Privy Council Appeal No. 64 *of* 1920.

Lascelles de Mercado and Company, Limited - - - *Appellants*

v.

James Charley - - - - - - - - *Respondent.*

FROM

THE COURT OF APPEAL OF JAMAICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD SHAW.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Court of Appeal of Jamaica affirming a judgment of the Chief Justice. The question which arises concerns the title of the appellants to recover commission under an agreement for the transfer to the respondent of an option for purchase of certain estates in Jamaica. The appellants are a company carrying on business as general commission merchants, and the respondent is a planter and the owner and lessee of estates in the island on which sugar is grown.

On the 17th September, 1918, the appellants had obtained from a Mr. Vickers, the managing director of a company known as The Belle Isle Estates Company, Limited, an option to purchase certain estates belonging to the company. This option was to expire on the 1st October, and the purchase price was fixed at £110,000. The letter from Vickers to the appellants which conferred the option contained the following clause :—

> " I agree if you so desire to allow fifty thousand pounds of the purchase money to remain on first mortgage of the properties and cattle thereon for five years from the 1st October, 1918, with interest at 6 per cent. payable half-yearly, with the right to you to pay off on the 1st October each year any portion of the amount."

A copy of this letter was sent by the solicitors of the appellants to the respondent with a covering letter of the 20th September referring to a negotiation with the respondent for the taking over by him from the appellants of the option referred to. The clause just quoted was, however, omitted from the copy of the letter. On the 21st September, the respondent replied in a formal letter to the effect that, in consideration of the appellants agreeing at his request to exercise this option, and of their " transferring to him the benefit of the contract," he would pay the £110,000, and any other money payable under it. This formal letter contained a stipulation that the appellants should render him all assistance in their power to raise on loan the amount required for the purchase money, but this was not to imply any personal liability on their part. The letter further provided that :—

> " In consideration of the premises I do hereby employ you as the sole selling agents of the sugar and rum to be produced or manufactured on all my estates " (naming them) " and also on the Belle Isle estates " (the subject of the option) " if and when purchased by me, and I am to consign to you as such agents for sale all the crops of sugar and rum to be produced or manufactured " during certain years. " As remuneration for your services as such selling agents, I am to pay you a net commission of 2½ per cent. on the gross prices at which such sugar and rum may from time to time be sold."

The letter concluded with these words :—

> " It is understood that you are not to exercise the option on my behalf unless the Colonial Bank agree to lend me £110,000, or I otherwise arrange for same."

At the time he wrote this letter the respondent was not aware that the option given by Vickers to the appellants contained the clause enabling the latter to claim that £50,000 of the purchase money should be allowed to remain on mortgage of the properties and the cattle thereon, nor did he become aware of the existence of this clause until June, 1919. In the meantime he had been endeavouring to raise the money required for the purchase. The Colonial Bank refused to assist. The appellants made some endeavours to help him to do so, but without success. They did not until long afterwards disclose the existence of the omitted clause already quoted. Ultimately the respondent purchased the Belle Isle estates from the Estates Company, not at the price named in the option, but at the higher price of £130,000, the company and Vickers having agreed under the new arrangement to allow him till July for the payment of £50,000, part of the total purchase money, and to permit a further £60,000 to remain on mortgage of the estates and of other estates belonging to the respondent till 1924. He also secured through Mr. Vickers an advance of the remaining portion of the purchase money, £20,000, on other securities.

The respondent refused to recognise the purchase thus made under the new contract of the 15th October, as one under his contract with the appellants or to which the exercise of their option had led. The appellants, therefore, on the 21st February,

1919, commenced the action on which this appeal arises, claiming the $2\frac{1}{2}$ per cent. commission.

The first question that arises is as to the nature of the right of the appellants against the respondent under the letter signed by him on the 21st September, 1918, which contains the terms of the contract. The letter begins by stating that, in consideration of the appellants agreeing as requested to exercise the option to purchase the estates for £110,000, and of their transferring to him the benefit of the contract, he agrees on his part to pay the purchase money, etc., payable under the option and to indemnify the appellants against all liability. This is followed by the statement that it is understood that the appellants will render him all the assistance in their power in his efforts to raise on loan the amount required for the purchase money, but this is not to imply any personal liability or guarantee on their part in connection with the loan. The appellants are further not to be obliged to exercise their option until satisfied that the respondent is in a position to pay and to perform all obligations arising out of the terms of their option. The option is to be exercised by the appellants forthwith as soon as they are satisfied of the respondent's ability to pay the purchase money, etc. "In consideration of the premises," the respondent thereby employs them as his sole selling agents of the sugar and rum to be produced or manufactured on all his other estates as well as on the Belle Isle estates, for the crops of a series of years at a $2\frac{1}{2}$ per cent. commission on gross prices. In conclusion it is stipulated that the appellants are not to exercise the option on his behalf unless the Colonial Bank agreed to lend him £110,000 or he should otherwise arrange to get this money lent to him.

By its terms the option expired on the 1st October. The Colonial Bank did not agree to advance the purchase money, nor did the respondent succeed in obtaining the loan elsewhere. The appellants not having procured a loan for him either, the respondent, on the 28th September, wrote to them to say that, as they had failed to raise the loan, he had decided to be off with the matter, as it did not suit him to remain in an indefinite position. This decision the appellants accepted, but they intimated that they considered themselves entitled to claim the commission.

Their Lordships agree with the Courts below that this claim was not well founded. The conditions under which the option was to be exercised never arose, for the loan of the purchase money was not arranged. Moreover, the appellants had not, as they contracted to do, transferred to the respondent the whole benefit of their contract. They had not included the clause as to the £50,000 to remain on first mortgage in what they transferred to the respondent on the 21st September. No doubt this was a clause personal to themselves, and had been said by Vickers to be so. But it none the less formed an important element in their contract with Vickers, and they ought to have disclosed it, with a view to the respondent seeing whether by negotiation use could

have been made of it, or else they should have stated it as there, but incapable of being effectively transferred. They did neither of these things, and their Lordships think that, having done neither one nor the other, the appellants cannot claim to have done all they contracted to do in the way of exercising and transferring the entire benefit of what was provided for in the letter of option of the 17th September. But quite apart from this failure on the part of the appellants to satisfy their full obligation, their Lordships think, as they have already intimated, that, as the contemplated assistance in raising the purchase money could not be obtained, the option, under the concluding words of the letter of the 21st September, ceased to be exercisable by the appellants on behalf of the respondent, and the whole agreement came to an end. The Chief Justice who tried the case says that he is satisfied that both parties made every effort to raise the purchase money, but without success. This may well be so, but their Lordships agree with the learned Chief Justice in thinking that none the less the transaction was thereby terminated. The commission and the appointments out of which it was to arise were only to become operative if the transaction went through.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

LASCELLES DE MERCADO AND COMPANY, LIMITED,

v.

JAMES CHARLEY.

DELIVERED BY VISCOUNT HALDANE.

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