No. 31 of 1961 (11)

IN THE HIGH COURT OF AUSTRALIA

PAYNES PROPERTIES PROPRIETARY LIMITED

V.

LEIGHTON

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 21st MAY 1962

W. M. Houston, Govt. Print., Melb.

PAYNES PROPERTIES PROPRIETARY LIMITED

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ORDER

Appeal dismissed with costs.

PAYNE'S PROPERTIES PROPRIETARY LIMITED

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JUDGMENT DIXON C.J.

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This appeal concerns the liability of a purchaser under the agglutinative and perhaps incongruous provisions of a contract of sale of land to pay interest on the balance of purchase money outstanding from time to time. The land consists of 438 acres of land at Deer Park, Melbourne. Except for eighteen acres it is "zoned" as rural land under the interim development order of the Melbourne & Metropolitan Board of Works. The purpose of the clauses in which the source of the difficulty has been found is to provide for the event, so far a contingent event, of the land being rezoned as a residential area. The legislation in force when the contract was made on 4th March 1960 was the Town and Country Planning Act 1958 (No. 6396) cf. sec.14. See also Town and Country Planning (Amendment) Act 1960 (No. 6637) sec. 3 and Town and Country Planning Act 1961 (a consolidating and amending Act) secs. 17, 18, 19, 25, 26, 44. But nothing turns on the statutes. The purchase money named in the contract worked out at £500 an acre and the deposit, which was duly paid, worked out at £75 an acre. It was evidently a transaction forming a step in an expected process of selling the land in subdivision. The vendor, however, was not the registered proprietor of the fee simple but held apparently under a contract of sale to him, and of course, except as to the eighteen acres, the "zoning" of the land as rural presented a difficulty which could not be overcome without at least a permit or permits. These matters formed the subject of special provisions which, with other clauses in type, were interleaved between the sheets of a printed form of contract that itself was filled in to form the basic agreement. Their purpose was to enable the purchaser to pay for large parcels of the land if rezoned and take them up.

There is said by the purchaser to be a conflict between the clause to be found in the printed sheets relating to interest on the balance of purchase money and one in the interleaved typescript. The clause in the print was not left standing in its printed form; on the contrary it is almost redrafted by means of typed insertions, substitutions and obliterations. Therefore, if there be an inconsistency it cannot be said that the print must give way, as perhaps overlooked, to clauses known to be actually composed by the parties or their advisers. The clause recast occupying its place in the print - it is clause 2 - provided simply that the purchaser should pay to the vendor interest calculated from the date hereof with quarterly rests at the rate of £6.10.0 per cent per annum on the residue of the purchase money such interest to be payable quarterly as from the said date. This considered alone would seem clearly enough to require that the unpaid balance of purchase money should bear interest until the residue was paid, an event which must take place, according to clause 1 of the contract, at the expiration of seven years from the date of the contract. But in the typescript pages clause 7, which consists of five paragraphs, contains a provision which the purchaser (the appellant here) says can mean nothing if it does not mean that interest only becomes payable after the land, or some of it, has been rezoned as residential. Paragraph (a) of clause 7 says that the land thereby sold is zoned under the Board's planning scheme partly as residential land (a reference to the eighteen acres) and partly as rural land within the meaning of the scheme. Paragraph (b) enabled the purchaser to take the whole or any part of the land at present zoned as residential (i.e. the eighteen acres) upon payment of £425 an acre. Paragraph (c) provided that if any of the land should be rezoned as residential the purchaser should within thirty days pay in reduction of the residue of purchase money £425 per acre of the rezoned land, subject to a limit upon his obligation of 25% of

the area rezoned. The paragraph is obscurely worded but it appears to mean that the purchaser must take 25% of the area rezoned and may take more, paying £425 an acre. Then comes the critical paragraph (d) which says - "An area rezoned but not taken up and paid for in accordance with clause 7(c) shall be valued at £425 per acre, which shall bear interest at the rate of 6½% from the date of rezoning." Paragraph (e) then says that notwithstanding anything therein contained the balance of purchase money shall be paid not later than the expiration of seven years from the date of the contract. The argument for the purchaser is that all this points to the liability for interest being intended to arise only on rezoning and then to relate only to the balance of the price per acre of £500, after deducting the deposit of £75 per acre, in respect of rezoned land still left in the hands of the vendor. The purchaser points to a general condition which says that if the conditions are inconsistent with the special conditions they shall be read as subject to the special conditions. The purchaser also calls to his aid other conditions such as that enabling him to pay off the purchase money at any time in any multiples of £500, and one reserving to the vendor a right to farm the land until the purchaser takes physical possession. The aid the clauses give is dubious, because in the first case there is a reference to the cessation of interest and in the second case it is clear that on payment of the deposit the purchaser becomes entitled to possession even if he does not take physical possession in fact. The scheme of the contract, according to the argument in support of the purchaser's appeal, is that for a price per acre many times greater than agricultural or pastoral land could command, payable as to 25% at once and as to 75% not later than seven years afterwards, a binding contract for the sale of land was made upon the footing that responsibility for further payments of the price and for taking transfers of the land or alternatively for interest on

the balance of purchase money from time to time outstanding, should arise only as and when the land was converted from a rural to a residential zone or zones. Thus clause 2 with its general reservation of interest must simply be treated as a mistake or perhaps a generality subsequently qualified and explained by the more exact or detailed clause 7(d). Put shortly, according to the argument the contract construed as a whole means that interest on the balance of purchase money when payable should be at 6½% per annum but no interest should be payable except upon the purchase money at £425 per acre on those areas which were or became residential land but were not taken over by the purchaser and paid for at that price. It requires no argument to shew that a reconciliation such as this argument proposes means the rejection or virtual rejection of what is plainly enough expressed by clause 2 if read alone: nor does it need any argument to establish that such a method of interpreting a document cannot be employed until all other attempts to reconcile apparently conflicting provisions fail as impracticable or unreasonable. It may indeed be said that it is going too far to find any real conflict between the two provisions; paragraph (d) of clause 7 may be regarded as expressing a special case within clause 2. But there is no doubt that it is not easy to assure oneself from the document what real intention the parties had present to their minds. However, a full examination of the contract and a consideration of the situation it appears to contemplate suggest that in the mind of the draughtsman there was no conflict. Before writing paragraph (d) of clause 7 he had in the earlier paragraphs of that clause provided for the possibility of the purchaser paying for areas forming part of the land at unascertained times before the end of the seven years. That would affect the immediate balances and the balance from time to time of unpaid purchase money. He felt probably that he must specify the price per acre of the land that remained and he felt, one may

suppose, that he must provide for the running of the rate of interest on the amount attributable to the blocks not taken over: hence paragraph (d). Then it might well appear to him that he should confirm the liability for the payment at the end of the seven years of any balance remaining; hence para.(e). Such an explanation seems not unreasonable and it provides a reconciliation which makes clause 7(d) nothing but a provision for the application in a special case of the general proposition in clause 2; otherwise leaving clause 2 in full operation.

That in effect is the view taken in the Supreme Court.

Accordingly the appeal should be dismissed with costs.

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JUDGMENT McTIERNAN J.

In my opinion the appeal should be dismissed.

The first matter to mention is that when the contract of sale was made the land included an area of residential land, the rest being rural land. The latter was not rezoned land within the meaning of the contract. Special Condition 7 provided for the contingency of the rural area being rezoned wholly or in part. The residue of the purchase money, in respect of which Condition 2 made the appellant liable to pay interest from the date of contract, was the balance payable for the whole of the land included in the contract. It seems clear that there is nothing in the contract to relieve the appellant of its obligation to pay interest on the full amount of the balance of purchase money, except that Special Condition 7(c) would require the appellant to pay part of the residue of purchase money referable to rezoned land, the result of which would be to reduce the balance of purchase money owing at the date of the contract. However, the appellant relies on Special Condition 7(d) which it contends overrides Condition 2 because of the provisions of Condition 7, a condition other than Special Condition 7. Condition 2, so the appellant argues, is inconsistent with Special Condition 7(d) and therefore the latter prevails over it. The alleged inconsistency is that whereas Condition 2 makes interest payable on the whole residue of purchase money from the date of the contract, Special Condition 7(d) says that as to land rezoned but not taken up and paid for by the appellant the amount of the value of such land shall bear interest from the date of rezoning. According to the argument Condition 2,

despite its terms, imposes an obligation to pay interest from the date of the contract only on the part of the residue of purchase money applicable to an area of residential land, zoned as such, at the date of the contract. This argument assumes an inconsistency between Special Condition 7(d) and Condition 2. To regard Special Condition 7(d) as a provision intended to limit the obligation of the appellant under Condition 2 to pay interest only on the part of the residue of the purchase money referable to the relatively small area of land zoned as residential at the date of the contract seems to give Special Condition 7(d) a larger operation than its words could possibly have. As no rezoning of any other area of the land has taken place since the date of the contract, the appellant is forced to contend for the sake of consistency of argument that the operation of Special Condition 7(d) on Condition 2 is independent of any rezoning. In my opinion, it is a better interpretation of Special Condition 7(d), and indeed more consonant with its words and the contract read as a whole, that that condition does not create any new obligation to pay interest which Condition 2 does not impose. The intention of Special Condition 7(d) is, having regard to all the terms and conditions of the contract, to declare that after any rezoning has taken place the purchaser shall continue to pay interest at the contract rate on the value of any rezoned area which it has not taken up.

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MENZIES J.
WINDEYER J.
OWEN J.

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The appellant is the purchaser from the respondent of 438 acres 1 rood 10 perches of land at Deer Park at a price of £219,156. 5. 0 (i.e. £500 an acre) under a contract of sale dated 4th March 1960 which entitled the purchaser to vacant possession upon acceptance of title and payment of a deposit of £32,873 (i.e. £75 per acre).

At the time of the sale the land was subject to an interim development order made by the Melbourne and Metropolitan Board of Works under which 18 acres were zoned "residential" and the remainder "rural".

"The residue of the purchase money" (i.e. what remained after the payment of the deposit) was payable at the expiration of seven years from the date of the contract but this was subject to the provisions of Special Condition 7, to which we will refer later.

Clause 2 of the general Terms and Conditions of Sale is as follows:

> "The Purchaser shall pay to the Vendor interest calculated from the date hereof with quarterly rests at the rate of £6.10. 0 per cent. per annum on the residue of the purchase money, such interest to be payable quarterly as from the said date".

If this applies according to its plain terms, the judgment of Pape J. and that of the Full Court were correct and the

respondent is bound to pay interest on the difference from time to time between the purchase price and what has been paid, but the appellant's contention is that to read clause 2 as applying to the residue of the purchase money would be inconsistent with Special Condition 7, which by virtue of clause 7 of the general conditions has overriding force, and to reconcile the two provisions it is necessary to restrict the operation of clause 2 to so much of the residue of the purchase money as from time to time remains to be paid in respect of the 18 acres that were, when the contract was made, zoned "residential". This construction, it will be observed, involves not only a drastic restriction upon the language of clause 2 but it involves treating an ascertainable part of the residue of the purchase money as payable in respect of particular land whereas the contract is for one amount for the whole of the land.

Although it was argued that this construction gave logic and symmetry to the contract as a whole, it depends essentially upon Special Condition 7(d), which is in these terms:

> "An area rezoned but not taken up and paid for in accordance with Clause 7(c) shall be valued at £425 per acre, which shall bear interest at the rate of 6½% from the date of rezoning".

To understand this provision it is necessary to look at Special Condition 7 as a whole. In the first place, it states without specifying any areas that part of the land sold is zoned as residential and part as rural (7(a)). Secondly, it entitles the purchaser to a transfer of the whole or any part of the land zoned as residential when the contract was made upon payment of £425 per acre (7(b)). Then it provides that in the event of any land zoned as rural being rezoned as

residential, the purchaser must within thirty days pay the vendor £425 per acre for at least 25 per cent of the land rezoned and may do so for the whole or any portion over and above 25 per cent. Upon such payment, the purchaser becomes entitled to a transfer of as many acres as it pays for, leaving the particular land to be transferred, if less than the whole area is taken, to be agreed between the parties (7(c)). Then comes 7(d). The Special Condition ends with 7(e), which is as follows:

> "Notwithstanding anything herein contained the balance of purchase money shall be paid no later than the expiration of seven years from the date hereof".

The appellant's contention is that Special Condition 7(d) makes it clear that until interest becomes payable thereunder no interest is payable in respect of the purchase money remaining unpaid in respect of land which may during the currency of the contract be rezoned as residential - that is, all the land except the 18 acres zoned as residential when the contract was made. Otherwise, it is said, why was it provided that a calculable sum in respect of land rezoned and not paid for and transferred should bear interest as from a particular date (i.e. the date of rezoning)?

We cannot accept this contention. The language of clause 2 is plain and its operation can be affected only by clear words of restriction.

It seems to us that even if Special Condition 7(d) could not be given operation consistent with clause 2 except by regarding it as a redundant provision unwisely included in an excess of caution, it should be so regarded in preference to attributing to it the effect of reducing and changing the operation of clause 2. It is to be observed that had the

parties intended to confine the obligation to pay interest within the limits for which the appellant contends, it could hardly have been done less aptly or more obscurely than by framing their agreement in language which is apt to impose an obligation to pay interest on all the purchase money not paid (i.e. after the payment of the deposit, £186,000 approximately) and then by framing a provision in the language of Special Condition 7(d), which deals only with a contingency, to limit that general obligation to a sum calculated by reference to another provision (i.e. Special Condition 7(b)) to £7,650. It is hardly a matter for surprise that under the agreement, framed as it is, the appellant did for a time make payments of interest calculated on the whole residue of the purchase price. Furthermore, 7(d) does not in terms impose an obligation to pay interest and it does not fix the times for the payment of any interest thereunder : it says that a sum of money to be calculated shall bear interest. This affords some reason for not regarding it as creating a new obligation but as reiterating the obligation imposed by clause 2.

If, however, Special Condition 7(d) does create a new obligation different from that arising from clause 2, we are disposed to think that the new obligation is not that contended for by the appellant but is an obligation to pay interest upon the sum calculated in the manner specified even if the residue of the purchase money upon which interest is payable under clause 2 has, by payments under Special Condition 4 - which authorises the purchaser from time to time to pay off principal in amounts of £500 or multiples of £500 - been reduced to less than the sum calculated in accordance with 7(d). So construed 7(d) would provide a powerful inducement for the purchaser to pay for and take transfers of all land rezoned, and that may have been its purpose. It is not,

however, necessary to reach a concluded opinion on this possibility.

It should only be added that it seems to us that the other provisions relied upon by Mr. Voumard for the appellant to favour limiting clause 2 do so only by finding far more in them than their language warrants. Thus, to render more acceptable the idea that practically no interest should be payable upon the bulk of the residue of the purchase money payable for land to which the purchaser is entitled to possession, he refers to Special Condition 11 whereby "the vendor reserves the right to all crops now on the property sold and to farm free of charge all areas of the land sold until such time as physical possession of same is taken by the purchaser", and equating the time of taking "physical possession" to the time of rezoning to residential, he argues that it was not intended that the purchaser should have possession of any of the land not zoned "residential". We are, however, unable to equate the date of rezoning with that of the purchaser taking "physical possession". As we read the contract the purchaser is entitled to do this at any time and it is only until it does so that the vendor is at liberty to farm the land. We have, of course, no doubt that as farming land the property is worth nothing like £500 an acre and agree that it might be unlikely that the purchaser would take physical possession of the land to farm it, but there are other contingencies upon the happening of which the purchaser would be most likely to take physical possession, notwithstanding that the land had not been rezoned "residential" - e.g., if the land were to be rezoned "industrial" and it could be subdivided for sale in industrial allotments. It is sufficient to say, however, that we find nothing in Special Condition 11 or in the remainder of the contract that sheds much light upon the meaning of clause 2 and

Special Condition 7. It is upon the language of these provisions that we have come to the conclusion that the result that was reached in the Supreme Court is correct.

In our opinion the appeal should be dismissed.