

33, 1969

IN THE PRIVY COUNCIL

**9 OF 1969**

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE LOAN INVESTMENT CORPORATION  
OF AUSTRALASIA LIMITED

AND

MANUS BONNER

UNIVERSITY OF LONDON
N. T. ... MANCL...
... DIES
Appellant
... SQUARE
... W.C.1.

Respondent

CASE FOR RESPONDENT PURSUANT TO RULE 60

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THE CIRCUMSTANCES OUT OF WHICH THE  
APPEAL ARISES.

RECORD

1. This appeal (from an appeal to the New Zealand Court of Appeal on grounds of law only) concerns a contract for the sale and purchase of land, fully set out in the judgment of Sir Alfred North P. The only question is whether the particular contract, in view of its particular terms, and in the unusual circumstances of this case, was specifically enforceable.

NZLR 1030  
line 41 to  
1031 line  
26

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2. The Respondent in this appeal (hereinafter for convenience called "the vendor") was the owner of two adjoining house properties in Wellington. The legal description of the properties is set out in paragraph 3 of the Statement of Claim. In early February 1967 the vendor instructed a Wellington Estate Agent (R.F. Lochore and Company) to sell the properties. The vendor had never had any previous dealings with that Agent. Although he had had some experience as a "Building Supervisor" for the New Zealand Forestry Department, he had never on his own account had any dealings over purchasing or selling a house property apart from that in question in these proceedings. Nor had he in his

p.2, lines  
12-39  
R.F. Lochore  
p.17, lines  
7-26  
Bonner  
p.27, lines  
1-3

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Bonner,  
p.28, line  
41 to p.29  
line 19

employment as a "Building Supervisor" had any experience of contracts for the sale or purchase of properties.

NZLR 1030  
line 41 to  
1031 line 26

3. On 27 February 1967, Michael Gavin Francis, as agent for the appellant, "The Loan Investment Corporation of Australasia Limited" (hereinafter for convenience called "the Purchaser") submitted, through the Vendor's agent, an offer to the Vendor for the purchase of the properties in question. While the terms of the offer (which, on acceptance by the Vendor, became the agreement in issue in this appeal) are set out in the judgment of Sir Alfred North P., it is convenient to summarise the salient features of the offer at this point: 10

- (a) The purchase price offered was £13,300.
- (b) The sum of £500 was to be paid immediately on acceptance of the offer by way of deposit and in part payment of the purchase price. 20
- (c) The balance of the purchase price (namely £12,800) was to be paid by the Purchaser on 7 March 1967.
- (d) Settlement was to be effected on 7 March 1967 or such earlier date as might be agreed upon.

This offer was expressly made subject to the following: 30

NZLR 1031  
lines 15-19

"On settlement the vendor shall deposit with The Loan Investment Corporation of Australasia Limited the sum of £11,000 for a term of 10 years at 7½% per annum, interest payable by equal quarterly instalments. Such loan to be personally guaranteed by the purchaser. Michael G. Francis."

The offer was signed:  
"M.G. Francis as agent". 40

(Mr Francis is the Governing Director of the Purchaser Company).

4. The above offer was formally accepted by the Vendor on 27 February 1967.

5. It should be added that the terms of the above offer were not formulated on the express instructions of the Vendor: in fact the offer was drawn up in accordance with the oral instructions of Mr Francis.

Francis  
p.8, lines  
31 to 40.

Lochore  
p.18, lines  
8 to 13

10 6. The above offer was made by the Purchaser in circumstances which are conveniently set out in the judgment of Sir Alexander Turner J. in the Court of Appeal. These circumstances emerged from Mr Francis under cross-examination and may be summarised as follows:

NZLR p.1042,  
lines 13 to 55.

20 (a) Mr Francis, on the morning of 27 February 1967, had been driving around Wellington with the same Estate Agent inspecting various properties which Mr Francis's company might be interested in buying. They looked at some at Island Bay (an outlying Wellington suburb) but these did not appeal to Mr Francis. On their way back to the City the Agent mentioned the Vendor's properties. He told Mr Francis that there had already been two prior offers for the properties, neither of which had been accepted.

Francis, XXN  
p.12, line 15  
to p.13 line  
20.

30 (b) Mr Francis and the Agent drove past the Vendor's properties. Mr Francis had not seen the properties before. He did not enter the properties. The Agent mentioned to Mr Francis that the Vendor was prepared to leave part of the purchase price on mortgage. Within three minutes at the most of their arrival outside the Vendor's properties, and without inspecting them, Mr Francis had made up his mind  
40 that his Company should buy them at

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£13,300, provided the Vendor on settlement, placed £11,000 on deposit with the purchaser company. (The value of the properties at that time was £10,875).

- (c) Mr Francis and the Agent then went immediately to the Agent's office, arriving there within ten minutes. Mr Francis affirmed his intention that his company should buy the properties at the price of £13,300. 10

Francis,  
p.9, lines  
33 to 43

NZLR,  
p.1043,  
lines 11-14

7. It should be noted that after Mr Francis had signed the offer he contemplated "at one stage" the possibility of converting the properties into flats, but, as Sir Alexander Turner J. points out, this was no more than a possibility.

8. The above offer was accepted by the Vendor in the following circumstances, as shown by the evidence-in-chief of the Agent, Robert Francis Lochore: 20

Lochore,  
p.18,  
lines 13-39

- (a) Upon receiving the Purchaser's offer, on the afternoon of 27 February 1967 the Agent telephoned the Vendor.

Exhibit C  
p.40 line 11  
to p.42  
line 42

- (b) The Vendor called at the Agent's office at 4.50 p.m. on that day. The Agent showed the Vendor the Purchaser's offer and a brochure which the Purchaser had supplied setting out the purchaser company's aims and objects. 30

- (c) The Vendor, having read the documents, accepted the Purchaser's offer by endorsing his signature on the form of offer.

Lochore  
p.20, line 32  
to p.22,  
line 40.

- (d) It emerged in cross-examination of Mr Lochore that his interview with the Vendor described above lasted 20 minutes; and that Mr Lochore told the Vendor that Mr Francis was Managing Director of two 40

or three companies and that he (Mr Lochore) had "had considerable business dealings with Mr Francis". Mr Lochore appears not to have told the Vendor any more than this about Mr Francis or his company.

(e) It further emerged from cross-examination of Mr Lochore that he had in fact sold Mr Francis seven properties and had sold eight properties for Mr Francis; that Mr Francis was a person whom Mr Lochore would inform about any properties Mr Lochore had as Agent which he thought might interest Mr Francis. Mr Lochore further said in cross-examination that as soon as the Vendor had "signed his acceptance" of the offer, Mr Lochore at once telephoned Mr Francis, who answered immediately, and that Mr Lochore knew that Mr Francis was waiting for him to telephone with the information that the Vendor's acceptance had been obtained.

(f) In answer to a question from the Bench, Mr Lochore stated that he had never had any previous dealings with the Vendor.

Lochore,  
p.23, lines  
10 to 15

30 It is common ground that the Vendor and Mr Francis had never met before the Supreme Court hearing.

9. The form of offer and acceptance signed on behalf of the Purchaser and signed by the Vendor is not expressed to be "subject to contract" or "subject to solicitors' approval". The Vendor had no legal advice until after the document was signed.

40 10. The purchaser company's characteristics and mode of business, and those of its governing director, Mr Francis, emerged from cross-examination of Mr Francis and are summarised in the judgment of Sir Alexander Turner J.:

Francis,  
p.10, line  
18 to p.12,  
line 14.  
NZLR.p.1041,  
lines 24-43

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NZLR,p.1041,  
lines 24-43

(a) Mr Francis is 22 years of age.

NZLR,p.1041,  
line 35.

(b) The "Loan Investment Corporation of Australasia Limited" is a one-man company, wholly owned (as Sir Alexander Turner J. puts it) "by one little more than a boy". Mr Francis owns all the shares except one.

(c) Of the 101,000 shares of £1 each, 5,000 have been fully paid up, while 6s.8d. per share has been "met" on the other 96,000 shares. 10

(d) A number of charges are registered against the company amounting to "something like £32,500", and there is a debenture, having first priority to all other charges, to the Bank of New Zealand for "advances".

Exhibit C.  
p.40, line 11  
to p.42,  
line 42.

(e) The company's business is described in a "brochure". It records the concern of Mr Francis for the "present state of the New Zealand economy"; that he has "spent five years studying the New Zealand economic situation" - i.e., since he was 17 years old; that he endorses a policy of "ECONOMIC NATIONALIZATION" whereby the company be resolved to defend the New Zealand economy"; that the company "will remain pledged to the investing public to carry out its policy of economic self-defence"; that the company is "principally" a property owning company and financier, that "the method employed by the Loan Investment Corporation of Australasia Limited by accepting monies on deposit ensures that at all times the Corporation will have funds available for investment and to take advantage of special situations in the field of property investment as they arise and for 20 30 40

10 which liquidity is essential." The brochure goes on to say that "By promoting our policy of "ECONOMIC NATIONALIZATION" we are protecting the investing public of New Zealand from ultimate disaster"; and investors with the Corporation are thanked for "appointing the Corporation to carry out this sublime act of national defence". The brochure is signed by Mr Francis as Managing Director.

11. On 6 March 1967 the purchaser's then solicitors wrote to the Vendor's solicitors tendering a memorandum of transfer for execution by the Vendor, asking for a settlement statement, and stating that "We, in turn, will have the appropriate deposit note available". p.43, line 22

20 12. After being advised by his solicitors of the probable consequences of completion of the agreement, the Vendor refused to complete, and on 23 March 1967 the Vendor's solicitors wrote to the Purchaser's then solicitors rescinding the contract and releasing the Purchaser from all liabilities and obligations thereunder. Exhibit G p.44

30 13. On 17 April 1967 the Purchaser's new solicitors wrote to the Vendor's solicitors calling upon the Vendor to complete the transaction and advising that if he did not, proceedings would be issued. p.46, line 15

14. On 10 May 1967 the Purchaser issued a writ. In its Statement of Claim it prayed for Statement of Claim, p.4, line 10

(a) An order for specific performance of the agreement by the Vendor; or, alternatively

(b) £1,500 damages.

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Statement of  
Defence p.4,  
line 27 to  
p.7,line 16.

15. In his Statement of Defence, filed on 14 June 1967, the Vendor put the purchaser to proof generally, and as affirmative defences alleging

(a) misrepresentation

(b) mistake.

NZLR p.1026,  
line 37 to  
p.1027,line  
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(On both these affirmative defences the Chief Justice in the Supreme Court held that on the facts the Vendor failed, and since the Vendor's appeal to the Court of Appeal was on other grounds, it is not necessary to consider such affirmative defences further.)

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16. The Purchaser's action was heard in the Supreme Court on 30 November 1967. Counsel for the Purchaser (plaintiff), in opening, dealt with the principles on which an order for specific performance could be made. In opening for the defence, counsel for the Vendor (defendant) submitted that specific performance could not be ordered either in relation to this particular contract or in the circumstances of the present case. Both counsel, in their closing addresses, enlarged on the submissions on this topic they had made in opening.

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17. In the course of his ex tempore judgment delivered on 30 November 1967 the Chief Justice dealt with counsel's submissions as to specific performance by holding:

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NZLR p.1027,  
lines 10 to  
25.

(a) that the present contract was "in truth and substance a contract for the sale and purchase of land" and therefore that South African Territories Ltd. v. Wallington [1898] A.C. 309 (H.L.) (in which it was laid down that a contract to advance money could not be enforced by specific performance) was distinguishable;

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- (b) that any hardship to the Vendor in the transaction was immaterial because in a contract of the present kind specific performance "is in effect granted as a matter of course even though the Judge may think it involves hardship".

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NZLR p.1027,  
lines 26 to  
40.

10 The Chief Justice thereupon made a decree  
"that the defendant [vendor] do specifically  
perform the agreement of 27 February 1967  
according to its terms."

NZLR p.1027,  
lines 41 to  
42.

18. The Vendor appealed to the Court of Appeal against this judgment. The Court of Appeal allowed the appeal. Judgments in the Court of Appeal in the Vendor's favour were: Sir Alfred North P. and Sir Alexander Turner J.; and in favour of the purchaser, Richmond J.

20 19. The effect of the judgments in the Court of Appeal was:

Sir Alfred North P.

- (a) The Court would not enforce by specific performance a mere agreement to lend money.

NZLR p.1032  
line 30 to  
p.1034 line 30.

- (b) The proper construction of the parties' contract was:

NZLR p.1034,  
line 36 to  
p.1035 line 17.

30 (i) The purchaser undertook to pay the purchase price (less the amount of the deposit already paid) in cash on 7 March 1967. The Vendor could have insisted on the Purchaser performing the contract in this way.

40 (ii) By clause 9(a) of the contract the Vendor undertook, on settlement, to deposit with the Purchaser the sum of £11,000. It was not

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expressed, but might be implied, that the Purchaser undertook to accept the loan.

- (iii) Clause 9(a) was therefore a separate stipulation distinct from the stipulations for the sale and purchase of the properties.

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NZLR p.1035 (c)  
lines 3 to  
17.

While, therefore, the contract for sale and purchase, being complete in itself and severable from the rest of the agreement, could be specifically enforced, the Vendor's undertaking to lend to the Purchaser the sum of £11,000 could not be specifically enforced.

NZLR p.1035, (d)  
line 22 to  
p.1036 line  
26.

But even if the contract were regarded as entire, specific performance would be refused, since there was an essential and inseparable part of the contract (namely the stipulation contained in clause 9(a)) which the Court could not specifically perform, and the Court cannot specifically perform a contract piecemeal.

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NZLR p.1037, (e)  
lines 24 to  
33.

Sir Alfred North P. also indicated that there were a number of unsatisfactory features about the Purchaser's standing which had left him uneasy. The impression left on his mind was that the Purchaser's principal objective was to get from the Vendor an unsecured loan of £11,000 which the company was not required to meet for 10 years. In the meantime the company was free to deal with the property in any way it chose, and consequently the prospect of the Vendor ever seeing his £11,000

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NZLR p.1041,  
lines 3 to 7

- (d) But even if the contract were regarded as entire, specific performance of it should have been refused in the exercise of the Court's discretion.

NZLR p.1041,  
lines 7 to 23

- (e) Because the Chief Justice did not purport to exercise the discretion, it was open, on the appeal, to consider how the discretion should have been exercised.

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NZLR p.1041,  
line 24 to  
p.1043, line 28.

- (f) Emphasizing the very unusual facts of the case, Sir Alexander Turner J., after examining the nature and standing of the Purchaser's business and the manner in which the contract had been entered into, held that the Purchaser had entered into the contract, not with the object of becoming the owner of a particular piece of property, but simply so as to acquire an unencumbered asset capable of being sold or mortgaged, upon which finance could be raised. This factor removed the case from that class of case where specific performance of a contract for the sale of land would be justified.

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NZLR p.1043,  
line 29 to  
p.1044, line 4.

- (g) In any event the result was so inequitable that the Court should refuse specific performance.

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Richmond J.

NZLR p.1044,  
lines 38 to 50.

- (a) There can be no specific performance of a contract to lend or borrow money either at the suit of the proposed lender or the proposed borrower.

NZLR p.1045,  
lines 7 to 33.

- (b) But the contract in this case was a composite and indivisible one in which the Vendor agreed both to transfer the ownership of land and to lend money; but not (as the Chief Justice held) "a contract for the sale and purchase of land,

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with a provision for part of the purchase money to remain on loan to the purchaser".

- (c) For breach of such a contract on the Vendor's part, damages is not a sufficient remedy. NZLR p.1045, line 34 to p.1047, line 48.
- (d) The contract was not one of a nature which the court could not enforce. NZLR p.1047 line 48 to p.1050, line 37.
- 10 (e) The Chief Justice had not approached the exercise of his discretion on a basis wrong in law. NZLR p.1050, line 38 to p.1051, line 21.

20. In the result the appeal was allowed, the order for specific performance vacated, and the case remitted to the Supreme Court for the assessment and award of such damages as might on the facts be found appropriate.

21. CONTENTIONS TO BE URGED BY THE RESPONDENT.

- 20 A. As a matter of principle, the contract in this case is not of a kind which can be specifically enforced, for the following reasons:
- (1) A contract to borrow or lend money cannot be enforced by an order for specific performance: The South African Territories Ltd. v. Wallington [1897] 1 Q.B. 692 (C.A.); [1898] A.C. 309 (H.L.). (This is a long-established principle which the Purchaser must be taken to have had in mind when it settled the form of offer which it submitted to the Vendor, and the Purchaser was rightly held by the Court of Appeal to be bound by the form of its offer).
- 30 (2) The contract in this case requires the Vendor to perform two distinct obligations:
- (a) to convey the property in question to the Purchaser in an unencumbered state; and

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- (b) to advance to the Purchaser the sum of £11,000 for 10 years without security.

The Purchaser has not elected to treat the latter obligation as severable, but has insisted on specific performance of the contract as a whole. Because the latter obligation is not one in respect of which specific performance can be granted, the Purchaser in these circumstances cannot have specific performance of any part of the contract. 10

(3) Because the Vendor's obligation to lend the Purchaser the sum of £11,000 is not specifically enforceable, there is nothing to distinguish this case from other cases of recognised authority where specific performance of "composite" contracts has been refused upon the ground that one of the obligations was not specifically enforceable: cp. Ogden v. Fossick (1862) 4 De Gex. F. & J. 426 (contract to take a lease and employ a servant); Gold v. Penney [1960] N.Z.L.R. 1032 (C.A.) (contract to take shares and to employ); Samson v. Collins (1910) 29 N.Z.L.R. 1163 (contract to sell car and make loan). 20

(4) This is not a contract for the sale of land containing provisions for deferred payment of the purchase price: the terms of this contract setting out the Vendor's obligation to lend cannot be regarded as merely descriptive of the manner in which the purchase price is to be paid or secured. (This is one means of explaining the decision in Starkey v. Barton [1900] 1 Ch. 284, although it is not conceded by the Vendor that that case was rightly decided.) In the present contract the Purchaser has expressly bound itself to pay the purchase price in full on settlement; and it is only following that event that the Vendor's separate obligation to lend the Purchaser £11,000 without security becomes operative. 30 40

(5) There was no mutuality between Vendor and Purchaser at any time that may be relevant. Even if the Vendor had conveyed the land in question to the Purchaser, and even if the Purchaser had paid the full purchase price on settlement, the Vendor could not have compelled the Purchaser to take the loan of £11,000 because of The South African Territories Ltd. v. Wallington (supra).

10 (6) In any event, because the Purchaser sought to purchase the land solely for the purposes of speculation as part of its general business, it is impossible to justify a decree for specific performance on the usual ground that the land, as such, had a peculiar and special value to the Purchaser. The Purchaser in this case is in a position  
 20 no different from that of a person who speculates in, e.g., personal property or goods in respect of which specific performance does not lie in the normal course.

B. In the circumstances of the present case, specific performance does not lie, for the Purchaser has suffered no loss for which damages would not be adequate or proper compensation:

(1) The land in question was not of a peculiar or special value to the Purchaser -

30 (a) Because it was purchased solely for the purpose of speculation;

(b) Even if it could be said that it was also purchased so that the Purchaser could be provided with an unencumbered asset on which it could raise further loans for the purpose of its business as a speculator in property, there is still no peculiar or special  
 40 feature in this property from the Purchaser's point of view which the Purchaser could not find in any other property in respect of which it could enter into a similar contract.

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(2) Even if it could be said that the contract as a whole was of value to the Purchaser because it provided the Purchaser with (a) an unencumbered property and (b) an unsecured loan, such value could not be of a "peculiar or special" character so as to justify specific performance: neither the subject-matter of the contract nor the contract itself has any special or unique feature or value which could not be found in any other transaction of a similar type into which the Purchaser might enter in the normal course of its business. 10

C. In any event, the circumstances of the case render it inequitable that the contract be specifically enforced. Reliance will be placed on the following features of the transaction: 20

- (1) In all the circumstances the terms of the contract are, as regards the Vendor, harsh, onerous, and oppressive;
- (2) The true nature and character of the Purchaser Company and of its (virtually) sole shareholder was not disclosed to the Vendor, and not known to him, at any time prior to his acceptance of the Purchaser's offer; 30
- (3) The Vendor had no legal advice prior to his acceptance of the Purchaser's offer; nor was this particular form of offer and acceptance made "subject to contract" or "subject to solicitor's approval";
- (4) The Vendor had had no prior experience of transactions of the kind in question here, whereas the Purchaser and its Director, Mr M.G. Francis, had had considerable experience in land transactions; 40

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- (5) The Vendor's Estate Agent did not disclose to the Vendor that he (the Estate Agent) had the Purchaser as one of its regular customers;
- (6) The Purchaser so conducted itself (both through the Estate Agent and by the production of the Purchaser's "Brochure") as to lead the Vendor to gain the impression that the Purchaser was a substantial and responsible corporation with substantial resources and that his (the Vendor's) investment would be safe;
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- (7) The Purchaser so conducted itself, through the Estate Agent, that there was undue haste in obtaining the Vendor's acceptance of the Purchaser's offer, so that the Vendor was deprived of the opportunity of adequately reflecting on the true nature of the Purchaser's offer, and of the opportunity to secure legal advice prior to such acceptance.

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D. The Chief Justice, in the Supreme Court, failed to exercise his discretion, or, alternatively, if he exercised his discretion did so on wrong principles. The reasoning of Sir Alexander Turner J. in the Court of Appeal on this part of the case is respectfully adopted.

NZLR p.1043,  
line 29 to  
p.1044 line 4.

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22. The Respondent respectfully submits that this Appeal should be dismissed and that the Order of the Court of Appeal should be affirmed, and that the Appellant should be ordered to pay the Respondent's costs and disbursements for the following among other

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REASONS

- (a) BECAUSE the decision of the Court of Appeal was right for the reasons given by the majority;
- (b) BECAUSE the contract in this case, containing as an essential obligation a promise to lend money and a promise to take such loan, is not a contract in respect of which a decree of specific performance lies; 10
- (c) BECAUSE in all the circumstances of the case an award of damages was proper and adequate compensation for breach of the contract;
- (d) BECAUSE in all the circumstances of the case specific performance was not a remedy which it was equitable to grant;
- (e) BECAUSE the Chief Justice, in the Supreme Court, in granting a decree of specific performance, failed to exercise the discretion which he should have exercised, or, alternatively, if he did exercise such discretion, exercised it on wrong principles. 20

B.D. INGLIS

A.H. WILSON