34/85

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN

JAMES JOSEPH WATSON and PAULINE ELAINE WATSON

(Defendants) Appellants

AND

GLEN ROBERT PHIPPS

(Plaintiff) Respondent

10

CASE FOR THE RESPONDENT

Brief Summary of the Respondent's Submissions — RECORD

1. (a) On 6th January 1978 the Appellants agreed to sell to the Respondent their interest in a property situated at Fernvale near Ipswich, Queensland being the whole of the land described as Subdivision 1 of Portion 161 on registered Plan No.28893 County of Churchill Parish of North containing an area of 30 acres and being the whole of the land described in Certificate of Title Volume 4865 Folio 146 together with improvements thereon at a price of THIRTYNINE THOUSAND FIVE HUNDRED DOLLARS ($39,500.00). — pp. 192-195

20

(b) By special condition (c) of the contract of sale the agreement was made subject to the Appellants' granting to the Respondent a lease for five years over — p.195 Ll 15-20

30

certain adjoining lands described as Subdivisions 1 and 2 of Resubdivision A and Subdivision 1 of Resubdivision C of Subdivision 1 of Portion 126 on registered Plan No.45048 County of Churchill Parish of North containing areas of 29 acres 2 roods 18 perches, 37 acres 3 roods 29 perches and 10 acres 31 perches respectively and being the whole of the lands contained in Certificates
10 of Title Volume 4865 Folios 142, 144 and 143 respectively.

(c) The Respondent contended that it had been orally agreed between him and the Appellants that he would have an option to purchase the leased lands during the subsistence of the said lease or at the expiration thereof at a price of ONE THOUSAND DOLLARS ($1,000.00) per acre and that the said option to purchase was to be
20 incorporated as a term of the lease; but that the lease when executed did not accurately express that agreement. The Appellants denied that they had ever intended to confer an option to purchase upon the Respondent.

p.16, Ll.41-49

pp.190-191

Chronology

2. (a) In mid December 1977 the Respondent and his brother discussed with the male Appellant the purchase of the property referred to in paragraph 1(a) and the lease
30

p.13, Ll.33-52, p.84, Ll.51-55, p.131, Ll52-60, p.132, Ll.1-14

of those properties described in paragraph 1(b).

(b) Within a day or two of the first meeting there was a further conversation between the Respondent and the male Appellant during which terms of the sale and lease were discussed.

p.14, Ll.48-60, p.86, Ll.10-59, p.132, Ll.16-44

(c) Within a day or two of that second meeting there was a further meeting between the Respondent and the male Appellant when the latter inspected the Respondent's house which was to be part of the consideration for the purchase of the property described in paragraph 1(a) above and at which the terms of sale were agreed.

p.15, Ll.28-50, p.87, Ll.50-60, p.135, Ll.1-12

(d) Shortly thereafter there was a discussion between the Respondent, his wife and the male Appellant in proximity to the dairy located upon the property that was to be sold at which the terms of the lease, the responsibility for the payment of rates and the option to purchase the leased lands at <u>ONE THOUSAND DOLLARS</u> ($1,000.00) per acre were discussed and, according to the Respondent and his wife, agreed.

p.16, Ll.5-60, p.17, Ll.1-13, p.63, Ll.44-60, p.64, Ll.1-57, p.89, Ll.33-60, p.90, Ll.1-41, p.91, Ll.1-11, p.132, Ll.54-60 p.133, Ll.1-60, p.134, Ll.1-50

(e) By letter dated 19th December 1977 the Appellants' Solicitors wrote to the Respondent's Solicitors enclosing a contract of sale for execution and advising that there

p.190, p.135, Ll.14-40

was to be a lease of other lands which lease was to contain an option to purchase. It was never suggested that the other lands were not the lands referred to in paragraph 1(b).

(f) On 21st December 1977 the Respondent's Solicitors returned the contract of sale duly executed by the Respondent and made reference to the proposed lease containing an option to purchase.

p.191, p.135, Ll.42-58

10

(g) On 6th January 1978 the Appellants executed the contract of sale in respect of the lands described in paragraph 1(a) above.

pp.192-195, p.136, Ll.6-24

(h) On 27th January 1978 the Respondent and the male Appellant attended a meeting of the Board of Directors of the Queensland Farmers Co-operative Association Ltd. The minutes of that meeting record that the male Appellant stated that he had recently sold an area of 30 acres and his dairy and house to the Respondent and leased a further 90 acres to the Respondent with an option to purchase.

p.17, Ll.59-60, p.18, Ll.1-26, p.87, Ll.12-25, pp.209-212, p.136, Ll.50-58

20

(i) A lease in respect of the lands referred to in paragraph 1(b) was executed in early February 1978. It did not contain any enforceable option to purchase. See clause 3(a) of the lease.

pp.198-206

(j) Because the lease was thought not to be in registrable form the parties executed a further lease in materially the same terms

pp.213-224

30

dated 7th April 1978.

(k) On 19th November 1981 the Respondent instituted proceedings seeking, inter alia, rectification of the lease dated 7th April 1978 to incorporate a valid option to purchase and specific performance of the lease as rectified. p.1

(l) On 11th February 1982 the Respondent purported to exercise the said option to purchase. p.226

10

(m) On 17th February 1982 the Appellants through their Solicitors denied the existence of a valid and subsisting option to purchase. p.227

(n) The Respondent's action was heard in the Supreme Court of Queensland on 26th and 27th July 1983. Shepherdson J. gave judgment for the Appellants on 19th August 1983. pp.10-128 pp.129-155

(o) On 9th September 1983 the Respondent appealed to the Full Court of the Supreme Court of Queensland. On 2nd November 1984 the Full Court of the Supreme Court of Queensland upheld the appeal, ordered rectification of the lease and specific performance of the agreement as rectified. pp.156-158 pp.159-186

20

(p) On 2nd January 1985 Mr Justice Kelly as vacation Judge exercising the powers of the Full Court of the Supreme Court of Queensland gave leave to the Appellants to appeal to Her Majesty in Council and ordered pp.187-189

30

that execution of the judgment of the Full Court be suspended upon the undertaking of the Appellants to pursue the appeal with due diligence and to transmit the Record of Appeal to the Registrar of the Judicial Committee before 15th February 1985.

Detailed Case

3. It is the Respondent's submission that there was overwhelming evidence emerging from an examination of contemporaneous events and documents to satisfy a tribunal of the existence of an oral agreement to grant an option to purchase the leased properties upon the terms alleged. Queensland Mines Ltd v. Hudson (1978) 52 A.L.J.R. 399.

(a) The most compelling evidence is furnished by the Appellants' Solicitors notes which came into existence at or about the time of the negotiations between the parties: exhibits 12 and 13. An option in the terms deposed to by the Respondent is stated in them. The Appellants' Solicitor said that when he used the word "option" he would not have used it other than in the legal sense meaning "legally enforceable option" and he said that he intended to create a legally enforceable option when drawing clause 3(a) of the lease.

(b) To the best of his recollection, the

pp.251-254, p.255

p.244, Ll.42-48

p.245, Ll.24-28, p.51, Ll.49-51, p.52, Ll.17-18

p.53, Ll.7-9

10
20
30

Appellants' Solicitor considered that the Respondent came to his office on only one occasion and that exhibits 12 and 13 came into existence on different occasions. The male Appellant agreed that the Respondent had accompanied him to his (the Appellant's) Solicitor only once.

p.53, Ll.15-16, p.110, L.8

(c) The learned trial Judge found that exhibit 12 probably came into existence prior to the discussion at the Appellants' dairy during which he is alleged to have agreed to the option to purchase. The learned trial Judge found that exhibit 13 probably came into existence after that meeting and after any meeting that the Respondent might have had in the Appellant's Solicitor's office in December 1977. Exhibit 13 must therefore have come into existence in the course of recording the male Appellant's instructions to his Solicitor.

p.145, Ll.48-50

p.145, Ll.54-60

(d) Further the Appellants' Solicitors' letter of 19th December 1977 makes reference to the option to purchase the leased lands during the currency of the lease yet to be prepared, the option to be contained in the said lease.

p.250, p.244, Ll.50-60

(e) Further the minutes of the meeting of the Board of Directors of the Queensland Farmers Co-Operative Association of 27th

p.209, Ll.46-50

10

20

30

January 1978 record that the male Appellant told the Board that he had granted to the Respondent an option to purchase the leased lands. Those minutes were approved at a meeting of the Board of Directors on 9th February 1978 as a correct record of the business transacted on 27th January 1978.

p.212, Ll.50-53

4. There were many inconsistencies in the evidence of the male Appellant and none in that of the Respondent. The male Appellant's evidence was clearly unreliable.

10

(a) It was suggested to the Respondent in cross-examination that the Respondent repeated a figure of $39,000.00 and became upset when the male Appellant had suggested a price of $39,500.00 in respect of the farm. This was contrary to the Respondent's evidence and no such evidence was given by the male Appellant in giving his evidence.

p.29, Ll.13-17

p.14, Ll.56-60, p.84, Ll.51-55, p.85, Ll.18-21

20

(b) It was important for the Appellants to establish that the instructions reflected in the Appellants' Solicitor's notes could have been given by the Respondent (see paragraph 3(c)) and to that end prove that the Respondent attended the Appellants' Solicitors' office after the meeting at the Appellants' dairy referred to in paragraphs 2(d) and 3(c). The male Appellant swore that he had observed the Respondent signing the

p.89, Ll.2-3, p.108, Ll.30-40, p.191

30

contract. That evidence was contradicted by the Respondent's Solicitors' letter of 21st December 1977.

(c) Although the male Appellant denied using the word "option" he subsequently said that he could not positively say that it was not said by him. It was never suggested to either the witness Zabel or the witness Palfrey that the word "option" had not been used in the context and sense in which they contended that it was used.

p.98, Ll.29-33, p.112, Ll.35-37, p.113, Ll.1-4, pp.47-52, pp.56-61

10

(d) It was always the Respondent's case that the leased lands were to be purchased at a price of $1,000.00 per acre. Although it was suggested that it was strange that there was no "haggling" over the price it was never put to the Respondent that he had offered anything less. The male Appellant swore that the Respondent had asked whether the Appellants would accept $750.00 an acre. He denied that the Respondent had ever mentioned a figure of $600.00. His sworn evidence was contrary to his sworn Affidavit of 24th February 1982.

p.16, Ll.41-49 p.34, Ll.50-51, p.35, Ll.4-7

p.90, Ll.32-37

20

p.105, Ll.25-40 p.228, Ll.50-54

(e) The male Appellant gave conflicting versions of the circumstances surrounding the conversation in which the Respondent swore he first indicated his intention of exercising the option. In his Affidavit the male

p.229, Ll.30-36

30

Appellant contended that the Respondent had given him a warning that he was to take up the option and that his (the Respondent's) Solicitor had said that the Appellants would have to sell. To this the male Appellant replied "Let the Solicitors fight it out then". In his evidence at the trial he swore that the Respondent had said nothing about an option in the course of the conversation. His version of the conversation, which was not put to the Respondent, was that it was the Respondent who had said "We will let our Solicitors fight about it". The male Appellant also swore that he would never have gone ahead and built his house on a block adjoining the leased lands had he been aware of the fact that the Respondent was contending that he had an option. He swore that it would be quite untrue for anyone to suggest that it was he that had said, "Let our Solicitors fight about that".

p.97, Ll.30-38
p.116, Ll.57-59
p.115, Ll.54-55,
p.117, Ll.26-27
pp.98, Ll.55-5
p.99, Ll.25-31
p.116, Ll.2-7

(f) It was implicit in the Appellants' Counsel's cross-examination of the Respondent that the suggestion of a three year lease came from the Respondent or his brother. The male Appellant subsequently gave evidence that it was the Respondent who asked for a five year lease and that it was he (the male Appellant) that preferred a three year lease.

p.24, Ll.13-19,
p.85, Ll.5-6

5. Some of the trial Judge's conclusions of

fact were not logical inferences from the evidence.

(a) In spite of the inconsistency referred to in paragraph 4(f) the trial Judge did not find that there was an agreement about the length of the term of the lease after the initial meeting between the male Appellant and the Respondent.

p.132, Ll.12-14

(b) The trial Judge considered it unlikely that the Appellants would have purchased a block of land so close to the leased lands unless they believed that at the expiration of the five year term the land would revert to them because the evidence was that any person using the top portion of the farm as a dairy needed the leased area to have any chance of success as a dairy farmer. Yet the same reasoning could have led His Honour to conclude that the Respondent would not have purchased the top portion without purchasing or obtaining an option to purchase the leased area.

p.152, Ll.40-48

p.131, Ll.46-50

10

20

(c) His Honour's finding that the financial pressure on the Appellants had eased and there was no pressing need for them to agree to sell the river flat land even at a future date is not borne out by the evidence. The Appellants had sold further land after the sale to the Respondent.

p.151, Ll.6-10, p.100, Ll.40-47

(d) The land which the Appellants sold was

30

in proximity to the leased land and its sale, upon an application of the trial Judge's test referred to in (b), is equally consistent with a view on the Appellants' part that there was no point in retaining that land since there was no assurance that it could be farmed in conjunction with the leased land.

(e) The male Appellant was unable to swear that he did not use the word "option" to the Board. Further he could say no more than that he could not remember mentioning the price. It was never put to Zabel in cross-examination that the male Appellant did not mention the price of $1,000.00. Nevertheless His Honour rejected Zabel's evidence in this respect.

p.138, Ll.20-24, p.98, L.38-43

p.147, L.24-30

10

The Law

6. (a) Rectification may be obtained where the parties have made a prior, though unenforceable, agreement and the subsequently executed instrument does not accurately record that agreement or where, though there has been no prior agreement, there has been a common accord as to what the agreement should be or as to what a particular term should be notwithstanding that that accord has not found outward expression, and the instrument, when executed, does not accurately express that accord. Pukallus v. Cameron (1982) 56

20

30

A.L.J.R. 907, Joscelyne v. Nissen [1970] 2 Q.B. 86.

(b) More convincing evidence is required in the latter case than in the former because in that case a Court is being asked to make an agreement where none previously existed. In the case where one seeks to show a prior agreement, the requirement is usually stated to be that of clear evidence because if the

10

evidence is uncertain as to what the prior agreement was, no prior agreement can be found to exist.

(c) It was the Respondent's contention that there was a prior oral agreement for an option to purchase the leased land. All the independent evidence supported this.

(d) The learned trial Judge applied the law relating to rectification as though it required that the Respondent establish his

p.149, Ll.6-12
pp.147-149, p.142, Ll.24-56

20

case beyond reasonable doubt. There was an apparent failure to be convinced by evidence from two undisputably independent sources of the Appellants having agreed to grant to the Respondent an option to purchase. His Honour was prepared to discount inconsistencies in the Appellants' evidence when there were none in the Respondent's. The learned trial Judge was concerned about the absence of evidence

p.143, Ll.50-60
p.144, Ll.1-10

30

which was either irrelevant or of marginal importance.

SUMMARY

The Respondent submits that the appeal from the Judgment of the Full Court of the Supreme Court of Queensland should be dismissed for the following reasons:

(a) The contents of the notes produced by the Appellants' Solicitors provide clear contemporaneous evidence of an intention on the part of the Appellants to give to the Respondent a valid and subsisting option to purchase the leased lands during the currency of the lease.

(b) The correspondence emanating from the Appellants' Solicitors' Office confirms an agreement between the parties to incorporate an option to purchase in the agreement for lease.

(c) The minutes of the Board of Directors of the Queensland Farmers Co-Operative Association Ltd provide independent contemporaneous evidence of an intention on the Appellants' part to give to the Respondent an option to purchase the leased lands.

(d) The evidence of the Appellants' Solicitor, Palfrey, and one of the Directors of the Queensland Farmers Co-Operative

Association Ltd, Zabel, was unequivocal and supported the contention that the Appellants had agreed with the Respondent to grant an option to purchase the leased lands. The evidence was rejected by the trial Judge for superficial and unconvincing reasons.

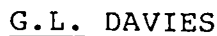
(e) There were such conflicts and inconsistencies in the male Appellant's evidence that the trial Judge should never have accepted that evidence in preference to the consistent, unshaken evidence of the Respondent, the Appellants' Solicitor and the Director of the Queensland Farmers' Co-Operative Association Ltd.

(f) The trial Judge adopted too strict a standard of proof in considering the Respondent's claim for rectification.

(g) The events upon which the trial Judge relied as being consistent with his finding that the Appellants had never intended to grant an option to purchase the leased lands were equivocal.

(h) The decision of the Full Court of the Supreme Court of Queensland was correct.

DATED the 7th day of June 1985



G.L. DAVIES

R.A.I. MYERS

10

20

30

No. 16 of 1985

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N

JAMES JOSEPH WATSON and

PAULINE ELAINE WATSON

(Defendants) Appellants

AND

GLEN ROBERT PHIPPS

(Plaintiff) Respondent

CASE FOR THE RESPONDENT

WALTONS & MORSE
Plantation House,
31-35 Fenchurch Street,
LONDON EC3M 3NN.

Solicitors for the Respondent