

1921

KENYA

44686  
6 EP 21

FROM  
O. A. G.  
NOTLEY  
LOOS

DATE  
20TH JULY 1921

FOR CIRCULATION:-  
Mr.  
Mr. *Sturges 13.*  
Mr. *Risley 19/7/21*  
Mr. *Carroll Bolton 19*  
Sir H. Lumsden  
Sir H. Boyd  
Sir G. Fiddes  
Mr. Wood  
Mr. Churchill

SUBJECT  
MR J. R. WOOD  
COMPENSATION IN RESPECT OF FARM.  
  
Enclosed copy of memo. by Attorney General explaining situation with copy of original legal opinion. States efforts made to settle claim.

Previous Paper  
*19690*  
  
*1481*  
*29 Sept 21*  
  
*11/10*

MINUTES  
  
Mr. Risley.  
May we have your observations on this?  
As a layman I hesitate to criticise Mr. Barth's opinion, but surely whatever may or may not be the law with regard to <sup>*estate*</sup> ~~the situation of~~ *the* ~~land~~ <sup>the</sup> whole of a property, has very little relation at all to the case of failure actually to transfer a small portion of the area stipulated owing to faulty survey. In any case it is clear that no blame attaches to Mr. Lyall Grant in this matter.  
Unless the Governor is absolutely clear that owing to the increased <sup>*of land*</sup> ~~accuracy~~ of ~~the~~ <sup>the</sup> ~~survey~~ <sup>survey</sup> it would seem to be desirable to adopt Mr. Blair Mackenzie's suggestion (see top of page of <sup>*Lyall*</sup> ~~Mr~~ <sup>Grant's</sup> memorandum) that an express stipulation should be inserted in all conditions of sale stating that no compensation for mis-description would be allowed.

Subsequent Paper  
*11944/22*

*11/10*  
*11/10*

Mr. Johnston

could you send me the  
minutes

I would be interested in  
knowing whether a copy of  
the minutes of the meeting  
held on 10/12/21, in relation  
to the contract Act, is  
available to the public.  
If not, could you please  
advise me of the reasons  
therefor, and if possible  
advise me of the date  
when it will be available.  
I am, Sir, very  
truly yours,  
A. J.

Mr. Fisher

As my minute is somewhat  
long, I have attached it as a  
separate enclosure. I have the  
Anderson reports & Pollack's edition  
of the Contract Act from the Punjab  
C<sup>o</sup> library & will keep them in  
case you may wish to refer to them.

A. J.

13 9 21

Mr. B. B. B.

I am generally with Mr  
Johnston's minute attached.  
Nothing can be done as regards  
this particular case, as  
pre-arranged has been made  
and approved.

But I will consult Mr. Johnston  
minute into - record and  
send it out, calling particular  
attention to the suggestions  
made at the end of para 6

J.R.

14/9/21

[ I send you only Pollack on the  
Contract Act - All the other  
authorities referred to are in my  
room and you can have them  
if you wish.  
Essentially Pollack & the 2 volumes  
of Anderson have nothing to be  
referred to the P Council Office  
from which the Anderson volumes  
then ]

I agree.

B. B. B.

W. J.

14 9 21

*De*

Memorandum

MINUTE

*Dr. P. S. S.*

1. I agree that the deficiency in acreage is not covered by the words or thereabouts and <sup>of the vendor's</sup> opinion that if the principles of English law had been applied to this case the purchaser of the farm in question would have been entitled to compensation and that the measure of damages would <sup>not have been a</sup> rateable abatement of the purchase money.

2. I base <sup>in brief</sup> this opinion on the following (among other) cases:-

(a) Hill *v* Bickley (17 *Wry* 394) in which it was held that compensation for a deficiency of acreage is presumptively measured by a rateable abatement of the price.

(b) Bain *v* Mottergill (7 H.L.159) "If a person enters into a contract for the sale of real estate, the purchaser cannot in an action for breach of contract recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit".

"Upon a contract for the real estate where the vendor, without his default, is unable to make a good title the purchaser is not by law entitled to recover damages for the loss of his <sup>own</sup> bargain".

(c) Durham *v* Legard (34 Beav.611) - the rateable amount of compensation will not be awarded where it would inflict a hardship on the vendor and the purchaser <sup>will in such a case</sup> ~~would~~ be compelled either to rescind the contract or to take the lesser amount of land without compensation.

(d) *Leake v* *Wright* (17 *Wry* 76) - ~~damages in~~ excess is a subject for compensation and purchaser

could

"could not enforce the contract without agreeing to compensate".

It is further considered  
 3. I am further of opinion that these principles apply to Kenya Colony. In the case of James V. Jaffer Dewji (East African Rep. V.p.68) they were considered and deliberately applied by the judge. The decision was based on them and has not been appealed from. In a previous case (heard previously though reported later in the same Vol. at p.117.) Hall V. Attorney General the same judge had given a decision in the opposite sense. The meagre report of this earlier case, however, makes it hardly worth while to consider it and suggests ~~to me~~ that the <sup>Attor</sup> Attorney General practically consented to judgment. The later case was, it is clear from the report, well argued and the decision is <sup>it is considered that</sup> in my opinion entitled to weight and until repealed by a competent tribunal is binding on a court of first instance in Kenya. <sup>It is however</sup> In my <sup>that</sup> opinion the decision in the case of Hall V. Attorney General is wrong and <sup>that</sup> an appeal from it would have been successful.

4. The opinion expressed by Mr. Barta that these English principles as to compensation in land case do not apply in Kenya is based on the terms of (a) S.73 of the <sup>Indian</sup> Contract Act and (b) on the two Bombay cases cited by him.

(a) As to S.73 - this contains a general statement of the principle on which damages are awarded for breach of contract and <sup>is considered to be</sup> in my opinion is quite consistent with the English rules above referred to. It is quite true the section does not make any special reference to this

special

*relating to land,*  
 special rules <sup>^</sup> but it is equally silent in regard to other peculiarities in assessing damages which spring from the nature of the transaction, e.g. promises of marriage etc. The English rules peculiarly applicable to land are not arbitrary inventions of judge or legislator. They <sup>appear</sup> seem to be logically deducible from the principle expressed in the section, if one ~~attaches~~ <sup>attaches</sup> proper weight to the latter part of the 1st sentence of the section.

As to (b) - in the cases quoted the remarks as to the scope of S.73 are obiter dicta not involved in the decision of the cases. <sup>It is considered that</sup> In my opinion had the cases been brought here under <sup>English</sup> our law the decisions would have been the same. In Bamchod V. Manmohandas (Bomb 32 p. 166) the case was one of wilful default and it was held that the damages will be the difference, if any, between the contract prices and the market value at the date of breach. <sup>to see</sup> Nothing inconsistent with English principles in that case - But it seems inconsistent with the East Africa case relied on by Mr. Barth of Hall V. Attorney General in which the damage was calculated on the value of the land at the time of the action.

In Najardhas V. Ahmadkhan - Bomb. 21 p. 185 a mortgagee in possession was evicted contrary to the terms of the contract - it was held he was entitled to the value at the date of the eviction. <sup>Such would have been the result here, I think.</sup> The case <sup>being dealt with</sup> we are dealing with is not one of wrongful eviction, <sup>not a wilful default but of innocent mistake.</sup> <sup>It seems to me that</sup> Mr. Barth was in error in taking into account the value of the land at the time he gave his opinion. If the English presumption that a rateable

rateable abatement of the price is the proper measure of damage is not conclusive in this case, the measure must be, according to the case cited by Mr. Barth, the difference in value at the making of the contract and at the time of the breach of it. <sup>The contract was signed 18th Nov</sup> In my opinion the breach occurred as soon as the purchaser <sup>put</sup> was in a position to enter on the farm in pursuance of the contract - that is to say when all the formalities were completed. It was then "tendered" to him as in fulfilment of the contract and as it was deficient in acreage, the breach of the contract occurred. <sup>At that time</sup> Our information is inadequate for confident opinion, <sup>but</sup> it seems to me exceedingly improbable that during the short period involved any change had taken place in the value of the land per acre. At any rate <sup>it is considered that</sup> in my opinion the value of the land at the time Mr. Barth gave his opinion was not an element to be considered in the matter in assessing the damage.

6. As the action of the Government will have given rise to doubt as to the results of inaccuracies in a survey, <sup>it is</sup> recommended that, in all their agreements as to ~~the~~ farms to be disposed of, there should be a clause that, in the event of its being found on a re-survey that the area is substantially larger or smaller, the purchase price shall be increased or diminished rateably.

A.S.

13 Sept 21.

provisionally what  
is said to  
be the result  
of the survey  
1/11

20th July, 1921.

Sir,

With reference to your despatch No. 675 of 30th April, I have the honour to inform you that your instructions conveyed in paragraph three are duly noted.

2. As regards the legal advice on which Government proceeded in making payment, I enclose a copy of a memorandum from the Attorney General explaining the situation. A copy of the original opinion given by Mr. Barth (then Attorney General) which is therein referred to, is also attached.

3. In accordance with Mr. Barth's suggestion, an attempt was made to induce Mr. Wood to accept as compensation an equivalent amount of the original purchase price, plus a proportionate amount of the rent paid. Mr. Wood refused to accept this offer, and Government was again advised that the value estimated in 1918, viz: £6/- per acre, should be paid on the precedent of the Hall case which is referred to in the Attorney General's memorandum.

4. All attempts to settle the matter by the grant of a piece of land were similarly unsuccessful as was reported to you previously.

I have the honour to be,

Sir,

Your humble, obedient servant,

  
 ACTING GOVERNOR.

THE RIGHT HONOURABLE

WINSTON CHURCHILL, P.C., M.P.,

SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET, LONDON, S. W.,

L. 1004/21.

15th July, 1921.

The Hon'ble Acting Colonial Secretary,

N a i r o b i .

re: J. R. WOOD (EVANS) FARM NO. 254.Ref. Secretary of State's Despatch Kenya No. 675  
S. 18493/56.

I see that the Secretary of State asks who was responsible for the legal advice on which compensation was paid in this case. As this is a matter which affects the professional reputation of the officers of this Department it seems only right that I should give an explanation though the matter has not been referred to me. The opinion referred to took place before my arrival but the history of negotiations is on the files and it seems only fair that the Secretary of State should be informed of the precise position.

The legal opinion on which compensation was paid in this case was given by Mr. Barth in 1918. See enclosure (b) to (1) in S. 18493. It was based on a decision of Mr. Justice Bonham Carter in the case of Attorney General versus W. Hall in 1914. That case was in all essentials identical with Wood's case and compensation was awarded on the basis of the value of the farm at the date of <sup>originally paid</sup> action (Rs. 75 as against Rs. 4/per acre) and no deduction was made in respect of the word "thereabouts" which occurred in the conditions of sale. (Copy <sup>judgment</sup> enclosed).

In view of this judgment and of the Indian cases referred to in his opinion Mr. Barth thought it unlikely that Government would succeed in its defence in Evans (Wood's) case.



At a later stage in the negotiations in January 1920 Mr. Blair-Mackenzie stated that he thought the High Court would probably hold that the claimant would be entitled to compensation and he agreed with the Commissioner of Lands on the valuation of £6 per acre. In a subsequent letter he suggested that an express stipulation should be inserted in all conditions of sale stating that no compensation for a misdescription would be allowed.

The Commissioner of Lands however considered such a stipulation unnecessary and added "I doubt also whether it is exactly fair or would even legally hold water to attempt to evade obligations in the future in the manner suggested by the Acting Solicitor General". He considered that owing to the increased accuracy of surveys no such error was likely to occur in future.

I may perhaps be allowed to express my disagreement with Mr. Justice Bonham Carter's judgment which appears to be inconsistent with the cases quoted to him which included *Winch versus Winchester* 35 E.R. 146.

Even if the shortage was too great to be covered by the word "thereabouts" some effect ought, it would appear to be given to the word.

All land auctioned in this Colony is I understand put up under a condition that the area is only approximate, see Crown Lands Ordinance 1915, Section 27 (a), and on a definite upset price and rental. I am therefore somewhat at a loss to know on what principle any rebate is allowed either in stand premium or rental (much less in actual increased value) in respect of a small difference between the estimated and the measured areas.

IN THE DISTRICT REGISTRY OF H.M.'S HIGH COURT AT NAIROBI

Civil Case No. 50 of 1913

William Hall .....Plaintiff

versus

The Attorney General on behalf of

The Government of the Protectorate .....Defendant

-----oOo-----  
-----oOo-----

J U D G M E N T :-

The Government contracted to sell to Mr. Hall 642 acres at Limuru and after a considerable time they find themselves only in a position to convey 582 acres, this 60 acres missing is not a small error covered by the words "thereabouts".

The Government is liable for the difference and I find the value of the land at Rs. 75 per acre. I make an order that the Government transfer the 582 acres to the Plaintiff and pay him damages of £300 or Rs. 4500. Judgment for Plaintiff with costs.

(Sgd.) A. T. B. CARTER

3. 11. 14.

February 25th, 1918.

Honourable  
Land Officer.

re: Farm No. 254 - Therika River.  
William Evans, Junior.

With reference to your No. 5445 of the 16th instant, I gather that there was an open contract to let 3571 acres on certain terms being fulfilled. The right to lease the farm subject to those terms was sold for Rs:10,600, and a licence to occupy embodying the terms was given. The terms of the licence were fulfilled and now the ~~Griensass~~ licensee is entitled to a lease under the Crown Lands Ordinance, 1915. Of the total area two areas of 44.3 acres, and 49.4 acres were resumed for the purpose respectively of the Fort Hall Road and the Thika Railway of these areas the first was specifically reserved when the right to lease was sold. The second area was resumed under the powers conferred by the Crown Lands Ordinance, 1902. It is proposed both to make a reduction in rent on account of such areas and also to refund a proportionate part of the stand premium. I am not aware of the principle on which such proposed refund of premium is based and so far as I am at present advised, there appears to be objections which can legitimately be urged against it.

2. On re-survey the area which was described as "3571 acres or thereabouts" was found in fact to be 3228.7 acres, (that is to say 3228 acres + 44.3 acres + 49.4 acres) leaving an actual area of 249.3 acres less than the amount which the Crown contracted to let to Mr. Evans.

3. The law applicable is in my opinion section 75 of the Indian Contract Act and that section has been construed in India as applying the same measure of damages in the case of contracts dealing with land as in contracts dealing with goods vide *Nagardas V/S Ahmedkhan* (1895) 21 Bombay 175, 185 and *Ranchod V/S Manmohandas* (1907) 32 Bombay 165.

4. As to the measure of damages Abatement of the purchase money has been followed at home in some cases - see pages 618 and 619, but at page 623 Fry (5th Edition) states - "Where there is a defect in the quantity of an estate, the principle on which abatement is calculated is prima facie acreage." Under the Contract Act, two instances are given - see pages 346 and 346 (Pollock 3rd Edition) the latter relating to land. "It is commonly said that where a person sustains loss by reason of a breach of contract he is prima facie entitled so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." - this statement - it goes on to say, is open to some misunderstanding. The case dealing with land is not on all fours, but very much in point. "At all events, where a vendor of land guarantees title to the purchaser, and the latter is evicted from his holding, he is entitled to recover the value of the land at the date of eviction, and not merely the purchase money." In these circumstances the Government stands on thin ice, and I have failed to find anything which offers a reasonable defence to a possible claim. Mr. Evans would appear to be entitled to damages, which in my opinion will be the difference between the purchase price and the present market value according to *Nagardas Ahmedkhan* (1895) 21 Bombay 175, which was decided under the Indian Contract Act and especially *Ranchod V/S*

Mammohandas 32 Bombay at Page 171. I fear an abatement in the purchase price and a refund of rent would not be accepted, but might be offered.

5. The only possible defence is in my opinion to contend that the word "thereabouts" covers the difference. I think, however, that we should not be likely to succeed in such a defence.

6. Your enclosures are returned herewith.

Sd. J. W. Barth.

ATTORNEY GENERAL.

24 September, 1921

Hand 1194/21

28

52

I have the track sheet of your despatch, No 1005, of the 20<sup>th</sup>

of July, regarding stating the

grounds on which compensation was

paid to Mr. R. Wood in respect

of shortage of area in his farm

No 254, Marikita River.

2. For guidance in any

case of a similar nature which

may arise, I enclose a

memorandum embodying

the views of my legal adviser

on the points at issue, and

M. H. C. 25

DRAFT.

Kenya  
No. 1481  
J.A.G.

MINUTE.

- Mr. Lushington 27.9.21.
- Mr. ~~Robertson~~ Erhardt 27
- Mr. Bottomley 27
- Mr. Grindle.
- Sir H. Lambert.
- Sir H. Read. 28
- Sir G. Fiddes.
- Mr. Wood.
- Mr. Churchill.

(if Mr. Erhardt's)

no 4486 is amended

As I would invite attention in  
particular to the recommendations  
contained in para. 6.

I am etc

(Signed) WINSTON S. CHURCHILL.