[HIGH COURT OF AUSTRALIA.]

JOHN JAMES JOPLING . . . . APPELLANT;

AND

MARGARET MARIA JOPLING . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 26, 29.

Griffith C.J., O'Connor and Isaacs JJ.

Arbitration—Award, validity of—Uncertainty—Refusal to hear evidence—Specific performance of agreement ordered—Lease, time of commencement—Covenant not to alter will.

On a reference to arbitration to determine all disputes between A. and B. the deed of submission gave the arbitrators or their umpire power to order what they or he should think fit to be done by either of the parties. By his award the umpire found that on a certain day an agreement had been entered into between the parties to the effect (*inter alia*) that A. should pay to B. a certain sum in settlement of all claims between them up to the date of the agreement, that A. should lease to B. certain premises for a certain term at a certain rent, and that A. should not alter the terms of her will. He also found that the agreement had been partly performed by B. having on a certain day been admitted by A. into possession of the premises agreed to be leased, and that B. had altered his position and incurred expense on the faith of the agreement. He then ordered and determined that A. should specifically perform her part of the agreement and should forthwith execute all deeds and documents necessary to effectuate such agreement, including a covenant that she would not alter her will, and that B. should execute all leases and documents and do all such things as might be necessary to effectuate the observance by him of the agreement. On a motion by A. to set aside the award,

Held, that the award was not uncertain, for (1) by reference to the agreement as to the lease and the finding that possession had been taken pursuant to that agreement on a particular day, the proper inference was that the lease was to begin on that day; (2) it was not necessary that the deeds and docu-

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ments directed to be executed should be further specified; and (3) that it was not necessary to set out the terms of the will referred to.

Held, further, that, as by the award it was found that an agreement had been made between the parties for the payment of a certain sum in settlement of all disputes between them, and specific performance of that agreement was directed, it was not necessary to go into evidence as to what were the disputes, and, therefore, that there had been no such refusal to hear evidence as would invalidate the award.

Judgment of the Supreme Court of Victoria (*Hood* J.) reversed.

APPEAL from the Supreme Court of Victoria.

John Robertson Jopling, the husband of Margaret Maria Jopling and father of John James Jopling, who died in 1901, by his will left all his property to his widow. The property included certain bone mills and a farm known as Rose Hill Farm. The business in connection with the bone mills was thereafter carried on by Mrs. Jopling under the management of John James Jopling. Rose Hill Farm had in 1892 been leased by John Robertson Jopling to John James Jopling at a rent of £52 a year, and was from that time occupied by John James Jopling, who however never paid any rent, by arrangement as he said with his father. Disputes between mother and son resulted in the son issuing a writ against his mother to enforce a verbal agreement alleged to have been made between the parties on 13th August 1907, hereafter more fully referred to, or, in the alternative, for £1,680 damages for breach of the agreement. Finally, on 25th January 1908, a reference was made to two arbitrators, or in the case of their disagreement to an umpire appointed by them, to determine all matters and differences between them as from 16th April 1901 until the date of the submission. The deed of submission (clause 4) provided that:—"The said arbitrators or their umpire shall have power to order and determine what they or he shall think fit to be done by either of the parties hereto respecting all matters in difference between them . . . ."

The arbitrators having differed, the umpire made an award of which the following are the material portions:—

"1. I find that on the 13th day of August 1907 it was verbally agreed by and between the said parties (*a*) that the said Margaret Maria Jopling should pay the said John James Jopling the sum

of two hundred and fifty pounds in settlement of all claims between them to that date (*b*) that the said Margaret Maria Jopling should lease to the said John James Jopling the bone mills at Ballarat North with the buildings thereon and land adjoining and then used in connection with the said mills for a term of five years with the right of renewal for two further periods each of five years at the clear rental of sixty-two pounds per annum to be paid by instalments every four weeks (*c*) that the said Margaret Jopling should lease to the said John James Jopling the property known as Rose Hill Farm situate at Mount Rowan for a term of five years with the right of renewal for a further period of five years at the clear rental of thirteen pounds per annum to be paid by instalments every four weeks (*d*) that the said farm was to be inspected by the said Margaret Maria Jopling or by some qualified person on her behalf and a report furnished to the said John James Jopling as to the state of repair of the buildings and fences on the said farm and that the same should be put in repair by the said John James Jopling (*e*) that the said John James Jopling should take over the said mills together with the stock in trade and plant therein and thereon and all book debts owing to the firm of 'John R. Jopling' and should pay the overdraft at the Bank of Victoria Limited at Ballarat then standing in the name of 'John R. Jopling' and (*f*) that the said Margaret Maria Jopling would not alter the terms of her then existing will.

"2. I find that such agreement has been partly performed by both the said parties the said John James Jopling having been admitted by the said Margaret Maria Jopling into possession of the said mills and farm and taken over the management thereof on the 14th day of August 1907 and that such possession was and is exclusively referable to the said agreement and that the said John James Jopling was allowed to expend money and incur expense and alter his financial position on the faith of such agreement.

"3. I award order and determine that the said Margaret Maria Jopling shall specifically perform her part of the said agreement and shall forthwith execute all deeds and documents necessary to

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effectuate such agreement including therein a covenant that she will not revoke or alter her said will.

"4. I further award order and determine that the said John James Jopling shall execute all leases and other documents and do all such things as may be necessary to effectuate the observance by him of such agreement."

The reference having been made a rule of Court, Mrs. Jopling moved to set aside the award on the grounds (*inter alia*) that it did not determine all matters and differences between the parties which were brought before the arbitrators and umpire, that the award was uncertain in several respects, that the arbitrators and umpire refused to receive certain evidence, and that the umpire had no jurisdiction to direct specific performance of the alleged agreement of 13th August 1907, nor to direct Margaret Maria Jopling to execute all deeds and documents necessary to effectuate such agreement, nor to direct her to enter into a covenant not to revoke or alter her will.

Other facts appear in the judgments hereunder.

The motion came before *Hood* J., who set the award aside, stating in his reasons that he doubted whether it covered all matters in dispute, that he thought it was exceedingly vague and unfair, and that it provided no penalty for non-compliance with the clause as to non-revocation by Mrs. Jopling of her will.

From this decision John James Jopling having obtained leave (and if necessary, special leave) to do so, now appealed to the High Court.

Kilpatrick (with him *Burgess*), for the appellant. The umpire having found that the agreement of 13th August had been made between the parties, part of which was that the respondent should pay £250 to the appellant in settlement of all claims between them, that was all he need do, for that agreement settled all the disputes up to that time, and the only dispute afterwards regarded the respondent's refusal to carry out the agreement. As to the objection that the award is uncertain, it is said that it does not fix the date of the commencement of the lease, or its terms. But the umpire has found that the agreement was in part performed by the appellant going into possession on 14th August

1907 in pursuance of the agreement. That fixes that day as the commencement of the lease. *Marshall* v. *Berridge* (1) is not an authority to the contrary, for there an element of the agreement for a lease was not in writing, and there is no suggestion of there having been part performance. As to the terms of the lease they are fixed by the general law, and the party who has to pay the rates is determined by the *Local Government Act* 1903, sec. 265. The Court will enforce an award when it orders a thing to be done which, if the parties themselves had agreed should be done, a Court of Equity would specifically enforce: *Wood* v. *Griffith* (2); *Russell on Arbitration and Award*, 9th ed., p. 33.

[Counsel also referred to *Henning* v. *Parker* (3); *Harrison* v. *Creswick* (4); *Russell on Arbitration and Award*, 9th ed., pp. 146, 198.]

Bryant (with him *Starke*), for the respondent. By the award the umpire only determined that on 13th August 1907 an agreement was made between the parties and what were its terms, but the umpire could not determine that that agreement was intended to cover all disputes between the parties unless he knew what these disputes were. The umpire was therefore wrong in rejecting evidence on that matter. The umpire also rejected material evidence on the question whether the agreement was made. The award is uncertain on its face in that the directions given as to what is to be done by the parties is not sufficiently specific: *Stonehewer* v. *Farrar* (5). No commencing point for the lease is indicated: *Marshall* v. *Berridge* (6). The direction to do all that is necessary to effectuate the agreement is insufficient: *Price* v. *Popkin* (7). The nature and character of the deeds and documents to be executed should be specified: *Tandy* v. *Tandy* (8); and who is to pay for them. The direction that the respondent should not alter her will is altogether uncertain and incapable of inforcement.

Counsel was not heard in reply.

(1) 19 Ch. D., 233.
(2) Wils. Ch., 34.
(3) 14 W.R., 328.
(4) 13 C.B., 399.
(5) 6 Q.B., 730.
(6) 19 Ch. D., 233, at p. 240.
(7) 10 A. & E., 139.
(8) 9 Dowl., P.R., 1,044.

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GRIFFITH C.J. In this case an award made by an umpire was impeached on various grounds which I feel some difficulty in apprehending as applicable to the award in question. The matter arose out of an unfortunate family dispute between a mother and her son. The son had been in possession of the property since his father's death, and had carried on in his father's name the business which his father had carried on. There were disputes between the son and his mother, and finally, on 13th August 1907, an agreement was alleged to have been made for the settlement of all matters in dispute. The mother, however, refused to carry out some of the terms of the alleged agreement, and the son brought an action against her in the Supreme Court claiming specific performance of the agreement and, in the alternative, damages for its breach. The matter was referred to arbitrators. They did not agree, and the umpire made an award, which seems to be based upon the fact, which he found, that on 13th August a verbal agreement had been made between the parties containing six separate stipulations, viz.:—

(1). That the respondent should pay the appellant £250 in settlement of all claims between them to that date:

(2). That the respondent should lease to the appellant certain bone mills for a term of five years, with a right of renewal for two further terms of five years each, at a rental of £62 per annum, payable every four weeks:

(3). That the respondent should lease to the appellant a certain farm for a term of five years, with a right of renewal for a further term of five years, at a rental of £13 per annum, payable every four weeks:

(4). That the respondent should have the right to inspect the farm, and that the appellant should put the buildings and fences in repair:

(5). That the appellant should take over the bone mills with the stock in trade and plant and all book debts of the business, and should pay the bank overdraft standing in his father's name:

(6). That the respondent should not alter the terms of a will which she had made and which was unrevoked.

The umpire also found that the agreement had been partly performed, the appellant having been let into possession of the

mills and farm and taken over the management of it on 14th August 1907. He further found that such possession was referable exclusively to the agreement, and that the appellant had altered his position on the faith of the agreement. He awarded that the respondent should specifically perform her part of the agreement and should forthwith execute all deeds and documents necessary to effectuate such agreement, including a covenant not to revoke or alter her will. The submission contained an express stipulation that the arbitrators or the umpire should have power to direct what should be done by either party.

That award is objected to, first, on the ground of uncertainty. The forms in which that objection was put varied. I totally fail to see any uncertainty on the face of it. The main objection seems to be that the day of the commencement of the term of the leases is not stated in the award. Reference was made to *Marshall* v. *Berridge* (1), which shows that where an agreement to grant a lease is made, it does not necessarily mean that the lease is to commence from the day on which the agreement is made. Of course it does not. But this is a case of a verbal agreement for a lease followed by a taking of possession in pursuance of the agreement. The obligations arising out of the transaction are partly made out from the agreement itself, and partly to be inferred from the conduct of the parties. The umpire sets out the facts showing the obligations, and then directs both parties to perform the agreement. What agreement? Why, the agreement which results from the verbal promise followed by the giving and taking of possession. All agreements are an expression of a common intent. I do not think that any person reading this award and desiring to find some meaning for it could come to any other conclusion than that the common intent was that the leases were to run from 14th August 1907, the day on which possession was taken, which would be the time from which they would have been made to run if a suit had been brought in a Court of Equity and similar evidence had been given. That objection therefore fails.

Then it is suggested that it does not appear what deeds or documents are to be executed. It is not necessary that any

(1) 19 Ch. D., 233.

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should be executed, although it may be desirable that the leases for five years should be in writing. It may be sufficient for the parties to rely on the award, but if there is any desire for formal leases they must contain the ordinary and usual covenants. What they are are settled by law.

Then it is suggested that it does not appear who is to pay for the deeds. The party who has to prepare deeds has to bear the cost of them in the first place, and, if there is no stipulation for payment by the other party, he cannot be relieved.

I have endeavoured to deal with these points as far as I can apprehend them. Then there are other points. One of them is that the arbitrators rejected material evidence. The case was put in two ways before the arbitrators, first, a claim for specific performance of the agreement, and, in the alternative, for damages. The arbitrators first directed their attention to finding whether there was an agreement. The umpire found that there was an agreement, one term of which was that all matters in dispute at the date of the agreement should be settled by the payment of £250 by the respondent to the appellant. Having found that that was so, it was clearly unnecessary to ascertain what were the disputes and how the sum of £250 was arrived at—and so the parties seem to have treated the matter. It is admitted that there was no dispute as to anything subsequent to the agreement except as matters connected with the carrying out of the agreement. There is no dispute that it was clearly the duty of the arbitrators to inquire whether there was an agreement, and it having been found that there was, there was no necessity to go into anything antecedent to it.

Then it is said that there is no evidence to show that the £250 was agreed to be paid in settlement of all disputes. That objection answers itself. The agreement was that all disputes should be settled by the payment of £250.

An objection was then taken—an objection I confess I cannot understand—that the award did not refer to the terms of the will which the respondent was to covenant not to revoke or alter. It is immaterial what its terms were. The covenant is to be that the respondent will not revoke or alter her will—I suppose that means as far as it is in favour of the appellant. But the terms

are perfectly immaterial to the covenant. The learned Judge gave as one of his reasons for judgment that he could not find any means of enforcing this clause as to not revoking or altering the will, but that observation was apparently made on a misapprehension. A covenant may be made to make a will in a particular way or not to alter a will already existing. If that covenant is broken, the remedy is an action for damages against the executors of the covenantor for breach of the covenant. That is no ground for impeaching the award.

It is further objected that there was no consideration (which I understand to mean no separate consideration) for making such a covenant. It seems to me that that is irrelevant. The agreement was made, and it cannot be said that it was without consideration. The Court cannot inquire as to the appropriate consideration for each stipulation taken by itself. It seems to me that all the objections fail, and that the order of the learned Judge should be discharged.

O'CONNOR J. I am of the same opinion. The parties here have chosen their judge—the judge of law and of fact—and they must abide by his decision. We have nothing to do with the question whether the award is or is not satisfactory to the parties. The law gives the Court the right to interfere in certain cases with an award of an arbitrator; one is where the arbitrator has not considered everything material which the parties have submitted to him. Another is where the award is on its face uncertain. It has been alleged that the arbitrator refused to hear material evidence as to matters in difference. To my mind it is quite clear he did not.

I endeavoured to ascertain from Mr. *Bryant* whether there were any matters in difference which arose between 13th August 1907 and 25th January 1908, the date of the submission to arbitration, and it is plain from his answer that any differences existing at the latter date were as to claims which had arisen out of the previous agreement of 13th August 1907, and were therefore differences which existed on 13th August 1907. The view that the umpire took was that all the matters had really been settled by the agreement of 13th August 1907. Taking that

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view, it was unnecessary to go into details of differences which had already been settled by the agreement. He came to that conclusion, and that is the basis of his decision. The decision embodied in the award seems to me certain on the face of it.

Matters were referred to by Mr. *Bryant* which were not expressly and definitely set out in the award, with the result, he says, of rendering the award uncertain. But the award may be rendered certain by applying its terms to the existing circumstances. I am therefore of opinion that the award is certain and that this Court cannot interfere with it.

ISAACS J. I quite agree. There were three objections taken to this award. The first was that the umpire had not done his duty because he did not inquire into claims previous to 13th August 1907. One of the matters in dispute between the parties was whether the agreement made on that date included a term that all claims between the parties up to that date should be settled by the respondent paying £250 to the appellant. If that agreement was made it rendered all the previous disputes perfectly immaterial. The umpire found that agreement was made. What, then, had the nature and extent of the previous disputes to do with granting specific performance of this agreement or awarding damages for its non-performance? The hardship would be a hardship of that agreement, not a hardship of the award. Both parties went into evidence, closed their evidence and addressed the arbitrators upon that agreement. The umpire found that the agreement was made, and having so found, all previous differences were swept away and gone for ever, and I cannot see that the umpire had anything more to do with them.

The next objection was that material evidence was rejected as to the making of the agreement. I think that was ultimately dropped. If it was proceeded with, it is answered by the fact that upon the affidavits before us it clearly appears that the case was closed on both sides.

Then as to the uncertainty of the award, I think the mistake the respondent fell into was in supposing that, if she could show uncertainty in the agreement itself apart from all other circumstances, that would be sufficient. That is a mistake, because she

undertook to show uncertainty in the award. The case of *Marshall* v. *Berridge* (1) established that unless a written agreement for a lease is such that you can find in it expressly or by reasonable inference some date from which it is to commence—some *terminus a quo*—you cannot enforce it. Applying this to the award, I look at the award and I do not find it impossible to read by way of inference from that award that the lease ordered by the umpire is to commence as from 14th August 1907. He recites that an agreement was made to grant leases of the mills and of the farm for particular terms and with certain other conditions mentioned, and he then finds that the agreement was partly performed by the parties, one giving possession and the other taking possession of the properties, and such possession was exclusively referable to the agreement. After that he orders by his award that the agreement be carried out. The irresistible conclusion, I think, from that is that the commencement of the leases was to be on 14th August 1907. Therefore that objection fails, and that was the really material objection. I therefore agree with what has been said by my learned brothers.

Appeal allowed. Order appealed from discharged.

Solicitor, for appellant, *C. J. McFarlane*, for *H. Barrett*, Ballarat.

Solicitors, for respondent, *Ford, Aspinwall & De Gruchy*, for *Cuthbert, Morrow & Must*, Ballarat.

B.L.

(1) 19 Ch. D., 233.