Privy Council Appeal No. 16 of 1985

James Joseph Watson and another *Appellants*

v.

Glen Robert Phipps *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1985

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRIGHTMAN
LORD GRIFFITHS
SIR OWEN WOODHOUSE

*[Delivered by **Lord Brightman**]*

This is an appeal from a decision of the Supreme Court of Queensland with the leave of that court. It concerns an oddly worded clause in a lease of farmland. The plaintiff, who is the respondent to the appeal, claimed at first instance and on appeal that the clause in question ought to be rectified so as to contain in express terms the grant to him of an option to purchase. His claim failed at first instance but succeeded on appeal. The Supreme Court was not invited by the plaintiff to consider whether the clause as it stood ought as a matter of construction to be read as conferring an option to purchase. The defendants, having failed on the issue of rectification before the Full Court, appealed to Her Majesty in Council to have the rectification decree set aside. Before the appellants' case was opened, their Lordships informed counsel that they wished first to consider the true construction of the clause, and to leave the question of rectification to be argued if their Lordships took the view that, on the true construction of the clause as it stood, no option to purchase was granted.

It will be convenient to refer to the appellants, who deny that an option was or was intended to be granted, as the lessors, and to the respondent as the lessee. In 1977 the lessors were engaged in dairy farming. The farm consisted of two pieces of land, a thirty acre block which was called "the top portion", on which there was a dwelling house, dairy and other buildings, and a seventy-eight acre block fronting the Brisbane river which was known as "the river flat area". The river flat area provided the grazing for the dairy herd. It was found by the trial judge that any person using the top portion as a dairy farm would need the river flat area if he were to have any chance of carrying on a successful dairy farming business.

In December 1977 the lessee, having heard that the property was on the market, raised with the lessors the question whether it would be possible for him to buy the top portion and to take only a lease of the river flat area. Negotiations ensued, and on 6th January 1978 the lessors entered into a contract to sell the top portion to the lessee at the price of $39,500, which was the equivalent of $1,316 an acre. The contract was expressed to be "subject to the vendors granting to the purchaser a lease for five years" over the river flat area.

The lease of the river flat area, for which the contract for the sale of the top portion stipulated, bears date 7th April 1978. An earlier version in similar terms, to which it is not necessary to refer, had been executed on 1st February 1978 but was found to be technically defective for registration purposes. The lease has all the appearance of a professionally drawn document. By its terms the lessors leased the river flat area to the lessee for the period of five years from 17th February 1978 (which was also the date fixed for completion of the contract for sale) at a monthly rent of $220 payable in advance. Clause 1, sub-clauses (a) to (m), set out the lessee's covenants. Clause 2 contained a covenant on the part of the lessors for quiet enjoyment and to pay certain outgoings. Clause 3(a), upon which the case turns, is in the following form:-

> "3. AND IT IS HEREBY MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO as follows -
>
> (a) At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars ($1,000-00) per acre."

The remainder of clause 3 consists of (b) a power of re-entry, (c) a provision that if the lessee held over, he should do so as a monthly tenant upon the

terms of the lease, (d) a provision designed to protect the lessors against any alleged waiver, (e) a provision regarding the service of notices, (f) an interpretation clause principally concerned with successors and assigns of the parties, (g) exemption of the lessors from liability for power failures, and (h) the appointment of the lessors as attornies of the lessee for certain purposes. The remainder of the document consisted of two schedules, signatures of the parties, and date.

On 11th February 1982, which was about a year before the term of the lease expired, the lessee's solicitors wrote to the lessors a letter containing the following:-

> "Our client hereby formally exercises his option in paragraph 3(a) to purchase the land detailed in Schedule 1 of the lease at $1,000.00 an acre. We look forward to receiving your Contract of Sale within seven (7) days of the date hereof for our client's signature. By our calculations, the purchase price should be shown as $77,737.50."

The lessors' solicitors replied six days later denying that the lease gave the lessee anything except "the right to offer to purchase the land for $1,000.00 an acre and if indeed your letter of 11th February is such an offer then it is refused".

Proceedings had in fact been started by the lessee against the lessors towards the end of 1981 primarily to secure registration of the lease. These proceedings were now amended, the lessee contending that there was an oral agreement made in or about December 1977 that the lease should contain an option to purchase the river flat area for a consideration equal to $1,000.00 per acre, that the lease was intended to contain such agreement, that it was signed by the parties in the belief that it did in fact contain such an agreement but "it does not in fact contain or embody the said agreement". The lessee accordingly claimed rectification of the lease "so as to embody an option to purchase", a declaration that the lessee had exercised such option, and specific performance of the agreement as rectified.

The action came to trial before Shepherdson J. and lasted for three days. The issue was whether or not the plaintiff had made out a case for rectification. No question of construction was raised. Their Lordships, for reasons which will hereafter appear, express no view upon the issue of rectification as argued before the trial judge; however they observe that by a letter dated 19th December 1977 the lessors' solicitors, writing to the lessee's solicitors, said, "We understand from our clients'

instructions that your client will have the option to purchase certain other lands during the currency of a lease yet to be prepared and that such option shall be contained in the said lease", to which the lessee's solicitors replied two days later, "We shall also be pleased to receive the lease contained in [obviously a misprint for "containing"] the option to purchase in due course".

The learned trial judge came to the conclusion on the evidence before him that there was no mutual mistake, "and indeed I have reached the clear view that clause 3(a) represents what was the agreement or arrangement made between the parties ...".

On appeal the Honourable Mr. Justice Kelly considered that when proper regard was had to the documentary evidence, there was convincing proof in clear and precise terms that the lessee was intended to have an option to purchase. The Honourable Mr. Justice Kneipp and the Honourable Mr. Justice Carter concurred. It was accordingly ordered that clause 3(a) of the lease should be rectified by substituting for the words "... the lessee may offer to purchase ..." the words "... the lessee has the option to purchase ..." and an order for specific performance was made accordingly.

Approaching the matter in the first instance as a question of construction, their Lordships disregard the letters to which reference has been made, these being admissible only in evidence on the issue of rectification.

The function of a court of construction is to ascertain what the parties meant by the words which they have used. For this purpose the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further; see the speech of Lord Wensleydale in *Grey v. Pearson* (1857) 6 H.L.C. at page 106, repeated by Lord Blackburn in *Caledonian Railway Co. v. North British Railway Co.* (1881) 6 App. Cas. at page 131.

Viewed out of context the meaning of clause 3(a) as a pure matter of wording is indeed plain: the lessee is to have the right during the term or at the expiration thereof to offer to purchase the demised land for a specified consideration. Such a right is however utterly meaningless. The lessee does not need a sub-clause to tell him that he may make an offer to buy the demised land, nor does he need to be told at what price he may make such offer. Anyone in the world, be he the lessee or anyone else, is at

liberty to offer to buy the demised premises at any price he chooses to name. So clause 3(a), if read strictly in accordance with the words used, is totally bereft of any legal content and indeed totally devoid of any purpose whatever. Counsel for the lessors could suggest no purpose that would bear examination.

Is it then to be supposed that the parties included clause 3(a) in the lease with no legal or other purpose? The answer to that question must be "no". The sub-clause follows immediately upon the words "and it is hereby mutually agreed by and between the parties hereto as follows". It must therefore be supposed that the sub-clause was intended to be an agreement between the parties, that is to say, as intending to create a right of some sort on one side and an obligation of some sort on the other side. The sub-clause names a price. Care is taken to ensure that there is no mistake over the price which is therefore expressed both in words and in figures. The right given to the lessee is expressed to end on the expiration of the term of the lease; the lessee is therefore intended to have a right of some sort during the currency of the lease which he will no longer have after the lease has ended. All this makes sense in the context of an option to buy the demised premises but is meaningless in the context of an offer. Sub-clause (a) can be read without giving rise to an absurdity if it is construed as creating a right to purchase, and not as creating a meaningless power to make an offer to purchase which the lessee will have, at any price, as much after the lease has ended as before it ends. In the opinion of their Lordships this is clearly a case in which, to quote Lord Wensleydale, "the grammatical and ordinary sense of the words may be modified so as to avoid [an] absurdity...".

Their Lordships, having decided the question of construction in favour of the lessee, are not required to decide and indeed have heard no argument upon the issue of rectification. Nevertheless their Lordships do not wish to be thought as casting any doubt upon the convincing judgments of the Full Court on that question.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed for the reasons indicated. The time scale in the Full Court's order for specific performance will need to be changed, but perhaps that can be agreed between the parties. If not, the case should be restored to the Full Court for further consideration of the terms of their order of 21st December 1984 which was stayed pending this appeal by their order of 2nd January 1985.

Their Lordships were addressed on the question of costs, counsel for the lessors submitting that if the appeal failed on the issue of construction the fault lay with the lessee for not raising that issue in his pleadings and not arguing it before the Supreme Court. Their Lordships do not accede to this submission, being of the opinion that the proceedings have not been protracted by the lessee's failure to take the point at an earlier stage. The appellants will therefore pay the respondent's costs.