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6, 1961

In The Privy Council

No. 68. of 1960

ON APPEAL

*FROM THE SUPREME COURT OF
NEW SOUTH WALES
IN ITS EQUITABLE JURISDICTION*

Between

J. JAMIESON AND 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 - - - - - Appellant

and

THE COMMISSIONER FOR RAILWAYS - - - - - Respondent

RECORD OF PROCEEDINGS

Farrer & Co.,
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Solicitors for the Respondent.

(i)

In the Privy Council

No. 68, of 1960

ON APPEAL from the Supreme Court of New South Wales in its Equitable Jurisdiction in Suit instituted by Statement of Claim No. 1616 of 1957.

Between

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

and

THE COMMISSIONER FOR RAILWAYS - - - - - Defendant

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)

TRANSCRIPT RECORD OF PROCEEDINGS

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No. 1
Statement of Claim (as originally filed)

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*
—
*No. 1.
Statement of
Claim
(as originally
filed).*
—
24th Dec., 1957.

1. The Defendant is and has at all material times been a body corporate and as such liable to be sued in and by its said corporate name and style.

2. The defendant is and was at all material times possessed of a certain occupation permit and a certain licence both granted by The Forestry Commission of New South Wales to occupy certain lands and to operate a certain saw mill in Bril Bril State Forest at Bellangry 10 near Wauchope in the State of New South Wales.

3. By an agreement in writing made between the plaintiff of the second part and the defendant of the third part it was provided that the plaintiff should operate the said sawmill and for that purpose should take on lease and hire the buildings and plant itemised in the schedule to the said agreement. The plaintiff has pursuant to the said agreement occupied the said lands and operated the said saw mill since the thirteenth day of July One thousand nine hundred and fifty two.

4. By the said agreement it was further provided that the plaintiff 20 should have a separate and distinct option to purchase each and every item set out in or subsequently added to the schedule to the said agreement and that any such option might be exercised upon the plaintiff giving three months' notice in writing by prepaid registered post to the defendant.

5. By the said agreement it was further provided that the purchase price should be the residual value of each item as aforesaid at the time of such purchase calculated in accordance with the figures set out in or subsequently added to the schedule to the said agreement.

6. By the said agreement it was further provided that the purchase 30 money should be paid to the defendant in cash upon the exercise of the said option.

7. By the said agreement it was also provided that when the plaintiff had purchased in pursuance of the said agreement all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the schedule to the said agreement the defendant would if required in writing by the plaintiff during the currency of the said agreement request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and would request the Forestry Commission to maintain to the plaintiff 40 during the currency of the said agreement a supply of timber to the extent previously provided for therein.

8. The plaintiff craves leave to refer to the said agreement when

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 1.
Statement of
Claim
(as originally
filed).
(Continued)
—
24th Dec., 1957.

produced as if the same has been fully set forth herein. The plaintiff also craves leave to refer to the various letters mentioned in the succeeding paragraphs of this statement of claim as if the same had been fully set forth herein.

9. By letter dated the eleventh day of June One thousand nine hundred and fifty seven the plaintiff gave to the defendant three months notice of its intention to exercise the option to purchase each and every item set out in or subsequently added to the schedule to the said agreement and deemed to form part thereof other than the road motor vehicles and tractors. 10

10. By letter dated twenty eighth day of August one thousand nine hundred and fifty seven the defendant informed the plaintiff of the amounts of the residual values as at the thirty first day of August one thousand nine hundred and fifty seven and also informed the plaintiff of certain amounts said to be outstanding for hire charges and on other accounts and which needed to be paid on the exercise of the said option.

11. By letters dated the sixth and eleventh days of September One thousand nine hundred and fifty seven the plaintiff confirmed the exercise of the option of which notice had been given by letter dated the eleventh day of June one thousand nine hundred and fifty seven. 20
By the said letters the plaintiff disputed that the amounts said to be outstanding by the defendant were in fact owing and claimed that the only amounts payable upon the exercise of the said option were the residual values as aforesaid. The plaintiff stated that it was willing to pay to the defendant the proper sum payable on the exercise of the said option and that it would as soon as this sum was determined pay the same to the defendant in cash or by bank cheque against performance by the defendant of its obligations.

12. By letter dated the sixth day of September the plaintiff 30
appropriated the value of all deliveries of timber by the plaintiff to the defendant not already paid for or appropriated to other accounts in reduction of the residual values of each and every item as aforesaid and of the hire charges alleged to be due.

13. The plaintiff charges and the fact is that on the eleventh day of September One thousand nine hundred and fifty seven the plaintiff by virtue of the said appropriation paid in cash the whole of the said residual values in respect of each and every item set out in or subsequently added to the said schedule and deemed to form part thereof other than the road motor vehicles and tractors and had also 40
by virtue of the said appropriation paid in cash the hire charges and other amounts alleged to be due in respect of each and every item as aforesaid.

14. By letter dated the thirteenth day of September One thousand nine hundred and fifty seven the defendant denied that the said option to purchase had been validly exercised.

15. By letter dated the sixteenth day of September one thousand nine hundred and fifty seven the plaintiff noted the contention of the defendant that there had been no valid exercise of the option to purchase contained in the said agreement. The said letter stated that without prejudice to the plaintiff's claim that the option had been validly exercised it gave the defendant a further three months notice pursuant to clause nine of the said agreement of its intention to exercise the option to purchase each and every item set out in or subsequently added to the schedule to the said agreement and deemed to form part thereof other than the road motor vehicles and tractors.

16. By letter dated the twenty third day of September One thousand nine hundred and fifty seven the defendant's solicitor referred to the plaintiff's said letter of the sixteenth day of September and claimed that the purported notice therein contained was inefficacious.

17. By letter dated the eleventh day of October One thousand nine hundred and fifty seven the plaintiff required the defendant in writing during the currency of the said agreement to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and also to request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

18. By a written memorandum made between the plaintiff of the one part and the defendant of the other part on the twelfth day of December instant it was provided that the plaintiff would deposit with Custom Credit Corporation Limited the sum of Twenty thousand pounds (£20,000.0.0) and hand to the defendant the documents of title thereto. It was further provided by the said agreement that if it should finally be determined that the plaintiff had exercised or might on the expiration of three months from the giving of the notice to the defendant dated the sixteenth day of September one thousand nine hundred and fifty seven exercise the said option of purchase the sum payable on the exercise of such option should be taken to have been paid to the defendant on such expiration as aforesaid.

19. On the 16th day of December 1957 the plaintiff deposited with Custom Credit Corporation Limited the sum of twenty thousand pounds (£20,000.0.0) and on the 18th day of December 1957 the documents of title thereto were handed to the defendant.

20. By letter dated the 23rd day of December 1957 the plaintiff required the defendant in writing during the currency of the said

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 1.
Statement of
Claim
(as originally
filed).
—
(Continued)

24th Dec., 1957.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 1.

Statement of
Claim
(as originally
filed).
(Continued)

—
24th Dec., 1957.

agreement to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and also to request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

21. The defendant has repeatedly refused to recognise that the plaintiff has validly exercised the said option of purchase either by its notice dated 11th June One thousand nine hundred and fifty seven or by its notice dated the sixteenth day of September One thousand nine hundred and fifty seven. The defendant has refused and neglected 10 and still refuses to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

22. By the said agreement it was also provided that if the plaintiff or the defendant should commit a breach of any clause or provision of the said agreement the plaintiff or the defendant as the case might be should be entitled to terminate the said agreement by giving three months notice in writing posted to the plaintiff or the defendant at its or his address. 20

23. By letter dated the twenty fifth day of November One thousand nine hundred and fifty seven the defendant pursuant to the said agreement purported to give to the plaintiff three months notice of termination of the said agreement. The said notice purported to be given for breaches by the plaintiff since the thirteenth day of March One thousand nine hundred and fifty seven of certain clauses of the agreement therein specified.

24. By letter dated the twenty ninth day of November One thousand nine hundred and fifty seven the plaintiff's solicitors requested the defendant to furnish details of the precise acts and omissions upon 30 which the defendant relied to establish breaches of the clauses referred to in the preceding paragraph.

25. By letter dated the third day of December One thousand nine hundred and fifty seven the defendant's solicitor declined to furnish particulars and stated that in due course and at the appropriate time the plaintiff would be informed of the details of such breaches.

26. The plaintiff charges and the fact is that there have been since the thirteenth day of March One thousand nine hundred and fifty-seven no breaches of the provisions of the said agreement upon the part of the plaintiff which would entitle the defendant to give notice 40 terminating the said agreement.

27. The plaintiff further charges that the said agreement is a

hire purchase agreement within the meaning of the Hire Purchase Agreements Act 1941-1955 and that the same cannot be validly determined except in accordance with the provisions of the said Act.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

28. The said saw mill and the said items in the Third Schedule to the said agreement purchased by the plaintiff by reason of its exercise of the said option as aforesaid and the said Permit and Licence constitute property of exceptional and peculiar value to the plaintiff.

—
No. 1.
Statement of
Claim
(as originally
filed).
(Continued)

29. The plaintiff fears that unless restrained by order of this Honourable Court the defendant will on or after the twenty fifth day of February next seek to eject the plaintiff from the said lands now occupied by it and take possession of the various items set out in or subsequent added to the schedule to the said agreement and the subject of the option as aforesaid.

—
24th Dec., 1957.

30. The plaintiff is and always has been ready and willing and hereby offers to carry out the said agreement so far as it remains to be performed on its part.

THE PLAINTIFF THEREFORE CLAIMS:

- 20 (1) That it may be declared that the said option to purchase has been validly exercised by the plaintiff and that the agreement arising therefrom ought to be specifically performed and carried into execution and that the same may be decreed accordingly the plaintiff hereby offering to specifically perform the same so far as the same remains to be performed on its part.
- 30 (2) That in addition to the specific performance of the said agreement the defendant may be ordered to pay to the plaintiff the damages which the plaintiff has sustained by reason of the said refusal and neglect of the defendant to perform the said agreement and that it may be referred to the Master in Equity to enquire what is the amount of such damages.
- 40 (3) That it may be ordered that the agreement of the defendant to request the Forestry Commission to transfer the said Permit and the said Licence to the plaintiff and to request the Forestry Commission to maintain to the plaintiff during the currency of the agreement referred to in paragraph three hereof a supply of timber to the extent previously provided for in the said agreement ought to be specifically enforced and that the same may be decreed accordingly or in the alternative that the defendant may be ordered to take such steps as the Master in Equity may direct for the purpose of obtaining the transfer of the

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 1.
Statement of
Claim
(as originally
filed).
(Continued)

24th Dec., 1957.

said Permit and the said Licence and the maintenance of the supply of timber as aforesaid.

- (4) That in addition to the specific performance of the agreement referred to in the preceding prayer the defendant may be ordered to pay to the plaintiff the damages which the plaintiff has sustained by reason of the said refusal and neglect of the defendant to perform the said agreement and that it may be referred to the Master in Equity to enquire what is the amount of such damages.
- (5) That pending completion of the said agreement referred to in the first prayer hereof the defendant his servants and agents may be restrained from entering upon the said lands now in the occupation of the plaintiff and from taking possession of or interfering in any way with the various items in the schedule the subject of the said agreement.
- (6) That it may be declared that the purported termination by the defendant of the agreement referred to in paragraph three hereof is invalid and inoperative and that the said agreement is in full force and effect. 20
- (7) That the defendant his servants and agents may be restrained from acting upon the purported termination of the said agreement referred to in paragraph three hereof and from interfering in any way with the buildings and plant leased and hired to the plaintiff under the said agreement.
- (8) That the defendant his servants and agents may be restrained from taking possession of the goods comprised in the agreement referred to in paragraph three hereof otherwise than in accordance with the Hire-Purchase Agreements Act 1941-1955. 30
- (9) That the defendant may be ordered to pay to the plaintiff the costs of this suit.
- (10) That the plaintiff may have such further and other relief as the nature of the case may require.

Harold H. Glass
Counsel for the Plaintiff.

NOTE: This Statement of Claim is filed by Messrs. Arthur T. George and Co. of 10 Martin Place, Sydney, the Solicitors for J. Jamieson & Sons Pty. Limited whose registered office is at 267 Elizabeth Street, Sydney, in the State of New South Wales, the abovenamed Plaintiff. 40

No. 2
Proposed Amendments to Statement of Claim (First Schedule to Decree—see No. 16)

*In the
 Supreme Court
 of New South
 Wales in its
 Equitable
 Jurisdiction.*

—
 No. 2.
 Proposed
 Amendments to
 Statement of
 Claim.

—
 18th Nov., 1959.

- 2A. Set out Agreement in full.
 Omit paragraphs 3-16.
- 3A. On the eleventh of June 1957 the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said Schedule other than the road motor vehicles and tractors.
- 10 3B. Alternatively to paragraph 3A on 11th September, 1957, the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.
- 3C. Alternatively to paragraphs 3A and 3B on the 16th September, 1957, the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.
- 20 3D. Alternatively to paragraphs 3A, 3B and 3C, on 16th December, 1957, the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.
- 3E. The plaintiff has paid to the defendant in cash the purchase money payable upon the exercise of the said option.
- 30 3F. Alternatively to paragraph 3E the plaintiff has offered and still offers to pay the said purchase money in cash.
17. Omit "By letter dated the eleventh day of October, one thousand nine hundred and fifty seven" and insert in place thereof: "After the exercise of the said option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors." Omit paragraphs 18, 19 and 20.
- 40 21. Omit "either by its notice dated 11th June one thousand nine hundred and fifty seven or by its notice dated the sixteenth day of September one thousand nine hundred and fifty seven." Omit 22, 23, 24, 25, 26, 27, 28.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 3.
Amended
Statement of
Claim,
incorporating
Agreement of
3rd May, 1956.
23rd Nov., 1959.

30. After "agreement" insert "set out in paragraph 2A and the contract arising out of the exercise of the said option" and delete "it remains" and substitute "so far as they or either of them remain."

No. 3

Amended Statement of Claim incorporating Agreement of 3rd May, 1956

1. The Defendant is and has at all material times been a body corporate and as such liable to be sued in and by its said corporate name and style. 10

2. The defendant is and was at all material times possessed of a certain occupation permit and a certain licence both granted by The Forestry Commission of New South Wales to occupy certain lands and to operate a certain saw-mill in Bril Bril State Forest at Bellangry near Wauchope in the State of New South Wales.

2A. By an Agreement dated the third day of May One thousand Nine Hundred and Fifty-Six between JOHN JAMIESON of the first part the Plaintiff of the second part and the Defendant of the third part it was provided as follows:— 20

AGREEMENT made this third day of May One thousand nine hundred and fifty-six BETWEEN JOHN JAMIESON of Sydney in the State of New South Wales Merchant formerly trading under the name style or firm of John Jamieson & Sons at 72 Pitt Street Sydney aforesaid (hereinafter called the Releasor) of the first part J. JAMIESON & SONS PTY. LIMITED a Company duly incorporated according to the laws of the State aforesaid and having its registered office at 267 Elizabeth Street Sydney aforesaid (hereinafter called the Contractor) of the second part and THE COMMISSIONER FOR RAILWAYS of 19 York Street Sydney aforesaid (hereinafter called the Owner) of the 30 third part WHEREAS the owner is possessed of an Occupation Permit No. 9546 and a Licence No. 7801 (hereinafter referred to as the said Permit or the said Licence as the case may be) from the Forestry Commission of New South Wales (hereinafter referred to as the Forestry Commission) to occupy certain lands and to operate a sawmill (hereinafter referred to as the mill) in Bril Bril State Forest at Bellangry near Wauchope in the said State (hereinafter called the said Forest) AND WHEREAS it was agreed between the Releasor and the Owner that the Releasor would operate the said mill upon terms and conditions to be 40 mutually decided AND WHEREAS the Releasor subsequently requested the Owner to agree to the said mill being operated by the Contractor in lieu of himself AND WHEREAS in pursuance of such request the Owner and the Contractor have agreed that

the Contractor will be deemed as from the thirteenth day of July One thousand nine hundred and fifty two to have operated and will operate as from the date hereof the said mill on the terms and conditions hereinafter set out and that the several covenants and obligations of the owner and/or the Contractor as hereafter set out shall apply to the operation of the said mill or otherwise as and from the thirteenth day of July One thousand nine hundred and fifty two as if the Agreement had been executed on that day NOW THIS AGREEMENT WITNESSETH:

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 3. Amended Statement of Claim, incorporating Agreement of 3rd May, 1956. (Continued)

10

1. THE Owner shall

(a) Request the Forestry Commission to renew and keep in force the said Permit and the said Licence from time to time as may be necessary.

20

(b) Make available on lease or hire as the case may be to the Contractor the buildings and plant itemised in the Schedule hereto at the monthly rental or hire set out opposite each such item in the seventh column of such Schedule PROVIDED ALWAYS that on the application of the Contractor during the currency of this Agreement the Owner may in his discretion and without being under any obligation so to do replace any buildings or plant or supply additional buildings or plant and the rental or hire charges (together with the figures for estimated useful life and estimated depreciation) for any buildings or plant so made available by the Owner by way of replacement or as additional buildings or plant shall be fixed by agreement between the parties or in default of such agreement by the Owner's Chief Civil Engineer whose decision shall be final and any such buildings or plant so made available by the Owner shall be added to the Schedule to this agreement and shall be deemed to be buildings and plant within the meaning of this agreement.

30

(c) Pay all accounts received from the Forestry Commission in respect of the Contractor's operation in the said Forest and debit the same to the Contractor on a monthly basis.

40

(d) Request the Forestry Commission to make available to the Contractor on an at stump basis such a quantity of suitable millable timber as will enable an intake to the said mill of at least ten million super feet per annum gross volume log measurement PROVIDED THAT any failure by the Forestry Commission to carry out such request shall not impose any liability of any kind whatsoever upon the Owner and shall in no way affect the

23rd Nov., 1959.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 3.
Amended
Statement of
Claim,
incorporating
Agreement of
3rd May, 1956.
(Continued)

—
23rd Nov., 1959.

rights of the Owner under this Agreement.

2. THE Contractor shall—

- (a) Repair and maintain in good working order and condition at its own expense the said buildings and plant and provide at its own expense all spare parts and other materials necessary for the purpose of such repair and maintenance. The Owner shall at the expense of the Contractor insure all such buildings and plant against fire under the usual terms and conditions acceptable to the Government Insurance Office in connection with such insurance and will also at the expense of the Contractor insure such items of plant as are motor vehicles and tractors under the usual terms applicable to Third Party and Comprehensive Insurance with the Government Insurance Office and to the extent to which the Owner is not covered by such insurance policies as aforesaid the Contractor shall be liable to indemnify and make good to the Owner any damage or injury of any kind whatsoever arising from any cause whatsoever to such buildings and plant and any other property of the Owner in and about such buildings or plant. 10
- (b) Operate the said mill and carry out the functions incidental thereto in a good workmanlike and efficient manner.
- (c) Mill all logs accepted by the Contractor from the Forestry Commission and sell the sleepers and sawn timber recovered therefrom to the Owner as hereinafter provided.
- (d) Use every reasonable effort to recover the maximum quantity of first quality sleepers from logs as supplied with a minimum of waste. 30
- (e) Cut the balance of the timber into sawn timber of various sizes suitable as far as possible for use by the Owner.
- (f) Arrange with the local Forester all adjustments necessary due to rejected and faulty logs and any other adjustments necessary due to log purchases between the Contractor and the local Forester.
3. (a) The owner shall subject to the right of rejection in clause 4 hereof and to the provisions of clause 5 hereof purchase all sleepers and timber milled by the Contractor pursuant to clause 2 hereof. 40
- (b) The Owner shall pay for sleepers and for sawn timber supplied by the Contractor in pursuance of this Agreement the prices authorised from time to time by the Prices Commissioner and in the event of prices not being so fixed by the Prices Commissioner then the prices will

be such prices as are from time to time fixed by the Country Sawmillers' Association of New South Wales provided that if the prices fixed by the Country Sawmillers' Association of New South Wales are not acceptable to the Owner the fixing of reasonable prices shall be determined by arbitration in accordance with clause 10 hereof.

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- 10 (c) Payments shall be made by the Owner to the Contractor against deliveries of sleepers and sawn timber to the Owner's Representative at Wauchope Railway Yards and such payments shall be made as far as possible for sleepers within seven (7) days and for sawn timber within fourteen (14) days.
- (d) The Owner shall render accounts monthly for:
 - (i) rental or hire under this agreement;
 - (ii) amounts debited by the Owner to the Contractor or in accordance with sub-clause (c) of clause 1 hereof;
 - 20 (iii) any other amounts due by the Contractor to the Owner; and all of the above amounts must be paid by the Contractor to the Owner within Thirty (30) days after the rendition of such accounts failing which the Owner may deduct the amounts from payments due to the Contractor under clause 3 (c).

4. THE Owner shall be entitled to reject any sleepers or sawn timber which in the opinion of the Owner's Inspector is—

- 30 (a) in the case of sleepers not of first quality
- (b) in the case of sawn timber produced from turpentine or bloodwood species or not of merchantable dimensions or merchantable quality within the meaning of the definition of merchantable quality as laid down by the Country Sawmillers' Association of New South Wales.

5. THE Contractor agrees not to sell any sleepers and/or sawn timber produced by it in the said mill other than to the Owner at the price above provided

PROVIDED ALWAYS that the Contractor may—

- 40 (a) Sell other than to the Owner any timber rejected by the Owner as herein provided.
- (b) Sell to other than the Owner such quantity of sleepers or timber as the Owner may from time to time consent in writing to release for sale in such manner
- (c) From time to time (subject to the consent in writing of the Owner being obtained on each and every occasion) use sawn timber for its own purposes or make available such timber to its employees for their own use.

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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 10 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.

7. THE Owner shall be entitled at any time upon giving to the Contractor two days previous notice to inspect the said buildings and plant and if in the opinion of the Owner on any such inspection the said buildings and plant have depreciated in value to a greater extent 20 than the estimated depreciation as calculated from the figures set out in the Schedule to this agreement or if in the opinion of the Owner upon any such inspection the estimated useful life of the said buildings and plant has diminished below the estimated useful life as calculated from the figures specified in the said Schedule the Owner may call upon the Contractor to pay by monthly instalments during the twelve months next succeeding any such inspection an amount sufficient to compensate the Owner for such increased depreciation or lessening in the estimated useful life as the case may be AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that if the parties hereto 30 are unable to agree upon any such amount then the fixing of such amount shall be determined in accordance with clause 10 hereof.

8. THIS contract shall be deemed to have been entered into on the thirteenth day of July One thousand nine hundred and fifty two and shall remain in force for a period of ten years commencing on and from the said thirteenth day of July One thousand nine hundred and fifty two unless previously determined as herein provided.

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 40 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 sub-clause (b) of clause 1 hereof.

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- (b) The purchase money shall be paid to the Owner in cash upon the exercise of such option.
- 10 (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
 - 20 (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.
- 30 (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.

10. IN the event of any dispute arising between the parties 40 hereto as to the interpretation of these presents or in any other way howsoever pursuant to these presents the matter shall be referred to arbitration pursuant to the Arbitration Act 1902.

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11. THE Contractor shall lodge with the Owner a Bank Guarantee or a bond in a form acceptable to the Owner by a recognised Insurance Company in the sum of One thousand pounds (£1,000.0.0) for the due performance of this agreement.

12. EXCEPT by consent in writing of the Owner the Contractor shall not be at liberty to assign or sublet this agreement in any way whatsoever nor shall it in the event of the said Permit and the said Licence being transferred to it in pursuance of subclause (c) of clause 9 hereof be at liberty to deal with the said Permit and the said Licence in any way whatsoever other than by way of transfer to the 10
Owner.

13. THE annual interest charged as set out in the Schedule hereto shall be at the rate of five per centum and is computed for the year commencing on the thirteenth day of July One thousand nine hundred and fifty two on the amounts set out in such Schedule for Estimated Value of Buildings and Plant as at the said thirteenth day of July One thousand nine hundred and fifty two. In respect of any subsequent year during the duration of this agreement the annual interest charged shall be five per centum of the estimated value of Buildings and Plant as at the thirteenth day of July of such year and 20
such Estimated Value shall be computed by deducting from the Estimated Value as at the thirteenth day of July One thousand nine hundred and fifty two the amounts of annual depreciation (as set out in Column (3) of the said schedule) which are applicable to each year subsequent to the said thirteenth day of July One thousand nine hundred and fifty two PROVIDED ALWAYS the said annual rate of interest of five per centum shall be calculated at monthly rests on the reducing estimated values of the said buildings and plant.

14. Annual insurance charges for the year commencing on the thirteenth day of July One thousand nine hundred and fifty two are 30
set out in Column (5) of the Schedule hereto and such charges shall in respect of any subsequent year vary according to the charges levied at the commencement of such year by the Government Insurance Office of New South Wales and shall be based on the Estimated Value of Buildings and Plant as at the thirteenth day of July of such year as determined in accordance with clause 13 hereof.

15. Rental or Hire per month for Buildings or Plant in respect of any year subsequent to the year commencing the thirteenth day of July one thousand nine hundred and fifty-two shall be adjusted appropriately to provide for variations in interest and insurance 40
charges.

16. In consideration of these presents, the Releasor and the

Owner hereby acknowledge that any agreement between himself and the Owner to operate the said mill has become merged in the Agreement herein set forth AND the Releasor and the Owner mutually release the one and the other from all or any liability under or in respect of any such agreement.

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IN WITNESS whereof the parties hereto have executed these presents the day and year first hereinbefore written.

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SIGNED SEALED AND DELIVERED by the said JOHN JAMIESON in the presence of:—

23rd Nov., 1959.

THE COMMON SEAL of J. JAMIESON & SONS PTY. LIMITED was affixed hereto by authority of the Directors of the said Company in the presence of the Secretary and of the Directors whose signatures are set opposite hereto who signed this Agreement in the presence of:—

Secretary.

20

THE COMMON SEAL of THE COMMISSIONER FOR RAILWAYS hath been hereunto duly affixed in the presence of:—

(L.S.)

(Sgd.) H. J. McAndrew

Correct Asst. Secretary for Railways

(Sgd.) Sydney Burke
Solicitor for Railways

S C H E D U L E

BUILDINGS OR PLANT ON HIRE TO JOHN JAMIESON AND SONS, BRIL BRIL, AS FROM 13/7/1952

	(1) Estimated Plant Value at 13th July, 1952 £	(2) Estimated Useful Life Years	(3) Annual Depreciation £	(4) 1st Year's Interest Charges		(5) 1st Year's Insurance Charges		(6) Inspection Charges per annum		(7) Hire or Rental per Calendar Month (being one- twelfth the total of columns (3), (4), (5), and (6)) £ s. d.		
				£	s.	£	s.	£	s.		£	s.
BUILDINGS:												
Workshop and Store	2,000*	10	130*	100	0	80	0	6	0	26	6	8
1/10 Man Hut	700	10	47	35	0	28	0	9	3	9	3	4
1/12 Man Hut	870	10	58	43	10	34	16	11	7	11	7	2
Kitchen, Mess and Recreation Room	800	10	53	40	0	32	0	10	8	10	8	4
Bachelor's Kitchen	80	10	5	4	0	3	4	1	0	1	0	4
Laundry and Shower Room	240	10	16	12	0	9	12	3	2	3	2	8
2/1000 gallon Tanks and Stands	50	10	3	2	10	2	0	12	6	12	6	
Sanitary Accommodation	60	10	4	3	0	2	8	15	8	15	8	
Mess Equipment	200	10	14	10	0	8	0	2	13	2	13	4
PLANT:												
(a) TRACTORS:												
Caterpillar D7 No.	4,417*	2	342*	220	17	32	0	6	0	50	1	5
Caterpillar D4	933	1/3 year	700	46	13	23	18	6	0	64	14	3
Allis Chalmers H.D. 10	1,067	1/3 year	800	53	7	25	10	6	0	73	14	10
Oliver Cietrac F.D.E. X56	10,473	2-5/12 year	1,933	503	13	106	10	6	0	212	8	9
Oliver Cietrac F.D.E. X.63	10,795	2-7/12 year	1,933	539	15	106	10	6	0	215	8	10
(b) ROAD MOTOR VEHICLES:												
Foden Truck, MV.665	3,000*	3	750*	150	0	52	7	6	0	79	17	3
White Truck MV.602	1,114	2	407	55	14	30	14	6	0	41	12	5
Mack Truck	1,000*	2	250*	50	0	29	11	6	0	27	19	4
Jeep, MV.348	114*	1	89*	5	14	14	3	3	0	9	6	5
Land Rover with Welding Equip- ment, MV.349	900	3	200	45	0	27	14	6	0	23	4	7
White Truck, MV.1004, & Trailer	5,965*	5	793*	298	5	79	17	6	0	98	1	10
White Truck, MV.1005, & Trailer	5,965*	5	793*	298	5	79	17	6	0	98	1	10

	(1) Estimated Plant Value at 13th July, 1952 £	(2) Estimated Useful Life Years	(3) Annual Depreciation £	(4) 1st Year's Interest Charges			(5) 1st Year's Insurance Charges			(6) Inspection Charges per annum £ s. d.	(7) Hire or Rental per Calendar Month (being one- twelfth the total of columns (3), (4), (5), and (6)) £ s. d.				
				£	s.	d.	£	s.	d.			£	s.	d.	
(c) SAWMILLS:															
R.A.E. Mill (known as No. 8), complete with—															
Leyland Beaver Engine	7,000*	10	500*	350	0	0	280	0	0	6	0	0	94	13	4
Leyland Beaver Engine	1,000	3	166	50	0	0	40	0	0	2	0	0	21	10	0
Caterpillar Engine	1,000	3	166	50	0	0	40	0	0	2	0	0	21	10	0
Saw Gulletting Machine, with 1½ h.p. Villier Engine	3,000	5	800	150	0	0	120	0	0				89	3	4
6 h.p. Engine for Mill Winch	40	1	10	2	0	0	1	12	0				1	2	8
Hand Winch	50	5	8	2	10	0	2	0	0				1	0	10
Hand Winch	20	10	2	1	0	0	16	0	0				6	6	4
(d) MISCELLANEOUS:															
½ ton Anchor Chain Block	45	10	2	2	5	0							7	1	
1½ ton Anchor Chain Block	20	10	1	1	0	0							3	4	
Spare Leyland Beaver Engine	1,000 (Interest and Insurance charges only)			50	0	0	40	0	0				7	10	0
(e) ELECTRIC LIGHTING															
1 Alternator	100*	5	10*	5	0	0	4	0	0				1	11	8
1 Ruston Hornsby Diesel Engine Electrical Installation, Wiring, etc.	150 150	5 10	15 15	7	10	0	6	0	0				2	7	6
			£11,015	£3,195	18	0	£1,349	4	2	£85	0	0	£1,303	15	4

*—Items marked * are incomplete and subject to adjustments.
Interest charges will be reduced monthly and calculated at monthly rests @ 5% per annum on the reducing residual value.
Insurance charges will be adjusted on payment of annual premiums.

This is the Schedule referred to in the annexed Agreement between John Jamieson, J. Jamieson & Sons Pty. Limited and The Commissioner for Railways dated the 3rd day of May, 1956.

For and on behalf of
J. Jamieson & Sons Pty. Limited
Secretary

For and on behalf of
The Commissioner for Railways
Secretary for Railways

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~~3. By an agreement in writing made between the plaintiff of the second part and the defendant of the third part it was provided that the plaintiff should operate the said sawmill and for that purpose should take on lease and hire the buildings and plant itemised in the schedule to the said agreement. The plaintiff has pursuant to the said agreement occupied the said lands and operated the said sawmill since the thirteenth day of July One thousand nine hundred and fifty two.~~

3A. On the eleventh of June 1957 the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.

3B. Alternatively to paragraph 3A on the eleventh day of September 1957 the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.

3C. Alternatively to paragraphs 3A and 3B on the 16th September, 1957 the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.

3D. Alternatively to paragraphs 3A, 3B and 3C on 16th December, 1957 the plaintiff exercised the option to purchase each and every item set out in or subsequently added to the schedule to the agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors.

3E. The plaintiff has paid to the defendant in cash the purchase money payable upon the exercise of the said option. 30

3F. Alternatively to paragraph 3E the plaintiff has offered and still offers to pay the said purchase money in cash.

~~4. By the said agreement it was further provided that the plaintiff should have a separate and distinct option to purchase each and every item set out in or subsequently added to the schedule to the said agreement and that any such option might be exercised upon the plaintiff giving three months notice in writing by prepaid registered post to the defendant.~~

5. By the said agreement it was further provided that the purchase price should be the residual value of each item as aforesaid at the time of such purchase calculated in accordance with the figures set out in or subsequently added to the schedule to the said agreement. 40

~~6. By the said agreement it was further provided that the purchase money should be paid to the defendant in cash upon the exercise of the said option.~~

7. By the said agreement it was also provided that when the plaintiff had purchased in pursuance of the said agreement all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the schedule to the said agreement the defendant would if required in writing by the plaintiff during the currency of the said agreement request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and would request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for therein.

8. The plaintiff craves leave to refer to the said agreement when produced as if the same has been fully set forth herein. The plaintiff also craves leave to refer to the various letters mentioned in the succeeding paragraphs of this statement of claim as if the same had been fully set forth herein.

9. By letter dated the eleventh day of June One thousand nine hundred and fifty seven the plaintiff gave to the defendant three months notice of its intention to exercise the option to purchase each and every item set out in or subsequently added to the schedule to the said agreement and deemed to form part thereof other than the road motor vehicles and tractors.

10. By letter dated twenty eighth day of August One thousand nine hundred and fifty seven the defendant informed the plaintiff of the amounts of the residual values as at the thirty first day of August one thousand nine hundred and fifty seven and also informed the plaintiff of certain amounts said to be outstanding for hire charges and on other accounts and which needed to be paid on the exercise of the said option.

11. By letters dated the sixth and eleventh days of September One thousand nine hundred and fifty seven the plaintiff confirmed the exercise of the option of which notice had been given by letter dated the eleventh day of June One thousand nine hundred and fifty-seven. By the said letters the plaintiff disputed that the amounts said to be outstanding by the defendant were in fact owing and claimed that the only amounts payable upon the exercise of the said option were the residual values as aforesaid. The plaintiff stated that it was willing to pay to the defendant the proper sum payable on the exercise of the said option and that it would as soon as this sum was determined pay the same to the defendant in each or by bank cheque against performance by the defendant of its obligations.

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~~12. By letter dated the sixth day of September the plaintiff appropriated the value of all deliveries of timber by the plaintiff to the defendant not already paid for or appropriated to other accounts in reduction of the residual value of each and every item as aforesaid and of the hire charges alleged to be due.~~

13. The plaintiff charges and the fact is that on the eleventh day of September One thousand nine hundred and fifty seven the plaintiff by virtue of the said appropriation paid in cash the whole of the said residual values in respect of each and every item set out in or subsequently added to the said schedule and deemed to form part 10 thereof other than the road motor vehicles and tractors and had also by virtue of the said appropriation paid in cash the hire charges and other amounts alleged to be due in respect of each and every item as aforesaid.

14. By letter dated the thirteenth day of September One thousand nine hundred and fifty seven the defendant denied that the said option to purchase had been validly exercised.

15. By letter dated the sixteenth day of September One thousand nine hundred and fifty seven the plaintiff noted the contention of the defendant that there had been no valid exercise of the option to 20 purchase contained in the said agreement. The said letter stated that without prejudice to the plaintiff's claim that the option had been validly exercised it gave the defendant a further three months notice pursuant to clause nine of the said agreement of its intention to exercise the option to purchase each and every item set out in or subsequently added to the schedule to the said agreement and deemed to form part thereof other than the road motor vehicle and tractors.

16. By letter dated the twenty third day of September One thousand nine hundred and fifty seven the defendant's solicitor referred to the plaintiff's said letter of the sixteenth day of September and 30 claimed that the purported notice therein contained was inefficacious.

17. By letter dated the eleventh day of October One thousand ~~nine hundred and fifty seven~~ after the exercise of the said option to purchase each and every item set out in or subsequently added to the schedule to the Agreement set out in paragraph 2A and deemed to form part of the said schedule other than the road motor vehicles and tractors, the plaintiff required the defendant in writing during the currency of the said agreement to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and also to request the Forestry Commission to maintain to the 40 plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

18. ~~By a written memorandum made between the plaintiff of the one part and the defendant of the other part on the twelfth day of December instant it was provided that the plaintiff would deposit with Custom Credit Corporation Limited the sum of Twenty Thousand pounds (£20,000.0.0) and hand to the defendant the documents of title thereto. It was further provided by the said agreement that if it should finally be determined that the plaintiff had exercised or might on the expiration of three months from the giving of the notice to the defendant dated the sixteenth day of September one thousand nine hundred and fifty seven exercise the said option of purchase the sum payable on the exercise of such option should be taken to have been paid to the defendant on such expiration as aforesaid.~~

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19. On the 16th day of December 1957 the plaintiff deposited with Custom Credit Corporation Limited the sum of twenty thousand pounds (£20,000.0.0) and on the 18th day of December 1957 the documents of title thereto were handed to the defendant.

20. By letter dated the 23rd day of December 1957 the plaintiff required the defendant in writing during the currency of the said agreement to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and also to request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

21. The defendant has repeatedly refused to recognise that the plaintiff has validly exercised the said option of purchase either by its notice dated 11th June one thousand nine hundred and fifty seven or by its notice dated the sixteenth day of September one thousand nine hundred and fifty seven. The defendant has refused and neglected and still refuses to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

22. ~~By the said agreement it was also provided that if the plaintiff or the defendant should commit a breach of any clause or provision of the said agreement the plaintiff or the defendant as the case might be should be entitled to terminate the said agreement by giving three months notice in writing posted to the plaintiff or the defendant at its or his address.~~

23. By letter dated the twenty fifth day of November One thousand nine hundred and fifty seven the defendant pursuant to the said agreement purported to give to the plaintiff three months notice of termination of the said agreement. The said notice purported to be given for breaches by the plaintiff since the thirteenth day of March

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~~One thousand nine hundred and fifty seven of certain clauses of the agreement therein specified.~~

24. By letter dated the twenty ninth day of November One thousand nine hundred and fifty seven the plaintiff's solicitors requested the defendant to furnish details of the precise acts and omissions upon which the defendant relied to establish breaches of the clauses referred to in the preceding paragraph.

25. By letter dated the third day of December One thousand nine hundred and fifty seven the defendant's solicitor declined to furnish particulars and stated that in due course and at the appropriate time the plaintiff would be informed of the details of such breaches. 10

26. The plaintiff charges and the fact is that there have been since the thirteenth day of March one thousand nine hundred and fifty-seven no breaches of the provisions of the said agreement upon the part of the plaintiff which would entitle the defendant to give notice terminating the said agreement.

27. The Plaintiff further charges that the said agreement is a hire purchase agreement within the meaning of the Hire Purchase Agreements Act 1941-1955 and that the same cannot be validly determined except in accordance with the provisions of the said Act. 20

28. The said saw mill and the said items in the Third Schedule to the said agreement purchased by the plaintiff by reason of its exercise of the said option as aforesaid and the said Permit and licence constitute property of exceptional and peculiar value to the plaintiff.

29. The plaintiff fears that unless restrained by order of this Honourable Court the defendant will on or after the twenty fifth day of February next seek to eject the plaintiff from the said lands now occupied by it and take possession of the various items set out in or subsequently added to the schedule to the said agreement and the subject of the option as aforesaid. 30

30. The plaintiff is and always has been ready and willing and hereby offers to carry out the said agreement set out in paragraph 2A and the contract arising out of the exercise of the said option ~~as far as it remains~~ so far as they or either of them remain to be performed on its part.

THE PLAINTIFF THEREFORE CLAIMS:—

- (1) That it may be declared that the said option to purchase has been validly exercised by the plaintiff and that the

agreement arising therefrom ought to be specifically performed and carried into execution and that the same may be decreed accordingly the plaintiff hereby offering to specifically perform the same so far as the same remains to be performed on its part.

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- 10 (2) That in addition to the specific performance of the said agreement the defendant may be ordered to pay to the plaintiff the damages which the plaintiff has sustained by reason of the said refusal and neglect of the defendant to perform the said agreement and that it may be referred to the Master in Equity to enquire what is the amount of such damages.
- 20 (3) That it may be ordered that the agreement of the defendant to request the Forestry Commission to transfer the said Permit and the said Licence to the plaintiff and to request the Forestry Commission to maintain to the plaintiff during the currency of the agreement referred to in paragraph three hereof a supply of timber to the extent previously provided for in the said agreement ought to be specifically enforced and that the same may be decreed accordingly or in the alternative that the defendant may be ordered to take such steps as the Master in Equity may direct for the purpose of obtaining the transfer of the said Permit and the said Licence and the maintenance of the supply of timber as aforesaid.
- 30 (4) That in addition to the specific performance of the agreement referred to in the preceding prayer the defendant may be ordered to pay to the plaintiff the damages which the plaintiff has sustained by reason of the said refusal and neglect of the defendant to perform the said agreement and that it may be referred to the Master in Equity to enquire what is the amount of such damages.
- (5) That pending completion of the said agreement referred to in the first prayer hereof the defendant his servants and agents may be restrained from entering upon the said lands now in the occupation of the plaintiff and from taking possession of or interfering in any way with the various items in the schedule the subject of the said agreement.
- 40 (6) That it may be declared that the purported termination by the defendant of the agreement referred to in paragraph three hereof is invalid and inoperative and that the said

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 3.
Amended
Statement of
Claim,
incorporating
Agreement of
3rd May, 1956.
(Continued)

—
23rd Nov., 1959.

- agreement is in full force and effect.
- (7) That the defendant his servants and agents may be restrained from acting upon the purported termination of the said agreement referred to in paragraph three hereof and from interfering in any way with the buildings and plant leased and hired to the plaintiff under the said agreement.
 - (8) That the defendant his servants and agents may be restrained from taking possession of the goods comprised in the agreement referred to in paragraph three hereof otherwise than in accordance with the Hire-Purchase Agreements Act 1941-1955. 10
 - (9) That the defendant may be ordered to pay to the plaintiff the costs of this suit.
 - (10) That the plaintiff may have such further relief and other relief as the nature of the case may require.

Counsel for the Plaintiff.

NOTE: This Amended Statement of Claim is filed by Messrs. Arthur T. George and Co., of 10 Martin Place, Sydney, the Solicitors for J. Jamieson & Sons Pty. Limited whose registered office is at 23 20 Hamilton Street, Sydney, in the State of New South Wales, the abovenamed Plaintiff.

No. 4.
Statement of
Defence and
Counterclaim
(as originally
filed.)

—
27th Feb., 1958.

No. 4

Statement of Defence and Counterclaim (as originally filed)

THE COMMISSIONER FOR RAILWAYS under its Common Seal says as follows:—

1. IN ANSWER TO paragraphs 3, 4, 5, 6, 7 and 22 of the Statement of Claim the defendant says that the said agreement mentioned in the said paragraphs was in the words and figures following that is to say:— 30

AGREEMENT made this third day of May One thousand nine hundred and fifty six. . . . (this Agreement has already been set out in full in the Amended Statement of Claim, page 33 to page 51).

2. IN FURTHER ANSWER TO Paragraph three of the Statement of Claim the defendant admits that the plaintiff has operated the said mill since the 13th day of July 1952 but says that the plaintiff has not since the 13th day of July 1952 observed and performed the 40 terms and conditions of the said agreement in relation to the operation of the said mill.

3. IN ANSWER TO paragraphs 9, 10, 11, 12, 14, 15, 16, 17, 20, 23, 24 and 25 of the Statement of Claim the defendant admits that certain letters passed between the plaintiff and the defendant but does not admit that the effect thereof is as set out in the said paragraphs and craves leave to refer to the said letters when produced as if the same had been fully set forth herein.

4. IN ANSWER TO paragraph 13 of the Statement of Claim the defendant says that the plaintiff did not on the 11th day of September 1957 or at any time by virtue of the alleged appropriation 10 or any appropriation pay in cash or otherwise the whole of the said residual values in respect of each and every item or in respect of any item set out in or subsequently added to the said schedule and deemed to form part thereof and the defendant also says that the plaintiff did not by virtue of the alleged appropriation pay in cash or otherwise 20 the hire charges and other amounts due in respect of the said items.

5. IN ANSWER TO paragraph 18 of the Statement of Claim the defendant admits that a written memorandum was made between the plaintiff of the one part and the defendant of the other part on the 12th day of December, 1957 but does not admit that the effect 20 thereof is as set out in the said paragraph and craves leave to refer to the said memorandum when produced as if the same had been fully set forth herein.

6. IN ANSWER TO paragraph 21 of the Statement of Claim the defendant says that as the plaintiff in pursuance of subclauses (a) and (b) of clause 9 of the said agreement has not purchased all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the Schedule to the said agreement the plaintiff was not and is not entitled to require the defendant to request the Forestry Commission to transfer to the 30 plaintiff the said permit and the said Licence nor to require the plaintiff to request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.

7. IN FURTHER ANSWER to paragraph 21 of the Statement of Claim the defendant says that in pursuance of subclause (d) of Clause (1) of the said agreement the defendant has requested the Forestry Commission to make available to the plaintiff on and at stump basis such a quantity of suitable millable timber as will enable an intake to the mill referred to in the said agreement of at least 10 40 million super feet per annum gross volume log measurement.

8. IN ANSWER TO paragraph 26 of the Statement of Claim the defendant charges and it is the fact that the plaintiff has com-

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 4.
Statement of
Defence and
Counterclaim
(as originally
filed.)
(Continued)

—
27th Feb., 1958.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 4.
Statement of
Defence and
Counterclaim
(as originally
filed.)
(Continued)
—
27th Feb., 1958.

mitted breaches of the said agreement set forth in paragraph (1) hereof in that:—

- (a) at least since the 13th day of March 1957 the plaintiff has not used every reasonable effort to recover the maximum quantity of first class sleepers with a minimum of waste from logs accepted by the plaintiff from the Forestry Commission in pursuance of the said agreement.
- (b) Between the 23rd day of October, 1957 and the 28th day of October, 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to one David Jamieson or else through David Jamieson as the plaintiff's agent sold such timber to A. E. Primrose Pty. Ltd. 10
- (c) between the 20th day of September 1957 and the 27th day of September 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to Pitt Son & Badgery Limited or else through the said lastmentioned Company as the plaintiff's agent sold such timber to Messieurs D. H. McFarlane & Company. 20
- (d) Between the 24th day of October 1957 and the 1st day of November 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to John Jamieson Trading Co. Pty. Limited or else through the said last mentioned Company as the plaintiff's agent sold such timber to the Timaru Harbour Trust of New Zealand. 30
- (e) The plaintiff has 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 plaintiff has committed the breaches set forth in sub-paragraphs (a) and (d) above. 40
- (f) The plaintiff has not paid to the defendant the rental or hire due by the plaintiff to the defendant under the said agreement within thirty days after the rendition of accounts

- by the defendant to the plaintiff for such rental or hire.
- (g) The plaintiff has not paid amounts debited by the defendant to the plaintiff 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 defendant to the plaintiff for such amounts.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 4.
Statement of
Defence and
Counterclaim
(as originally
filed).
(Continued)

9. IN ANSWER TO paragraph 27 of the Statement of Claim the defendant denies that the said agreement is a hire purchase agreement within the meaning of the Hire Purchase Agreements Act 1941-1955.

27th Feb., 1953.

10. IN ANSWER TO paragraph 28 of the Statement of Claim the defendant does not know and cannot admit that the said sawmill and the said items in the Third Schedule to the said agreement and the said Permit and Licence constitute property of exceptional or peculiar value to the plaintiff and the defendant further denies that the said sawmill and the said items have been purchased by the plaintiff and that the said option has been exercised.

11. IN ANSWER TO paragraph 30 of the Statement of Claim the defendant denies that the plaintiff has always been ready and willing to carry out the said agreement.

12. IN ANSWER TO the whole of the Statement of Claim the defendant submits that the plaintiff has no equity entitling it to proceed against the defendant in the Equitable Jurisdiction of this Honourable Court and that the plaintiff's proper remedy (if any) is at law and the defendant craves the same benefit from this defence as if it had pleaded or demurred to the Statement of Claim.

30

THE COMMON SEAL of THE
COMMISSIONER FOR RAIL-
WAYS was hereunto duly affixed
on the twenty-seventh day of
February one thousand nine
hundred and fifty eight, in the
presence of

L.S.

D. H. WATSON
Asst. Secretary for Railways

BY WAY OF COUNTERCLAIM the defendant states as follows:—

- 40 (1) The defendant repeats the allegations contained in paragraphs 1 and 8 of its Statement of Defence.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 4.
Statement of
Defence and
Counterclaim
(as originally
filed.)
(Continued)
—
27th Feb., 1958.

- (2) By reason of the breaches of the said agreement committed by the plaintiff which said breaches are set forth in paragraph 8 of its Statement of Defence the defendant has terminated the said agreement by giving to the plaintiff three months' notice in writing as required by the said agreement and the said agreement in fact terminated as on and from the 25th day of February 1958.
- (3) The defendant submits that the plaintiff is not entitled after the 25th day of February 1958 to remain in possession of the lands and saw mill referred to in paragraph 10 two of the Statement of Claim.
- (4) The defendant fears that unless restrained by this Honourable Court the plaintiff will refuse to allow the defendant to enter upon the said lands and sawmill.

THE DEFENDANT THEREFORE CLAIMS:

- (1) THAT it may be declared that the plaintiff is not entitled to remain in possession of the said lands and sawmill.
- (2) THAT the plaintiff its servants and agents may be restrained from preventing or hindering the defendant its servants and agents from entering upon the said lands and saw mill. 20
- (3) THAT the defendant may have such further and other relief as the nature of the case may require.
- (4) THAT the plaintiff may be ordered to pay to the defendant the costs of this suit.

(Sgd.) HERMANN JENKINS
Counsel for the Defendant.

NOTE: This Statement of Defence and Counterclaim is filed by Sydney Burke, Solicitor for Railways, 19 York Street, Sydney, 30 the Solicitor for the above named defendant, The Commissioner for Railways.

No. 5

Proposed Further Amendments to Counterclaim (Third Schedule to Decree—see No. 16)

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 5.
Proposed
Further
Amendments
to Counterclaim.
—
3rd Dec., 1959.

4. As in original counter claim.
5. (a) The plaintiff wrongly claims the right to remain in possession and occupation of the lands and sawmill referred to in paragraph 2 of the Statement of Claim and to exclude the defendant from the possession and occupation thereof.
- 10 (b) The plaintiff wrongly claims the right to prevent the defendant from ejecting the plaintiff from the said lands and sawmill.
- (c) Unless restrained by this Honourable Court the plaintiff will remain in possession and occupation of the said lands and sawmill and will prevent the defendant from entering into possession or occupation of the said lands and sawmill.
- 20 (d) The plaintiff is wrongfully hindering the defendant in the possession and enjoyment of his rights to and under the said occupation permit and licence and unless restrained by this Honourable Court will continue to hinder the defendant in the possession and enjoyment of the said rights.

30

40

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 6.
Amended
Statement of
Defence.
—
24th Nov., 1959.

No. 6

Amended Statement of Defence and Counterclaim amended and further amended

THE COMMISSIONER FOR RAILWAYS under its Common Seal says as follows:

~~1. IN ANSWER TO paragraphs 3, 4, 5, 6, 7 and 22 of the Statement of Claim the defendant says that the said agreement mentioned in the said paragraphs was in the words and figures following that is to say:—~~

~~AGREEMENT made this third day of May One thousand nine hundred and fifty six . . .~~

1. In answer to paragraph 3A of the Amended Statement of Claim the defendant says that the plaintiff did not on the 11th day of June 1958 exercise the option referred to therein.

~~2. IN FURTHER ANSWER TO Paragraph three of the Statement of Claim the defendant admits that the plaintiff has operated the said mill since the 13th day of July 1952 but says that the plaintiff has not since the 13th day of July 1952 observed and performed the terms and conditions of the said agreement in relation to the operation of the said mill.~~

2. In further answer to paragraph 3A of the Amended Statement of Claim the defendant says that the plaintiff did not on the 11th day of June 1957 pay to the defendant in cash or otherwise the purchase money referred to in Clause 9 (b) of the agreement set out in paragraph 2A of the said Statement of Claim.

~~3. IN ANSWER TO paragraphs 9, 10, 11, 12, 14, 15, 16, 17, 20, 23, 24 and 25 of the Statement of Claim the defendant admits that certain letters passed between the plaintiff and the defendant but does not admit that the effect thereof is as set out in the said paragraphs and craves leave to refer to the said letters when produced as if the same had been fully set forth herein.~~

3. In answer to paragraph 3B of the Amended Statement of Claim the defendant says that the plaintiff did not on the 11th day of September 1957 exercise the option referred to therein.

~~4. IN ANSWER TO paragraph 13 of the Statement of Claim the defendant says that the plaintiff did not on the 11th day of September 1957 or at any time by virtue of the alleged appropriation or any appropriation pay in cash or otherwise the whole of the said residual values in respect of each and every item or in respect of any item set out in or subsequently added to the said schedule and deemed to form part thereof and the defendant also says that the plaintiff did not by virtue of the alleged appropriation pay in cash or otherwise the hire charges and other amounts due in respect of the said items.~~

4. In further answer to paragraph 3B of the Amended Statement of Claim the defendant says that the plaintiff did not on the 11th day of September 1957 pay to the defendant in cash or otherwise the purchase money referred to in Clause 9 (b) of the agreement referred to in paragraph 2A of the said Statement of Claim.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 6.
Amended
Statement of
Defence.
(Continued)

—
24th Nov., 1959.

~~5. IN ANSWER TO paragraph 18 of the Statement of Claim the defendant admits that a written memorandum was made between the plaintiff of the one part and the defendant of the other part on the 12th day of December 1957 but does not admit that the effect thereof is as set out in the said paragraph and craves leave to refer to the said memorandum when produced as if the same had been fully set forth herein.~~

5. In answer to paragraph 3C of the Amended Statement of Claim the defendant says that the plaintiff did not on the 16th day of September 1957 exercise the option referred to therein.

~~6. IN ANSWER TO paragraph 21 of the Statement of Claim the defendant says that as the plaintiff in pursuance of subclause (a) and (b) of clause 9 of the said agreement has not purchased all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the Schedule to the said agreement the plaintiff was not and is not entitled to require the defendant to request the Forestry Commission to transfer to the plaintiff the said permit and the said Licence nor to require the plaintiff to request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement.~~

6. In further answer to paragraph 3C of the Amended Statement of Claim the defendant says that the plaintiff did not on the 16th day of September 1957 pay to the defendant in cash or otherwise the purchase money referred to in Clause 9 (b) of the agreement set out in paragraph 2A of the said Statement of Claim.

~~7. IN FURTHER ANSWER to paragraph 21 of the Statement of Claim the defendant says that in pursuance of subclause (d) of Clause (1) of the said agreement the defendant has requested the Forestry Commission to make available to the plaintiff on an at stump basis such a quantity of suitable millable timber as will enable an intake to the mill referred to in the said agreement of at least 10 million super feet per annum gross value log measurement.~~

7. In answer to paragraph 3D of the Amended Statement of Claim the defendant says that the plaintiff did not on the 16th day of December 1957 exercise the option referred to therein.

~~8. IN ANSWER TO paragraph 26 of the Statement of Claim the defendant charges and it is the fact that the plaintiff has committed~~

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 6.
Amended
Statement of
Defence.
(Continued)

—
24th Nov., 1959.

~~breaches of the said agreement set forth in paragraph (1) hereof in that—~~

- (a) At least since the 13th day of March 1957 the plaintiff has not used every reasonable effort to recover the maximum quantity of first class sleepers with a minimum of waste from logs accepted by the plaintiff from the Forestry Commission in pursuance of the said agreement.
- (b) Between the 23rd day of October 1957 and the 28th day of October 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to one David Jamieson or else through David Jamieson as the plaintiff's agent sold such timber to A. E. Primrose Pty. Ltd.
- (c) Between the 20th day of September 1957 and the 27th day of September 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to Pitt Son & Badgery Limited or else through the said lastmentioned Company as the plaintiff's agent sold such timber to Messieurs D. H. McFarlane & Company.
- (d) Between the 24th day of October 1957 and the 1st day of November 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to John Jamieson Trading Co. Pty. Limited or else through the said last mentioned Company as the plaintiff's agent sold such timber to the Timaru Harbour Trust of New Zealand.
- (e) The plaintiff has 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 plaintiff has committed the breaches set forth in ~~sub-paragraphs (a) and (d) above.~~

(f) ~~The plaintiff has not paid to the defendant the rental or hire due by the plaintiff to the defendant under the said agreement within thirty days after the rendition of accounts by the defendant to the plaintiff for such rental or hire.~~

(g) The plaintiff has not paid amounts debited by the defendant to the plaintiff 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 defendant to the plaintiff for such amounts.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

*No. 6.
Amended
Statement of
Defence.
(Continued)*

21th Nov., 1959.

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8. In further answer to paragraph 3D of the Amended Statement of Claim the defendant says that the plaintiff did not the 16th day of December 1957 pay to the defendant in cash or otherwise the purchase money referred to in Clause 9 (b) of the agreement set forth in paragraph 2A of the said Statement of Claim.

~~9. IN ANSWER to paragraph 27 of the Statement of Claim the defendant denies that the said agreement is a hire purchase agreement within the meaning of the Hire Purchase Agreements Act 1941-20 1955.~~

9. In answer to paragraph 3E of the Amended Statement of Claim the defendant says that by agreement dated the 3rd day of December 1958 in settlement of interlocutory applications in this suit and in settlement of other matters it was agreed by and between the plaintiff and the defendant that the residual values as at the 16th day of December 1957 of each and every item set out in or subsequently added to the schedule to the said agreement as set forth in paragraph 2A of the said Statement of Claim amounted to the sum of £9,841.0.5 and it was further agreed that the plaintiff would pay to the defendant 30 the sum of £9,841.0.5 upon the terms and conditions that such payment was to be without prejudice to the defendant's notice of termination, the defendant's contention that the agreement as set forth in paragraph 2A of the said Statement of Claim had been terminated, and the defendant's further contention that the option under such last mentioned agreement was not duly exercised by the plaintiff and it was further provided by the said agreement of 3rd December 1958 that the defendant should be at liberty to pursue its claim as to the effectiveness or otherwise of the purported exercise by the plaintiff of the said option to purchase contained in the said agreement set forth 40 in the said paragraph 2A and as to the purported termination of such lastmentioned agreement and that in the event of it being held in this suit that the said option was not duly exercised by the plaintiff the defendant was to refund to the plaintiff the said sum of £9,841.0.5

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 6.
Amended
Statement of
Defence.
(Continued)

—
24th Nov., 1959.

and the defendant says that in pursuance of the said agreement of the 3rd December 1957 certain moneys were paid by the plaintiff to the defendant and other moneys were credited by the defendant to the plaintiff so that after the said 3rd day of December 1957 the defendant was holding to the credit of the plaintiff a sum of £9,841.0.5., but save as aforesaid the defendant denies that the plaintiff has paid to the defendant in cash the purchase money payable upon the alleged exercise of the said option.

~~10. IN ANSWER TO paragraph 28 of the Statement of Claim the defendant does not know and cannot admit that the said sawmill and the said items in the Third Schedule to the said agreement and the said Permit and Licence constitute property of exceptional or peculiar value to the plaintiff and the defendant further denies that the said sawmill and the said items have been purchased by the plaintiff and that the said option has been exercised.~~ 10

10. In further answer to paragraphs 3A, 3B, 3C, 3D and 3E and in answer to paragraphs 3F and 30 of the Amended Statement of Claim the defendant says that between the 14th day of March 1957 and the 25th day of November 1957 the plaintiff committed breaches of clauses or provisions of the agreement set forth in paragraph 2A of 20 the said Statement of Claim in that—

- (a) At least since the 13th day of March 1957 the plaintiff has not used every reasonable effort to recover the maximum quantity of first class sleepers with a minimum of waste from logs accepted by the plaintiff from the Forestry Commission in pursuance of the said agreement.
- (b) Between the 23rd day of October 1957 and the 28th day of October, 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to one David Jamieson or else through David Jamieson as the plaintiff's agent sold such timber to A. E. Primrose Pty. Ltd. 30
- (c) Between the 20th day of September 1957 and the 27th day of September 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to Pitt Son & Badgery or else through the said lastmentioned Company as the plaintiff's 40

agent sold such timber to Messieurs D. H. McFarlane & Company.

- (d) Between the 24th day of October 1957 and the 1st day of November 1957 the plaintiff did not sell to the defendant certain sawn timber produced by the plaintiff in the said mill mentioned in the said agreement from logs accepted by the plaintiff from the Forestry Commission but the plaintiff between such dates as aforesaid either sold such timber to John Jamieson Trading Co. Pty. Limited or else through the said last mentioned Company as the plaintiff's agent sold such timber to the Timaru Harbour Trust of New Zealand.

- (e) The plaintiff has 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 plaintiff has committed the breaches set forth in sub-paragraphs (a) and (d) above.

- (f) The plaintiff has not paid to the defendant the rental or hire due by the plaintiff to the defendant under the said agreement within thirty days after the rendition of accounts by the defendant to the plaintiff for such rental or hire.

- (g) The plaintiff has not paid amounts debited by the defendant to the plaintiff 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 defendant to the plaintiff for such amounts.

~~11. IN ANSWER TO paragraph 30 of the Statement of Claim the defendant denies that the plaintiff has always been ready and willing to carry out the said agreement.~~

11. In further answer to paragraphs 3A, 3B, 3C, 3D, 3E, 3F, and 30 of the Amended Statement of Claim the defendant says that because of the breaches set forth in the preceding paragraph hereof the defendant on the 25th day of November, 1957 gave notice to the plaintiff in accordance with Clause 6 of the agreement set forth in paragraph 2A of the said Statement of Claim and the agreement has terminated.

~~12. IN ANSWER TO the whole of the Statement of Claim the defendant submits that the plaintiff has no equity entitling it to proceed against the defendant in the Equitable Jurisdiction of this Honourable Court and that the plaintiff's proper remedy (if any) is at law and~~

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

*No. 6.
Amended
Statement of
Defence.
(Continued)*

24th Nov., 1959.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 6.
Amended
Statement of
Defence.
(Continued)
—
24th Nov., 1959.

~~the defendant craves the same benefit from this defence as if it had pleaded or demurred to the Statement of Claim.~~

12. In answer to paragraph 17 of the Amended Statement of Claim the defendant admits that the plaintiff required the defendant in writing to request the Forestry Commission to transfer to the plaintiff the said permit and the said licence and also to request the Forestry Commission to maintain to the plaintiff during the currency of the said agreement a supply of timber to the extent previously provided for in the said agreement and says that the only requirements given by the plaintiff to the defendant were on 11th October 1957 and on 23rd December 1957 but the defendant denies that before such requirement there was an exercise by the plaintiff of the said option. 10

13. In further answer to paragraph 30 of the Amended Statement of Claim the defendant denies that the plaintiff has always been ready and willing to carry out the said agreement set out in paragraph 2A of the said Statement of claim and that there has ever been an exercise of the said option by the plaintiff or that there was any contract arising out of any alleged exercise of option by the plaintiff.

14. In answer to the whole of the Amended Statement of Claim the defendant submits that the plaintiff has no equity entitling it to proceed against the defendant in the Equitable Jurisdiction of this Honourable Court and that the plaintiff's proper remedy (if any) is at law and the defendant craves the same benefit from this defence as if it had pleaded or demurred to the said Statement of Claim. 20

15. In answer to the whole of the Amended Statement of Claim the defendant says that the agreement set forth in paragraph 2A of the said Statement of Claim has been terminated by the defendant because of breaches by the plaintiff of clauses or provisions of the said agreement.

THE COMMON SEAL of THE COMMISSIONER
FOR RAILWAYS was hereunto duly affixed on the
Twenty Fourth day of November One thousand
nine hundred and fifty nine in the presence of: 30
W. A. ANDERSON
Secretary for Railways

L.S.

BY WAY OF COUNTERCLAIM the defendant states as follows:

~~(1) The defendant repeats the allegations contained in paragraphs 1 and 8 of its Statement of Defence.~~

1. The defendant makes the allegations contained in paragraphs 1, 2 and 2A of the Amended Statement of Claim herein. 40

~~(2) By reason of the breaches of the said agreement committed by the plaintiff which said breaches are set forth in paragraph 8 of its Statement of Defence the defendant has terminated the said agreement by giving to the plaintiff three months' notice in writing as required by the said agreement and the said agreement in fact terminated as on and from the 25th day of February 1958.~~

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 6,
Amended
Statement of
Defence.
(Continued)

2. The defendant repeats the allegations contained in paragraphs 10 and 11 of its Amended Statement of Defence.

—
24th Nov., 1959.

10 ~~(3) The defendant submits that the plaintiff is not entitled after the 25th day of February 1958 to remain in possession of the lands and sawmill referred to in paragraph two of the statement of claim.~~

3. The defendant charges and it is the fact that the plaintiff after the 25th day of February 1958 has remained in possession of the lands and sawmill referred to in paragraph 2 of the Amended Statement of Claim and has refused and still refuses to allow the defendant to enter upon the said lands and sawmill.

20 ~~(4) The defendant fears that unless restrained by this Honourable Court the plaintiff will refuse to allow the defendant to enter upon the said lands and sawmill.~~

THE DEFENDANT THEREFORE CLAIMS:

- 30
- (1) THAT it may be declared that the plaintiff is not entitled to remain in possession of the said lands and sawmill.
 - (2) THAT the plaintiff its servants and agents may be restrained from preventing or hindering the defendant its servants and agents from entering upon the said lands and saw mill.
 - (3) THAT the defendant may have such further and other relief as the nature of the case may require.
 - (4) THAT the plaintiff may be ordered to pay to the defendant the costs of this suit.

Hermann Jenkins

Counsel for the Defendant.

NOTE: This Amended Statement of Defence and Counterclaim is filed by Sydney Burke, Solicitor for Railways, 19 York Street, Sydney, the Solicitor for the abovenamed defendant, The Commissioner for Railways.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 6.
Further
Amended
Counterclaim.

—
24th Nov., 1959.

FURTHER AMENDED COUNTERCLAIM

BY WAY OF COUNTERCLAIM the defendant states as follows:

~~(1) The defendant repeats the allegations contained in paragraphs 1 and 8 of its Statement of Defence.~~

1. The defendant makes the allegations contained in paragraphs 1, 2 and 2A of the Amended Statement of Claim herein.

~~(2) By reason of the breaches of the said agreement committed by the plaintiff which said breaches are set forth in paragraph 8 of its Statement of Defence the defendant has terminated the said agreement by giving to the plaintiff three months notice' in writing as required by the said agreement and the said agreement in fact terminated as on and from the 25th day of February 1958.~~

2. The defendant repeats the allegations contained in paragraphs 10 and 11 of its Amended Statement of Defence.

~~(3) The defendant submits that the plaintiff is not entitled after the 25th day of February 1958 to remain in possession of the lands and saw mill referred to in paragraph two of the statement of claim.~~

3. The defendant charges and it is the fact that the plaintiff after the 25th day of February 1958 has remained in possession of the lands and sawmill referred to in paragraph 2 of the Amended Statement of Claim and has refused and still refuses to allow the defendant to enter upon the said lands and sawmill.

~~(4) The defendant fears that unless restrained by this Honourable Court the plaintiff will refuse to allow the defendant to enter upon the said lands and sawmill.~~

4. The defendant fears that unless restrained by this Honourable Court the plaintiff will refuse to allow the defendant to enter upon the said lands and sawmill.

5. (a) The plaintiff wrongly claims the right to remain in possession and occupation of the lands and sawmill referred to in paragraph 2 of the Statement of Claim and to exclude the defendant from the possession and occupation thereof.

(b) The plaintiff wrongly claims the right to prevent the defendant from ejecting the plaintiff from the said lands and sawmill.

- (c) Unless restrained by this Honourable Court the plaintiff will remain in possession and occupation of the said lands and sawmill and will prevent the defendant from entering into possession or occupation of the said lands and sawmill.
- (d) The plaintiff is wrongfully hindering the defendant in the possession and enjoyment of his rights to and under the said occupation permit and licence and unless restrained by this Honourable Court will continue to hinder the defendant in the possession and enjoyment of the said rights.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

No. 6, Further Amended Counterclaim. (Continued)

21th Nov., 1959.

10

THE DEFENDANT THEREFORE CLAIMS:

- (1) THAT it may be declared that the plaintiff is not entitled to remain in possession of the said lands and sawmill.
- (2) THAT the plaintiff its servants and agents may be restrained from preventing or hindering the defendant its servants and agents from entering upon the said lands and sawmill.
- (3) THAT the defendant may have such further and other relief as the nature of the case may require.
- (4) THAT the plaintiff may be ordered to pay to the defendant the costs of this suit.

20

R. W. FOX
Counsel for the Defendant.

NOTE: This Amended Statement of Defence and Counterclaim is filed by Sydney Burke, Solicitor for Railways, 19 York Street, Sydney, the Solicitor for the abovenamed defendant, The Commissioner for Railways.

No. 7

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

**Plaintiff's Replication to Statement of Defence and Defence to
Counterclaim (as originally filed)**

No. 7.
Plaintiff's
Replication to
Statement of
Defence and
Defence to
Counterclaim
(as originally
filed).

REPLICATION

1. The Plaintiff accepts the allegations contained in paragraph 1 of the Statement of Defence.
2. Save as aforesaid the Plaintiff joins issue with the Defendant upon its Statement of Defence herein.

14th Mar., 1958.

H. Glass

Counsel for the Plaintiff 10

DEFENCE TO COUNTERCLAIM

By way of defence to the Counterclaim of the Defendant I, BRUCE MORTON THOMAS, the Secretary of the abovenamed Plaintiff do on my oath say as follows:—

1. In answer to paragraph 1 of the Counterclaim the Plaintiff admits that it entered into the agreement set forth in paragraph 1 of the Statement of Defence.
2. In further answer to paragraph 1 of the Counterclaim the Plaintiff denies the allegations and each of them contained in paragraph 8 of the Statement of Defence other than the allegations contained in 20 clauses (b) (c) and (d) thereof.
3. In further answer to paragraph 1 of the Counterclaim the Plaintiff as to clause (b) of paragraph 8 of the Statement of Defence admits that it sold certain sawn timber to one DAVID JAMIESON but says that the said timber sold to the said David Jamieson was non quota timber which the Defendant had refused to accept from the Plaintiff and which the Defendant had permitted the Plaintiff to sell otherwise than to the Defendant.
4. In further answer to paragraph 1 of the Counterclaim the Plaintiff in answer to clause (c) of paragraph 8 admits that it sold 30 certain sawn timber to PITT SON & BADGERY LIMITED but says that the said timber sold to the said Pitt Son & Badgery Limited was non quota timber which the Defendant had refused to accept from the Plaintiff and which the Defendant had permitted the Plaintiff to sell otherwise than to the Defendant.

5. In further answer to paragraph 1 of the Counterclaim the Plaintiff as to clause (d) of paragraph 8 admits that it sold certain sawn timber to the TIMARU HARBOUR TRUST OF NEW ZEALAND but says that the said timber sold to the said Timaru Harbour Trust of New Zealand was non quota timber which the Defendant had refused to accept from the Plaintiff and which the Defendant had permitted the Plaintiff to sell otherwise than to the Defendant.

In the Supreme Court of New South Wales in its Equitable Jurisdiction.

6. In further answer to paragraph 1 of the Counterclaim the Plaintiff save as aforesaid denies the allegations contained in clauses 10 (b) (c) and (d) of paragraph 8 of the Counterclaim and each of them.

No. 7.
Plaintiff's
Replication to
Statement of
Defence and
Defence to
Counterclaim
(as originally
filed).
(Continued)

7. In answer to paragraph 2 of the Counterclaim the Plaintiff denies that any breaches of the said agreement have been committed by the Plaintiff as set forth in paragraph 8 of the Statement of Defence.

14th Mar., 1958.

8. In further answer to paragraph 2 of the Counterclaim the Plaintiff says that the Defendant has not terminated the said agreement as therein set forth and that the said agreement was not in fact terminated on and from the 25th February, 1958.

9. In answer to paragraph 3 of the Counterclaim the Plaintiff claims that it is entitled after the 25th day of February, 1958, to remain in possession of the lands and sawmill referred to in paragraph 2 of the Statement of Claim.

H. Glass

Counsel for the Plaintiff

B. M. Thomas
Secretary of Plaintiff

The above defence to Counterclaim was sworn by the abovenamed BRUCE MORTON THOMAS at Sydney this fourteenth day of March, 1958, before me:

C. D. Irwin

Chief Clerk in Equity.

30

NOTE: This Replication and Defence to Counterclaim is filed by Messieurs Arthur T. George & Co. of Challis House, number 10 Martin Place, Sydney, the Solicitors for the abovenamed Plaintiff whose registered office is situate at number 267 Elizabeth Street, Sydney, in the State of New South Wales.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 8.
Amended
Replication.

—
23rd Nov., 1959.

No. 8

Amended Replication and Amended Defence to Counterclaim

1. The Plaintiff accepts the allegations contained in paragraph 1 of the Statement of Defence.

1A. The Plaintiff accepts the statements of the Defendant in paragraphs—

9 in so far as the said paragraph admits that there was an “Agreement dated the Third day of December 1958 in settlement of interlocutory applications in this suit and in settlement of other matters”; 10 (f) and (g); so much of paragraph 11 as alleges that because of the breaches set forth in paragraphs 10 (f) and (g) the Defendant on the Twenty fifth day of November 1957 gave Notice to the Plaintiff in accordance with Clause 6 of the Agreement set forth in paragraph 2A of the Amended Statement of Claim and the Agreement has terminated; and so much of paragraph 15 as alleges that the Agreement set forth in paragraph 2A of the Amended Statement of Claim has been terminated by the Defendant because of the breaches by the Plaintiff between the dates alleged of Clause 3 (d) of the said Agreement, which requires payment by the Plaintiff to the Defendant of rental or hire or of amounts debited under Clause 1 (c) of the said agreement—

of its amended Statement of Defence.

~~2. Save as aforesaid the Plaintiff joins issue with the Defendant upon its Statement of Defence herein.~~

2A. In answer to so much of paragraph 9 of the Amended Statement of Defence as purports to set forth the effect of the Agreement therein mentioned the Plaintiff does not admit that the Agreement referred to therein properly set out in the said paragraph and craves leave to refer to the said Agreement when produced as if the same had been fully set forth herein.

3. In answer to paragraph 12 of the Amended Statement of Defence the Plaintiff does not admit that the only requirement given by the Plaintiff to the Defendant was on the Twenty Third day of December 1957.

4. Save as aforesaid the Plaintiff joins issue with the Defendant.

Counsel for the Plaintiff.

AMENDED DEFENCE TO COUNTERCLAIM

By way of defence to the Amended Counterclaim of the Defendant I BRUCE MORTON THOMAS, the Secretary of the abovenamed Plaintiff do on my oath say as follows:

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 8,
Amended
Defence to
Counterclaim.
—
23rd Nov., 1959

~~1. In answer to paragraph 1 of the Counterclaim the Plaintiff admits that it entered into the agreement set forth in paragraph 1 of the Statement of Defence.~~

1A. In answer to paragraph 2 of the Amended Counterclaim the Plaintiff denies so much of paragraph 10 of the Amended Statement of
10 Defence as alleges that between the Fourteenth day of March 1957 and the Twenty fifth day of November 1957 the Plaintiff committed breaches of clauses or provisions of the Agreement set forth in paragraph 2A of the amended Statement of Claim in that

- (a) At least since the Thirteenth day of March 1957 the Plaintiff has not used every reasonable effort to recover the maximum quantity of first class sleepers with a minimum of waste from logs accepted by the Plaintiff from the Forestry Commission in pursuance of the said Agreement;
- 20 (b) Between the Twenty third day of October 1957 and the Twenty eighth day of October 1957 the Plaintiff did not sell to the Defendant certain sawn timber produced by the Plaintiff in the said mill mentioned in the said agreement from logs accepted by the Plaintiff from the Forestry Commission but the Plaintiff between such dates as aforesaid either sold such timber to one David Jamieson or else through David Jamieson as the Plaintiff's Agent to A. E. Primrose Pty. Limited;
- 30 (c) Between the Twentieth day of September 1957 and the Twenty seventh day of September 1957 the Plaintiff did not sell to the Defendant certain sawn timber produced by the Plaintiff in the said mill mentioned in the said agreement from logs accepted by the Plaintiff from the Forestry Commission but the Plaintiff between such dates as aforesaid either sold such timber to Pitt Son and Badgery Limited or else through the lastmentioned Company as the Plaintiff's agent to Messieurs D. H. McFarlane and Company;
- 40 (d) Between the Twenty fourth day of October 1957 and the First day of November 1957 the Plaintiff did not sell to the Defendant certain sawn timber produced by the Plaintiff in the said mill mentioned in the said Agreement

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 8.
Amended
Defence to
Counterclaim.
(Continued)

—
23rd Nov., 1959.

from logs accepted by the Plaintiff from the Forestry Commission but the Plaintiff between such dates as aforesaid either sold such timber to John Jamieson Trading Company Pty. Limited or else through the last mentioned Company as the Plaintiff's Agent to the Timaru Harbour Trust of New Zealand.

- (e) The Plaintiff has 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 Plaintiff has committed the breaches set forth in 10 paragraphs (a) to (d) inclusive above.

~~2. In further answer to paragraph 1 of the Counterclaim the Plaintiff denies the allegations and each of them contained in paragraph 8 of the Statement of Defence other than the allegations contained in clauses (b) (c) and (d) thereof.~~

2A. In answer to paragraph 3 of the Amended Counterclaim the Plaintiff says that it is the owner of the whole of the said sawmill or so much thereof as does not include such of the items to the schedule of the Agreement set forth in paragraph 2A of the Amended Statement of Claim or items subsequently added thereto which the 20 Court may hold the Plaintiff has not purchased by virtue of the exercise of its option under the said Agreement and referred to in paragraphs 3A, 3B, 3C and 3D of the Amended Statement of Claim.

~~3. In further answer to paragraph 1 of the Counterclaim the Plaintiff as to clause (b) of paragraph 8 of the Statement of Defence admits that it sold certain sawn timber to one DAVID JAMIESON but says that the said timber sold to the said David Jamieson was non quota timber which the Defendant had refused to accept from the Plaintiff and which the Defendant had permitted the Plaintiff to sell otherwise than to the Defendant.~~ 30

3A. The Plaintiff will object to the whole of the Amended Counterclaim.

- (a) On the ground that the Defendant has no equity entitling it to proceed against the Plaintiff by way of Counterclaim in the Equitable Jurisdiction of this Honourable Court and the Plaintiff craves the same benefit from this Defence as if it had demurred to the Amended Counterclaim:
and
- (b) On the ground that this Honourable Court has no jurisdiction or power to grant the relief claimed in the 40 Amended Counterclaim and the Plaintiff craves the same benefit from this Defence as if it had demurred to the Amended Counterclaim.

4. ~~In further answer to paragraph 1 of the Counterclaim the~~ Plaintiff in answer to clause (c) of paragraph 8 admits that it sold certain sawn timber to PITT SON & BADGERY LIMITED but says that the said timber sold to the said Pitt Son & Badgery Limited was non quota timber which the Defendant had refused to accept from the Plaintiff and which the Defendant had permitted the Plaintiff to sell otherwise than to the Defendant.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 3,
Amended
Defence to
Counterclaim.
(Continued)

—
23rd Nov., 1959.

5. In further answer to paragraph 1 of the Counterclaim the Plaintiff as to clause (d) of paragraph 8 admits that it sold certain
10 sawn timber to the TIMARU HARBOUR TRUST OF NEW ZEALAND but says that the said timber sold to the said Timaru Harbour Trust of New Zealand was non quota timber which the Defendant had refused to accept from the Plaintiff and which the Defendant had permitted the Plaintiff to sell otherwise than to the Defendant.

6. In further answer to paragraph 1 of the Counterclaim the Plaintiff save as aforesaid denies the allegations contained in clauses (b) (c) and (d) of paragraph 8 of the Counterclaim and each of them.

7. In answer to paragraph 2 of the Counterclaim the Plaintiff
20 denies that any breaches of the said agreement have been committed by the Plaintiff as set forth in paragraph 8 of the Statement of Defence.

8. In further answer to paragraph 2 of the Counterclaim the Plaintiff says that the Defendant has not terminated the said agreement as therein set forth and that the said agreement was not in fact terminated on and from the 25th February, 1958.

9. In answer to paragraph 3 of the Counterclaim the Plaintiff claims that it is entitled after the 25th day of February, 1958, to remain in possession of the lands and sawmill referred to in paragraph
~~2 of the Statement of Claim.~~

Counsel for the Plaintiff.

30 The above Amended Defence to Counter claim was sworn by the abovenamed BRUCE MORTON THOMAS at Sydney this Twenty third day of November 1959 before me:

Secretary for the
Plaintiff.
Chief Clerk
in Equity.

NOTE: This Amended Replication and Amended Defence to
Counterclaim is filed by Messieurs Arthur T. George & Co. of Challis
House, number 10 Martin Place, Sydney, the Solicitors for the above-
40 named Plaintiff whose registered office is situate at number 23 Hamilton Street Sydney, in the State of New South Wales.

No. 9

Proposed Amendment to Replication

3A. In answer to so much of paragraph 10 of the amended statement of defence as alleges that the plaintiff has committed the breaches of the said agreement particularised in sub paragraphs (b) (c) and (d) the plaintiff admits that it sold the timber referred to but says that the said timber was milled from non quota logs.

3B. In further answer to so much of paragraph 10 of the amended statement of defence as alleges that the plaintiff has committed the breaches of the said agreement particularised in sub paragraphs (b) (c) and (d) and alternatively to paragraph 3A, the plaintiff admits that it sold the timber referred to but says that the said timber was timber which the defendant had permitted the plaintiff to sell otherwise than to the defendant. 10

3C. In further answer to so much of paragraph 10 of the amended statement of defence as alleges that the plaintiff has committed the breaches of the said agreement particularised in sub paragraphs (b) (c) and (d) and alternatively to paragraphs 3A and 3B the plaintiff admits that it sold the timber referred to but says that the defendant would not take select timber unless it was ordered as select and the said timber was select timber not ordered by the defendant. 20

3D. In further answer to paragraph 10 of the amended statement of defence the plaintiff says that the defendant induced the breaches alleged in the said paragraph by reason of the following matters:—

- (a) By refusing to accept sleepers and sawn timber milled by the plaintiff from non quota logs.
- (b) By requesting the plaintiff not to cut sleepers but to mill logs into sawn timber against orders. 30
- (c) By placing with the plaintiff and insisting on the execution of orders for sawn timber which could only be executed by milling logs which were suitable for milling as sleepers.
- (d) By refusing to inspect and/or purchase sawn timber which the defendant was required to accept under the contract.
- (e) By persistently refusing the request of the plaintiff that a conference should be held to discuss the matters affecting the construction of the contract in dispute between the parties.
- (f) By insisting that upon the proper construction of the agreement referred to in paragraph 2A of the statement of claim the defendant was obliged only to accept sleepers and sawn timber which had previously been ordered by him. 40

- (g) By refusing to take brush box except as to 10% of any one parcel.
- (h) By refusing to take blue gum except as to 10% of any one parcel.
- (i) By refusing to take short lengths, that is to say lengths under 8 ft. except as to 5% of any one parcel.
- (j) By refusing to pay any other price than a price for merchantable quality.
- (k) By refusing to pay the species allowance for tallow wood.
- 10 (l) By refusing to take the whole of the output of the said mill.
- (m) By refusing to ship timber promptly from the railway yard.
- (n) By refusing to pass promptly timber submitted for inspection.
- (o) By refusing to inspect sawn timber in the planer yard.
- (p) By refusing to accept or pay for sleepers and sawn timber unless previously ordered.
- (q) By accepting part of the output of the mill and refusing either to pay for or give credit for the timber so accepted.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 9.
Proposed
Amendment to
Replication.
(Continued)
—

3E. In further answer to paragraph 10 so far as it alleges the
20 breaches particularised in sub paragraphs (a) and (e) the plaintiff says
that the defendant required the plaintiff to abstain from cutting the
maximum quantity of sleepers and did not give any notice to the
plaintiff to the contrary during the period in respect of which the said
breaches are alleged.

3F. In further answer to so much of paragraph 10 as alleges the
breach particularised in sub paragraph (d) the plaintiff says that the
defendant promised the plaintiff that if the plaintiff sold sawn timber
not required by the defendant to persons other than the defendant to
not required by the defendant to persons other than the defendant the
30 defendant would not treat such sales as a breach of the agreement set
out in paragraph 2A of the amended statement of claim and the
plaintiff acting upon the said promise did sell the timber in the said
paragraph referred to to persons other than the defendant before any
notice was given to the plaintiff to comply with the terms of the said
contract and the defendant failed to allow reasonable opportunity for
the plaintiff to fulfil its obligations after it gave such a notice.

3G. In further answer to paragraph 10 so far as it alleges the
breach particularised in paragraph (a) the plaintiff says that the
plaintiff had at all times before and during the period from 11th
40 March, 1957 to 25th November, 1957 milled logs so as to recover
the maximum quantity of sleepers consistently with the avoidance of
economic waste as the defendant knew and allowed.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 10

Proposed Amendment to draft Amended Replication (Second Schedule to Decree—see No. 16)

No. 10.
Proposed
Amendment
to draft
Amended
Replication.
—
26th Nov., 1959.

3A. In further answer to paragraph 10 so far as it alleges the breaches particularised in sub paragraphs (a) and (e) the Plaintiff says that the Defendant intending to affect the legal relationship of the plaintiff and the defendant under the said agreement promised the plaintiff in or about February 1957 that if the Plaintiff did not use every reasonable effort to recover the maximum quantity of first quality sleepers from logs as supplied by the Forestry Commission the defendant would not regard such failure to use every reasonable effort to recover the maximum quantity of first quality sleepers from logs as supplied by the Forestry Commission as a breach of the said agreement and the defendant knew that the plaintiff intended to act upon such promise and the plaintiff acted upon the said promise and did not recover the maximum quantity of first class sleepers as aforesaid and the Defendant did not during the period 13th March 1957 to 25th November 1957 give to the Plaintiff any Notice that it required the plaintiff to fulfill its said obligation under the said contract and the defendant is thereby estopped from setting up the said breach of the said agreement in this suit. 10

3B. In further answer to so much of paragraph 10 as alleges the breach particularised in subparagraph (d) the plaintiff says that the defendant intending to affect the legal relationship of the plaintiff and the defendant under the said agreement promised the plaintiff that if the plaintiff sold sawn timber not required by the Defendant to persons other than the defendant the defendant would not treat such sales as a breach of the agreement set out in paragraph 2A of the amended Statement of Claim and the Defendant knew that the Plaintiff intended to act upon such promise and the Plaintiff acted upon the said promise and sold the timber in the said paragraph referred to to persons other than the defendant before any notice was given to the plaintiff to comply with the terms of the said contract and the defendant failed to allow reasonable opportunity for the plaintiff to fulfil its obligations after it gave such notice and the defendant is thereby estopped from setting up the said breach of the said agreement in this suit. 30

3C. In further answer to paragraph 10 so far as it alleges the breach particularised in paragraph (a) the plaintiff says that the said breach does not disentitle it to the relief claimed in the amended Statement of Claim for the reason that the plaintiff before and during the period 13th March 1957 and 25th November 1957 milled logs so as to recover therefrom the maximum quantity of sleepers consistently 40

with the avoidance of economic waste as the defendant knew and permitted before and after the 3rd May 1956.

3D. In answer to the whole of the amended Statement of Defence the Plaintiff says that the breaches alleged in paragraph 10 thereof do not disentitle it to the relief claimed in the Amended Statement of Claim by reason of the following facts:

- 10 (a) The defendant refused to accept sleepers and sawn timber milled by the Plaintiff from non quota logs, that is to say, logs accepted by the plaintiff from the Forestry Commission in excess of the nett annual quota allocated to the defendant by the Forestry Commission.
- (b) The defendant refused from time to time to accept sleepers and sawn timber milled by the plaintiff from brush box logs which were quota logs.
- (c) The defendant directed the plaintiff not to cut sleepers but to mill logs which were suitable for milling into sleepers to meet the orders of the defendant for sawn timber.
- 20 (d) The defendant insisted on the execution of orders for sawn timber which could only be executed by milling logs which were suitable for milling as sleepers.
- (e) The defendant refused to inspect and/or purchase sawn timber which the defendant was required to accept under the contract.
- (f) The defendant refused to take sawn timber milled from Brush Box except as to 10% of any one parcel.
- (g) The defendant refused to take sawn timber milled from Blue Gum except as to 10% of any one parcel.
- 30 (h) The defendant refused to take short lengths of sawn timber that is to say lengths under 8 ft. except as to 5% of any one parcel.
- (i) The defendant refused to pay any price for sawn timber other than a price for merchantable quality even though the said timber was select grade.
- (j) The defendant refused to accept sawn timber and sleepers milled from tallowwood logs at the price fixed by the said agreement.
- (k) The defendant refused to take the whole of the output of the said mill.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 10.
Proposed
Amendment
to draft
Amended
Replication.
(Continued)

—
26th Nov., 1959.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 10.
Proposed
Amendment
to draft
Amended
Replication.
(Continued)
—
26th Nov., 1959.

- (l) The defendant refused to remove sawn timber and sleepers in reasonable time from the railway yard at Wauchope.
- (m) The defendant refused to pass within a reasonable time sawn timber and sleepers submitted for inspection.
- (n) The defendant refused to inspect sawn timber in the planer yard at Wauchope.
- (o) The defendant refused to accept or pay for sleepers and sawn timber unless previously ordered by it.
- (p) The defendant accepted part of the output of the said mill and refused either to pay for or give credit for the 10 output so accepted.
- (q) The defendant insisted that upon the proper construction of the agreement referred to in paragraph 2A of the Statement of Claim the defendant was obliged only to accept sleepers and sawn timber which had previously been ordered by it.
- (r) The defendant persistently refused the request of the plaintiff that a conference should be held to discuss the matters affecting the construction of the contract in dispute between the parties.

20

The amended Replication will not contain paragraph 4 of the proposed amended Replication.

PROPOSED AMENDED DEFENCE TO COUNTERCLAIM

1, 2, 2A, 3, 3A, 4-9 to be retained as in proposed draft.

1A to be deleted from draft.

New 1A and 1B as follows

1A. In answer to paragraph 2 of the Amended Counterclaim so far as it alleges the breaches particularised in sub paragraphs (a) and (e) the Plaintiff says that the defendant intending to affect the legal relationship of the plaintiff and the defendant under the said agreement promised the plaintiff in or about February 1957 that if
 10 the plaintiff did not use every reasonable effort to recover the maximum quantity of first quality sleepers from logs as supplied by the Forestry Commission the defendant would not regard such failure to use every reasonable effort to recover the maximum quantity of first quality sleepers from logs as supplied by the Forestry Commission as a breach of the said agreement and the defendant knew that the plaintiff intended to act upon such promise and the plaintiff acted upon the said promise and did not recover the maximum quantity of first class sleepers as aforesaid and the Defendant did not during the period 13th March 1957 to 25th November 1957 give to the plaintiff
 20 any notice that it required the plaintiff to fulfil its said obligation under the said contract and the defendant is thereby estopped from setting up the said breach of the said agreement in this suit.

1B. In answer to paragraph 2 of the Amended Counterclaim so far as it alleges the breach particularised in sub paragraph (d) the plaintiff says that the defendant intending to affect the legal relationship of the plaintiff and the defendant under the said agreement promised the plaintiff that if the plaintiff sold sawn timber not required by the defendant to persons other than the defendant the defendant would not treat such sales as a breach of the agreement set out in
 30 paragraph 2A of the Amended Statement of Claim and the Defendant knew that the plaintiff intended to act upon such promise and the plaintiff acted upon the said promise and sold the timber in the said paragraph referred to to persons other than the defendant before any notice was given to the plaintiff to comply with the terms of the said contract and the defendant failed to allow reasonable opportunity for the plaintiff to fulfil its obligations after it gave such notice and the Defendant is thereby estopped from setting up the said breach of the said agreement in this suit.

*In the
 Supreme Court
 of New South
 Wales in its
 Equitable
 Jurisdiction.*

*No. 10,
 Proposed
 Amendment
 to draft
 Amended
 Replication.
 (Continued)*

26th Nov., 1959.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 11**Proposed Defence to Further Amended Counterclaim (Fourth Schedule to Decree—see No. 16)**

No. 11.
Proposed
Defence to
Further
Amended
Counterclaim.
—
3rd Dec., 1959.

1. In answer to paragraph 3 of the further amended Counterclaim the Plaintiff denies that it has after the 25th day of February 1958 remained in possession of the lands and sawmill referred to in paragraph 2 of the amended Statement of Claim and that it has refused and still refuses to allow the Defendant to enter upon the said lands and sawmill. 10

2. In answer to paragraph 5 (a) of the further amended Counterclaim the Plaintiff denies that it wrongly claims the right to remain in possession and occupation of the lands and sawmill referred to in paragraph 2 of the amended Statement of Claim and to exclude the Defendant from the possession and occupation thereof.

3. In answer to paragraph 5 (b) of the further amended Counterclaim the Plaintiff denies that it claims the right to prevent the Defendant from ejecting the Plaintiff from the said lands and sawmill.

4. In answer to paragraph 5 (c) of the further amended Counterclaim the Plaintiff denies that unless restrained by this Honourable 20 Court it will remain in possession and occupation of the said lands and sawmill and that it will prevent the Defendant from entering into possession and occupation of the said lands and sawmill.

5. In answer to paragraph 5 (d) of the further amended Counterclaim the Plaintiff denies that it is wrongfully hindering the Defendant in the possession and enjoyment of his rights to and under the said occupation permit and that unless restrained by this Honourable Court it will continue to hinder the Defendant in the possession and enjoyment of the said rights.

6. In answer to the whole of the further amended Counterclaim 30 the Plaintiff repeats the allegations contained in paragraphs 3A, 3B, 3C, 3D, 3E, 3F, 17 and 21 of the amended Statement of Claim.

7. In answer to the whole of the further amended Counterclaim the Plaintiff says that it claims to be entitled to remain in possession of the said sawmill only if it should be determined that it has duly exercised the option given by Clause 9 of the said agreement set out in paragraph 2A of the amended Statement of Claim and to be entitled to remain in occupation of the said lands only if it should be determined that it has duly required the Defendant to make the requests provided for in paragraph 9 (c) of the said agreement. 40

8. In further answer to the whole of the further amended Counterclaim the Plaintiff submits that the Defendant has no equity entitling it to proceed against the Plaintiff by way of Counterclaim in the Equitable Jurisdiction of this Honourable Court and the Plaintiff craves the same benefit from this as if it had pleaded or demurred to the further amended Counterclaim.

9. In further answer to the whole of the further amended Counterclaim the Plaintiff submits that this Honourable Court in its Equitable Jurisdiction has no jurisdiction or power to grant the relief
10 sought in the further amended Counterclaim and the Plaintiff craves the same benefit from this defence as if it had pleaded or demurred to the further amended Counterclaim.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 11.
Proposed
Defence to
Further
Amended
Counterclaim.
(Continued)

—
3rd Dec., 1959.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 12.
Amended
Defence to
Counterclaim.

—
4th Dec., 1959.

No. 12

Amended Defence to Counterclaim

By way of defence to the amended Counterclaim of the defendant Australian Hardwoods Pty. Limited under its Common Seal says as follows:—

~~1. In answer to paragraph 1 of the Counterclaim the plaintiff admits that it entered into the agreement set forth in paragraph 1 of the Statement of Defence.~~

1A. In answer to paragraph 3 of the further amended Counterclaim the plaintiff denies that it has after the 25th day of February 10 1958 remained in possession of the lands and sawmill referred to in paragraph 2 of the amended Statement of Claim and that it has refused and still refuses to allow the defendant to enter upon the said lands and sawmill.

~~2. In further answer to paragraph 1 of the Counterclaim the plaintiff denies the allegations and each of them contained in paragraph 8 of the Statement of Defence other than the allegations contained in clauses (b) (c) and (d) thereof.~~

2A. In answer to paragraph 5 (a) of the further amended Counterclaim the plaintiff denies that it wrongly claims the right to 20 remain in possession and occupation of the lands and sawmill referred to in paragraphs 2 of the amended Statement of Claim and to exclude the Defendant from the possession and occupation thereof.

~~3. In further answer to paragraph 1 of the Counterclaim the plaintiff as to clause (b) of paragraph 8 of the Statement of Defence admits that it sold certain sawn timber to one David Jamieson but says that the said timber sold to the said David Jamieson was non quota timber which the defendant had refused to accept from the plaintiff and which the defendant had permitted the plaintiff to sell otherwise than to the defendant.~~ 30

3A. In answer to paragraph 5 (b) of the further amended Counterclaim the plaintiff denies that it claims the right to prevent the defendant from ejecting the plaintiff from the said lands and sawmill.

~~4. In further answer to paragraph 1 of the Counterclaim the plaintiff in answer to clause (c) of paragraph 8 admits that it sold certain sawn timber to Pitt Son & Badgery but says that the said timber sold to the said Pitt Son & Badgery was non quota timber which the defendant had refused to accept from the plaintiff and which~~

~~the defendant had permitted the plaintiff to sell otherwise than to the defendant.~~

*In the
Supreme Court
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—
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(Continued)

—
4th Dec., 1959.

4A. In answer to paragraph 5 (c) of the further amended Counterclaim the plaintiff denies that unless restrained by this Honourable Court it will remain in possession and occupation of the said lands and sawmill and that it will prevent the defendant from entering into possession and occupation of the said lands and sawmill.

10 ~~5. In further answer to paragraph 1 of the Counterclaim the plaintiff as to clause (d) of paragraph 8 admits that it sold certain sawn timber to the Timaru Harbour Trust of New Zealand but says that the said timber sold to the said Timaru Harbour Trust of New Zealand was non quota timber which the defendant had refused to accept from the plaintiff and which the defendant had permitted the plaintiff to sell otherwise than to the defendant.~~

20 5A. In answer to paragraph 5 (d) of the further amended Counterclaim the plaintiff denies that it is wrongfully hindering the defendant in the possession and enjoyment of his rights to and under the said occupation permit and that unless restrained by this Honourable Court it will continue to hinder the defendant in the possession and enjoyment of the said rights.

~~6. In further answer to paragraph 1 of the Counterclaim the plaintiff save as aforesaid denies the allegations contained in clauses (b) (c) and (d) of paragraph 8 of the Counterclaim and each of them.~~

6A. In answer to the whole of the further amended Counterclaim the plaintiff repeats the allegations contained in paragraphs 3A, 3B, 3C, 3D, 3E, 3F, 17 and 21 of the amended Statement of Claim.

~~7. In answer to paragraph 2 of the Counterclaim the plaintiff denies that any breaches of the said agreement have been committed by the plaintiff as set forth in paragraph 8 of the Statement of Defence.~~

30 7A. In answer to the whole of the further amended Counterclaim the plaintiff says that it claims to be entitled to remain in possession of the said sawmill only if it should be determined that it has duly exercised the option given by Clause 9 of the said agreement set out in paragraph 2A of the amended Statement of Claim and to be entitled to remain in occupation of the said lands only if it should be determined that it has duly required the defendant to make the requests provided for in paragraph 9 (c) of the said agreement.

~~8. In further answer to paragraph 2 of the Counterclaim the plaintiff says that the defendant has not terminated the said agreement~~

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as therein set forth and that the said agreement was not in fact terminated on and from the 25th February, 1958.

8A. In further answer to the whole of the further amended Counterclaim the plaintiff submits that the defendant has no equity entitling it to proceed against the plaintiff by way of Counterclaim in the Equitable jurisdiction of this Honourable Court and the plaintiff craves the same benefit from this as if it had pleaded or demurred to the further amended Counterclaim.

~~9. In answer to paragraph 2 of the Counterclaim the plaintiff claims that it is entitled after the 25th day of February 1958 to remain in possession of the lands and sawmill referred to in paragraph 2 of the Statement of Claim.~~ 10

9A. In further answer to the whole of the further amended Counterclaim the plaintiff submits that this Honourable Court in its Equitable Jurisdiction has no jurisdiction or power to grant the relief sought in the further amended Counterclaim and the plaintiff craves the same benefit from this defence as if it had pleaded or demurred to the further amended Counterclaim.

THE COMMON SEAL of
AUSTRALIAN HARDWOODS 20
PTY. LIMITED was here-
unto affixed by authority
of the Board and in the
presence of:

B. M. Thomas,
Secretary.

L.S.

C. W. ALDERTON

NOTE: This amended replication and amended defence to counterclaim is filed by Messieurs Arthur T. George & Co. of Challis 30 House, Number 10 Martin Place, Sydney, the Solicitors for the above-named plaintiff whose registered office is situate at number 23 Hamilton Street, Sydney in the State of New South Wales.

No. 13

Defendant's Replication to Plaintiff's Defence to Counterclaim

The defendant joins issue with the plaintiff upon its amended Statement of Defence to Counterclaim herein.

DATED this second day of June, 1958.

Hermann Jenkins

Counsel for the Defendant.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 13.
Defendant's
Replication to
Plaintiff's
Defence to
Counterclaim.

—
2nd June, 1958.

NOTE: This replication is filed by Sydney Burke Esquire Solicitor
10 for Railways of 19 York Street, Sydney, the Solicitor for the above-
named defendant.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

No. 14.
Proceedings
before
His Honour
Mr Justice
Myers.

18th Nov., 1959

No. 14
Proceedings before His Honour Mr. Justice Myers
Wednesday, 18th November, 1959

J. Jamieson & Sons Pty. Ltd. v. The Commissioner for Railways

MR HOLMES, Q.C., with MR GLASS appeared for the plaintiff.
MR JENKYN, Q.C. with MR H. JENKINS appeared for the
defendant.

10

(Mr Holmes stated that he desired to make application, before the hearing of the case was entered upon, for dismissal of the counterclaim, under s.39 (2) of the Equity Act. Argument ensued. During the course of the argument, Mr. Holmes tendered certain suggested amendments to the statement of claim and stated that if leave were granted to amend he would undertake to file an amended statement of claim as soon as possible. Further argument ensued.)

20

HIS HONOR: I think I should make these amendments, but since the purpose of making an amendment is to enable the true issues between the parties to be tried, I do not think I should allow my decision to affect the right of the defendant to have its counter-claim heard in this suit.

30

The order that I make is this. I order that the plaintiff is to be at liberty to amend its statement of claim in accordance with the document initialled by me and placed with the papers; the plaintiff to pay, in any event, the costs of and occasioned by the amendments and any costs thrown away or rendered abortive by the adjournment which I will grant. This order and the amendments to the statement of claim to be made in pursuance of it shall not prejudice the rights, if any, of the defendant to avail itself of the counterclaim in this suit. The matter is to stand over until the 23rd November, 1959.

(At this stage further hearing adjourned until Monday, 23rd November 1959.)

23rd Nov., 1959.

Second Day: Monday, 23rd November, 1959

40

(On resumption, Mr Holmes stated that although the amended statement of claim had been prepared, it had not actually been filed and was available in Court. Mr Holmes then handed to His Honour a copy of the amended statement of claim and an amended copy of the replication and defence to the counter claim, all of which documents he undertook to file during the course of the day. Mr Jenkyn then handed His Honor a copy of the amended statement of defence, which he intimated would be filed in due course. Mr Jenkyn further stated that he would like a little more time to consider the joinder of issue, and that he might be able to resolve that matter not later than Tuesday, the 24th November.)

Mr Jenkyn stated that he objected to the granting of Mr Holmes' application under S.39 (2) of the Equity Act, and after hearing further argument on this point His Honor delivered judgment dismissing the application with costs. (For judgment see separate transcript.)

(Mr Holmes called for letter of the 11th June 1957 from the plaintiff to the defendant; document produced; tendered and marked Exhibit A.)

(Mr Holmes tendered letter of the 14th June 1957 from the defendant to the plaintiff; admitted and marked Exhibit B.)

10 (Mr Holmes tendered letter of the 18th July 1956, from the defendant to the plaintiff, together with letter of the 4th September 1956, from the defendant to the plaintiff, with Schedule B referred to in the letter; admitted and marked Exhibit C.)

(Mr Holmes tendered letter of the 25th July 1957, from the defendant to the plaintiff, together with two schedules referred to in the letter; admitted and marked Exhibit D.)

(Mr Holmes tendered letter of the 28th August 1957, from the defendant to the plaintiff; Mr Jenkyn stated that subject to the pencilled additions on p.2 of the document, he had no objection; admitted and 20 marked Exhibit E.)

(Mr Holmes called for letter of the 11th September 1957 from the plaintiff to the defendant; document produced; tendered and marked Exhibit F.)

(Mr Holmes called for letter of the 12th September 1957, from the plaintiff's solicitors to the defendant's solicitor; document produced; tendered and marked Exhibit G.)

(Mr Holmes tendered letter of the 13th September 1957, from the defendant's solicitor to the plaintiff's solicitor; admitted and marked Exhibit H.)

30 (Mr Holmes called for registered letter of the 16th September 1957 from the plaintiff company to the defendant; document produced; tendered and marked Exhibit J.)

(At this stage His Honor stated that he would note that it was admitted by the defendant that Exhibits A and J were sent by the plaintiff to the defendant by prepaid registered post.)

(Mr Holmes called for letter of the 17th September 1957, from the plaintiff's solicitor to the defendant's solicitor; document produced; tendered and marked Exhibit K.)

40 (Mr Holmes called for letter of the 11th October 1957 from the plaintiff's solicitor to the defendant's solicitor, letter of the 29th November 1957 from the plaintiff's solicitor to the defendant; documents produced.)

(Mr Holmes tendered letter of the 23rd September 1957 from

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the defendant's solicitor to the plaintiff's solicitor, letter of 11th October 1957, from the plaintiff's solicitor to the defendant's solicitor; letter of 11th October 1957 from the defendant's solicitor to the plaintiff's solicitor, letter of 29th November 1957, from the plaintiff's solicitor to the defendant, and letter of the 3rd December 1957, from the defendant's solicitor to the plaintiff's solicitor; admitted and marked Exhibit L.)

(Mr Holmes tendered an agreement between counsel of the terms of adjournment of arbitration, undated, but which appeared to have been made before the 16th December 1957; Mr Jenkyn objected to the tender of the document as irrelevant but stated that he was prepared to concede that the agreement was made before the 16th December 1957; argument ensued.)

AT 2.15 P.M.

(On resumption further argument ensued on objection to tender of agreement between counsel of the terms of adjournment of arbitration, stated to have been entered into on some date before the 16th December 1957; admitted and marked Exhibit M.)

(Mr Holmes called for a letter from the plaintiff's solicitor to the defendant, of the 23rd December 1957; document produced, and together with a letter from the defendant's solicitor to the plaintiff's solicitor of the 30th December 1957 tendered and marked Exhibit N.)

(At this stage His Honor stated that he would note that it was admitted that the agreement Exhibit M was entered into on or about the 12th December 1957.)

(Mr Holmes tendered terms of settlement of injunction proceedings in the Equity Court, dated 3rd December 1957, and filed in Court on 12th December 1957; objected to; pressed; argument ensued; admitted and marked Exhibit O.)

(Mr Holmes tendered letter from the defendant's solicitor to the plaintiff's solicitor, of the 24th December, 1958; objected to; pressed; argument ensued; admitted and marked Exhibit P.)

HIS HONOR: I will note that notwithstanding the amended replication which, in this respect, was prepared in error, the plaintiff accepts the statement in para. 9 of the statement of defence, that in pursuance of the agreement of the 3rd December 1957, certain moneys were paid by the plaintiff to the defendant and other moneys were credited by the defendant to the plaintiff, so that after the 3rd December 1958, the defendant was holding to the credit of the plaintiff the sum of £9,841/-/5d.

(Case for the Plaintiff Closed.)

(At this stage further hearing adjourned until Tuesday, 24th November, 1959 at 10 a.m.

Judgment

(On Application Under S.39 (2) of the Equity Act.)

*In the
Supreme Court
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—
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Proceedings
before
His Honour
Mr Justice
Myers.
(Continued)

—
23rd Nov., 1959.

HIS HONOR: The amended statement of claim in this suit seeks specific performance of an agreement which is set out verbatim. It is sufficient for the present purpose to state that the agreement is one by which the plaintiff agrees to operate a sawmill owned by the defendant with plant owned by the defendant and to supply the milled timber to the defendant. The land on which the sawmill is situated is occupied by the defendant in pursuance of a licence issued by the
10 Forestry Commission, and the sawmill is operated in pursuance of a permit given by the Commission to the defendant. The timber is obtained from Forestry Commission forests.

The agreement gives the plaintiff an option, in certain circumstances, to purchase the whole of the plant and buildings, which are all chattels, and requires the defendant, if so requested by the plaintiff, to request the Forestry Commissioner to transfer the licence and permit to it. The plaintiff claims that it has validly exercised the option to purchase the chattels and has paid for them, and that the defendant refuses to carry out the agreement and therefore seeks
20 specific performance. The defendant denies the exercise of the option and claims in any event that the Court, in its discretion, would not grant specific performance. The defendant also says that the plaintiff has committed a number of breaches of the agreement and that the defendant, in consequence thereof, duly terminated the agreement in pursuance of the power reserved to him by it.

The defendant has also filed a counter claim in effect setting out the allegations as to breach and termination made by him in his statement of defence and asking for an injunction restraining the plaintiff from preventing or hindering the defendant entering upon the
30 lands and the sawmill.

After the suit was called, the plaintiff made an application under S.39 sub-section (2) of the Equity Act, as amended, asking for an order that the defendant should not be allowed to avail himself of his counter claim. The ground upon which it is put, as I understand the argument, is that the defendant would, in his counter claim, go into a considerable amount of evidence relating to breaches which would not be necessary for the determination of the main suit. It would not be necessary, according to the plaintiff, because the plaintiff, in its replication, admits that the agreement was validly terminated,
40 though it admits only two of a large number of breaches on which the defendant relies for his notice of termination. The defendant says, however, that these breaches which he pleads in his statement of

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before
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Myers.
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—
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defence, as well as in the counter claim, are matters on which he desires to rely in the suit as furnishing a discretionary defence to the claim for specific performance. I do not and cannot, on this application, determine whether the breaches have been properly pleaded in the statement of defence or not. They were pleaded and no attempt was made to compel the defendant to amend his pleading by eliminating them. Indeed, the very issue was raised by the plaintiff in its own statement of claim, and it was only after the argument on this matter had proceeded for some time that the plaintiff amended its statement of claim by eliminating any reference to the breaches. It seems difficult 10 to come to any conclusion but that the statement of claim was amended in this respect in order to strengthen the plaintiff's hand in this application.

As the section has been amended, a counter claim now can be pleaded whether it be an equitable or legal claim and whether or not it has been connected with the claim of the plaintiff. I would have thought that this counter claim was one which I would have been bound to allow in any event, but on the section as it is amended I feel no doubt that I could not refuse to allow the defendant to avail himself of this counter claim. It is, in my opinion, the very type of 20 counter claim which should be tried in the one proceeding. It may be—although I do not think so—that it will lengthen the hearing, but the fact that the hearing is lengthened does not seem to me to be a reason for saying that it would not be convenient to hear the counter claim, nor does it appear to be a reason for saying that the counter claim ought not to be allowed. Indeed, in my experience most counter claims have that effect.

I would only add that I express no concluded view as to whether this application can be entertained at the present time, although having regard to the provision in sub-section (2) that the Court may refuse 30 permission to the defendant to avail himself of the counter claim on the application of the plaintiff before the hearing, it seems to me that once the suit is put in the list for hearing and is called the hearing is commenced and it is too late to make the application and that the section and convenience and even justice may require that an application such as this should be the subject of a separate application made by motion prior to the day on which the suit appears in the list to be tried.

In my opinion the application fails in any event, and I dismiss it with costs. 40

Third Day: Tuesday, 24th November, 1959

(On resumption Mr Jenkyn announced that he now filed the amended statement of defence. Mr Holmes stated that the replication and defence to the counter claim had not yet been completed because he had been awaiting the amended statement of defence. He further stated that it would be filed under the common seal of the company, and that that would be done during the course of the day. Mr Jenkyn stated that he was prepared to accept Mr Holmes' assurance on that.)

(Mr Jenkyn called for letter of the 9th October 1959 from the 10 Solicitor for Railways to the solicitor for the plaintiff; copy produced; copy letter of the 7th October 1959, from the solicitor to the plaintiff, to the solicitor for the defendant, and copy of reply, dated 9th October 1959, tendered and marked Exhibit 1.)

(Allston John Bourne, called on subpoena duces tecum, stated that he was an officer of the Forestry Commission and that he produced, under the subpoena, certain records of the Forestry Commission, together with the subpoena. He further stated that the documents produced were the sum total of the documents called for under the subpoena. The documents were handed to His Honor's associate, 20 m.f.i. 1, and Mr Bourne was allowed to leave the Court.)

CECIL KENNEDY,
sworn and examined:

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
No. 11.
Proceedings
before
His Honour
Mr Justice
Myers.
(Continued)

—
24th Nov., 1959.

Defendant's
Evidence.
Cecil Kennedy.
Examination.

Mr JENKYN: Q. You are a timber inspector employed by the Forestry Commission of N.S.W.? A. Yes.

Q. And you are stationed at the present time at Bulahdelah? A. Yes, that is correct.

Q. And you reside at Blanche Street, Bulahdelah? A. Yes.

Q. I think that you have been employed in the timber industry all your working life? A. Yes.

30 Q. That is somewhere round about 30 years of working life so far? A. That is right.

Q. And you have had, during that time, experience in sleeper cutting—? A. Yes.

Q. What is called "falling"—? A. Yes.

Q. "Snigging"—? A. Yes.

Q. And hauling of timber? A. Yes.

Q. In the bush? A. Yes.

Q. And experienced in sawmilling? A. Yes.

Q. Which includes experience as a sawyer? A. That is right.

40 Q. I think you commenced to work for the Forestry Commission somewhere round about 1951? A. That is right.

Q. And did you have, after that, experience in actually "falling" logs in the Brill Brill state forest at Bellangry? A. Yes.

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—
Defendant's
Evidence.
Cecil Kennedy.
Examination.
(Continued)
—

Q. And after you had completed a round of "falling" timber, did you then become a leading hand? A. Yes.

Q. And I think that was about when? A. I think about late 1952 or 1953.

Q. And at the beginning of 1955 were you transferred—that is on behalf of the Forestry Commission—to do work at the Railway mobile mills at Bellangry? A. Yes.

Q. And those were the mills that were being operated by John Jamieson & Sons Pty. Ltd. A. They were.

Q. And I think that after you had been there for some time you were then employed and engaged on the work of what is called a "tally-man"? A. That is correct.

Q. And were you so stationed at this mill during 1957? A. Yes.

Q. Acting as the tally-man? A. That is correct.

Q. And when did you finally leave that mill? A. It was either very late in 1957 or very early in 1958.

Q. So that you were there in particular between the 14th March and the 29th November 1957? A. Yes.

Q. I think as the tally-man in the mill it was your duty, amongst other things, to measure every log which came into the mill? A. That is correct.

Q. And to make out then and there what is called a tally sheet recording the details, in triplicate? A. That is right.

Q. First of all, did you record on the tally sheet, as the logs were coming in, your identification number of the log? A. Yes.

Q. And was that a number which you yourself, as the tally-man, gave to the log as it came in? A. Yes.

Q. And was that number that you gave the log then stamped in any way on the log itself? A. Stamped, yes.

Q. Stamped on the log? A. Yes.

Q. When the log came to the mill did it, at that stage, have already identification marks on it? A. Yes, as for area it did.

Mr HOLMES: Q. Do you mean the area from which it had come? A. Yes, that is right.

Mr JENKYN: Q. I do not want to go through each particular log that came in, but what were the types of markings on the logs which were there at the moment you commenced to inspect the logs—indicating what? A. Indicating the area.

Q. The area from which the log had come? A. Yes, and the "faller" that felled the logs.

Q. And the indication of the faller that felled the log would be a number or something? A. A number.

Q. Do you call them "fallers" or "fellers"? A. "Fallers".

Q. Each faller would have his own identifying number? A. Yes.

Q. Which was stamped on the log? A. That is right.

Q. And what indicated the particular area of the Brill Brill

forest from which the timber came? A. The symbol before and after the faller's number.

Q. The symbol—? A. Before and after the faller's number.

Q. And what form did those symbols take? Were they numbers or letters or what? A. Letters and numbers.

Q. I will not worry you with the detail of it. So that from looking at the log itself with these identifying symbols you would then be able to determine from what part of the Brill Brill forest it came? A. Yes.

Q. And did you then, on your tally docket, record those details?
10 A. Only the area.

Q. The area from which it came? A. Yes.

Q. Then I think you also measured each log? A. Yes.

Q. Taking the length—? A. Yes.

Q. Centre girth—? A. Yes.

Q. And what is called "defects" in the log? A. That is right.

Q. Such as "pipe" or "rot" or "knotholes" or "swells", and that sort of thing? A. Yes.

Q. And by taking the measurements that you did take and record, were you able then to arrive at a fairly accurate estimate of
20 how much timber was in the log—that is, gross? A. Yes—accurate.

HIS HONOR: Q. Was that the amount of sawn timber? A. No; that is the amount of super feet in the log itself.

Mr JENKYN: Q. As it stood or rested in front of you? A. Yes.

Q. And did you record that what you might call the gross value of that log—? A. Yes.

Q. In superficial feet? A. Yes, on the tally docket.

Q. And would you, as the tally-man, make an allowance in respect of "defect"? A. Yes.

Q. Has every log got some "defect", or are any of them perfect?
30 A. There never was one perfect yet.

Q. So that you then estimate the allowance for "defect"? A. Yes.

Q. And do you record then the amount of superficial feet which is constituted by the "defect"? A. That is correct.

Q. And from that then the nett volume in superficial feet of that log can be derived from merely subtracting the "defect" quantity from the "gross"? A. That is correct.

Q. I suppose you were familiar, naturally, with the sort of timber which was coming from the Brill Brill forest? A. Species, yes.

Q. And its general quality and type? A. Yes.

40 Q. And as a miller of experience can you tell me this? When you cut up timber—when the timber is cut in the mill—is 100% of the nett volume recoverable in the sawn timber, or is there a loss in the sawing? A. There is a loss in the sawing.

Q. And in the type of timber that was coming in from the Brill Brill forest, approximately what percentage recovery would you have expected from those logs. A. 65 or 66.

*In the
Supreme Court
of New South
Wales in its
Equitable
Jurisdiction.*

—
Defendant's
Evidence,
Cecil Kennedy,
Examination.
(Continued)
—

*In the
Supreme Court
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Wales in its
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—
Defendant's
Evidence.
Cecil Kennedy.
Examination.
(Continued)
—

Q. 65 or 66%? A. Yes.

Q. And would that be in every log, or would that be an average?

A. That would be an average.

Q. There might be some more or some less, but averaging 65 or 66%? A. Yes.

Q. And while you were there as tallyman did you, on any occasions, follow through the timber after you had examined and measured it, to see what results were being produced in the actual sawing operations? A. Yes.

Q. And what did you find, from your personal examination, as to what percentage was, on the average, being recovered in the form of sawn timber? (Objected to; pressed; argument ensued; admitted.) 10

Q. What did you find when you followed the log through into the milling stage as to the recovery in fact being got from the timber in the mill? A. In some cases up to 76%; in other cases down to 40%.

Q. And on the occasions that you followed it through, taking the sum total of the occasions—you say that you expected it to average 65 or 66%—what did you find it averaged? A. Not 66%, but between 60 and 66. 20

Q. Will you look at the documents m.f.i. 1. (Documents handed to witness). I do not want you to take the time to go through every page, but just look at the books and pick out those that are yours. You might answer this question first. You have told me that they are made out in triplicate? A. Yes.

Q. Was the original retained in book form—was it remaining in the book? A. No.

Q. Will you have a look and see whether those are your books as tallyman (Witness perused books). A. This one is mine—these are mine. (Indicating.) 30

Q. What about the first book you looked at—is that yours? A. No.

Q. Just pick out the ones that are yours. (Witness perused books.) Just hand over the ones that are yours. (Witness handed over certain books.)

Mr JENKYN: I tender those books. Might I postpone the tender of those documents until after the adjournment so that my friend may have more time to look at them?

HIS HONOR: Yes.

Mr HOLMES: I think I have almost finished looking at them. Insofar as these come within the period nominated in the particulars, I do not object, but insofar as they are before and after the period I do object. 40

Mr JENKYN: I do not want to use them for any period other than within the period named. I will postpone the tender if necessary.

Mr HOLMES: There are three volumes completely within the period and one is earlier than the period and another later than the period.

Mr JENKYN: There are four lots there. (Indicating.)

Mr HOLMES: Yes, four.

Mr JENKYN: Q. I want you to limit your evidence for the moment to the period we are concerned with in this particular matter—and that is between March 14th and November 29th, 1957.

Mr HOLMES: The 25th.

HIS HONOR: Is it not the 25th?

Mr JENKYN: Q. Between the 14th March and the 25th November, 1957 you saw logs as they came in to that mill? A. Yes.

Q. And made your recordings? A. Yes.

10 Q. And did you, during that period, see what sort of recovery was being made from the nett volume of timber which passed into the mill? A. No; I would have no figures on that whatsoever.

Q. I am not asking you for the precise figures. Did you in fact see whether the timber was fully utilised or otherwise? A. I did.

Q. That is, without recording any precise figures? A. That is correct.

Q. What did you yourself see in relation to what was being done with the timber being milled in that mill during that period? A. There was a terrific waste of timber.

20 Q. And in regard to the recovery—you estimated the recovery of about 66% or 65 or 66%—at periods during those months what was the approximate percentage of what you have described as wastage of the timber that was being milled at that mill? A. Between 40 and 50% of each log.

Q. 40 or 50% of each log? A. Not of each log—of individual logs. The waste was more in some logs than in others.

HIS HONOR: Q. You mean that in some logs there was a wastage of 40% or 50%? A. Yes; that could have been cut into good timber.

Mr JENKYN: Q. 40 or 50% of what you would ordinarily have 30 expected to be the recovered timber? A. Yes.

Q. Was that nearly half or half of what should have been recovered of the timber? A. Yes.

Q. You might tell us what timber you saw wasted, and you might tell us what was done with it? A. Well, I saw one piece of timber 8 x 8 go down the chute into the burning area—that would be an 8 x 8 piece of timber.

Q. Are you talking of feet or inches? A. 8 inches.

Q. It just went down the chute? A. Yes.

Q. In that same period did you see what timber was being cut 40 into sleepers and what timber was being cut into other forms of milled timber? A. In most cases, yes.

Q. Did you see, at any stage during that period, any timber or any logs which could have been cut into sleepers, cut into any other form of millable timber? A. Yes.

Q. And was that a matter of just an odd occasion or did you see that on many occasions? A. On many occasions.

Q. And when you say that you saw logs which could have been

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cut into sleepers, were they logs of poor quality or first class quality timber? A. Of general quality—a log of a poor quality most definitely could not be cut into sleepers at any time.

Q. So that you are talking of the type or quality of timber suitable for sleepers? A. Yes.

Q. I am not asking you precise figures—(Objected to as leading).

Q. Can you give us any idea, during this time, of approximately how many of these logs which you saw passed into the mill, suitable for sleeper cutting, and cut into something else? A. They would be fairly great. 10

Q. Was it a matter of fives or tens or dozens or hundreds, or what would be the figure? A. I would say hundreds or better.

Q. Hundreds or better? A. Yes.

Q. And instead of being cut into sleepers, what were those logs being cut into—what form of timber? A. . . (The answer to this question was objected to and ordered to be struck out of the notes.)

HIS HONOR: Q. You said that they were cut into scantlings? A. Yes.

Mr JENKYN: Q. And what else? A. "Junk".

Q. Has that some technical significance? A. In this case it would be a piece of timber which would measure more than 12 inches 20 cross section.

Q. So that when you speak of "junk", then you are speaking of timber in rather big dimensions? A. Yes, big dimensions.

Q. Whereas most of the milled timber would be in small dimensions? A. No.

Q. Well, the timber which is not "junk" would be in smaller dimensions? A. Yes.

Q. Sleepers are 8 feet x 9 inches x 4½ inches? A. Yes.

Q. And "junk" is something which is wider in dimension anyhow than sleepers? A. No. A sleeper is called a piece of "junk", if it 30 is not being used as a sleeper.

Q. Well, it is big enough in size and dimensions if it comes within the technical dimensions of "junk"? A. Yes.

Q. What is "scantlings"? A. The smaller pieces of timber—3 inches x 2, 4 inches x 2, 3 inches x 3.

Q. What did this timber mostly consist of—what species? A. Blackbutt—the majority of blackbutt.

Q. Up until about the middle of 1957 the logs which were coming in from the forest were coming in from what particular section? A. Pigeon Top A. 40

Q. And the timber coming, or the logs coming from Pigeon Top A were of what quality? A. Above average.

Q. And when you speak of quality in that sense—quality timber—does it or does it not have regard, amongst other things, to the centre girth of the log? A. Yes; centre girth is counted into it. Centre girth is in it.

Q. Is centre girth an important or unimportant factor in deter-

mining the quality of timber coming into the mill? A. Yes; it could have a great bearing on it. A small log could be of first quality, but then the bigger the girth it is it has a better chance of being first class quality.

HIS HONOR: Q. The greater the girth the better the chance it has of being first class quality. A. Yes.

Mr JENKYN: Q. And does the centre girth of the log have some relationship as to the size of timber which could be cut out of the log? A. Yes.

10 Q. For instance, with regard to the cutting of railway sleepers, is it a relevant factor that the centre girth should be of a particular size? A. No. It is possible to cut a sleeper out of any girthed log from, say, 4 feet up. It possibly could be cut out of a log under 4 feet.

Q. So that if you have logs of a certain centre girth—that is of a minimum centre girth—does that or does that not stamp that particular log as being at least a log from which sleepers may be cut? A. Yes.

Q. And what is the centre girth from which, if you knew the centre girth, you could say, “Well, sleepers can be cut from that log”? A. Well, I would put it down to 6 feet or over. A 6 foot log,
20 you would be fairly certain, according to the quality of the log, that you could cut sleepers from it.

Q. And below that you could still probably, on occasions, get timber of a sleeper size? A. Yes.

Q. Even though it was less than 6 feet girth? A. Yes.

Q. You have told me that the logs were coming from Pigeon Top A up to about the middle of 1957, and from then onwards during 1957 where were they coming from? A. To the best of my knowledge, as far as I can remember, Pigeon Top B.

Q. And how did the average quality of timber from Pigeon Top
30 B compare with that from Pigeon Top A? A. It was not as good.

Q. You have told us that A was above average. How would you describe B? A. Average run of the bush.

(Short adjournment.)

(Document purporting to be an admission of facts pursuant to a notice to admit facts, tendered and marked Exhibit 2.)

Mr JENKYN: Q. I think you have seen yourself the certificates Nos. 19963, dated 5th July, 1957, 22628, dated 9th October 1957, 22634 dated 22nd October 1957, and 22635, dated 24th October 1957, being certificates of a Mr John Kennedy? A. Yes.

40 Q. Do you know Mr John Kennedy, a timber inspector. A. Yes.

Q. And have you yourself any independent recollection of seeing these particular inspections take place at the Brill Brill mill or not? A. No.

Q. I want you to assume for a moment that the material—the timber in respect of which those certificates were furnished—was all timber 9 inches x 4 inches in dimension. I want you to assume that the lengths of that timber ranged from 12 feet to 20 feet, and I want

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you to assume that the majority of that timber was blackbutt. I want you also to assume that it was timber answering this description—"The best of its kind, well cut, sound, free from sap, shakes, some cracks, worm holes, pipes, cores or other defects, straight and measured the full scheduled dimensions both in length and cross section, clear of splits, shakes and unsquared ends." Do you follow that description?
A. Yes.

Q. Is that a description which, as a timber man, is one which you appreciate and understand? A. Yes.

Q. And if that be a correct description of the timber which was sent pursuant to these certificates, to New Zealand, can you tell us whether that timber must have come from logs of at least some minimum centre girth measurement? A. The majority of it would come from logs over 6 feet, but it is not impossible to get a piece of timber that size out of a smaller log.

Q. So that the bulk of that timber would come, in your view, from logs 6 feet or over? A. Yes.

Q. And if that description be a correct description of that timber, what do you say as to whether those logs from which the milled timber came, could or could not have been used for the cutting of sleepers? A. It could have been.

Q. Were you asked, in recent times, to go to New Zealand?
A. Yes.

Q. And did you go? A. Yes, I did.

Q. When was that? A. The 27th October.

Q. This year? A. This year.

Q. And when you were there, first of all did you meet a gentleman by the name of Tilborg? A. Yes.

Q. And were you taken to a wharf at Timaru? A. Yes.

Q. And was a certain section of that wharf indicated to you by Mr Tilborg? A. It was.

Q. Did you then make a careful inspection of that wharf? A. As careful as possible.

Q. As careful as you could? A. Yes.

Q. It was, at that stage, a completed wharf, was it? A. It was.

Q. And did you make as careful an inspection as you could of the timber in that wharf? A. Yes.

Q. Was the timber that you saw in the wharf in the main blackbutt? A. It was.

Q. And how did these measurements and dimensions, as you saw the timber, compare with the measurements and dimensions that I have just asked you to assume? A. In the 9 x 4 it was all that timber—it had been docked into different lengths and some pieces were 12 feet and some pieces were 20 feet. There were different lengths. Some of it was cut back into pieces of 6 feet lengths.

Q. But as they were there in the wharf it was still timber of 12 to 20 feet in length? A. Yes.

Q. Still timber of 12 to 20 feet in length after the wharf had been completed? A. Yes.

Q. And as you saw that timber in the wharf itself—the timber that you saw in the wharf—what is your view as to whether that timber came or did not come from logs from which sleepers could have been cut? A. It came from logs—the majority of it anyhow came from logs that sleepers could have been cut out of.

Q. Were you shown by Mr Tilborg some remnants of timber that had not been incorporated into the wharf? A. Yes.

10 Q. And did you bring back some? A. I think Mr Woods did.

Q. Somebody else who accompanied you on the trip? A. Yes.

Q. Would you just look at this piece of wood, first of all? (Piece of wood handed to witness.) Is that one of the pieces that was brought back? A. Yes.

Q. You were just examining something closely at that moment. What were you looking at on that piece of timber? A. The hammer brand.

Q. And what hammer brand appears on that piece of timber? A. No. 9 New South Wales blackbutt—BB.

20 Mr HOLMES: Q. Is that “N.S.W.”? A. Yes.

Q. “9 N.S.W.”, and what is the rest? A. “BB”.

Mr JENKYN: Q. “BB”, which stands for what? A. Blackbutt.

Q. Do you know what stamp No. 9 represents? A. Yes; it is the hammer of John Kennedy, timber inspector.

HIS HONOR: What is a hammer brand?

Mr JENKYN: Q. Just explain to His Honor how the brand is put on. A. The hammer is that those figures and letters are cut into the hammer, and when you hit the piece of timber it leaves its impression.

Q. The hammer is made of iron or steel or something? A. Steel.

30 Q. And it has the No. 9 on it? A. Yes.

Q. And has it also got this New South Wales on it? A. “N.S.W.”

Q. And that is stamped into the timber? A. Yes.

Q. So that it makes an indentation on to the timber? A. Yes.

HIS HONOR: Q: “9 N.S.W.” would be J. Kennedy’s hammer brand? A. Yes.

Q. The “BB” would be put on by somebody else? A. No; it is all on the same hammer.

Q. So that if he was branding a different kind of timber he would use a different hammer? A. Yes, a different hammer.

40 (Piece of timber tendered; objected to; rejected at that stage.)

Mr JENKYN: Q. Would you look at this piece of timber? (Piece of timber handed to witness.) Is that another piece that you brought back? (Objected to.)

Q. You saw the timber collected to be brought back, did you? A. Yes.

Q. Is that one of the pieces that was collected in New Zealand and was brought back? A. I would say so.

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Q. What are you looking at? A. The hammer brand again.

Q. What is the hammer brand on that one? A. Exactly the same as the other one.

Mr HOLMES: Q. "9 N.S.W. BB", is it? A. Yes, correct.

HIS HONOR: If you like I will say, without actually having them marked, that the first one is marked "2" and the second one is marked "3", but at this stage I won't bother having them marked.

Mr JENKYN: Q. Have a look at these two pieces of timber again. (Handed to witness.) Look at the first one. You have told us that that is blackbutt? A. Yes. 10

Q. When you look at a piece of timber like that is there anything about the timber itself which indicates to you or to any person who has knowledge of timber—? (Objected to as leading.)

Q. What the approximate girth of the log from which it was taken was? A. Yes.

Q. What do you see as you look at that piece of timber, which enables you to say that? A. There is a gum vein in this piece, and there are the growth rings.

Q. The growth rings? A. Yes.

Q. And those growth rings clearly appear on the face of the 20 timber, do they? A. Yes.

Q. I do not want you to go into a long dissertation on growth rings, but could you tell us, in brief fashion, what the growth rings indicate to you in regard to centre girth? A. The growth ring, if it was, say, starting in that manner and coming up there and coming down there (indicating) would indicate that it was out of a small log or was very close to the heart of a log. As in this piece it goes almost straight across, it indicates that it was a fairly large girth.

Q. Of a minimum size of what, looking at that piece? A. Looking at that piece I would say a minimum size of 6 ft. 30

Q. Centre girth? A. Yes.

Q. Have a look at the second piece and tell me whether the same applies, to that, or are there any qualifications to that? A. I would say that the same applies to this, only that this piece was cut a little bit closer to the heart of the tree than that piece. (Indicating.)

Q. And you would say of a centre girth minimum of 6 ft.? A. Yes, 6 ft.

Q. The logs from which those two pieces of timber came—what is your view as to whether those logs could have been cut into sleepers? A. I would say that they could have. 40

HIS HONOR: One thing is that although this witness has given some figures as to the number that were suitable for sleepers and not cut into sleepers, I have no idea of the quantity that went through this mill at all.

Mr JENKYN: I will be adducing evidence as to the figures from the person who actually took out these figures.

CROSS-EXAMINATION

Mr HOLMES: Q. Just on this Timaru matter—you said that these 9 x 4 lengths of 12 feet and 20 feet could have been cut into sleepers?

A. Yes.

Q. Of course, to cut a length of 12 feet into a railway sleeper means that there is a loss of 4 feet? A. Yes.

Q. And to cut a length of 20 ft. into sleepers means that there is a loss of 2 feet in length? A. 4 feet.

Q. And you do not know from what size logs or flitches these 10 pieces were cut, do you? A. I never saw them.

Q. You never saw them? A. Not that I can remember.

Q. So that when you say that sleepers could have been cut from this timber you would unqualifyingly agree with me that it could only have been done with the waste which I have indicated, that is to say, on the 12's a loss of 4 feet and on the 20's a loss of 4 feet. (Objected to.) A. Yes.

Q. 4 feet of the flitch in both cases? (Objected to; pressed; argument ensued.)

HIS HONOR: Ask the question again and I will rule on it.

20 Mr HOLMES: Q. You have been an inspector for some time with the Forestry Commission? A. No; only 18 months.

Q. Prior to that you had some experience in a sawmill? A. Yes.

Q. And I suppose you know something about the timber trade. A. Yes.

Q. As a trade? A. Not such a lot as a trade, no.

Q. Do you know that 4 feet lengths of timber are not lengths that are ordinarily or easily marketed? (Objected to; pressed; rejected.)

HIS HONOR: The witness has said that if you cut these 12 feet or 20 feet lengths into sleepers you have 4 feet over in each case.

30 Mr HOLMES: Q. The timber that you saw in the pier at Timaru you said was in the main blackbutt? A. That is right.

Q. What other species did you see on this occasion that were pointed out to you by Mr Tilborg—? A. Brush box.

Q. Brush box? A. Yes.

Q. And when you say in the main that it was blackbutt, are you able to give some percentage of blackbutt to brush box? A. Yes; I would say that it would be 75% at least blackbutt.

Q. 75% at least would be blackbutt. A. Yes.

40 Q. And were the lengths of brush box more than 8 feet in length that you saw in the pier? A. Some of them were—some of them were not.

Q. Some were more? A. Some were more and some were less.

Q. How much more? A. Some would be 20 feet long.

Q. Some would be 20 feet long? A. Yes.

Q. Do you know whether any samples of brush box were brought back from New Zealand—like these samples of blackbutt that you have been speaking of? A. I do not know. I do not know of any.

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Q. You told my friend that there was a terrific waste of timber during this period between March and November 1957 in the milling at this mill, and you gave an illustration of a piece of 8 inch x 8 inch that went down into the burning area? A. Yes.

Q. How long was that piece that you were then speaking of?
A. 16 feet.

Q. 16 feet? A. Yes.

Q. And can you say what the species was? A. Blackbutt.

Q. The species was blackbutt? A. Yes.

Q. Did you examine it before it went down? A. No. 10

Q. Did you examine the log from which it came? A. Yes.

Q. In the mill? A. No.

Q. Tell us about this incident a bit more. You were in the mill. It does not matter why for the moment, and you just saw a piece 8 x 8 and what do you say its length was? A. 16 feet long.

Q. Go down the chute into the burning area? A. Yes.

Q. How long had you been inside the mill when that happened?
A. That is something I could not remember.

Q. You could not remember? You may have just come in?

A. I may have been there for hours or I may have been there for two 20 minutes.

Q. When you say that there was a terrific waste of timber, are you referring to timber that went down the chute and was burnt?
A. Yes.

Q. Did you examine any of the timber that went down into the burning area? A. Not closely. I saw it before it was put down that way, though.

Q. I am talking about it after it had been milled. I know you have told us that you examined logs? A. Yes.

Q. Did you examine it after it had been milled but before it 30 went down to the burning area? A. No.

Q. You did not? A. No.

Q. I think you said that during this period it was mostly blackbutt that was coming into the mill—? A. Yes.

Q. From Pigeon Top A and Pigeon Top B? A. Yes.

Q. Timber came into the mill during this period also from Cobrabald, did it? A. Yes.

Q. And during this period Cobrabald was an ex-quota area, was it not? A. Yes. (Objected to; rejected in that form.)

Q. There is timber which is known to the Commission as "quota" 40 and "ex-quota" timber, is there not? (Objected to; pressed; rejected.)

WITNESS: It is not in my department. That does not come under my department.

HIS HONOR: What is the relevance of it? You mean the Forestry Commission?

Mr HOLMES: Yes.

HIS HONOR: I thought you were referring to the Railway Commission.

Mr HOLMES: No; the Forestry Commission. (Argument ensued on objection.)

HIS HONOR: All I can do at the moment is to say that the question is not relevant to any issue raised on the pleadings.

Mr HOLMES: Before I make any application, I would like to consider my position on this matter.

HIS HONOR: Yes; I will give you any consideration that I can, but I must decide everything that arises in this suit by reference to the pleadings, unless the parties agree otherwise.

10 (At this stage further hearing adjourned until Wednesday, 25th November, 1959, at 10 a.m.)

Fourth Day—Wednesday: 25th November 1959

(On resumption Mr Holmes stated that he now appeared with Mr Glass and Mr Powell for the plaintiff.)

(Mr Holmes stated that on Tuesday, 24th November, he undertook to file an amended replication, but in the light of having to consider whether it would be necessary to ask for leave to amend the replication he did not carry out the undertaking given. His Honor stated that he did not regard it as an undertaking, and Mr Holmes stated that that being so he felt he was still in time to file the amended replication. Mr Holmes then handed to His Honour a document containing a note of the additional matters he wished to put into the replication, and stated also that he had handed a copy of the document to Mr Jenkyn only some five minutes previously. He further stated that he was not quite satisfied with the form in which the various matters were put. Mr Jenkyn stated that at this stage he would hold Mr Holmes to what he understood was an undertaking to file the replication because he (Mr Jenkyn) proposed to submit that the application was really one to amend the replication already filed.)

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HIS HONOR: I appreciate what you say, Mr Jenkyn, and I can assure you that what I propose to say, although I differ from you, does not really affect the situation that you want to arrive at. My understanding of the position is that Mr Holmes had to file an amended replication because you had to file an amended statement of defence and counterclaim. You had to do that because he had amended his statement of claim. I am sure that it was not an undertaking in the strict sense that Mr Holmes gave. He said that the replication would be filed yesterday, and I accepted it and you accepted it. A draft of the proposed replication was handed to me and also handed to you, and I still have it here, and the suit proceeded on the footing that that would be the replication. Now Mr Holmes wants to add something else to it. Now, if Mr Holmes wishes to amend his replication in a way which does not arise out of your amended statement of defence, then it is a matter for leave, although I differ from you as to whether

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there was an undertaking. I would not think that there was an undertaking given in the sense that I could attach a solicitor or anything like that.

(Mr Jenkyn stated that he merely wished to point out that the application of Mr Holmes raised an entirely different case altogether. Mr Holmes stated that to some extent he would not disagree with Mr Jenkyn that he had put matter which was new in the case into the proposed amendments, but that in the original defence to counterclaim that was filed there were allegations as to certain of the breaches which were alleged by the defendant 10 and were answered by the plaintiff in regard to sales of certain timber to persons outside the contract, as per paras. 3, 4 & 5 of the original defence to the counter claim; also that in regard to the matter relating to sales of non-quota timber, that was not an entirely new position between the parties. Mr Holmes then stated that he now sought leave to amend the replication in accordance with the document handed to His Honor and Mr Jenkyn previously, together with the addition of the matters which had just been handed to His Honor in documentary form.)

HIS HONOR: Before I get to this question of whether you ought to 20 be allowed to plead all these matters or not, it seems to me that some of these paragraphs are in a form that you should not be allowed to plead anyhow—that is, in point of form. I do not think that I should be asked to rule on those matters until they have been put in their final forms. The second matter is this, that Mr Jenkyn might want this replication verified on oath, and lastly I should imagine that Mr Jenkyn would want to administer interrogatories. I only mention those things as a preliminary to saying that it seems to me that if these amendments are going to be allowed we will not get any further with this suit this year. 30

(Mr Holmes stated that he could not oppose Mr Jenkyn's right to any of the matters mentioned by His Honor, and that he sought leave to make an amendment raising the matters referred to in the document handed to His Honor; also that he would like the opportunity from the point of view of time to put the matters in question into proper form, and that in the meantime he would ask His Honor to stand the matter over until that can be done. Mr Jenkyn stated that in his submission Mr Holmes should make the application for the amendments in the exact form in which he proposes the amendments should be, and that 40 this should be done with reasonable expedition. His Honor stated that he was in agreement with that submission. Mr Jenkyn then suggested that the amendments could no doubt be put in their final form by 10 o'clock tomorrow morning. Mr Holmes stated that he could not undertake to do it as speedily as that, and suggested that the proposed amendments might be handed to Mr Jenkyn on Thursday the 26th November and the suit adjourned

till Monday the 30th November, during which time Mr Jenkyn would be able to consider them. Mr Jenkyn stated that he would prefer the adjournment until tomorrow morning, even though he would have a shorter time to consider the proposed amendments.)

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HIS HONOR: I think that this is what I must do. I feel that this matter had stood adjourned since half past 12 yesterday, Mr Holmes, to enable you to consider what you should do with the pleadings, and I do not think I can give you longer than until 10 o'clock tomorrow. I will simply say that this matter is to stand over until 10 o'clock tomorrow. Now Mr Jenkyn, I am not saying anything about when these draft amendments should be handed to you. If they are not delivered to you until 10 o'clock in the morning, I expect that I will have to give you some time to think about the matter. What I propose to do is this: At 10 o'clock tomorrow morning, if you do not get them until then I will grant you an adjournment until 2 o'clock, but at 2 o'clock I will go on hearing this application for amendment and I will sit until I finish it even if it takes me until 10 o'clock at night.

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(Mr Jenkyn stated that he took it from what Mr Holmes had already said that the substance of the amendments he proposed to make was to be found in the document which he had produced in Court today, and that the question of the ultimate state of the amendments was a matter of merely putting into legal form the substance of what was already set out in the document. If that were so, Mr Jenkyn further stated that that would allow him to go on with some preparatory approach to the matter without waiting for the more formal document. Mr Holmes agreed with what Mr Jenkyn had put on this aspect, and His Honor stood the matter over until Thursday the 26th November 1959 at 10 a.m.)

30 **Fifth Day—Thursday, 26th November, 1959**

26th Nov., 1959

(On resumption Mr Holmes stated that he now had prepared in proper form a document a copy of which he had handed Mr Jenkyn earlier, headed "Proposed amendment to Replication". Mr Holmes further stated that the document was also a proposed amendment of defence to the counter claim because it had incorporated in it the consequential amendments that would flow from it. The document was handed to His Honor, and argument ensued.)

(Luncheon adjournment.)

40 AT 2 P.M.

(Argument continued on proposed amendment of the replication and defence to the counter claim. During the course of the argument, Mr Holmes stated that there had been a change in the name of the plaintiff company to Australian Hardwoods Pty. Ltd., and that perhaps Mr Jenkyn might be disposed to admit the

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change in name. Mr Jenkyn stated that he would make the admission requested. Mr Holmes then asked that it be noted that Mr Jenkyn admitted that J. Jamieson & Sons Pty. Ltd., the plaintiff, in the suit, had changed its name to "Australian Hardwoods Pty. Ltd." during the pendency of the suit. Mr Holmes finally submitted that, subject to an affidavit being filed explaining the change from what appears in the sworn defence to the counter claim, His Honor might allow the amendments asked. His Honor stated that he would allow 3A and 3B. Mr Jenkyn then asked that it be understood that if Mr Holmes filed an affidavit from the secretary of the plaintiff company, the secretary would be available for cross-examination on the affidavit. Mr Jenkyn also stated that whatever course His Honor took on the application, he (Mr Jenkyn) would not ask for an adjournment; further that he understood that Mr Holmes now sought leave to file a replication on the basis that all the breaches alleged were admitted.)

HIS HONOR: I will give a decision on this matter now. I will require the affidavit on Monday, and if I am dissatisfied I will just rescind my order.

(His Honor then delivered judgment on the application to amend the replication and defence to the counter claim, for which see separate transcript.)

(His Honor then excused the witness Cecil Kennedy from further attendance at the hearing, and the further hearing of the suit was adjourned until Monday, 30th November, 1959.)

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Judgment

(On Application to Amend Replication and Defence to Counter Claim)
HIS HONOR: This is an application by the plaintiff to amend its replication to the statement of defence and its defence to a counter claim filed by the defendant. After the suit was called on for hearing, the plaintiff asked for leave to amend its statement of claim, and I gave leave to it accordingly. The consequence of that was that the defendant became bound, under r.176 of the consolidated Equity Rules, to amend his statement of defence and, if necessary, his counter claim also within eight days after service of the amended statement of claim. The amended statement of defence and counter claim were filed on 24th November, the amended statement of claim having been filed the day previously. Mr Holmes then handed to counsel for the defendant and to myself a copy of the amended replication and amended defence to the counter claim which it was proposed to file on behalf of the plaintiff. The suit proceeded on the footing that that pleading of the plaintiff would be filed in that form, but in fact it was not filed on that day, though it must not be thought that I attribute that to any fault or lack of good faith on the part of the plaintiff's

representatives. The following day, during the course of the cross-examination of a witness called on behalf of the defendant, a question arose as to the admissibility of evidence and, as a result of a ruling which I gave, Mr Holmes stated he would not file the amended replication in the form which had been prepared, but wished to make other amendments to it. He contended, in the first place, that since the statement of defence and counter claim had been amended, he was entitled to amend his replication without leave, but I expressed the view—and I adhere to it—that he could not.

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10 The relevant rule is r.176 which provides that where a party has amended his pleading under r.173 or r.174 or by leave of the Court, the opposite party shall plead to the amended pleading within certain times which are specified. R.173 allows a plaintiff to amend the statement of claim before the expiration of the time limited for the replication, and before the replication is filed, and r.174 enables a defendant, without leave, to amend a set-off or counter claim at any time before the expiration of the time allowed for his replication. The plaintiff's pleading was not amended pursuant to r.173, nor was the defendant's pleading amended pursuant to r.174. The plaintiff
20 amended its pleading pursuant to leave which I gave, and the defendant amended his pleading under r.176. Consequently r.176 gave no right to the plaintiff to file any amended replication at all, and the replication in any event in my opinion required leave. Even if this were not so, I do not think that r.176 allows a party, where his opponent has amended a plea, to make any amendment in his own pleading that he likes. He is not at large. On its correct interpretation, r.176 only allows a party to amend his pleading for the purpose of replying to the amendments which have been made by his opponent; it does not permit him to add matter to his pleading which has no
30 relation whatever to the amendments made by the opponent. For those reasons I was of the opinion that the plaintiff could not reply without leave, or even if it could it could not plead the matter which it desired to without leave, because that was not pleading rendered necessary by the amendment but the pleading of facts which would have been applicable to the defendant's pleading in its original form.

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Having expressed that view, though not having given my reasons for it, Mr Holmes applied then for leave to file an amended replication and defence to counter claim. He handed to Mr Jenkyn and to myself a document which did not purport to be in the form of a pleading
40 but which indicated the amendments which the plaintiff desired to make. That document was submitted after I had adjourned the matter prior to the luncheon adjournment, and was delivered on the following morning when I resumed. That has now been withdrawn and a fresh set of amendments has been submitted.

The amendments sought in the replication are contained in four paragraphs numbered 3A, 3B, 3C and 3D. There is a question whether paragraphs 3A and 3B really disclose any ground of defence as a

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matter of law, but that is a matter which I am unwilling to decide at this stage of the hearing of the suit, and the question being at least arguable I would not disallow the amendments on that ground. I would perhaps have disallowed them on the question of form, but no objection was taken as to form.

Paragraph 3C is in a form which I consider at least embarrassing. It could be a denial of the breach alleged or it could be an admission of the breach with a plea of waiver, or it could be a plea of estoppel. It is, moreover, in uncertain form in that it alleges that the plaintiff milled the maximum quantity of logs consistent with the avoidance of economic waste, which is not, in my opinion, a sufficiently certain or accurate phrase to warrant its inclusion in a pleading. I therefore do not think that I should allow paragraph 3C. 10

Paragraph 3D commences in these terms—"In answer to the whole of the amended statement of defence the plaintiff says that the breaches alleged in paragraph 10 thereof do not disentitle it to the relief claimed in the amended statement of claim by reason of the following facts". Then there are set out a number of paragraphs distinguished by the letters (a) to (r). Now this suit is a suit for specific performance of an agreement. In answer to the statement of claim, the defendant has pleaded a number of breaches. A plaintiff who is seeking specific performance must himself have performed the contract on his part so far as its performance has, up to the time of the suit, been required by the terms of the contract. If he has not done so and the breach is of a sufficiently serious nature, it will afford a defence to the suit. It may afford a defence on other grounds, but I do not think it necessary or proper to consider those for the present purpose. That is what has occurred here. 20

The plaintiff has sued for specific performance. It has not alleged, as it should have done in its statement of claim, that it has performed the contract on its part, but the defendant, taking no advantage of that, has simply pleaded breaches which the defendant alleges the plaintiff has committed. It is open to the plaintiff, in answer to those allegations, to deny the breaches if it can, or to admit them and to allege some matter which would, as a matter of law, furnish an excuse, such as waiver. Here none of the matters alleged are claimed to have had anything to do with the breaches pleaded at all. There is simply an allegation by the plaintiff that though it has committed breaches which may disentitle it to relief, such relief should not be withheld from it because of conduct of the defendant which is not stated or claimed to have anything to do with the breaches at all. That obviously is no answer, and on that ground alone I would disallow Paragraph 3D. 30 40

The matter does, however, go a lot deeper than that. A great deal of the matter alleged in the paragraphs lettered (a) to (r) is not altogether intelligible to me and is not in the clear or direct form which a pleading requires, and some of it seems to me to have nothing to do with the questions arising in this suit at all. An extreme instance

of this is afforded by Paragraph (r) which is said to be a reason why the breaches by the plaintiff should not be held to disentitle it to relief. It is in this form:—

“The defendant persistently refused the request of the plaintiff that a conference should be held to discuss the matters affecting the construction of the contract in dispute between the parties.”

It is possible that if the prefatory statement were amended some of the allegations that follow might properly find their way into a replication, but no attempt has been made on behalf of the plaintiff
10 to discuss any of those paragraphs at all. I do not propose to go through them and determine whether any of them would be acceptable if the prefatory statement were amended, particularly as no suggestion that it could be or might be amended has been made to me. I must not be taken to express the view that any of the paragraphs could be admitted in their present form or at all. I go no further than to say that in the circumstances that I have given I do not consider it any part of my duty to discuss them individually or to endeavour to do what the plaintiff has not done, namely, to discuss them individually to see whether some are acceptable. They have been put to me in one
20 mass and in no other way, and I reject them accordingly.

As to the amendment of the defence to the counter claim, I see no objection to its present form, and consequently I allow the amendment asked.

I only wish to add this, that there are defences on the file which have been sworn to on behalf of the plaintiff. They have been on the file for a considerable time and there has been no suggestion of altering one word of them until the difficulty as to evidence arose a few days ago. There can be no doubt that in some respects the attention of the plaintiff was forcibly drawn to the contents and meaning of the original
30 replication and defence to the counter claim, and in spite of that there was no suggestion that it should be amended. It is not without significance that whereas the breaches were denied on oath until this difficulty arose, now that the defendant has disclosed his hand and has put some of his evidence before the Court and indicated in writing to the plaintiff other evidence which he proposes to call, the denial of the breaches is withdrawn altogether, and their occurrence is admitted.

It is also to be observed that what is now intended to be pleaded is, on its face at least, inconsistent with what has already been sworn. However, Mr Holmes contends that that was not due to any difference
40 in the facts but due to a different view being taken of the same facts. I feel that I should have some evidence on oath in the form of an affidavit to explain that matter, but I am unwilling to postpone my decision because this suit has already been delayed more than it should have been. It was commenced on 18th November and so far the hearing of the evidence has taken about two or three hours. If I did not decide this matter of the amendment at once it would mean that, due to the intervention of the weekend and the fact that I could not sit on

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this suit tomorrow, there would be several days before the pleadings were amended and several days more before the evidence could be resumed. What I propose to do, therefore, is to allow the amendment but to reserve to myself the liberty of withdrawing my decision unless an affidavit satisfactory to me is produced on Monday morning when the hearing is resumed. For that purpose, although I will make an order now, it will not be able to be taken out until after Monday, although, of course, it may be acted on immediately.

There is one matter that I should deal with before making the order, and that is the question of costs. The defendant has brought to the Court, for the purpose of proving the breaches, a number of witnesses, some from as far afield as New Zealand. The breaches are now all admitted; in fact the whole of the statement of defence and counter claim is admitted and countervailing matter only is alleged. In those circumstances, the whole costs of the trial so far incurred by the defendant have been wasted, and what I propose to do, as a condition of the amendment, is to require the plaintiff to pay not only the costs of and occasioned by the amendment but the whole of the defendant's costs of this hearing to the present time.

The order I make is this. The plaintiff is to be at liberty to amend its replication and defence to the counter claim in accordance with the document initialled by me and placed with the papers, with the exception of paragraphs 3C and 3D thereof. The plaintiff is also to be at liberty to amend the title of the suit by substituting "Australian Hardwoods Pty. Ltd." as the name of the plaintiff.

The plaintiff is to pay, in any event, the costs of and occasioned by the amendment and the costs of the defendant of the hearing up to and inclusive of this day, save so far as such costs may have been included in any prior order.

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Sixth Day: Monday, 30th November, 1959

30

(On resumption, Mr Jenkyn announced that Mr Fox now appeared with him for the Defendant in place of Mr H. Jenkins who had taken ill.)

(Mr Holmes stated that the Plaintiff did not now intend to amend the replication and defence to counterclaim in pursuance of the leave granted, and that it was not proposed to file any replication or defence to counterclaim. Mr Jenkyn then asked for an order that the plaintiff pay the costs of the suit to date. His Honor stated that he had previously ordered the plaintiff to pay in any event the costs of and occasioned by the amendment, and the costs of the defendant of the hearing, up to and inclusive of Thursday, 26th November, 1959, save so far as such costs may have been included in any prior order. Mr Jenkyn asked that the order be allowed to stand, and His Honor agreed to that being done.)

Mr Jenkyn then asked for a short adjournment in order that he

might consider the position. No objection being offered, His Honor adjourned the hearing for a short time.)

(On resumption, Mr Jenkyn stated that he was ready to proceed with his evidence, and tendered an occupation permit No. 9546; admitted and marked Exhibit "3".)

(Sawmill Licence No. 7801 tendered and marked Exhibit "4".)

(Special Licence No. G.6295 tendered and marked Exhibit "5".)

(Letter of the 6th September, 1957, from the plaintiff company to the Secretary for Railways, tendered; objected to; pressed; argument 10 ensued; admitted and marked Exhibit "6".)

(File of correspondence consisting of letter of the 9th October, 1959 from the solicitor for Railways to the solicitor for the plaintiff, letter of the 15th October, 1959 from the solicitor for Railways to the solicitor for the plaintiff, two letters of the 28th October, 1959 from the solicitor for the plaintiff to the solicitor for Railways, letter of the 11th November, 1959 from the solicitor for the plaintiff to the solicitor for Railways and reply of the 12th November, 1959, from the solicitor for Railways to the solicitor for the plaintiff, tendered; objected to; pressed, argument ensued; rejected and documents 20 m.f.i.4.)

(Case for the Defendant closed.)

Mr HOLMES: I have no evidence in reply.
(Counsel addressed.)

(At this stage further hearing adjourned until Tuesday, 1st December, 1959, at 10 a.m.)

Seventh Day: Tuesday, 1st December, 1959

1st Dec., 1959.

(Counsel continued to address.)

(At this stage further hearing adjourned until Wednesday, 2nd December, 1959, at 10 a.m.)

30 **Eighth Day: Wednesday, 2nd December, 1959**

2nd Dec., 1959.

(Counsel continued to address.)

(During the course of his address, Mr Jenkyn asked leave to amend the counter claim in accordance with the document initialled by His Honor and placed with the papers. Mr Holmes objected to the amendments except the proposed paragraph 4. Argument ensued.)

HIS HONOR: I allow the amendments, the defendant in any event to pay the costs of and occasioned by the amendments and all costs of the plaintiff wasted or thrown away by reason thereof.

40 (At this stage further hearing adjourned until Thursday, 3rd December, 1959, at 10 a.m.)

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—
*Proceedings
before
His Honour
Mr. Justice
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(Continued)

30th Nov., 1959.

Ninth Day—Thursday, 3rd December, 1959

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Proceedings
before.

His Honour
Mr. Justice
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(Continued)

3rd Dec., 1959.

(On resumption, Mr Holmes stated that at the adjournment on the previous day His Honor had given leave to Mr Jenkyn to amend the counter claim. Mr Holmes further stated that accordingly he had prepared a defence as set out in the document handed to His Honor, a copy of which he had also handed to Mr Jenkyn, and he now asked His Honor to rescind the order made on Wednesday, 3rd December. Argument ensued, at the conclusion of which His Honor delivered judgment refusing the application to rescind the order made and giving the defendant leave to 10 amend his counter claim and the plaintiff leave to file a defence to the counter claim in accordance with the document initialled by His Honor and placed with the Court papers.) (For judgment see separate transcript.)

(At the request of His Honor both counsel agreed to file their respective documents during the course of the day. Mr Jenkyn then stated that he did not propose to reopen his case to call any further evidence, and that he would make arrangements to file his joinder of issue within the time allowed. Mr Holmes stated that in the circumstances the plaintiff would have to go 20 into evidence, and for this purpose he called Mr Alderton.)

WARREN WALLACE ALDERTON
sworn and examined:

Plaintiff's
Evidence.
Warren Wallace
Alderton.
Examination.

Mr HOLMES: Q. You are the Chairman of Directors of Australian Hardwoods Pty. Ltd. A. I am.

Q. Which was John Jamieson Pty. Ltd.? A. Yes.

Q. That company is at present operating the sawmill at Brill Brill, or is it Bellangry? A. Yes, Bellangry.

Q. Which has been referred to in this suit? A. Yes.

Q. Has the company passed any resolution in reference to how 30 long it proposes to remain in occupation? (Objected to: rejected.)

Q. Have the directors of the company considered any question as to how long they will remain in occupation?

HIS HONOR: I do not think you can have that question either.

Mr HOLMES: Q. Are you aware of anything which the company has in mind in connection with its occupation of the sawmill premises at Bellangry? (Objected to as irrelevant; rejected.)

Q. On what basis is the company in occupation of the sawmill now? (Objected to; pressed.)

HIS HONOR: I do not understand what the question means. 40

Mr HOLMES. Q. Has the company any arrangements, apart from the contract in dispute in this suit—has the company any arrangement with the Commissioner for Railways as to its occupation? (Objected to as irrelevant; pressed; admitted.)

Q. Can you remember the question? A. Have we an arrangement with the Commissioner for occupation?

Q. Yes; that was the question. A. The answer is "Yes."

Q. And is that arrangement in writing? A. Yes.

Q. And is it in the terms of Exhibit O in this case? Have a look at Exhibit O. (Handed to witness.) They are the terms of settlement? A. The interim agreement, as we call it, yes.

Q. I think you have seen a copy of it? A. Yes.

10 Q. If in this suit it is decided that the plaintiff, the company, is not entitled to remain in occupation of the lands or sawmill, what will it do? A. It will abide by the decision of this or any other Court. (Objected to as irrelevant; pressed; admitted.)

(Short adjournment.)

Mr HOLMES: Q. Is the plaintiff company ready and willing to perform the agreement of the 3rd May 1956? A. Yes—only too anxious to.

Q. Is the plaintiff company ready and willing to pay any sum of money which it is found it may still have to pay in respect of an exercise of the option? A. Yes. (Objected to as irrelevant; pressed; argument ensued; admitted.)

20

CROSS-EXAMINATION:

Mr JENKYN: Q. The situation is that the company is at present operating this sawmill at Brill Brill? A. That is right.

Q. And has been in occupation and possession of that mill site at any rate from the 25th February 1958 up to the present time? (Objected to; pressed; admitted.)

Q. Your company has been in occupation and possession there since the 25th February 1958? A. We have been in occupation, anyway.

Q. You have been in occupation? A. Yes.

30 Q. And running the mill—? A. Yes.

Q. All that time? A. Yes.

Q. In addition to operating the mill with the plant that you were using under the contract, you have other plant and equipment with you, or have you not—? A. Yes.

Q. Belonging to the company? A. Yes.

Q. Quite unrelated to the plant that is referred to in the contract? A. Yes; quite a lot of the mill itself belongs to us.

Q. And you claim the right to remain in possession and occupation of that area? A. Until otherwise determined by any Court.

40 Q. Until a decree is made by this Court? A. Or any Court of Appeal, if the matter should go there.

Q. Or a Court of Appeal if it should go there? A. Yes.

Q. And I suppose in those circumstances you want, in these proceedings, a declaration as to whether you have the right to remain in possession of this land? A. I would like it.

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—
Plaintiff's
Evidence.
Warren Wallace
Alderton.
Examination.
(Continued)
—

Cross
Examination.
—

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—
Plaintiff's
Evidence.
Warren
Wallace
Alderton.
Cross
Examination.
(Continued)
—

Q. And occupation—I use both words—“possession” and “occupation”? A. Yes.

Q. And that has been your attitude and is your attitude right up to the present time—that you have got the right, you claim, to remain in possession? A. I believe—that is my firm belief.

Q. And you claim that on behalf of your company? A. Yes, that is right; I believe it.

Q. And I take it that it would be correct, in those circumstances, to say that your company, because of its contention, has refused to leave this area? A. Yes; it has never arisen, to my knowledge. 10

Q. It has refused to leave this area? A. It has never been asked to.

Q. Are you prepared to leave it now—your company? A. If so ordered by the Court.

Q. Is your company prepared to leave it now? A. We maintain that we have a legal right to stay there.

Q. Are you prepared to leave it now? A. Why should I?

Q. You maintain that you are not prepared to leave it? A. No one has asked me to leave it until now.

Q. Is your company prepared to leave that area now? A. By 20 what right?

Q. Answer the question. Is your company prepared to leave that area now. A. If it is so ordered by a court.

Q. Is your company prepared to leave that area now? A. This minute?

Q. Before any order is made. A. No.

Q. So that it is true that you refuse to allow the defendant to take possession of this land before any order is made? A. The defendant has never asked us.

Q. You refuse to allow the defendant to take possession of this 30 land before any order is made? A. No; he can come in and take possession of the land. It is not his land but he can come in and take possession of it.

Q. Answer the question. (Objected to.)

Q. Do you now refuse to allow the defendant to enter on to this land and sawmill. (Objected to.) A. May I ask Your Honor something?

HIS HONOR: No.

Q. Do you now refuse to allow the defendant to enter on to this land and sawmill? A. I take it that you are asking me to leave as 40 of this minute?

Q. Yes. A. I would say “No”.

Q. You would not leave? A. No, not without the order of the Court.

Q. The company. A. No, not without the order of the Court.

Q. You would not allow the defendant to take over the land and

the sawmill at the present moment? A. Not until the Court has so ruled.

Q. When did you become Chairman of Directors of this company? A. I think at the end of January or the beginning of February 1957.

Q. 1957? A. Yes.

Q. Who is Mr Thomas? A. Mr Thomas is the secretary of the company.

Q. Is Mr Miller still connected with this company? A. He is
10 the managing director.

Q. He is the managing director? A. Yes.

Q. And he is in Sydney? A. Today?

Q. No—generally stationed in Sydney—for the last week or so?
A. Yes.

Q. And who are the other directors of the company? A. Mr Knox and Mr Miller and myself. I think that is all.

Q. You, Knox and Miller? A. Yes.

(Witness retired.)

Mr HOLMES: That is my case.

20 HIS HONOR: Are you going to call any evidence in reply, Mr Jenkyn?

Mr JENKYN: No.

(Counsel continued to address.)

(At this stage further hearing adjourned till Monday, 7th December 1959, at 10 a.m.)

30

*In the
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Wales in its
Equitable
Jurisdiction.*

—
Plaintiff's
Evidence.

Warren
Wallace
Alderton.

Cross
Examination.
(Continued)

—

40

*In the
Supreme Court
of New South
Wales in its
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Jurisdiction.*

No. 15.
Notes of
His Honour
Mr Justice
Myers.
—
18th Nov., 1959
to
7th Dec., 1959.

No. 15
Notes of His Honour Mr. Justice Myers

Wednesday, 18th November, 1959.

HOLMES, Q.C. & GLASS for plaintiff.
JENKYN, Q.C. & JENKINS for defendant.
Holmes applies under sec. 39 (2) of Equity Act for an order refusing to allow the defendant to avail itself of its counter claim.
Holmes asks for leave to amend Statement of Claim in accordance with document initialled by me and placed with the papers.
Jenkyn opposes amendments. 10
I allow amendments and give my reasons.
Plaintiff to be at liberty to amend its S/Claim in accordance with the document initialled by me and placed with the papers.
The plaintiff to pay in any event the costs of and occasioned by the amendment and all costs thrown away or rendered abortive by the adjournment.
This order and amendments to the S/Claim to be made in pursuance of it shall not prejudice the right (if any) of the defendant to avail himself of the counter claim in this suit.
Stood over to 23rd November. 20

Monday, 23rd November, 1959

Appearances as before.
Amended Statement of Claim filed in Court.
JENKYN to Court.
Holmes in reply.
I deliver oral judgment.
Application to refuse to allow the defendant to avail himself of his counter claim dismissed with the costs.
Exhibit A: Letter 11th June, 1957.
Exhibit B: Letter 14th June, 1957. 30
Exhibit C: Letter 18th July, 1956. 4th September, 1956.
Exhibit D: Letter 25th July, 1957 and Schedule.
Exhibit E: Letter 28th August, 1957.
Exhibit F: Letter 11th September, 1957.
Exhibit G: Letter, 12th September, 1957.
Exhibit H: Letter 13th September, 1957.
Exhibit J: Letter 16th September, 1957.
Exhibit K: Letter 17th September, 1957.
Exhibit L: Letters 23rd September, 1957; 11th October, 1957; 11th October, 1957; 29th November, 1957; 3rd December, 1957. 40
Exhibit M: Agreement December, 1957.
Exhibit N: Letter 23rd December and 30th December, 1957.
Exhibit O: Agreement 3rd December, 1958.

Exhibit P: Letter 24th December, 1958.
Plaintiff's case closed.

Tuesday, 24th November, 1959

Appearances as before.

Amended Statement of Defence and Counterclaim filed in Court.
Case for defendant.

Exhibit 1: Letter 7th October, 1959; Letter 9th October, 1959.

- Forestry Commission called on subpoena duces tecum. Answered
by A. J. Vaughan who produces documents.
10 Documents produced m.f.i. (1).
C. Kennedy, sworn xd.
Exhibit "2". Admission of facts.
m.f.i. (2) Hammer brand (1) "9.N.S.W. BB".
m.f.i. (3) Hammer brand (2) the same.
xxd:

Wednesday, 25th November, 1959

Appearances as before save that P. Powell now appears with
Holmes Q.C. and Glass.

20 **Thursday, 26th November, 1959**

Appearances as before.

Holmes asks for leave to amend Replication and defence to
Counterclaim in accordance with document initialled by me and
placed with the papers.

Jenkyn opposes application.

Holmes in reply.

I deliver oral judgment.

- Plaintiff to be at liberty to amend its Replication and defence to
Counterclaim in accordance with the document initialled by me and
30 placed with the papers with the exception of paragraphs 3C and 3d
thereof the plaintiff also to be at liberty to amend the title of the suit
by substituting "Australian Hardwoods Pty. Ltd." as the name of the
plaintiff. The plaintiff to pay in any event the costs of and occasioned
by the amendment and the costs of the defendant of the hearing up
to and inclusive of this day, save so far as such costs may have been
included in any prior order.

Monday, 30th November, 1959

Appearances as before save that Fox now appears with Jenkyn
Q.C. for the defendant.

- 40 Holmes states that plaintiff does not now intend to amend

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18th Nov., 1959
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Replication and defence to Counterclaim in pursuance of leave granted and does not propose to file any Replication or defence to Counterclaim.

Exhibit "3"—Permit to occupy.

Exhibit "4"—Sawmill licence.

Exhibit "5"—Special licence.

Exhibit "6"—Letter 6 Sept. 1957.

m.f.i. (4)—Bundle of correspondence from 9th Oct. 1959.

Case for defendant closed.

No case in reply.

Holmes to court.

Jenkyn to court.

10

Tuesday, 1st December, 1959

Appearances as before.

Jenkyn further to court.

Wednesday, 2nd December, 1959

Appearances as before.

Jenkyn further to court;

Jenkyn asks for leave to amend Counterclaim in accordance with the document initialled by me and placed with the papers. 20

Holmes objects to amendments, except the proposed paragraph 4.

I allow the amendments, the defendant in any event to pay the costs of and occasioned by the amendments and all costs of the plaintiff wasted or thrown away by reason thereof.

Holmes in reply.

Thursday, 3rd December, 1959

Appearances as before.

Holmes asks that leave granted to defendant to amend Counterclaim be rescinded.

Jenkyn opposes. 30

I refuse to rescind the order.

Plaintiff to be at liberty to file a defence to the Counterclaim in accordance with the document initialled by me and placed with the papers.

Jenkyn does not call any further evidence in support of the amended Counterclaim.

Case for plaintiff on defence to Counterclaim.

W. W. Alderton, sworn, examined, cross-examined. No re-examination

Plaintiff's case on defence to Counterclaim closed. 40

No evidence in reply.
Jenkyn to Court.
Holmes to Court.
Jenkyn to Court.

Monday, 7th December, 1959

Appearances as before.
I deliver oral judgment.

I dismiss the suit and Counterclaim in each case with costs,
except so far as the costs have already been provided for in any prior
10 order.

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Wales in its
Equitable
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—
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Notes of
His Honour
Mr Justice
Myers.
(Continued)

—
18th Nov., 1959
to
7th Dec., 1959.

M. Woodman,

Associate.

*In the
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No. 16

Decree of His Honour Mr. Justice Myers

No. 16.
Decree of
His Honour
Mr Justice
Myers.

MONDAY the Seventh day of December One thousand nine hundred and fifty nine.

7th Dec., 1959.

THIS SUIT coming on to be heard before The Honourable Frederick George Myers a Judge of the Supreme Court sitting in Equity on the Eighteenth day of November last WHEREUPON AND UPON HEARING READ the pleadings filed herein AND UPON HEARING what was alleged by Mr Holmes of Queen's Counsel with whom was Mr Glass of Counsel for the Plaintiff and by Mr Jenkyn of Queen's Counsel with whom was Mr H. Jenkins of Counsel for the Defendant AND UPON APPLICATION made by its said Counsel on behalf of the Plaintiff pursuant to Section 39 (2) of the Equity Act 1901 as amended for an Order refusing to allow the Defendant to avail himself of his Counterclaim herein THIS COURT DID GRANT LEAVE to the Plaintiff to amend the Statement of Claim in accordance with draft amendments set out in the First Schedule hereto AND THIS COURT DID ORDER that the further hearing of this Suit stand adjourned to the Twenty third day of November last AND THIS COURT DID FURTHER ORDER that the Plaintiff pay 20 in any event the costs of and occasioned by such amendment and all costs thrown away or rendered abortive by such adjournment AND THIS COURT DID FURTHER ORDER that this Order and the amendments to be made to the Statement of Claim in pursuance of it should not prejudice the right (if any) of the Defendant to avail himself of the Counterclaim in this Suit AND THIS SUIT coming on to be further heard on the said Twenty third day of November last and on the Twenty fourth, Twenty fifth, Twenty sixth and Thirtieth days of November last and the First, Second and Third days of December instant respectively WHEREUPON AND UPON HEAR- 30 ING what was alleged by Mr Holmes of Queen's Counsel with whom were Mr Glass and as from the said Twenty fifth day of November last Mr Powell of Counsel for the Plaintiff and by Mr Jenkyn of Queen's Counsel with whom were Mr H. Jenkins and as from the said Thirtieth day of November last Mr Fox of Counsel for the Defendant THIS COURT DID on the said Twenty third day of November last DISMISS the said Application AND DID ORDER that the Plaintiff pay to the Defendant the costs thereof AND THIS COURT DID on the said Second day of December instant FURTHER ORDER that the Plaintiff be at liberty to amend its Replication and 40 Defence to Counterclaim in accordance with the draft proposed Amendments set out in the Second Schedule hereto with the exception

of Paragraphs 3 (c) and 3 (d) thereof AND that the Plaintiff be at liberty to amend the title of the Suit by substituting "Australian Hardwoods Pty. Limited" as the name of the Plaintiff AND THIS COURT DID FURTHER ORDER that the Plaintiff pay to the Defendant in any event the costs of and occasioned by such amendment and the costs of the Defendant of the hearing up to and inclusive of the Twenty sixth day of November last save so far as such costs might have been included in any prior Order made herein AND THIS COURT DID on the said Second day of December instant GRANT

10 LEAVE to the Defendant to amend his Counterclaim in accordance with the draft amendments set out in the Third Schedule hereto AND DID ORDER that the Defendant in any event pay the costs of and occasioned by such amendment and all costs of the Plaintiff wasted or thrown away by reason thereof AND THIS COURT DID on the said Third day of December instant GRANT LEAVE to the Plaintiff to file a Defence to the Counterclaim in accordance with a document copy of which is set out in the Fourth Schedule hereto WHEREUPON AND UPON HEARING READ the Pleadings as so amended as

20 lace Alderton called on behalf of the Plaintiff and of Cecil Kennedy called on behalf of the Defendant AND UPON READING AND EXAMINING the Exhibits put in evidence on behalf of the Plaintiff and marked with the letters "A", "B", "C", "D", "E", "F", "G", "H", "J", "K", "L", "M", "N", "O", and "P" respectively and the Exhibits put in evidence on behalf of the Defendant and marked with the numbers "1", "2", "3", "4", "5", and "6" respectively AND UPON HEARING what was alleged by the said Counsel for the said parties respectively THIS COURT DID ORDER that this Suit for Judgment AND the same standing in the paper this day for Judgment

30 accordingly THIS COURT DOTH ORDER that this Suit and Counterclaim be and the same are hereby dismissed out of this Court AND THIS COURT DOTH FURTHER ORDER that it be referred to the Deputy Registrar or Chief Clerk in Equity to tax the costs hereinbefore provided for and subject thereto the costs of the Defendant of this Suit and the costs of the Plaintiff of the Counterclaim AND to set off the costs so taxed as aforesaid and to certify to which of the parties the balance after such set off is due AND THIS COURT DOTH FURTHER ORDER that such balance be paid by the party from whom to the party to whom the same shall be certified to be

40 due within fourteen days after service upon such firstmentioned party of an office copy of the Certificate of such taxation.

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No. 16.
Decree of
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The First Schedule Hereinbefore Referred To

(These Schedules have, for convenience, been inserted earlier in the Appeal Book. For this Schedule, see Document No. 2. Page 7 to Page 8.)

The Second Schedule Hereinbefore Referred To

(For this Schedule, see Document No. 10. Page 48 to Page

The Third Schedule Hereinbefore Referred To

(For this Schedule, see Document No. 5. Page 29.)

The Fourth Schedule Hereinbefore Referred To

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(For this Schedule, see Document No. 11. Page 52 to Page 53.)

No. 17

Reasons for Judgment (Myers J.)

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HIS HONOR: This is a suit for specific performance of a contract made between the plaintiff and the defendant. There is also a counter-claim by the defendant. In my opinion, both suits fail.

The contract was made on 3rd May 1956 and it recites that the defendant had an occupation permit and licence to operate a sawmill in a State Forest. So far as material the agreement provides that the defendant, who was called the owner, should make available, on lease
10 or hire to the plaintiff, who was called the contractor, the buildings and plant set out in the schedule to the agreement at the rent or hire set opposite to each item, with a proviso that if the plaintiff should make application to the defendant, the defendant might, in his discretion, replace any buildings or plant or supply additional buildings or plant at a rent or hire to be determined in a particular manner. The buildings and plant were all chattels. The agreement further provided that the plaintiff should operate the sawmill in a good and workmanlike and efficient manner, and should mill all logs which it might accept from the Forestry Commission and sell the sleepers
20 and sawn timber recovered from the logs to the defendant in the manner provided by the agreement, that it should use every reasonable effort to recover the maximum quantity of first quality sleepers from the logs with a minimum of waste and should cut the balance of the timber into sawn timber of various sizes suitable, as far as possible, for use by the defendants. The agreement went on to provide that the defendant should render monthly accounts for amounts due to him by the plaintiff and that the plaintiff would pay those amounts within 30 days after the rendering of the account.

Clause 5 provided that the plaintiff would not sell any sleepers
30 or sawn timber produced by it in the mill other than to the defendant, with the exception of timber rejected by the defendant, timber which the defendant in writing released the plaintiff from selling to him and timber used by the plaintiff for its own purpose or for the purposes of its employees.

Clause 6 provided that if the plaintiff or the defendant should commit a breach of the agreement the party not in breach should be entitled to terminate the contract by giving three months' notice in writing to the other with a proviso that if the defendant should give notice of termination to the plaintiff, the plaintiff should not, during
40 the period of three months, have the right to exercise the option of purchase given to it by clause 9 of the agreement.

Clause 8 provided that the contract should be deemed to have been entered into on 13th July 1952, and should remain in force for a period of 10 years from that day.

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Clause 9 requires to be set out verbatim. It is as follows:—

- “(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 10 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.
- (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 20 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 License 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 subclause (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 30 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 License 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 agree- 40 ment insofar as they are applicable.”

On 11th June 1957 the plaintiff gave to the defendant a notice in writing which it claimed was an exercise of the option given to it by clause 9 (a). A dispute having arisen as to the manner in which the option was required to be exercised, further notices were given by

the plaintiff on 11th September, 16th September and 16th December 1957. On 25th November 1957, the defendant gave to the plaintiff, pursuant to clause 6, three months' notice of termination of the contract for breach. It is admitted that at that time the plaintiff had committed the following breaches:—

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- 10 (1) At least since 13th March 1957 the plaintiff had not used every reasonable effort to recover the maximum quantity of first-class sleepers with a minimum of waste from logs accepted by the plaintiff from the Forestry Commission.
- (2) Between 20th September and 27th September 1957, 23rd October and 28th October 1957 and 24th October and 1st November 1957, the plaintiff did not sell to the defendant sawn timber produced by it in the mill from logs accepted by the plaintiff from the Forestry Commission, and sold such logs to other persons.
- 20 (3) The plaintiff did not operate the mill and carry out the functions incidental thereto in a good workmanlike and efficient manner in that it permitted the breach firstly set out and the breach constituted by the sale of timber between 24th October and 1st November.
- (4) The plaintiff did not pay to the defendant the rental or hire due by it under the agreement within 30 days after accounts were rendered to the plaintiff.
- (5) The plaintiff did not pay certain other amounts within 30 days after the accounts for them were rendered to it by the defendant.

The notice given by the defendant expired on 25th February 1958, and on that day the contract admittedly came to an end. After 30 the purported exercise of the option given by clause 9 (a) the plaintiff gave to the defendant a notice pursuant to clause 9 (c) of the contract, requiring the defendant to request the Forestry Commission to transfer to the plaintiff the occupation permit and licence to operate the saw-mill, which the defendant has refused to do. The defendant claims that the option has not been duly exercised, and that therefore the plaintiff was not entitled to make the request under clause 9 (c).

The plaintiff first seeks specific performance of the contract for the sale of the chattels said to have been constituted by the exercise of the option. This claim fails for at least two reasons. First, there 40 is nothing to show that the contract, if it exists, is of a nature susceptible of specific performance, because it is a mere contract for the

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sale of goods, and there is no evidence that damages would not be a sufficient remedy for breach, and second, the goods are in the possession of the plaintiff so that, if it has duly exercised the option there is no other act left to be performed by the defendant.

The plaintiff next seeks specific performance of the promise in clause 9 (c) to request the Forestry Commission to transfer to it the occupation permit and licence. If the defendant is bound by that promise, the plaintiff will be bound, under clauses 9 (d) and 9 (e) and after transfer of the permit and licence, to continue to sell sleepers and sawn timber to the defendant until the year 1972 on terms similar 10 to so much of the contract as is applicable to sales of timber. The Court could not order specific performance of the contract at the instance of the defendant because of the nature of the agreement and, since the remedy of specific performance would not be mutual, the plaintiff therefore could not have specific performance on its part.

The plaintiff's claim, under clause 9 (c), fails for another reason. There is no evidence that the plaintiff has always been ready and willing to perform its obligations under paragraphs (d) and (e), and I strongly suspect that until a few days ago it was not ready and willing 20 to do so. The plaintiff's counsel called no evidence as to readiness and willingness in his own case, and during argument, after the evidence had closed, claimed that he was not bound to do so. After the final amendment to the counterclaim the plaintiff was allowed to reopen its case on the counterclaim and it then called the Chairman of Directors of the plaintiff company who stated that the company was then ready and willing to perform its obligations under the contract. He was not asked and said nothing as to its attitude in the past, and, so much having been said on the point in argument, I can only regard both omissions as deliberate. Bearing in mind also the plaintiff's 30 breaches of its obligations under the contract to sell sleepers and sawn timber to the defendant, I have strong suspicions that it did not intend to perform paragraphs (d) and (e) of clause 9 if it could secure transfer to it of the occupation permit and licence. However, be that as it may, I am quite unable on the evidence to find that the plaintiff was ever ready and willing to perform its obligations under those two paragraphs until the occasion when the Chairman of Directors was called as a witness.

The defendant also claims that the admitted breaches of the contract of 1956 preclude the plaintiff from any relief at all by way of specific performance. The plaintiff does not dispute this if para- 40 graphs (a) (b) and (c) of clause 9 form part of the contract, but it contends that there were two contracts, one consisting of those three paragraphs and the other of the rest of the written document. I do not think that there is any substance in this contention. In my opinion

no part of the document can fairly be said to be capable of "standing alone" as an independent contract, and among other considerations it is to be observed that the chattels the subject of the option, and the price to be paid for them, can only be ascertained by reference to the agreement, and the right to exercise the option is itself controlled, in certain circumstances, by the proviso to clause 6. The fact that the rights conferred by paragraphs (a) and (c) are limited to the currency of the contract strongly suggests that they are part of it. In my opinion there was only one contract between the parties,
 10 and the breaches by the plaintiff therefore afford a defence to the counterclaim for specific performance.

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There were a number of other matters raised by way of defence to the plaintiff's suit, but I do not think it is necessary to deal with them.

I now turn to the counterclaim. In its original form it was filed on 28th February 1958, three days after the notice terminating the agreement expired. It pleaded the contract and its termination, submitted that the plaintiff was not entitled, after 25th February 1958, to remain in possession of the lands and sawmill and alleged that the
 20 defendant feared that unless restrained the plaintiff would refuse to allow the defendant to enter upon the lands and sawmill. The relief sought was, firstly, a declaration that the plaintiff was not entitled to remain in possession of the lands and sawmill, and secondly, an injunction restraining the plaintiff from preventing or hindering the defendant from entering upon the lands and sawmill.

During the hearing before me the defendant amended the counterclaim. In its new form it again pleaded the agreement and its termination and alleged that the plaintiff remained in possession of the lands and sawmill after 25th February 1958, and refused to allow the
 30 defendant to enter upon them. The relief claimed was not altered. A week later the counterclaim was again amended. In this, its final form, it pleaded the contract and its termination, alleged that the plaintiff remained in possession of the lands and sawmill after 25th February 1958 and refused to allow the defendant to enter upon them, and alleged that the defendant feared that unless restrained the plaintiff would refuse to allow the defendant to enter upon the lands and sawmill. It also alleged that the plaintiff wrongly claimed the right to remain in possession and occupation of the lands and sawmill, and excluded the defendant from possession and occupation thereof; that
 40 the plaintiff wrongly claimed the right to prevent the defendant from ejecting the plaintiff from the lands and sawmill; that unless restrained the plaintiff would remain in possession and occupation of the lands and sawmill and would prevent the defendant from entering into possession or occupation of them and that the plaintiff was wrongfully

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hindering the defendant in the possession and enjoyment of his rights to and under the occupation permit and licence and unless restrained by the Court would continue to hinder the defendant in the possession and enjoyment of those rights. The relief sought still remained the same relief as was sought by the counterclaim in its original form.

I might here observe that there is no evidence to support any of the allegations added in the third version of the counterclaim unless they are understood in a particular sense and to relate to the circumstances which existed on the 28th February, 1958, and not to those existing when the counterclaim was finally amended.

10

The plaintiff claims that it has exercised the options given by paragraphs (a) and (c) of clause 9 of the contract which the defendant denies. Subject to the approval of the Forestry Commission, the exercise of those options would give to the plaintiff the right, as against the defendant, to use the land and to operate the sawmill. The defendant denies the plaintiff's claim, and the plaintiff has therefore instituted this suit to enforce it. Pending the hearing and after the institution of the suit, the parties agreed that the plaintiff should remain on the land and operate the mill on the terms of the expired contract. The agreement contained no provision as to what was to 20 happen after the suit, but the plaintiff does not intend and never has intended to remain on the land unless it succeeds in its suit, in which event, of course, it would be entitled to remain. Excepting in the sense that the plaintiff claims a right in the suit and in the circumstances which I have outlined, there is nothing to support any of the added allegations in the counterclaim. It is necessary, however, to deal with the facts in more detail.

The land in question is an area of three acres and is part of a State Forest. The Forestry Act vests control of the forest in the Forestry Commission. Each year, commencing in 1952, the Commis- 30 sion has issued to the defendant a document described as an occupation permit, which is in the following terms:—

“This Permit, which is issued subject to the provisions of the Forestry Act 1916-1935, and Regulations thereunder, shall be sufficient authority to entitle Department of Railways of Sydney to utilise for the purpose of Site for Sawmill Licence & Camp Site 7801 (No. 8 Mill) the land specified herein, subject to payment in advance to the Forestry Commission of the sum of £6.0.0 per annum.”

There are certain other provisions, but it is not necessary to 40 refer to them for the present purpose. Similarly, the Forestry Commission has granted to the defendant a licence to conduct a sawmill

for the sawing or treatment of timber. Clauses 1 and 2 are in the following terms:—

1. This licence is granted for the sole purpose of sawing sleepers and off-cuts from such Crown logs as may be made available at the discretion of the Commission under special licence from Bril Bril State Forest.
2. The mill operated under this licence shall not be transferred from site to site without the prior approval in writing of the District Forester."

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10 Trees were cut in the forest under the direction of the Forestry Commission and the timber was sawn at the mill. The occupation permit did not give to the defendant an exclusive right to occupy the land, and I do not understand either party to contend that it did. From 1952 until 25th February 1958 the mill was operated by the plaintiff in pursuance of the contract with the defendant, the Forestry Commission apparently regarding the permit and licence as extending to a contractor to the defendant. From 25th February 1958 to 3rd December 1958 the plaintiff remained on the land. I have not been told whether it operated the mill during this period and if
20 it did whether it did so with the defendant's plant and equipment or its own, or whether it continued to supply sleepers and sawn timber to the defendant. By remaining on the land during this period the plaintiff committed no wrongful act as far as the defendant was concerned, for it was not a breach of the 1956 contract, which did not require the plaintiff to leave the land when it terminated, and the defendant had no right of possession or occupation of the land which would make the presence of a third party wrongful. If the plaintiff did not have permission from the Forestry Commission—
30 and there is no evidence on that point—it may have committed a trespass as against the Commission or the Crown but not as against the defendant. It is not altogether irrelevant to observe that a State Forest may be proclaimed on land which has been alienated by the Crown and if the land in question was part of a State Forest proclaimed an alienated land, the holder from the Crown could have permitted the plaintiff to remain on it. Whatever the position may have been with respect to the Forestry Commission and others, it is clear that the defendant had no interest in the land which would make the mere presence of a stranger on it wrongful as against him.

40 On 3rd December 1958 the plaintiff and the defendant entered into a written agreement. This agreement was made at a time when a motion for an injunction by each party was pending in this suit and

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when there were actions at common law also pending between the parties. It is not necessary to quote the agreement verbatim or to attempt to summarise the whole of it. It is sufficient to say that by it each party consented to his application for an injunction being dismissed, and they agreed that the plaintiff should remain on the land and operate the sawmill on the terms of the expired contract until the conclusion of this suit. Since that agreement was made the plaintiff has remained on the land and operated the mill in accordance with it, that is, with the consent and permission of the defendant. The defendant has not at any time attempted to enter on the land or to operate the mill, and has never requested the plaintiff to leave. The plaintiff has never been asked to allow the defendant to enter on the land and has never refused to do so. As I have said, the plaintiff is on the land with the consent of the defendant, and will be entitled under its agreement with the defendant, to remain there until this suit is concluded. If in this suit the plaintiff fails to establish a right against the defendant to operate the sawmill, it intends to leave the land, and this has always been its intention. With those facts in mind, I turn to the relief claimed.

The first prayer is for a declaration that the plaintiff is not entitled to remain in possession of the said lands and sawmill. The plaintiff has no interest in the land which would give it a right to such a declaration.

The second prayer is for an injunction to restrain the plaintiff from preventing or hindering the defendant from entering upon the lands and sawmill. There is no evidence whatever that the plaintiff has ever prevented or hindered the defendant from entering upon the lands and sawmill or that it intends to do so. I am not quite sure what is meant by this prayer, but if it means merely entering upon the land I am quite satisfied that the plaintiff would allow him to do so at any time. If it means, on the other hand, that the plaintiff will prevent or hinder the defendant from taking possession of the lands and sawmill, then the position is that by the defendant's own act the plaintiff is entitled to remain on the land until this suit is concluded, and in any event the defendant is not, nor is the plaintiff, possessed of or entitled to possession of the land. The sawmill, of course, is merely a collection of chattels and the remedy to recover them is detinue.

The defendant must, in my opinion, fail on his counterclaim for another reason also. The prayer for an injunction is to protect a common law right which the defendant claims to possess. Such an injunction involves proof that the other party will probably infringe the right, but there is no evidence in this case which would support such an allegation. I have already held that the claim for an injunc-

tion fails on this ground; that is, because there is no evidence at all that the plaintiff will probably prevent or hinder the defendant from entering on the lands. The first prayer is for a declaration of a common law right. This Court has no power to make such a declaration unless the declaration is consequential upon or incidental to equitable or similar relief. The equitable relief sought here is, of course, the injunction, but since the defendant is not entitled to the injunction, there is no jurisdiction to make the declaration sought alone. For these reasons I am of the opinion that the counterclaim
10 also fails.

I would only add this.

The counterclaim appears to be based on a misconception of the defendants rights. The plaintiff is in possession of the sawmill, which consists of buildings and plant which are all chattels. Its workmen are on the land and are operating the mill. The defendant claims that the plaintiff has no right to remain in possession of the chattels or to operate the mill, because the mill is the property of the defendant. If that is so, the defendant can recover the chattels in an action of detinuc, and the plaintiff will then be unable to operate the mill. There
20 is no case so far for the intervention of the Equity Court.

The defendant also claims that the plaintiff is no longer entitled to remain on the land, because the contract has been determined. The determination of the contract would put an end to the plaintiff's right to remain under the contract, but it would not follow that the plaintiff had no right to be on the land at all. That would only be the case if the defendant or another person had an interest in the land which entitled him to exclusive possession. The defendant has no such right, because he has only a non-exclusive licence to use the land and, if any other person has such an interest, then it is for that other to sue.
30 A different situation might arise if the defendant claimed that the contract bound the plaintiff to leave, or that the plaintiff intended to prevent the defendant operating the mill, but he does neither. He only claims that he is entitled to possession of the land, which he is not, and that the plaintiff intends to prevent him entering on the land, which it does not.

The defendant may have succeeded in a suit founded on contract, or repeated trespasses, or for interference with his rights to utilize the land and operate the sawmill, but no such case has been pleaded or suggested in argument. He has adhered from beginning to end on his
40 right to possession and his claim that the plaintiff intends to prevent him entering, and on that basis the counterclaim cannot succeed.

The order that I make is this. I dismiss the suit and counterclaim in each case with costs, except so far as costs have been provided for in any prior order.

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No. 18**Notice of Appeal to Full Court by the Plaintiff**

No. 18.
Notice of Appeal
by the Plaintiff.
—
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TAKE NOTICE that this Honourable Court will be moved on behalf of the above-named Plaintiff AUSTRALIAN HARDWOODS PTY. LIMITED on the first day on which the said Court sits in Banco after the expiration of sixteen days from the filing of this Notice or so soon thereafter as Counsel can be heard in that behalf on an appeal from so much of the Order of His Honour Mr. Justice Myers made on the Twenty-fifth day of November One thousand nine hundred and fifty-nine as refused leave to the Plaintiff to amend its Replication by adding as additional paragraphs therein paragraphs 3A, 3B, 3C, 3D, 3E and 3F of the Proposed Amendments to Replication filed in Court on the Twenty-fifth day of November One thousand nine hundred and fifty-nine and so much of the Decree of His Honour made on the Seventh day of December One thousand nine hundred and fifty-nine as dismissed with costs the suit brought by the Plaintiff herein AND TAKE NOTICE that upon the hearing the Appellant intends to ask that the said Order and the said Decree may be set aside and that in lieu thereof it may be ordered:

1. THAT leave be granted to the Defendant to amend its Replication by adding as additional paragraphs therein paragraphs 3A, 3B, 3C, 3D, 3E and 3F of the Proposed Amendments to Replication filed in Court on the Twenty-fifth day of November One thousand nine hundred and fifty-nine. 10
2. THAT there be a new trial of the suit.

AND FURTHER TAKE NOTICE that upon the hearing the Appellant intends to ask that in the alternative the said Decree may be set aside and that in lieu thereof it may be decreed:—

1. THAT the options to purchase set out in paragraph 9 (a) of the Agreement set forth in paragraph 2A of the Amended Statement of Claim have been validly exercised by the Appellant and that the agreement arising therefrom ought to be specifically performed and carried into execution. 30
2. THAT in addition to the specific performance of the said agreement the Respondent may be ordered to pay to the Appellant the damages which the Appellant has sustained by reason of the refusal and neglect of the Respondent to perform the said agreement and that it may be referred to the Master in Equity to enquire what is the amount of such damages.

3. THAT it may be ordered that the agreement of the Respondent to request the Forestry Commission to transfer to the Appellant the permit and licence referred to in the said Agreement ought to be specifically performed and that the same may be decreed accordingly or in the alternative that the Respondent may be ordered to take such steps as the Master in Equity may direct for the purpose of obtaining the transfer of the said permit and the said licence.
- 10 4. THAT in addition to the specific performance of the agreement last referred to the Respondent may be ordered to pay to the Appellant the damages which the Appellant has sustained by reason of the refusal and neglect of the Respondent to perform the said agreement and that it may be referred to the Master in Equity to enquire what is the amount of such damages.
- 20 5. THAT pending completion of the agreement first above referred to the Respondent his servants and agents may be restrained from entering upon the lands referred to in the Agreement set out in paragraph 2A of the Amended Statement of Claim and from taking possession of or interfering in any way with the various items in the Schedule the subject of the said Agreement.

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by the Plaintiff.
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AND FURTHER TAKE NOTICE that upon the hearing the Appellant intends to ask that the Respondent be ordered to pay the costs of the suit before His Honour and of this Appeal AND FURTHER TAKE NOTICE that on the hearing of this Appeal the Appellant intends to rely on the following among other grounds and reasons, that is to say:—

- 30 1. THAT in the circumstances of the case His Honour was in error in refusing the Plaintiff leave to amend its Replication by adding as additional paragraphs therein paragraphs 3A, 3B, 3C, 3D, 3E and 3F of the Proposed Amendments to Replication filed on the Twenty-fifth day of November One thousand nine hundred and fifty-nine.
2. THAT in the circumstances of the case His Honour should have granted leave to the Plaintiff to amend its Replication by adding the said paragraphs.
3. THAT His Honour was in error in dismissing the Plaintiff's suit.
- 40 4. THAT His Honour was in error in holding that the contract formed by the exercise by the Plaintiff of the options contained in claims 9 (a) of the Agreement set out in paragraph 2A of the Amended Statement of Claim was not susceptible of specific

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Notice of Appeal
by the Plaintiff.
(Continued)

21st Dec., 1959.

- performance in that it was a mere contract for the sale of goods and that there was no evidence that damages were not a sufficient remedy for non-performance by the Respondent of the said contract.
5. THAT on the evidence His Honour should have held that damages were not a sufficient remedy for the non-performance by the Respondent of the said contract.
 6. THAT His Honour was in error in holding that the contract formed by the exercise by the Plaintiff of the options contained in clause 9 (a) of the Agreement set out in paragraph 2A of the Amended Statement of Claim was not susceptible of specific performance because the goods therein referred to were at the time of the bringing of the suit in the possession of the Plaintiff and no act was required on the part of the Defendant to transfer to the Plaintiff the title to the said goods. 10
 7. THAT on the evidence His Honour should have held that the Plaintiff had duly exercised the options contained in clause 9 (a) of the Agreement set out in paragraph 2A of the Amended Statement of Claim.
 8. THAT His Honour should have decreed specific performance of the contract arising out of the exercise by the Plaintiff of the options contained in clause 9 (a) of the Agreement set out in paragraph 2A of the Amended Statement of Claim. 20
 9. THAT His Honour was in error in holding that the terms of clauses 9 (a), 9 (b) and 9 (c) of the Agreement set out in paragraph 2A of the Amended Statement of Claim were not independent of the remainder of the said Agreement.
 10. THAT on the evidence His Honour should have held that the Plaintiff had duly made a request to the Defendant in accordance with clause 9 (c) of the Agreement set out in paragraph 2A of the Amended Statement of Claim. 30
 11. THAT His Honour was in error in holding that because of the breaches by the Plaintiff of the Agreement set out in paragraph 2A of the Amended Statement of Claim which breaches were particularised in paragraph 10. of the Amended Statement of Defence the Plaintiff was disentitled to have specifically performed the obligation cast on the Defendant by clause 9 (c) of the said Agreement.
 12. THAT in the circumstances of this case His Honour was in error in holding that if the Defendant were bound by the promise contained in clause 9 (c) of the Agreement set out in paragraph 2A of the Amended Statement of Claim the Plaintiff was bound by virtue of the provisions of clauses 9 (d) and 9 (e) to continue 40

to sell timber to the Defendant until the year One thousand nine hundred and seventy two on terms similar to so much of the said Agreement as was applicable.

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13. THAT in the circumstances of the case His Honour was in error in holding that the provisions of clauses 9 (d) and 9 (e) of the Agreement set out in paragraph 2A of the Amended Statement of Claim were in any way relevant to the matters raised in the suit.
14. THAT His Honour was in error in holding that if the Defendant were bound by the promise contained in clause 9 (c) of the Agreement set out in paragraph 2A of the Amended Statement of Claim such promise was not susceptible of specific performance since the contract of which it formed a part could not be enforced on the application of the Defendant.
15. THAT His Honour was in error in holding that there was no evidence of readiness and willingness on the part of the Plaintiff to perform the agreement arising out of clauses 9 (d) and 9 (e) of the Agreement set out in paragraph 2A of the Amended Statement of Claim.
16. THAT on the evidence His Honour should have held that the Plaintiff was and at all times had been ready and willing to perform the agreement arising out of clauses 9 (d) and 9 (e) of the Agreement set out in paragraph 2A of the Amended Statement of Claim.
17. THAT in the circumstances of this case His Honour was in error in holding that the Plaintiff was bound to establish that it was ready and willing to perform the agreement arising out of clauses 9 (d) and 9 (e) of the Agreement set out in paragraph 2A of the Amended Statement of claim.
18. THAT His Honour should have decreed that the promise on the part of the Defendant contained in clause 9 (c) of the Agreement set out in paragraph 2A of the Amended Statement of Claim ought to have been specifically performed.

No. 18.
Notice of Appeal
by the Plaintiff.
(Continued)
21st Dec., 1959.

DATED this Twenty first day of December 1959.

(Sgd.) P. POWELL
Counsel for Appellant.

This Notice of Appeal is filed by Messrs. Arthur T. George & Co., of 10 Martin Place, Sydney, Solicitors for the abovenamed Appellant, Australian Hardwoods Pty. Limited.

*In the
Full Court of the
Supreme Court
of New South
Wales.*

No. 19.
Notice of
Cross-Appeal by
the Defendant.
—
21st Dec., 1959.

No. 19**Notice of Cross-Appeal to Full Court by the Defendant**

TAKE NOTICE that the Defendant appeals against so much of the decree of His Honour Mr. Justice Myers a Judge of the Supreme Court sitting in Equity dated the seventh day of December 1959 as dismissed the Counterclaim of the Defendant for the following among other grounds and reasons that is to say:—

1. THAT His Honour should have declared that the Plaintiff is not entitled to remain in possession of the lands and sawmill described in paragraph 1 of the agreement referred to in paragraph 10 2 of the Statement of Claim.
2. THAT His Honour should have granted an injunction restraining the Plaintiff its servants or agents from preventing or hindering the Defendant its servants or agents from entering upon the said lands or sawmill.
3. THAT His Honour should have held that the Plaintiff was not entitled after the twenty-fifth day of February 1958 to remain in possession of the said lands and sawmill.
4. THAT His Honour should have held that the Plaintiff refused to allow the Defendant to enter upon the said lands and sawmill. 20
5. THAT His Honour should have held that the Plaintiff had threatened to refuse to allow the Defendant to enter upon the said lands and sawmill.
6. THAT His Honour was in error in holding that the Plaintiff does not intend and never did intend to remain on the said lands.
7. THAT His Honour was in error in holding that the Defendant had not an interest in the said lands which would entitle it to the Declaration referred to in paragraph 1.
8. THAT His Honour was in error in holding that the Defendant was not entitled to possession of the said land. 30
9. THAT His Honour was in error in holding that the Defendant has only a non-exclusive licence to use the said land.
10. THAT His Honour should have held that the Defendant's Counterclaim was an equitable or legal right or claim which the Defendant was entitled to set up by way of a Counterclaim against the claim of the Plaintiff.
11. THAT His Honour was in error in dismissing the Defendant's Counterclaim.

DATED this twenty-first day of December 1959.

(Sgd.) SYDNEY BURKE 40
Solicitor for the Appellant.

This Notice of Appeal is filed by Sydney Burke of 19 York Street, Sydney, Solicitor for the abovenamed Appellant The Commissioner for Railways.

No. 20**Affidavit by A. G. Crawford.**

*In the
Full Court of the
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of New South
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No. 20,
Affidavit by
A. G. Crawford.

7th April, 1960.

ON the seventh day of April One thousand nine hundred and sixty ALAN GRANT CRAWFORD of Sydney, Solicitor, being duly sworn makes oath and says as follows:

1. I am a Solicitor employed in the Office of the Solicitor for Railways and I have the conduct of this matter.
2. On the Tenth day of December 1959 the Solicitor for the Commissioner wrote a letter to the Solicitor for the Plaintiff Company 10 which omitting formal parts is as follows:

"The Suit No. 1616 of 1957 brought by your client in the Supreme Court in Equity was, as you are aware, concluded on Monday last, 7th December instant, when His Honour, Mr Justice Myers dismissed such Suit with costs, and as a result the modus vivendi agreement dated 3rd December, 1958, and filed in Court came to an end on that date.

20 Details of accounts between the parties will be supplied to you as soon as practicable, and subject to necessary adjustments, the amount of £9,841.0.5d. held by the Commissioner pursuant to such agreement of 3rd December, 1958, previously referred to will be paid to you upon production of an appropriate authority authorising you to receive same on behalf of your client.

30 During the continuance of the hearing it was formally admitted by the Plaintiff Company that the agreement of the 3rd May, 1956, was validly terminated on 25th February, 1958, because of its breaches. Your client is accordingly notified that as all relationships between it and the Commissioner arising under such agreement and/or the modus vivendi agreement (on which, it is pointed out, your client was in substantial breach before the termination of the Suit) have now terminated, it is hereby required to cease any operations which it may be carrying out on the land the subject of Occupation Permit No. 9546 in the Bril Bril State Forest, and remove from such land within seven days from the date hereof any property which it may have on such land.

Should your client refuse or neglect to comply with this request within such period, immediate steps will be taken to restore the Commissioner to the effective control of the area the subject of the Occupation Permit.

40 A copy of a letter to the Forestry Commission of New South Wales is enclosed for your client's information.

In the light of the above, it is unnecessary to reply to the copy of the letter dated 2nd instant addressed to your Mr A. T. George by Mr V. V. Alderton, which was forwarded with your letter to The Commissioner for Railways of the same date."

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3. On the Eleventh day of December 1959 the Solicitor for the Commissioner wrote a letter to the Solicitor for the Plaintiff Company which omitting formal parts is as follows:

“Your letter of yesterday’s date is acknowledged, and it is noted that you intend to file a Notice of Appeal against the Judgment of His Honour Mr Justice Myers within the next few days.

I am sure you will agree, however, that the result of any appeal could not alter the present position, which is that the Agreement of the 3rd May, 1956, was validly terminated on 10 25th February, 1958, because of the Plaintiff Company’s admitted breaches; that all relationships between it and the Commissioner arising from such Agreement and/or the modus vivendi agreement (of which it is pointed out your client was in substantial breach before the termination of the Suit) have now terminated, and that such Company should immediately cease any operations which it may be carrying out on the land the subject of Occupation Permit No. 9546 in the Bril Bril State Forest.”

4. On the Fifteenth day of December 1959 the Solicitor for the Plaintiff Company wrote a letter to the Solicitor for the Com- 20 missioner which omitting formal parts is as follows:

“We acknowledge receipt of your letters of the 11th instant. You will by now have received our letter of the 10th instant, informing you that our client has instructed us to appeal against the decision of His Honour, Mr Justice Myers in Equity Suit No. 1616 of 1957. As a result of such appeal, the modus vivendi Agreement between our respective clients dated the 3rd December, 1958, still continues in force. Does your client propose to carry out the modus vivendi or are we to understand that you now repudiate the terms filed in Court. 30

It is clear that no decision was made by His Honour in the Equity Suit No. 1616 of 1957 as to whether the option contained in Clause 9 of the Agreement dated the 3rd May, 1956, had or had not been validly exercised by our clients, since this question did not arise for decision in His Honour’s view, in either of our client’s suit or your client’s Counterclaim. It is our client’s view that such option has been validly exercised and that all the items in the Schedule to the Agreement of the 3rd May, 1956, as subsequently amended (other than tractors and road motor vehicles) are the property of our client. 40

The question of accounting for the sum of £9,841.0.5 does not arise at this stage.

Far from admitting breach of the modus vivendi agreement by our client, our client contends that your client is and has been seriously and deliberately in breach of such Agreement, in par-

particular by failure to pay promptly for timber delivered and failure to pay the prices required by the Agreement of the 3rd May, 1956.

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10 You are well aware that His Honour in giving judgment held that your client had no enforceable interest in the land, the subject of Occupation Permit No. 9546. In view of this, and our client's contention that it now owns all the plant at the mill site (other than tractors and road motor vehicles), we can see no justification for your client's demand that we cease operation on such land. His Honour clearly indicated in his judgment that the Forestry Commission was the only authority having any right to eject our client or in any way control its operations. Furthermore, these matters do not arise during the pendency of the appeal.

We thank you for copy of your letter to the Forestry Commission, and enclose herewith copy of letter, which we have today written to the same authority.

20 In our view, it is vital to both our respective clients for a decision to be reached as to whether the option above referred to has or has not been validly exercised. This question having been left undecided by the Equity Suit, we now invite you to agree in principle to the submission of such question to an independent arbitrator appointed pursuant to Clause 10 of the Agreement of the 3rd May, 1956. Such clause is of course still on foot for the purpose of arbitrating all disputes prior to the termination of the contract and the correspondence clearly shows a dispute between our respective clients on this question. A decision on such question can only assist both our client by clarifying the obscurity of the present relationship between them.

30 Would you please obtain instructions on this suggestion and advise us at your earliest convenience. Failing your reply within fourteen (14) days, we shall take it that you will not accede to it and we are instructed in that event to take the appropriate steps under the Arbitration Act, 1902."

Attached to such letter was a copy of a letter addressed to The Secretary of The Forestry Commission of New South Wales dated the Fifteenth day of December 1959 which omitting formal parts is as follows:

40 "In view of our client's request to your Commission for a licence and occupation permit to be issued in its name in respect of the Mill operated by it at Bril Bril, and also in view of certain approaches which we are informed are being made to your Commission by the Commissioner for Railways, we are instructed to advise you of the result of the Equity Suit No. 1616 of 1957 between our client as Plaintiff and the Commissioner for Rail-

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7th April, 1960.

ways as Defendant. In that suit, His Honour Mr Justice Myers dismissed both the Plaintiff's claim and the Defendant's Counter-Claim.

The Plaintiff's claim was dismissed because in His Honour's view, if the licence and occupation permit were transferred to the Plaintiff, it would be obliged under the Agreement between the parties to supply all timber milled to the Defendant. The Court would be unable to supervise this latter obligation and, specific performance being a mutual remedy, His Honour was unable to decree performance of the Defendant's obligation to request your Commission to transfer the licence and occupation permit to the Plaintiff. 10

His Honour also dismissed the Defendant's Counter-Claim seeking to eject the Plaintiff from the mill premises on the ground primarily that the Defendant had no legal or equitable right to exclude the Plaintiff from such mill premises, and the Plaintiff was entitled to remain there.

In the course of giving judgment, His Honour did not decide whether or not the Plaintiff had validly exercised the option to purchase the mill equipment given by the Agreement between the respective parties dated the 3rd May, 1956, or whether the Plaintiff was entitled to have the Defendant request the transfer of the licence and occupation permit. It is our client's contention that such option was validly exercised, so that the whole of the mill equipment is now our client's property with the exception of certain tractors and road motor vehicles. While our client is in occupation of the mill and operating it, we would submit that our client's request for licence and permit in its name should be granted." 20

5. On the Seventeenth day of December 1959 the Solicitor for the Commissioner wrote a letter to the Solicitor for the Plaintiff Company which omitting formal parts is as follows: 30

"I acknowledge your letter of 15th December instant enclosing copy of a letter of the same date addressed to the Forestry Commission.

It is not agreed that the *modus vivendi* agreement still continues in force, or that in the event of your client lodging a Notice of Appeal, such action would in any way revive such Agreement.

The view expressed in the second paragraph of your letter under reply as to the content of His Honour's Judgment is not considered to be correct. It is true that His Honour did not specifically decide the question as to whether your client had exercised the option, but your statement that the question did not arise for decision in His Honour's view in your client's Suit misrepresents the facts, particularly as a Declaration was sought in your client's Statement of Claim that the option had been 40

validly exercised. Moreover, your client's view that the option has been validly exercised can find no support in His Honour's Judgment.

A financial statement covering the balance of account between the parties as at the date of His Honour's Judgment is in process of completion, and it is hoped to furnish you with this, before the end of the current week.

10 With reference to the fourth paragraph of your letter, it is pointed out that your client made default in payment of amounts due by it in respect of royalty charges for the month of September and hire charges for the month of October, amounting in all to over £1,800.0.0, and has remained in default up to the present time. It is denied that there has been a serious and deliberate, or any, breach by this Department of the modus vivendi agreement and your client's contention that there has been 'failure to pay the prices required by the agreement of 3rd May 1956' and its claim to put forward this contention as in some way constituting a breach of the modus vivendi agreement is an attempt to circumvent the meaning and purpose of such agreement.

20 It is not agreed that any of the statements or contentions contained in the fifth paragraph of your letter are correct.

30 With regard to the invitation contained in the penultimate paragraph of your letter: it is considered that such a request at this juncture is idle, in view of the fact, now beyond dispute, that the Agreement of 3rd May, 1956, terminated on 25th February, 1958. You state in the first paragraph of your letter under reply, that your client has instructed you to appeal against the decision of His Honour Mr Justice Myers. If a result to be sought in such appeal is a reversal of His Honour's refusal of the Declaration above referred to, that your client has in fact exercised the option, then any arbitration proceedings would be futile. If, on the other hand your client is prepared to concede that it is not entitled to such a Declaration then appropriate action will be taken to safeguard this Department's interests.

40 It is noted that your client has, in spite of His Honour's refusal of specific performance of Clause 9 (c) of the Agreement of 3rd May, 1956, sought to procure a transfer to it of the Commissioner's Sawmill Licence and Occupation Permit, notwithstanding, your assertion that it was intended to contest His Honour's decision by appeal. I am sure you will agree that, even had the modus vivendi agreement continued to have any existence subsequent to the date of His Honour's Judgment, this action on the part of your client amounts to a complete repudiation of it."

6. On the Sixth day of January 1960 the Solicitor for the Plaintiff Company wrote a letter to the Solicitor for the Commissioner which omitting formal parts is as follows:

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No. 20,
Affidavit by
A. G. Crawford
(Continued)

7th April, 1960.

*In the
Full Court of the
Supreme Court
of New South
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No. 20.
Affidavit by
A. G. Crawford.
(Continued)

7th April, 1960.

"We acknowledge receipt of your letter of the 17th and 18th ult., and apologise for the delay in replying, which was occasioned by the closing down of this office during the Christmas break.

Replying firstly to your letter of the 17th ult., we note that you do not regard the modus vivendi agreement as continuing in force. Our clients will take such action in this regard as they may be advised.

With regard to the third paragraph of that letter, we note that you agree that His Honour did not specifically decide the question as to whether our client had exercised the option. A declaration on this point was certainly sought in our client's statement of claim but His Honour's view was that no declaration could be made unless relief was consequential upon it, and no relief could arise merely from the exercise of the option alone since the chattels concerned were in the possession of our clients. We agree that His Honour's Judgment does not support our client's view that the option has been validly exercised but neither does it in any way derogate from it. It was precisely because this question has been so unsatisfactorily left undecided by the Equity suit that our clients made the invitation for an arbitration to determine this question and we now repeat that invitation before taking steps to compel such arbitration.

As stated previously, the question of accounting does not arise at this stage in view of the pendency of the Appeal.

Our client denies the allegations in the fifth paragraph of your letter, but in any case, it is pointed out that your client holds ample money on behalf of our client to cover any possible arrears of hiring charges and any late payment by our client of these amounts would be caused by your client's failure to pay the proper prices. In this regard, we would point out that the modus vivendi agreement clearly continues the obligations of the agreement of the 3rd May 1956 and therefore the obligation to pay the prices fixed by that agreement.

We cannot agree that an arbitration on the question of the option is futile. The right to such arbitration arose prior to the determination of the agreement. The question did not arise in the Equity suit and may not arise in the Appeal and an arbitration seems to our client clearly the simplest and most expeditious way of determining the question. Without prejudice to any of our client's rights, would your client agree to such an arbitration, if our client abandons the Appeal instituted by it?

With regard to the last paragraph of your letter, we see nothing inconsistent in seeking to procure a transfer of the Forestry Commission licence and occupation permit and at the same time contesting by Appeal His Honour's refusal to decree such transfer. His Honour's refusal of the decree was based on

the fact that our client's obligations under the relevant portions of the agreement could not be supervised by the Court, and therefore the remedy of specific performance lacked the necessary mutuality. This also does not derogate from our client's view that your client is bound by the Agreement of the 3rd May, 1956, to assist in transfer of the Forestry Commission permit and licence, and if your client refuses to co-operate, it is no way a breach of the agreement for our client to seek the transfer.

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—
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10 With regard to your letter of the 18th ult., we reiterate our view that no question of accounting arises at this stage."

7. On the said Sixth day of January 1960 the Solicitor for the Plaintiff Company wrote a further letter to the Solicitor for the Commissioner which omitting formal parts is as follows:

"We understand that your client desires to have several of its employees enter upon the land whereon the Mill owned by our client is conducted, for the purpose of erecting a water tank and other water storage equipment.

20 Our clients of course, have no objection to this, but we wish to place it on record that our clients are not to be taken thereby as admitting any of the rights claimed by your client."

8. On the Fourteenth day of January, 1960 the Solicitor for the Commissioner wrote a letter to the Solicitor for the Plaintiff Company which omitting formal parts is as follows:

30 "With reference to your letter of 6th January instant relative to the erection of fire fighting equipment on the land the subject of the Occupation Permit to this Department: it is denied that your client either owns any Mill on the said land or is in any way entitled to any occupation thereof. Your client is informed that it has no further rights whatever in respect of such land and is required to cease any occupation thereof forthwith.

As it is understood that your client has at various times brought certain property of its own upon such land, a reasonable time will be allowed for the removal of this property, and in this connection, Friday 22nd January instant is notified to you as the date by which such property should be removed.

With respect to your second letter of 6th January instant, I have to advise that certain aspects thereof are being submitted to Counsel, and a detailed reply cannot therefore be made until Counsel's Opinion has been obtained thereon. However, the statements made in my letter of 17th December last are repeated.

40 Whatever rights your client may conceivably hope to achieve as a result of its appeal, there is no question that, unless and

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7th April, 1960.

until at some future time the Forestry Commission should make any alteration in the holding of the Sawmill Licence and Occupation Permit, such Licence and Permit are held by this Department, and your client has no right whatever to remain in occupation of the land covered by the Permit. As stated above, it is required to cease any occupation thereof forthwith."

9. On the Nineteenth day of January 1960 the Solicitor for the Plaintiff Company wrote a letter to the Solicitor for the Commissioner which omitting formal parts is as follows:

"We acknowledge receipt of your letter of the 14th instant. 10

Our letter of the 6th instant relating to the erection of fire fighting equipment was only written to record the basis on which our client permitted your client's officers to go upon the land.

Our client considers that your client has no right or interest in the land. A view which is borne out by His Honour's adverse decision in the Equity Suit in the Counterclaim by your client."

10. On the Twenty sixth day of January 1960 the Solicitor for the Commissioner wrote a letter to the Solicitor for the Plaintiff Company which omitting formal parts is as follows:

"With further reference to your letter of 6th January instant: 20
Counsel advises that your client is not entitled to resort to arbitration and the Commissioner is not prepared to agree thereto.

Your client, having failed in the equity suit, is now not only refusing to vacate the lands which the Commissioner holds under Occupation Permit from the Forestry Commission, but is endeavouring to deprive the Commissioner of his title thereto. Furthermore, your client is using the plant and equipment of the mill, comprised in the Schedule to the agreement, for its own private purposes.

Counsel advises that because of such actions on the part 30
of your client and for other reasons, the Commissioner should apply for an expedited hearing of the appeal. This application will be made in due course to the Full Court, and it is presumed that upon such application, your client will consent to the appeal being expedited. In the meantime the request is made that your client refrain from action calculated to prejudice the Commissioner's title to the mill and from the use of the plant and equipment mentioned above.

In respect of the appeals, it is suggested that one appeal 40
book, incorporating both appeals, would be sufficient and that each party pay half the cost of the preparation of the requisite

number of copies thereof. If there be any difficulty on the part of the plaintiff in having such appeal books completed and filed within the time prescribed by the rules, I am prepared to attend to the completion thereof. Will you please let me have your views hereon as soon as possible."

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(Continued)

—
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11. I am informed by Edward George Moffett, a Timber Inspector, employed by the Commissioner, and verily believe that the Plaintiff Company has remained and continues to be in occupation of the area the subject of the said Occupation Permit and is carrying out
10 thereon for its own purposes the milling of timber in the mill referred to in paragraph 3 of this my Affidavit.

SWORN by the Deponent on the
day and year first hereinbefore
written at Sydney before me:

A Justice of the Peace.

*In the
Full Court of the
Supreme Court
of New South
Wales.*

No. 21**Decree of Full Court of New South Wales**

No. 21.
Decree of
Full Court.
—
1st June, 1960.

UPON the Appeal of the Plaintiff from so much of the Decree of The Honourable Frederick George Myers a Judge of the Supreme Court sitting in Equity made the seventh day of December last as dismisses with costs the suit brought by the Plaintiff herein AND UPON the Appeal of the Defendant from so much of the said Decree as dismisses the Counterclaim of the Defendant herein BOTH coming on to be heard the thirteenth, fourteenth, twentieth and twenty first days of April last before The Right Honourable Herbert Vere Evatt Chief 10 Justice and The Honourable Leslie James Herron and The Honourable Bernard Sugerman Puisne Judges of this Court in pursuance of Notice of Appeal by the Plaintiff dated the twenty first day of December last and Notice of Appeal by the Defendant dated the twenty first day of December last both filed herein WHEREUPON AND UPON HEARING READ the said Notices of Appeal and the printed record of proceedings filed herein for the purposes of the hearing of the said suit and counterclaim AND UPON HEARING READ the affidavit of Alan Grant Crawford sworn the seventh day of April last and filed herein AND UPON HEARING what was alleged by Mr. Staff 20 of Queen's Counsel with whom was Mr. Powell of Counsel for the plaintiff Australian Hardwoods Pty. Limited and by Mr. Jenkyn of Queen's Counsel with whom was Mr. H. Jenkins of Counsel for the defendant The Commissioner for Railways THIS COURT DID ORDER that the said Appeals stand for Judgment AND the same standing in the paper this day for Judgment accordingly THIS COURT DOTH ORDER that the Appeal of the Plaintiff Australian Hardwoods Pty. Limited against so much of the said Decree as dismisses the suit of the plaintiff be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that the Appeal of the Defendant The 30 Commissioner for Railways against so much of the said Decree as dismisses the Counterclaim of the defendant be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the lastmentioned portion of the said Decree be and it is hereby set aside and in lieu thereof THIS COURT DOTH DECLARE that the Plaintiff is not entitled to remain in possession as against the Defendant of the lands referred to in the said Counterclaim being the lands described in Occupation Permit No. 9546 issued under the Forestry Act 1916-1935 on the fifteenth day of April 1952 AND THIS COURT DOTH FURTHER ORDER that the Plaintiff do 40 deliver up possession of the said lands to the Defendant within two (2) calendar months from the date hereof that is on or before Monday the First day of August next AND THIS COURT DOTH FURTHER ORDER that the Plaintiff be and it is hereby restrained from continuing in possession of the said lands after the lastmentioned date

AND THIS COURT DOTH FURTHER ORDER that it be referred to the Deputy Registrar or Chief Clerk in Equity to tax and certify the costs of the Defendant of the said Appeals and of the said suit and Counterclaim and that such costs when so taxed and certified be paid by the Plaintiff to the Defendant or to its Solicitor within fourteen (14) days after service upon the Plaintiff or its Solicitor of an office copy of the Certificate of such Taxation.

*In the
Full Court of the
Supreme Court
of New South
Wales.*

—
No. 21.
Decree of
Full Court.
(Continued)

—
1st June, 1960.

PASSED this Nineteenth day of July, 1960.

C.D.1.

10 ENTERED same day. T.L.

(Sgd.) C. D. IRWIN (L.S.)
DEPUTY REGISTRAR IN EQUITY.

If you the within named AUSTRALIAN HARDWOODS PTY.
LIMITED neglect to obey this Decree by the time therein limited
you will be liable to have your estate sequestrated.

20

30

40

*In the
Full Court of the
Supreme Court
of New South
Wales.*

—
No. 22.
Reasons for
Judgment of
Full Court.
—
1st June, 1960.

No. 22**Reasons for Judgment of the Full Court of New South Wales (Evatt
C. J., Herron J. and Sugerman J.)**

EVATT, C. J. }
HERRON, J. } Two appeals from a decree of Myers J. are brought.
SUGERMAN, J. }

One is an appeal by the plaintiff company from so much of the decree as dismissed a suit brought by it for specific performance; the other is a cross appeal against so much of the decree as dismissed a counter claim for an injunction by the defendant Commissioner for Railways against the plaintiff company. Both appeal and cross appeal involve a consideration of an agreement in writing dated 3rd May, 1956. The appellant Company has since changed its name from J. Jamieson & Sons Pty. Ltd. the name by which it is referred to in the agreement. For the sake of clarity we will refer in this judgment to the appellant plaintiff as the Company and to the respondent defendant as the Commissioner. The fate of the appeal by the Company depends, in our opinion, on the proper construction of the agreement viewed in light of the history of the transaction and of the circumstances surrounding it. 20

On 7th November, 1951, the Commissioner was issued with a sawmill licence by the Forestry Commission of N.S.W. under the terms of the Forestry Act 1916-1935. This licence authorised the Commissioner to conduct a sawmill at the Brill Brill State Forest near Wauchope until 31st December, 1951. This licence was stated to have been issued for the sole purpose of sawing sleepers and off cuts from such Crown logs as should be made available at the discretion of the Forestry Commission from the State Forest. According to its terms the licence expired on 31st December of each year but was subject to renewal upon payment before its expiry of the prescribed 30 fee. It has been renewed annually and is still in force. It was a condition of the licence, for breach of which a penalty is provided, that it was not to be transferred without the consent in writing of the Forestry Commission. On 15th April, 1952, the Commissioner was issued with an occupation permit which took effect from 1st November, 1951 issued under the Act entitling him to the use of certain specified land for a sawmill and camp site. This permit was subject to certain conditions and was renewable annually on payment of a fee.

Prior to 1956 one Jamieson had operated the sawmill for the Commissioner and in 1956 he requested the Commissioner to agree 40 to the mill being operated by the Company in lieu of himself. It was therefore agreed that the Company was as from 13th July, 1952,

deemed to have operated the mill and would thereafter for an initial period of ten years do so on certain terms and conditions. It is with the application of these terms and conditions that these appeals are concerned. By the agreement the Commissioner was to request the Forestry Commission to renew the Permit and Licence from time to time as should be necessary. It was to make available to the Company on lease or hire the buildings and plant itemised in the Schedule to the agreement at a monthly rental there set out, variations being provided for future years. The Commissioner was to pay the royalties and charges due to the Forestry Commission and debit these to the Company monthly.

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It should be observed at the outset that the Commissioner was concerned to obtain a regular supply of sleepers and timber for use in the working of the railways in this state and for this purpose proposed to make available the mill site and sawmill plant and log hauling machinery owned by him to a suitable contractor. The Commissioner was to request the Forestry Commission to make available to the Company suitable millable timber of at least ten million super feet of logs per annum. On its part the Company was to operate, repair and maintain the mill and mill the logs which it accepted from the Forestry Commission. An important condition was that the Company was to sell the sleepers and sawn timber recovered from these logs to the Commissioner. The Company was to use every reasonable effort to recover the maximum quantity of first class sleepers from the logs with a minimum of waste and to cut the balance into sawn timber suitable for use by the Commissioner. The Commissioner had a corresponding obligation subject to conditions to purchase all sleepers and timber milled by the Company the terms of payment being provided for in clause 3 of the agreement. A further important condition was contained in clause 5. This read:

“THE Contractor agrees not to sell any sleepers and/or sawn timber produced by it in the said mill other than to the Owner at the price above provided

PROVIDED ALWAYS that the Contractor may

- (a) sell other than to the Owner any timber rejected by the Owner as herein provided
- (b) sell to other than the Owner such quantity of sleepers or timber as the Owner may from time to time consent in writing to release for sale in such manner
- (c) from time to time (subject to the consent in writing of the Owner being obtained on each and every occasion) use sawn timber for its own purposes or make available such timber to its employees for their own use”.

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Upon breach by either party of any clause or provision of the Agreement the other party was entitled (Clause 6) to terminate the contract by giving three months notice in writing. The exercise of this right by the Commissioner brought into operation certain important restrictions on the rights of the Company to which we will later refer. The Company was not without consent to assign or sublet the agreement.

Clause 9 which is of special importance is in the following terms:

- “(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. 10
- (b) The Purchase money shall be paid to the Owner in cash upon the exercise of such option. 20
- (c) When the contractor in pursuance of subclauses (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 subclause (d) of clause 1 hereof. 30
- (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 40

(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 in so far as they are applicable”.

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In the event of the Permit or Licence being transferred to the Company by virtue of clause set out it was not at liberty to deal with them except by way of retransfer to the Commissioner.

10 It will thus be seen that the intention of the parties in making this agreement was to constitute the Company a manager of the Commissioner's sawmill and its log falling and haulage equipment primarily on a rental basis so that with the use of the Commissioner's forestry permit and licence, for an initial period of ten years the Commissioner would be guaranteed a constant supply of sleepers and timber for railway purposes. Myers, J. found that before the end of 1957 the Company committed breaches of the agreement, breaches which could not be disputed and many of which were of a serious character. On 25th November, 1957 the Commissioner gave the Company, pursuant
20 to clause 6, three months notice of termination by reason of these breaches. This notice expired on the 25th February, 1958 and Myers, J. found that on that date the contract came to an end. This finding was not challenged on this appeal and it is conceded that the termination of the contract by the Commissioner was a valid exercise of its rights under Clause 6. This at once raises the question of the Company's contention as to the nature and extent of its rights under Clause 9. For on the 11th June, 1957, the Company had given the Commissioner a notice in writing purporting to be an exercise of the option contained in clause 9 (a). It was in the following terms:

30 “Lre. fr. J. Jamieson & Sons Pty. Ltd.
to the Commissioner for Railways, by
registered mail,
dated 11th June, 1957.

Dear Sir,

re Brill Brill Departmental Sawmill

Pursuant to and in accordance with Clause 9 of the contract made between this Company and yourself on 3rd May, 1956, the Company now gives you three months notice of its intention to exercise the option to purchase each and every item set out in
40 **or subsequently added** to the schedule to such agreement and deemed to form part thereof **other than the road motor vehicles and tractors.**

The Company's Accountant will be writing to you in the course of the next few days setting forth his calculation of the purchase price to be paid for such items. If you do not agree

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with such calculation, would you please advise us immediately, so that we will have an opportunity of discussing the same with you before the period of the notice above referred to expires.

We also foreshadow that after completion of the purchase of the foregoing items the Company will be making the two requests referred to in paragraphs (I) and (II) of sub-clause C. of Clause 9 of the agreement referred to above.

Yours faithfully,
J. JAMIESON & SONS PTY. LIMITED
D. Jamieson
(David Jamieson)
Managing Director."

10

In order to resolve difficulties as to the correct procedure relating to the exercise of the option the Company gave two further notices. On 11th September, 1957, it confirmed the notice of the 11th June and on the 16th September, 1957, it gave a further three months notice of the exercise by it of the option. In the suit in Equity before Myers, J. the Company sought specific performance of the Contract for the sale of the property which it contended resulted from the exercise of the option. It also sought specific performance by the Commissioner 20 of the promise contained in Clause 9 (c) to request the Forestry Commission to transfer to the Company the occupation permit and Licence. Myers, J. dismissed the suit holding that the Company was not entitled to have either branch of the agreement specifically performed. Before examining His Honour's reasons it is necessary to examine closely the nature of the rights which clause 9 confers on the parties. The option relates to the purchase of the items set out in the schedule. These were the workshops, men's huts and other like build- ings and plant associated with a bush sawmill. The schedule also 30 related to tractors, road vehicles, sawmills and other miscellaneous equipment used in connection with the mill. Most of the items were chattels. We think on its true construction clause 9 was intended merely to alter the incidence of the financial arrangements to which each party was committed under the contract.

The Main purpose of the agreement was to ensure a supply of timber to the Commissioner and ancillary to this was an agreement to hire the plant with which this work was to be done initially until 1962. If however, the Company desired to buy the plant and equip- 40 ment then the agreement was to be extended until 1972. In the latter case the Company was entitled to secure a transfer of the permit and licence to give efficiency to this extended agreement. Whilst the hire of the plant and equipment continued a somewhat complex system of accounts had to be kept, debits for charges for hire were to be made and accounts rendered monthly to the Company. Likewise the Commissioner was to pay the royalties and charges of the Forestry Commission and render accounts for these items to the Company. The

intention of the parties was that if the Company purchased the plant and equipment it should thereafter deal direct with the Forestry Commission. But the main purpose of the agreement did not come to an end when this event occurred. The purpose of the agreement was until its determination to secure a supply of timber to the Commissioner. He alone could permit its disposal elsewhere. The parties cannot, we think have intended once the Company exercised its option and purchased the plant and equipment and obtained the permit and licence in its own name that the right of the Commissioner to the receipt of the output from the mill was to be discontinued. This we think overlooks the paramount consideration that runs throughout the agreement.

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The appellant contends that the option provision contained in clause 9 was independent of the rest of the contract and that when the offer by the Commissioner, contained in the option, was duly accepted by the Company a new contract came into effect which had a being and substance independent from the main contract. The argument for the appellant was that clause 9 (a) created an irrevocable offer which could be accepted by the Company by it giving three months notice in writing stating the items proposed to be purchased. There then comes into force, according to the appellant, an agreement for sale. In other words, according to the appellant, clause 9 provides for a contract of sale to come into existence on notice and by which it takes title to the goods at the end of three months subject to payment of the price within a reasonable time. In short the appellant says the notices constitutes a final determination of the Company's rights. This, it is said, results from the use of the expression "upon the Contractor giving three months notice in writing. . .". Hence once the notice is given the option is accepted on the expiry of the three months period.

This argument is attractive at first sight. There are authorities which support the proposition that the acceptance by optionee of the offer contained in the option creates a contract of sale and that once the option has been duly exercised the relationship of the parties becomes that of vendor and purchaser of the property and their rights and obligations are the same as those which arise where a contract of sale is made by persons between whom no legal relationship existed prior to the making of the contract.

Ballas v. Theophilos (98 C.L.R. 193); **Nicholson v. Smith** (22 Ch. D. 640). The appellant also points to authorities which support the view that specific performance may be ordered in respect of an independent promise if the contract is executed notwithstanding past breaches. The appellant relied upon such authorities as **Boston Deep Sea Fishing and Ice Company v. Ansell** (39 Ch. D. 339); and **McDonald v. Dennys Lascelles Ltd.** (48 C.L.R. 457). The contention of the appellant is here that the suit was commenced before the contract was determined

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and that the Company's right under Clause 9 (c) was complete before the determination of the contract in February, 1958.

We have adverted at some length to the contentions of the appellant so as to do justice to Mr. Staff's arguments. We are unable however to adopt them. It appears to us that upon the proper construction of the agreement the option could only be validly exercised by the Company if it gave three months written notice of the chattels which it proposed to purchase and at the expiration of that period it tendered to the Commissioner the purchase price in cash according to the price stated in the schedule. It was also necessary for this to be done before notice of determination was given on the 25th November, 1957. We think that the language of clause 9 does not permit the construction urged upon us by the appellant. In any event the failure by the Company to pay the purchase price was fatal to its right of purchase, and this is so whether the effective notice is to be regarded as that of the 11th June or the 11th September or the 16th September.

The Notice required by clause 9 (a) of the agreement is not itself an exercise of the option conferred by that clause but is intended as a notice that the Company proposed to exercise the option to be given three months in advance of its exercise. It is required to specify the item or items which the contractor "proposes to purchase" and the reason for requiring the notice and the specification is suggested by the next sentence of clause 9 (a), namely to allow an interval for calculation by both parties of the purchase price in accordance with the formula provided and for agreement upon the result of such calculation, and also for the Schedules being brought up to date in respect of any replacement of, or addition to, the buildings and plant pursuant to Clause 1 (b). The purchase price is to be the residual value "at the time of such purchase", and by clause 9 (b) it is to be paid to the Commissioner "in cash upon the exercise of the option". Then Clause 9 (c), relating to the transfer of the Permit and Licence, opens with the words "When the Contractor in pursuance of subclause (a) **and (b)** of this clause **has purchased**". These provisions serve to show that under Clause 9 the notice in writing is one thing and the actual exercise of the option another and later thing; that the latter is required to be accompanied by, if not actually constituted by, payment of the purchase money; and that the buildings and plant are "purchased" when there has been a notice in writing followed by actual exercise of the option with payment of the purchase money. It has been submitted that the Courts are reluctant to regard an obligation to pay the purchase money as a condition of the exercise of an option. But the cases which have been relied upon establish no general proposition and were dependent for their decision upon the terms of the particular agreement in question. Whether payment of purchase money is a condition of the exercise of an option or no more than a term of the

contract constituted by its exercise is a question of the construction of the agreement by which the option is conferred.

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With reference to the payment of the purchase price we mention that the contract contained a provision referring to arbitration of any dispute arising between the parties. (Clause 10). In September, 1957, the Company had raised the question whether it had validly exercised the option to purchase under Clause 9 despite the non-payment of the purchase money. This question was referred to arbitrators. On the 12th December, 1957, those proceedings were adjourned by consent
10 to allow the Company to make certain financial arrangements with Customs Credit Limited and to deposit with that Company certain moneys on account of the purchase price due under the Contract. This arrangement was stated to be without prejudice to the rights of the Commissioner nor was it to prejudice his contention that no arbitrable dispute existed or his contention that the option had not been and could not then be exercised. On the view we take of the option clause this transaction could have no effect on the rights of the parties. A payment in December could not discharge the Company's obligations under Clause 9 for as already mentioned Clause 6 limited the rights
20 of any party who had committed a breach of the contract. One such express limitation was that once three months notice of termination was given the Company was precluded during the period of the notice from exercising the option pursuant to Clause 9. The notice of termination given by the Commissioner on 25th November was of course current in December and the modus operandi adopted during the arbitration proceedings cannot assist the Company. In any event in adopting such a course the rights of the Commissioner were clearly preserved.

A fundamental consideration in this case is that the exercise of
30 the option operated merely to effect a sale of plant and equipment to the Company. The option contained in Clause 9 (a) cannot be construed so as to destroy in other respects the full operation of the agreement. All that occurred was that the financial position was changed so that the provisions relating to the hire of the plant and equipment and the method of payment of royalties to the Forestry Commission no longer applied. The main purpose of the agreement namely to supply timber to the Commissioner continued despite the exercise by the Company of the option. The Commissioner's obligations under Clause 9 (c) (i) and (ii) were in aid of the continued supply
40 of sleepers and timber until 1972. Clause 9 (d) expressly stated that the exercise of the option by the Company was not to effect the contractual rights of the parties during the first ten years so far as relates to the sale and purchase of sleepers and timber. Clause 9 (e) makes it clear that after the permit and licence have been transferred to the Company, the Company is obliged to continue until 1972 the

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sale of the whole of the sleepers and sawn timber in accordance with the terms of the agreement. It appears to us to be evident that the intentions of the parties was that if the agreement was lawfully determined at any time during its currency all the rights of the parties should thereupon cease. Once the Company's obligation to supply and sell sleepers and timber to the Commissioner ceased any right that it otherwise had to the executory aspects of Clause 9 ceased. We think that the finding of Myers J. which cannot be contraverted that the contract came to an end on the 25th February 1958 is fatal to the appellant's claim to specific performance. For as we have said the option was not validly exercised by reason of the non payment of the purchase price and secondly clause 9 cannot be said to stand alone to create a wholly independent contract. It was as we have said merely an alternative method by which a change of ownership of the plant and equipment by which the end purpose of the agreement, namely the management of the mill with a view to supplying the requirements of the Commissioner, was to be achieved. 10

It is unnecessary therefor for us to examine many of the other reasons advanced by His Honour for dismissing the suit for specific performance. Suffice to say that we agree with the order made by 20 him so far as relates to this branch of the case.

We turn now to the cross appeal of the respondent Commissioner. At the hearing Myers J. dealt with a counter claim by the Commissioner raised by the pleadings. In its original form it was filed on 28th February, 1958, three days after the notice terminating the agreement expired. It pleaded the contract and its termination, submitted that the plaintiff was not entitled, after 25th February, 1958, to remain in possession of the lands and sawmill and alleged that the defendant feared that unless restrained the plaintiff would refuse to allow the defendant to enter upon the lands and sawmill. The relief sought was, 30 firstly, a declaration that the plaintiff was not entitled to remain in possession of the lands and sawmill, and secondly, an injunction restraining the plaintiff from preventing or hindering the defendant from entering upon the lands and sawmill. During the hearing the counter claim was amended. In its new form it again pleaded the agreement and its termination and alleged that the plaintiff remained in possession of the lands and sawmill after 25th February, 1958, and refused to allow the defendant to enter upon the same. The relief claimed was not altered. A week later the counter-claim was again amended. In this, its final form, it pleaded the contract and its termina- 40 tion, alleged that the plaintiff remained in possession of the lands and sawmill after the 25th February, 1958, and refused to allow the defendant to enter upon them, and alleged that the defendant feared that unless restrained the plaintiff would refuse to allow the defendant to enter upon the lands and sawmill. It also alleged that the plaintiff

wrongly claimed the right to remain in possession and occupation of the lands and sawmill, and excluded the defendant from possession and occupation thereof; and that the plaintiff wrongly claimed the right to prevent the defendant from ejecting the plaintiff from the lands and sawmill; that unless restrained the plaintiff would remain in possession and occupation of the lands and sawmill and would prevent the defendant from entering into possession or occupation of them and that the plaintiff was wrongly hindering the defendant in the possession and enjoyment of his rights to and under the occupation
 10 permit and licence and unless restrained by the Court would continue to hinder the defendant in the possession and enjoyment of those rights. The relief sought still remained the same relief as was sought by the counter-claim in its original form.

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Pending the hearing of the suit the Company sought and obtained an injunction in aid of its claim for specific performance on 3rd December, 1958, the parties agreed on certain matters designed to preserve the status quo. Their agreement was reduced to writing. We have considered this agreement. It seems to us that it was a substitute for an interlocutory injunction pending the hearing of a suit in Equity.
 20 Its purpose was merely to preserve the rights of the parties and to provide a modus vivendi until the whole of the matters in dispute could be determined at the hearing. It was not intended to affect the rights and liabilities of the parties beyond the hearing. It provided that the plaintiff's injunction was to be dissolved. Then followed certain terms designed to permit the Company to retain possession of the sawmill and site and to continue, pending the hearing, to produce sleepers and timber for the Commissioner's benefit. The value of the property in the schedule was fixed and a method of payment therefor was agreed to. The Company agreed to continue to deliver timber to
 30 the Commissioner but performance of the interim arrangement was expressly stated not to prejudice the Commissioner's notice of rescission and his contentions that the agreement had been duly determined or his contention that the option had not been duly exercised by the Company. Clause 11 of the interim agreement provided:

“Both parties are at liberty to pursue their claims in Suit No. 1616 of 1957 as to the effectiveness or otherwise of the purported exercise of the option of purchase under the agreement and as to the purported rescission of the agreement.”

Clause 13 provided.

40 “Nothing herein contained and nothing formerly agreed by the parties as to a modus vivendi pending the hearing of the said suit shall excuse or be taken to have excused or exonerated or to have exonerated the Company from its obligations to perform the said agreement in any respect if it is found that the same has not

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already been rescinded except to the extent to which the Commissioner has agreed expressly or impliedly by these presents or otherwise to a variation of the Company's obligations thereunder and each party is to be at liberty to assert that the other party has since 25th November, 1957 committed breaches of the said agreement and to take appropriate action in respect thereof."

Myers J. dismissed the counter-claim. His Honour regarded the interim agreement of 3rd December as evidencing the Company's intention not to remain on the land unless it succeeded in its claim for specific performance. His Honour held that the Commissioners' apprehension that the Company would seek to deprive it of possession of the mill site was unfounded. His Honour also held that the Commissioner had no interest in the land which would entitle it to a declaration in Equity that the Company was not entitled to retain possession. His Honour also held that the Company had not prevented or hindered the Commissioner from entering on the lands and sawmill or that it intended to do so.

Broadly speaking the learned trial Judge held that there was no proof that the Company would probably infringe the right to possession which on the termination of the agreement the Commissioner had in law. With great respect to His Honour we cannot agree with his conclusions. It seems clear on the evidence in the suit and on the arguments addressed to us that the Company intends to remain on the land covered by the Permit and Licence and to conduct the sawmill for its own business purposes. An affidavit by the Commissioner's Solicitor makes it clear that this is the Company's attitude up to the present time. It shows moreover that the Company had since the decision in the Equity suit sought to procure a transfer to it of the Commissioner's sawmill licence and Occupation Permit.

It follows from our earlier conclusions that the Company had no right, at law or in equity, to remain upon the land the subject of the Commissioner's occupation permit, once the agreement of 3rd May, 1956 terminated, pursuant to the notice given by the Commissioner, on 25th February, 1958. Thereupon the Commissioner became entitled to resume possession of the land, and the Company, holding by agreement with the Commissioner in succession to Jamieson as Licensee under the Commissioner could not be heard to dispute the Commissioner's right to possession; **Johnson v. Baytup** (3 A & E 188); **Willis v. Birchmore** (9 A. & E. 662); **Dudley v. Brown** (14 V.L.R. 655). The Commissioner was entitled to have his right declared and enforced under his counter-claim notwithstanding that the right in question was a legal and not an equitable right—Equity Act, 1901, Section 39 (1), as amended by Supreme Court Procedure Act, 1957, Section 5 (2) (d) (i); **Burnham v. Carroll Musgrove Theatres Ltd.** (26 S.R. 372). He was entitled to have his right declared and enforced because, as at

the time when the counter-claim was instituted, the Company was in possession and claiming to be entitled to remain in possession as against the Commissioner, and we are of opinion with respect to His Honour that it is no answer to the Commissioner's right to have a curial declaration and enforcement of his rights in the counter-claim that the Company did not intend to remain on the land unless it succeeded in the suit—if, indeed, in the light of subsequent events and of what has been argued on the Company's behalf at the hearing of the appeal, that was the Company's state of mind. Nor, since the 10 agreement of 3rd December, 1958, was no more than an agreed modus vivendi, preserving the rights of the parties, until the determination of the suit, can that agreement or any considerations derivable from it—such as the Company's immediate possession was an agreed possession thereunder — afford an answer to the Commissioner's counter-claim. The Commissioner's prayer in his counter-claim was for an injunction restraining the Company from preventing or hindering his entering upon the land. The Commissioner was, however, entitled under his prayer for general relief to such proper relief as he was entitled to on the case made on his pleading, namely a mandatory 20 order for the delivery up to the Commissioner.

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For the reasons stated, we make the following order:

- (1) Dismiss the plaintiff's appeal against so much of the decree of His Honour as dismisses the plaintiff's suit;
- (2) Allow the defendant's appeal against so much of the decree of His Honour as dismisses the defendant's counter-claim;
- (3) Set aside the last mentioned portion of His Honour's decree, and in lieu thereof:
 - (a) Declare that the plaintiff is not entitled to remain in possession as against the defendant of the lands referred to in the Counter-claim, being the lands described in Occupation Permit No. 9546 issued under the Forestry Act 1916-1935, on 15th April, 1952.
 - (b) Order that the plaintiff do deliver up possession of the said lands to the defendant within two calendar months of this date, that is on or before Monday, 1st August, 1960.
 - (c) Further order that the plaintiff be restrained by injunction from continuing in possession of the said lands after the last mentioned date.
- 40 (4) Order that the plaintiff do pay the Defendants costs of the suit and Counter-claim and of the appeal and cross-appeal.

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Affidavit by R. C. Jennings

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Affidavit by
R. C. Jennings.
10th June, 1960.

ON the Tenth day of June One thousand nine hundred and sixty
ROGER CHRISTIE JENNINGS of 53 Martin Place, Sydney, Solicitor
being duly sworn makes oath and says as follows:

1. I am a Solicitor in the employ of Messrs. Allen, Allen and Hemsley, Solicitors for the Plaintiff and as such have the conduct of this matter.

2. The two several Motions herein are applications to this 10 Honourable Court for leave to appeal to Her Majesty in Council from the Decrees made for the Full Court on the first day of June, 1960 in the Plaintiff's suit and the Defendant's Counter-claim.

3. Both the suit and the Counterclaim arose out of an agreement made between the parties and one John Jamieson on the third day of May, 1956 and related to the conduct by the Plaintiff of a certain sawmill owned by the Defendant.

4. The said agreement contained the following (inter alia) clauses:

"6. If the Owner or the Contractor shall commit a breach of any 20 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 30 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."

"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 40

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 proposed 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.

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of New South
Wales.*

—
No. 23,
Affidavit by
R. C. Jennings.
(Continued)

—
10th June, 1960.

- 10 (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
- 20 (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.
- 30 (e) In the event of the said Permit and the said Licence being transferred to the Contractor in pursuance of sub-clause (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 sub-clause (c) of clause 2 hereof in accordance with the terms and conditions of this agreement in so far as they are applicable.”

5. In the Suit the Plaintiff claimed that it had validly exercised the option to purchase all the buildings and plant (with the exception of road motor vehicles and tractors). The value of the items which the Plaintiff claimed to have purchased was in excess of Nine thousand pounds (£9,000.0.0).

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10th June, 1960.

6. The Plaintiff sought a declaration that it had validly exercised the option to purchase the items referred to.

7. The Plaintiff also claimed in the Suit that it had validly required the Defendant to request the Forestry Commission to transfer to it the Occupation Permit and Licence referred to in Clause 9 (c) of the said Agreement.

8. The Plaintiff sought a declaration that it had validly required the Defendant to make the request referred to and a decree that the Defendant perform in specie its obligations under Clause 9 (c) of the said Agreement. 10

9. The Defendant denied that the Plaintiff had validly exercised the option to purchase the items referred to or that the Plaintiff had validly required it to make the requests referred to in Clause 9 (c) of the said Agreement.

10. The Defendant also alleged that the Plaintiff had committed a number of breaches of the said agreement and that it had validly determined the said agreement under Clause 6 hereof.

11. The Full Court dismissed the Plaintiff's suit on the ground that payment in full of the purchase price was a condition precedent to a valid exercise of the option. 20

12. The Plaintiff had been unable to pay the purchase price as the Defendant had consistently refused to recognise as valid notices from the Plaintiff of its intention to exercise the option and had refused to state what was its opinion as to the purchase price calculated in accordance with the agreement.

13. In its Counterclaim the Defendant alleged that it had validly determined the said agreement, that the Plaintiff was wrongfully remaining in possession of the lands and the sawmill built on it, and was wrongfully preventing the defendant from entering upon the lands and sawmill.

14. The Defendant sought a declaration that the Plaintiff was 30 not entitled to remain in possession as against the Defendant and a decree requiring the Plaintiff to deliver up possession of the lands and sawmill to it.

15. The Plaintiff alleged that it had validly exercised the option to purchase the plant and sawmill and had validly required the Defendant to request the Forestry Commission to transfer the Occupation Permit and Licence to it. The Plaintiff further alleged that it claimed to be entitled to remain in possession of the lands only if it should be determined that it had duly exercised the option to purchase the items referred to and if it had validly required the Defendant to request the 40 Forestry Commission to transfer to it the Occupation Permit and Licence.

16. The Full Court held that the Plaintiff, not having validly exercised the option to purchase the items referred to, and the agreement having been validly terminated, was wrongfully withholding possession of the lands and sawmill and ordered the Plaintiff to deliver up to the Defendant possession of the said lands.

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No. 23.
Affidavit by
R. C. Jennings.
(Continued)

10th June, 1960.

17. The sawmill buildings erected on the said lands exceed Seven thousand pounds (£7,000.0.0) in value.

18. The effect of the Decree in the suit is that the Plaintiff has been held not to have purchased buildings and plant the value of which 10 exceeds Nine thousand pounds (£9,000.0.0).

19. The effect of the Decree in the Counterclaim is that the Plaintiff is required to deliver up to the Defendant lands upon which are erected buildings the value of which exceeds Seven thousand pounds (£7,000.0.0).

20. In addition to the plant which the Plaintiff claimed to have purchased from the Defendant the Plaintiff has for some time used in the sawmill a considerable quantity of chattels owned by it. If the said chattels are required to be removed from the sawmill the sawmill would become incapable of operation for some considerable time.

20 21. In addition to the Licence of which the Plaintiff sought a transfer the Plaintiff has for some time been the holder in its own right to mill what is known as "high defect timber" obtained in the same State Forest to which the Defendant's licence refers. If the Plaintiff were obliged to deliver up possession of the said lands it would be unable to mill timber obtained under its own licence.

22. It is therefore respectively requested that conditional leave be granted to the Plaintiff to appeal to Her Majesty in Council against the Decrees in the Suit and in the Counterclaim, and that such appeals may be consolidated.

30 23. It is further respectfully requested that all proceedings under the Decree or otherwise in the Defendant's Counterclaim be stayed pending the appeal.

SWORN by the Deponent at
Sydney the day and year
firstly hereinbefore mentioned,

R. C. JENNINGS

Before me,

M. GARRATT
A JUSTICE OF THE PEACE

*In the
Full Court of the
Supreme Court
of New South
Wales.*

No. 24**Affidavit by A. G. Crawford**

No. 24.
Affidavit by
A. G. Crawford.
22nd June, 1960.

ON this twenty second day of June in the year One thousand nine hundred and sixty ALAN GRANT CRAWFORD of 19 York Street Sydney in the State of New South Wales, Solicitor being duly sworn makes oath and says as follows:—

1. I am a Solicitor in the employ of The Commissioner for Railways and as such I have the conduct of this matter.

2. I crave leave to refer to the Notices of Motion and the Affidavit of Roger Christie Jennings all dated the Tenth day of June 10 instant and filed herein.

3. I also crave leave to refer to the Affidavit of Norman Scott sworn the eighth day of March 1960 and filed in support of an Application made to this Honourable Court on behalf of the Defendant The Commissioner for Railways for expedition of the hearing of the Appeals by the Plaintiff and Defendant respectively to this Honourable Court.

4. I am informed by Thomas Housden Fussell the Defendant's Comptroller of Stores and verily believe that the Defendant has closed its Tenders for the supply of timber to it for a period of two years 20 commencing on the First day of July 1960 and that a number of tenders have been received. I am further informed by the said Comptroller of Stores and verily believe that until it can be ascertained whether the output of the mill at Bellangry will be available to the Defendant it is not possible for the Defendant to decide what quantities of timber should be obtained by means of the said tenders.

5. I am informed by Edward George Moffett, a Timber Inspector employed by the Defendant, and verily believe that he has during the two weeks immediately past conducted an inspection at and taken an inventory of the plant and equipment located at the said mill at 30 Bellangry which plant and equipment was the subject of the agreement between the Plaintiff and the Defendant dated the Third day of May, 1956, and I am further informed by the said Edward George Moffett and verily believed that the said mill could be operated at any time by the Defendant using the said plant and equipment so as to produce sleepers and sawn timber from logs made available by the Forestry Commission under the Defendant's Licence from such Commission.

6. I am further informed by the said Edward George Moffett and verily believe that certain items of plant and equipment including two

Leyland Beaver engines, three motor trucks and a stiff-legged crane which items form part of the abovementioned plant and equipment, are not present at the mill site.

*In the
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Wales.*

7. The Defendant respectfully submits that on the balance of convenience the Order of This Honourable Court should not be stayed beyond the First day of August next.

No. 21.
Affidavit by
A. G. Crawford.
(Continued)

22nd June, 1960.

SWORN by the Deponent on the day first
hereinbefore mentioned at Sydney, Before
me:

10 ALAN G. CRAWFORD

E. B. HOWE, J.P.
A Justice of the Peace

*In the
Full Court of the
Supreme Court
of New South
Wales.*

No. 25

Affidavit by G. F. Woods

No. 25.
Affidavit by
G. F. Woods.
—
22nd June, 1960.

ON this Twenty second day of June in the year One thousand nine hundred and sixty GORDON FRANCIS WOODS of 509 Pitt Street Sydney in the State of New South Wales Railways Detective Inspector being duly sworn makes oath and says as follows:—

1. I did between the Seventh and Seventeenth days of June instant in company with Edward George Moffett conduct an inspection at and take an inventory of a sawmill situate at Bellangry in the State of New South Wales which said mill is operated by the Plaintiff 10 (Appellant) herein.

2. During such period I was present in the mill on many occasions for long periods and at all such times I saw that only one saw-bench was operating.

3. Among the items which form part of plant and equipment of the said mill is a stiff-legged crane number X27. This crane was not present at the mill site.

4. On the Eighth day of June instant I said to John Leslie, Manager of the said mill for the Plaintiff "Do you know where the stiff-legged crane is?" He said "I don't know where it is." I said "I understand it went to Sydney". He said "That is right. We got rid of it." 20

5. I am informed by Allan Ronald Jackson Clerk in charge of Plant Operating Accounts in the Way and Works Branch of the Commissioner, and verily believe, that the residual value of the said crane at the present time exceeds Eight hundred pounds (£800.0.0).

SWORN by the Deponent on the day
first hereinbefore mentioned at
Sydney, before me:

G. F. WOODS

F. B. HOWE, J.P.
A Justice of the Peace.

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No. 26**Affidavit by W. W. Alderton**

*In the
Full Court of the
Supreme Court
of New South
Wales.*

—
No. 26.
Affidavit by
W. W. Alderton.
—
28th June, 1960.

On the 28th day of June one thousand nine hundred and sixty WARREN WALLACE ALDERTON of 24 Burgoyne Street, Gordon in the State of New South Wales being duly sworn makes oath and says as follows:

1. I am the chairman of the Board of Directors of Australian Hardwoods Pty. Limited and have held office since February, 1957.
2. I have read what purports to be a copy of an affidavit sworn 10 by Alan Grant Crawford and I crave leave to refer thereto.
3. I refer to paragraph 5 of the said Affidavit wherein it is alleged that by using the plant and equipment which was the subject of the agreement the said mill could be operated at any time by the Defendant using the same for the purposes therein referred to and I say that this claim is untrue for the following reasons:
 - (a) The plant and equipment which was the subject of the said agreement and which is now located at the said mill at Bellangry is set out in the schedule which appears at 20 page 249 of the Appeal Book herein. The effect of the decree of this Honourable Court is that the said plant and equipment (except road motor vehicles and tractors) remains the property of the Commissioner.
 - (b) The buildings therein referred to do not comprise all the buildings at present used in the operation of the said sawmill.
 - (c) The Tractors road motor vehicles and caterpillar engine 30 therein referred to are the subject of detinue proceedings in the common law jurisdiction of this Honourable Court between the Plaintiff and the Defendant in this suit wherein the Company has pleaded (inter alia) to the Plaintiff's declaration that the said tractors and motor vehicles were not nor are the property of the Commissioner.
 - (d) The "sawmills" therein referred to do not comprise all the machinery at present used in the operation of the said sawmill.
 - (e) Apart from the "miscellaneous plant" and electric lighting 40 installation referred to in the said schedules all other buildings plant electrical installation switchgear and electric motors located at the said sawmill are the property of the Company.
 - (f) Such buildings and plant comprise the following:
 - (i) Approximately one-third of the main sawmill building including No. 3 fire shute.
 - (ii) Docking saw, winch, blowers, and breast drilling mill therein.

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Affidavit by
W. W. Alderton.
(Continued)

—
28th June, 1960.

- (iii) Grooving mill No. 10 and plant therein.
- (iv) Office building and office furniture and equipment therein.
- (v) Sawbench building No. 9 and equipment therein.
- (vi) Electric chain saw.
- (vii) All electric motors and starts and electric wiring located at the sawmill.
- (viii) Switch room and switch board therein.
- (ix) Oil store and stores therein.
- (x) Tools spare parts and stores in work shop building. 10
- (g) If the Company is required to vacate the lands referred to in the Decree of this Honourable Court before the first day of August next it claims to be entitled to remove the buildings and plant referred to in paragraph (f) hereof.
- (h) Without the said plant and buildings which are the property of the Company the said mill could not be operated by the Commissioner at all as an electrically operated mill nor could it be operated as a power driven mill without complete replacement or conversion of the existing mode of operation by electricity including in 20 either event the installation of new plant. It would in my opinion be impractical and uneconomic for the mill to revert to any form of power other than electricity.
- (i) Upon removal of the said plant and buildings which are the property of the Company the said mill could not be operated by the Commissioner without the re-erection of at least some of the said buildings and a No. 2 sawbench with fire chute therefrom for waste disposal.
- (j) The value of the buildings and plant at the said mill which are owned by the Company is approximately £15,340. 30 The cost of dismantling and removing the same would be substantial.
- (k) The removal of the buildings and switch board which are the property of the Company would cause irreparable damage to the Company because upon removal the materials comprising the same would be of little other than scrap value. The total value of such buildings and switch board in their present condition is approximately £5,700 and they are insured for this sum.
- (l) In the event of the Company being required to vacate the 40 sawmill before the first day of August next the time involved in putting the mill in working order would cause substantial loss of production.
 - (i) To the Commissioner during the period immediately following such vacation by the Company.

and (ii) In the event of Her Majesty in Council allowing the Company's appeal to the Company during the period of re-establishment which would follow.

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(m) The time involved in putting the mill into working order following the removal therefrom of the buildings and plant which are the property of the Company would be affected also by

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No. 26.
Affidavit by
W. W. Alderton.
(Continued)

(i) The absence at the mill site of customary stocks of logs necessary to avoid delays during winter months due to weather conditions.

28th June, 1960.

10

(ii) The need for the Commissioner to acquire logging equipment and transportation plant for work in the bush

(iii) The delay which would be occasioned by the need to have trees marked by the Forestry Commission, felled and transported from eight to fifteen miles to the mill site before milling operations could commence.

20

(n) Exhibited hereto and marked "A" is a schedule of equipment which the Company claims as its undisputed property. The said schedule was annexed to a letter from the Commissioner's Chief Civil Engineer to the Company dated the 27th day of August, 1956 wherein the same was acknowledged to be the property of the Company. The Commissioner and his Solicitor have also acknowledged in writing from time to time since August, 1956 the Company's ownership of certain plant and equipment located at the mill.

30

(o) During the month of September 1958 at the request of the Commissioner insurance cover on the property of the Commissioner located at the said mill was reduced from £48,062 to £21,130. The items now insured in the name of the Commissioner consist of the plant and buildings (other than road motor vehicles and tractors) referred to in the Schedule at page 249 of the Appeal Book. Since September, 1958 all the items in paragraph (f) hereof formerly insured by arrangement with the Commissioner in his name have been deleted from the Schedule annexed to the Commissioner's insurance policy. The buildings and plant listed in the schedules annexed hereto and marked "A" are all items which have been so deleted from the Commissioner's insurance policy.

40

4. It is in my opinion extremely doubtful whether effective production could commence under two months having regard to the initial problems which would confront the Commissioner upon taking possession of the lands referred to in the Decree of this Honourable Court.

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Affidavit by
W. W. Alderton.
(Continued)

28th June, 1960.

5. I refer to paragraph 6 of the Affidavit of Alan Grant Crawford and repeat paragraph 3 (c) hereof. The Leyland Beaver Engines there referred to were used before the mill was converted by the installation by the Company at its own expense of the present electrical system. The engines subsequently became the property of the Company and are not claimed by the Commissioner in the said detinue action.

6. I crave leave to refer to the Affidavit of Gordon Francis Woods sworn herein on the 22nd day of June last. I refer to paragraph 2 thereof and say that it is common for a large number of sawmills in this State to operate only one sawbench except during periods of high production. The Company's present production is limited to approximately 8,000 super feet of sawn timber per day by virtue of the fact that its only licence relates to production from ex-quota and high defect logs. It has not been necessary to operate both sawbenches since the Company ceased producing timber for the Commissioner by virtue of the termination of the said agreement.

7. I refer to paragraphs 3, 4 and 5 thereof and say that the stiff-legged crane therein referred to is part of the plant referred to in the schedule to the said agreement and forms part of the subject matter of the dispute between the Commissioner and the Company in the pending detinue action.

8. I refer to paragraph 4 of the Affidavit of Alan Grant Crawford. I verily believe that although the Commissioner may be in receipt of a number of tenders for the supply of timber to it as from the first day of July 1960 the terms upon which it is the practice of the Commissioner to accept such tenders do not bind him to any sawmiller to receive timber in excess of such quantities as the Commissioner may order from time to time. It is therefore misleading to suggest that it is necessary to ascertain whether the output of the mill at Bellangry will be available to the Defendant in order to decide what quantities of timber should be obtained by means of the said tenders. It is also misleading to suggest that the Commissioner is required by the terms of the tenders called for to bind himself to any particular sawmiller to accept any quantity of timber for a period of two years commencing on the first day of July next.

9. I crave leave to refer to the Affidavit of Roger Christie Jennings sworn the tenth day of June, 1960 and filed herein.

10. The agreement referred to in paragraph 3 of the said Affidavit contained the following (inter alia) clauses:— 40

"2. The Contractor shall—

(c) Mill all logs accepted by the Contractor from the Forestry Commission and sell the sleepers and sawn timber recovered therefrom to the Owner as hereinafter provided;

- (d) Use every reasonable effort to recover the maximum quantity of first quality sleepers from logs as supplied with a minimum of waste;
- (e) Cut the balance of the timber into sawn timber for various sizes suitable as far as possible for use by the Owner.

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3. (a) The Owner shall subject to the right of rejection in clause 4 hereof and to the provisions of clause 5 hereof purchase all sleepers and timber milled by the Contractor pursuant to clause 2 hereof.

—
28th June, 1960.

10

4. The Owner shall be entitled to reject any sleepers or sawn timber which in the opinion of the Owner's Inspector is—
- (a) in the case of sleepers not of first quality
- (b) in the case of sawn timber produced from turpentine or bloodwood species or not of merchantable dimensions or merchantable quality within the meaning of the definition of merchantable quality as laid down by the Country Sawmillers Association of New South Wales”.

20

11. Throughout the currency of the said Agreement, the Defendant never purchased from the Plaintiff all sleepers and sawn timber milled by it pursuant to clause 2 of the said agreement. As a result the Plaintiff was obliged to find its own market for a substantial portion of the output of the mill which was not purchased by the Defendant. Prior to March 1957 the Plaintiff was authorised by the Defendant to sell to persons other than the Defendant sawn timber other than railway sleepers produced by it and not required by the Defendant in March 1957 this authority was withdrawn by the Defendant. There-

30 after the Defendant consistently refused to purchase from the Plaintiff all sleepers and timber milled by it pursuant to clause 2 of the said agreement. In particular the Defendant refused to—

- (a) to purchase sleepers and sawn timber milled by the Plaintiff from “non quota” logs, that is to say logs accepted by the Plaintiff from the Forestry Commission in excess of the nett annual quota of standard grade logs allocated to the Defendant by the Forestry Commission;
- (b) to purchase sleepers and sawn timber milled by the Plaintiff from logs of the “brush-box” species, except as to ten percent of any one parcel tendered to it by the Plaintiff;
- (c) to purchase sleepers and sawn timber milled by the Plaintiff from logs of the “blue gum” species, except as to ten percent of any one parcel tendered to it by the Plaintiff.

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—
28th June, 1960.

(d) to purchase “short lengths”, that is to say of eight feet in length and under of timber milled by the Plaintiff, except as to five percent of any one parcel tendered to it by the Plaintiff.

As a result the Plaintiff was still obliged to find its own market for a substantial portion of the output of the mill which was not purchased by the Defendant; for example, of the 2,474,894 super feet produced by the Plaintiff in 1957 only 1,658,212 super feet was accepted by the Defendant.

12. Since the decree of His Honour Mr. Justice Myers the 10 Defendant has consistently refused to purchase any sleepers or sawn timber from the Plaintiff and has consistently maintained that the “modus vivendi” agreement contained at pages 272-279 of the appeal book is no longer in operation.

13. In the light of these facts I submit that the Defendant’s claim that he requires the output of the said mill is not a genuine one.

14. The Plaintiff is prepared to undertake to this Honourable Court to do all such things as may be necessary on its part to permit these appeals to be listed for hearing in the sittings of the Judicial Committee of the Privy Council commencing in October next. 20

15. I refer to paragraph 4 of the said Affidavit of Alan Grant Crawford and I say that if a stay of proceedings is granted pending the decision of Her Majesty in Council the Company is prepared to supply the whole or any part of the output of the sawmill at Bellangry to the Commissioner upon the same terms and conditions as are set out in the Agreement dated 3rd day of May, 1956 except with regard to the prices and the Company is prepared to supply timber at the same prices as appear in any tender which has been received by the Commissioner pursuant to the application for tenders referred to in paragraph 4 of the said Affidavit. Alternatively, the Company is 30 prepared to supply timber upon the same terms and conditions as appear in any such tender.

16. In all the circumstances I submit that on the balance of convenience all proceedings under the Decree of the Full Court or otherwise in the Defendant’s Counterclaim ought to be stayed pending the hearing of these appeals to Her Majesty in Council.

SWORN by the abovenamed Deponent
the day and year first above written
at Sydney, before me:

W. W. ALDERTON

A. PHELONG
A Justice of the Peace

40

BRIL BRIL STATE FOREST, WAUCHOPE—J. JAMIESON AND SONS PTY. LTD.

	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
Amount Insured	Rate			Annual Premium			Period Premium			Stamp Duty		
Bldg. Saw Mill and Benches, including Fire Chute No. 3	1,500	72	0	54	0	0	54	0	0	13	7	(1 year)
Machinery therein viz:—												
Docking Saw	130	72	0	4	13	7	4	13	7	1	2	(1 year)
Winch	250	72	0	9	0	0	9	0	0	2	3	(1 year)
Blower	150	72	0	5	8	0	5	8	0	1	4	(1 year)
Brest and Drilling Mill	400	72	0	14	8	0	14	8	0	3	7	(1 year)
Timber Stacks adjacent to No. 3—												
Nos. 5, 6, 7	2,000	72	0	72	0	0	72	0	0	18	1	(1 year)
Building Grooving Mill No. 10	300	72	0	10	16	0	10	16	0	2	8	(1 year)
Grooving Mill Plant	6,700	72	0	241	4	0	241	4	0	3	0	(1 year)
Building Office No. 8	2,500	12	6	15	12	6	15	12	6	3	11	(1 year)
Office Furniture and Equipment	500	12	6	3	2	6	3	2	6	9	9	(1 year)
Building Saw Bench No. 9	100	72	0	3	12	0	3	12	0	10	10	(1 year)
Saw Bench Equipment	900	72	0	32	8	0	29	14	9	7	5	(336 days)
—do— Amount reduced from £900 to £100	100	72	0	3	12	0	5	11		1		(30 days)
Electric Chain Saw in Mill yard	280	72	0	10	1	7	10	1	7	2	6	(1 year)
Electric Motors and Starters as per Schedule	1,072	72	0	38	11	10	38	11	10	9	8	(1 year)
Fusion Cover on Electric Motors and Starters as per Schedule (£1,072)	5,000	20	0	10	14	5	10	14	5	2	8	(1 year)
Stock of Logs in Mill Yards (Nos. 1 & 2)		72	0	180	0	0	180	0	0	2	5	(1 year)
Stacks of Timber in open air on Mill Site (stacked 100 yds. clear of mill and other buildings)	2,000	15	0	115	0	0	13	15	4	3	7	(336 days)
Building Switchroom, No. 3 (a)	200	72	0	7	4	0	7	4	0	1	10	(1 year)
Switchboard therein	1,000	72	0	36	0	0	36	0	0	9	0	(1 year)
Building Oil Store, No. 11	100	50	0	2	10	0	4	1		1		(30 days)
Stores therein	150	50	0	3	15	0	6	2		1		(30 days)
							£760	14	8	£9	11	0
							Total	£770	5	8		

This is the Exhibit marked "A" referred to in the Affidavit of WARREN WALLACE ALDERTON sworn this 20th day of June, 1960.

Before me,

S. PHILONG
A Justice of the Peace

*In the
Full Court of the
Supreme Court
of New South
Wales.*

No. 27

Affidavit by A. G. Crawford

No. 27.
Affidavit by
A. G. Crawford.
—
29th June, 1960.

ON this twenty ninth day of June in the year one thousand nine hundred and sixty ALAN GRANT CRAWFORD of 19 York Street Sydney in the State of New South Wales, Solicitor, being duly sworn makes oath and says as follows:—

1. I have read what purports to be a copy of an Affidavit of Warren Wallace Alderton sworn the Twenty eighth day of June instant and filed herein.

2. In respect of paragraph (3) of such Affidavit and particularly 10 sub-paragraphs (e) and (f) thereof, the Defendant Commissioner does not admit that the buildings and plant therein set forth are the property of the Plaintiff Company. Perusal of voluminous accounts and records in the Defendant's possession from 1951 onwards establishes that it was the practice of the Defendant to reimburse to the Plaintiff the cost of the outlay upon additions and repairs to buildings and plant. I am causing these accounts and records to be analysed by the Defendant's Officers and Accountants to establish just what reimbursement has been made to the Plaintiff but such analysis will take a 20 period of some weeks.

3. Assuming that all the buildings and plant in the said sub-paragraph (f) are not available for use in the Mill I am informed by Edward George Moffett the Defendant's Sub-inspector of Timber and verily believe that the mill could be operated efficiently by the defendant immediately on vacation thereof by the plaintiff and I am further informed by the said Edward George Moffett and verily believe that diesel or petrol motor power, which is in the possession of the defendant, would be adequate for such operation and that the use thereof would not be impractical or uneconomic.

4. In respect of sub-paragraph (m) of the said paragraph (3) I 30 am informed by the said Edward George Moffett and verily believe that there is ample time between the present date and 1st August next to arrange the matters set forth in the said sub-paragraph to ensure ability on the part of the Defendant to commence full milling operations on the said 1st August next.

5. In respect of sub-paragraphs (n) and (o) of the said paragraph (3) it is correct that certain items were deleted from the defendant's insurance cover on the basis that the plaintiff claimed such items as its property but preliminary perusal of the defendant's accounts and records referred to in paragraph (2) hereof indicates that the Plaintiff 40

may have no right to some of such items as the Defendant has reimbursed the Plaintiff for the cost thereof.

6. In respect of paragraph (5) of the said Affidavit perusal of the said accounts and records referred to in paragraph (2) hereof indicates that the Defendant reimbursed the Plaintiff in respect of certain expense of installing the electrical system. In respect of the Leyland Beaver Engines the Defendant disputes that the same became the property of the Company. The said engines are not included in the said detinue action as they are part of the equipment of the mill and the detinue action relates only to tractors road motor vehicles and a stiff-legged crane.

7. In respect of paragraph (8) of the said Affidavit I am informed by Thomas Housden Fussell the Defendants Comptroller of Stores and verily believe that the Defendant is in receipt of a number of tenders for the supply to it of timber from 1st July 1960; the tenders are for varying prices and if it is necessary to obtain all the Defendant's requirements of timber by means of such tenders then it will probably be necessary to let some seven or eight tenders in order to get the required quantity; if on the other hand the Defendant could obtain possession of the Bril Bril Mill it would probably only be necessary to let three or four of such tenders and these tenders would be the tenders at the lowest prices; although under the terms of the tenders the Defendant may have the legal right to cut down the quantity of timber which the tenderer would expect the Defendant to take, it is the position that tenders are for two years and it is the policy of the Defendant once a tender has been let to order regularly and in quantity from each tenderer otherwise the tenderers would probably not be willing to tender on future occasions except possibly at the highest prices pertaining in the trade.

8. In respect of paragraph (11) of the said Affidavit the Defendant denies the whole of such paragraph except the third and fourth sentences thereof. The Defendant submits that in any event the paragraph is irrelevant.

SWORN by the Deponent on the day first hereinbefore mentioned at Sydney, before me:

ALAN G. CRAWFORD

NEVILLE BOYD, J.P.
A Justice of the Peace.

*In the
Full Court of the
Supreme Court
of New South
Wales.*

No. 28

**Order of Full Court of New South Wales granting conditional leave
to appeal to Her Majesty in Council**

No. 28.
Order granting
Conditional
Leave to Appeal.
7th July, 1960.

Thursday the Seventh day of July One thousand nine hundred and sixty.
UPON MOTION made the twenty-third day of June One thousand
nine hundred and sixty on behalf of Australian Hardwoods Pty.
Limited WHEREUPON AND UPON READING the Notices of
Motion herein dated the Tenth day of June last and the Affidavit
of Roger Christie Jennings sworn the Tenth day of June last and the
Affidavits of Alan Grant Crawford and Gordon Francis Woods sworn 10
the twenty-second day of June last AND UPON HEARING what
was alleged by Mr. Powell of Counsel for the Appellant Australian
Hardwoods Pty. Limited and Mr. Jenkyn of Queens Counsel with
whom was Mr. H. Jenkins of Counsel for the Respondent the Com-
missioner for Railways AND the said Motion standing adjourned sine
die AND UPON the said Motion coming on for hearing this day
WHEREUPON AND UPON READING the Affidavit of Warren
Wallace Alderton sworn the twenty-eighth day of June last and the
further Affidavit of Alan Grant Crawford sworn herein the twenty-
ninth day of June last AND UPON HEARING the said Counsel IT 20
IS ORDERED that leave to appeal to Her Majesty in Council from
the judgment of this Court be and the same is hereby granted to
Australian Hardwoods Pty. Limited (hereinafter called "the Appellant")
upon condition that the Appellant do within one month from the date
hereof give security to the satisfaction of the Prothonotary in the
amount of Five hundred pounds (£500.0.0) for the due prosecution
of the said appeal and the payment of such costs as may become
payable to the Respondent in the event of the Appellant not obtaining
an order granting it final leave to appeal from the said judgment or
of the appeal being dismissed for non-prosecution or of Her Majesty 30
in Council ordering the Appellant to pay the Respondent's costs of
the said appeal as the case may be AND UPON FURTHER CONDI-
TION that the Appellant do within fourteen (14) days from the date
hereof deposit with the Prothonotary the sum of Twenty-five pounds
(£25.0.0) as security for and towards the costs of the preparation of
the transcript record for the purposes of the said appeal AND UPON
FURTHER CONDITION that the Appellant do within three months
of the date hereof take out and proceed upon all such appointments
and take all such other steps as may be necessary for the purpose of
settling the index to the said transcript record and enabling the 40
Prothonotary to certify that the said index has been settled and
that the conditions hereinbefore referred to have been duly
performed AND UPON FURTHER CONDITION finally that the
Appellant do obtain a final order of this Court granting it leave to
appeal as aforesaid AND UPON the Respondent by its Counsel under-
taking that subject to the Appellant prosecuting its application for a

final order granting it leave to appeal as aforesaid and the appeal to Her Majesty in Council with all due diligence it will, in the event of the said appeal in respect of the counterclaim being successful pay to the Appellant such damages as the Appellant may suffer by reason of being kept out of possession of the subject land pending the determination of the appeal (not including any damage resulting from the removal of property therefrom) as assessed by a judge of this Court sitting in its equitable jurisdiction and upon the Respondent by its Counsel further undertaking that it will upon the determination of
 10 the said appeal pay to the appellant a reasonable compensation to be so assessed for any use which the Respondent may make of any property of the Appellant hereinafter mentioned AND THIS COURT
 DOTH FURTHER ORDER

*In the
 Full Court of the
 Supreme Court
 of New South
 Wales.*

 No. 28.
 Order granting
 Conditional
 Leave to Appeal.
 (Continued)

 7th July, 1960.

- 20
- (a) That save as provided in and subject to, (b) and (c) below the judgment of this Court be carried into execution;
 - (b) that the Appellant may however allow to remain on the subject land and shall not be obliged to remove therefrom within the time for giving up possession provided for by the said judgment any property of the Appellant which is now upon the subject land;
 - (c) that the Appellant shall be at liberty to enter upon the subject land and remove therefrom any property of the Appellant thereon within such time as may hereafter be fixed for that purpose on the application of either party by a Judge of this Court sitting in its equitable jurisdiction.

AND THIS COURT DOTH FURTHER ORDER that before the said judgment is carried into execution the Respondent enter into good and sufficient security by bond in favour of the Prothonotary of an amount and in a form to be approved by the Prothonotary for the
 30 due performance of such order as Her Majesty in Council shall think fit to make upon the appeal AND THIS COURT DOTH FURTHER ORDER that the application made by the said Notices of Motion in respect of the appeals of the Plaintiff Australian Hardwoods Pty. Limited and the Defendant the Commissioner for Railways be consolidated AND THIS COURT DOTH FURTHER ORDER that the costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy
 40 Council in respect to the costs of the said appeal or do abide by the result of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the rules next hereinafter mentioned that is to say rules 16, 17 and 20 and 21 of the Rules of the second day of April one thousand nine hundred and nine regulating appeals from

*In the
Full Court of the
Supreme Court
of New South
Wales.*

—
No. 28.
Order granting
Conditional
Leave to Appeal.
(Continued)

—
7th July, 1960.

this Court to Her Majesty in Council AND THIS COURT DOTH FURTHER ORDER that the costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party to this appeal be taxed and paid to the party to whom the same shall be payable AND THIS COURT DOTH FURTHER ORDER that so much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend AND that 10 after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant AND that each party is to be at liberty to restore this matter to the list upon giving two days notice thereof to the other for the purpose of obtaining any necessary rectification of this order.

BY THE COURT,

(sgd.) R. E. Walker

PROTHONOTARY

No. 29**Order of the Full Court of New South Wales granting final leave to appeal to Her Majesty in Council**

Thursday the Sixth day of October, One
thousand nine hundred and sixty

*of New South
Wales.*

No. 29.
Order granting
Final Leave to
Appeal to
Her Majesty
in Council.

10961 110 419

UPON NOTICE made this day unto this Court before the Right Honourable Herbert Vere Evatt Chief Justice the Honourable Leslie James Herron and the Honourable Wilfred Herbert Collins Puisne Judges of this Court by Counsel on behalf of the Appellant Australian
10 Hardwoods Pty. Limited pursuant to Notice of Motion filed herein the thirtieth day of September last WHEREUPON AND UPON HEARING READ the said Notice of Motion the Order made herein the seventh day of July last and the Certificate of the Prothonotary dated the sixth day of September last of due compliance with the terms and conditions of the said Order and filed herein AND UPON HEARING what was alleged by Mr Powell of Counsel for the Appellant THIS COURT DOTH GRANT to the Appellant final leave to appeal to Her Majesty in Her Majesty's Privy Council from the decree of the Full Court made herein the first day of June last
20 AND THIS COURT DOTH ORDER that upon payment by the Appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Twenty-five pounds (£25.0.0) deposited in Court by the Appellant as security for and towards the costs thereof be paid out of Court to the Appellant.

PASSED this 14th day of November, 1960.

C.D.I.

ENTERED same day.
A.M.

(Sgd.) C. D. IRWIN,

Deputy Registrar in Equity.

No. 31

Certificate of Chief Justice

*In the
Full Court of the
Supreme Court
of New South
Wales.*

**No. 31
Certificate of
Chief Justice.**

I the RIGHT HONOURABLE HERBERT VERE EVATT Chief Justice of the Supreme Court of New South Wales DO HEREBY CERTIFY that Edward Naasson Dawes who has signed the Certificate above written is the Master in Equity of the said Supreme Court and that he has the custody of the records of the said Supreme Court in its equitable jurisdiction.

10

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this day of _____ in the year of Our Lord One thousand nine hundred and sixty.

H. V. EVATT (L.S.)

Chief Justice of the Supreme
Court of New South Wales

Exhibit A.

—
Letter from
Plaintiff to
Defendant.
—

EXHIBIT A

Letter, Plaintiff to Defendant

11th June, 1957. Lre. fr. J. Jamieson & Sons Pty. Ltd.
to The Commissioner for Railways, by
registered mail,
dated 11th June, 1957.

Dear Sir,

re Bril Bril Departmental
Sawmill.

Pursuant to and in accordance with Clause 9 of the Contract 10 made between this Company and yourself on 3rd May, 1956, the Company now gives you three months' notice of its intention to exercise the option to purchase each and every item set out in or subsequently added to the schedule to such agreement and deemed to form part thereof other than the road motor vehicles and tractors.

The Company's Accountant will be writing to you in the course of the next few days setting forth his calculation of the purchase price to be paid for such items. If you do not agree with such calculation, would you please advise us immediately, so that we will have an opportunity of discussing the same with you before the period of the 20 notice above referred to expires.

We also foreshadow that after completion of the purchase of the foregoing items the Company will be making the two requests referred to in paragraphs (1) and (11) of Sub clause C. of Clause 9 of the agreement referred to above.

Yours faithfully,

J. JAMIESON & SONS PTY. LIMITED

D. Jamieson
(David Jamieson)
Managing Director.

EXHIBIT B

Letter, Defendant to Plaintiff

Lre. fr. Comptroller of Stores,
to J. Jamieson & Sons Pty. Ltd.
dated 14th June, 1957.

Exhibit B.
—
Letter from
Defendant to
Plaintiff.
—
14th June, 1957.

Dear Sirs,

I have to acknowledge receipt of your letter 11/6/1957 the
content of which has been noted.

Yours faithfully,

B. T. Ruting
Comptroller of Stores.

EXHIBIT C

RD : SF.

F8-2295

18th July, 56.

J. Jamieson & Sons Pty. Ltd.,
267 Elizabeth Street,
SYDNEY.

Dear Sirs,

Enclosed please find (1) Schedule "A" showing estimated plant value at 1/7/56 of all items of buildings and plant on hire to your 10 firm at Bril Bril, together with the annual charges on account of Depreciation, Interest and Insurance.

(2) Schedule "B" showing the monthly hire charge on all items contained in Schedule "A" based on a monthly reducing rate of interest and operating from 1/7/56.

Yours faithfully,

N. C. VOGAN

Per:

Chief Civil Engineer.

DATE RECEIVED 20/7/56.
DATE ANSWERED ———.

20

SCHEDULES (from 1st July, 1956)

BUILDINGS AND PLANT ON HIRE TO J. JAMIESON AND SONS PTY. LTD., BRIL BRIL

	(1) Estimated Plant Value at 1st July, 1956		(2) Estimated Useful Life		(3) Annual Depreciation		(4) Interest Charges		(5) Insurance Charges		Hire or Rental for calendar month 1/12 of columns 3, 4 and 5		
	£	s. d.	Years	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.
BUILDINGS:													
Workshop and Store	2,280	2 0	6	191	0 0	114	0 1	17	14 4	26	17 10		
1/10 Man Hut	509	4 8	6	47	0 0	25	9 0	4	8 7	6	8 2		
1/12 Man Hut	634	12 4	6	58	0 0	31	14 7	5	10 1	7	18 9		
Kitchen, Mess and Recreation Room	584	19 5	6	53	0 0	29	5 0	5	1 3	7	5 6		
Bachelors' Kitchen	59	16 10	6	5	0 0	2	19 10	10	1 1	14	2 2		
2/1000 gal. Tanks and Stand	37	17 10	6	3	0 0	1	17 11	6	4 4	8	8 8		
Sanitary Accommodation	43	17 4	6	4	0 0	2	3 10	15	2 11	7 7			
Mess Equipment	143	4 3	6	14	0 0	7	3 3	1	5 4	1 17	5 5		
PLANT:													
(a) Tractors:													
Oliver Cletrac F.D.E. X.56	2,658	5 5	—	1,933	0 0	132	18 3	53	4 6	176	11 11		
Oliver Cletrac F.D.E. X.63	2,950	5 5	—	1,933	0 0	147	10 3	53	4 6	177	16 3		
Stiff-legged Crane X.27	1,385	0 0	9	100	0 0	69	5 0	57	1 0	18	17 2		
(b) ROAD MOTOR VEHICLES:													
Land Rover M.V. 349, with ever-lasting equipment	88	5 10	—	200	0 0	4	8 4	19	4 10	18	12 9		
White Trailer M.V. 1004A	2,887	12 9	1	939	0 0	144	7 8	62	1 6	95	9 1		
White Truck M.V. 1004	2,887	12 9	1	939	0 0	144	7 8	62	1 6	95	9 1		
White Trailer M.V. 1005A	2,887	12 9	1	939	0 0	144	7 8	62	1 6	95	9 1		
White Truck M.V. 1005	2,887	12 9	1	939	0 0	144	7 8	62	1 6	95	9 1		

	(1) Estimated Plant Value at 1st July, 1956	(2) Estimated Useful Life	(3) Annual Depreciation	(4) Interest Charges	(5) Insurance Charges	Hire or Rental for calendar month 1/12 of columns 3, 4 and 5
(c) SAWMILLS:						
R.A.E. Mill (known as No. 8) ...	5,634	6	1,275	0	0	281 14 4
Complete with:						
Caterpillar Engine ...	1,047	4	3	246	0	0
Hand Winch ...	11	18	7	2	0	0
(d) MISCELLANEOUS:						
½ ton Anchor Chain Block ...	36	18	7	6	2	0
1½ ton Anchor Chain Block ...	15	19	5	6	1	0
Electric Emery Grinder and Stand, Wolfe 2C ½ in. cap. Electric Drill and Stand ...	75	11	2	6	12	8
S.D.4D ½ in. Drill and Stand (electric)	12	12	10	1	13	8
Battery Charger "AMP-LITE" com- plete with "AMPLION" Engine ...	10	4	8	1	9	8
Kero Swift, complete with Foot Pumps and Spray ...	14	0	2	1	17	0
Jack, Garage, 4 Wheel ...	371	5	7	6	63	0
(e) ELECTRIC LIGHTING:						
Electrical Installation, wiring, etc. ...						
	£24,380	18	1	£8,060	4	3
				£1,219	0	10
				£936	19	10
				£851	7	2

The estimated residual value at the end of the period shown in column (2) of this schedule is derived by taking the difference between the value shown in column (1) and the product of columns (2) and (3).

EXHIBIT C

Letter, Defendant to Plaintiff; Schedule B referred to in letter attached

Exhibit C.
—
Letter,
Defendant to
Plaintiff;
Schedule B
referred to
in letter
attached.
—
4th Sept., 1956.

F8-2295

RF:MT
4th September, 56

J. Jamieson & Sons Pty. Ltd.,
267 Elizabeth Street,
SYDNEY.

Dear Sir,

Further to mine of 18/7/56, enclosed please find schedule "B"
10 which has been amended from September, 1956, owing to Third Party
Insurance being incorrectly taken on White Trucks Nos. 1004 and
1005 and Trailers Nos. 1004-A and 1005-A.

Also, the month of June, 1957, has been amended to cover
variations in Fire Insurance charges for year ending 30/6/57.

Adjustment of over deduction of £1.14.8 for Third Party In-
surance on White Trucks has been made in the month of September.
1956.

Yours faithfully,

N. C. VOGAN,
per:
Chief Civil Engineer.

20

DATE RECEIVED: 7/9/56.

DATE ANSWERED —.

SCHEDULE "B"
J. JAMIESON AND SONS PTY. LTD. — BRIL BRIL

	July, 1956		August, 1956		Sept., 1956		Oct., 1956		Nov., 1956		Dec., 1956	
	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.
SAWMILLS:												
R.A.E. Mill (known as No. 8)	167	12 3	167	3 5	166	14 6	166	5 8	165	16 10	165	8 0
Complete with:—												
Caterpillar Engine	33	19 6	33	17 9	33	16 1	33	14 4	33	12 8	33	10 11
Hand Winch	5	7	5	7	5	7	5	7	5	7	5	6
MISCELLANEOUS:												
½ ton Anchor Chain Block	6	5	6	5	6	5	6	5	6	5	6	4
1-1½ ton Anchor Chain Block	3	0	3	0	3	0	3	0	3	0	3	0
Electric Emery Grinder and Stand, Wolfe												
201/4 in. cap. Electric Drill and Stand.												
S.D. 4D 1/4 in. Drill and Stand, electric	1	13 0	1	12 11	1	12 11	1	12 9	1	12 8	1	12 8
Battery Charger "Amp-Lite," complete with												
"Amplion" Engine	1	5 10	1	5 9	1	5 8	1	5 7	1	5 6	1	5 5
Kero Swift Cleaner, complete with Foot												
Pumps and Spray	18	4	18	4	18	3	18	3	18	2	18	1
Jack, Garage 4 Wheel	1	12 6	1	12 5	1	12 3	1	12 2	1	12 0	1	11 11
ELECTRIC LIGHTING:												
Electrical Installation, Wiring, etc.	8	12 5	8	12 0	8	11 6	8	11 1	8	10 8	8	10 2
BUILDINGS:												
Workshop and Store	26	17 10	26	16 6	26	15 2	26	13 10	26	12 6	26	11 2
1/10 Man Hut	6	8 2	6	7 10	6	7 6	6	7 2	6	6 10	6	6 6
1/12 Man Hut	7	18 9	7	18 4	7	17 11	7	17 6	7	17 1	7	16 8
Kitchen, Mess and Recreation Room	7	5 6	7	5 2	7	4 10	7	4 5	7	4 1	7	3 9
Bachelors' Kitchen	14	2	14	1	14	1	14	0	14	0	13	11
2/1,000 gall. Tanks and Stand	8	8	8	8	8	8	8	7	8	7	8	7
Sanitary Accommodation	11	7	11	7	11	6	11	6	11	6	11	6
Mess Equipment	1	17 5	1	17 4	1	17 2	1	17 1	1	16 11	1	16 10
PLANT:												
(a) Tractors:												
Oliver Cletrac F.D.E. X.56	176	11 11	175	18 5	175	5 0	174	11 7	173	18 2	173	4 9
Oliver Cletrac F.D.E. X.63	177	16 3	177	2 9	176	9 4	175	15 11	175	2 6	174	9 1
Stiff-legged Crane, X.27	18	17 2	18	16 5	18	15 9	18	15 0	18	14 4	18	13 8
(b) ROAD MOTOR VEHICLES:												
Land Rover, M.V. 349, with Welding												
Equipment	18	12 9	18	11 4	18	9 11	18	8 6	18	7 1	18	16 4
White Truck, M.V. 1004	95	9 1	95	2 6	92	4 0	93	12 2	93	5 8	92	19 2
White Truck Trailer, 1004-A												
White Truck, M.V. 1005	95	9 1	95	2 6	92	4 0	93	12 2	93	5 8	92	19 2
White Truck, Trailer 1005-A												
TOTALS:	£850	7 0	£848	11 0	£840	11 0	£841	4 3	£838	8 5	£830	3 0

	Jan., 1957		Feb., 1957		March, 1957		April, 1957		May, 1957		June, 1957	
	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.
SAWMILLS:												
R.A.E. Mill (known as No. 8)	164	19 1	164	10 3	164	1 4	163	12 5	163	3 7	163	11 1
Complete with:—												
Caterpillar Engine	33	9 3	33	7 6	33	5 10	33	4 1	33	2 5	33	4 5
Hand Winch	5	6	5	5	5	5	5	4	5	4	5	5
MISCELLANEOUS:												
½ ton Anchor Chain Block	6	4	6	4	6	4	6	3	6	3	6	3
1-½ ton Anchor Chain Block	3	0	3	0	3	0	3	0	3	0	3	0
Electric Emery Grinder and Stand, Wolfe 201/4 in. cap. Electric Drill and Stand. S.D. 4D 1/4 in. Drill and Stand, electric Battery Charger "Amp-Lite," complete with "Amplion" Engine	1	12 6	1	12 5	1	12 4	1	12 4	1	12 2	1	12 1
Kero Swift Cleaner, complete with Foot Pumps and Spray	1	5 4	1	5 3	1	5 2	1	5 1	1	5 0	1	5 9
Jack, Garage 4 Wheel	18	0	18	0	17	11	17	10	17	9	17	8
1/11 9	1	11 9	1	11 8	1	11 6	1	14 3	—	—	—	—
ELECTRIC LIGHTING:												
Electrical Installation, Wiring, etc.	8	9 8	8	9 3	8	8 10	8	8 5	8	7 11	8	7 6
BUILDINGS:												
Workshop and Store	26	9 10	26	8 6	26	7 2	26	5 10	26	4 6	26	4 3
1/10 Man Hut	6	6 2	6	5 9	6	5 5	6	5 1	6	4 9	6	4 8
1/12 Man Hut	7	16 3	7	15 10	7	15 5	7	15 0	7	14 8	7	14 8
Kitchen, Mess and Recreation Room	7	3 4	7	3 0	7	2 8	7	2 3	7	1 11	7	1 11
Bachelors' Kitchen	13	11	13	10	13	10	13	10	13	10	13	10
2/1,000 gall. Tanks and Stand	8	7	8	6	8	6	8	6	8	5	8	5
Sanitary Accommodation	11	5	11	5	11	5	11	4	11	5	11	5
Mess Equipment	1	16 9	1	16 8	1	16 6	1	16 5	1	16 4	1	16 2
PLANT:												
(a) Tractors:												
Oliver Cletrac F.D.E. X.56	172	11 3	171	17 10	171	4 5	170	11 0	169	17 7	169	4 2
Oliver Cletrac F.D.E. X.63	173	15 7	173	2 2	172	8 9	171	15 4	171	1 11	170	8 6
Stiff-legged Crane, X.27	18	12 11	18	12 3	18	11 7	18	10 10	18	10 2	18	9 6
(b) ROAD MOTOR VEHICLES:												
Land Rover, M.V. 349, with Welding Equipment	92	12 8	92	6 1	91	19 6	91	13 0	91	6 6	90	19 11
White Truck, M.V. 1004	92	12 8	92	6 1	91	19 6	91	13 0	91	6 6	90	19 11
White Truck Trailer, 1004-A	92	12 8	92	6 1	91	19 6	91	13 0	91	6 6	90	19 11
White Truck, M.V. 1005	92	12 8	92	6 1	91	19 6	91	13 0	91	6 6	90	19 11
White Truck, Trailer 1005-A	92	12 8	92	6 1	91	19 6	91	13 0	91	6 6	90	19 11
£814 11 9	£811 17 0	£809 2 3	£806 10 5	£802 1 9	£799 14 9							

SCHEDULES OF PLANT HIRE BASED ON MONTHLY REDUCING RATE OF INTEREST

EXHIBIT D

Exhibit D.
—
Letter,
Defendant to
Plaintiff;
2 Schedules
referred to in
letter attached.
—
25th July, 1957.

Letter, Defendant to Plaintiff; 2 Schedules referred to in letter attached

Copy.

F8-2295

RF:GB
25th July, 1957.

J. Jamieson & Sons Pty. Ltd.,
267 Elizabeth St.,
SYDNEY.

Dear Sirs,

Enclosed please find (1) Schedule "A" showing estimated plant 10 value at 1/7/57 of all items of buildings and plant on hire to your firm at Brill Brill, together with the annual charges on account of Depreciation, Interest and Insurance.

(2) Schedule "B" showing the monthly hire charge on all items contained in Schedule "A" based on a monthly reducing rate of Interest and operating from 1/7/57.

Yours faithfully,

N. C. VOGAN,
Per:
Chief Civil Engineer. 20

DATE RECEIVED: 29 JUL 57.

DATE ANSWERED —.

SCHEDULES (FROM 1st JULY, 1957)
BUILDINGS AND PLANT ON HIRE TO J. JAMIESON AND SONS PTY. LTD., BRIL BRIL

	(1) Estimated Plant Value at 1st July, 1957		(2) Estimated Useful Life Years	(3) Annual Depreciation		(4) Interest Charges		(5) Insurance Charges		Hire or Rental per calendar month 1/12 of columns 3, 4 and 5	
	£	s. d.		£	s. d.	£	s. d.	£	s. d.	£	s. d.
BUILDINGS:											
Workshop and Store	2,089	2 0	5	191	0 0	104	9 1	17	15 0	26	2 0
1/10 Man Hut	462	4 8	5	47	0 0	23	2 2	4	8 9	6	4 3
1/12 Man Hut	576	12 4	5	58	0 0	28	16 8	5	10 4	7	13 11
Kitchen, Mess and Recreation Room	531	19 5	5	53	0 0	26	12 0	5	1 5	7	1 2
Bachelors' Kitchen	54	16 10	5	5	0 0	2	14 10	10	2	13	9
2/1,000 gal. Tanks and Stand	34	17 10	5	3	0 0	1	14 10	6	4	8	5
Sanitary Accommodation	39	17 4	5	4	0 0	1	19 10	15	2	11	3
Mess Equipment	129	4 3	5	14	0 0	6	9 2	1	5 4	1	16 3
PLANT:											
(a) Tractors:											
Oliver Cletrac F.D.E. X.56	725	5 5	—	1,933	0 0	36	5 4	53	4 6	168	10 10
Oliver Cletrac F.D.E. X.63	1,017	5 5	—	1,933	0 0	50	17 4	53	4 6	169	15 2
Stiff-legged Crane X.27	1,285	0 0	8	100	0 0	64	5 0	57	1 0	18	8 10
(b) ROAD MOTOR VEHICLES:											
White Truck 1004 and Trailer	1,948	12 9	—	939	0 0	97	8 8	49	1 0	90	9 2
White Truck 1005 and Trailer	1,948	12 9	—	939	0 0	97	8 8	49	1 0	90	9 2
(c) SAWMILLS:											
R.A.E. Mill (known as No. 8)	4,359	6 0	5	1,275	0 0	217	19 4	458	16 2	162	12 11
Complete with:	801	4 3	—	246	0 0	40	1 2	109	10 9	32	19 3
Caterpillar Engine	9	18 7	5	2	0 0	9	11	14	8	5	4
Hand Winch	34	18 7	5	2	0 0	1	14 11	—	—	6	3
1½ ton Anchor Chain Block	14	19 5	5	1	0 0	15	0	—	—	2	11
Electric Emery Grinder and Stand,											
Wolfe 2C ½ in. capacity Electric	63	2 11	5	12	8 3	3	3 2	3	12 0	1	11 11
Drill and Stand, S.D. 4D ½ in.											
Electric Drill and Stand	16	8	—	9	8 0	10		1	2 0	1	18 9
Kero Swift Cleaner, complete with											
Foot Pump and Spray	308	5 7	5	63	0 0	15	8 3	21	18 3	8	7 2
ELECTRIC LIGHTING:											
Electric Installation, Wiring, etc.	£16,436	3 0		£7,829	16 3	£821	16 2	£892	18 4	£796	8 8

The estimated residual value at the end of the period shown in column (2) of this schedule is derived by taking the difference between the value shown in column (1) and the product of columns (2) and (3).

SCHEDULE "B"

J. JAMIESON AND SONS PTY. LTD.—BRIL BRIL

	July, 1957		August, 1957		September, 1957		October, 1957		November, 1957		December, 1957	
	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.
SAWMILLS:												
R.A.E. Mill (known as No. 8)	162	12 11	162	4 1	161	15 3	161	6 4	160	17 6	160	8 8
Complete with:—												
Caterpillar Engine	32	19 3	32	17 6	32	15 10	32	14 2	32	12 6	32	10 9
Hand Winch	5	4	5	4	5	4	5	4	5	4	5	3
MISCELLANEOUS:												
½ ton Anchor Chain Block	6	3	6	3	6	3	6	3	6	3	6	2
1-1½ ton Anchor Chain Block	2	11	2	11	2	11	2	11	2	11	2	11
Electric Emery Grinder and Stand, Wolfe												
2C ½ in. capacity Electric Drill and Stand,	1	11 11	1	11 10	1	11 9	1	11 9	1	11 7	1	11 6
S.D. 4D ½ in. Electric Drill and Stand,												
Kero Swift Cleaner, complete with Foot	1	18 9	—	—	—	—	—	—	—	—	—	—
Pumps and Spray	8	7 2	8	6 9	8	6 4	8	5 10	8	5 5	8	5 0
ELECTRIC LIGHTING:												
Electrical Installation, Wiring, etc.	26	2 0	26	1 8	26	1 4	26	1 0	26	0 8	26	0 4
BUILDINGS:												
Workshop and Store	6	4 3	6	3 11	6	3 7	6	3 3	6	2 11	6	2 7
1/10 Man Hut	7	13 11	7	13 6	7	13 1	7	12 8	7	12 3	7	11 10
1/12 Man Hut	7	1 2	7	0 10	7	0 5	7	0 1	6	19 8	6	19 3
Kitchen, Mess and Recreation Room	13	9	13	9	13	8	13	8	13	7	13	7
Bachelors' Kitchen	8	5	8	5	8	5	8	4	8	4	8	4
2/1,000 gall. Tanks and Stand	11	3	11	3	11	2	11	2	11	2	11	1
Sanitary Accommodation	1	16 3	1	16 2	1	16 1	1	16 0	1	15 10	1	15 8
Mess Equipment												
PLANT:												
(a) Tractors:												
Oliver Cletrac F.D.E. X.56	168	10 10	167	17 5	167	4 0	166	10 7	116	15 0	—	—
Oliver Cletrac F.D.E. X.63	169	15 2	169	1 9	168	8 4	167	14 11	167	1 6	166	8 1
Stiff-legged Crane, X.27	18	8 10	18	8 2	18	7 5	18	6 9	18	6 1	18	5 4
(b) ROAD MOTOR VEHICLES:												
White Truck 1004 and Trailer 1004A	90	9 2	90	2 8	89	16 2	89	9 7	89	3 1	88	16 7
White Truck 1005 and trailer 1005A	90	9 2	90	2 8	89	16 2	89	9 7	89	3 1	88	16 7
TOTALS:	£796	8 8	£791	16 10	£789	3 6	£786	10 2	£734	14 8	£615	19 6

	January, 1958		February, 1958		March, 1958		April, 1958		May, 1958		June, 1958	
	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.	£	s. d.
SAWMILLS:												
R.A.E. Mill (known as No. 8)	159	19 10	159	2 1	158	13 3	158	4 6	157	15 7		
Complete with:—												
Caterpillar Engine	32	9 1	32	7 4	32	5 8	32	2 3	32	0 6		
Hand Winch	5	3	5	3	5	2	5	2	5	1		
MISCELLANEOUS:												
‡ ton Anchor Chain Block	6	2	6	2	6	2	6	2	6	2	6	1
1‡ ton Anchor Chain Block	2	11	2	11	2	11	2	11	2	11	2	10
Electric Emery Grinder and Stand, Wolfe												
2C ‡ in. capacity Electric Drill and Stand,												
S.D. 4D ‡ in. Electric Drill and Stand	1	11 5	1	11 5	1	11 3	1	11 2	1	11 1	1	11 1
Kero Swift Cleaner, complete with Foot												
Pumps and Spray	—	—	—	—	—	—	—	—	—	—	—	—
ELECTRIC LIGHTING:												
Electrical Installation, Wiring, etc.	8	4 7	8	4 1	8	3 8	8	3 4	8	2 11	8	2 5
BUILDINGS:												
Workshop and Store	26	0 0	25	19 8	25	19 4	25	19 0	25	18 8	25	18 5
1/10 Man Hut	6	2 3	6	1 11	6	1 7	6	1 2	6	0 10	6	0 7
1/12 Man Hut	7	11 6	7	11 1	7	10 8	7	10 3	7	9 10	7	9 9
Kitchen, Mess and Recreation Room ..	6	18 11	6	18 6	6	18 2	6	17 9	6	17 5	6	17 1
Bachelors' Kitchen	13	7	13	6	13	6	13	5	13	6	13	5
2/1,000 gall. Tanks and Stand	8	4	8	3	8	4	8	4	8	4	8	3
Sanitary Accommodation	11	1	11	1	11	0	11	0	11	0	11	1
Mess Equipment	1	15 7	1	15 6	1	15 5	1	15 4	1	15 3	1	15 1
PLANT:												
(a) Tractors:												
Oliver Cletrac F.D.E. X.56	77	11 8	—	—	—	—	—	—	—	—	—	—
Oliver Cletrac F.D.E. X.63	18	4 8	18	4 0	18	3 3	18	2 7	18	1 11	18	1 2
Stiff-legged Crane, X.27												
(b) ROAD MOTOR VEHICLES:												
White Truck 1004 and Trailer 1004A	88	10 1	88	3 6	87	17 0	87	10 6	87	4 0	86	17 5
White Truck 1005 and trailer 1005A	88	10 1	88	3 6	87	17 0	87	10 6	87	4 0	86	17 5
TOTALS:	£525	17 0	£446	18 7	£445	12 2	£444	5 9	£442	19 9	£441	13 3

SCHEDULES OF PLANT HIRE BASED ON MONTHLY REDUCING RATE OF INTEREST

Exhibit E.
—
Letter,
Defendant to
Plaintiff.
—

EXHIBIT E

Letter, Defendant to Plaintiff

28th Aug., 1957. Lre. fr. Secretary for Railways
to John Jamieson & Sons Pty. Limited,
Box 3470, G.P.O., Sydney,
dated 28th August, 1957.

Dear Sirs,

Further to your letter of the 11th June, 1957, and subsequent telephone inquiry, the following amounts, errors and omissions excepted, are outstanding in respect of hire charges, etc., and will need to be paid on the exercise of the option:—

	£	s.	d.
December, 1952 (Pt)—Hire Charges	684	10	6
Road Motor Vehicle 938, 1/7/52 to 11/8/52	82	12	11
January, 1953—Hire Charges	1,896	3	3
Additional Equipment, 1/7/52 to 31/12/52	14	15	9
Wheels Jacks, 1/7/52 to 31/12/52	12	4	6
February, 1953—Hire Charges	1,896	3	3
March, 1953—Hire Charges	1,896	3	3
Motor Vehicle 323—14/11/52 to 19/12/1952	50	1	0 20
Motor Vehicle 264—23/1/53 to 31/3/53	196	16	0
April, 1953—Hire Charges	1,896	3	3
Motor Vehicle 264—1/4/53 to 30/4/53	82	0	0
May, 1953—Hire Charges	1,896	3	3
Electric Crane X27—15/5/53 to 31/5/53	34	0	0
Motor Vehicle 264—1/5/53 to 31/5/53	61	10	0
June, 1953—Hire Charges	1,887	13	3
July, 1953—Hire Charges	1,896	3	3
August, 1953—Hire Charges	1,896	3	3
September, 1953—Hire Charges	1,896	3	3 30
October, 1953—Hire Charges	1,896	3	3
November, 1953—Hire Charges	1,896	3	3
December, 1953—Hire Charges	1,896	3	3
January, 1954—Hire Charges	1,896	3	3
February, 1954—Plant and Buildings with Adjust- ments	107	1	0
March, 1954—Hire Charges	1,316	0	5
April, 1954—Hire Charges	1,304	3	10
May, 1954—Hire Charges	1,387	8	1
June, 1954—Hire Charges	1,295	18	10 40
August, 1954—Hire Charges	1,229	2	4
September, 1954—Hire Charges	1,217	6	8
October, 1954—Hire Charges	1,213	7	4
Carried Forward	£34,930	11	5

	Brought Forward	£34,930	11	5	Exhibit E.
		£	s.	d.	Letter,
	November, 1954—Hire Charges	1,209	7	7	Defendant to
	July, 1957—Hire Charges	796	8	8	Plaintiff.
	August, 1957—Hire Charges	791	6	10	(Continued)
	Residual Values as at 31/8/1957—				23th Aug., 1957.
	R.A.E. Mill (Known as No. 8)	4,146	16	0	
	Caterpillar Engine	760	4	3	
	Hand Winch	9	11	11	
10	$\frac{1}{2}$ ton Anchor Chain Block	34	11	11	
	1-1 $\frac{1}{2}$ ton Anchor Chain Block	14	16	1	
	Electric Emery Grinder and Stand, Wolfe 201/4 in. cap. electric, Drill and Stand, S.D.4D $\frac{1}{4}$ in. Drill and Stand (electric)	61	1	7	
	Stiff-legged Crane X27	1,268	6	8	
	Electrical Installation, Wiring, etc.	297	15	7	
	Workshops and Store	2,057	5	4	
	1/10 Man Hut	454	8	0	
	1/12 Man Hut	566	19	0	
20	Kitchen, Mess and Recreation Room	523	2	9	
	Bachelors' Kitchen	54	0	2	
	2-1,000 gallon Tanks and Stand	34	7	10	
	Mess Equipment	126	17	7	
	Sanitary Accommodation	39	4	0	
	Total	£48,177	3	2	

Yours faithfully,

W. A. Anderson

Secretary for Railways.

Exhibit F.
 Letter, Plaintiff
 to Defendant.

EXHIBIT F
Letter, Plaintiff to Defendant

11th Sept., 1957. Lre. fr. J. Jamieson & Sons Pty. Ltd.,
 to The Commissioner for Railways,
 dated 11th September, 1957.

Dear Sir,

We refer to our letter to the Secretary for Railways of 6th September, 1957 and would point out that in the seventh line the word "all" has been typed instead of the word "of". As this error may have caused an incorrect impression we hasten to correct the mistake.

The notice of intention to exercise the option given by our letter of 11th June 1957 expires today and we hereby confirm the exercise of the option accordingly. Referring to your letter of 28th August, 1957, in which you require the sum of £48,277.3.2 to be paid on the exercise of the option, as you are well aware we do not admit that this is the sum to be paid.

We reiterate our statements previously made in correspondence that it is the intention of this Company to adhere strictly to the contract and to fulfil in every respect its obligations thereunder, but it does not and cannot agree with the interpretations placed by you upon the contract.

The Company is willing to pay to you the proper amount payable for the acquisition of the items referred to in our letter of 11th June 1957 and as soon as this amount is known will pay the same to you in cash or by Bank Cheque as you elect against performance by you of your obligations in relation thereto.

As it appears that this Company and the Commissioner is unable to agree upon the amount now to be paid upon the exercise of the option referred to a dispute has arisen within the meaning of clause 10 of the contract made between this Company and the Commissioner on 3rd May 1956 and, in accordance with the provisions of that clause, we require this dispute to be referred to arbitration pursuant to the Arbitration Act, 1902.

We are accordingly today instructing our Solicitors, Messrs. Arthur T. George & Co., to write to your Solicitor, the Solicitor for Railways, with a view to agreeing upon the terms of reference and the appointment of an Arbitrator. We consider that it is in your interests, as well as in the interests of this Company, that the matter be referred to arbitration as speedily as practicable and seek your co-operation to this end.

Yours faithfully,

J. JAMIESON & SONS PTY. LIMITED
 D. Jamieson
 Managing Director.

EXHIBIT G

Letter, Plaintiff's Solicitors to Defendant's Solicitor

Lre. fr. Arthur T. George & Co.,
to Solr. fr. Rlwys.
dated 12th September, 1957.

Exhibit G.
—
Letter, Plaintiff's
Solicitors to
Defendant's
Solicitor.
—
12th Sept., 1957.

Dear Sir,

We understand from our clients that a dispute has arisen under the above contract and that they are referring the matter to arbitration pursuant to clause 10 of the same.

10 We would appreciate it if the Solicitor in your office handling the matter would phone the writer with a view to arranging an appointment at which the terms of reference and the name of the arbitrator can be discussed.

We understand that the matter is one of some urgency and would appreciate your advice on this point tomorrow, Friday, 13th September, 1957.

Yours faithfully,

A. T. GEORGE & CO.

Per C. J. Berry

Exhibit H.

Letter,
Defendant's
Solicitor to
Plaintiff's
Solicitors.

13th Sept., 1957.

EXHIBIT H

Letter, Defendant's Solicitor to Plaintiff's Solicitors

Lre. fr. Solicitor for Railways,
Solicitors, dated 13/9/57.
to Messrs. Arthur T. George & Co.,

Dear Sirs,

I acknowledge receipt of your letter of 12th instant, and am instructed that the understanding which you have is quite erroneous.

As you are acting for J. Jamieson & Sons Pty. Limited, I am further instructed to reply to you in respect of your client's letters of 6th and 11th instant, addressed, respectively, to the Secretary for Railways and the Commissioner.

Your client has no right to make any appropriation such as is purported to be made in the letter of 6th instant.

In respect of the letter of 11th instant, there is, in law, no exercise of option. There is no dispute for reference to arbitration.

If, in respect of the pending action by the Commissioner to recover debts due by your client, any attempt be made by your client to create a pseudo-dispute, with consequent delay or obstruction of such action, appropriate proceedings will be taken to manifest to the Court the real position.

Yours faithfully,

S. Burke,

Solicitor for Railways.

EXHIBIT J

Registered Letter, Plaintiff to Defendant

Exhibit J.
 —
 Registered letter,
 Plaintiff to
 Defendant.
 —
 16th Sept., 1957.

Lre. fr. J. Jamieson & Sons Pty. Ltd.
 to The Commissioner for Railways, by
 registered post,
 dated 16/9/57

Dear Sir,

Re Bril Bril Sawmill.

We refer to our letter of 11th June 1957 and to subsequent cor-
 10 respondence relating thereto. We note the contention contained in
 your Solicitor's letter of 13th September 1957 to our Solicitors that
 in law there has been no exercise of the option to purchase contained
 in clause 9 of the Agreement.

We do not agree with this contention and are taking steps to
 have this dispute referred to arbitration.

Without prejudice to our claim that we have validly exercised
 this option and to meet the contingency of your contention prevailing
 we now give you a further three months' notice pursuant to Clause 9
 of the Contract made between this Company and yourself on 3rd
 20 May 1956 of our intention to exercise the option to purchase each and
 every item set out in or subsequently added to the Schedule to such
 Agreement and deemed to form part thereof, other than the road
 motor vehicles and tractors. In conjunction therewith we also fore-
 shadow that after completion of the purchase of the foregoing items
 the Company will be making the two requests referred to in paragraphs
 (i) and (ii) of sub-clause (c) of Clause 9 of the Agreement referred to
 above.

Yours faithfully,

J. JAMIESON & SONS PTY. LIMITED

30

D. Jamieson
 David Jamieson
 Managing Director.

Exhibit K.
 Letter, Plaintiff's
 Solicitors to
 Defendant's
 Solicitor.
 17th Sept., 1957.

EXHIBIT K

Letter, Plaintiff's Solicitors to Defendant's Solicitor

Lre. fr. Arthur T. George & Co.,
 to Solr. fr. Rlwys.
 dated 17th September, 1957.

Dear Sir,

We refer to your letter dated 13th September, 1957.

It appears to us that two disputes have now arisen between our client Company and the Commissioner for Railways.

These disputes are—

- (a) Whether J. Jamieson & Sons Pty. Limited have validly exercised the option to purchase (granted by clause 9 of the Agreement made between our client Company and the Commissioner on 3rd May 1956) all buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the Schedule to such Agreement.
- (b) What is the sum of money properly payable to the Commissioner on the exercise of such option.

10

We hereby give you notice pursuant to clause 7 of the Arbitration Act 1902 to concur in the appointment of an arbitrator to arbitrate upon the above disputes pursuant to the submission contained in clause 10 of the said Agreement. The arbitrator may be chosen from among the following names:

Gordon Wallace, Esq., Q.C.
 Lennard C. Badham, Esq., Q.C.
 B. P. Macfarlan, Esq., O.B.E., Q.C.

If you are unable to accept an arbitrator chosen from this panel and submit to us within seven days an alternative panel of names we shall be glad to discuss the matter further.

30

In the event of failure on your part to select a name from our panel or to submit a panel of your own within seven clear days from the date of service of this notice it is our intention to apply to the Court for the appointment of an arbitrator and for all consequential orders.

Yours faithfully,

Per C. J. Berry
 A. T. GEORGE & CO.,

EXHIBIT L

Letter, Defendant's Solicitor to Plaintiff's Solicitors

Lre. fr. Solicitor for Railways
to Arthur T. George & Co., Solicitors,
dated 23/9/57

Exhibit L.

—
L. Letter,
Defendant's
Solicitor to
Plaintiff's
Solicitors.
—

23rd Sept., 1957.

Dear Sirs,

I acknowledge your letter of 17th September and note the assertions therein contained.

It is not agreed that any dispute has arisen between the Commissioner and your client in respect of any matter, and in particular, in respect of the two matters specifically alleged.

However if your client considers that any clarification of such matters may result from submission thereof to arbitration, the Commissioner has no objection to such submission to Mr. L. C. Badham, Q.C. as arbitrator.

It is, of course, emphasised that such submission is irrelevant to and entirely without prejudice to the Commissioner's rights in the action now pending.

With respect to your client's letter to the Commissioner of 16th 20 September, I am instructed to reply that the purported notice therein contained is inefficacious.

Yours truly,

S. Burke,

Solicitor for Railways.

Exhibit L.
(Continued)

2. Letter,
Plaintiff's
Solicitors to
Defendant's
Solicitor.

11th Oct., 1957.

Exhibit L contd.

Letter, Plaintiff's Solicitors to Defendant's Solicitor

ARTHUR T. GEORGE & CO.

Solicitors

Challis House—10 Martin Place, Sydney

Please Quote

in reply CJB

11th October, 1957.

The Solicitor for Railways,
19 York Street,
SYDNEY.

10

Dear Sir,

re: J. Jamieson & Sons Pty. Limited
at the Commissioner for Railways
—Your ref: Cd/W.

We refer to the Pleas filed and served herein yesterday and would draw your attention to the fact that the Pleas by way of set off and counter claim contained therein comprise only part of your client's claim against the Commissioner.

Although the heads of the damages sustained by our client Com- 20
pany are known it feels that claims against the Commissioner in respect of these other heads of damage cannot at the moment be formulated with sufficient particularity until further information is available to it. When this information is available we foreshadow adding further Pleas by way of set off and counter claim or issuing another writ.

Meanwhile, we would draw your attention to the fact that the Pleas by way of set off and counter claim insofar as they do cover our client's claims against the Commissioner be confined at present to the period prior to 31st December 1956, except for part of the Pleas 30
of set off amounting to £11,444.9.0 and the particulars under this heading refer only to timber which has not been paid for at all or not credited in any way whatsoever. Our client Company reserves, of course, the right at a future date to bring this claim up to date.

We also refer to previous correspondence in which you rejected our client Company's claim that the option to purchase granted by Clause 9 of the Agreement has been validly exercised. We confirm our understanding that the Commissioner would refuse to act upon a written request by the Company that the Commissioner request the Forestry Commission to transfer the licence and permit to the Com- 20
pany, etc. Nonetheless and for more abundant caution we now require on behalf of the Company that you request the Forestry Commission in the manner provided for by Clause 9 (c) (i) and (ii) of the said Agreement.

Yours faithfully,
ARTHUR T. GEORGE & CO.
Per C. J. Berry.

Exhibit L contd.

Letter, Defendant's Solicitor to Plaintiff's Solicitors

Lrs. from Solr. for Railways,
to A. T. George & Co.

dated 11th October, 1957. (Incorrectly dated—correct date 14th
October, 1957.)

Exhibit L,
(Continued)

—
3. Letter,
Defendant's
Solicitor to
Plaintiff's
Solicitors.

—
11th Oct., 1957.

Dear Sirs,

Your letter of 11th instant was received on 14th instant.

The first three paragraphs of your letter leave the defendant's
10 plea in such an unsatisfactory state that it is imperative that the
plaintiff be supplied with the particulars requested in a letter of even
date herewith.

The concluding paragraph of your letter in respect of the licence
and permit is noted. There has, as intimated on prior occasions, been
no valid exercise of option.

Yours truly,

S. Burke,

Solicitor for Railways.

Exhibit L
(Continued) Exhibit L contd.

4. Letter,
Plaintiff's
Solicitors to
Defendant.
—
29th Nov., 1957.

Letter, Plaintiff's Solicitors to Defendant

ARTHUR T. GEORGE & CO.
Solicitors,
10 Martin Place,
SYDNEY.

29th November, 1957.

The Commissioner for Railways,
19 York Street,
SYDNEY.
Dear Sir,

10

Re Bril Bril Saw Mill.

We refer to our client Company's letter to you of 16th September last.

Kindly inform us by 14th December next at the latest of the amount of purchase money which according to your view is payable by our client Company to the Commissioner in cash upon the exercise of the option.

We desire to point out that credits in reduction of the amount claimed by the Commissioner will be arising from current deliveries 20 to the railway yards at Wauchope.

Yours faithfully,

ARTHUR T. GEORGE & CO.

Arthur T. George

Exhibit L contd.

Letter, Defendant's Solicitor to Plaintiff's Solicitors

3rd December, 1957.

Messrs. Arthur T. George & Co.,
Solicitors,
10 Martin Place,
SYDNEY.

Exhibit L.
(Continued)

5. Letter,
Defendant's
Solicitor to
Plaintiff's
Solicitors.

3rd Dec., 1957.

Dear Sirs,

The Commissioner for Railways v.
J. Jamieson & Sons Pty. Ltd.

10

Your four letters all dated 29th November last addressed to my client, The Commissioner for Railways, have been handed to me for reply.

With reference to those two of your said letters which refer to paragraph 2 of my letter of 25th November last to yourselves, I am instructed to inform you that, the Company observing and performing the terms of the agreement during the period of notice of termination the Commissioner will do likewise.

20 With reference to your letter relating to purchase money payable upon exercise of option, the view has previously been intimated to you that there has been no valid exercise of the option and this being so, the question of purchase money does not arise.

With reference to your other letter requesting details of acts or omissions relied upon to establish breaches by your client Company of the Agreement between it and the Commissioner; in due course and at the appropriate time you will be informed of details of breaches of such agreement.

Yours truly,

(Sgd.) S. Burke,

Solicitor for Railways.

30

EXHIBIT M

Exhibit M.
—
Agreement
between
Counsel on
Terms of
Adjournment of
Arbitration.
—
12th Dec., 1957.

Agreement between Counsel on terms of adjournment of arbitration

1. Jamieson to deposit with Custom Credit Limited at call forthwith in the name of the Commissioner the sum of Twenty thousand pounds (£20,000) and hand to the Commissioner the document of title thereto. Such deposit shall be without prejudice to the rights of the Commissioner in any respect. Such sum, though deposited in the name of the Commissioner, shall at all times be at the risk of Jamieson. 10

2. If it should finally be determined that Jamieson either has not exercised, or cannot exercise, or if he does not exercise the option of purchase given by Clause 9 of the Agreement between the parties, the Commissioner shall forthwith upon such final determination or the decision by Jamieson not to exercise the option endorse to Jamieson the documents of title to the said sum and all interest thereon and shall take all other steps to enable Jamieson to obtain the said sum and interest thereon. The Commissioner shall also pay to Jamieson any interest on the said sum which the Commissioner may have collected in the meantime. 20

3. If it should be finally determined that Jamieson either has exercised, or may on the expiration of three months from the giving to the Commissioner the notice dated 16th September, 1957 exercise the said option of purchase, so much of the said sum of £20,000 as is necessary to satisfy Jamieson's obligation as to the purchase price on the exercise of such option and all interest thereon shall be withdrawn by the Commissioner and the amount other than the interest shall be applied in satisfaction of such price. When actually received by the Commissioner, such sum shall be taken to have been paid to the Commissioner on such expiration as aforesaid. The balance of 30 the said sum of £20,000 and all interest thereon shall be thereupon paid to Jamieson and not applied by the Commissioner to any other account which may then be outstanding between the parties. The Commissioner shall execute all necessary documents and take all necessary steps to enable Jamieson to obtain such balance and interest thereon.

Should the purchase price to be paid by Jamieson be determined to be greater than £20,000 Jamieson shall pay to the Commissioner the excess forthwith on demand made after such determination. If the amount of such deposit be received by the Commissioner and such 40 excess be so paid, the whole purchase price will be taken to have been paid as on such expiration as aforesaid. But, if either the amount of the said deposit be not received by the Commissioner, or if such excess be not so paid, the purchase price will not be taken to have been paid

on such expiration as aforesaid. Interest on so much of the said sum of £20,000 as is required to meet the said purchase shall be retained by the Commissioner.

4. The sittings of the arbitration shall be adjourned to a mutually satisfactory date in 1958, not sooner than February 10th.

5. Nothing herein contained or done pursuant to anything herein contained shall prejudice the contention of the Commissioner that no dispute now exists which is arbitrable under the contract or his contention that the said option of purchase has not been and cannot now be exercised.

Exhibit M.
(Continued)

—
Agreement
between
Counsel on
Terms of
Adjournment of
Arbitration.

—
12th Dec., 1957.

G. E. Barwick

K. W. Asprey

Exhibit N.

—
I. Letter,
Plaintiff's
Solicitors to
Defendant.

—
23rd Dec., 1957.

EXHIBIT N

Letter, Plaintiff's Solicitors to Defendant

Lre. from Arthur T. George & Co.,
to Commr. for R/wys. dated 23/12/57:

Dear Sir,

re J. Jamieson & Sons Pty. Limited—
Bril Bril Sawmill and Agreement
of 3rd May, 1956.

We refer to previous correspondence and in particular to the
Notice of Exercise of Option given on 16th September, 1957. 10

Without prejudice to our client Company's contention that the
Notice of Exercise of Option given on 11th June 1957 is valid and
effectual we now on behalf of our client Company require you to
request the Forestry Commission in the manner provided for by Clause
9 (c) (i) and (ii) of the said Agreement of 3rd May, 1956.

Yours faithfully,

ARTHUR T. GEORGE & CO.

C. J. Berry.

Exhibit N contd.

Letter, Defendant's Solicitor to Plaintiff's Solicitors

Lre. from Solr. for R/wys, to
Arthur T. George & Co. dated 30/12/57:

Dear Sirs,

Re J. Jamieson & Sons Pty. Limited
and the Commissioner.
Arbitration Proceedings.

I acknowledge your letter of 17th December instant enclosing
10 Custom Credit in the sum of £20,000.0.0d., together with letter of
16th December instant, addressed to the Commissioner for Railways
by the Secretary General of Custom Credit Corporation Limited.

Yours truly,

Sydney Burke,

Solicitor for Railways

per A.G.C.

Exhibit N.
(Continued)

—
2. Letter,
Defendant's
Solicitor to
Plaintiff's
Solicitors.

—
30th Dec., 1957.

Exhibit O.
 —
 Terms of
 Settlement of
 Injunction
 Proceedings filed
 in Equity Court
 on 12th Dec.,
 1958.
 —
 3rd Dec., 1958.

EXHIBIT O

**Terms of Settlement of Injunction Proceedings filed in Equity Court
 on 12.12.58**

J. Jamieson & Sons Pty. Ltd. v. The Commissioner for Railways

1. Injunction to be dissolved and Motions of the Company (the Plaintiff in this Suit) and Commissioner (the Defendant in this Suit) to be dismissed—Costs in the cause.
2. Company to undertake to deliver to the Commissioner in accordance with the Contract all such sleepers and timber as the Commissioner would from time to time be entitled to receive under the 10 contract.
3. The Company performing its obligations under the contract the Commissioner will perform the obligations specified by the Contract to be performed by him, and in addition—
 - (a) Make a reasonable amount of space in Wauchope railway yard available for placing timber brought in by the Company for inspection, provided that the Company will not bring in timber in quantities larger than can be thoroughly inspected by the Commissioner's timber inspector in a reasonable time. The Company will remove forthwith all 20 timber and sleepers as and when rejected by the Commissioner's timber inspector including any such timber and sleepers now in the yard.
 - (b) Carry out inspection of all timber delivered to such railway yard by the Company as soon as reasonably practicable.
 - (c) If the Company tenders any parcel of timber as select grade keep a detailed record of such timber, in such parcels as in the opinion of his timber inspector is equal to a select quality, entirely without prejudice to the Com- 30 missioner's contention that he is not obliged to inspect as select any timber not ordered by him as select nor that he is obliged to pay for any timber not ordered by him as select at any rate higher than merchantable.
 - (d) The Commissioner will pay for sleepers and sawn timber in accordance with the provisions of the contract and in any case where the Commissioner makes any deduction by way of set off against the Company against any amount payable hereunder it will notify the Company to that effect.
4. The Company and the Commissioner agree that, subject to 40 the claims made by the Company in Action No. 15290 in the Supreme Court, the Company was on the ninth day of October, 1958, indebted to the Commissioner in the sum of £17,606.6.8 on current account whereof particulars are annexed.

5. The Company and the Commissioner agree that the residual values for the purposes of Clause 9 of the Agreement as at 16th December 1957 amount to the sum of £9,841/0/5.

6. The Company to pay to the Commissioner the sum of £17,606/6/8 in satisfaction of the said indebtedness, and the sum of £9,841/0/5 in respect of the said residual values. The Company to authorise the payment by Custom Credit Corporation of the sum of £20,000 and interest accrued thereon, such sum and interest on receipt by the Commissioner to be applied towards satisfaction of the said amount of £17,606.6.8 and thereafter to the satisfaction pro tanto of the said sum of £9,841.0.5. The Company to pay to the Commissioner in cash within 7 days the balance of the said sum of £9,841.0.5.

7. The Company to agree to the presence at the Mill at Bellangry during any or all hours of operation of the Mill of an observer nominated by the Commissioner, such observer not to interfere in any way with the conduct by the Company of the said Mill or of the Company's business.

8. Action No. 11459 of 1957 in the Supreme Court to be settled on the following terms to be filed therein:—

- 20 (i) The plaintiff in such action (the Commissioner) acknowledges that its claim of £45,156.13.11 has been paid in full;
- (ii) The Plaintiff's costs will be taxed.
- (iii) If the amount of such taxed costs be not paid by the Defendant (the Company) within 14 days after service on the Defendant's Solicitors of the Certificate of such taxation the Plaintiff shall be at liberty to enter judgment for amount of such costs as taxed and certified.

30 9. The payment by the Company and the receipt by the Commissioner of the said sum of £9,841.0.5 and the acceptance by the Commissioner of timber delivered by the Company since the twenty fifth day of November, 1957 and to be delivered hereafter and the acceptance of any other performance by the Company of the said Agreement since such date and hereafter and the performance by the Commissioner since that date and hereafter of any of the obligations of the said Agreement to be without prejudice to the Commissioner's notice of rescission and his contentions that the said agreement has been duly determined and that the option thereunder was not duly exercised by the Company.

40 10. Acceptance by the Company of payment for timber delivered hereafter shall be without prejudice to the Company's contention that the price to be paid under the contract by the Commissioner for select timber delivered hereafter to him by the Company is greater than the amount actually paid or credited for such timber and payment by the

Exhibit O.
(Continued)
—
Terms of
Settlement of
Injunction
Proceedings filed
in Equity Court
on 12th Dec.,
1958.
—
3rd Dec., 1958.

Exhibit O.
(Continued)
—
Terms of
Settlement of
Injunction
Proceedings filed
in Equity Court
on 12th Dec.,
1958.
—
3rd Dec., 1958.

Company of the said sum of £17,606.6.8 shall be without prejudice to the Company's claims in Action No. 15290 of 1957 in the Supreme Court, or the Company's contentions in Suit No. 1616 of 1957.

11. Both parties are at liberty to pursue their claims in Suit No. 1616 of 1957 as to the effectiveness or otherwise of the purported exercise of the option of purchase under the agreement and as to the purported rescission of the agreement.

12. The Company to be at liberty to pursue its Action No. 15290 of 1957 in the Supreme Court as at present framed and nothing contained in these presents shall preclude the Commissioner from raising in such action any plea, cross action, set off or other defence whatsoever or from applying to strike out any count in the Declaration in such Action. 10

13. Nothing herein contained and nothing formerly agreed by the parties as a modus vivendi pending the hearing of the said suit shall excuse or be taken to have excused or exonerate or to have exonerated the Company from its obligations to perform the said agreement in any respect if it is found that the same has not already been rescinded except to the extent to which the Commissioner has agreed expressly or impliedly by these presents or otherwise to a variation of the Company's obligations thereunder and each party is to be at liberty to assert that the other party has since 25th November 1957 committed breaches of the said agreement and to take appropriate action in respect thereof. 20

14. In the event of it being held that the said option was not duly exercised the Commissioner shall refund to the Company the said sum of £9,841.0.5.

15. The Company concedes that the sum of £9,841.0.5 referred to in Clause 5 does not include certain motor vehicles in respect of which hire charges have been and are being paid in pursuance of clause 9 (c) of the Agreement and that residual value of such vehicles amounted on 16th December, 1957, to £3,162.14.4 and that hire charges are still payable by the Company in respect of such motor vehicles. 30

16. In the event of it being held that the option has been exercised the Commissioner shall refund to the Company the amount of hire charges paid on the items of property in respect of which the option shall have been held to have been exercised subsequent to the date on which it shall have been held to have been exercised.

DATED this 3rd December, 1958.

Harold H. Glass
Counsel for the Plaintiff
Hermann Jenkins
Counsel for the Defendant

40

EXHIBIT P

Letter, Defendant's Solicitor to Plaintiff's Solicitors

Lre. from Solr. for Railways to
Messrs. Arthur T. George & Co.,
dated 24/12/58:
Dear Sirs,

Exhibit P.
—
Letter,
Defendant's
Solicitor to
Plaintiff's
Solicitors.
—
24th Dec., 1958.

The Commissioner for Railways
v. J. Jamieson & Sons Pty. Limited.

Pursuant to the terms filed in Court on 12th December instant,
10 I have to advise that note on Customs Credit has been realised and
the amount therefor, including accrued interest, was £20,749.9.9. The
balance payable by your Company under Clause 6 of the Agreement
is, therefore, £6,697/17/2. Will you please arrange for same to be
paid within seven (7) days from the date hereof.

Steps are being taken to arrange for an appropriate person to
act as observer in accordance with Clause 7 of the terms. As it will
probably be found necessary for such person to be relieved from time
to time, the names of all persons who will act in this capacity will be
notified to you shortly.

20 As indicated to your Mr Southern in a telephone conversation
yesterday, a statement is being prepared which will bring up to date
the accounts between the parties, and this, together with a cheque for
the balance shown thereby to be payable to your client, will be
forwarded to your client direct.

Yours truly,

S. Burke

Solicitor for Railways.

Exhibit 1.

EXHIBIT 1

1. Letter,
Solicitor for
Plaintiff to
Solicitor for
Defendant.

Letter, Solicitor for Plaintiff to Solicitor for Defendant

7th Oct., 1959. Letter from A. T. George & Co. to
Solr. for Railways dated 7/10/59.

We refer to paragraph 8 of your client's Statement of Defence herein and paragraph 2 of your client's Counterclaim herein.

In order to obviate administering interrogatories but without prejudice to our right to do so in respect of other matters, would you please supply us with particulars of the allegations in such paragraphs as follows:—

10

1. In what manner and on what occasions is it alleged that the Plaintiff has not used every reasonable effort to recover the maximum quantity of first class sleepers with a minimum of waste from logs accepted by the Plaintiff from the Forestry Commission in pursuance of the Agreement between the parties dated 3rd May 1956.
2. On what occasions is it alleged that the Plaintiff has not paid to the Defendant rental or hire due by the Plaintiff to the Defendant under the said Agreement within thirty days after the rendition of accounts by the Defendant to the Plaintiff 20 for such rental or hire.
3. On what occasions is it alleged that the Plaintiff has not paid amounts debited by the Defendant to the Plaintiff 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 Defendant to the Plaintiff for such amounts.

Please supply these particulars to us within seven (7) days from the date of this letter. Your failure to reply within such time will be taken as indicating your unwillingness to supply the particulars re- 30
quested other than by interrogatory.

Yours faithfully,

ARTHUR T. GEORGE & COMPANY.

Letter, Solicitor for Defendant to Solicitor for Plaintiff in reply

Exhibit 1 contd.
58/448/D3.

Cd/N.

Messrs. A. T. George & Co.,
Solicitors,
10 Martin Place, SYDNEY.

9th October, 1959.

Exhibit 1.
(Continued)

2. Letter,
Solicitor for
Defendant to
Solicitor for
Plaintiff,
in reply.

9th Oct., 1959.

10 Dear Sirs,

The Commissioner for Railways
ats. J. Jamieson & Sons Pty.
Limited.

I refer to your letter of the 7th instant.
Your request for particulars is answered as follows:

1. As to the "Occasions", the defendant alleges the whole period from the 13th March, 1957 to the 25th November, 1957. As to the "manner", this is peculiarly within the knowledge of the plaintiff.
- 20 2. On all occasions between the 13th March, 1957 and 25th November, 1957, when rental or hire became due by the plaintiff to the defendant, it is alleged that the plaintiff did not pay the said rental or hire within thirty days after rendition of accounts.
- 30 3. On all occasions between 13th March, 1957 and 25th November, 1957, it is alleged that the plaintiff did not pay the amounts debited by the defendant to the plaintiff in respect of the said accounts received from the Forestry Commission within thirty days after the rendition of such accounts by the defendant to the plaintiff.

Yours truly,

Sydney Burke

Solicitor for Railways.

Per A.G.C.

Qualifications or
Limitations, if
any, subject to
which they are to
be admitted.

Exhibit 2.
(Continued)
—
Admission of
Facts,
pursuant to
Notice to Admit.
—
23rd Oct., 1959.

Facts Admitted.

(v) That the timber set forth in Certificate of Timber Inspection No. B22634 signed by J. Kennedy, Timber Inspector of the Forestry Commission as having been branded and passed by
10 him at Bellangry on 21st and 22nd October 1957 and that the timber set forth in Certificate of Timber Inspection B22635 signed by the said J. Kennedy as having been passed and branded by him at Wauchope was forwarded by or on behalf of the Plaintiff from Wauchope Railway Station to Newcastle and thence by the s.s. "Waipori" to the Timaru Harbour Board, Timaru, New Zealand, and that upon arrival at Timaru the said timber
20 was taken from the s.s. "Waipori" by railway truck to No. (1) Wharf Extension Timaru Harbour where the said timber was unloaded on the 5th, 6th and 17th days of December, 1957 on to a site adjacent to No. (1) Wharf Extension, such unloading being checked by one Petrus Hubertus Marie van Tilborg, an assistant engineer employed by the Timaru Harbour Board.

NIL

(vi) That the timber set forth in Certificate of Timber Inspection No. B22628 and signed by J. Kennedy Timber Inspector as having been
30 passed and branded by him at Bellangry on 9th October 1957 was forwarded by or on behalf of the Plaintiff from Wauchope Railway Station to Coff's Harbour and thence by m.v. "Kopua" to Timaru Harbour Board, Timaru, New Zealand, and that upon arrival at Timaru the said timber was taken from the m.v. "Kopua" by railway trucks on to No. (1) Wharf Extension Timaru Harbour where the said timber was unloaded on the 31st October 1957 and the 1st, 4th, 5th, 6th
40 and 7th days of November, 1957 on to a site adjacent to No. (1) Wharf Extension Timaru such unloading being checked by one Petrus Hubertus Marie van Tilborg an assistant engineer employed by the Timaru Harbour Board.

NIL

Exhibit 3.
 —
 Occupation
 Permit 9546.
 —
 15th April, 1952.

EXHIBIT 3

Occupation Permit 9546
 FORESTRY ACT, 1916-1935
 NEW SOUTH WALES
 No. 9546
 Papers 4/50/70550
 OCCUPATION PERMIT

THIS PERMIT, which is issued subject to the provisions of the Forestry Act, 1916-1935, and Regulations thereunder, shall be sufficient authority to entitle
 Department of Railways, of
 Sydney to utilise for the purpose of Site for
 Sawmill-Licence 7801
 & Camp Site/(No. 8 mill) the land specified herein, subject to payment in advance to the Forestry Commission of the sum of £6.0.0 per annum and to the conditions

10

(1) Unless the Commission otherwise directs, this Permit be regarded as having been renewed on the payment of the annual sum of £6 to the District Forester, Wauchope, on or before 30th November of each year.

20

(2) Permittee shall pay all rates and taxes on the area during the currency of the Permit.

(3) See also Schedule of conditions at back hereof relating to fire-control.

Land to which Permit applies:—County of Macquarie Parish Bellangry; area of 3 acres on Bril Bril State Forest No. 158 and indicated by red tint on plan attached.

This Permit shall take effect from 1st November, 1951 and the sum of £1 has been paid therefor to 31st December, 1951.

DATED this Fifteenth day of April, 1952. 30

The Seal of the Commission was
 affixed hereto on the date
 abovementioned, in the presence
 of

D. W. Murray
 Secretary,
 Forestry Commission.

Area and annual rental increased to 13.6 acres and £27.4.0—
as from 1/7/55 vide appro. of 25/8/55—

Exhibit 3.
(Continued)

—
Occupation
Permit 9546.

—
15th April, 1952.

4/50/70549
M. S. THOMSON
Secretary
Forestry Commission
Per R.H.
11/1/56.

ANNEXURES:

- 10 Plan of Site (Scale 40 chs. to 1 inch.)
Tracing (Scale 2 chs. to 1 inch.)
Sheet containing six conditions numbered (a) to (f) with the word
“Cancelled” endorsed across its face.

File No. 3/35/59283

Conditions of Occupation Permit No. 9546 relat-
ing to the taking of precautions for the prevention
of fire.

—
This set of conditions supersedes the previous conditions attached
20 to this permit.

During the currency of the permit, the permittee:—

- (a) Shall take, and shall ensure that his employees and his
or their resident dependants take, every precaution to
prevent damage by fire on the State Forest, Timber
Reserve or Crown land mentioned in the Permit.
- (b) Shall immediately report, and shall ensure that his em-
ployees immediately report, the outbreak of fire on or
near the Occupation Permit area to the nearest Forest
Officer or his deputy.
- 30 (c) Shall with his employees extinguish or prevent the spread
of fire as soon as such fire is discovered and continue to
render assistance until the fire is brought under control
by employees of the Forestry Commission.
- (d) Shall establish and maintain free of all inflammable mat-
ter as defined in the Bush Fires Act 1949 to a width of
not less than 10 feet the protective trails in the vicinity
of the mill which are indicated on the accompanying
sketch map.

Exhibit 4.
 Sawmill Licence
 No. 7801.
 7th Nov., 1951.

EXHIBIT 4
 Sawmill Licence No. 7801
 FORESTRY ACT, 1916-1935
 NEW SOUTH WALES
 No. 7801
 Papers 4/50/70550
 SAWMILL LICENCE

To The Secretary, Department of Railways
 of York Street, SYDNEY.

THIS LICENCE is and shall be your sufficient authority for conducting 10

Mobile }
 Sleeper }

a Sawmill for the sawing or treatment of timber, situated at Bril Bril
 State Forest (No. 8 Mill)

, in the Parish of

County of , during the period from 1st
 November, 1951 to 31st December, 1951, subject to the provisions
 of the Forestry Act, 1916-1935, and the Regulations thereunder, and
 , and to the following conditions and
 limitations (if any),

viz.:—1. This licence is granted for the sole purpose of sawing sleepers
 and off-cuts from such Crown logs as may be made available at the 20
 discretion of the Commission under special licence from Bril Bril
 State Forest.

2. The mill operated under this licence shall not be transferred
 from site to site without the prior approval in writing of the District
 Forester.

3. No guarantee is given or should be inferred that any particu-
 lar quality or quantity of logs can or will be made available to the
 mill operated under this licence.

The licensee shall comply with the provisions of the Building
 Limits of sawmill yard:—Operations and Building Materials Control 30
 Act, 1945, and the
 Regulations thereunder
 and with any notice
 served upon him under
 that Act and with the provisions of any other Act relating to the
 Production, supply, distribution or treatment of timber.

The date of expiry of this licence is 31st December of each year and if renewal is desired for the following year the prescribed fee must be paid to the District Forester, Wauchope, on or before the date of expiry.

Exhibit 4.
(Continued)
—
Sawmill Licence
No. 7801.
—
7th Nov., 1951.

Dated this Seventh day of November, 1951.

The Seal of the Commission
was affixed hereto on the
date abovementioned, in
the presence of—

10

D. W. MURRAY.

Secretary,
Forestry Commission.

The sawmill operated under this licence may not be transferred to a site other than that shown hereon, or from the licensee to any other person or firm without the prior consent in writing of the Forestry Commission. Contravention of this renders the person or firm conducting the sawmill liable to a penalty of up to £50 for unlawfully working the sawmill.

EXHIBIT 5

Special Licence No. 6295

Renewal of Special License No. G6271

File No. A.206

DOB822.

FORESTRY ACT, 1916-1951.

New South Wales.

Licence G 6295.

SPECIAL LICENCE

10 To DEPT OF RAILWAYS of SYDNEY.

THIS SPECIAL LICENSE is and shall be your sufficient authority for obtaining and removing the timber or products hereinafter specified on and from the area described herein, subject to the Forestry Act, 1916-1951, and Regulations thereunder, including Regulations 21 to 33 inclusive, and any amendments thereto and to the conditions and limitations contained in this licence.

This licence shall have effect from 1st July, 1959 and shall subject to the provisions hereof remain in force until 30th June, 1960.

Timber or products authorised to be obtained: Hardwood logs.

20 Description of area: Logging Areas in Bellangry S.F.524 and Mt. Boss S.F.910 Parish of Bellangry and Morton, County of Macquarie.
DATED this Twenty third day of July, 1959.

W. R. Hindmarsh

District Forester

Wauchope.

Exhibit 5.
Special Licence
No. 6295.
23rd July, 1959.

CONDITIONS

Exhibit 5.
(Continued)

Special Licence
No. 6295.
23rd July, 1959.

1. The licensee shall before commencing operations under this license furnish to the Commission a deposit of—and a guarantee—acceptable to the Commission, for ——. Such deposit and/or guarantee may be disposed of as provided by the Forestry Act and Regulations thereunder.

2. The licensee shall remove not less than 15,000 S.F. Nett per month and not more than 2,790,000 S.F. Nett during the currency of this license. Operations shall commence forthwith from the date of issue of the license. 10

3. The brand to be used on all timber cut under this license shall be.

4. The licensee shall pay to the Commission in respect of the timber cut or deemed to have been cut by the licensee under this license at the rates determined by the Commission from time to time under the provisions of the Forestry Act, 1916-1951. The rates applicable to the timber or products authorised to be taken under this license, subject to Conditions 15 and 21 hereof, are as follows. Unless otherwise stated, the rates for logs are per 100 super feet net quarter girth measurement as provided in Regulation 70. 20

AREA

Area	Base Rate	Grp. "B"	Medium Logs	Gross
Cobrabald "L" Ridge Cpts. 25 & 26	20/11	P.H.S. less 4 pence for ea.	1%	defect
Cundle Rd. Cpt. 15	20/8	P.H.S. less 4 pence for ea.	1%	defect
Pigeon Top "B" Cpt. 44	16/5	P.H.S. less 4 pence for ea.	1%	defect
Lookout Pt. Cpt. 50	11/6	P.H.S. less 4 pence for ea.	1%	defect
Koala West Pt. Cpt. 47	19/10	P.H.S. less 4 pence for ea.	1%	defect

A felling charge of 3/2 P.H.S. for converted Logs will be added to the rates after all deductions have been made or to the minimum rates where these apply. 30

5. The heads of all trees shall be lopped immediately after felling to the satisfaction of a Forest Officer and if so directed by him shall be stacked in suitable heaps.

6. Unless otherwise directed by a Forest Officer no timber shall be removed from where it is felled unless it has been branded by a Forest Officer or employee of the Commission.

7. The licensee shall cause all stumps and logs to be branded with the licensee's brand as soon as each tree is felled and shall if so directed by a Forest Officer cause all logs to be numbered consecutively and all stumps to bear the same number or numbers as the log or 40 logs cut therefrom. The licensee if so directed by a Forest Officer shall cause each log to be correctly measured and such measurement

marked on the log with the number and the measurement of the log or logs obtained shall be marked on the stump from which the log or logs were obtained.

Exhibit 5.
(Continued)
—
Special Licence:
No. 6295.
—
23rd July, 1959.

8. The license shall be terminated by a valid application for a tenure under the Crown Lands Act which vest the timber or products in the applicant and the Commission will not be liable for any loss or injury caused thereby.

9. The license is subject to any rights conferred by the Crown Lands Acts on the holders of any part of the land which is or may
10 be leased under these acts and that the Crown has the right at any time, without compensation to the licensee, to dispose of the land under the Crown Lands Acts under any conditions considered advisable, or to reserve, dedicate, or use for any public purpose any of the land covered by the license, and the Commission may restrict or cancel the license as regards such areas if the circumstances so warrant.

10. Sufficient timber shall be left to the satisfaction of a Forest Officer for the probable requirements of the lease or incoming settler.

11. The area shall be exploited and completely worked in sections as directed on behalf of and to the satisfaction of a Forest
20 Officer.

12. All trees felled shall be utilised with a minimum of waste to the satisfaction of a Forest Officer.

13. All timber cut on the area except that cut under license issued as provided in Condition 16 shall be deemed to have been cut by the licensee under this license unless a Forest Officer certifies otherwise.

14. Nothing in this license is to be construed that the area contains any specific quantity of timber or products and the Commission makes no warranty as to the quantity, kind, class, soundness, quality,
30 girth, accessibility or any other like matters pertaining to the timber or products to be obtained under this license or as to its suitability for any particular purpose.

15. The right is reserved to the Commission at any time of felling trees in the area and all trees so felled and cut into lengths by employees of the Commission during the currency of this license shall, unless otherwise directed by the Commission, be deemed to have been felled for the purpose of this license and shall be taken by the licensee under the conditions and at the rates specified in Condition 4 plus the cost of conversion, if same already has not been included in the rates
40 specified, as determined by the Commission.

16. The right is reserved by the Commission to issue other licenses to apply to this area where, in its opinion, timber is required

Exhibit 5.
(Continued)
Special Licence
No. 6295.
23rd July, 1959.

for any local or public purpose or where Condition 11 has not been satisfactorily observed.

17. The Commission reserves the right at any time during the currency of the license to exempt from felling any tree or trees and/or to limit the felling of trees to those marked for felling by a Forest Officer or employees of the Commission, and/or to prohibit operations by the licensee on any part of the area required for silvicultural or other forestry purpose.

18. The right of access by authorised persons to and across the area shall not be interfered with by the issue of this license. 10

19. The District Forester may refuse to issue or renew an employee's license under this license.

20. A Forest Officer or employee of the Commission may from time to time prohibit for such period as he may decide the removal of timber or forest products over any road or track if in his opinion damage to such road or track would result from such removal.

21. Subject to one month's notice or such further reasonable notice as may be arranged (except as provided herein), the Commission may in its discretion, on any and every such occasion by a notification under the hand of its Secretary, or Acting Secretary or District Forester, vary or revoke all or any of the conditions and/or provisions of or attaching to the License for the time being, including the adding thereto of such new conditions and/or provisions as the Commission may think fit and including the increasing of the rate or amount of royalty for the time being payable under the license by such sums as the Commission may think fit. Provided that where such variation or revocation applies to licenses generally or to particular groups of licensees, the Commission may in its discretion effect the variation or revocation without notice. 20

22. The licensee shall take every reasonable precaution to prevent damage by fire on the area. The licensee shall also immediately report to the nearest Forest Officer the outbreak of fire and shall render all assistance in his power to the satisfaction of the Commission in extinguishing or preventing fires on or adjacent to the areas or adjacent Forests or Crown Lands. 30

23. The licensee shall be liable for damage caused by him, his employees, agents, servants or contractors to the area and/or improvements thereon and any personal property of the Commission or Occupation Permittee or lessee.

P L A N

Exhibit 5.
(Continued)Special Licence
No. 6295.

23rd July, 1959.

SPECIAL CONDITION.

Base Rate for Group "B" Medium Hardwood Logs (as detailed overleaf) P.H.S. Gross.

Log measurement subject to deduction of 4 pence for each 1% Defect allowed on the gross volume of logs covered by the royalty account subject further to the margins and minimum rates as fixed from time to time by the Commission for Groupings by Species and 10 girth classes.

Any log over 40 ft. in length may at the discretion of the Commission or Forest Officer be measured and charged as two logs of approximately equal lengths.

SPECIAL CONDITION.

Unless otherwise authorised by a Forest Officer, all timber obtained and removed under this license shall be measured and branded by a Forest Officer or employee of the Commission at the Commission's Measuring Site on Bellangry State Forest.

Exhibit 6.

EXHIBIT 6

Letter, Plaintiff
to Secretary for
Railways.

Letter, Plaintiff to Secretary for Railways

6th Sept., 1957. Lre. fr. J. Jamieson & Sons Pty. Ltd.
to Secretary for Railways
dated 6/9/57

Dear Sir,

Further to our letter of 11th June, 1957 and in reply to your letter of 28th August, 1957, we reiterate our previous contention that no part of the sum claimed by you in your letter now under reply is due by this Company to the Commissioner for Railways. Without 10 prejudice to such contention we hereby appropriate in reduction, firstly, all the residual values shown in your said letter, and, secondly, in reduction of the hire charges alleged in your said letter to be due, the value of all deliveries of timber by this company to the Commissioner for Railways, in so far as the same have not been paid for by the Commissioner, or appropriated to other accounts hitherto.

We now give you notice that we hereby appropriate in the same manner and for the same purposes the value of all future deliveries of timber in so far as the same are not paid for by the Commissioner for Railways to this company in cash, this appropriation to continue 20 until further advice from this company.

Yours faithfully,

J. JAMIESON & SONS PTY. LIMITED

D. Jamieson

Managing Director.