain the required consent. They must be presumed to have understood the relevant law applicable to their contract in terms of the Land Settlement Promotion and Land Acquisition Act, and the procedure for the making of orders granting consent. p.25, 1.9  
30 p.25, 11.16-24
- 40 (c) Beattie J. then considered the status of the Land Valuation Committee, and held that such a Committee acts for and on behalf of the Supreme Court (Administrative p.26, 1.4 -  
p.28, 1.24

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Division) and as an integral part of it.

- (d) Beattie J. held that both parties knew that on 19 October 1973 the Land Valuation Committee had unconditionally consented to the transaction. One effect of clause 9 of their contract was that neither could appeal against the Committee's consent, which would therefore inevitably become the deemed Order of the Court. Therefore no further "consent" was necessary by the Administrative Division of the Supreme Court. 10
- p.28, 11.25-36
- (e) Beattie J. accepted that the purchaser could not register a Memorandum of Transfer without producing a sealed Order to the District Land Registrar, but he regarded the sealing of an Order as an administrative function following upon a consent concerning which the parties themselves had no effective right of appeal. 20
- p.30, 11.8-15
- (f) Beattie J. therefore granted a decree of specific performance to the respondent.
- p.30, 1.24
16. The appellant appealed to the Court of Appeal of New Zealand from the Judgment of the Supreme Court on the ground that the Judgment was erroneous in fact and in law. 30
- p.31
17. Judgment of the Court of Appeal was delivered on 30 October 1975 when the Court, in separate judgments by McCarthy P. and Cooke J. (Richmond J. dissenting) dismissed the appeal.
- pp.32-37
18. McCarthy P., in his Judgment, mentioned that the main question was what was meant by the words "necessary consent" in clause 9 of the parties' contract. 40
- p.33, 1.11

19. (a) McCarthy P. stated that there was no doubt that in order to make a transaction of this class effective the consent of the Supreme Court (Administrative Division) was required; and he continued that were it not for the language of s.28 of the Land Settlement Promotion and Land Acquisition Act 1952, a consent granted by a Land Valuation Committee could not satisfy the words "necessary consent" in clause 9 of the parties' contract.

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p.33,11.39-45

(b) McCarthy P. said that he found it impossible to read s.28 otherwise than as intending that in those cases where the Committee acts under the powers it confers, the Committee gives consent on behalf of the Court, so that a consent given by a Committee is actually a consent given by the Court.

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p.34, 11.8-14

(c) However McCarthy P. then referred to the difficulty raised by s.25(2) of the Land Valuation Proceedings Act 1948 (providing that if an appeal is not lodged a formal order embodying the Committee's determination is to be sealed "and shall thereupon be deemed to be an order of the Court"). McCarthy P. referred to two opposing views open on the requirements of s.25(2): on the one hand, that no consent was given by the Court until the Committee's order had been sealed; on the other hand that sealing was only for the purpose of

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- conferring a degree of finality upon what the Committee had already done, and the fact that sealing was required for that purpose did not prevent the conclusion that in granting consent a Committee acted as a deputy or surrogate of the Court.
- p.35, 11.1-22
- (d) McCarthy P. preferred the latter view because it fitted in more suitably with the structure of Part II of the Land Settlement Promotion and Land Acquisition Act 1951, as well as with the language of s.28 of that Act. 10
- p.35,11.23-26
- (e) McCarthy P. drew attention to the form of Order adopted by the Court, showing that the Committee did give the consent of the Court, though such consent was inchoate until sealing was effected. 20
- p.35, 1.27 -  
p.37, 1.4
- (f) On the "real question in the case" McCarthy P. asked what was intended by the parties by their wording of clause 9: did they intend that the Order must be sealed and the consent thereby made fully effective by the date stated in the clause, or did they intend that "the consent of the Court granted by the Committee but not sealed" would be sufficient if the Committee acted under s.28. McCarthy P. stated that for the reasons developed at length by Cooke J. the latter view was preferable, and that there was no reason to think that the parties would have viewed sealing as the critical step. 30
- p.37,11.5-18
20. (a) Richmond J. (dissenting) first drew attention to the wording of clause 9 of the parties' contract. He mentioned that 40

the clause was part of a standard form printed contract, evidently drafted in such a way as to cover both transactions in which a purchaser was able to make a declaration under s.25(1)(b) of the Land Settlement Promotion and Land Acquisition Act 1952 and those in which he was not. The latter was the position in the present case, and accordingly the transaction would have been unlawful and would have had no effect (s.25(4)) unless entered into subject to the consent of the Supreme Court (Administrative Division) (s.25(1)(a)).

p.37, 1.38 -  
p.38, 1.29

(b) Richmond J. pointed out that in the Act the terms "Court" and "Land Valuation Committee" were separately defined, that there was nothing in s.25 to suggest that the word "Court" is used to include a Land Valuation Committee, and that on the contrary the two expressions were used in contradistinction to one another in s.25(1)(a) and in s.25(6).

p.38, 11.29-38

(c) Richmond J., after setting out s.25(5), went on to say that the words in clause 9 of the contract, "any necessary consent", must mean the consent of the Supreme Court (Administrative Division), for if it meant anything else the contract would be unlawful.

p.39, 11.7-14

(d) Richmond J., continuing his interpretation of clause 9, said that the time limit for obtaining the Court's consent was a matter of private bargain between the parties and not a statutory requirement. He found the words "any such consent where necessary" (following the phrase "for the

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- purpose of endeavouring to obtain such consent") intractably incapable of any other meaning than as relating back to the same kind of consent as is earlier referred to: that is, the consent of the Supreme Court (Administrative Division).
- p.39, 1.15 -  
p.40, 1.3
- (e) Richmond J. pointed out that the consent to which the transaction must be made subject (s.25(1)(2)) and the consent which gives efficacy to the transaction (s.25(5)) were clearly one and the same thing. 10
- p.40, 11.4-7
- (f) Richmond J. then proceeded to consider s.28 of the Land Settlement Promotion and Land Acquisition Act 1952, and said that if that section stood alone it might be possible to argue that it empowered a Committee, acting as the statutory delegate of the Court, to make an order which effectively granted the consent of the Court to the transaction; but he found the language of s.28, even standing alone, not compelling in that direction, and said that it might be read as doing no more than empowering the Committee to give its own consent to the transaction. 20
- p.40, 1.30 -  
p.41, 1.8
- (g) But, said Richmond J., s.28 did not stand alone; it had to be considered in the light of s.25 of the Land Valuation Proceedings Act 1948. Richmond J. regarded s.25(2) of that Act as having two very evident purposes: first, to enable an order of a Committee to be given (by the affixing of the Court's seal) a quality in law which it did not previously possess; thereupon it was "deemed" to be an order of the 30 40

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10 Court", thus having the same effect as an order of the Court itself granting consent to the transaction. Secondly, s.25(2) ensured that an order of a Committee did not operate as an order of the Court until the time for an appeal had run out, and then only if no appeal had been lodged. These purposes of s.25(2) were irreconcilable with a construction of s.28 of the Land Settlement Promotion and Land Acquisition Act 1952 which would enable a Committee to grant an immediate and operative consent of the Court.

p.41, l.12 -  
p.42, l.7

20 (h) Richmond J. added that he could see nothing in the language of the Land Settlement Promotion and Land Acquisition Act 1952 which justified attributing to a consent given by a Committee under s.28 any different quality: i.e., a consent of a Committee which did not operate as an immediate and operative consent of the Court.

p.42, ll.8-45

30 (i) Richmond J. therefore concluded:

(1) That clause 9 of the contract unambiguously provided that the contract would be "void" if the consent of the Court were not given by 26 October 1973.

40 (2) That under the relevant provisions of the two statutes it was not possible to regard the consent of the Committee as a consent of the Court until it was deemed to be so after sealing in terms of s.25(2) of the Land Valuation Proceedings Act 1948.

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(3) That in the present case there was accordingly in existence, as at 26 October 1973, only a consent of the Committee and not a consent of the Court.

21. (a) Cooke J., in his Judgment, reviewed both the history of the matter and the legislative provisions. 10

p.43, 1.34 -  
p.49, 1.41

(b) Cooke J. then proceeded to say that in determining whether an order or consent has been made or granted by a Court, it was necessary to have regard to the purposes for which the question was asked and the context in which it arose. There was no reason in principle why a reference to the granting of a consent should not be taken as referring to the making or pronouncing of the order as distinct from its perfection by sealing. Cooke J. mentioned that in the present case the parties were more likely to have been concerned with the fact of consent, so that for practical purposes they could know where they stood, than with the formality of sealing. Nor was it likely that the parties were concerned with the contingency of a consent being challenged on appeal or review. 20 30

p.49, 1.42 -  
p.50, 1.32

(c) Cooke J. then stated the question in issue as being whether, within the meaning of clause 9 of the parties' contract, "any necessary consent under the Land Settlement Promotion Act had not been granted by 26 October 1973." Prima facie the words of the parties had to be taken in the ordinary or natural meaning they bore in the context of their 40

contract referring to a statute, and then they had to be applied to the facts.

RECORD

p.50,11.33-46

- 10 (d) Cooke J. regarded the purpose of clause 9 as plainly to ensure that the parties did all they reasonably could to obtain consent under the statute by 26 October 1973 and that they would know by then whether consent had been granted. If consent were granted unconditionally by then, the contract would continue; if not, it might be treated as at an end. Cooke J. stated that the great majority of applications under Part II of the Land Settlement Promotion and Land Acquisition Act 1952 were granted by Committees. p.51, 11.1-12
- 20 (e) Cooke J. remarked that, the agreement having been made on 18 September 1973, whereunder the purchaser had until 10 October 1973 to arrange finance, the parties would hardly have contemplated that the Administrative Division of the Supreme Court itself would grant consent by 26 October 1973. He thought the parties contemplated the ordinary procedure of reference to a Committee. (Cooke J. did not advert to the fact that the offer had been made by the respondent as agent for an undisclosed principal). p.51, 11.12-36
- 30 (f) Cooke J. held that although Land Valuation Committees were sui generis, they were in a sense delegates of and acted on behalf of the Administrative Division of the Supreme Court. p.51, 1.37 - p.53, 1.6
- 40 (g) Cooke J. then said that the idea of statutory delegation was consistent with the language of s.28 of the Land Settlement

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- Promotion and Land Acquisition Act 1952; and that although s.25 required the consent of the Court, s.28 might be interpreted as empowering the Committee to grant its consent on behalf of the Court. The section was designed to provide prompt and simple machinery for disposing of straight-forward cases. 10
- (h) Cooke J. then went on to say that although s.25(2) provides that an order of a Committee is not deemed to be an order of the Court until sealed, that order is made on behalf of the Court before then, although for some purposes it may not be fully effective before sealing. The Court should try to give a practical interpretation to the contract in relation to the Committee's order. 20
- (i) Cooke J. said that the question was whether the justice of the case required the "order made by the Committee for the Court" to be treated as subsisting before sealing; whether the true interpretation of the contract required the order to be so treated. The parties could not have meant an irrevocable consent. There was good reason for treating the consent so granted by the Committee as the necessary consent within the meaning of clause 9. 30
- (j) Cooke J. held that s.25(2) of the Land Valuation Proceedings Act 1948 provided in essence that the document evidencing the order was to be available when the time for appeal had expired and no appeal had been lodged. The words "shall thereupon be deemed to be an order 40

p.53, 11.7-21

p.53, 1.22 -  
p.54, 1.14

p.55, 11.9-43

of the Court" refer simply to the status of the document, and are not inconsistent with the view that the consent of the Committee has been granted in effect by the Court.

RECORD

p.55, 1.44 -  
p.56, 1.9

- (k) Cooke J. therefore held that a provision in a contract requiring that the necessary consent under the Land Settlement Promotion and Land Acquisition Act 1952 must be granted by a certain date may reasonably be interpreted as requiring the granting of consent by a Committee. There was in the present case no compelling reason for any other interpretation.

p.56, 11.10-25

22. The Court of Appeal of New Zealand on 1 March 1976 granted the Appellant final leave to appeal from the Judgment of the Court of Appeal to Her Majesty in Council.

p.57

23. The Appellant submits that the Judgment of the Court of Appeal of New Zealand was erroneous for the reasons -

- (a) In his formal offer, accepted by the appellant, the respondent, representing himself as agent for an undisclosed principal, included express terms and conditions to the following effect:

(i) That settlement was to be effected on or before 26 October 1973 or 14 days after the approval should have been granted by the Supreme Court under the Land Settlement Promotion and Land Acquisition Act 1952, whichever should be the later;

(ii) That any contract arising out of such offer would be

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conditional upon the obtaining of "any necessary consent under or otherwise complying with the provisions of" the Land Settlement Promotion and Land Acquisition Act 1952, and that the appellant as vendor and the purchaser (whoever he, they, or it might be) should do all such acts and things as might be reasonably necessary or expedient for the purpose of endeavouring to obtain such consent and ensuring compliance with that Act and Regulations; 10

(iii) That if such consent where necessary should not be granted by 26 October 1973 or such later date as the parties agreed, then any contract arising out of such offer would be void; 20

(iv) That his offer as agent for an undisclosed principal was subject to his principal being able to arrange his, their, or its finances to his, their, or its and his, their or its solicitors' satisfaction by a date not later than 10 October 1973. 30

(b) By s.25(4) of the Land Settlement Promotion and Land Acquisition Act, the transaction was (in the circumstances which must be taken to have been known to or in the contemplation of both parties at the time when the contract came into being) incapable of being lawful and incapable of having any effect unless entered into subject to the consent of the Supreme 40

10 Court (Administrative Division).  
Moreover at that time both parties  
must be taken to have known that,  
by virtue of s.25(5) of the same  
Act, their transaction could have  
no effect unless the Supreme  
Court (Administrative Division)  
consented to it and unless any  
conditions upon or subject to  
which such consent might be granted  
were complied with.

20 (c) There was no evidence that the  
appellant at the time when he  
accepted the offer knew anything  
about the respondent's (or his  
undisclosed principal's) status or  
circumstances, particularly those  
relevant in terms of the Land  
Settlement Promotion and Land  
Acquisition Act, and there was no  
evidence from which it could  
properly have been inferred that  
the appellant, at that time knew  
or ought reasonably to have known  
facts concerning the respondent  
or his undisclosed principal  
which would or might have led the  
appellant to believe that the  
30 application for the consent of  
the Supreme Court (Administrative  
Division) was likely to be heard  
or dealt with by a Land Valuation  
Committee rather than the Court  
itself or that the transaction  
was a straightforward one.

40 (d) Because the respondent had submitted  
the offer as agent for an undisclosed  
principal, there was no way in  
which the appellant could have known,  
at the time when he accepted the  
offer, what status the undisclosed  
principal, as purchaser, might  
have in terms of the Land  
Settlement Promotion and Land  
Acquisition Act 1952. Nor was  
there any evidence that the  
appellant knew or could have known

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at that time what such status the respondent might have. The respondent or his undisclosed principal might, for example, have been a person or a company to whom the "undue aggregation" principles of s.31 of the Act might have applied; or either might have been a trustee for infant beneficiaries or a company with infant shareholders to whom s.29A of the Act applied; or either might have been an overseas purchaser to whom Part IIA of the Act applied. In any event there was nothing on the face of the formal offer submitted to the appellant from which the appellant could reasonably have inferred that the transaction was or might be a "straight-forward" one in terms of the Land Settlement Promotion and Land Acquisition Act 1952. 10 20

- (e) The only reasonable inference to be drawn by a reasonable vendor from the terms of the offer tendered to the appellant was that the purchaser's intention was that he, they, or it would be freed from all liability under any contract which resulted from acceptance of the offer if, for any cause, including matters concerning the status of the respondent or his undisclosed principal such as those mentioned above in para. 23(d), an order of the Supreme Court (Administrative Division) granting its consent to the transaction was not sealed by 26 October 1973. 30
- (f) The respondent's principal's offer was to be interpreted, not in the light of events which occurred subsequent to its acceptance by the appellant, but as a reasonable vendor would have interpreted it at the time of acceptance. There was no evidence that at that time the appellant had any knowledge or notice concerning the purchaser's status or circumstances from which the appellant might reasonably have drawn any 40

inferences concerning the nature or duration of any proceedings required by the Land Settlement Promotion and Land Acquisition Act 1952.

- (g) The respondent himself having formulated the terms and conditions in the formal offer as to the time available to the ultimate purchaser to "arrange his finances to his and his solicitors' satisfaction" and as to the date upon which the contract would lapse if the consent of the Supreme Court (Administrative Division) had not then been obtained, the only proper inference, in the absence of proof to the contrary, was that the respondent, as agent for the offeror, was content that the purchaser should accept any risks that might be inherent in providing limited times within which such conditions might be fulfilled; and in particular, contrary to the Judgment of Cooke J. (with which, in this respect, McCarthy P. concurred), it could not properly be inferred from the terms of the formal offer that the appellant, when he accepted it, "contemplated the ordinary procedure of reference to a Committee", or that he contemplated that by 26 October 1973 both he and the purchaser "would know ... whether consent had been granted". The purpose which clause 9 was designed to serve was to relieve both the purchaser and the appellant of all liability under the contract if for any reason the consent of the Supreme Court (Administrative Division) was not given by 26 October 1973, and that would necessarily include a situation where the application for consent had not been considered

p.51, 11.12-36  
p.37, 11.13-18

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by a Committee or the Court by then, unless of course the parties mutually agreed to extend the deadline.

- (h) On the true interpretation of the contract, it was the parties' intention that their contract was subject to the consent to the transaction of the Supreme Court (Administrative Division) as the only consent which could give efficacy to their transaction, and that if the consent of that Court, evidenced by a sealed order of that Court, had not been given by 26 October 1973 the contract would be void. 10
- (i) A Land Valuation Committee does not, in law, act as a delegate or a surrogate of the Supreme Court (Administrative Division); but, even if it does so act, a Committee's consent or order is not the consent or order of the Court until such consent or order has been sealed as a consent or order of the Court pursuant to s.25(2) of the Land Settlement Promotion and Land Acquisition Act 1952. 20
- (j) In law the sealing of an order of a Land Valuation Committee pursuant s.25(2) gives the order the quality or status of an order of the Supreme Court (Administrative Division) which it did not previously possess. Accordingly in the present case there was no consent of the Court in existence, as required by the contract, as at 26 October 1973. 30  
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24. The appellant contends that the Judgment of Richmond J. was correct for the reasons he gave, and respectfully adopts those reasons.

21.

25. The appellant contends that this  
Appeal should be allowed with costs  
for the following among other

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R E A S O N S

The decision of the Court of Appeal  
was wrong in fact and in law.

B.D. INGLIS  
J.J. FORDHAM

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