

[HIGH COURT OF AUSTRALIA.]

MILBURN APPELLANT ;
PLAINTIFF,

AND

BLOMLEY RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
QUEENSLAND.

Vendor and Purchaser—Contract of sale of land—Control of land sales—Sale subject to consent of Commissioner of Prices at agreed price “or at such lesser price at which the Commissioner will grant his consent”—Vendor’s option to refuse to sell at lesser price—Commissioner’s intimation of willingness to consent to sale at lesser price—Subsequent lifting of control—Refusal by vendor to sell—Specific performance—Whether contract enforceable by purchaser—The Profiteering Prevention Act of 1948 (Q.) (12 Geo. VI. No. 34), ss. 69 (1), 73.

Section 69 of *The Profiteering Prevention Act of 1948 (Q.)* provides that “(1) A transaction to which the consent of the commissioner is required under this Part may be entered into subject to a condition that such transaction shall become and be null and void unless the commissioner shall consent thereto, if, but only if—(i) that transaction is in writing duly executed by all parties thereto; and (ii) The afore-mentioned condition is stated in the writing constituting the transaction and . . . (iv) Application for the consent of the commissioner is made within three months after the date of the transaction. Every such transaction shall become and be null and void on and from the expiration of—(i) the period agreed upon by all parties—if that period is stated in the writing constituting the transaction; or (ii) the period of six months next succeeding the date of the transaction—if some other period as agreed upon by all parties thereto is not stated in the writing . . . unless the commissioner shall have sooner consented to that transaction: Provided that if the commissioner has sooner refused to consent to any such transaction, that transaction shall become and be null and void on and from the date of such refusal.” By a contract of sale dated 25th January 1950 for the sale of certain grazing lands for £27,198 7s. 6d.,

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the parties agreed that if the consent of the commissioner should be required to the sale, such sale should be subject to such consent at the price agreed upon or at such lesser price at which the commissioner would grant his consent, provided that the vendor might at his option refuse to sell at such lesser price and should the consent of the commissioner be refused at the price agreed upon or at a lesser price the sale should be null and void. Application was duly made for the consent of the commissioner, who advised on 21st March, 1950 that the transaction would be approved of at a price not exceeding £18,000. On 23rd March 1950, all sales of land were by proclamation exempted from the operation of the Act. The purchaser was willing to proceed with the sale at the price originally agreed upon and on the vendor's refusal to do so, the purchaser brought an action for specific performance.

Held, that as the commissioner by his advice had refused his consent to the transaction at the original price, the transaction became null and void as from 21st March, 1950, and thereafter there was no enforceable contract between the parties, there being no contract to sell at a lesser price until the vendor so agreed.

Decision of the Supreme Court of Queensland (O'Hagan A.J.): *Milburn v. Blomley*, (1951) Q.S.R. 76, affirmed.

APPEAL from the Supreme Court of Queensland.

By a contract in writing dated 25th January 1950 Thomas Shelley Blomley sold to Campbell McIntyre Milburn certain grazing lands together with improvements and materials for £27,198 7s. 6d. Among the conditions of sale was the following clause: "1 (a) If the consent of the Commissioner of Prices under *The Profiteering Prevention Act* of 1948 shall be required to this sale, then such sale shall be subject to such consent at the sale price agreed upon herein or at such lesser price at which the commissioner will grant his consent. Provided always that the vendor may at his option refuse to sell at such lesser price and should the consent of the commissioner be refused at the price agreed upon or at a lesser price this sale shall become null and void."

Application was made to the Commissioner of Prices for his consent to the transaction and by letter dated 21st March 1950 the commissioner replied as follows:—"I have to advise that the transaction may be approved at a price not exceeding £18,000. On receipt of an original amended contract of sale showing the price at £18,000 the necessary consent may be endorsed thereon, provided the amendment is signed by both parties." By a proclamation dated 23rd March 1950 and made under s. 71 (2) of *The Profiteering Prevention Act* of 1948 (Q.) all sales of land were exempted from Part V. of the Act. The purchaser was willing to proceed with the contract at the original price and on the vendor's

refusal so to do commenced an action for specific performance. By his defence the vendor set up clause 1 (a) of the contract of sale; that the Commissioner of Prices had refused his consent to the transaction; and that pursuant to the provisions of *The Profiteering Prevention Act of 1948* (Q.) the contract, in consequence of such refusal of consent, became null and void and unenforceable.

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Section 73 of the Act is as follows:—“(1) Subject to s. 69 of this Act, where any transaction is entered into in contravention of this Part, or where any condition to which the transaction is subject is not complied with, the transaction shall not thereby be invalidated, and the rights, powers, and remedies of any person thereunder shall be the same as if this Part had not been enacted. (2) Nothing in this section shall affect the liability of any person to any penalty in respect of any offence against any provision of this Part”.

The trial judge, *O'Hagan A.J.*, dismissed the action and ordered the plaintiff to pay the defendant's costs: *Milburn v. Blomley* (1).

From that decision the defendant appealed to the High Court.

Other relevant provisions of the Act are set out in the judgments hereunder.

M. Hanger K.C. (with him *H. T. Gibbs*), for the appellant. Failure to obtain the consent of the commissioner does not make the transaction invalid. The effect of s. 69 (1) of *The Profiteering Prevention Act of 1948* (Q.) is to free the parties of any penalty. It makes the transaction lawful in that it is lawful to enter into the transaction subject to a condition as to consent. There is no condition in this case that the transaction shall become null and void if no consent is obtained. There is a difference between failure to get consent and refusal of consent (*McFarlane v. Wilkinson* (2)). If consent is required to be obtained a reasonable time must be allowed to obtain the consent and if no reasonable time is allowed the transaction remains open (*Smith v. Butler* (3); *Re Sandwell Park Colliery Co.*: *Field v. The Company* (4); *Doyle v. Heenan* (5)). The contract became null and void only when the refusal of the commissioner's consent was final. The letter received from the commissioner was not a refusal within the meaning of clause 1 (a). The contract was validated by s. 73 of the Act, whether the commissioner has consented to the sale or not. Thus the consent is not required to the sale, and as the condition which

(1) (1951) Q.S.R. 76.

(2) (1927) V.L.R. 359.

(3) (1900) 1 Q.B. 694, at p. 699.

(4) (1929) 1 Ch. 277 at p. 281.

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brought clause 1 (a) into operation has not been fulfilled, the contract operates as though it did not exist. If the reason for the clause disappears there is no purpose in having the clause in the contract now, the result being that the contract operates without the clause (*Scanlan's New Neon Ltd. v. Tooheys Ltd.* (1)). The refusal of consent, if any, did not render the sale void but voidable. The clause was a condition subsequent and the refusal of consent rendered the contract voidable. If nothing happened after that and the vendor did not exercise his right to avoid, the contract is still alive (*Suttor v. Gundowda Pty. Ltd.* (2); *British Movietone News Ltd. v. London and District Cinemas Ltd.* (3); *Roach v. Bickle* (4)).

M. B. Hoare for the respondent. The contract is validated under s. 73 of the Act provided the parties comply with s. 69. The latter section is a code which if complied with does not invalidate the transaction. Subject to s. 69 the contract is enforceable. But when the consent of the commissioner is refused the contract becomes null and void. The effect is that there never was any contract and therefore no offence. In the interpretation of s. 69 and other relevant sections regard must be had to the scheme of the Act as a whole and the particular sections must be considered in the framework of the Act (*Committee for Privileges; Viscountess Rhondda's claim* (5); *Commissioners of Inland Revenue v. Herbert* (6); *Food Controller v. Cork* (7); *McLaughlin v. Westgarth* (8); *Duke of Newcastle v. Morris* (9)). Under s. 70 the commissioner has to consider two matters only, the price and the rate of interest. He can only exercise his power of refusal if these are excessive. A contract of sale is a transaction within the meaning of s. 69 (*O'Neill v. O'Connell* (10); *Re Thomas; Evans v. Griffiths* (11)). The commissioner's letter amounted to a refusal of consent (*Walker v. Oldham* (12); *Smith v. Butler* (13)). If the contract were kept open there would be a complete negation of s. 69, which would lead to absurd results. Whether clause 1 (a) is a condition precedent or subsequent, the contract becomes null and void under the proviso to s. 69. This case is unlike *Suttor v. Gundowda Pty. Ltd.* (14) and *Doyle v. Heenan* (15). In those cases further steps

(1) (1943) 67 C.L.R., 169.

(2) (1950) 81 C.L.R. 418, at pp. 420, 421, 440.

(3) (1951) 1 K.B. 190, at pp. 200-202.

(4) (1915) 20 C.L.R. 663, at pp. 668-671.

(5) (1922) 2 A.C. 339, at p. 397.

(6) (1913) A.C. 326, at p. 332.

(7) (1923) A.C. 647, at p. 668.

(8) (1906) 75 L.J.P.C. 117.

(9) (1870) L.R. 4 H.L. 661, at p. 671.

(10) (1946) 72 C.L.R. 101.

(11) (1900) 1 Ch. 454.

(12) (1948) 1 A.L.R. 129.

(13) (1900) 1 Q.B. 694.

(14) (1950) 81 C.L.R. 418.

(15) (1946) V.L.R. 77.

had to be taken in order to get consent. The contract is not affected by any change in the law. It required consent at the time it was made and clause 1 (a) still stands unaffected by the Order in Council exempting sales of land from the provisions of the Act (*Worsley v. Wood* (1)). There was no intention by the parties to import any implied term into the contract (*Heimann v. The Commonwealth* (2)).

M. Hanger K.C. in reply. Clause 1 (a) operates as a condition subsequent. If it were a condition precedent an offence would have been committed under s. 78 (b). The commissioner did not refuse consent, as he said he would consent at a lower price.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON AND WILLIAMS JJ. This is an appeal from a judgment of the Supreme Court of Queensland (*O'Hagan A.J.*) dismissing a suit for specific performance of a contract entered into between the appellant as purchaser and the defendant as vendor on 25th January 1950 for the purchase of 7,503 acres of grazing land and certain other property in the county of Pring, Parish of Reilly, Queensland, for the sum of £27,198 7s. 6d. The suit was defended on the ground that it was a condition of the contract that if the consent of the Commissioner of Prices under *The Profiteering Prevention Act of 1948* should be required for the sale then such sale should be subject to such consent at the sale price agreed upon therein or at such lesser price at which the commissioner would grant his consent, that the consent of the commissioner was in fact required to the sale pursuant to the provisions of the Act, that the commissioner on or about the twenty-first day of March 1950 refused his consent to the sale, and that pursuant to the provisions of the Act and the contract, the contract in consequence of such refusal of consent became null and void and unenforceable. The clause in the contract to which this defence refers is clause 1 (a) the text of which is as follows: "If the consent of the Commissioner of Prices under '*The Profiteering Prevention Act of 1948*' shall be required to this Sale then such sale shall be subject to such consent at the sale price agreed upon herein or at such lesser price at which the Commissioner will grant his Consent Provided always that the Vendor may at his option refuse to sell

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(1) (1796) 6 T.R. 710 [101 E.R. 785]. (2) (1938) 38 S.R. (N.S.W.) 691;
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at such lesser price and should the consent of the Commissioner be refused at the price agreed upon or at a lesser price this sale shall become null and void. Each of the parties hereto will use his best endeavours to obtain the consent of the Commissioner hereto and will do all acts and furnish all information, make all necessary amendments hereto and sign all documents required to be done furnished made and signed by him for the purpose of obtaining such consent. Any valuation required in connection with the application for such consent shall be procured by and at the expense of the vendor."

The relevant provisions of *The Profiteering Prevention Act of 1948* are contained in Part V. headed "Land Sales" which comprises ss. 66 to 79 inclusive. Section 67 provides that except as provided by this Part, a person shall not, without the consent in writing of the commissioner—(a) purchase any land. In January 1950 the land, the subject matter of the contract in suit, was land to which this section applied. Accordingly, if this section had stood alone, it would have been unlawful for the appellant and respondent to have entered into the contract of 25th January 1950 without the prior consent in writing of the commissioner. Section 69, however, provides that a transaction to which the consent of the commissioner is required under Part V. may be entered into subject to a condition that such transaction shall become and be null and void unless the commissioner shall consent thereto if, but only if (i) that transaction is in writing duly executed by all parties thereto; and (ii) the aforementioned condition is stated in the writing constituting the transaction; and (iii) (if all parties thereto have agreed upon a period at the expiration of which the transaction shall become null and void unless the commissioner has consented thereto) the period so agreed upon is stated in the writing constituting the transaction; and (iv) application for the consent of the commissioner is made within three months after the date of the transaction. This section goes on to provide that—"Every such transaction shall become and be null and void on and from the expiration of—(i) the period agreed upon by all parties—if that period is stated in the writing constituting the transaction; or (ii) the period of six months next succeeding the date of the transaction—if some other period as agreed upon by all parties thereto is not stated in the writing constituting the transaction, unless the Commissioner shall have sooner consented to that transaction: Provided that if the Commissioner has sooner refused to consent to any such transaction, that transaction shall become and be null and void on and from the date of the refusal".

Part V. also contains s. 73, which provides that (1) subject to s. 69 of this Act, where any transaction is entered into in contravention of this Part, or where any condition to which the transaction is subject is not complied with, the transaction shall not thereby be invalidated, and the rights, powers, and remedies of any person thereunder shall be the same as if this Part had not been enacted; (2) nothing in this section shall affect the liability of any person to any penalty in respect of any offence against any provision of this Part. Part V. of *The Profiteering Prevention Act* is the Queensland derivative of Part III. of the *National Security (Economic Organization) Regulations*, and s. 73 of the Act, except for the insertion of the words "subject to s. 69 of this Act", corresponds with reg. 10 of the *Economic Organization Regulations*. The effect of this regulation was considered by this Court in *O'Neill v. O'Connell* (1) and *Suttor v. Gundowda Pty. Ltd.* (2), but the insertion of these words in s. 73 makes it necessary to consider to what extent the construction placed upon the regulation in these decisions is applicable to s. 73. It was contended that they give a different meaning to the provisions contained in s. 73 and that these decisions are not applicable to the Queensland legislation. We think that the purpose of introducing the words in question into s. 73 was to make it clear that s. 69 formed an exception to the policy of validation expressed in s. 73 because s. 69, while providing a procedure for entering upon a transaction otherwise forbidden under penalties, did so only upon the condition that the transaction became invalid if the requisite consent was refused or withheld for the time specified. Section 73 still means that the illegality created by a breach of s. 67 of the Act does not invalidate the transaction but only exposes the contraveners to penalties. The effect of the insertion is to make it clear that s. 73 does not operate to validate a transaction which has become null and void under the provisions of s. 69.

It was contended for the appellant that since s. 73 has the effect of validating a contract whether the commissioner has consented to the sale or not, the consent of the commissioner was not required to the sale, so that the condition which brought clause 1 (a) into operation was not fulfilled and the contract operated as though it did not exist. But the consent of the commissioner was required to the sale if it was to take place without the parties becoming liable to a prosecution for penalties and this was, in our opinion, a requirement within the meaning of the clause.

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The commissioner has not an unrestricted discretion to refuse to consent to a sale of land. His discretion is restricted by s. 70, which provides that, notwithstanding anything contained in Part V., except for the purpose of giving effect to a policy of (a) preventing or limiting increases in prices of land; or (b) preventing or limiting increases in rates of interest, the commissioner shall not refuse to grant his consent under this Part or make the granting of his consent under this Part subject to any condition. The contract in suit was a sale for cash, so that it was only material for the commissioner to consider the price. Shortly after the date of the contract solicitors acting for both parties applied to the commissioner for his consent to the transaction. On 21st March 1950 he replied: "I have to advise that this transaction may be approved at a price not exceeding £18,000. On receipt of an original amended contract of sale showing the price at £18,000 the necessary consent may be endorsed thereon, provided the amendment is signed by both parties". Section 71(2) of the Act provides that the Governor in Council may from time to time by Order in Council exempt (either unconditionally or subject to such conditions as are specified in the Order in Council in question) from the application of the whole or any of the provisions of this Part any person or class of persons or any transaction or class of transactions or any land or class of land. On 23rd March 1950 a proclamation was made under this sub-section which exempted unconditionally from the application of the provisions of Part V. of the Act (other than s. 75) all persons, all transactions and all lands and declared that the exemption should be general.

After the date of this proclamation the consent of the commissioner to the sale was no longer required, so that, if the contract of 25th January 1950 was still on foot, clause 1 (a) no longer presented an obstacle to its lawful performance at the agreed price of £27,198 7s. 6d. The crucial question is whether the contract was still on foot on 23rd March 1950. His Honour held that it was at an end and in our opinion he was right. The inclusion of clause 1 (a) in the contract made the sale a transaction entered into subject to a condition that it should become and be null and void unless the commissioner should consent thereto, as required by s. 69 of the Act. The transaction embodied in the contract complied with the requisites of pars. (i) and (ii) of the section, and par. (iii) was fulfilled because application for the consent of the commissioner was made within three months after the date of the transaction. The form of clause 1 (a) imposes a condition which has two aspects. The sale is "subject to the

consent of the commissioner ", which means that, until the consent is given, the obligations of the parties to complete the sale do not begin to operate. But if the commissioner refuse his consent then the whole contract (for that is the meaning of " this sale ") becomes null and void. In both aspects the clause is expressed to relate to the sale price agreed upon, viz., £27,198 7s. 6d. and to " such lesser price at which the Commissioner will grant his consent ". The proviso says that the vendor may at his option refuse to sell at such lesser price. Such a provision is not an agreement to buy and sell at a price to be named by a third party. It is no more than a statement that the commissioner may name a price which the vendor may be not unwilling to accept, it being assumed that the purchaser cannot be averse from a reduction of price. Such a stipulation does not of its own force effect a contract. It creates no obligation. The legal obligation of the clause relates only to the agreed price and that legal obligation becomes absolute only if and when the commissioner consents and becomes void upon a refusal of consent by him. The clause includes a condition subsequent. It operates both with respect to the price of £27,198 7s. 6d. originally fixed by the contract and, if the commissioner will not agree to that price, also with respect to any lesser price to which the commissioner would consent. It makes both the transaction at the original price and at this lesser price subject to the consent of the commissioner and provides that, should the consent of the commissioner be refused at the price agreed upon or at the lesser price, the sale should become null and void. The parties did not agree upon a period at the expiration of which the transaction should become null and void unless the commissioner consented thereto. The period was therefore that of six months next succeeding the date of the transaction fixed by s. 69. The commissioner dealt with the application within this period and returned the contract to the solicitors for the parties.

Section 69 provides that if the commissioner has sooner refused to consent to any transaction, that transaction shall become and be null and void on and from the date of that refusal. The communication of 21st March 1950 was a refusal to consent to the sale at £27,198 7s. 6d.: *Walker v. Oldham* (1). The transaction of sale at that price therefore became null and void on 21st March and the contract was at an end unless the provisions of clause 1 (a) with respect to a sale at a lesser price were sufficient to keep it on foot. But the defendant had never agreed that he would sell

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at any lesser price if the commissioner would not consent to the original price. The clause provided that the vendor might at his option refuse to sell at such lesser price. The only binding agreement was to sell at the original price and there could be no contract to sell at the lesser price unless and until the vendor agreed to sell at that price, which the defendant never did. Thus the contract became null and void on 21st March 1950. The transaction was past and closed at the date of the proclamation of 23rd March 1950, and the proclamation came too late to have any effect upon the rights of the parties.

The appeal should be dismissed with costs.

McTIERNAN J. In my opinion the appeal should be dismissed.

I have arrived at the conclusion that the contract for the sale of the land at £27,198 7s. 6d. was rendered null and void by the operation of s. 69 of *The Profiteering Prevention Act of 1948* (Q.).

Section 67 (1) prohibits any person from purchasing land without the consent of the Commissioner of Prices. The sale for which the contract provided was subject to this provision.

Section 69 provides means for entering into a transaction to which the commissioner's consent is required and for putting an end to the transaction if his consent is refused.

The contract constituted a transaction to which the commissioner's consent was required. The transaction was a sale at the price of £27,198 7s. 6d., the price upon which the appellant and respondent had agreed.

Clause 1 (a) of the conditions of sale provided that the sale at this price was subject to the commissioner's consent and that if it were refused the sale would be null and void. The insertion of this clause satisfied the requirement of s. 69 (1) (ii). The clause was framed to meet the contingency of the consent of the commissioner being required to the sale. This consent was required.

Clause 1 (a) brought the transaction of sale at £27,198 7s. 6d., constituted by the contract, within the operation of s. 69. The clause provided for the possibility of the commissioner's consenting to a sale at a lesser price. There was, however, no agreement for sale at a lesser price than £27,198 7s. 6d.

The commissioner's advice that he consented to the sale of the land at a price "not exceeding £18,000" and his action in returning the contract for consequential amendment amounted to a refusal to consent to the sale at £27,198 7s. 6d., which was the transaction into which the parties entered. The refusal operated, by force of the proviso to s. 69, to make the contract null and void

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The sale of the land would have been exempt from the control imposed by the Act upon sales of land if the sale had been made after 23rd March 1950, the date of the exempting Order in Council made under s. 71 (2). The contract to sell at £27,198 7s. 6d. became null and void before this date and the Order in Council could not possibly alter that result.

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FULLAGAR J. I agree that this appeal should be dismissed. The facts have already been fully stated and I can express my own view of the case quite shortly.

I think that the contract of 25th January 1950 complied with the requirements of s. 69 (1) of *The Profiteering Prevention Act of 1948* (Q.), and that it was a valid instrument, though the obligations to convey the land and pay the price were subject to the expressed condition precedent that the Commissioner should consent to the transaction. On the other hand, I do not think that s. 69 (2) operates to invalidate a provision in a contract which purports to avoid the transaction forthwith upon a refusal of the Commissioner to consent to the transaction. Nor, as I think, does s. 69 (2) operate to invalidate or override an otherwise lawful provision designed to define the relations of the parties in the event of consent being obtainable conditionally on a reduction of price.

If the view so far expressed be correct, the case must depend on the effect of clause 1 (a) of the contract. The relevant part of that clause is as follows:—"If the consent of the Commissioner of Prices under *The Profiteering Prevention Act of 1948* shall be required to this sale, then such sale shall be subject to such consent at the sale price agreed upon herein or at such lesser price at which the Commissioner will grant his consent Provided always that the vendor may at his option refuse to sell at such lesser price, and should the consent of the Commissioner be refused at the price agreed upon or at a lesser price this sale shall become null and void". There are, I think, two possible constructions of this clause, but, in my opinion, the result is the same whichever construction be adopted.

The clause is illogical in conception and confused in form. No difficulty, of course, would arise if the Commissioner consented to the sale "at the sale price agreed upon". Apart from that event, I think that the clause was designed to deal with two events foreseen as possible. The first was a refusal to consent to the sale at the agreed price, accompanied by an intimation that consent would be given to a sale at a reduced price. The second was a

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refusal to consent to the sale at any price. The first possibility was intended to be covered by the first part of the clause, which ends with the end of the proviso, and the second possibility by the last part of the clause, which begins with the words "and should the consent". The second possibility did not occur, but the first did, when the Commissioner wrote his letter of the 21st March 1950. What, then, was the position thereupon created by the first part of the clause?

The view on which the appellant must rely is that the contract thereupon became a contract for the sale of the land at the "lesser" price stated in the Commissioner's letter—subject, however, to this, that the vendor could (presumably within a reasonable time) bring the contract to an end by informing the purchaser that he refused to sell at the lesser price. Even if this view were accepted, it does not appear to me that the appellant would be entitled to succeed. His argument must be that on the 23rd March 1950 (when the proclamation exempting the land from the operation of the Act was gazetted) there was still a contractual obligation actually in existence, although it was capable of being destroyed by the vendor's unilateral act. When the proclamation was published, he says, the contract ceased altogether to be subject to clause 1 (a): it must now be read as if clause 1 (a) were omitted from it, and, so read, it is simply a contract for the sale of the land at the original sale price, and a perfectly valid contract because the Act does not now touch it. This argument seems to me to be fallacious. It may be observed that it achieves the very remarkable result of converting a defeasible contract of sale for the price of £18,000 into an indefeasible contract of sale for the price of £27,198. But, apart from this, the truth is that clause 1 (a), if we adopt the appellant's construction, had, before the date of the proclamation, created a definite legal position. There was a contract, defeasible at the option of the vendor, for the sale of the land for £18,000. I can see no reason whatever for saying that the proclamation destroyed, or in any way affected, a position thus definitely established by the operation of the terms of the contract on events which had actually happened. It seems to me that after the proclamation, as immediately before it, there was, on the construction which we are assuming, a contract of sale for the price of £18,000, which the vendor could, if he wished, destroy. He still had a reasonable time within which to "refuse to sell at such lesser price", and he did so refuse.

I am of opinion, however, that the construction on which the argument just considered proceeds does not represent the real effect of the instrument. Clause 1 (a) in terms gives an option to

the vendor, but not to the purchaser. This is doubtless because it was assumed that the purchaser would be only too glad to carry out the contract at a “lesser” price. But this would not necessarily be so, and, if it were not so, I would think it impossible for the vendor to hold the purchaser bound when once the Commissioner had refused to consent to the transaction at the contract price of £27,198. A provision that a contract of sale for the price of £27,198 shall be “subject to the Commissioner’s consent at such lesser price at which he will grant his consent” is on its face more or less nonsensical, but it might, if it stood alone, be construed as meaning that, if the Commissioner will consent to a sale of the land but only at a price less than the agreed price, then the parties are to be bound to sell and buy respectively at the lower price approved by the Commissioner. But that provision does not stand alone. It is followed by a “proviso” that the vendor may “refuse to sell at such lesser price”. The words “refuse to sell” are quite inapt to refer to an option to cancel a contractual obligation binding unless and until cancelled. They are quite appropriate if they are taken as referring to an option to accept or refuse an offer. And it is such an option that they do, in my opinion, confer. The real meaning of the first part of clause 1 (a) is, I think, that, if the Commissioner will consent to a sale of the land but only at a reduced price, the purchaser is to be taken as offering to purchase at that reduced price. That offer may be revoked, like any other offer, at any time before acceptance. The vendor, like any other offeree, may accept it within a reasonable time or he may refuse it. But the original contract is at an end, and there will be no new contract unless and until the vendor accepts the purchaser’s offer before it is revoked. On this view there was not at any material time any enforceable contract between the appellant and the respondent.

There is, of course, a good deal to be said for the appellant’s construction of clause 1 (a). I do not think, however, that it is the correct construction. And, even if it be the correct construction, it seems to me that the appellant must still fail.

KIRTO J. I agree that the appeal should be dismissed. The introductory words of clause 1 (a), which made its operation dependent upon the condition that the consent of the Commissioner of Prices under *The Profiteering Prevention Act of 1948 (Q.)* “shall be required to this sale” clearly meant that the provisions of the sub-clause should take effect if the commissioner’s consent to the sale of the subject property by the vendor to the purchaser was

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necessary in order that the sale should not contravene the Act. That condition was satisfied.

Clause 1 (a) of the contract is so framed as to attract the provisions of s. 69 of the Act to the sale of the subject property at the agreed price of £27,198 7s. 6d. That sale was "a transaction to which the consent of the Commissioner is required" within the meaning of the section: see s. 67. It was made subject to the consent of the commissioner, and was therefore, within the meaning of the section, "subject to a condition that such transaction shall become and be null and void unless the Commissioner shall consent thereto". To that transaction, while it was still one to which s. 69 applied, the commissioner refused his consent, for that was the plain meaning of his letter of 21st March 1950. Therefore the proviso to sub-s. (1) of that section operated to render the sale at the agreed price null and void on and from the date of the refusal.

The clause had another operation also. It contemplated the possibility of the commissioner's refusing his consent to the sale at the agreed price but being willing to give his consent to a sale at a lesser price. It provided for a sale in that event at the lesser price, subject to the commissioner's actual consent, provided that the vendor might at his option refuse to sell at such lesser price. This cannot mean, I think, that, upon the commissioner's intimating his willingness to consent to a sale at a lesser price, a binding contract of sale subject to the commissioner's consent should come into existence, and that the vendor should have the right to dissolve that contract by refusing to sell at the lesser price. The meaning of the proviso seems to me to have been that the question whether there should be a sale at the lesser price subject to the commissioner's consent was to depend upon the unilateral decision of the vendor. An option to refuse to sell imports a right to elect either to sell or to refrain from selling. It is an option to refuse to enter into a contract, and it therefore postulates that there is no contract unless and until the optionee by his election brings one into existence. The vendor in fact did not elect to sell at the lesser price, and therefore no contract at that price ever came into existence.

The result is that there is no contract to be enforced between the parties, and the action was rightly dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Carvosso & Winship, Dalby, by E. J. B. Robertson & Hurwood.*

Solicitor for the respondent, *A. L. Steindl.*

B. J. J.