

1856.

HOUSE OF REPRESENTATIVES.

DECISION OF MR. JUSTICE STEPHEN

IN THE MATTER OF THE CLAIM OF MR. GEORGE DUPPA TO A GRANT OF LAND AT THE WAIRAU IN THE PROVINCE OF NELSON.

Laid on the table of the House June 27th, 1856, and ordered to be Printed.

This claim was referred to me for my opinion by the direction of his Excellency Sir George Grey, communicated through the Commissioner of Crown Lands, in accordance with the provisions of the New Zealand Company's Land Claimants' Ordinance, Sess. 11, No. 15.

There was a case stated, and there were transmitted to me the several letters and documents referred to in the appendix subjoined, from which I was to collect more full information; and I was requested to advise—*first*, whether the award of the arbitrators, which, by the terms of the reference, might be made a rule of the Supreme Court, forms a contract legally binding on the Crown; and *secondly*, whether, if not legally binding on the Crown, the award ought nevertheless to be carried out on equitable considerations.

Besides the letters so transmitted, there was a letter forwarded to me, through the Civil Secretary, from Mr. D. Wakefield, then Attorney-General of the Southern District of New Zealand, dated 16th March, 1853; and since then, I have taken the examination of Mr. Fox, the New Zealand Company's Agent, at the time of the transactions in question. This was taken on 20th December, 1854, soon after Mr. Fox's return to New Zealand, for which it appeared desirable to wait, as he could throw more light on the subject than was furnished to me by the case; but more especially, as I could then ascertain whether the award was obtained through fraud or mistake.

Mr. Duppa's claim is founded on an award, dated 22nd May, 1850, and made by three gentlemen, to whom it was referred by the principal agent of the Company and by Mr. Duppa, under an agreement by which the agent, on behalf of the Company, and Mr. Duppa bound themselves to abide by such award.

The arbitrators awarded that Mr. Duppa was entitled to receive from the Company, for the balance, and in full liquidation of all his claims upon the said Company, Land Scrip to the amount of £2000, to be selected in land at 5s. per acre, which they awarded should be selected in blocks in the Wairau District.

Mr. Duppa's claim had been submitted, in 1844, to Colonel Wakefield, the first agent of the New Zealand Company, and he had awarded to Mr. Duppa certain Suburban Land at the Waimea.

There were certain objections to this first award by a large body of the Nelson settlers, in the form of a protest, dated September, 1844, made to the Directors of the Company; and it is apparently in consequence of those objections that this claim has not been allowed.

The objections seem to amount to this:—that by the Company's terms of sale to the Nelson settlers, there was a fixed price for the sale of lands, the proceeds of which were to be applied in

introducing immigrants, and in other ways for the benefit of the settlement in general; and that by there being so much land abstracted from the saleable land, there would be so much the less payable to those several funds. This is the substantial way of stating the objection, though in the protest it is made to refer only to Mr. Duppa's case, where the claimant, having been a purchaser from the Company of lands in the settlement of Wellington, was allowed compensation out of their lands at Nelson.

There were subordinate objections made in the protest, such as—*First*, that the award made in favour of the claimant was, that he should have his land in one continuous block, whereas by the Company's terms of sale the lands were to be offered for selection in certain small lots, which selections were to be determined by a lottery. *Secondly*, that the upset price of the lands in that settlement was 30s. per acre; and they allege that Mr. Duppa received the land so awarded at much below the real value of the land, as well as so much below the minimum price fixed by the Company.

In order to the clear understanding of the case, it must be presumed that the New Zealand Company were entitled to certain lands in the several settlements of Wellington, Nelson, and New Plymouth, which they advertised for sale on certain terms; that both the Company and the settlers at these several settlements contemplated that these terms would be carried out *in perpetuum*, whereas it appears, from Mr. Fox's evidence, (taken December 20, 1854,) the whole of the original scheme of the Nelson settlement had, before the year 1848, been superseded, so far as the distribution of the lands was concerned, and that with the concurrence of the Nelson land purchasers; and that the whole of their claims on the New Zealand Company had then been fully settled.

The Nelson settlers had received compensation from the Company by reason of their several claims upon the Company in not fulfilling their engagements, in additional portions of land being transferred to them, for which they then paid no additional price, so that they had themselves destroyed the scheme of making all the Nelson land saleable at a *certain* price, out of which were to arise the funds for keeping up immigration and other public purposes.

What they object to in Mr. Duppa's case, they saw no objection to in their own: and as to the price at which he was to receive his compensation lands, it made no difference to them, seeing that the scheme was then abandoned. Nor could they complain that particular lands had been set apart for him, inasmuch as they had rejected those lands when they might have taken them, either by way of purchase or as compensation lands; though in their protest they object to their having been allotted to Mr. Duppa in one continuous block, whilst others had to select in smaller portions, and that by means of a lottery: this would obviously be a disadvantage to purchasers in general, as in taking a large quantity in one block the probability is that much of it would be bad, and it may have been an object with the arbitrators to prevent his selecting, by making him take the bad with the good. I am much led to this conclusion by the statement of the Hon. Mr. Dillon, who says, that in cases of arbitration others had to take out the "Compensation in land at the following prices:—Rural Land, at from 5s. to 20s. per acre," &c. He also says:—"The value of uncultivated land at some distance from the most settled parts is necessarily arbitrary;—it, in fact, possesses in itself no value." Mr. Fox, in his evidence, says:—"That the land selected by Mr. Duppa in compensation, agreeably to the terms of the submission, consisted partly of land which had been open for selection to the land purchasers at Nelson ever since 1848, and had been actually rejected by them, as well at the selection of rural lands, as in the subsequent compensation arrangements, and that the residue consisted of rugged mountain land, fitted only for pastoral purposes."

Having then considered how far the Nelson settlers had a right to object to this grant, I would observe, that if Mr. Duppa did not come within the express terms of the Nelson scheme, he virtually did more than most, if not any of them, in furthering the principal object of that scheme; that is, in securing to the settlement a large body of immigrants: for the Attorney-General, in his letter to the Colonial Secretary, dated March 16th, 1853, says, the peculiarity of Mr. Duppa's case was, "that it was a reward for services rendered, as well as compensation for losses sustained. The services rendered to the Nelson settlement, at a highly critical moment in its history, was most valuable. By a very liberal and opportune expenditure in the employment of labourers, at a time when that class was just about to help themselves by pillage, Mr. Duppa assisted largely in upholding order, if not in preventing social convulsion. Such a service deserved a most liberal recompence." Again;—"The losses sustained by Mr. Duppa appear to have been singularly large. They were, moreover, caused in a more direct manner by the Company than the losses of other claimants for compensation: these persons alleged injuries and grievances of various kinds, incident to an enterprise in which they and the Company had embarked, as it were, together, and had, as it were, made common cause; whereas a considerable portion of Mr. Duppa's claim rested on damages sustained by the unjustifiable, and, in some respects, wilful negligence, of the Company's servants at the commencement of his operations." The Attorney-General, in that letter, expresses his opinion on the case thus:—"I am satisfied that Mr. Fox, the Company's agent, had full power and authority to make such an arrangement; that it was a binding one on the Company, and, as a matter of course, a binding one on the Government, in virtue of the tenth and eleventh Vict., c. 12."

Mr. Fox also, in his evidence, alludes to the destruction of Mr. Duppa's goods as a reason why Mr. Duppa had claimed compound interest, and that the surrender of any claim for this loss was one reason for its being allowed.

That which appeared to me the worst feature in the case is, that Mr. Duppa was allowed compound interest for the sums paid for his land, and for the losses sustained in property destroyed through the improper conduct of the Company's servants, but that allowance seems, on further consideration, to have been merely a mode of calculating what should be allowed to him, which was more easily ascertainable in that manner than by calculating the actual loss sustained; and I am convinced that the difference between the price given in England for his implements of husbandry, and other property so destroyed, and what he would have had to pay to replace them in New Zealand, would have been far greater than what was proposed to be allowed to him in giving him compound interest. Again, the loss of time by his not having the means of cultivating his land at so important a period as the first arrival of settlers here, was also one that would be ill compensated by the allowance of that rate of interest. On referring, however, to the approximate calculation, I find that compound interest was allowed only on the amount of his land purchases, though the above considerations had their weight in adopting this mode of estimating the compensation to be allowed.

But I find, in the Colonial Land and Emigration Commissioner's report to Earl Grey, dated May 28, 1851, they say,—“ We are aware, from the enclosures to Mr. Harrington's letter, No. 47, that compound interest was awarded by the arbitrators, in other Nelson compensation awards, though the amount is not stated;” and they conclude with a recommendation (after assuming that Mr. Fox was a partner with Mr. Duppa in his pastoral pursuits, and commenting upon that circumstance as if it were an ascertained fact) “ that Governor Grey should be requested to institute an enquiry into the case, and to report his opinion as to the justice or expediency of confirming or disallowing it.”

Having thus gone into several particulars which I deem necessary for the full and fair understanding of the nature of the claim, I propose to consider the first point submitted for my opinion, viz., whether the award of the arbitrators, which, by the terms of the reference, might be made a rule of the Supreme Court, forms a contract legally binding on the Crown.

Mr. Fox, it is admitted, was the principal agent of the Company within New Zealand, and he entered into the agreement to refer, on the behalf of the Company.

The principal agent was appointed by a Power of Attorney from the Company, dated 30th June, 1849, by the 11th clause of which, power is given to him (subject to the proviso next hereinafter contained) “ to state, settle, and adjust all accounts, reckonings, claims and demands whatsoever depending, or to depend, between us or the New Zealand Land Company or the said New Zealand Company, prior to its incorporation as aforesaid, &c., and if our Attorney shall think proper to refer any such matter, to enter into, subscribe, execute, and perfect any agreement of reference, or arbitration bond in respect thereof, &c.” And the proviso set forth in the next and 12th clause, thus:—“ Provided always that nothing in these presents contained shall authorise our said Attorney to refer to arbitration, or otherwise to deal with and determine any claims or demands made upon us in respect of contracts for the conveyance or sale of lands by us, or by the said New Zealand Land Company or New Zealand Company previous to the execution of these presents, except only with our previous expressed sanction and direction in writing.” As this award was in respect of other matters besides the conveyance or sale of lands, it would seem not to come strictly within the proviso.

Mr. Fox, however, from time to time received written directions from the Company how to act; and as it was necessary that all the transactions of the Company in New Zealand should be wound up, in order to enable the Company to settle their accounts with the Government and with the shareholders in Great Britain on the 5th of April, 1850, they were very urgent in 1849 with their agent to get them closed with as little delay as possible.

In adjusting the differences between the Company and the purchasers of land at their different settlements, the Company had, through Lord Grey, requested Sir George Grey to act as their arbitrator; but this he had declined doing (see letter of C. Cox, Esq., Secretary to the Company, to H. Merrivale, Esq., under Secretary of State for the Colonies, dated 18th September, 1849).

The Directors had previously to this (in a letter addressed to Col. Wakefield, Mr. Fox's predecessor in office, dated 3rd March, 1848,) adverted to this request to Sir George Grey; and in full expectation of his compliance, they had observed, “ under that arrangement, the decision is in every case to be left to the sole discretion of Governor Grey, restricted only by the condition that the award shall be made exclusively in land.” But, they observe, “ on the principle of reserving to such persons as may remain dissatisfied with the arrangement (that is, certain proposals for re-distributing the Town and Suburban Lands by means of re-selections,) or its results, a power of having recourse to arbitration there can be no question.

But this desire to refer to arbitration was afterwards expressed to Mr. Fox in more general and more urgent terms, in a letter from the Company's Secretary, dated 25th June, 1849, in which Mr. Fox is desired to solicit his Excellency either to lay down, if possible, some general rule by which all such cases (that is, of persons who had not obtained beneficial possession of their lands) may be determined; if that be not practicable, or be deemed inconsistent with justice to appoint persons in accordance with his original intention, as expressed by the letter addressed by Mr. Domett to Colonel Wakefield on 4th September, 1848, to whom each case may be referred, as it arises, and be decided on at once. The object of the Directors, for the attainment of which they are most anxious, is to put the parties in possession of whatever, by an impartial and competent tribunal, they may be declared to be entitled to, and to close every transaction with the least possible delay.

In the spirit of this communication, I cannot but consider that Mr. Fox was justified in referring Mr. Duppa's claim to arbitration; for it was obvious that the Directors of the Company desired all claims against them to be so settled; and although they preferred that Sir George Grey should name some one person to act as arbitrator, they did not tie down their agent to an arbitration to a person so to be constituted. Sir George Grey was to be solicited to name such person. But how if he declined? or if the parties should refuse? Why should not the ordinary and fair course be followed of allowing each party to name his own arbitrator, with power to appoint an umpire? The person by whom appointed would seem to be but a secondary consideration; the impartiality of the tribunal seemed alone to be regarded, and the principal agent accordingly, in concurrence with Mr. Duppa, referred to the arbitration of the three gentlemen who made the award in compliance with the wish of the Company, in order to close this transaction with the least possible delay. And what is not unworthy of notice is, that the arbitrators are two of the first merchants, as well as some of the earliest settlers of Nelson, and their award has been confirmed as to the amount of compensation by the Commissioners appointed to hear and decide claims to grants (see their report 22nd Nov., 1851.)

In answer, then, to the first enquiry, I am of opinion, for the several reasons, and under the several circumstances set forth above, that the award of the arbitrators forms a contract legally binding on the Crown. I think a jury would hold that Mr. Fox had acted within the scope, and according to the spirit of the authority given in the several instructions of the Company.

The second point for my consideration, though thus rendered unnecessary, viz., "if not legally binding on the Crown, it ought, nevertheless, to be carried out on equitable considerations," may perhaps as well be noticed, because it is possible that every one may not concur in that opinion.

The fact that Mr. Duppa has now been so much longer kept out of compensation under a fair reliance that the act of the Company's agent would be confirmed, gives him at this time a still stronger claim than he even had before; and if this claim should be disallowed, and should he be driven to seek the same remedy that Mr. Beit and others sought and obtained, he would, even if he recovered very high damages, be deprived of the advantage which would have resulted from an earlier appeal to an English tribunal.

Again, the proclamation of Sir George Grey of March, 1853, by which rural lands may be purchased at from 5s. to 10s. per acre, shows clearly the estimated value of rural lands of the Colony, so that, if only the same amount were awarded to Mr. Duppa, he might become a purchaser of the same lands he now claims. As far as the New Zealand Company were or may be concerned, it seems that the land so awarded may be fairly regarded as part of their partnership assets; and that they might pay their debts incurred in the carrying on their partnership business out of lands of theirs without reference to the question whether the person damaged had contemplated being a purchaser of lands at Nelson or Wellington. How far they did right in making compensation in any case out of the land is another matter. But in this instance, the particular land claimed was their own (see Mr. Harrington's letter to Earl Grey, dated 10th March, 1843); nor was the case of Mr. Duppa the only instance in which compensation was made out of lands in one settlement in respect of claims arising out of transactions in another settlement, and which received the sanction of the Company; I allude to the case of Mr. Greenwood, referred to in the last mentioned letter, in which he was awarded by arbitration 400 acres (also at the Wairau, in the District of Nelson, for 100 acres Land Order, to be selected at Wanganui in the district of Wellington.) This claim had been referred to arbitration by the principal agent, and was confirmed by the Directors (see Blue Book, p. 102—3,) and afterwards sanctioned by Earl Grey (see letter from B. Hawes, Esq., M.P., to F. C. Harrington, Esq., dated 20th March, 1848. Blue Book, p. 529.) There were other similar cases in which land purchasers in one settlement were compensated by lands in another settlement, and a 5s. per acre, to which no objections seem to have been taken.

The only matter now to be noticed is, whether this award was obtained either through fraud or mistake. The report of the Colonial Land and Emigration Commissioners on the subject of this claim, indirectly charges Mr. Fox, the principal agent, with being an interested party, as being "a partner with Mr. Duppa in his pastoral pursuits;" and Lord Grey, no doubt, acquiescing in their opinion that the arrangement should, for this reason more especially, be investigated on the

spot by Governor Grey, writes to his Excellency in the same month to this effect,—“ In regard to this arrangement (that is, in reference to certain adjustments of Nelson claims,) I am of opinion that it will not be advisable to interfere with what has been already done in the Colony. It is very probable that some awards have been unreasonable, and possible that it may be wrong to confirm them. The possibility of such cases being disclosed, renders it necessary that I should leave you a discretionary power, and not enjoin you to confirm, indiscriminately, all the awards which may have been made between the Company and residents in December, 1849. But it is extremely desirable that the arrangement should be as soon as possible closed. I wish you on no account to exercise the power of disallowance, unless on the clearest evidence of fraud or mistake being brought to your notice. I do not think it necessary that you should enter into any minute investigation for the purpose of detecting such instances, being satisfied that more advantage will be obtained by speedy settlement than by the reversal of a few unreasonable decisions, if such there should be.”

With these views of her Majesty's Secretary of State before him (for the Blue Books are received in the Colony by the earliest opportunity,) and with a consciousness that there was no fraud on his part, nor on that of the principal agent, nor mistake on the part of the arbitrators (see the Company's and Government Crown Commissioner's Report, sent to me with the case.) Mr. Duppa has been delayed so much the longer in seeking any other redress, from the expectation held out to him by the above letter that his claim would be confirmed. And what makes this a still more desirable case for amicable adjustment is, that Mr. Duppa's contract was with the original Land Company of 1839, who have long ceased to have any interest in the lands in New Zealand, but who would still be liable if this claim were disallowed.

All these matters, then, lead me to the conclusion that, on the second point for my opinion, Mr. Duppa has, independently of any legal claim, a strong equitable claim to the grant awarded to him.

It will be seen that, whilst there is no evidence, nor even a pretence of any, that Mr. Fox was a partner with Mr. Duppa, as alleged by the Commissioners. Mr. Duppa, in his letters, expressly denies it; and Mr. Fox, in the deposition taken before me, agreeably to the Ordinance under which this case was referred to me, which deposition is forwarded herewith, together with the case and other documents transmitted to me, says, “ He had no interest whatever with the said Mr. Duppa in the said claim to compensation, nor in the land awarded in respect thereof, and that he had no other dealings with the said Mr. Duppa, than that the said Mr. Duppa had charge of some sheep and cattle of this deponent on thirds in the year 1848, up to the year 1851, and deponent expressly denies that he was in any manner a partner with the said Mr. Duppa in any transaction whatever.”

(Signed) SIDNEY STEPHEN,
Judge.

1st October, 1853.

