

IN THE PRIVY COUNCIL

No. 28 of 1976

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

BETWEEN:

ROBERT GOODE

Appellant

MURRAY NEWTON SCOTT

Respondent

CASE FOR RESPONDENT

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- 10 1. This is an appeal from a judgment of the Court of Appeal of New Zealand (McCarthy P., Cooke J., Richmond J. dissenting) given on 30th October 1975 in which the Court dismissed an appeal by the Appellant against the judgment of the Supreme Court of New Zealand (Beattie J.) in which the Respondent as plaintiff was granted a decree of specific performance of a written contract for the sale of a
- 20 block of land entered into between the parties.
2. The material facts were agreed at the trial and may be shortly stated. By an Agreement in writing dated the 18th September 1973 the Appellant agreed to sell and the Respondent agreed to buy the freehold of 13½ acres of market garden land for the price of \$65,000. The crucial condition of the Agreement is in
- 30 Clause 9 which provides:

p.7, 28
et seq.

"9. Any contract arising out of this offer is conditional upon obtaining any necessary consent under or otherwise complying with the

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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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p.8, 10-20 3.

The Appellant applied to the Administrative Division of the Supreme Court for consent to the sale, and on the 19th October 1973 the Palmerston North Land Valuation Committee consented to the application without calling on the parties to attend or give evidence. The Committee's order was sealed at the office of the Supreme Court at Palmerston North on the 29th October 1973. By his solicitors' letters of the 26th and 29th October 1973 the Appellant refused to execute the transfer proffered by the Respondent because, as he claimed, The Committee's order not having by then been sealed, and since he refused to agree to an extension of time for obtaining the Court's consent, the Agreement was void from midnight the 26th October in accordance with clause 9.

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p.8, 30-33

p.8, 37 to
p.9, 9

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The Respondent in those circumstances sued for an order of specific performance which he obtained from the Supreme Court and retained in the Court of Appeal.

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p.4, 36 to
p.5, 14 5.

The sole issue is one of law and in particular of construction of clause 9 of the Agreement. It is whether, in the language of the second sentence of that clause, "any such consent where necessary" had been granted by the 26th October 1973. It is submitted that if it had, the Appellant was not entitled to refuse to execute the transfer and the Respondent

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should have been granted, as he was granted, RECORD
an order for specific performance.

6. Before setting out his arguments in detail the Respondent respectfully suggests that it may be helpful to identify the legislative context in which clause 9 must be construed since it has no equivalent in English law.
- 10 7. For the purpose of preventing the undue aggregation of farm land Part 2 of the Land Settlement Promotion and Land Acquisition Act 1952 ("the 1952 Act") requires the consent of the Administrative Division of the Supreme Court to be given to certain transactions involving farm land, including a contract or agreement for the sale or transfer of any freehold estate or interest in such land.
- 20 8. The form and manner in which an application for consent is to be made, and the documents which must be attached to or filed in support of the application, are laid down by the Supreme Court (Administrative Division) Rules 1969 ("the Rules") and Rule 47 in particular. The application is normally referred to a Land Valuation Committee established under
30 section 19 of the Land Valuation Proceedings Act 1948 ("the 1948 Act") and exercising functions in the locality in which the land the subject matter of the application is situated (section 22: 1948 Act). If the Committee is satisfied that completion of the transaction will not cause an undue aggregation of farm land, and of the other matters specified in section 29(1) of the
40 1952 Act, it shall "make an order consenting to the transaction" either absolutely or subject to conditions, or if it is not so satisfied it shall refuse the application (section 29: 1952 Act). When, having regard to any report of the Crown representative, the Committee is satisfied that an application for consent should be granted in accordance with it the Committee may "make an order consenting to the

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transaction" without calling on the applicant or hearing evidence (Rule 55(1) and section 28: 1952 Act). Otherwise it must hold a public hearing at which the parties to the proceedings, a representative of the Crown and any other person who satisfies the Committee that he is interested in the hearing, are entitled to appear, be heard and call evidence before the Committee makes an order (sections 23, 24 and 36: 1948 Act). 10

9. Throughout the Committee's exercise of its functions there is reserved to the Court a residual power of control and intervention. Thus it is subject to a general jurisdiction of the Court (section 27(1); 1948 Act), which may issue general directions on questions of procedure to be observed by Land Valuation Committees and may itself exercise any power or function of a Committee (section 16: 1948 Act). With the leave of the Court and at the request of all parties concerned, proceedings may be heard and determined by the Court from the outset instead of by a Committee (section 22(1): 1948 Act), and a Committee to which proceedings are initially referred may itself refer any matter arising therein to the Court for its direction (section 24: 1948 Act). The function of the Land Valuation Committees and their relationship with the Court were summarised by Wild C.J. in Horowhenua County v. Nash [1968] N.Z.L.R. 525 at 527 in this sentence: 20

"The scheme of the Act ... is that, broadly speaking, the Land Valuation Committees are the work-horses of the Land Valuation Court, harnessed to do most of the routine work but held on a tight rein of direction and control." 30 40

The intentional generality of that description is no less apt since the Land Valuation Court was abolished and its powers and jurisdiction vested in the

Administrative Division of the Supreme Court.

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10. When the Committee has made a "final order" on an application for consent, the Registrar must give notice of it to the parties in prescribed form (section 25: 1948 Act: Rules 55(2) and 59). Any person affected by the order, or any Minister or Crown representative acting for Her Majesty, may then appeal from it or any part of it to the Court within the prescribed time after the making of the order or such further time as the Court may allow (section 26(1): 1948 Act). In the case of an order granting an application unconditionally where there is no objection from the Crown representative the prescribed time is 7 days; otherwise it is 14 days (section 26(2): 1948 Act). If no appeal is lodged, the Court may nevertheless of its own motion direct that the order be reviewed before the Court as if an appeal had been lodged or be referred to the Committee for further consideration, provided that it does so before the "formal order" embodying the determination of the Committee is sealed (section 26(3): 1948 Act). Upon such an appeal or review, which is by way of rehearing, the Court may make such order as it thinks just and equitable and may in particular confirm, discharge or vary "the order of the Committee" or refer it back to the Committee for further consideration (section 26(1) and (4): 1948 Act). Subject to a right of appeal and of limited reference to the Court of Appeal, the decision of the Court on any such appeal or review is final (section 26(5): 1958 Act). On the delivery of the Court's decision the Registrar must prepare and seal "an order embodying it" (Rule 69(1)).
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11. If within the prescribed time no appeal has been lodged against the Committee's final order, and the Court has not directed that the order be reviewed or referred to the Committee and no application

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for an extension of the prescribed time is pending in or has been granted by the Court (Rule 60(4)), then:

"... 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."

(Section 25(2): 1948 Act)

12. After consent has been granted to an application for consent the Court retains a power by order to revoke the consent in specified circumstances, and upon the making of such an order the consent revoked is deemed for the purposes of the 1952 Act not to have been obtained (section 34: 1952 Act). 10

13. Having traced the steps by which the consent of the Court is obtained, the Respondent now turns to the somewhat intricate legislation of Part 2 of the 1952 Act by which the need for such consent is enacted. Section 23 opens Part 2 by specifying the transactions to which it applies. Section 24 exempts from the need to obtain the consent of the Court some transactions to which Part 2 applies but which satisfy conditions in respect of which a statutory declaration is made and deposited within a specified time. Section 25 then imposes the requirement to obtain the consent of the Court to transactions to which Part 2 applies. It begins by enacting that any transaction to which Part 2 applies shall be deemed to be entered into in contravention of Part 2 unless: 20 30 40

"(a) The transaction is entered into subject to the consent of the Court and an application is made within 1 month after the date of the transaction or ...

within such further time as may be allowed by the Court or a Land Valuation Committee; or

(b) In any case to which section 24 of this Act applies, a statutory declaration referred to in that section is deposited ... within the time specified in that section."

(section 25(1): 1952 Act)

10 Significantly section 25(1) does not imply into a transaction to which Part 2 applies a condition that it shall be subject to the consent of the Court; it provides that there is a contravention of Part 2 unless the transaction is in fact entered into subject to such consent. The effect of this approach is apparent from the succeeding sub-sections. Thus if a transaction is, as required, entered
20 into subject to the consent of the Court, it -

"... shall not have any effect unless the Court consents to it and the conditions upon or subject to which the consent is granted are complied with."

(section 25(5): 1952 Act)

30 But a transaction which is not entered into subject to the consent of the Court, and is therefore in contravention of Part 2, is not only of no effect but is also "deemed" to be unlawful (section 24(4): 1952 Act), and a person who enters into it without lawful excuse is guilty of an offence (sections 25(2)(a) and 43: 1952 Act).

14. The Respondent submits that within the foregoing legislative context clause 9 falls to be construed and the issue raised
40 by this appeal to be determined.

15. The clause is effectively in three parts. The first satisfies the statutory

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requirement of section 25 of the 1952 Act, if applicable, by making the Agreement -

"... conditional upon obtaining any necessary consent under or otherwise complying with the provisions of ..."

the 1952 Act. By the other parts the parties accept, however, mutual obligations and create mutual rights which go beyond any statutory requirement. Thus they agree, in the second half of the first sentence, to -

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"... do all such acts and things as may be reasonably necessary or expedient for the purpose of endeavouring to obtain such consent..."

Thirdly in the second sentence they agree that the Agreement shall be avoided in any one of three eventualities, that is to say where "any such consent where necessary":

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- shall not be granted by the 26th October 1973, or
- shall be refused, or
- shall be granted subject to conditions unacceptable to the parties.

Common to all three eventualities is the introductory phrase "any such consent where necessary". It is therefore the absence of this necessary consent by the 26th October 1973 or such later date as they agree, or the refusal of it, or the grant of it subject to conditions unacceptable to them which the parties expressly agreed should have the effect of avoiding the Agreement.

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16. As the Agreement was a transaction to which Part 2 of the 1952 Act applied and was not exempt by section 24 from the need to obtain the consent of Court, it

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10 would by virtue of section 25 have been unlawful and of no effect, and the parties to it would without lawful excuse have been guilty of a criminal offence, if it had not been entered into "subject to the consent of the Court". The effect of the first part of clause 9 is, therefore, in the Respondent's submission, to make the Agreement "subject to the consent of the Court" under Part 2 of the 1952 Act, or, in other words, conditional upon the consent of the Court being obtained so that the Agreement is effective in accordance with Part 2 of the 1952 Act.

17. The provision in the second sentence of the clause is not, however, intended to satisfy any statutory requirement. To ascertain the intention of the parties the Court need only therefore look at the words actually used. The actual words used are: "any such consent where necessary" and it is submitted that they mean "the consent of the Court" under Part 2 of the 1952 Act where necessary, but do not necessarily mean such consent as is necessary for the purposes of making the Agreement effective in accordance with Part 2 of the 1952 Act.

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p.5, 7

18. The Respondent submits that the issue in this appeal resolves itself therefore into the question whether the consent of the Court under Part 2 of the 1952 Act had been granted by the 26th October 1973.

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19. The Respondent's principal contention on this issue is that the decision of the Committee of the 19th October 1973 granted the consent of the Court under Part 2 of the 1952 Act, and therefore for the purposes of the second sentence of clause 9 "any such consent where necessary" had been granted by the 26th October 1973 and the Appellant was accordingly not entitled to avoid the Agreement.

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20. The Respondent submits that the necessary effect of the clear language of the

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relevant provisions of the 1952 Act is that the Committee is authorised to make an order granting the consent of the Court to the transaction. The application referred to the Committee to be "dealt with" (section 22(1): 1948 Act) is "for the consent of the Court" (section 27: 1952 Act; Rule 47(1); and see Form 6 in the Schedule to the Rules). The power which is expressly given to the Committee in dealing with the application is to "make an order consenting to the transaction in accordance with the application" (section 28: 1952 Act) or to "make an order consenting to the transaction, either absolutely or subject to ... conditions" or "refusing the application" (section 29: 1952 Act). When the Committee acts under Section 28 of the 1952 Act its power is limited to making an order "consenting to the transaction in accordance with the application", but it must first be satisfied that the "application for the consent of the Court should be granted". It is submitted that these provisions clearly establish that it is the consent of the Court which the Committee either grants or refuses.

21. Although the order of the Committee granting the consent of the Court under s.28 of the 1952 Act does not become an order of the Court until it is sealed (s.25: 1948 Act), it nevertheless, in the Respondent's submission, grants the consent of the Court under Part 2 of the 1952 Act as soon as it is made and before it is sealed and this is the "necessary consent" for the purpose of the second sentence of clause 9 of the contract.
22. In support of his contention that the order of the Committee under section 28 of the 1952 Act granted the consent of the Court the Respondent will rely upon a substantial and well established body of judicial dicta of the New Zealand Courts, against the background of which clause 9 is to be construed, and which lead to and support

the majority judgments of the New Zealand Courts in this case upholding the Respondent's contention. Thus:

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- In Fisher to Pitman [1946] N.Z.L.R. 64 at 65 where Finlay J. spoke of a Land Sales Committee as being "the executive instrument by which the order is made".
- 10 - In Mountney to Young [1947] N.Z.L.R. 436 at 441 Judge Archer spoke of a Land Sales Committee as "acting on behalf of the Court".
- In Horowhenua County v. Nash [1968] N.Z.L.R. 525 at 527 Wild C.J. said:

"The scheme of the Act ... is that, broadly speaking, the Land Valuation Committees are the work-horses of the Land Valuation Court..."
- 20 - In Tauhara Properties Ltd. v. Mercantile Developments Ltd. [1974] N.Z.L.R. 584 at 592 Cooke J. referred to Land Valuation Committees as "in a sense ... the delegates of the Administrative Division".
- In Barker v. Liddington (Hamilton, 8 July 1976) Mahon J. held:

"It is clear that the order of the Committee does not become an order of the Court until it is sealed, but the order only enshrines the consent of the Court previously given on its behalf by the Committee".
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- 23. Inasmuch as an order of a Committee refusing the consent the Court under Part 2 of the 1952 Act would, on the construction of the second sentence of clause 9 for which the Respondent contends, have enabled either party to avoid the Agreement without an appeal to the Court, the Respondent submits that this sentence would in those
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circumstances be construed in the light of the prevailing earlier provision in the second part of the first sentence of clause 9 which would oblige the parties to appeal the decision to the Court. There is, however, no reason why an order should not enable either party to whom the conditions were acceptable to avoid the Agreement under the second sentence of clause 9.

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24. It is consistent with the expressed intention of the parties that the consent granted by a Committee under s.28 (1952 Act) is the consent required to give effect to a transaction under section 25(5) of the 1952 Act. Any other interpretation from a contractual viewpoint could have significant consequences. Thus, once the Committee made its order on the 19th October 1973 there would be no way that the transaction could ever have effect because the seven days for appealing would not expire until after the 26th October. A further consequence could be that if the Committee made its order consenting to the transaction on, say, the 1st October 1973, and the Crown appealed or a review by the Court or a reconsideration by the Committee was ordered the transaction could not come into effect unless the appeal or review was disposed of by the 26th October. Such an interpretation seems inconsistent with the intention of the parties as expressed in clause 9 of the contract.
25. The Respondent respectfully submits that this Appeal should be dismissed with costs for the following among other

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R E A S O N S

- (i) The condition expressed in the first part of Clause 9 must be construed in the light of the evident object of it, namely to satisfy the requirement of section 25 of the 1952 Act.

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10 The expression "conditional upon obtaining any necessary consent under" the 1952 Act must therefore be construed as meaning : "subject to the consent of the Court". In this part of the clause "any necessary consent" must therefore mean the consent of the Court under the 1952 Act. In particular it means that the contract is conditional upon the consent of the Court being obtained so that the contract is effective in accordance with Part 2 of the 1952 Act.

(ii) The provision in the second sentence of the clause is not, however, intended to satisfy any statutory requirement. To ascertain the intention of the parties the Court need only therefore look at the words actually used.
20 The actual words used are : "any such consent where necessary"; i.e. "any consent under the 1952 Act where necessary".

(iii) The order made by a Committee grants the consent of the Court and this is the necessary consent for the purpose of the second sentence of clause 9.

(iv) Therefore the order made by the Committee on the 19th October 1973 granted the necessary consent before
30 the 26th October 1973.

(v) In terms of clause 9 of the Agreement for Sale and Purchase the necessary consent had been granted by the 26th October 1973 and the Appellant was accordingly not entitled to avoid the Agreement.

(vi) The majority decision of the Court of Appeal of New Zealand is consistent
40 with the established body of judicial dicta of the New Zealand Courts.

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- (vii) The majority decision of the Court of Appeal of New Zealand was correct.



A.D. FORD