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In The Privy Council

No. 68 of 1960

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

Between

J. JAMIESON & SONS PTY. LIMITED - - - - - - Plaintiff

and

THE COMMISSIONER FOR RAILWAYS - - - - - - Defendant

AND BY AMENDMENT Made the Fourth day of December, 1959, pursuant to leave granted the Twenty-sixth day of November, 1959

Between

AUSTRALIAN HARDWOODS PTY. LIMITED - - - Plaintiff (Appellant)

and

THE COMMISSIONER FOR RAILWAYS - - - Defendant (Respondent)

CASES

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Between

AUSTRALIAN HARDWOODS PTY. LIMITED - - Plaintiff (Appellant)

and

THE COMMISSIONER FOR RAILWAYS - - Defendant (Respondent)

CASE FOR THE APPELLANT

RECORD: p. 118-9.

1. This is an appeal by leave of the Supreme Court of New South Wales from a Decree of that Court (Evatt C.J., Herron and Sugerman JJ.) made the 1st day of June, 1960. That Decree, dismissed the appeal of the Appellant from the Decree of Myers J.

pp. 92-4.

dismissing the Plaintiff's suit and allowed the appeal by the respondent from the Decree of Myers dismissing the Respondent's counter-claim.

pp. 8-17.

2. The suit and counter-claim arose out of an agreement between the Appellant and the Respondent made the 3rd day of May, 1956. In the suit the Appellant prayed a declaration that it had exercised an option to purchase certain property conferred upon it by that Agreement and consequential relief. The Counter-Claim of the Respondent prayed a declaration that the Appellant was not entitled to remain in possession of certain lands in respect of which an occupation permit and sawmill licence had, before the making of the agreement been issued to the Respondent under the provisions of the Forestry Act 1916-1935.

RECORD: pp. 8-17.

3. The Agreement abovementioned recited that the Respondent was the holder of a permit under the Forestry Act 1916-1935 to occupy certain lands for the purposes of a sawmill and was the holder of a licence under that Act to operate a sawmill thereon, and that the Appellant should thereafter operate the Respondent's mill upon the terms and conditions contained in the Agreement. Clause 2. of the Agreement imposed various obligations upon the Appellant in relation to the operation by it of the sawmill. By Clause 5 of the Agreement, an obligation was imposed upon the Appellant to sell to the Respondent timber of a defined class produced at the mill, save in the circumstances therein specified. Clause 8. provided that the Agreement should be deemed to have been entered into on the 13th July, 1952 and that it should remain in force, unless previously determined, until the 13th July, 1962.

p. 10. ll. 2-36.

p. 11. ll. 32-44.

p. 12. ll. 33-37.

4. Clause 6. of the Agreement was in the following terms:

"6. IF the Owner or the Contractor shall commit a breach of any clause or provision of this agreement the Owner or the Contractor as the case may be shall be entitled (without prejudice to any other right to which such breach may give rise) to terminate the contract by giving three (3) months' notice in writing posted to the Contractor or the Owner at its or his address as hereinbefore set out AND in the event of the Owner exercising his right to terminate the contract under this clause the Contractor shall be precluded from referring to arbitration in pursuance of clause 10 hereof the question of the entitlement or otherwise of the Owner to exercise such right of termination PROVIDED however that upon notice of termination being given to the Contractor by the Owner the Contractor shall not during the period of three (3) months hereinbefore referred to have the right of exercising the option in pursuance of clause 9. hereof to purchase all or any of the items set out in or subsequently added to the Schedule to this Agreement."

p. 12. ll. 1-16.

5. Clause 9. of the Agreement was in the following terms:

"9. (a) The Contractor shall have a separate and distinct option to purchase each and every item set out in or subsequently added to the Schedule to this Agreement and any such option may be exercised upon the Contractor giving three (3) months' notice in writing by prepaid registered post to the owner at 19 York Street, Sydney each such notice to specify the item or items which the Contractor proposes to purchase. The purchase price in each and every case shall be the residual value at the time of such purchase calculated in accordance with the figures set out in or subsequently added to the Schedule to this Agreement in accordance with subclause (b) of clause 1 hereof.

pp. 12-13.

(b) The purchase money shall be paid to the Owner in cash upon the exercise of such option.

(c) When the Contractor in pursuance of subclause (a) and (b) of this clause has purchased all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the Schedule to this agreement the Owner shall if required in writing by the Contractor during the currency of this agreement

(i) request the Forestry Commission to transfer to the Contractor the said Permit and the said Licence and

(ii) request the Forestry Commission to maintain to the Contractor during the currency of this agreement a supply of timber to the extent previously provided for in sub-clause (d) of clause 1 hereof.

(d) The exercise from time to time of any option by the Contractor prior to the determination of the Agreement shall not affect the contractual rights of the parties hereto during the said period of ten years insofar as relates to the sale and purchase of sleepers and sawn timber.

(e) In the event of the said Permit and the said Licence being transferred to the Contractor in pursuance of subclause (c) of this clause the Contractor shall for a period of ten (10) years after the thirteenth day of July One thousand nine hundred and sixty two continue to sell and the Owner shall continue to purchase the whole of the sleepers and sawn timber referred to in subclause (c) of clause 2 hereof in accordance with the terms and conditions of this agreement insofar as they are applicable."

RECORD: p. 154.

6. The Appellant operated the mill pursuant to the Agreement from the 3rd May, 1956 until the 25th February, 1958. On the 11th June, 1957 the Appellant wrote to the Respondent giving notice of its intention to purchase all the property described in the Schedule to the Agreement with the exception of "road motor vehicles and tractors." Thereafter, certain correspondence passed between the parties, in the course of which disputes arose as to the amount payable by the Appellant to the Respondent on the exercise of the option. On the 11th September, 1957 the Appellant wrote to the Respondent confirming the exercise of its option. As the Respondent denied that the option had been validly exercised, the Appellant again wrote to the Respondent on the 16th September, 1957 giving a further three months' notice of its intention to exercise the option, this letter being expressed to be "without prejudice to any previous exercise of the option." The Appellant on the 11th October, 1957 requested the Respondent to apply to the Forestry Commission to transfer to the Appellant the sawmill licence and occupation permit. Subsequently,

pp. 155 et seq.

p. 168.

p. 171.

p. 174.

ll. 21-24.

RECORD: p. 35. on the 25th November, 1957 the Respondent gave to the Appellant notice of its intention to terminate the agreement pursuant to Clause 6 thereof.

pp. 1-6. 7. On the 24th December, 1957 the Appellant commenced a suit in Equity by Statement of Claim. In addition to praying a declaration that it had validly exercised the aforesaid option, the Appellant thereby prayed specific performance of the contract for sale and purchase thereby made. The Appellant also prayed an order that the Respondent request the Forestry Commission to transfer to the Appellant the aforesaid occupation permit and sawmill licence.

pp. 24-7. 8. By its Statement of Defence, the Defendant denied that the Plaintiff had validly exercised the aforesaid option and alleged that the Plaintiff had committed breaches of Clauses 2 and 5 of the Agreement in that it had:

(a) not used every reasonable effort to recover the maximum quantity of first class sleepers with a minimum of waste from logs accepted by the Appellant from the Forestry Commission in pursuance of the said agreement:

(b) not sold to the Respondent certain sawn timber produced by the Appellant in the said mill mentioned in the said agreement from logs accepted by the Appellant from the Forestry Commission but either sold such timber to one David Jamieson or else through David Jamieson as the Appellant's agent sold such timber to A. E. Primrose Pty. Ltd.;

(c) not sold to the Respondent certain sawn timber produced by the Appellant in the said mill mentioned in the said agreement from logs accepted by the Appellant from the Forestry Commission but had either sold such timber to Pitt Son & Badgery Limited or else through the said lastmentioned Company as the Appellant's agent sold such timber to Messieurs D. H. McFarlane & Company;

(d) not sold to the Respondent certain sawn timber produced by the Appellant in the said mill mentioned in the said agreement from logs accepted by the Appellant from the Forestry Commission but had either sold such timber to John Jamieson Trading Co. Pty. Limited or else through the said lastmentioned Company as the Appellant's agent sold such timber to the Timaru Harbour Trust of New Zealand;

(e) not operated the mill mentioned in the said agreement and carried out the functions incidental thereto in a good workmanlike and efficient manner in that the Appellant had committed the breaches set forth in subparagraphs (a) and (d) above;

(f) not paid to the Respondent the rental or hire due by the Appellant to the Respondent under the said agreement within thirty days after the rendition of accounts by the Respondent to the Appellant for such rental or hire;

(g) not paid amounts debited by the Respondent to the Appellant in respect of accounts received from the Forestry Commission as set forth in Clause (1) (c) of the said agreement within thirty days after the rendition of accounts by the Respondent to the Appellant for such amounts;

and that thereupon the Respondent had, on the 25th November, 1957, given notice to the Appellant to terminate the agreement pursuant to the provisions of Clause 6. of the agreement and that upon the expiration of three months thereafter, namely on the 25th day of February, 1958, the agreement had terminated. With that defence, the Respondent delivered a Counter-Claim alleging that the Appellant wrongfully claimed to remain in possession of the lands and sawmill and wrongfully claimed the right to prevent the Respondent from ejecting the Appellant therefrom. Accordingly, the Respondent prayed thereby a declaration (inter alia) that the Appellant was not entitled to remain in possession of the aforesaid lands and sawmill and an injunction restraining the Appellant (inter alia) from preventing or hindering the Respondent from entering upon the said lands and sawmill.

RECORD: pp. 27-8.

9. The suit was heard on the 18th, 23rd, 24th, 25th, 26th and 30th days of November and the 1st, 2nd and 3rd days of December, 1959 before Myers J. who dismissed both the suit and the counter-claim.

pp. 95-103. 10. Myers J., by his judgment delivered on the 7th December, 1959 dismissed the suit for the following reasons:—

pp. 97-8. (a) That the contract for sale and purchase of chattels (of which specific performance was prayed) was a mere contract for the sale of goods and as such was not capable of equitable relief by way of specific performance, there being no evidence that damages would not be a sufficient remedy.

p. 98. ll. 2-4. (b) That since the goods the subject of the alleged contract were in the possession of the Appellant, there was no act remaining to be performed by the Respondent to complete the contract on its part.

p. 98. ll. 5-15. (c) (i) That, upon the true construction of Clause 9. of the agreement, if the Respondent were bound by the promise therein made to request the Forestry Commission to transfer the occupation permit and sawmill licence to the Appellant, it would be bound by clauses 9 (d) and (e) to continue to sell sleepers and sawn timber to the Respondent until the year 1972.

(ii) That the Court could not order specific performance of that contract at the instance of the Respondent because of the nature of the Agreement.

(iii) That, since the remedy of specific performance would not be mutual, the Appellant could not have specific performance of the Agreement on its part.

RECORD:
p. 98.
ll. 16-37.

(d) That there was no evidence that the Appellant was and always had been ready willing and able to perform its obligations under paragraphs (d) and (e) of clause 9 of the Agreement.

pp. 98-9.

(e) That the admitted breaches of the Agreement on the part of the Appellant constituted an absolute (not discretionary) defence to the suit, both in respect of the claim for specific performance of the contract arising out of the exercise of the option and the claim to an order that the Respondent perform, by request to the Forestry Department, the obligation imposed by paragraph (d) of clause 9. of the agreement.

11. His Honour's reasons given in dismissing the Counter-Claim were as follows:—

p. 101.
ll. 10-38.

(a) That the occupation permit and sawmill licence did not confer upon the Respondent exclusive possession of the land upon which the sawmill was situate; accordingly that, by remaining on the land, the Appellant committed no violation of the Respondent's rights.

(b) That the Appellant claimed to remain on the land only until its rights had been determined and that accordingly there was no evidence to justify the grant of an injunction.

p. 102.
ll. 20-23.

(c) That the Respondent had no proprietary interest in the land upon which the sawmill was conducted and was, accordingly, not entitled to a declaration that the Appellant was not entitled to remain in possession of the lands and the sawmill.

p. 102.
ll. 24-37.

(d) That there was no evidence that the Appellant had ever prevented or hindered the Respondent from entering upon the lands and sawmill and that, accordingly, the Respondent was not entitled to an injunction to restrain the Appellant from preventing or hindering the Respondent from entering thereon.

p. 102.
ll. 37-39.

(e) That the sawmill was merely a collection of chattels and, accordingly, the proper remedy to recover them was not an injunction but by a common law action for detinue.

pp. 102-3.

(f) That even if the Respondent did have a common law right to possession of the land upon which the sawmill was conducted, it was not entitled to a declaration to that effect because the Supreme Court of New South Wales

in its Equitable Jurisdiction has no jurisdiction to make such a declaration unless the declaration is consequential upon or incidental to equitable or similar relief. Since the Respondent was not entitled to an injunction, the Court therefore had no jurisdiction to make the declaration sought alone.

RECORD: p. 103. ll. 12-41.

(g) Although the determination of the contract of May, 1956 put an end to the Appellant's right to remain on the lands under the contract, it did not follow that the Appellant had no right to be on the land at all. Such a result would follow only if the Respondent had an interest in the land which entitled him to exclusive possession. Insofar as the Respondent did not have exclusive possession of the land, it did not necessarily follow that the Appellant had no right to be there.

pp. 104-7. p. 108.

12. From His Honour's decree both the Appellant and the Respondent appealed to the Full Court of the Supreme Court of New South Wales. That Court by its judgment delivered on the 1st June, 1960, dismissed the Appellant's appeal and upheld the Respondent's appeal. Upon the Counter-Claim it made a declaration that the Appellant was not entitled to remain in possession of the lands and sawmill, ordered the Appellant to deliver up possession of the lands within two calendar months thereafter and restrained the Appellant by injunction from continuing in possession of the lands after that date.

p. 118.

p. 118. ll. 35-39.

p. 118. ll. 39-43.

p. 118. ll 43-45.

pp. 126-8.

13. Upon the Appellant's appeal, the Court held that, upon the true construction of Clause 9. of the Agreement, the option given to the Appellant could be validly exercised by the Appellant only if it first gave three months' written notice specifying the chattels which it is proposed to purchase and, at the expiration of that period, paid or tendered to the defendant the purchase price in cash calculated in accordance with the provisions of the Schedule and did so before a valid notice of termination of the agreement under Clause 6. had been given to it—though it had not then expired. In short, the Court held that the option was not to be exercisable by giving an appropriate notice—that was a mere preliminary event or a condition precedent to a valid exercise of the option. It could be exercised not by notice but only by the tender or payment of the precise sum of the purchase money calculated in accordance with the detailed provisions of the agreement. Accordingly, the Court held that the Appellant had not validly exercised the option and, in any event, had not paid the purchase price in cash before notice of the termination of the agreement was given by the Respondent on the 25th November, 1957.

p. 126. ll. 5-10.

p. 126. ll. 10-12.

p. 126.

p. 126. ll. 13-16.

14. As an additional ground for its decision the Court held that the evident intention of the parties to the agreement was that if

RECORD:

p. 128. ll. 1-7. p. 128. ll. 7-10. the agreement was lawfully determined at any time during its currency all the rights of the parties should thereupon cease; that all executory rights of the Appellant arising out of Clause 9. of the agreement came to an end, in consequence of the termination of the agreement upon the 25th February, 1958—that is, after the institution by the Appellant of the suit.

pp. 128-131. p. 130. ll. 34-39. p. 131. ll. 3-9. p. 131. ll. 26-38. 15. Upon the Counter-Claim the Court held that, although the Company might have no right to exclusive possession of the land the subject of the occupation permit, nonetheless the Appellant, holding by agreement under the Respondent, could not be heard to dispute the Respondent's right to possession; moreover, that the Appellant's claim to remain on the land was no less unlawful, because it intended to vacate, if it were held not to have the right it claimed. The Court, accordingly, made the declaration and orders hereinbefore set forth.

16. The Appellant respectfully submits that both Myers J. and the Full Court fell into error in dismissing the Appellant's suit.

p. 126. ll. 5-16. 17. The first question which arises in this appeal is whether the option contained in Clause 9. of the Agreement was validly exercised. Myers J. did not discuss this matter, assuming it in favour of the Appellant for the purposes of his reasons. The Full Court was of the opinion that the option had not been validly exercised; and was incapable of being validly exercised unless at the expiration of a three months' notice the purchase price, in cash, was paid in full or, at least, tendered to the Respondent prior to notice of termination of the Agreement being given to the Appellant by the Respondent. The Appellant respectfully submits that this conclusion is erroneous.

Exhibit A. p. 154. Exhibit F. p. 168. 18. Notice of intention to exercise the option was given by the Appellant to the Respondent on the 11th June, 1957 and was confirmed on the 11th September, 1957—that is, three months later.

Exhibit E. pp. 166-7. Exhibit F. p. 168. Exhibit H. p. 170. ll. 16-17. 19. On the 28th August, 1957 the Respondent had written to the Appellant setting out for the first time its calculation of the amounts payable by the Appellant on the exercise of the option. By its letter, the Respondent claimed that there was payable to it an amount of £48,177.3.2. of which £37,727.14.6. represented what it claimed to be outstanding hiring charges and £10,449.8.8. represented the residual values of the chattels in question. By its letter confirming its exercise of the option the Appellant stated that it was willing to pay the correct amount payable for the acquisition of the chattels in question and that it was willing to pay this amount as soon as the Respondent agreed with it upon the precise amount payable. The Appellant also sought a reference to arbitration to determine that amount. On the 13th September, 1957 the Respondent replied to

RECORD:

Exhibit J. p. 171. ll. 16-23.

Exhibit K. p. 172.

the Appellant's letter stating that "there is, in law, no exercise of the option. There is no dispute for reference to arbitration." On the 16th September, 1957 the Appellant wrote a further letter to the Respondent without prejudice to its contention that it had validly exercised the option and again stated its intention to exercise the option. On the 17th September, 1957 the Appellant's solicitors wrote to the Respondent's solicitors and requested a reference to arbitration under the provisions of the Agreement (Clause 10) to determine two questions:

(a) Whether the Appellant had validly exercised the option; and

(b) What was the sum properly payable to the Respondent in consequence of the exercise of the option.

Exhibit L. p. 173.

20. On the 23rd September, 1957 the Respondent's solicitors wrote to the Appellant's Solicitors denying that there was any dispute between the parties in respect of any matter and in particular in respect of the two matters sought to be referred to arbitration. On the 29th November, 1957 the Appellant's solicitors again wrote to the Respondent's solicitors enquiring the amount of the purchase money which the Respondent contended was payable. On the 3rd December, 1957 the Respondent's solicitors replied indicating that, as in the Respondent's view there had been no valid exercise of the option, the question of the amount of the purchase money did not arise. Thereafter, the Appellant's suit by Statement of Claim was instituted on the 24th December, 1957.

Exhibit L. p. 176.

Exhibit L. p. 177.

Exhibit L. p. 177. ll. 19-22.

pp. 12-13.

21. The Appellant submits that the option contained in Clause 9. of the Agreement constituted an irrevocable offer (so long as the Agreement continued in force) to sell the whole or any part of the described chattels which offer was capable of acceptance at any time prior to the giving of a notice of termination under Clause 6. of the Agreement so as to constitute a concluded contract for the sale and purchase of the relevant chattels. The terms of that contract are in part to be ascertained by reference to particular provisions of the Agreement dated the 3rd day of May, 1956; but the contract for sale and purchase of the specified chattels, once concluded, was, in legal consequence, independent of the prior Agreement.

p. 12.

p. 12.

22. It is further submitted that the Agreement, by Clause 6., expressly restricts the right, which would otherwise exist, to exercise the option contained in Clause 9. at any time during the period of the Agreement. Thereby that right is extinguished or, in other words, the period during which the offer contained in Clause 9. is open for acceptance may be brought to an end. Thus, Clause 6. provides that the option contained in Clause 9. shall not be exercisable after notice of termination of the Agreement has been given, notwithstanding that

pp. 12-13.

the Agreement continues in force for a period of three months thereafter. The Appellant respectfully submits that—

(a) There is, accordingly, no room for any other or further restriction of the period during which the option was to be exercisable by resort to implication from an assumed dominant purpose or intention of the contracting parties.

RECORD:

p. 126. ll. 10-12.

(b) That in finding, by such an implication, a further restriction of that period the Full Court of the Supreme Court of New South Wales was in error.

23. The critical question, therefore, is whether the option contained in Clause 9. of the Agreement was, upon its true construction, exercised:— 10

(a) at the time notice was given;
(b) at the expiration of the period of notice required to be given; or,
(c) only upon payment or tender of the precise amount of the purchase moneys required to be paid.

24. (a) The Appellant respectfully submits that the language of the Agreement compels the conclusion that, in the event mentioned in (a) above, the parties intended their rights 20 and obligations to be finally determined between them—in short, that a concluded contract then came into existence, at which time the respective rights and obligations of the parties were finally determined. This view involves the consequence that the period of postponement (that is, the three months period) was adopted to enable the parties, meantime, to adjust their respective affairs to conform with the altered situation thus arising, and to enable the ascertainment of the purchase money in the light of the calculations required for determining the 30 "residual value" of the relevant chattels. The intention of the parties was, thus, that a binding contract for sale should come into existence upon notice being given, the time for completion being postponed until the expiration of three months—that is that the "sale" should then be completed. **Mills v. Haywood** 6 Ch. D 196; **Nicholson v. Smith** 22 Ch. D. 640; **Ballas v. Theophilos** (No. 2) 98 C.L.R. 193.

(b) The alternative construction suggested, ((b) and (c) above) each involve, necessarily, the conclusion that 40 during the period of three months no concluded contract existed and, as a consequence that the Appellant was to be at liberty to revoke his provisional exercise of the option, though the Respondent's offer constituted by the option continued to be irrevocable.

25. Alternatively, the Appellant respectfully submits that a concluded contract for sale of the relevant chattels arose from the exercise by the Appellant of the option contained in Clause 9. of the Agreement upon the expiration of three months from the giving of notice under that clause. If this be the true construction of the Agreement, the Appellant acquired upon the 11th September, 1957 a right to purchase the relevant chattels and became subject to an obligation to pay the relevant purchase moneys. The performance of the latter obligation was not a condition precedent to the passing of the property in the relevant chattels which were at the relevant time in the possession of the Appellant. **Ballas v. Theophilos** (No. 2) (supra); Sale of Goods Act 1923-1937 (N.S.W.), Section 23. Thereupon, the Respondent had an accrued right to payment of the purchase moneys. The Appellant had the property in the goods sold. The contract was executed. In short, the Appellant "had purchased" the relevant chattels.

RECORD:

Exhibit L. p. 174. ll. 35-44.

Exhibit M. pp. 178-9.

Exhibit O. pp. 182-4.

26. The relevant purchase moneys were not in fact paid because the Respondent maintained that the option had not been validly exercised and refused to consider the question of the amount of the price. Nevertheless, during the currency of the Agreement, the Appellant required the Respondent pursuant to Clause 9 (e) of the Agreement to request the Forestry Commission to transfer the relevant occupation permit and sawmill licence. This the Respondent refused to do. Moreover, by a subsequent agreement of the parties (Exhibit M.) made during the currency of the Agreement of 3rd May, 1956 the Respondent undertook to treat the Appellant as having, in fact, paid the relevant purchase moneys if it should thereafter be determined that the option had been validly exercised.

p. 97. ll. 39-41.

p. 98. ll. 2-4.

27. Myers J. in dismissing the suit assumed, without deciding, the validity of the exercise of the option by the Appellant. His Honour held that the claim to specific performance of the contract for sale of the relevant chattels arising out of the exercise of the option failed for two reasons; firstly, that there was nothing to show that the contract was of a nature susceptible to specific performance, because it was a mere contract for the sale of goods; and, secondly, that there was no act left to be performed by the Respondent since the chattels were already in the possession of the Appellant. The Appellant respectfully submits that His Honour was in error in his first conclusion. The evidence showed that the subject matter of the suit was an agglomeration of chattels, constituting a sawmill "in situ" which was being operated as a "going concern". That fact was, in the Appellant's submission, sufficient to support the Appellant's claim to specific performance of the relevant chattels cf. **Turner v. Bladin** 82 C.L.R. 463.

RECORD: p. 98. 11. 5-7.

28. Myers J. then proceeded to examine the Appellant's claim to an order that the Respondent request the Forestry Commission to transfer the relevant occupation permit and the sawmill licence to it and described this claim as a claim for specific performance. The Appellant submits that, in so doing, His Honour misconceived the true nature of the Appellant's claim which lead him to a discussion of certain matters which were irrelevant. It is submitted that the equitable remedy of specific performance is apposite only to an "executory" contract and not to an "executed" contract. In the latter case, the relief truly sought is for performance in specie by way of injunction, whether mandatory or prohibitory. The distinction between an "executory" contract and an "executed" contract, for this purpose, lies in the intention of the parties. An "executory" contract is one which is not intended by the parties to be the final instrument regulating their legal relations in respect of the subject matter of the contract. A contract is "executed" if no other instrument is intended to be brought into existence for the purpose of defining the final rights and obligations of the parties to the relevant contract. **Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Co.** L.R. 16 Eq. 433, 438, 439; **Fry on Specific Performance** 6th Ed. pp. 16, 17 paras. 38-9; **Pakenham Upper Fruit Co. Ltd. v. Crosby** 35 C.L.R. 386; **Sydney Consumers' Milk and Ice Co. Ltd. v. Hawkesbury Dairy and Ice Society Ltd. & Ors.** 31 S.R. (N.S.W.) 458, 461-2; **J. C. Williamson Ltd. v. Lukey** 45 C.L.R. 282; per Dixon J. (as he then was) 45 C.L.R. at 297.

p. 98.

29. Having overlooked this distinction, Myers J. proceeded to treat the suit as one for specific performance of the Agreement of 3rd May, 1956. His Honour first construed that Agreement by Clauses 9 (d) and 9 (e) as requiring, in the events which had happened, that the Appellant continue to sell sleepers and sawn timber to the Respondent until 1972. In the light of that construction of the Agreement, His Honour held that specific performance of such a contract could not have been granted at the suit of the Respondent against the Appellant and that, accordingly, there could be no mutuality of remedy by reason whereof the Appellant's suit must be dismissed. The Appellant submits that each of the steps taken in the reasoning of Myers J. was erroneous. Upon the evidence, in the events which had happened, the Appellant's obligations under Clauses 9 (d) and (e) of the Agreement had been determined by the act of the Respondent in causing the termination of the Agreement on the 25th February, 1958. Thereafter the only obligations which remained to be performed by either party were:

p. 98. 11. 7-11.

11. 11-15.

(a) That the Respondent request that the permit and licence be transferred to the Appellant.

(b) That the Appellant pay the purchase price for the relevant chattels.

In that event, no question of want of mutuality of remedy could arise. **(Turner v. Bladin** 82 C.L.R. 463.)

30. Alternatively, the Appellant submits that there was no want of mutuality of remedy, insofar as the doctrine extends (if at all) to specific relief in respect of an "executed" contract. The true principle, it is submitted, is that specific performance will be granted and specific relief will be decreed in Equity when the Court is able, at the time of making the decree, to secure to a defendant by some means, other than a mere action at law for damages, the performance by a plaintiff of those substantial obligations to the defendant, upon which the obligations to be enforced at the suit of the plaintiff depend. **(Williston, on Contracts** (Revised Edition) Vol 5 p. 4002 et seq. paras. 1430 et seq; **Hanbury, Modern Equity** (4th Ed.) at 475, et seq; (5th Ed.) at 614, et seq; **J. C. Williamson Ltd. v. Lukey** 45 C.L.R. 282, per Starke J. at 292; per Dixon J. (as he then was) at 298-9; **Turner v. Bladin** 82 C.L.R. 463, at 470-1). A wide variety of examples can be found in the following cases: **Suttor v. Gundowda Pty. Ltd.** 81 C.L.R. 418; **Lytton v. Great Northern Railway Co.** 2 K. & J. 394; 69 E.R. 1; **Wolverhampton Corporation v. Emmons** (1901) 1 K.B. 515; **James Jones v. Tankerville** (1909) 2 Ch. 440; **Metropolitan Electric Supply v. Gender** (1901) 2 Ch. 799; **Ampol Petroleum Limited v. Mutton** 53 S.R. (N.S.W.) 1).

RECORD:

p. 98. ll. 16-37.

31. Myers J., in dismissing the suit also held that there was no evidence that the Appellant was always ready and willing to perform its obligations until a few days prior to the making of the decree. The Appellant submits that evidence of "readiness and willingness" is irrelevant to a claim for specific relief upon an "executed" contract. **Sydney Consumers' Milk and Ice Co. Ltd. v. Hawkesbury Dairy and Ice Society Ltd. & Ors.** (supra); **Fry, on Specific Performance** (6th Ed.) p. 18 para. 43; pp. 390-393, paras. 841-847. Alternatively, the Appellant submits that His Honour's finding that there was no evidence that the Plaintiff was ready and willing to perform the contract was erroneous. If the relevant contract is that constituted by the exercise by the Appellant of the option contained in Clause 9. of the Agreement of 3rd May, 1956 the whole of the evidence and the correspondence and the conduct of the Appellant in prosecuting the suit pointed irresistibly and overwhelmingly to the readiness and willingness of the Appellant at all material times to perform that contract. **(Alam v. Preston** 38 S.R. (N.S.W.) 475.) There was, in the Appellant's submission, no evidence to support a finding to the contrary.

pp. 12-13.

pp. 98-9.

32. Finally, Myers J. held that the admitted breaches by the Appellant of the Agreement dated 3rd May, 1956 precluded the Appellant from relief in any event; in other words, that those breaches

constituted an absolute bar to the Appellant's suit. To support this conclusion, Myers J. held that there was only one agreement between the parties, that is, the Agreement of the 3rd May, 1956—that the exercise by the Appellant of the option did not create a further contract between the parties. The Appellant submits that each of these conclusions was erroneous; the second, for the reason that the option provisions of Clauses 9. of the Agreement could not, without more, place the parties in the position of vendor and purchaser of the relevant chattels. Upon the exercise of the option a new contractual relationship arose—namely that of vendor and purchaser. It could not have arisen otherwise than from contract. The Agreement of 3rd May, 1956 did not create it—but merely made an offer which was to be irrevocable for a defined period. The Appellant further submits that the performance or non-performance of the Agreement of 3rd May, 1956 was, upon the trut construction of the Agreement, irrelevant to—

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(a) the capacity of the Plaintiff to exercise the option contained in Clause 9 (c); and

(b) the right of the Plaintiff to specific relief upon an executed contract **(Rafferty v. Schofield)** (1897) 1 Ch. 937, 941-2, 942-3; **Green v. Lowe** 22 Beavan 625; **Oxford v. Provand** L.R. 2 P.C. 135, 156; **Griffith v. Pelton** (1957) 3 W.L.R. 522; (1957) 3 A.E.R. 75).

The only relevance of the admitted breaches, as an absolute bar, could be the dependency of the varying promises of the one party upon the performance by the other party of his promises **(Oxford v. Provand** (supra); Fry, on Specific Performance (6th Ed.) 441 para. 937; cf. **McDonald v. Dennys Lascelles Ltd.** 48 C.L.R. 457; and per Dixon J. (as he then was) at 476-7; **Boston Deep Sea Fishing and Ice Company v. Ansell** 39 Ch. D. 339; **Hirji Mulji & Ors. v. Cheong Yue Steamship Co. Ltd.** (1926) A.C. 497, and at 503, 510). His Honour did not find that (nor was there any evidence to enable the determination of the question) the admitted breaches were of such a nature as to justify the refusal of relief as a matter of discretion. Only two breaches were admitted on the pleadings. Even if all the breaches alleged had been admitted, there was no evidence to enable it to be seen whether they were trivial or substantial and of such a nature as to warrant the withholding of specific equitable relief. Insofar as the onus was upon the Respondent to prove the existence of such circumstances (there being no evidence whatsoever on the point), the Appellant submits that the Respondent did not establish such circumstances. **(Pearson v. Arcadia Stores (Guyra) Ltd.** (No. 1) 53 C.L.R. 571, per Rich, Dixon, Evatt and McTiernan JJ. at 585-6.)

33. Alternatively, it is submitted that if it be determined that the Appellant had validly exercised the option to purchase the relevant chattels it was entitled, even if specific relief be not granted to it, to

a declaration that the said option had been validly exercised by it and that the Respondent was bound by the provisions of the Agreement to request the Forestry Commission to transfer the relevant occupation permit and sawmill licence to the Appellant. (Equity Act 1901-1957, Sections 8 and 10.)

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pp. 126-8.

34. The decision of the Full Court upon the counter-claim rests upon its decision that the Appellant had not exercised the option to purchase the sawmill conferred by Clause 9. of the Agreement. In consequence, the Appellant was not entitled to require the Respondent to request the Forestry Commission to transfer to it the relevant occupation permit and sawmill licence. Accordingly, if it be determined that the Appellant had validly exercised the option to purchase the sawmill and had validly required the Respondent to request the Forestry Commission to transfer to the Appellant the relevant occupation permit and sawmill licence (as the Appellant respectfully submits) the whole foundation of the decision of the Full Court upon the counter-claim disappears.

35. In the circumstances of the present appeal, the Appellant does not desire to argue the correctness of the jurisdictional grounds upon which Myers J. dismissed the Respondent's counter-claim. Its sole submission upon the appeal from the Decree of the Full Court of New South Wales insofar as it upheld the appeal of the Respondent from the Decree of Myers J. dismissing the counter-claim is that, if the Appellant had validly exercised the option contained in Clause 9. of the Agreement of 3rd May, 1956 and had validly required the Respondent to request the Forestry Commission to transfer the relevant occupation permit and sawmill licence, it was entitled until the latter request was made by the Respondent to remain in possession or occupation of the relevant lands and sawmill.

36. The Appellant respectfully submits that the Decree of the Full Court of the Supreme Court dismissing the Appellant's appeal in the suit and upholding the Respondent's appeal upon the counter-claim was erroneous and ought to be reversed and that the appeal of the Appellant should be allowed for the following, (amongst other)

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1. Because the Appellant had validly exercised the option to purchase conferred by Clause 9. of the Agreement of the 3rd May, 1956.
2. Because the Appellant had validly requested the Respondent to apply to the Forestry Commission to transfer to it the occupation permit and sawmill licence.
3. Because the Respondent had no title to any relief whatsover in the counter-claim.

P. Powell.