[HIGH COURT OF AUSTRALIA.]

LION WHITE LEAD LIMITED AND OTHERS Appellants ;
Defendants,

AND

ROGERS AND OTHERS . . . . . Respondents.
Plaintiff and Defendants,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Breach—Discharge—Right of one joint contractor to sue.

If A and B jointly enter into a contract with C and when the time for performance has arrived C commits a breach going to the root of the contract, A has a right to refuse to proceed further with the contract notwithstanding that B desires to waive the breach and proceed with the contract.

Cullen v. *Knowles*, (1898) 2 Q.B., 380, followed.

A, who had discovered a process of manufacture, employed B to assist in disposing of the process in consideration of B receiving a proportion of the proceeds of disposal, but B never had any proprietary interest in the process. An agreement was afterwards entered into by which A and B purported to give an option to C to purchase the process, the consideration being a 20 per cent. fully paid up interest in a company which should be formed to work the process, which company should have a working capital of £20,000. In pursuance of this agreement a company was formed having a total capital of £20,000 in 20,000 shares of one pound each, and an agreement was entered into by it to purchase the process from C giving as consideration 10,000 of these shares as fully paid up. B became a director of the company.

Held, that as the company had not a working capital of £20,000 A was entitled in an action brought by him alone against B and C and the company to a declaration discharging him from performance of the contract made by himself and his co-contractor B with C.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed.

H. C. of A. 1918.

Sydney, *Nov.* 11, 14, 28.

Barton, Isaacs and Rich JJ.

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in Equity by Charles Robert Rogers against the Lion White Lead Ltd., Jervis George Blackman, Samuel Bowen, Henry Petrie Fletcher and Catherine Fletcher in which the statement of claim was substantially as follows :—

1. The plaintiff is the original inventor of a process or invention for the manufacture of white lead known as " Process for the conversion of wet precipitates into oil pastes and the removal of water therefrom without first drying."

2. On or about 20th July 1917 the plaintiff duly applied to the Commonwealth Patents Office for a patent for the said invention, and the said invention has at all material times been and is now entitled to provisional protection.

3. On or about 9th July 1917 the plaintiff and the defendant Jervis George Blackman, who had no interest in the said invention or process, gave to the defendant Henry Petrie Fletcher an option of purchase for fourteen days from the said 9th July 1917 of the said process on the following terms and conditions, namely : the purchaser to guarantee to find £20,000 working capital if required, subject to a satisfactory demonstration of the process by the plaintiff and subsequent confirmatory report by adjudicating chemist acceptable to the defendant Henry Petrie Fletcher, to which chemist a full and confidential disclosure had alone to be made; on notification of acceptance of the terms of purchase therein additional time should be given to enable the purchaser to complete the purchase in terms thereinafter referred to by reason of the formation and registration of any desired company ; that in the event of the proposal being accepted by the purchaser the purchaser should pay as a full and only consideration to the plaintiff 20,000 one pound 6 per cent. debentures together with a royalty of 10 per cent. on net profit of white lead produced ; and that the plaintiff was to guarantee the profits should not be less than the amounts therein mentioned, and was to be allowed the sum of £750 for management (which sum was based on the production of 1,500 tons of white lead per annum) and to be reasonably increased as the profits of the business warranted ; that the plaintiff would superintend the erection of the plant necessary

to carry on the production of white lead by his process, and would carry on the manufacture of white lead by his said process in works so erected for a period of twelve months; and that on completion of the purchase in terms therein recited the plaintiff would disclose the full method of manufacture of white lead by his said process to an appointee or appointees of purchasers when called upon to do so. The said option contained other provisions not material to be herein set out, and the plaintiff craves leave to refer to the same as if it were set out in full herein.

4. On or about 20th July 1917 the defendant Henry Petrie Fletcher accepted the said option.

5. By memorandum of agreement made 26th July 1917 between the plaintiff of the one part, the defendant Jervis George Blackman of the second part, and the defendant Catherine Fletcher, the wife of the defendant Henry Petrie Fletcher, of the third part, it was agreed that the 20,000 debentures to be issued under the option in par. 3 hereinbefore mentioned should be divided as follows, namely, to the plaintiff 15,000 debentures, to the defendants Jervis George Blackman and Catherine Fletcher 5,000 debentures, and that the royalty to be paid should be divided between them in the following proportions, namely, to the plaintiff 60 per cent. thereof, to the defendant Catherine Fletcher 30 per cent. thereof and to the defendant Jervis George Blackman 10 per cent. thereof.

6. On or about 20th August 1917 it was agreed between the plaintiff and the said defendants Jervis George Blackman and Henry Petrie Fletcher that a royalty of 20 per cent. should be accepted in lieu of 20,000 debentures and a royalty of 10 per cent.

7. It was subsequently agreed by and between the plaintiff and the defendants Jervis George Blackburn, Henry Petrie Fletcher and Samuel Bowen, who claimed to be the principal of the defendant Henry Petrie Fletcher, that, in lieu of the plaintiff and the defendant Jervis George Blackman receiving a royalty of 20 per cent. as in the last preceding paragraph mentioned, a company should be incorporated under the *Companies Act* 1899 to acquire the said process or invention and manufacture white lead, with a capital of at least £20,000, of which the whole amount thereof was to be paid for in cash and to be the working capital of the company; and

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

that the plaintiff and the defendant Jervis George Blackman were to have transferred to them by the defendants Henry Petrie Fletcher and Samuel Bowen or one of them fully paid up shares in the said company representing 20 per cent. of the capital of the said company as the consideration for the sale by the plaintiff and the defendant Jervis George Blackman of the said process or invention. It was also further agreed by and between the said parties that not less than 50 per cent. of the profits to be made by the said company in any year should be distributed by way of dividend between and amongst the shareholders thereof, and that the plaintiff and the defendant Jervis George Blackman should be discharged from the guarantee given by them in the said option of 9th July 1917.

8. As evidence of the said agreement the plaintiff and the defendant Jervis George Blackman wrote to the defendant Samuel Bowen, at the request of the defendant Henry Petrie Fletcher, a letter dated 28th August 1917 containing the words and figures following:—"*Re* option of 9th July 1917 to H. P. Fletcher, *re* Rogers White Lead Process in which we were to receive 20 per cent. royalty, we hereby agree to vary same and are prepared to accept 20 per cent. fully paid up interest in a company of at least £20,000 as full compensation for the said process with understanding that not less than 50 per cent. of profit to be declared in any one year." And in reply thereto the defendant Samuel Bowen wrote to the plaintiff and the defendant Jervis George Blackman a letter dated 1st September 1917 containing the words and figures following:—"*Re* Rogers White Lead Process.—In respect to the above option by you both and given to Henry Petrie Fletcher on the 9th inst., which terms of purchase were varied by mutual consent on the 28th of August in letter addressed to Samuel Bowen, I beg to notify you both that instructions have been given to our solicitors to prepare all necessary documents. *Re* preparation of company to be registered under the Limited Acts of New South Wales as specified. When these documents are in order the registration of the company aforesaid will be proceeded with forthwith—we anticipate this will take probably a week."

9. The said letters of 28th August 1917 and 1st September 1917 were written with the intention of setting out the agreement in

par. 7 hereinbefore mentioned and not otherwise, as the defendants Jervis George Blackman, Henry Petrie Fletcher and Samuel Bowen at all material times were well aware, and if the said letters do not set out the said agreement the same were executed under a common or mutual mistake of the plaintiff and the said defendants.

10. By agreement in writing made 17th October 1917 between the defendant Samuel Bowen of the one part and Edmund Charles Barry for and on behalf of the Company thereinafter mentioned, of the other part, after reciting that the defendant Samuel Bowen was then entitled to the process or invention hereinbefore mentioned, that a company to be called "Lion White Lead Limited" was about to be formed under the *Companies Act* 1899 having for its objects the acquisition of the said invention or process and the manufacture of white lead by the said process, and that the memorandum and articles of association had with the privity of the defendant Samuel Bowen been prepared, that the nominal capital of the Company was to be £20,000 divided into 20,000 shares of one pound each, and that by the articles of association it was provided that the directors of the Company should immediately after the incorporation thereof adopt on behalf of the Company and carry into effect an agreement therein referred to, being the now recited agreement, it was agreed (*inter alia*) as follows: that the defendant Samuel Bowen should sell and the Company should purchase all that the said invention or process and any letters patent for the same; and as consideration for the said sale the Company should pay to the said Samuel Bowen the sum of £10,000, which sum should be paid and satisfied by the allotment and issue to the defendant Samuel Bowen or his nominees of 10,000 shares in the capital of the Company which should be deemed for all purposes to be fully paid up shares; that the Company should undertake that a dividend of not less than 50 per cent. of the net profits in each year should be declared and paid to the shareholders of the Company; that the purchase should be completed on or before 17th November 1917, when the Company should allot the said 10,000 fully paid up shares as thereinbefore provided; that upon the adoption of the agreement by the Company the said Edmund Charles Barry should be discharged from all liability in respect thereof; and that the Company should pay all costs and expenses of

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

and incidental to the preparation and execution of the said agreement and of the memorandum and articles of association of the Company and of and attendant upon the registration of the Company, and all stamp duty, fees, advertising, printing, legal and other expenses incident to the formation and registration of the Company.

11. On or about 19th October 1917 the defendant Lion White Lead Ltd. was incorporated as a limited company under the said *Companies Act*.

12. By the memorandum of association of the defendant Company it is provided that the objects for which the Company is established are—*inter alia*—(*a*) to acquire the invention of Charles Robert Rogers of a new and improved process described as " Process for the conversion of wet precipitates into oil pastes and the removal of the water therefrom without first drying " and all letters patent in connection therewith, and all future improvements to the said invention, and all benefits, privileges and advantages appertaining thereto, and with a view thereto to adopt an agreement dated 17th October 1917 made between Samuel Bowen of the one part and Edmund Charles Barry as trustee for the Company of the other part, being an agreement for the acquisition of the said invention, letters patent and premises, and to carry such agreement into effect with or without modification; and that the capital of the Company is £20,000 divided into 20,000 shares of one pound each.

13. By agreement under seal made 20th October 1917 between the defendant Company of the first part, the said Edmund Charles Barry of the second part and the defendant Samuel Bowen of the third part, it was thereby mutually agreed that the said agreement of 17th October 1917 be adopted by the defendant Company, and was and should be binding on the defendant Company in the same manner and be read and construed in all respects as if the defendant Company had been incorporated prior to the date thereof and had been party thereto instead of the said Edmund Charles Barry, and that the said Edmund Charles Barry should henceforth be discharged and freed from all liabilities and obligations whatever incurred by him under the said agreement in the same manner as if he had not been a party to that agreement.

14. On or about 26th October 1917 the said agreement dated

17th October 1917, and in par. 10 hereinbefore mentioned, was filed with the Registrar of Joint Stock Companies.

15. On or about 15th November 1917 the said agreement dated 20th October 1917, and in par. 13 hereinbefore mentioned, was filed with the said Registrar of Joint Stock Companies.

16. On or about 29th October 1917 the defendant Company, at the request of the defendant Samuel Bowen, issued 4,000 fully paid up shares to the defendant Jervis George Blackman and the plaintiff conjointly, and the names of the plaintiff and the said defendant are entered in the register of members of the defendant Company as the holders of the said 4,000 fully paid up shares.

17. The plaintiff has never applied to the defendant Company or to the defendant Samuel Bowen for the said shares or for any shares in the said Company.

18. The defendant Company has pursuant to the said agreements of 17th and 20th October 1917 issued to the defendant Samuel Bowen or his nominees 10,000 fully paid up shares in the defendant Company and has also issued 250 other fully paid up shares: no other shares have been issued by the defendant Company.

19. The plaintiff has disclosed to the defendant Henry Petrie Fletcher, who was appointed adjudicating chemist under the said agreement, his said process or invention, for the purpose of enabling the said defendant to demonstrate the same to the defendant Samuel Bowen and a few other persons and not otherwise; and prior to such disclosure it was expressly agreed by and between the plaintiff and the defendant Henry Petrie Fletcher that in consideration of the plaintiff disclosing his said process or invention to the said defendant he, the said defendant, would not disclose the same to any person or persons prior to the issue of the said patent.

20. The defendants Jervis George Blackman, Samuel Bowen and Henry Petrie Fletcher decline to be bound by the said agreement in par. 7 hereinbefore mentioned.

21. The defendants claim the right to use and have threatened to use the said process or invention of the plaintiff in the manufacture of white lead, and the plaintiff fears that unless the defendants be restrained by the order and injunction of this Honourable Court the defendants will disclose the said process or invention and

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

will use the same in the manufacture of white lead, and the plaintiff will thereby suffer great loss and damage.

22. The plaintiff submits to this Honourable Court that under the circumstances hereinbefore mentioned any agreement by the plaintiff or the plaintiff and the defendant Jervis George Blackman for the sale of the said process or invention is not binding on the plaintiff.

The plaintiff claimed as follows :—

(1) That it may be declared that any agreement made by the plaintiff or by the plaintiff and the defendant Jervis George Blackman for the sale of the said process or invention is not binding on the plaintiff or the plaintiff and the defendant Jervis George Blackman ;

(2) That the defendants and the directors, managers and workmen of the defendant Company may be restrained by the order and injunction of this Honourable Court from disclosing the said process or invention or any portion thereof ;

(3) That the defendants and the directors, managers and workmen of the defendant Company may be further restrained by the order and injunction of this Honourable Court from using the said process or invention or any portion thereof and from holding the defendants or any of them out to be the owner of the said process or invention ;

(4) That it may be declared that the plaintiff is not bound to assign or transfer his said process or invention to the defendants or any of them in consideration of the issue to the plaintiff and the defendant Jervis George Blackman of the said 4,000 shares in the defendant Company or any shares in the defendant Company ;

(5) That the register of members of the defendant Company may be rectified by striking out therefrom the names of the plaintiff and the defendant Jervis George Blackman or the name of the plaintiff as the holders or holder of the said 4,000 shares or any portion thereof ;

(6) That if and so far as necessary the agreement contained in the letters of the said 28th August 1917 and 1st September 1917 may be rectified so as to set out the true agreement between the plaintiff and the defendants other than the defendant Company ;

(7) That the defendants Samuel Bowen, Henry Petrie Fletcher

and the defendant Company or some or one of them may be ordered to pay the costs of this suit;

(8) That the plaintiff may have such further or other relief as this Honourable Court may think fit to grant.

The defence of the defendants other than Catherine Fletcher was as follows:—

1. In answer to par. 2 of the statement of claim these defendants do not know and cannot admit that the date of the application is therein correctly stated.

2. In answer to par. 3 the defendant Jervis George Blackman denies that he had no interest in the said invention or process.

3. In answer to par. 6 these defendants say that the agreement therein mentioned was set out in the document signed by the plaintiff and the defendant Jervis George Blackman, a true copy whereof is as follows:—"Sydney, August 13, 1917.—H. P. Fletcher, Esq.—Dear Sir—*Re* our option to you in which we were prepared to accept 20,000 £1 debentures carrying 6 per cent. interest and 10 per cent. of the profits—we are prepared to vary that to read as a counter proposal which may be more acceptable to you or your principals to accept 20 per cent. of profits as full payment for C. R. Rogers process.—C. R. Rogers. J. G. Blackman."

4. In answer to pars. 7 and 8 these defendants say that the whole agreement between the plaintiff and the defendants Jervis George Blackman, Henry Petrie Fletcher and Samuel Bowen is set out in the two letters in par. 8 set out.

5. In answer to par. 9 these defendants deny that the said letters or either of them were written with the intention of setting out the agreement in par. 7 of the statement of claim, and they deny that the same or either of them were executed under a common or mutual or any mistake of the plaintiff and the defendants or any of them.

6. These defendants crave leave to refer to the documents mentioned in pars. 10, 12 and 13 of the statement of claim, and do not admit that the same are correctly or sufficiently set forth therein.

7. In answer to par. 18 the defendant Company says that 5,637 other shares have been applied for and issued as fully paid up.

8. The defendant Henry Petrie Fletcher denies it was ever

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

agreed between him and the plaintiff that in consideration of the plaintiff disclosing his said process or invention to the said defendant, or for any other consideration or at all, he, the said defendant, would not disclose the same to any person or persons prior to the issue of the said patent or at all.

9. In answer to par. 20 these defendants repeat pars. 4 and 5 hereof.

10. These defendants submit that this suit should be dismissed with costs.

The plaintiff joined issue on that defence.

The suit was heard by *Harvey* J., who found substantially in accordance with the facts alleged in the statement of claim, and made a decree declaring that no partnership then existed between the plaintiff and Blackman in respect of the rights in the process or invention in the pleadings mentioned, and that Blackman had no proprietary interest in such process or invention; declaring that there was then no contract made by the plaintiff or the plaintiff and Blackman with Fletcher and Bowen or either of them binding on the plaintiff for the sale of the process or invention; decreeing that the defendants and each of them and the directors, managers and workmen of the Company and each of them should be and they were thereby perpetually restrained from disclosing the process or invention or any portion thereof; decreeing that the defendants and each of them and the directors &c. of the Company should be and they were thereby restrained from using the process or invention or any part thereof; decreeing that the defendants and each of them and the directors &c. of the Company should be and they were thereby perpetually restrained from holding out the defendants or any of them to be the owners or owner of the process or invention; declaring that the plaintiff was not bound to transfer or assign the process or invention to the defendants or any of them in consideration of the issue to the plaintiff and Blackman of the 4,000 shares mentioned in the pleadings or any shares in the Company; and decreeing that the Company should within three weeks rectify the register of members by striking out therefrom the names of the plaintiff and Blackman or the name of the plaintiff as the holders or holder of the 4,000 shares or any portion thereof.

From that decision the defendants the Lion White Lead Ltd., Samuel Bowen and Henry Petrie Fletcher now appealed to the High Court.

Loxton K.C. and *S. A. Thompson*, for the appellants. There was ample evidence of a *consensus ad idem*. The term "working capital" in the agreement included the money or shares representing money given by the Company for what it was purchasing. The evidence shows that on 28th August 1917, when the final agreement was made, it was obvious to all parties that nothing like £25,000 of capital was necessary to work the process. This is an action for a declaration that the contract is at an end, and such an action does not lie unless the other party to it has indicated an intention to be no longer bound by the contract (*Francis* v. *Lyon* (1); *Freeth* v. *Burr* (2); *Halsbury's Laws of England*, vol. VII., p. 439, art. 898).

[RICH J. referred to *General Billposting Co.* v. *Atkinson* (3).]

Even if such an intention was indicated, the breach did not go to the root of the contract, and the only remedy is in damages. Rogers and Blackman had a joint interest in the process. If one person has conceived an idea and another makes that idea articulate, they have joint proprietary rights in a contract made by them with some other person to provide money to carry out the idea which has been so made articulate. Rogers and Blackman were in any event co-contractors, and, the contract being joint, both must join in an action in respect of the contract (*Halsbury's Laws of England*, vol. VII., p. 337, art. 691). If one of the co-contractors will not join in the action, the proper course is for one of them to ask the Court to wind up the transaction. Before an action like the present is brought the co-contractors have to elect whether they will treat the contract as at an end or will sue for damages, and that is a matter which they must determine between themselves with or without the aid of a Court.

[RICH J. referred to *Cullen* v. *Knowles* (4).]

R. K. Manning, for the respondent Rogers. This respondent

(1) 4 C.L.R., 1023, at p. 1035.
(2) L.R. 9 C.P., 208, at p. 213.
(3) (1909) A.C., 118, at p. 121.
(4) (1898) 2 Q.B., 380.

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

could come into a Court of equity and for himself ask for a rescission of the contract (*Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (1)).

The respondents Blackman and Catherine Fletcher appeared to submit to any order the Court might make.

Cur. adv. vult.

Nov. 28.

The following judgments were read :—

BARTON J. Having had the advantage of reading the judgment of my brothers *Isaacs* and *Rich*, which is about to be delivered, I do not propose to state my conclusions at length, as I am in agreement with those at which my colleagues have arrived. I desire, however, to make a few observations on the third question—that is, the competency of the respondent Rogers as sole plaintiff to sue for the relief he seeks.

The plaintiff had the sole proprietary interest in the process which was the subject of the agreement. Blackman was really brought into the agreement for the purpose of securing to him certain remuneration for his services to the plaintiff. The consideration for the agreement was the process, a consideration moving from the plaintiff only. The complaint of the appellants is that Blackman was not made a party plaintiff. As a party defendant he has been before the Court throughout. Blackman was obviously in opposition to the plaintiff from a time not very long after the variation of 28th August ; he refused to sign a paper repudiating the agreement, and indeed is a director of the Company formed in defiance of it, and, as a request for his consent would have been a manifest futility, it is quite plain that Rogers could not have joined him as a co-plaintiff. No doubt, equity requires that all the parties directly concerned should be before the Court. But the plaintiff has not offended against that requirement. Is he, then, to be deprived of his remedy because he has made a defendant of one whom he could not have as a co-plaintiff ? I think such a conclusion would be quite absurd. Of course, Blackman would have been within his right in refusing, as he must have refused, his consent

(1) 69 L.J. Ch., 813, at p. 818.

to be joined. *Bigham* J. (now Lord *Mersey*) says, in *Cullen* v. *Knowles* (1): "The question, therefore, here is whether such refusal prevents his co-promisee from suing at all, or whether he can get over the difficulty by joining the co-promisee who refuses to join as plaintiff, as a defendant." Here there has been no formal request and therefore no refusal: the plaintiff's course has been taken because Blackman's consent is inconceivable. To my mind the absence of consent does not affect the principle in such circumstances. It is impossible for any of the defendants to say that the consent was obtainable. All the parties interested were before the Court, and, once there, the Court was fully entitled to adjudicate. Had the facts admitted of some decree which would have given relief to both the plaintiff and Blackman, it would have been open to *Harvey* J. to pronounce it. But it is through Blackman's conduct in allying himself with Bowen and Fletcher that no such decree was open on the facts.

The appeal must be dismissed with costs.

ISAACS AND RICH JJ. Rogers sued all the other parties to this appeal, substantially claiming that in view of the events that have happened he is entitled to a declaration either (1) that on the true construction of the documents he is not now bound by any agreement of sale of his white lead process, or (2) that if on the true construction of the documents as they stand he is bound, then they should be rectified so as to conform to the actual agreement he entered into, and that on such agreement he is not now bound. There was the usual general prayer for relief. The defendants to the action, except Catherine Fletcher, in a joint defence resisted both specific claims, and denied all right to relief.

The case was heard by *Harvey* J., who made the first declaration asked for, and added ancillary relief specifically claimed. A good deal of oral evidence was taken, including that of Rogers, Blackman, Bowen and Fletcher, and others. The learned Judge said:—"I think Rogers is a truthful witness, though he is anything but a shrewd business man. The recollection of Bowen and Fletcher and Blackman is, in my opinion, not reliable, and I think they have

(1) (1898) 2 Q.B., at p. 381.

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

Isaacs J. Rich J.

deposed to conversations taking place with Rogers which took place behind his back. In my opinion there was a want of frankness on their part in dealing with Rogers."

In view of the direct conflict of testimony which the evidence presents, it is clear that unless some overwhelming circumstances could be pointed to in order to show that the Court's reliance on Rogers was misplaced, his version of the facts must be accepted should it be necessary for him to travel outside the purport of the documents themselves. Learned counsel for the appellants did not suggest any such circumstance, except what was termed the probabilities of the situation. It was urged for the appellants that even accepting the uncontroverted facts they should succeed.

The facts which must govern our decision are contained in the documents themselves and in Rogers's evidence, which is mostly uncontradicted on the material facts, and, where contradicted, must be accepted, having regard to the opinion of the learned Judge on the question of his reliability.

Three questions present themselves for determination, namely, (1) the terms and effect of the contract actually made; (2) the nature of the breach if any; and (3) the competency of the respondent Rogers as sole plaintiff to sue for the relief he seeks.

From the facts in evidence, ascertained as abovementioned, it appears that Rogers was the discoverer of a valuable process of manufacturing white lead, and, though immaterial to the decision of this appeal, it may be observed that it was a process which perhaps he brought to a more satisfactory operation after meeting Fletcher, but which owes almost its whole merit to Rogers himself. He employed Blackman, who informed him that he was a successful company promoter and knew a good many business people of standing in Sydney, to assist him in disposing of his process. The arrangement was that Rogers would give Blackman 40 per cent. of what he was allowed. Blackman never acquired any proprietary interest in the process. So *Harvey* J. found, and from that Blackman has not appealed, and the facts support the conclusion. Blackman's only interest was as Rogers's agent to share his remuneration, and this fact was throughout well known to everybody concerned. Efforts to sell extended over many months. Blackman

brought Fletcher to Rogers in connection with some other matter, and then the process itself was spoken of. Several conversations ensued. Rogers constantly made plain and prominent his belief that £20,000 working capital must be provided by the purchasers.

Eventually, an agreement in writing was drawn up, dated 9th July 1917. It is signed by Rogers and Blackman, and purports to give jointly an option to Fletcher. But Blackman's position being as described, he had, of course, nothing to give, and as the consideration moved from Rogers, his participation was apparently to secure himself with respect to his share of the remuneration which Rogers was to receive. But his joining in the offer did not in fact, as between him and Rogers, give him any right to control the process or the performance of the contract; and Fletcher knew and admitted as much to Rogers. By the terms of the document of 9th July 1917 Rogers, who may for present purposes be regarded as the sole offeror, agreed to give Fletcher an option of purchasing the process, but the document provided in the clearest terms that the purchasers should "guarantee to find £20,000 working capital if required." The document left it to the purchasers themselves to determine whether they would be incorporated or unincorporated. The word "guarantee" is very strong to indicate the importance of the stipulation as to working capital. The expression "if required" is attached, not to "guarantee," but to the words "working capital." The stipulation is preceded by the phrase "terms and conditions," and on the proper construction of the document the stipulation is a true condition that the purchasers must "guarantee," or warrant, that £20,000 for working capital must be forthcoming if that amount should be required for the purposes of the business. And it is equally clear that either manifest inability or unwillingness to provide that capital when the time of performance arrived would be a vital breach of the condition of the offer. The document provided also that if the purchasers decided to incorporate, then additional time should be allowed for the completion of the purchase. The consideration for the sale, apart from the guarantee as to working capital, was to be 20,000 one pound 6 per cent. debenture "shares," which meant simply debentures, and also a royalty of 10 per cent. on net profits, and other terms unnecessary to specify.

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

Isaacs J. Rich J.

On 20th July the option was accepted by Fletcher, and also, separately, by Bowen as Fletcher's principal. A few days later Fletcher informed Rogers that the provision as to debentures was impracticable from a business standpoint, and suggested that, instead of the debentures and 10 per cent. royalty, there should be substituted a 20 per cent. royalty. To this Rogers agreed; and about a week later, Fletcher informed Rogers that the Commonwealth authorities, acting under the *War Precautions Act*, would object to any company if the basis of royalty was adopted, and said that Rogers would have to choose between partnership and shares. He chose "shares" since there was "no alternative," as he supposed from what he was told. Accordingly, the letter of 28th August 1917 was signed addressed to Bowen. On 1st September Bowen by letter closed the matter, intimating also that a company was to be registered. The additional time referred to in the letter of 9th July then commenced, and ended on 17th October, when the Company was registered, as hereinafter mentioned.

Throughout, according to Rogers's evidence, he insisted on retaining the obligation of the purchasers to see that £20,000 working capital should be provided. The letter of 28th August is quite consistent with that, provided it be remembered that Rogers was not himself contracting or proposing to contract with a company formed or to be formed, but with Bowen and anyone associated with him; and it was to him or them that Rogers looked to see that the company if formed had £20,000 working capital. If Bowen or his friends paid to the company they formed cash for whatever shares they handed paid up to Rogers, the two conditions could stand together. But Bowen did not disclose to Rogers that he contemplated selling, as his own and independently, to a company which he was proposing to treat as an independent purchaser, and represented by another person as trustee in that company, the process in return—not for cash—but for 10,000 paid up shares, leaving only 10,000 shares to be paid for in cash, if indeed they were taken up. This, however, he did on 17th October, a person named Barry being the ostensible purchaser for the company to be formed. The Company was registered on 19th October. On 20th October—the next day—the Company by agreement with Bowen formally

adopted the agreement and became the legal purchaser from Bowen so far as it could under the terms of the agreement of 17th October. But up to 10th December 1917, at all events, no shares were issued except Bowen's 10,000 and 250 others. As the shares were one pound shares, it is evident that Bowen as the purchaser could not guarantee, and never intended to fulfil a guarantee, that £20,000 working capital would be forthcoming if required, and, further, it is plain that there could not, even if all the remaining shares had been applied for and allotted, be in any real business sense £20,000 working capital. Doubtless there is power under the *Companies Act* 1899 and the articles of this Company to increase the capital. But that has not been done, and may never be done ; and the Company is under no contractual obligation to any person to do it. Besides, a special resolution, even if passed, would not in itself provide the capital : the shares might not be taken up. That this is not a merely theoretical consideration is further shown by the fact that even as late as February 1918, when the defence was put in, there were only 5,637 shares applied for " issued as fully paid up " (whatever that means)—par. 7 of the defence—in addition to the 10,000 Bowen shares.

Again, Rogers's agreement of 28th August was to get a 20 per cent. interest in the Company, and it would raise a very serious question whether he would not be entitled to have allotted to him fully paid for shares to maintain his proportional interest in the full capital of the Company. In any event, the attitude assumed by the defendants, in the action, was that they were not bound to provide £20,000 working capital; they refused to do so, and the breach was complete.

Consequently, construing the documents by the light of the relations in which the parties stood to each other, the condition as to guaranteeing £20,000 working capital was broken, and it is fundamental as it stands in the document of 9th July. Even supposing in favour of the appellants—a violent supposition—that the 20 per cent. remuneration ultimately agreed to was *pro tanto* a modification of the requirements of £20,000 working capital, that would leave the requirement still standing as to 80 per cent., and would require

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

Isaacs J. Rich J.

£16,000 working capital to be provided, which is also a fatal deviation. But if, going further, the strict construction of the letter of 28th August would bind Rogers to present arrangements, the evidence he gives, both alone and supported by his attitude as deposed to by Sir Allen Taylor, makes it quite clear that he was persistent in adhering to the requirement of £20,000 working capital, and that both Fletcher and Bowen must be taken on the evidence as tacitly agreeing to this, and in that case the document should be rectified accordingly, so as to accurately represent the contract actually made.

The real position, however, is that Bowen's sale to the Company on 17th October 1917, as already pointed out, is *ultra* the position of Rogers, and that Bowen, whatever he chose to arrange between himself and the Company, was bound to see (1) that Rogers got 20 per cent of the share capital and (2) that the Company provided £20,000 as working capital. If that were not so, Bowen could, if he had chosen, have fixed his own consideration at 16,000 shares less a sufficient number to constitute the Company, and so he could have left the Company without any means of working the process, but in possession of the process, for which Rogers would ultimately receive nothing. That position is too absurd for contemplation.

It was argued that the failure to comply with the stipulation as to £20,000 working capital was not fundamental, but at most a subject for damages, and that no substantial sum would in the circumstances be awarded. The rule of law applicable to this particular branch is that where the thing tendered as the consideration differs essentially from the thing contracted for, there is a failure of consideration, and the bargain is at an end (*Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1)). A company with only £5,637 of working capital, and not only so, but with 10,000 shares issued as paid up and participating in dividend though not contributing to capital, is essentially different from a company having £20,000 of working capital and formed merely of those who have bought the process for no consideration but that paid and payable to Rogers himself, which was the plain object of the option.

(1) L.R. 2 Q.B., 580.

Questions 1 and 2 must, therefore, be answered adversely to the appellants.

The third question, namely, Rogers's status in suing alone, is an interesting one. Learned counsel put the matter thus:—There were two joint contractors, Rogers and Blackburn, and whatever their respective proprietary rights might be, they were still joint contractors. Consequently, it was said, they must agree between themselves whether they would elect to affirm or to disaffirm the contract; in other words, whether they would sue for damages on the basis of transferring the process, or would sue for rescission on the basis of keeping it. The position, however, though somewhat novel, seems clear in principle. If A and B jointly agree with C, and if C announces, before the normal moment of performance arrives, that he renounces the contract, it is competent for A and B jointly to accept that renunciation, and to terminate the contract. But that is a new agreement, and requires the assent of all. A may refuse, and, if so, B and C must abide by the bargain until the time for actual performance arrives. The contract may or may not then be normally performed. But once that time has arrived, if C commits an actual breach going to the root of the bargain, A has a right, by virtue of the contract already made, to say he will not proceed further, and he may refuse notwithstanding B's desire to waive his rights and proceed. The same necessity of a new bargain which in the case first put prevents A from altering the existing position prevents B in the second case from affecting A's accrued rights. It is the second case that arises here. The time for performance having arrived and an actual fundamental breach having occurred, Rogers is entitled to say "I will not proceed further. There is nothing to compel me." Bowen cannot affect Rogers's rights in that regard, and Bowen has no right to compel Rogers to agree to what Blackman may desire. Blackman, who is a director of the appellant Company and who as such director agreed to adopt Bowen's sale to the Company, and who is interested in sharing whatever Rogers might be paid for transferring his process, naturally does not join Rogers in this action. But his wish is immaterial unless Rogers concurs. Rogers, having joined all parties interested in the suit, had a right to ask a Court of equity to declare, in the

H. C. OF A. 1918.

LION WHITE LEAD LTD. v. ROGERS.

Isaacs J. Rich J.

circumstances as they existed when he commenced his proceedings, that he was not bound to proceed further with the transaction. Having established his necessary facts, his status is clear. The case of *Cullen* v. *Knowles* (1) is a clear authority.

In the result, the appeal should be dismissed with costs.

[*Note.*—As to the third question see per Lord *Wrenbury* in the case of *Bradley* v. *Newsum, Sons & Co. Ltd.* (2), the report of which was not available to us until after this judgment was delivered.—*I.A.I. G.E.R.*]

Appeal dismissed with costs.

Solicitor for the appellants, *R. W. Fraser.*

Solicitors for the respondents, *Pigott & Stinson*; *Dodds & Richardson*; *R. W. Fraser.*

B. L.

(1) (1898) 2 Q.B., 380.

(2) 119 L.T., 239, at p. 250.

Aff *Commonwealth v Hazeldell Ltd* (1921) 29 CLR 448

Foll *Securities Exchanges Guarantee Corp v Aird* (2001) 38 ACSR 185

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANTS; DEFENDANTS,

AND

HAZELDELL LIMITED . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *Nov.* 19, 20; *Dec.* 5.

Griffith C.J., Gavan Duffy and Rich JJ.

Land—Acquisition by Commonwealth—Compensation—Minerals—Reservation of all minerals in Crown grant—Right of public to mine for "all minerals"—Substance proclaimed a mineral—Limestone—Lands Acquisition Act 1906 (*No.* 13 *of* 1906), *secs.* 26, 37—*Crown Lands Alienation Act* 1861 (*N.S.W.*) (25 *Vict. No.* 1), *secs.* 13, 18—*Crown Lands Act* 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 2, 4, 5, 6, 7—*Mining Act* 1906 (*N.S.W.*) (*No.* 49 *of* 1906), *secs.* 3, 45, 46.