

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The South African Breweries, Limited, v. The Mayor and Councillors of the Borough of Durban, from the Supreme Court of the Colony of Natal ; delivered the 21st February 1912.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD SHAW.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD SHAW.]

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This is an Appeal from a judgment of the Supreme Court of the Colony of Natal, dated the 5th May 1910. The action was brought by the Respondents against the Appellants, who are a Limited Company engaged in the business of brewing in Natal and elsewhere, and the Respondents' claim is for 18 months' rent from the 20th December 1907, and for additional rent or rates for two years from the 31st July 1907, and certain smaller sums, it being admitted by the Appellants before their Lordships, as it was in the Courts below, that if the Appellants are liable the amounts sued for are correct.

The sums are payable in respect of certain lands contracted to be leased to the Appellants by the Respondents. These lands are situate in the Congella District of Durban, and the lease of them was advertised to take place on the 20th December 1902 by auction. The leases were

offered for 30 years, with a perpetual right of renewal. It is not denied that the Appellants purchased at the sale, and that the prices and conditions of sale are correctly stated and founded upon by the Respondents, unless the objections to the transaction made by the Appellants are sound.

It does not appear to be doubted that the prices offered by the Brewery Company and by other offerers for these plots of ground were high. The period of sale was during what is termed a boom occurring subsequent to the conclusion of the Boer war. The boom has since subsided, and the Appellant Company, after having paid rent and the rates contracted for for a period of about five years, have put forward a defence to this suit, and a claim in reconvention that the contract is not binding on the Breweries, or that the same may be set aside, and that all the monies hitherto paid under the transaction should be repaid.

With the exception of one trifling transaction, which need not be referred to, it may be said generally that the Breweries, having purchased at this sale, and having been in possession of the lots, did nothing in the way of building, but left the land bare and waste as they had found it. On the other hand, during the period of about five years referred to, they paid, as stated, the rent stipulated, and they also paid the rates stipulated in the conditions of sale.

At the Bar of this Board the main objections pleaded to the liability of the Breweries under the Agreement founded upon were, first, that the Agreement itself was *ultra vires* of the Corporation, by reason of the lease which was tendered having been granted without the consent of the Governor of the Colony. The second main objection is to the effect that the City of Durban has itself committed a breach of the

Agreement, and has so dealt with the property which was the subject of lease as to terminate that lease and all its (the City's) rights to rents or other prestations thereunder.

1. The catalogue of the Corporation Sale is founded upon by the Appellants in respect particularly of Condition 3, which is to the following effect:—"3. Buildings not less in value than the rental realised at sale capitalised at  $4\frac{1}{2}$  per cent. must be erected on each lot within twelve months from date of sale, to the satisfaction of the Town Council, or failing erection, lessees to pay rates in each and every succeeding year on a sum equivalent in the same way as though the buildings were erected, in addition to the value of the land."

It is admitted by both parties that, under the terms of Section 77 of the Law No. 19 of 1872 (the Municipal Corporations Act), the consent of the Lieutenant-Governor of the Colony was required to the conditions upon which the leases were put up for sale. The exact material words of the Section are as follows:—"The Council may, with the consent of the Lieutenant-Governor, lease any portion of the lands belonging to the Corporation for any period not exceeding fifty years, with or without the option of purchase, at such price and upon such conditions as may be approved by the Lieutenant-Governor, and with or without an undertaking to renew such lease, as provided in clauses succeeding." It may be, as the learned Judges of the Supreme Court think, that the object of requiring this consent is "to protect the interests of the burgesses by fixing a minimum price and stipulating for adequate conditions, so that the Corporation may be prevented from sacrificing its estate." This seems *prima facie* to be a reasonable view; but, on the other hand, whatever the object be,

the provisions laid down by the Statute as to consent must be complied with. It is to be observed, however, that the Statute nowhere prescribes that the Lieutenant-Governor's consent shall be in writing, and their Lordships think it proper to add that in a case where a bargain has been acted upon for a considerable term of years, and great change of circumstances has in the meantime occurred, any argument going to an attack upon the foundations of the bargain must be examined with the most careful scrutiny, and cannot be lightly entertained.

The argument in the present case is that Condition 3 above quoted is essentially two conditions, one providing for the erection of buildings and another for the non-erection of buildings. Their Lordships are disposed to hold that the latter of the alleged separate conditions is simply a proviso affecting the former and containing a stipulation that, in the event of the main condition as to buildings not being complied with, certain penal consequences shall follow. It does not appear to them that, when a body of conditions is presented to the Lieutenant-Governor, and when a general consent thereto is indicated, it is essential that the details of provisos relative to the conditions should be entered upon his consent. It has been already observed that the consent may be a verbal one. In this case, however, the consent was by letter. The letter is from the Minister of Lands and Works, dated the 19th December 1902 (the day before the sale) and supersigned by the Governor :—“ I do hereby . . . give my  
“ consent to the leasing by the Town Council  
“ of the Borough of Durban for a term of  
“ thirty years, with right to renew for twenty-one  
“ years, subject to the provisions of Section 2 of  
“ Law No. 27 of 1884, the following lands situate  
“ in the said borough, the exact position of which

“ is set forth in the tracing accompanying this consent. Buildings equal to the value of the lands capitalised at  $4\frac{1}{2}$  per cent. to be erected within twelve months.” It is urged that the proviso as to there being no buildings is not there contained, and therefore that the entire consent is unavailing, that the sale was made without legal consent, and that everything in it and under it is invalid. Their Lordships are not disposed so to construe the document. It is in general terms, it refers to the “leasing by the Town Council” and to buildings “within twelve months.” What is this leasing and this period? It is something which must in all probability have been explained by the previous correspondence, and there seems little doubt that the whole conditions, which were general, which appear to have been in no way secret, but on the contrary publicly and widely known, conditions for the sale on the following day, were sent when the consent was asked. On the 19th December the Secretary of Lands and Works wrote to the Mayor of Durban as follows:- “I have the honour to forward to your Worship His Excellency’s consent to the leasing of the lands situate in the Borough of Durban, and which are referred to in your Worship’s letter of the 12th ultimo to the Colonial Secretary.” The Appellants were asked for that letter, and it appears that its terms have not been obtained and that it has not been produced or referred to in the proceedings. A further question was put whether the conditions of sale were not before the Governor as a whole or were not in all probability actually forwarded to him. To these questions no reply could be given, and accordingly the argument is confined to the bare point that in the letter of consent the proviso alluded to is not specifically mentioned. The learned

Judges of the Supreme Court "have come to the  
 " conclusion that this is not a new condition such  
 " as would necessarily require the Governor's con-  
 " sent, but that its object and effect is rather to  
 " indicate what will be the consequence of neglect  
 " to comply with the building clause; in other  
 " words, it imposes a penalty in the event of  
 " such default." Their Lordships are of the  
 same opinion, and, after the delay already  
 alluded to, they are indisposed to give any  
 effect to what appears in substance to be hyper-  
 criticism.

2. A long and elaborate proof was taken  
 upon the allegations that by their actings the  
 City of Durban had committed a breach of the  
 agreement, which disentitled them to found  
 upon it. It does not appear to be disputed  
 that the action of the City was not an ultroneous  
 interference with, or interruption of, rights  
 granted by it to its lessee, but followed  
 upon arrangements made on public grounds  
 with the Colonial Government and upon Colonial  
 legislation. The Act No. 36 of 1904 is referred  
 to in this connection. That Act confirmed an  
 agreement between the Government and the  
 Corporation, the agreement being scheduled.  
 It makes elaborate provisions for the reclama-  
 tion of land at or about the Bay of Natal  
 or the foreshore thereof, "so that hence-  
 " forth the Government shall have and enjoy  
 " full, free, and absolute right of carrying out  
 " such works and operations in, over, and in  
 " connection with the said bay and the harbour  
 " of Natal as the Government may at any time  
 " think fit."

From the plans it appears that the stretches  
 of land referred to include those contained in  
 the lease, and there seems to be no doubt  
 whatever upon the evidence that the land so  
 leased was from its situation and levels subject

to flooding, and generally in such a condition that the raising of the level would be to the advantage, not only of the community in general, but of the owners. It does not further seem to be doubtful that these operations were undertaken, both upon the part of the Government and the Corporation, to use the language of the Agreement, "for the public good and benefit," and that from beginning to end they were conducted in the knowledge of the Breweries, who were lessees of the ground. It is not indeed surprising that the latter should have consented to the operations, for they had already intimated in writing that their plan of erecting a brewery upon the lands was abandoned, and they were having reclamation works of value executed upon their lands without any cost to themselves the lessees. In general language, it may be said that the level of the lands was raised 12 feet, and their Lordships find themselves in entire agreement with the Supreme Court when it observes:—  
 "Reviewing the evidence as a whole, we are  
 "inclined to the opinion that, so far as the lots  
 "in question are concerned, the reclamation  
 "works will prove an advantage rather than  
 "the reverse, once the drainage works con-  
 "templated by the Borough Engineer have been  
 "carried out."

Further, their Lordships are of opinion that it is not open to a lessee, who has known for years of operations which he alleges constitute a trespass, to make such operations subsequently the ground for an action for rescission of the contract of lease. He may have certain remedies in damages if the circumstances admit and do not bar his claim, but he has not a right to rescission of the contract.

It may, in conclusion, on this head be observed that the reclamation works were in

point of fact, and under the Statute, executed by the Government of Natal. It is no doubt true that this was done by agreement, and properly so, with the Corporation. But the Act complained of as grounding a rescission of the lease is the act, not of the lessor, but of the Government of the Colony, and Section 4 of the Statute of 1904 specifically provides that no person shall have any "right of action against the Corporation or the Government by way of damages or otherwise in respect of the non-exercise or abandonment of the cession to the Government of the rights and privileges referred to in the said clause, or by reason of the sale or transfer to the Government of the lands mentioned in the said Agreement, or of the exercise of any of the rights thereby conferred upon the Government." It would rather appear accordingly that any right of action was expressly excluded, and there appears to be no reason why this exclusion should not extend to the present Action. But,—whether that be so or not,—for the reasons already given, their Lordships are of opinion that the remedy of rescission and the grounds of breach of agreement by the City put forward by the Appellants are invalid.

There were two other grounds upon which the Appellants' case was rested, and these were said to be founded upon the Roman-Dutch Law. The first, as to their being no registration of the lease, and that the transaction was therefore void, was not argued; and the second,—that the contract was voidable because in the circumstances there was *laesio enormis* under the Roman-Dutch Law,—was not seriously entered upon. Their Lordships are not surprised that this judicious course was taken on both points.

The case of the Appellants, in which every point of criticism was seized, appears in substance simply to be the ordinary case of a



purchaser who has bought in a high market, the transaction being in all respects open and fair, and who endeavours to get rid of a bargain so made when he has changed his view as to the suitability of his purchase or finds himself in a sagging market.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

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In the Privy Council.

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THE SOUTH AFRICAN BREWERIES,  
LIMITED

v.

THE MAYOR AND COUNCILLORS OF  
THE BOROUGH OF DURBAN.

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DELIVERED BY LORD SHAW.

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