

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John H. Kilmer v. The British Columbia Orchard Lands, Limited, from the Court of Appeal of British Columbia (P.C. Appeal No. 77 of 1912); delivered the 26th February 1913.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.

LORD ATKINSON.

LORD MOULTON.

The question on this Appeal arises out of a claim by the Respondent Company—an unpaid vendor of a tract of undeveloped land in British Columbia—to enforce a condition of forfeiture contained in the agreement for sale. By the terms of the agreement the purchase-money was to be paid together with interest by specified instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void, all payments made under the agreement were to be absolutely forfeited to the vendor, and the vendor was to be at liberty to resell the property immediately. The Appellant Kilmer, who was the purchaser, and who had been let into possession upon payment of the first instalment on the

execution of the agreement, met the Company's claim by a counterclaim for specific performance, and the money then due was paid into Court to the credit of the action. The trial Judge dismissed the action. On the counterclaim he decided in favour of Kilmer with costs. Then there was an Appeal. The Court of Appeal, consisting of three Judges, by a majority allowed the Appeal and dismissed the counterclaim. Hence this Appeal.

The trial Judge rested his decision mainly on the view that the conduct of the Plaintiff Company was oppressive, harsh, and vindictive, and such as to lull the Defendant to sleep and justify him in assuming that he would, notwithstanding the terms of the contract, have some indulgence in making his payments.

Their Lordships agree to the result at which the learned trial Judge arrived, though not exactly upon the same grounds.

In the case of *In re Dagenham (Thames) Dock Company ex parte Hulse*, VIII. Ch., Ap. 1022, Mellish, L.J., expresses himself as follows:—
“ I have always understood that where there is
“ a stipulation that if on a certain day an
“ agreement remains either wholly or in any
“ part unperformed—in which case the real
“ damage may be either very large or very
“ trifling—there is to be a certain forfeiture
“ incurred, that stipulation is to be treated as
“ in the nature of a penalty.” That was a
case like this of forfeiture claimed under the
letter of the agreement met by an action for
specific performance. James, L.J., seems to
have been of the same opinion. “In my
“ opinion,” he says, “this is an extremely clear
“ case of a mere penalty for non-payment of
“ the purchase-money.” He ends by stating
that he agreed with the Master of the Rolls

that it was a penalty from which the Company were entitled to be relieved on payment of the residue of the purchase-money with interest. No doubt, the learned Lord Justice referred in detail to the special circumstances of the case, but it appears to their Lordships that that reference was made in answer to the arguments which had been addressed to the Court on behalf of the Appellants. As regards the ground of his decision the two Lords Justices seem to have been in perfect accord.

The question raised by the present Appeal appears to their Lordships to come within the decision in the case of the Dagenham Docks. The law in British Columbia on such a point must be the same as the law in this country.

The facts of the present case, so far as they are material to the decision, are as follows:—By an agreement dated the 14th of December 1909 the Respondent Company agreed to sell to the Appellant Kilmer, and Kilmer agreed to purchase certain lands therein described for the sum of \$75,000, payable in manner and on the days and times thereinafter mentioned, that was to say, \$2,000 on the execution of these presents, a further sum of \$5,000 on or before 14th of June 1910, a further sum of \$5,000 on or before 14th of December 1910, a further sum of \$60,000 in six equal semi-annual instalments of \$10,000 each, on or before the 14th days of June and December in the years 1911, 1912, and 1913, and the balance of \$3,000 on or before 14th of June 1914, together with interest on so much of the said purchase-moneys as may from time to time remain unpaid at the rate of 7 per cent. per annum, and as well after as before maturity at the same rate, payable with each said instalment of purchase-money as aforesaid. Then

followed an agreement on the part of Kilmer to pay the said sum of \$75,000, together with the interest thereon at the rate of 7 per cent. per annum, on the days and times and in the manner above-mentioned, and to pay and discharge all taxes, rates, and local improvement assessments wherewith the said land might be rated and charged, and to take all necessary steps to procure a supply of water for irrigating the said lands, and to defray all the expenses of managing the said lands as from the date of the agreement, and all costs of surveying and subdividing the said lands. Then came the following agreements and declarations, namely:—

The usual statutory covenants.

And the party of the first part further agrees with the party of the second part, his heirs and assigns to sign any plan or plans of sub-division of said lands or any part thereof prepared for or on behalf of the party of the second part, and in the event of a sale or sales by the said party of the second part, his heirs or assigns of all or any of the sub-divisions of the said lands for a cash consideration, the party of the first part on payment to it of seventy-five (75) per cent. of the price paid to the party of the second part therefor, or seventy-five dollars (\$75.00) per acre whichever shall be the greater sum will by a good and sufficient deed or deeds in fee simple grant and convey to the party of the second part, his heirs or assigns, such sub-division or sub-divisions so sold as aforesaid.

And also shall and will suffer and permit the said party of the second part, his heirs and assigns to occupy and enjoy the same until default be made in the payment of the said sums of money above mentioned, or the interest thereon or any part thereof on the days and times and in the manner above mentioned; subject nevertheless to impeachment for voluntary or permissive waste.

And it is expressly understood that time is to be considered the essence of this Agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and the said party of the first part shall be at liberty to re-sell the land and all payments made hereunder shall be absolutely forfeited to the party of the first part.

It is hereby expressly agreed that the said party of the first part is not to be bound to furnish any abstract of title, or produce any title deeds or other evidence not in its possession or control, or to give copies of any title deeds, but that the party of the second part is to search the title at his own expense, and if said party of the first part without any default on its part shall be unable to make a good title to the said land within ninety (90) days from the date hereof (if the party of the second part declines to take such title as it is able to make), then he may withdraw from this contract on the repayment to him of any sum of money paid on account of said purchase money and without being entitled to any compensation or expenses in connection therewith.

What happened was this:—The first instalment of \$2,000 was duly paid on the execution of the agreement. The second instalment of \$5,000 with interest as provided by the agreement was not paid on the day fixed for payment. The date of payment, which by the terms of the agreement was to be on or before the 14th of June 1910, was extended to the 7th of July 1910. On the 8th of July Kilmer wrote to the Secretary explaining the circumstances which prevented his making the payment on the 7th, but promising to pay without fail on Tuesday, the 12th. On the 9th the Secretary of the Company sent a telegram saying the deal was off, and on the 1st of August following the Respondent Company brought this action to enforce their rights according to the strict letter of the agreement. This was met by a counter-claim asking for specific performance, and the money which ought to have been paid on the 7th of July was paid into Court and remains in Court to the credit of the action.

The circumstances of this case seem to bring it entirely within the ruling of the Dagenham Dock case. It seems to be even a stronger case, for the penalty if enforced,

according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger.

Clause 1 is not without a bearing on this view of the case. The purchaser was to be at liberty to subdivide the property, the vendor was bound to assent on receiving three-fourths of the money for which the subdivisions might be sold. And yet the vendor, if his construction of the agreement be right, reserved the power of forfeiting the money paid in respect of these subdivisions, because it will be observed that the conveyance of the subdivisions was not to be made to the respective purchasers but to Kilmer and the party of the second part.

Other points were raised in the course of the argument, but their Lordships do not think it necessary to refer to them.

Their Lordships will therefore humbly advise his Majesty that the Appeal be allowed, and the judgment of the Court of Appeal be discharged with costs, and the judgment of the Judge at the trial restored. The Respondents must pay the costs of this Appeal.

In the Privy Council.

JOHN H. KILMER

o.

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