BETWEEN:

DIMENSIONAL INVESTMENTS LIMITED ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Toronto 1965 Nov. 22-26 Ottawa 1966 Feb 25

Crown—Constitutional law—Indian lands—Contract for sale of surrendered Indian lands—Default in payment of price—Provision for termination of contract and retention of money paid—Whether a penalty or pre-estimate of damages—Petition of right—Right to repayment of money in excess of value of land acquired under contract—Equitable jurisdiction to relieve against penalty—"Penalty", meaning of—Exchequer Court Act s. 48—Construction of—Whether limited to public works—Unconscionability of retaining both land and payments.

By a contract dated March 14th 1959 the Crown agreed to sell suppliant some 3,100 acres of Indian lands at Sarnia, Ontario, which had been surrendered for sale. The price was $6,521,000 (approx.) of which $323,000 (approx.) was payable to individual Indians and $750,000 to the Crown on execution of the contract, $600,000 to the Crown in instalments within the following year and the balance on March 15th 1961. Interest was payable on the unpaid balance at 5% per annum. The contract entitled suppliant to obtain grants of portions of the land on making additional pre-payments calculated on the area and location of the land to be granted but suppliant was not otherwise entitled to possession of any land until the price was paid in full. The contract provided that on failure by the purchaser to remedy any default in payment after 30 days' notice the vendor might terminate the contract and retain any moneys paid thereon as liquidated damages and not as a penalty, and time was declared to be of the essence. Suppliant paid $2,323,000 (approx.) under the contract, of which $973,000 (approx.) was attributable to land actually taken up, but suppliant failed to make the final payment of $4,300,000 (approx.) due on March 15th 1961 or to remedy the default within 30 days of notice, and the Crown terminated the agreement on April 17th 1961. Suppliant had paid the Crown $1,350,000 more than the amount required for the lands granted, but $375,000 of that sum was paid by the Crown to individual Indians as required by the surrender and the Crown retained only $975,000 at the time suppliant presented this petition of right for repayment of the $1,350,000. Suppliant was not in a position to make any further payments on the contract.

Held, the petition must be rejected.

(1) While the provision of the contract that on default the Crown might retain sums paid as liquidated damages and not as a penalty was a penal provision rather than a genuine pre-estimate of damages, s. 48 of the *Exchequer Court Act* required that it be construed as importing an assessment of damages by mutual consent, thereby excluding the equitable jurisdiction to relieve against penalties. The word "penalty" in s. 48 means a pecuniary amount. *In re Dagenham (Thames) Dock Co., Ex. parte Hulse* (1873) L.R., 8 Ch. App. 1022 per Mellish L.J. at

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p. 125; *Kilmer v. B.C. Orchard Lands Ltd.* [1913] A.C. 319 per Lord Moulton at p. 325 referred to; *Dussault et al v. The King* (1917) 16 Ex. C.R. 288, distinguished.

(2) Section 48 of the *Exchequer Court Act* is *intra vires* Parliament so far at least as it purports to apply to the legal effect of contracts entered into by or on behalf of the Crown in right of Canada (*Att'y Gen. Can v. Jackson* [1946] S.C.R. 489 per Kellock J. at p. 496), at any rate where the contracts relate to land reserved for Indians, a subject within the exclusive legislative competence of Parliament under s. 91(24) of the *B.N.A. Act.*

(3) Having regard to its plain and unambiguous language s. 48 of the *Exchequer Court Act* cannot be construed as restricted to contracts for the construction of public works and is broad enough to include the contract under review.

Semble, if the equitable jurisdiction to relieve against penalties were not excluded by s. 48 of the *Exchequer Court Act,* suppliant would be entitled to the relief sought on proper terms, which would include an opportunity for the Crown to set off any loss sustained from suppliant's failure to make payments when due and limit the amount to be repaid suppliant in any event to the $975,000 in the Crown's hands at the time the petition of right was presented.

There is equitable jurisdiction to grant relief if it would be unconscionable for the vendor to retain both the land and the money paid therefor, notwithstanding that there was no sharp practice by the vendor and although the purchaser is unable to complete the contract. *Stockloser v. Johnson* [1954] 1 Q.B. 476; *Walsh v. Willaughan* (1918) 42 D.L.R. 581, discussed; *Galbraith v. Mitchenall Estates Ltd.* [1964] 3 W.L.R. 454; *Campbell Discount v. Bridge* [1961] 1 Q.B. 445; *Steedman v. Drinkle* [1916] 1 A.C. 275; *Snell v. Brickles* (1914) 49 S.C.R. 260 per Duff J. at p. 371; *Boericke v. Sinclair* [1929] 1 D.L.R. 561, referred to.

PETITION OF RIGHT.

R. N. Starr, Q.C. for suppliant.

N. A. Chalmers and *A. M. Garneau* for respondent.

THURLOW J: This is a petition of right claiming the return of moneys paid by the suppliant under the terms of a contract for the sale to it by the Crown, represented by the Minister of Citizenship and Immigration, of a tract of some 3,100 acres of land at Sarnia, Ontario, being part of an Indian reserve surrendered to the Crown by the Indian band for the purpose of such sale. The suppliant having failed to make the final payment when it fell due the Crown terminated the contract pursuant to one of its provisions and in these proceedings takes the position that the suppliant's rights in the land (other than that conveyed pursuant to the contract) are at an end and that the Crown is entitled to retain the moneys paid by the suppliant on account of the purchase price. That the contract in terms so

provides is not in doubt but the suppliant asserts that it is unconscionable for the Crown to retain the moneys and that relief from their forfeiture should be granted. The petition also includes several claims for damages for alleged breaches of the contract by the Crown but these were abandoned in the course of the trial.

The contract, which was dated March 14th, 1959, called for payment of a total purchase price of $6,521,946. Of this $323,763.63 was payable to individual Indians on execution of the agreement. The remainder was payable to the Receiver General of Canada over a two year period. Of the amount payable to the Receiver General $750,000 was to be paid on execution, a further $500,000 was to be paid in ten monthly instalments of $50,000 each, a further $100,000 in four quarterly instalments of $25,000 each, all within the space of one year or thereabouts after the execution of the contract and the balance on or before March 15th, 1961. In addition, the suppliant agreed to pay interest at the rate of 5 per cent. per annum on the unpaid balance "both before and after default and both before and after maturity" half yearly on the 15th days of March and September in each year but was entitled to pay any further amounts or the whole balance owing at any time without notice or bonus. Under further provisions the suppliant was to be entitled to a grant of the lands sold only on payment in full of the purchase price but in the meantime, when not in default, was entitled to obtain grants of portions of the land on making certain additional prepayments calculated on the area and location of the land to be conveyed. The suppliant was, however, not entitled to possession of any of the lands agreed to be sold until the same were granted or until the suppliant became entitled to a grant thereof and then only after sixty days' notice to the individual Indian occupying the same or in the case of land upon which an Indian was residing only after six months' notice. Paragraph 10 read as follows:

The Purchaser convenants and agrees that if default be made in payment of the said purchase price and interest, and any part thereof, upon the days and times herein before provided, or if default be made in the performance or observation of any of the covenants, agreements and stipulations to be performed and observed by the Purchaser, the Minister shall be entitled to give the Purchaser thirty days' notice in writing requiring it to remedy such default, and upon such notice having been given and such default not having been remedied, this agreement shall, at

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the option of the Minister, be terminated and all rights and interest hereby created or then existing in favour of the Purchaser or derived by it under this agreement with respect to the lands not already granted to the Purchaser shall cease and determine, and the Minister shall be entitled to retain any moneys paid under this agreement as liquidated damages and not as a penalty.

By paragraph 13 it was agreed that time should be of the essence of the agreement and that no extension of time for any payment by the suppliant or for rectification of any breach should operate as a waiver of the provision as to time being of the essence with respect to any other payment or rectification or extension of time except as specifically granted in writing by the Minister.

The suppliant paid the sums payable on execution of the contract and, though it initially defaulted in paying several of the monthly and quarterly instalments of purchase price and several interest payments when due, it succeeded in making each of such payments in full prior to the termination of the thirty-day period provided for in paragraph 10 and on March 14th, 1961 was not in default. In the meantime following the making of the agreement the suppliant had paid for and obtained grants to its nominees of certain portions of the land and on March 15th, 1961 the balance of the total purchase price remaining unpaid stood at $4,198,549.15. That amount together with $107,408.28 for interest fell due on March 15th, 1961 and was not paid. On that or the following day the Minister pursuant to paragraph 10 gave the suppliant thirty days' notice to remedy the default and on April 17th, 1961, the money not having been paid, the Minister terminated the agreement.

From its inception the principal promoter of the suppliant company had been a Mr. S. Ray, a man of experience in the real estate business. He had invested a large part of his means in the venture but had become incapacitated in February 1960 by an illness from which he subsequently died. From the time when he took ill his son, Howard Ray, a pharmacist, assumed and thereafter conducted the affairs of the suppliant company. Having committed the remainder of his father's means in making an interest payment of more than $100,000 Howard Ray endeavoured to interest persons of means in backing the venture and as the time for payment of the final instalment of the price approached he succeeded in interesting at least two financially capable

prospects to the extent given the time to look thoroughly into the situation either might have been prepared to put up funds in the vicinity of $1,000,000 to be paid on account on the granting of further time in the order of three years to pay the balance. Overtures were therefore made to the Minister with a view to obtaining an extension of the time for payment but came to nought.

The total amount which had been paid by the suppliant on account of the purchase price was $2,323,396.85 which amount, it is agreed was $1,350,000 in excess of what was required under the terms of the contract to pay for land granted to the suppliant or its nominees. Of the $1,350,000, however, $375,000 had been paid out to individual members of the Indian band in accordance with one of the provisions of the surrender requiring the Crown to disburse at once to members of the band one-half of certain moneys received in respect of the band interest in the land. The surrender itself is referred to in all three recitals of the contract for the sale of the land and distribution by the Crown in accordance with the terms of the surrender of moneys paid by the suppliant must, I think, be treated as having been within the contemplation of the parties to the contract. At the time of the commencement of these proceedings, however, at least $975,000 of the amount paid by the suppliant had not been disbursed but remained in the hands of the Crown as trustee for the Indian band.

The suppliant's case is that the provision of paragraph 10, that on termination of the contract the Crown might retain any moneys paid under the agreement "as liquidated damages and not as a penalty", was not a genuine pre-estimate or assessment by the parties of damage likely to result from breach but was in the nature of a penalty, that in the circumstances of the case it is unconscionable for the Crown to terminate the suppliant's rights in the land and retain the $1,350,000 as well, that the evidence shows that the Crown, having retaken the land, suffered no damage as a result of the suppliant's failure to pay the balance of the purchase money and that on the equitable principles expounded by the majority of the Court of Appeal in *Stockloser v. Johnson*[1] the $1,350,000 should be repaid.

[1] [1954] 1 Q.B. 476.

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The Crown answers this case at three points. It submits, first, that on ordinary principles of interpretation the provision in question was not of a penal nature but a genuine pre-estimate of damage, secondly, that in any event s. 48 of the *Exchequer Court Act*[1] requires that the provision be so interpreted and that when so interpreted the suppliant must fail, and, thirdly, that even on the principles of the *Stockloser* case upon which the suppliant relies, it is not unconscionable in the circumstances of this case for the Crown to forfeit the suppliant's rights in the land and to retain the money in question as well and that no case for equitable relief has been established. Several further points of a more technical nature were also raised in defence but though they were not abandoned neither were they pressed and in view of the conclusion I have reached it is not necessary to state or deal with them.

The first question to be determined is accordingly whether the provision of clause 10 of the contract authorizing the Crown to retain the money paid on account of the purchase price should be interpreted as being a genuine pre-estimate by the parties of the damages expected to result from breach of the contract by the suppliant. It was conceded that the suppliant must fail if the provision is to be interpreted as a genuine pre-estimate of such damage but the question is not resolved merely by referring to the assertion to that effect in the provision itself and cases are not hard to find wherein sums have been held to be liquidated damages though called penalties in the contracts and *vice versa*.[2] Here despite the fact that the contract provides for the retention of the money "as liquidated damages and not as a penalty" in my opinion the whole of paragraph 10 is a penal provision and the provision for retention of the money is a penalty in the sense in which that term is commonly used to refer to a pecuniary amount to be paid or forfeited as a punishment in a particular situation.

The principle which, in my view, leads to this conclusion was stated by Mellish L.J. in *In re Dagenham (Thames)*

[1] R.S.C. 1952, c. 98.

[2] *Vide Clydebank Engineering and Shipbuilding Co. Ltd. v. Castaneda* [1905] A.C. 6 and *Kemble v. Farren* (1829) 6 Bing. 141; 130 E.R. 1234.

Dock Company, Ex. Parte Hulse[1], and was later approved and followed by the Privy Council in *Kilmer v. British Columbia Orchard Lands Limited*[2] and *Steedman v. Drinkle*[3]. In the *Dagenham* case Mellish L.J. put the point as follows at page 1025:

> 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. Here, when you look at the last agreement, it provides that if the whole £2000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase-money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve.

Here paragraph 10 provides for the same consequences if default is made "In payment of the purchase price and interest, or any part thereof" upon the days and times thereinbefore provided—in which case the real damage might be very large or very trifling—and this appears to me to be precisely the kind of provision to which Mellish L.J. was referring. Moreover, the total money from time to time paid on account was to increase by payments during the first year and in this respect the case resembles the *Kilmer*[4] case where Lord Moulton said at page 325:

> The circumstances of this case seem to bring it entirely within the ruling of the *Dagenham Dock Case* L.R. 8 Ch. 1022. 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.

Paragraph 10 therefore appears to me to be clearly of a penal nature and to constitute a mere security for the performance of the contract.

It was submitted on behalf of the Crown that the practical danger of loss to the Crown inherent in the making of this contract lay in the chance that the purchaser might abandon the contract after paying for and obtaining conveyances of the best of the land during the two year period leaving the Crown with unsaleable and perhaps landlocked portions, that this was the possibility against which paragraph 10 was intended to provide and that since the land

[1] (1873) L.R., 8 Ch. App. 1022.
[2] [1913] A.C. 319.
[3] [1916] 1 A.C. 275.
[4] [1913] A.C. 319.

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would have been tied up during the two year period and might in the meantime have fallen in value there might be great difficulty experienced in making an accurate assessment of the Crown's loss in the event of the purchaser abandoning the contract and that in these circumstances the provisions for retention of the money by the Crown was in fact a genuine pre-estimate of anticipated damage. While this submission is not unattractive I do not think it can prevail. The suggested inference as to the purpose of the paragraph is, I think, considerably weakened by the fact that the contract itself provides different prices to be paid by the purchaser to obtain conveyances of different parts of the land. But apart from this the fact is that the provisions of paragraph 10 apply in many possible situations other than that suggested and the fallacy in the submission becomes I think apparent when one considers that the same amount would be retained as "liquidated damages" even if what had been taken up had been the least saleable portions of the land. Accordingly I reject this submission and but for s. 48 of the *Exchequer Court Act* I would hold that paragraph 10 was a penal provision.

I turn therefore to the Crown's alternative submission that s. 48 of the *Exchequer Court Act* applies and requires the Court to interpret paragraph 10 as importing "an assessment by mutual consent of the damages caused by" the suppliant's default even though on ordinary principles of construction the paragraph might be interpreted otherwise. Since the construction of s. 48 depends on the preceding section I quote it as well.

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
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> (a) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, or,
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> (b) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.
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> 48. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in the contract, shall be considered as commina-

tory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

Before considering the question of the applicability of s. 48 it will be convenient to deal with a submission put forward on behalf of the suppliant that the provision interferes with property and civil rights in the province and is *ultra vires*. Sections 47 and 48 have been in the *Exchequer Court Act* with but immaterial alteration since their enactment by c. 16 of S. of C. 1887. By s. 15 of the same statute the jurisdiction of this Court was redefined so as to make it clear that the Court had jurisdiction in respect of claims arising upon contracts entered into by or on behalf of the Crown in right of Canada, and it is worthy of note that in *The King v. Paradis & Farley*[1] Taschereau J. (as he then was) in considering s. 47 first referred to the provision by which the jurisdiction in respect of claims on contracts was conferred. As the subject matter with which s. 47 deals is what this Court may do "in adjudicating upon any claim arising out of any contract in writing" it seems clear that what is being referred to is the kind of contract upon which claims may arise in respect to which the jurisdiction of the Court may be exercisable. From this it appears to me that s. 47 refers, at least for the most part, if not exclusively, to claims arising on contracts entered into by or on behalf of the Crown in right of Canada. Since the contracts to which s. 48 applies are defined by the words "any such contract" the same comment appears to me to apply to the scope of that section as well. Though I am not aware of any case in which the precise point has been determined, I am of the opinion that it lies within the legislative competence of Parliament with respect to "matters not coming within the classes of subjects by this Act[2] assigned exclusively to the legislatures of the Provinces" to prescribe the legal effect of contracts to be entered into by or on behalf of the Crown in right of Canada, whether such effect is to be decided in this or any other court,[3] and to the extent that s. 48 purports to apply to such contracts (which is sufficient for the present case) if not to any further extent, it is, I think, *intra*

[1] [1942] S.C.R. 10 at p. 18.

[2] *B.N.A. Act*, 1867, s. 91.

[3] See Kellock J. in *Attorney General of Canada v. Jackson* [1946] S.C.R. 489 at 496.

See also the analysis of the subject of the rights and responsibilities of the Crown in *The Queen v. Murray et al.*, [1965] 2 Ex. C.R. 663.

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vires. Moreover even if, contrary to this view, the prescribing of the legal effect of contracts to be entered into by or on behalf of the Crown in right of Canada is not in all cases within the legislative competence of Parliament, the prescribing of the legal effect of such contracts where the same relate to "lands reserved for the Indians" seems to me to fall within the legislative competence of Parliament under s. 91 (24) of the *British North America Act*, 1867 and this alone appears to me to furnish a sufficient basis to support the provision in its application to the present case. I therefore reject the suppliant's submission.

To what contracts of the Crown then do these sections apply? On this question counsel for the suppliant made two submissions, first that s. 48 must be read along with ss. 46, 47 and 49 and that when so read it becomes clear that s. 48 is intended to apply only to the types of contracts for the construction of public works referred to in s. 47, and secondly that since s. 48, when applicable, abrogates what would otherwise be the rights of parties to contracts it should be construed strictly and applied only to contracts falling clearly within its terms, that when read strictly the section is ambiguous and that it should not be allowed to apply to a contract of the kind here in question which is not clearly one of the kind contemplated.

I am unable to accept either of these submissions. Sections 46 and 49 do not deal with claims arising upon contracts but with principles to be applied by the court in determining compensation for injury to property or for property taken for or injuriously affected by a public work. While their proximity to ss. 47 and 48 as well as their inclusion in the group of sections headed *"Rules for Adjudicating Upon Claims"* may suggest that the draftsman's attention may have been principally occupied with situations in which public works would be involved I do not think that anything in the heading or in ss. 46 and 49 can be allowed to restrict the plain meaning of the language used in ss. 47 and 48. There does not appear to me to be any limitation by reference to subject matter on the kinds of contracts to which s. 47 refers and indeed there seems to be no limitation of the meaning of the word "contract" in the section beyond (1) that implicit in the reference to adjudication by the court which, as I have indicated, appears to me to limit the kind of contracts referred to to

those upon which claims in respect of which this court has jurisdiction may arise and (2) that found in the words "in writing". This, I think, is the scope of the kinds of contracts referred to in the first clause of s. 47, which is a positive provision, and as I read the section nothing in the two specific prohibitory clauses which follow serves to narrow or restrict that scope. It is contracts of the same kind to which the expression "any such contract" in s. 48 in my opinion refers and while I do not quarrel with the submission that the section should be applied only to cases falling clearly within the meaning of the expressions used I think that the expression used in s. 48 is not ambiguous and is broad enough to include the contract in question in these proceedings.

A further point as to the application of s. 48 is whether the provision in paragraph 10 of the contract authorizing the Crown to retain the money was one stipulating for a "penalty" within the meaning of that term in s. 48. The meaning of the word "penalty", when used as a noun, can vary depending on the context in which it is found. In s. 48 the context by referring to a "drawback" and to "an assessment by mutual consent of damages" suggests to me that "penalty" is used in the sense of a pecuniary amount rather than in the broader sense in which it may refer to other types of punishment as well. Subject to this, however, in its context the expression "in which a drawback or penalty is stipulated for" appears to me to be concerned with the substance or character of what is stipulated for rather than with its form or the manner of its enforcement and to contain no limitation by reference to the form or the manner of enforcement of the stipulation.

In the present case what paragraph 10 provided was that upon the suppliant's default continuing beyond the thirty-day period, the Crown might terminate the suppliant's rights in the land and retain the money paid on account as well. But for the latter provision, on termination of the contract, a right to the return of the money paid on account would have arisen in favour of the suppliant[1] and the provision for the abortion of this right appears to me to

[1] *Mayson v. Cluett* [1924] AC 980, *Dies v British and International Arms Co* [1939] 1 KB 724, *Cronholm v Cole* [1928] 3 DLR 321, *York v Krause* [1930] SCR 376

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have in itself all the attributes of and to be a pecuniary penalty.

The only reported case on the interpretation of s. 48 of which I am aware is *Dussault et al v. The King*[1] where Audette J. after posing a series of questions with respect to its application seems to have held, though not without hesitation, that the section would not apply where no damage arises from the breach for which the penalty is stipulated. In the Supreme Court,[2] however, the judgment turned on other provisions of the contract to which s. 48 did not apply.

As what s. 48 prescribes is a rule of construction, which it seems to me must be applicable at and from the time when the contract is made, I have some difficulty in understanding how that construction can be affected by a subsequent event, that is to say, that the Crown happens to suffer no damage from the breach, but in any case I do not think the *Dussault* case applies in the present instance since I do not think it has been shown that the Crown suffered no damage to which that expression in the section could apply. There were answers given on discovery as to prospective and actual damage which were read at the trial and some answers were given as well in the course of the evidence of David Vogt but all that appears to me to have been established by them is that on the assumption that the Crown would be in a position to terminate the suppliant's rights in the land and keep the money paid on account of the price as well no loss was expected to result or did result from breach or default on the part of the suppliant and that there may or may not have been damage through decline in value of the land during the two year period when the contract was in force. In the *Dussault* case the fact that the Crown had suffered no loss from the suppliant's breach of contract clearly appeared. The situation in the present case is thus distinguishable on the facts from that considered by Audette J. and I am unable to see any other means of escape for the suppliant from s. 48. As the effect of that section is that the provision for retention by the Crown of the money must not be considered as punitive but on the contrary must be construed as importing an assessment by mutual

[1] (1917) 16 Ex. C.R. 228 at 236 *et seq.*
[2] (1917) 58 S.C.R. 1.

consent of the damage caused by the breach, there appears to me to be no basis on which the suppliant can be afforded any of the relief claimed.

As this conclusion disposes of the case it is not strictly necessary to express any view on the complex and rather contentious question whether the suppliant would be entitled to relief even if s. 48 did not apply but since this judgment is based on s. 48 alone it may be desirable that I should express my view briefly in case it should be of some importance in the event of an appeal.

On this question it should first be noted that what the suppliant seeks by its petition of right is neither specific performance of the contract nor specific performance and, failing that, repayment of moneys paid on account. The suppliant is not in a position to pay the balance of the purchase price and interest, or to offer to perform the contract, so as to put the court in a position to decree that the money heretofore paid ought to be returned unless the Crown elects to waive the provisions of paragraphs 10 and 11 and to complete its part of the contract on the usual terms as to payment of the balance of the price and interest. In the course of an examination for discovery held in September 1963 counsel for the suppliant stated that if given two years to do so the suppliant would raise the necessary funds and complete payment for the property but notwithstanding the size of the amount required I do not think an offer to pay requiring so long an extension can be regarded as a reasonable offer to carry out a contract which stipulated that time was to be of the essence and that payment in full should be made in two years ending in March 1961.

There is a body of judicial opinion which holds that in the absence of fraud, sharp practice or other unconscionable conduct on the part of a vendor equitable jurisdiction to order repayment of purchase money paid on account in a situation of this kind, that is to say, where the purchaser has defaulted and the contract provides for retention of the money by the vendor on termination by him of the contract, depends on the readiness and willingness of the purchaser to complete the contract and can be exercised only as an alternative remedy where, though the purchaser is ready and willing to complete the contract, the court is not

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in a position to give the defaulting purchaser further time and to decree specific performance.

This appears to have been the opinion of Farwell J. in *Mussen v. Van Deimen's Land Co.*[1] and of Romer L.J. in *Stockloser v. Johnson*[2] and the basis of the judgment of the Appellate Division of the Supreme Court of Ontario in *Walsh v. Willaughan*[3].

Thus in *Stockloser v. Johnson* Romer L.J. said at p. 501:

> There is, in my judgment, nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting upon his contractual right to retain instalments of purchase-money already paid In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so, and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract
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> My brother Denning in his judgment has referred to the hypothetical case which was suggested during the argument of a purchaser who buys a pearl necklace on terms that the purchase price is to be payable by instalments and that the vendor is to be entitled to get the necklace back and retain all previous payments if the purchaser makes default in the punctual payment of any instalment, even the final one It would certainly seem hard that the purchaser should lose both the necklace and all previous instalments owing to his inability to pay the last one But that is the bargain into which the purchaser freely entered and the risk which he voluntarily accepted The court would doubtless, as I have already indicated, give him further time to find the money if he could establish some probability of his being able to do so, but I do not know why it should interfere further, nor would it be easy to determine at what point in his failure to pay the agreed instalments the suggested equity would arise

This opinion was also adopted and followed in *Galbraith v. Mitchenall Estates Limited*[4], where Sachs J. preferred it to the opinions of Somervell and Denning L.JJ. in the *Stockloser* case and drew support for his preference from the opinions of several members of the Court of Appeal in *Campbell Discount v. Bridge*[5].

[1] [1938] Ch 253
[2] [1954] 1 Q B 476
[3] (1918) 42 D L R 581
[4] (1964) 3 W L R 454
[5] [1961] 1 Q B 445 Reversed on another point [1962] A C 600

In *Walsh v. Willaughan*[1] the rule was stated by Mulock C.J. Ex., who spoke for the majority of the Court, as follows at page 585:

It is not the law that in all cases, upon the rescission of a contract by the vendor, the purchaser is entitled to a return of moneys paid on account of the contract The conduct of a purchaser, as in this case, may fully justify rescission by the vendor and entitle to retain moneys paid on account of the contract

Further, the conduct of the parties, after rescission, may be considered in determining whether a purchaser is entitled to relief from forfeiture of payments made on account In support of his proposition Mr Beck relies on *Boyd v Richards*, 29 O L R 119, 13 D L R 865, and *Steedman v Drinkle*, [1916] 1 A C 275, 25 D L R 420 *Those cases do not decide that, under all circumstances, where a vendor rescinds a contract for sale of land, the purchaser is entitled to return of moneys paid on account of the purchase-money, but merely that, where a purchaser is ready and willing to carry out his contract and seeks specific performance, and where the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money, then relief from forfeiture may properly be given*

Riddell J. also said at page 590:

Very many cases were cited to us not unlike the present in some particulars, in which such a provision as we have in this case, has been called a penalty and has been relieved against at the instance of a purchaser, but it has been relieved against in order to allow the purchaser who was willing and able to carry out his contract (except in the matter of time) to do so on proper terms It is unnecessary to enumerate these cases—the most important and authoritative is *Kilmer v British Columbia Orchard Lands Limited*, [1913] A C 319, 10 D L R 172 I add to those cited in the argument only *In re Dagenham (Thames) Dock Co* [1873], L R 8 Ch 1022

The part payments might be recovered back (on proper terms) if specific performance were refused the latest case of this kind in the Judicial Committee is *Steedman v Drinkle*, [1916] 1 A C 275, 25 D L R 420, and that this is the law is indicated in *Brickles v Snell*, [1916] 2 A C 599, at p 604, 30 D L R 31 The case of *Labelle v O'Connor*, 15 O L R 519, is to the same effect

But there is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation In the language of Kekewich J, "that would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely, taken advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract." *Soper v Arnold* [1887], 35 Ch D 384, at p 390

If the scope of equitable jurisdiction, in the absence of fraud, sharp practice or unconscionable conduct on the part of the vendor, is so limited, it is plain that on the facts

[1] (1918) 42 D L R 581.

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which I have summarized the suppliant is not in a position to obtain the relief claimed for the suppliant does not ask for specific performance and is not in a position to offer to complete the purchase. An attempt was made to establish sharp practice on the part of officials of the department in three incidents occurring while the contract was in effect and in one further incident occurring during the course of these proceedings but I am of the opinion that the incidents relied on do not constitute sharp practice in any relevant sense and that no equity of such a nature has been established.

On the other hand if the jurisdiction of equity, as exercised in *Steedman v. Drinkle*[1], to decree return of purchase money notwithstanding the provision of the contract for its retention by the vendor, is not a mere adjunct of procedure for specific performance to be called into operation only when the vendor is insisting on his contractual right to keep the property and the money too, despite the purchaser's readiness to complete, but is part of the jurisdiction of a court of equity to relieve from penalties and forfeitures, (and this was the legal basis on which the arguments of counsel were mainly developed), other principles apply and the readiness and willingness of the purchaser to complete, though important, is not critical and becomes but a circumstance, to be taken into account as part of the whole situation in determining whether the case is one in which relief should be granted. This was the view held by Somervell and Denning L.JJ. in *Stockloser v. Johnson*[2].

Somervell L.J. put the matter as follows at page 484 to page 487:

> Various arguments were developed before us. I am clear that the plaintiff could only recover if he could satisfy the court that it was unconscionable in the defendant to retain the money. I agree with the judge that he fails to do this and the analysis which I have made of the instalments and the sums which might have been anticipated reinforces the conclusion. Where instalments are to be paid over a period in which the plaintiff has the use or the benefit of the subject-matter the burden of showing unconscionability is not a light one. The judge, I think, proceeded on the basis that it could not be discharged unless the plaintiff was ready and able to complete the purchase, although the defendant having rescinded, no decree for specific performance could be made.

[1] [1916] 1 A.C. 275.
See also *Boericke v. Sinclair* [1929] 1 D.L.R. 561.
[2] [1954] 1 Q.B. 476.

I have had the advantage of reading the judgments which will be delivered by my brethren My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. *I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think that they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.*

Somervell L.J. then proceeded to discuss *In re Dagenham (Thames) Dock Co.*[1], *Kemble v. Farren*[2] and *Steedman v. Drinkle*[3] in the course of which he said at page 486:

As it seems to me, James L.J. (in the *Dagenham* case) is assimilating the retention of instalments, if the result would be penal in its nature, to a provision for the payment of a penalty sum on a breach or breaches. It is a question of the effect of the clause and not of the defendant's conduct.

If that is right, it would seem wrong and, as I think, illogical to hold that no relief could be given where the plaintiff in default was unable to complete. If the Lords Justices had had any such limited principle in mind they would, I think, have worded their judgments differently. I think that this view is supported by *Steedman v. Drinkle* [1916] 1 A.C. 275, although I agree that sentences in that case could be relied on as supporting the narrower view. There was a provision for forfeiture of instalments, time was of the essence and the buyer defaulted. The buyer sought a decree of specific performance, but as time was of the essence and the defendant was unwilling it was held that this claim failed. The Judicial Committee, however, were of the opinion "that the stipulation in question was one for a penalty against which relief should be given on proper terms." The terms were not settled, and the plaintiff was left to apply to the court of first instance. That, therefore, was a case in which the readiness and willingness could not lead to a decree for specific performance, but if the narrower argument is right, readiness and willingness is a condition precedent to any relief being given. This, as I have already said, seems illogical to my mind, if these forfeiture clauses are, as was said in the *Dagenham* case L.R. 8 Ch. 1022, in the same general category as penalty clauses. I am not, of course, suggesting that the plaintiff's readiness in *Steedman's* case [1916] 1 A.C. 275 was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation it would have done so.

Denning L.J. summed up the position thus at page 489:

It seems to me that the cases show the law to be this: (1) *When there is no forfeiture clause.* If money is handed over in part payment of the

[1] (1874) L.R. 8 Ch. 1022.
[2] (1829) 6 Bing. 141; 130 E.R. 1234.
[3] [1916] 1 A.C. 275.

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purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages see *Palmer v Temple* (1839) 9 Ad & El 508, *Mayson v Clouet* [1924] A C 980, 40 T L R 678; *Dies v British and International Co* [1939] 1 K B 724, Williams on Vendor and purchaser, 4th ed, p 1006 (2) *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),* then the buyer who is in default cannot recover the money at law at all He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit That is, I think, shown clearly by the decision of the Privy Council in *Steedman v Drinkle* [1916] 1 A C 275, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner

> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L J has said about it, differing herein from the view of Romer L J Two things are necessary first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money

If it were necessary for the purposes of this case to reach a concluded opinion on the extent of equity jurisdiction in matters of this kind I would adhere to the opinion of Somervell L.J. It seems to me that his view follows logically from what Duff J. (as he then was) referred to in *Snell v. Brickles*[1] as the traditional view of Courts of Equity that the substantial interest of the vendor in a contract of sale lies in his right to demand and enforce payment of the purchase price. In this view the amount of the puchase price, as of the day when it is due, is the measure of the vendor's interest in the contract and his rights under a provision such as paragraph 10 are neither in addition nor alternative to that interest but are ancillary to and a means of realizing it. It seems to me to follow from this that relief from the strict terms of a penal provision should be obtainable to the extent that the provision that he may retake the land and retain the money paid on account of purchase price as well gives the vendor more than full compensation for the purchase money, interest and any loss or expense to which he may have been put. This, to my mind, is what the

[1] (1914) 49 S C R 260 at 371 See also Jessell, M R. in *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 and Kay L J in *Law v Local Board of Redditch* [1892] 1 Q B 127 at 133

order "for sale and payment, as in the ordinary case of vendor's lien" offered by the Master of the Rolls in the *Dagenham* case was intended and calculated to accomplish. Had the offer been accepted any surplus proceeds of the sale over the amount required to pay to the vendor the balance of the purchase price, interest and costs would plainly have been payable to the purchaser.

The *Dagenham* case was one in which the purchaser had had possession of the property under the agreement for several years but one-half of the purchase price had been paid, and it is, therefore, not difficult to see a basis upon which the court could regard it as unconscionable, in the sense in which the word is I think used by Somervell L.J., for the vendor to retake the land and keep the money as well. The same result, however, would not necessarily be appropriate in a case where a very small portion of the purchase price has been paid unless other circumstances are present which make retention of the money by the vendor as well as the land unconscionable.

Turning to the situation as I see it in the present case, as already mentioned, a number of incidents were put forward as constituting sharp practices on the part of Crown representatives and as being sufficient to bring the suppliant's case for relief even within the exception reserved by Romer L.J. but I am not persuaded that there is anything in any of the incidents which afford an equity in favour of the suppliant or advances its case. Moreover, it seems clear that no one acting on behalf of the Crown at any time gave the suppliant any reason to think that strict performance of the contract would not be insisted upon or that the time for making the final or any other payment would be extended.

There is also the fact, which militates, if at all, against the suppliant that the suppliant defaulted in paying the final instalment and interest when due and that through inability to raise the funds, rather than through any desire to abandon the purchase, it has never been in a position to offer to make the payment. With this there is I think to be weighed the fact that there has never been any indication of readiness on the part of the Crown to waive the strict terms of the contract on being paid the balance of the purchase price and interest and the further fact that the Crown is no longer in a position to complete even if the

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suppliant were in a position to offer the necessary payment since in the meantime a small portion of the land has been sold. To my mind the latter facts tend to neutralize the effect of the fact that the suppliant has not come forward with the necessary money since they tend to make the position somewhat similar to that in which the purchaser offers the money but the vendor relying on the contract will not take it. In the cases, such as *Steedman v. Drinkle*[1] and *Boericke v. Sinclair*[2], in which repayment was ordered there appears to have been an unconscionable insistence by the vendor on having the land and the money too, a fact which the unaccepted offer to complete even at a late stage was calculated to establish. Here though the suppliant has been unable to offer to complete the contract the material fact of the intention of the Crown (whether conscionable or not I come to next) to insist on having the land and the money too is I think apparent from the facts which I have mentioned.

I turn next to the picture presented by the Crown terminating the suppliant's rights in the unconveyed land and retaining $1,350,000 of the purchase price, (not being money paid as a deposit) as well. Of the total amount of $2,323,396.85 paid by the suppliant on account of the purchase price $973,396.85 appears to have been attributable to land actually taken up, leaving $5,548,549.15 of the total purchase price to represent the price of the remaining land. Of this amount the $1,350,000, even after deducting therefrom about $125,000 for interest to which the Crown was entitled under the contract up to the time of its termination, represented something in excess of 22 per cent. In the meantime while the contract was in effect the suppliant had not had possession of the land or revenue therefrom and the Crown had received interest on the unpaid portion of the purchase money. On the evidence there is thus nothing that the Crown could, as I see it, claim to set off as loss recoverable from the $1,350,000 with the possible exception of (1) some amount for fees of solicitors or agents of its own; (2) the commission of an agent whose services might be required to re-sell the property, the total of both of which items should I think be unlikely to reach 10 per cent. of the $5,548,549.15; and (3) any loss that might result

[1] [1916] 1 A.C. 275. [2] [1929] 1 D.L.R. 561.

from inability to realize that amount from the land. In these circumstances I should have thought that the suppliant was entitled to relief from the forfeiture of the $1,350,000 on proper terms including an opportunity for the Crown to establish and set off any loss which it may have sustained from the failure of the suppliant to complete payment of the balance of the purchase price and interest when due[1] and including, as well, a term limiting the amount to be repaid in any event to the $975,000 thereof which remained in the hands of the Crown at the time of the presentation of the petition of right.

However, in view of the conclusion which I have reached on the effect of s. 48 of the *Exchequer Court Act*, though not without some hesitation arising from the reflection that but for that provision I should have thought the suppliant entitled to relief, I am of the opinion that the judgment must be that the suppliant is not entitled to any of the relief claimed.

The Crown is entitled to its costs.

[1] *Vide Benson v. Gibson* (1746) 3 Atk. 395; 26 E.R. 1027. *Commissioner of Public Works v. Hills* [1906] A.C. 368 at 376.