

ORIGINAL
IN THE HIGH COURT OF AUSTRALIA.

WALKER

V.

OLDHAM & OTHERS.

REASONS FOR JUDGMENT.

Delivered at Sydney.

on Thursday, 22nd April, 1948.

JUDGMENT.

LATHAM C.J.

This is an appeal in a purchasers' suit for specific performance of a contract for the purchase of land. The contract was made on the 9th November 1945 and it contained this provision:-

"The sale is subject to the consent of the Delegate to the Treasurer pursuant to National Security (Economic Organisation) Regulations. In the event of such consent being refused the deposit paid shall be refunded to the purchasers and thereafter this contract shall be null and void".

The National Security (Economic Organisation) Regulations contain in regulation 6 a prohibition on certain transactions in these terms:-

"Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer --

(a) purchase any land".

Regulation 6 (10) provides:-

"Where a transaction prohibited by this regulation has been entered into subject to the consent of the Treasurer thereto being obtained, the transaction shall be deemed not to have been entered into in contravention of this regulation if an application for the consent of the Treasurer is made within three months after the date of the transaction, but the transaction shall not have any effect unless the Treasurer gives his consent thereto".

To those words were added in the month of December 1946 these words by way of amendment:-

"within a period of six months after the date of the transaction"

or within such other period as is agreed to in the manner stated in the sub-regulation.

His Honour Mr. Justice Roper held that this amendment applied to this case and that as the consent of the Treasurer had not been given within the specified time, and it was impossible for him to give it within the specified time, the contract was determined and therefore the plaintiff failed.

A question has been raised, but not argued, as to the validity of these regulations and the precise meaning of regulation 6 read in conjunction with regulations 10 and 21 has been discussed. The regulations present many difficulties of construction. In my opinion, however, it is possible to decide the case upon a much simpler ground, and it is this: His Honour held that the Treasurer did not refuse to consent to the transaction. The evidence on this matter depends entirely upon the construction of a letter from the Treasurer, possibly combined with subsequent events, but in my opinion it depends entirely upon the construction of the letter from the Treasurer. The words in the contract are "In the event of such consent being refused the deposit shall be refunded and thereafter this contract shall be null and void" Application was made for the consent of the Treasurer; the contract price was £1210. The Treasurer on the 26th April 1946 wrote to the Solicitors for the Purchasers - "Consent to this transaction will be granted provided the sale price does not exceed £1150. On receipt of an amended contract showing the price at £1150 the necessary consent will be endorsed thereon". I read that letter as a statement that consent will not be given to the only contract which existed between the parties and in respect of which the application was made; that consent was refused to the existing contract at £1210 and the statement was made that if a new amended contract were made at a smaller sum, consent would be given.

That appears to me to be plainly a refusal to consent to the contract for sale for £1210.

Later the Treasurer - or the Delegate to the Treasurer - changed his mind upon further information being provided and assented to the contract at £1210.

In my opinion he had already refused his consent and the refusal of the consent brought into operation clause 18 of the contract and therefore the contract, in accordance with the express agreement of the parties, became null and void.

In my opinion, on that ground - apart from other grounds and I am not to be understood as expressing an opinion on other aspects of the case - the appeal should be dismissed.

ORDER: Appeal dismissed with costs.

JUDGMENT.

STARKE J.

I agree that the appeal should be dismissed. This unfortunate litigation has arisen out of a most unreasonable act on the part of the Delegate to the Treasurer.

A contract was made for the sale of land at £1210 but the Delegate would not consent to the contract unless it was reduced to a sum of £1150, a difference of £60.

Apparently the safety and the defence of the Commonwealth turned upon that difference. It was a great abuse of the powers that the National Security (Economic Organization) Regulations give to the Treasurer to intimate, as did the Delegate, that consent to the transaction would not be granted unless the selling price did not exceed £1150. The door, however, was not closed to further consideration. But the delay caused by the action of the Delegate ultimately resulted in the non-performance of the contract and these legal proceedings which followed. I do not agree with this Court in its determination that the Treasurer did absolutely and finally refuse his consent.

But I do agree with Mr. Justice Roper that the regulations and the amendment S.R. 1945 No. 189 which have been referred to cover this case.

I do not propose to make a detailed examination of the regulations. The case is within the opening words of the Regulation and the character of the amendment plainly indicates that it applies to every case within those opening words.

Upon the question of validity of these regulations I say nothing. No such objection was taken before Mr. Justice Roper and I do not think the party who suggests it should now be allowed to raise the matter.

ORAL JUDGMENTDIXON J.

I agree that the appeal should be dismissed.

The appellant based his case, in the first instance, upon the view that reg. 6 (10) of the National Security (Economic Organization) Regulations, as amended, did not limit the time within which the authority of the Treasurer to give his consent to this transaction might be exercised to six months from the date of the transaction. The contract in fact provided that it should be subject to the consent of the delegate of the Treasurer and that, if the consent of the Treasurer was refused, the deposit should be returned and the contract should be null and void.

The application for consent was forwarded by the purchaser on 14th November 1945, the contract itself being dated 9th November 1945. The material supporting the application did not include a new valuation but the Delegate to the Treasurer was asked to look at an old valuation made in a previous transaction. He was not provided with the filing number of the document and he replied requesting that he should be furnished with the means of obtaining the information which the old valuation would give to him. This must have been supplied to him. After the lapse of some months, namely on 26th April 1946, the Delegate wrote saying that consent would be given to the transaction provided that the price was reduced to £1,150, that is by £60. He then went on to say that, if the contract was amended and the new amended contract be forwarded to him, he would endorse his consent. To the reduction of price the vendors refused to agree and their solicitor wrote that it seemed nothing remained but to rescind the contract. The purchaser, however, on 16th May 1946, communicated with the Delegate of the Treasurer again, providing him with a fresh valuation. On that fresh valuation the Delegate ~~is~~ of the Treasurer reconsidered his decision. He wrote that he was content to accept the higher

price, but on this occasion he expressed the view, in effect, that he was not in a position to give his consent unless the parties agreed to extend the period of time for his doing so. His reason for that was that, in the meantime, a month after the contract was made, reg. 6 (10) had been amended by S.R. 1945 No. 189 which placed a limit of six months, from the date of a transaction, upon the Treasurer's power of consenting to a contract.

Perhaps I should continue the narrative and add that by some means of which we are not informed, the Delegate of the Treasurer was induced afterwards to repent of that view of the operation of the amendment. He gave his consent to the contract, on the footing, no doubt, that the limitation did not apply retrospectively to transactions entered upon before its date. He gave his consent by endorsing it on the original contract on 27th November 1946, something like a year after the application. That was forwarded to the purchaser who notified the vendors.

I am inclined to think that the last view of the Delegate of the Treasurer is correct and that the limitation of time which was introduced does not apply to a transaction which was under way before the amendment was made.

The situation of parties to a contract under reg. 6 (10) is peculiar. The transaction is not prohibited by the regulation. The sub-regulation says that the transaction shall be deemed not to have been entered into in contravention of the regulation if an application for consent is made within six months after the date of the transaction, but the transaction shall not have any effect unless the Treasurer gives his consent thereto.

It seems to me that the parties who have entered into such a contract and have applied for the consent of the Treasurer are in a situation in which, though they have no definite contractual rights one against the other, yet they have become parties to a transaction complete so far as any action on their part goes, but dependent for its legal operation upon the giving of the Treasurer's consent. It is a transaction to be perfected by the Treasurer's consent. It may not be strictly accurate to say they have vested rights, but they are in the situation in which they have placed themselves

contractually, in a position from which neither can withdraw pending the decision of the Treasurer and, if he approves, they are bound ab initio by an enforceable contract.

Prima facie I think ~~the~~ new legislation which would affect such an existing situation and bring it to an end should not be construed as extending back to it unless some definite indication appears that it was so intended. The words which were added in December 1945 are "within a period of six months after" the date of the transaction, or within such other period as is "agreed upon in writing, at the time the transaction is entered into or any time thereafter, by all parties to the transaction" or, where the agreement was made after the death of any party, by "the surviving parties and the legal personal representative of" the deceased party. "

In the first place, it seems to me to be reasonably clear that those words could not apply to a case where the Treasurer had given his consent to a transaction which was more than six months old at the time he gave his consent but was one to which he had consented before the making of the amendment. It could not have that retrospective effect.

Again, I think that the words "within such period as is agreed on in writing at the time of the transaction" indicate that it was the intention of the draftsman of the limitation or proviso to put it in the power of the parties to control the time within which the Treasurer should or should not give his consent and to make ~~the~~ period of limitation a matter for their free agreement at the time they entered into the contract, or subsequently. In this way it was left to them to limit the time for the exercise of the Treasurer's power of consent or extend it and the period of six months is only put in as something the draftsman fixed in default of their agreement. But it appears clearly to be intended to place the parties in a position at the time they enter into a contract to say what shall be the time limit. That could only apply to fresh transactions. I do not think that the inference arising from this part of the provision is altogether displaced

by the fact that an agreement may be also be made subsequently to the original transaction.

These indications seem to me to show that it is quite unlikely that this provision is intended to apply to a case where the parties had agreed more than six months ago and were at the time it was introduced still attempting to get the consent of the Treasurer.

These considerations lead me to think that, upon the proper construction of the words added by S.R. 1945 No. 189 to reg. 6 (10), the amending words apply only to fresh contracts and have no operation upon contracts entered into prior to the making of the amendment.

However, that does not entitle the purchaser to succeed in this suit unless she makes good her position upon other points in the case. In my opinion the purchaser fails upon the ground that the contract came to an end because the consent of the Delegate of the Treasurer was refused within the meaning of the condition in the contract. I agree with the Chief Justice that the Delegate of the Treasurer had so expressed his refusal to consent as to satisfy the condition of the contract which in that event made the contract null and void.

The view we are taking may be thought to be in opposition to that of Fullagar J. in *Doyle v Heenan* 1946 A.L.R. 135, but a close scrutiny of that case shows that there are some points of difference. In the circumstances of that case it was by no means clear that the Treasurer by his communication to the parties was not intimating to them that if further material was placed before him it might change his view. His Honour was very much affected by the view that the operation of the condition would not be exhausted until a reasonable time had elapsed from the date of the making of the contract. In other words, the purpose of the contract was to give an undefined time but a reasonable time only within which consent might be obtained. His Honour took the view, as the last words of his judgment show, that until a reasonable time had elapsed the possibility of obtaining the Treasurer's consent was not exhausted and, therefore, as he construed the

contract a preliminary refusal of the Treasurer was not to be considered as definite unless a reasonable time had elapsed or the refusal was definitively expressed. I am not sure that I am prepared to adopt in full the construction of the contract His Honour had before him. It was very like the contract in this case. But in this case I think that the Treasurer indicated on two occasions a quite definite decision on his part.

His decision on 26th April necessarily implied that he was against the transaction as it stood and that he had made up his mind about it. His next statement, on 11th June 1946, indicated again that, while he was prepared to accept the transaction, he had definitely decided he could not give his consent for the reason from which he afterwards departed, that six months had elapsed - a legal reason. I think that the condition of the contract means that, when the Treasurer has given a definite decision, the parties are to be absolved from the further obligation of the contract and remitted to their former position. They can thus make fresh arrangements with other people or inter se.

It is perhaps necessary to add, in view of the argument addressed to us, that I do not construe regulation 10 of the Economic Organization Regulations as affecting the discharge of the parties from the contract by the refusal of the Treasurer. I think that the words "where any condition to which the transaction is subject are not complied with" do not cover such a situation; they are, I think, based on regulation 9.

For these reasons I agree that the appeal should be dismissed.

WALKER v. OLDHAM & ORS.

JUDGMENT

MCTIERNAN J.

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JUDGMENT

MCTIERNAN J.

I would dismiss the appeal on the ground that the letter of the 26th April 1946, constituted within the meaning of the relevant clause of the contract a refusal by the Treasurer to consent to the transaction, that is to a sale at the price mentioned in the contract; and the Treasurer's consent having been refused, the contract was by reason of the terms of the contract at an end and the suit for specific performance was rightly dismissed.