

Appl
Telaga
Developments
Pty Ltd v Slay
Enterprises
Pty Ltd [1984]
20dR 585

Cons
Perm v
Coolangatta
Investments
Pty Ltd 149
CLR 537

[HIGH COURT OF AUSTRALIA.]

MAYNARD APPELLANT;
DEFENDANT,

AND

GOODE AND ANOTHER RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Vendor and Purchaser—Contract of sale—Specific performance—Conditions precedent or subsequent—Waiver—Time essence of contract—Performance within reasonable time—Readiness and willingness. H. C. OF A. 1925-1926.

G. and his sons, one of whom was an infant, held a block of land under the provisions of the *Closer Settlement Acts* (N.S.W.). They could not acquire other land under those Acts except with the consent of the Minister for Lands; and in order to enable them to obtain that consent it was necessary for them to divest themselves of their interest in the block which they then held. G., having entered into an agreement to sell that block to A., on 1st February 1924 agreed to purchase from C. another block of land under those Acts upon the terms:—"That the Department postpones two rents of £211 16s. 10d. each until the end of the term of money due to Crown. And providing that the transfer of purchaser's block goes through in reasonable time." The contract also provided that possession should be given on 7th March 1924. In February 1924 C. repudiated the contract of 1st February 1924 and entered into an agreement to sell the same block to M. On 23rd May 1924, G.'s infant son having then attained his majority, the transfer to A. of the block sold to him by G. was executed and on 22nd July 1924 was finally completed by registration. In a suit by G. against C. and M., commenced on 19th May 1924, for specific performance of the agreement of 1st February 1924,

Held, (1) that the stipulation in the contract relating to the postponement of payment of rent was for the benefit of C. and might be and had been waived by him; (2) that the stipulation relating to the transfer of G.'s block going

SYDNEY,
Nov. 9, 10,
1925; April
9, 1926.
Knox C.J.,
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through in a reasonable time was not a condition precedent, but a condition subsequent, and had been performed ; (3) that time was not of the essence of the contract and that the transfer of G.'s block to A. had gone through in reasonable time ; (4) that G. was ready and willing to perform the contract ; and, therefore, (5) that G. was entitled to specific performance.

Decision of the Supreme Court of New South Wales (*Long Innes J.*) affirmed with a variation.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by George David Goode against David Crosby and Charles Maynard in which the statement of claim was substantially as follows :—

1. By a contract in writing dated 1st February 1924 the defendant Crosby agreed to sell and the plaintiff to purchase the land known as " Cairnton " situated three miles from Tarcutta containing about 1,455 acres of soldiers settlement land at the price of £4 2s. 6d. per acre on a freehold basis upon the following terms : " That the Department postpones two rents of £211 16s. 10d. each until the end of the term of money due to Crown and providing that the transfer of purchaser's block goes through in reasonable time and the purchaser now pays £20 into the hands of the agents to be held as stake money." The Department referred to is the Department of Public Lands for the State of New South Wales and the defendant is described in the records of the said Department as the registered owner of Soldiers' Group Purchase No. 1919/17 which comprises the said land. The purchaser's block referred to is land of which the plaintiff was then the owner.

2. Other terms of the said contract were that the said defendant would within a reasonable time prepare and deliver to the plaintiff or his solicitor or agent particulars of his title and would give the plaintiff possession of the said property on or before 7th March 1924.

3. The plaintiff duly paid the said sum of £20 to Tapscott Brothers who were the agents hereinbefore referred to and the transfer of the plaintiff's own land referred to in the first paragraph from the plaintiff to the purchaser thereof was duly registered within a reasonable time from the date of the said contract.

4. Shortly after the said 1st February 1924 the said defendant informed the plaintiff that he would not carry out the contract

hereinbefore stated and that he had since the said date agreed to sell the said land to the defendant Charles Maynard.

5. The defendant Charles Maynard has since taken possession and is still in possession of the said land and the defendant and the said Charles Maynard have applied to the Minister for Public Lands pursuant to the *Crown Lands Consolidation Act* 1913 and the *Returned Soldiers Settlement Act* 1916 and the amendments thereof and the Regulations thereunder to consent to a transfer by the defendant Crosby to the defendant Maynard of the said land which transfer the defendants allege was recently executed by them purporting to act in performance of their alleged agreement referred to in the fourth paragraph.

6. The plaintiff has frequently requested the defendant Crosby to carry out the contract referred to in the first and second paragraphs and to execute a proper transfer to the plaintiff of the said land and join with the plaintiff in applying to the said Minister to consent to the said transfer and has always been and still is ready and willing and hereby offers to perform the said contract on his part as far as the same remains unperformed by him but the said defendant has refused and still refuses to carry out the said contract and deliver the particulars of his title as aforesaid and execute a transfer and join with the plaintiff in applying as aforesaid.

6A. The plaintiff has recently discovered and it is the fact that at the time of the making of the agreement (if any) referred to in the fourth paragraph and before the execution of the transfer referred to in the fifth paragraph the defendant Maynard was well aware that the said land was subject to the contract referred to in the first and second paragraphs.

7. The plaintiff fears that unless the defendants and each of them are and is restrained by the order of this Honourable Court the defendants will procure the transfer to the defendant Maynard of the said land to the detriment of the plaintiff.

The plaintiff claimed (*inter alia*) :—

(1) That it may be declared that the agreement referred to in the first and second paragraphs ought to be specifically performed and that the same may be decreed accordingly ;

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(2) That in addition to or in lieu of specific performance of the said agreement the defendants may be ordered to pay to the plaintiff jointly and severally the damages which the plaintiff has sustained by reason of the said refusal of the defendant Crosby to perform his said agreement and that it be referred to the Master in Equity to inquire what is the amount of such damages ;

(5) That the defendants and each of them may be ordered to withdraw the application to the Minister for Public Lands referred to in the fifth paragraph and may be restrained from proceeding with the said application and transfer to the defendant Maynard and may be restrained from selling mortgaging alienating or otherwise dealing with the said land except under the direction of the plaintiff and that the defendant Crosby may be ordered to sign and otherwise complete an application in the prescribed form to the said Minister for permission to transfer the said land by way of sale to the plaintiff and a transfer to the plaintiff and all other documents necessary to vest the said land in the plaintiff.

The suit was heard by *Long Innes J.*, who made a decree declaring that the agreement sued on ought to be specifically performed and ordering accordingly ; ordering an inquiry as to the damages sustained by the plaintiff by reason of Crosby's refusal to perform the contract and payment of the amount found on such inquiry ; ordering both defendants to pay the plaintiff's costs of the suit ; allowing a set-off of costs and damages against the unpaid purchase-money ; ordering that, on payment by Goode to Crosby of the balance of purchase-money owing under the contract, the defendants should execute all such documents as might be necessary to divest them of their respective interests ; restraining the defendants until further order from proceeding with the transfer of the land to Maynard ; and reserving further consideration and liberty to apply.

From that decision Maynard now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Loxton K.C. (with him *Davidson*), for the appellant. The provision as to payment of rent to the Crown being postponed was not for the benefit of Crosby only, but in the circumstances was for the benefit of Goode also, and therefore it could not be waived by

Crosby. The provision as to the transfer of Goode's block going through in reasonable time was a condition precedent (*Williams v. Brisco* (1); *Frost v. Knight* (2); *Johnstone v. Milling* (3)), and on the evidence the transfer did not go through in a reasonable time. [Counsel referred to *Returned Soldiers Settlement Act* 1916 (N.S.W.) (No. 21 of 1916), secs. 6, 7; *Returned Soldiers Settlement (Amendment) Act* 1917 (N.S.W.) (No. 24 of 1917), secs. 4 (b), 8; *Returned Soldiers Settlement (Amendment) Act* 1919 (N.S.W.) (No. 51 of 1919), sec. 4; *Returned Soldiers Settlement (Amendment) Act* 1922 (N.S.W.) (No. 5 of 1922), sec. 2; *Crown Lands Consolidation Act* 1913 (N.S.W.) (No. 7 of 1913), secs. 259, 260, 261, 272.]

[HIGGINS J. referred to *Stickney v. Keeble* (4).]

As Goode did not treat the repudiation of the contract by Crosby as an anticipatory breach, it was necessary for him to prove his readiness and willingness at all times to perform his part of the contract (*Ellis v. Rogers* (5); *McDonald v. McMullen* (6); *King v. Poggioli* (7)). By reason of the infancy of Goode's son, Goode could not say that he would be able, when the time came, to perform his contract; that shows an absence of readiness and willingness to perform the contract (see *Brewer v. Broadwood* (8)). The action was premature because at the time it was brought—that is, before the son attained his majority—the liability of Crosby had not become absolute. The relation of vendor and purchaser had not then arisen.

[ISAACS J. referred to *Brickles v. Snell* (9).]

This case is not one for specific performance but for damages; for the Minister, whose consent to the sale is necessary, cannot be controlled by the Court.

Maughan K.C. (with him *Power*), for the respondent Goode. The Court can make a decree for specific performance although eventually the contract will not be carried out. The law does not prevent the contract being made. The order for specific performance was properly made. [Counsel referred to *Ellis v. Rogers* (10).]

Cur. adv. vult.

(1) (1882) 22 Ch. D. 441, at p. 447.

(2) (1872) L.R. 7 Ex. 111.

(3) (1886) 16 Q.B.D. 460.

(4) (1915) A.C. 386.

(5) (1884) 50 L.T. 660, at p. 661.

(6) (1908) 25 N.S.W.W.N. 142.

(7) (1923) 32 C.L.R. 222.

(8) (1882) 22 Ch. D. 105.

(9) (1916) 2 A.C. 599.

(10) (1885) 29 Ch. D. 661.

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The following written judgments were delivered :—

KNOX C.J. This is an appeal from a decree for specific performance of a contract for the sale of a group settlement purchase taken up by the respondent Crosby under the *Returned Soldiers Settlement Acts*.

The contract was dated 1st February 1924 and made between the respondent Crosby as vendor and the respondent Goode as purchaser and, so far as now relevant, is in the words following :—

“The vendor agrees to sell and the purchaser agrees to purchase all that piece of land known as ‘Cairnton’ situated three miles from Tarcutta containing about 1,455 acres of soldiers settlement land for the sum of £4 2s. 6d. per acre on freehold basis upon the following terms :—That the Department postpones two rents of £211 16s. 10d. each until the end of term of money due to Crown. And providing that the transfer of purchaser’s block goes through in reasonable time. And the purchaser now pays £20 into the hands of the agents to be held as stake money.” It contains no provision that time shall be of the essence of the contract, and no dates are specified for delivery of abstract of title or objections, but it provides that possession is to be given on or before 7th March 1924. The land agreed to be sold could not be transferred to the purchaser except with the consent of the Minister, and in order to obtain that consent it was necessary for the purchaser to divest himself of his interest in certain other land held by him jointly with his two sons, one of whom was at the date of the contract an infant. This son attained the age of twenty-one shortly before 23rd May 1924. In December 1923 one Angel had agreed to buy this last-mentioned parcel of land from the respondent Goode and his sons, possession to be given on 1st March 1924, and it is common ground that the stipulation that the transfer of purchaser’s block should go through in reasonable time refers to the transfer of this land to Angel. The evidence establishes that early in the month of February 1924 Crosby refused to carry out his contract with Goode, and that on the 11th of that month he entered into an agreement to sell the land the subject of that contract to the appellant. On 28th February 1924 Goode and his two sons executed transfers under the *Real Property Act* and the *Crown Lands Consolidation Act* in favour of Angel of the land sold by them to him. On 11th March Angel paid his purchase-money and

was put in possession. The transfer under the *Real Property Act* was lodged for registration on 11th April but rejected by the Registrar-General on the ground that one of the transferors was an infant. On 23rd May 1924 this transfer was re-executed, the son having attained his majority, and it was duly registered on 18th June 1924. The transfer to Angel under the *Crown Lands Consolidation Act* was lodged on 26th June 1924 and registered in the office of the Registrar-General on 22nd July 1924.

On 19th May 1924 respondent Goode began a suit in equity against Crosby for specific performance of the contract of 1st February, and on 14th June 1924 the present appellant was added as a defendant. On the hearing of the suit *Long Innes J.* made a decree (1) declaring that the contract sued on ought to be specifically performed and ordering accordingly ; (2) ordering an inquiry as to damages sustained by the plaintiff by reason of Crosby's refusal to perform the contract and payment of the amount found on such inquiry ; (3) ordering both defendants to pay the plaintiff's costs of the suit ; (4) allowing a set-off of costs and damages against the purchase-money ; (5) ordering that, on payment by Goode to Crosby of the balance of purchase-money owing under the contract, the defendants should execute all such documents as might be necessary to divest them of their respective interests (if any) in the land the subject of the contract and to enable the land to be transferred to the plaintiff if the Minister should approve of the plaintiff as a transferee of the same ; (6) restraining the defendants until further order from proceeding with the transfer of the land to the appellant, and (7) reserving further consideration with liberty to apply.

Mr. *Loxton* stated the grounds on which he founded his attack on this decree as follows : (1) That the stipulation contained in the contract relating (a) to the postponement of payment of rents and (b) to the transfer of Goode's block going through in reasonable time were true conditions precedent—that is to say, that Crosby incurred no obligation to carry out the contract until these conditions had been performed ; (2) that time was of the essence of the contract, and (3) that if time were not of the essence of the contract the transfer of Goode's block had not gone through within a reasonable time.

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In my opinion none of these grounds of objection can be sustained. I agree with *Long Innes J.* in thinking that the stipulation relating to postponement of payment of the rents, whether a condition precedent or not, was a term solely in favour of the plaintiff which he could waive if he wished. It is not disputed that the plaintiff did in fact waive it.

With regard to the stipulation as to the transfer going through within a reasonable time, I think it is clear on the construction of the contract that this was not a condition precedent. It provides that the performance of the contract shall be subject to the happening of an event which is to happen, if at all, at a future time which cannot be precisely specified. Unless that event happens neither party is to be compelled to perform the contract in its entirety, the promise of each being subject to or defeasible upon the condition expressed. According to *Anson on Contracts*, 8th ed., at p. 339, such a condition is a condition subsequent. The contract provides for possession being given on 7th March, and it would be absurd to construe it as giving no right to possession unless the condition had been performed before that day.

With regard to the second objection it is enough to say that, in the absence of any stipulation that time shall be of the essence of the contract, there is nothing in the circumstances to justify the conclusion that the parties intended that time should be essential.

The third objection, in my opinion, fails because in all the circumstances of the case the transfer of Goode's block to Angel did go through within a reasonable time.

It was also contended that the respondent Goode was not ready and willing to perform the contract on his part. On this question I agree with the learned trial Judge both in his conclusion and in the reasoning by which it is supported.

In my opinion the appeal fails, but a mistake appears to have been made in drawing up the decree which it is proper to correct. The decree provides for the execution by the defendants of the necessary documents on payment to the defendant Crosby of the balance of purchase-money. I do not think the purchase-money should be paid to Crosby until it is certain that the Minister will approve of the plaintiff as a transferee. The proper order, in my

opinion, is that, on payment into Court of the balance of the purchase-money after the set-off and deduction mentioned in the decree, the defendants should execute the necessary documents. The decree should be varied accordingly and the appellant should pay the costs of the appeal.

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ISAACS J. The points insisted on for the appellant were (1) that in February 1924 Crosby had rightfully put an end to the contract by repudiation or by sale to appellant; (2) that apart from repudiation both or one of two stipulated conditions precedent to the creation of the relation of vendor and purchaser had not been fulfilled, and (3) that at the date the suit was commenced Goode was not ready and willing and could not truthfully say he was ready and willing to perform the second condition precedent. The first essential is to read and understand the bargain as it stands in writing. This is a suit for specific performance, and therefore susceptible to the special jurisdiction and doctrines of equity. But the law as to the formation and the construction of the contract and as to its dissolution by acts of the parties is the same both in law and equity.

The contract is an agreement to sell and to purchase 1,455 acres of soldiers settlement land for £4 2s. 6d. per acre on freehold basis "upon the following terms"—and then follow the two stipulations referred to. The first is "That the Department postpones two rents of £211 16s. 10d. each till the end of term of money due to Crown," and the second is "And providing the transfer of purchaser's block goes through in reasonable time." In my opinion, the effect of those stipulations is this:—As to the first, it is wholly for the benefit of the purchaser; and it means that, unless he can have the benefit of the two instalments in arrear being deferred, he need not proceed with the purchase. His obligation—if the matter goes on to effective conveyance—is to pay £4 2s. 6d. per acre, that is, £6,001 17s. 6d. on a freehold basis. But as the land is to be paid for to the Crown by annual instalments of £211 16s. 10d. until £3,530 13s. 7d. has been paid, that is, in $16\frac{2}{3}$ years, the amount to be paid direct to Crosby would be £6,001 17s. 6d. less whatever was at the date of transfer owing to the Crown. If not deferred, the two instalments would be so much more immediate outlay by Goode but no benefit

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to Crosby. The relation of the stipulation to the rest of the bargain, therefore, is that it is in the nature of a condition subsequent in favour solely of Goode and susceptible of being renounced by him. But it in no way prevents the immediate obligation of vendor and purchaser arising, subject to its own operation at Goode's option. And he has waived it, as he might. As to the second stipulation I agree that it was for the benefit of the vendor—whether solely for his benefit is immaterial. The effective part of the stipulation is the expression “in reasonable time.” The vendor obviously would not be willing to wait an unreasonable time to see whether he could effectually dispose of his valuable interest and get free of his annual obligations to the Crown. This stipulation, therefore, Crosby was entitled to insist upon as a condition subsequent, the non-fulfilment of which would, in strict law and, as I interpret it, also in equity, entitle him to be discharged from further obligations under the contract. The first question then, and perhaps the only question as to this point, is whether the stipulation was fulfilled. The learned primary Judge held it was fulfilled. I agree with him. The question of what is “reasonable time” is always relative; that is, it means “a reasonable time under the circumstances” (*Postlethwaite v. Freeland* (1) and *Hick v. Raymond* (2)). There is no difference as to this in law or equity. The consequence of a departure from compliance may have very different results in the different jurisdictions. The conduct of one of the parties may render it unfair for him to profit by the failure of the other to adhere to the requirement of the contract as to time, whether definitely fixed or indefinitely stated as “reasonable” (*Stickney v. Keeble* (3)). But that does not affect the question of whether or not the requirement is complied with in point of fact or law. It concerns merely the result. Construction of the contract is not affected by circumstances subsequent, but only by those which are contemporaneous with its creation. What, then, were those circumstances here? Crosby was certainly four or five years in arrear, but there was no threat of forfeiture or pressure of any kind suggested. The fact that the stipulation was left indefinite in point of time strongly indicates

(1) (1880) 5 App. Cas. 599, at pp. 608, 621.

(2) (1893) A.C. 22, at pp. 30, 36.
(3) (1915) A.C. 386.

the absence of special importance being attached to time. It would have been easy to fix a limit. The transfer of the purchaser's block, though the terms of Goode's contract were not disclosed to Crosby and are not fully disclosed now, was necessarily subject to the requirements of the *Crown Lands Acts* and Regulations. Sec. 261 of the Act of 1913 (No. 7) imposes certain restrictions, and the transferee must be qualified. Both parties, therefore, knew that official procedure was necessary, with, possibly, unexpected delay. They must have contemplated that delivery of possession might take place before the purchaser's block was transferred in law. Possession was to be given "on or before the seventh day of March 1924." Looking, for this purpose, at the position of the parties as they reciprocally stood on 1st February 1924, the date of the contract, the words "in reasonable time" should be interpreted as meaning within such time as might enable the purchaser with ordinary despatch to comply with any possible requirements of the law and administration of the *Crown Lands Acts*, but not such delay as to cause or threaten prejudice to the position of the vendor under the contract. The transfer was actually registered on 18th June 1924. The circumstances establish a bona fide endeavour to get it through much earlier, but the exigencies of law and official requirements brought the matter down to the date mentioned. The position of the vendor was not actually or potentially affected by the lapse of time, and the stipulation should therefore be held, as *Long Innes J.* held, to have been substantially performed. It follows that at no time could the vendor lawfully repudiate. The appellant's first point fails even as a matter of strict law.

The matter, however, may not rest there. I think, as I have said, that "reasonable time" connotes as a limit the unfairness of further delay to the vendor. If that is right, the legal and the equitable standard is the same. If, however, a more rigid legal standard is to be applied to the construction of the words, something further may be necessary. If, for instance, as urged, Goode must be regarded as the only contemplated transferor and, therefore, unable to call in aid the minority of John Edgar Evel Goode as a valid element in the measure of reasonable time, then the contention becomes a claim for strict time limit. In that case the equitable

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doctrine of time not being primarily of the essence would apply, because there are no reasons for displacing it (*Tilley v. Thomas* (1)).

Whichever way this point is viewed, it fails.

The second point is, in effect, already dealt with. In justice to Mr. *Loxton's* very earnest argument I would add the following observations. Learned counsel pressed greatly the view that since the stipulations, and particularly the second, were conditions precedent, the relation of vendor and purchaser could not arise until their fulfilment. But a condition precedent may have that effect, and it may not. We must ask the question "Precedent to what?" If it is precedent to the agreement being operative as a contract, it is of the nature urged by Mr. *Loxton*. *Davis v. Jones* (2), *Pym v. Campbell* (3) and *Pattle v. Hornibrook* (4) are instances of this.

But it may be a condition precedent to the performance of a particular term of the contract, which is of common occurrence. The case relied on, *Williams v. Brisco* (5), is in one aspect an illustration of this. In one sense the second stipulation is of that nature, because there was no obligation on Crosby to transfer unless Goode first transferred his holding in reasonable time. But in another sense it is—as is the other stipulation also—a condition subsequent in relation, not to a particular term, but to the whole contract, as a binding obligation, that is, as a defeasance, because failure of the first stipulation entitled the purchaser, if he had chosen, and failure of the second would have entitled the vendor, to retire from the transaction altogether. Whether any form of words so operates depends, as was said by *Ashhurst J.* in *Hotham v. East India Co.* (6), on "the nature of the transaction."

The third question involves the necessity of a clear apprehension of what a plaintiff must aver in such a case. Every plaintiff suing at law on a special contract must aver, and, if the averment be denied, must prove, that he has performed or has been excused from performing all things precedent, and that he is ready and willing—which includes ability—to perform all things concurrent or subsequent which the contract binds him to perform (*Cohen & Co.*

(1) (1867) L.R. 3 Ch. 61.

(2) (1856) 17 C.B. 625.

(3) (1856) 6 El. & Bl. 370.

(4) (1897) 1 Ch. 25.

(5) (1882) 22 Ch. D. 441.

(6) (1787) 1 T.R. 638, at p. 645.

v. Ockerby & Co. (1)). Equity in cases of specific performance demands the same of a plaintiff, except that it limits the obligation to essentials. Mr. *Loxton* urged that at the time the suit was instituted, namely, 19th May 1924, not only was the transfer of Goode's block not through, but a necessary party to the transfer, namely, John Edgar Evel Goode, was a minor and was under no obligation to join. This establishes, it is contended, a failure to show the necessary readiness, that is, ability, to perform the condition stipulated. The answer is that readiness and willingness are averred, that the time for performance had not expired, and the averment was proved by the confirmation of the transfer on 23rd May by John Edgar Evel Goode, who then had attained his majority. That there is no such rigid rule as is contended for is shown by the case of *Brickles v. Snell* (2).

The appellant, therefore, fails to show a right to succeed. But, though there is no cross-appeal or other notice, there is a manifest error in drawing up the decree, not in any way attributable to the actual judgment of the learned primary Judge. This should be corrected in the way proposed by the Chief Justice.

HIGGINS J. I concur in the opinion that this appeal must be dismissed. I cannot accept Mr. *Loxton's* contention that the relation of vendor and purchaser did not arise under the contract until the transfer of Goode's block to Angel should have been completed by registration of the transfer. The completion of the transfer was not a condition precedent to the operation of the contract. Clause 1 of the contract was distinctly in operation—"The vendor will within a reasonable time *after the day of sale*" (1st February 1924) "prepare and deliver to the purchaser . . . particulars of his title"; and on that day of sale (the day of the contract) the purchaser paid £20 to the agents to be held as stake money. To paraphrase the language of the contract as I understand it, the vendor says:—"As you cannot, under the law applicable to soldiers settlement land such as mine, get my land transferred to you until you get rid of your own block, there must be some reasonable limit to the time you take in doing so. I do not know anything

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(1) (1917) 24 C.L.R. 288, at p. 298.

(2) (1916) 2 A.C. 599.

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about your contract to sell your block to Angel, or who must concur in the transfer : so we must provide that, if I am to be kept bound by my contract with you, the transfer of your block must go through—be completed—within a reasonable time ; and if you should, from whatever cause, fail to get the transfer of your block completed, I must be at liberty to declare our bargain off.” The words of the contract are quite consistent with this view ; and the provision in clause 1 for production of particulars of Crosby’s title without regard to the completion of the transfer to Angel, is inconsistent with any other view. In other words, the proviso as to the transfer of the purchaser’s block going through in reasonable time cannot be treated as a condition precedent. In this contract there are no words to indicate that the completion of this transfer was to be prior in order of time to the operation of Crosby’s contract to sell ; and the proviso in question requires something to be done which will necessarily take time—which is always treated as a strong indication against a condition precedent (see *Theobald on Wills*, 5th ed., p. 492 ; *Pordage v. Cole* (1)). Indeed, the Courts always object to treat words as imposing a condition where a different effect can fairly be given to them.

Then we have to consider whether the transfer of the purchaser’s block was completed in reasonable time. The contract Crosby to Goode was made on 1st February ; the transfer of such part of the purchaser’s block as was under the *Real Property Act* was registered on 18th June—the transfer of such part as was under the *Crown Lands Consolidation Act* 1913 was registered on 22nd July—all in 1924. I do not see any justification for saying that this completion was not within a reasonable time from the contract Crosby to Goode ; and, besides, I strongly think that a right to put an end to the contract or to refuse to perform it would not arise thereunder automatically without some warning notice from the vendor, fixing a reasonable limit of time for completion. If in place of the words “ in reasonable time ” some definite date were fixed by the contract, it is clear that the vendor could not treat the contract as at an end merely because that date had been passed without giving such a notice (*Taylor v. Brown* (2) ; *Stickney v. Keeble* (3) ; *Fry on*

(1) (1669) 1 Wms. Saund. 319f, at p. 320.

(2) (1839) 2 Beav. 180.

(3) (1915) A.C. 386.

Specific Performance, 6th ed., pp. 510-511). I am speaking, of course, of contracts in which time is not made of the essence of the contract; and time was not made of the essence here. So little was time regarded that in clause 3 the parties failed to fix a date even for objections to title, or to fix a date for tender of the transfer for execution. If under the practice of Courts of equity the passing of a date fixed for the completion of the transfer Goode to Angel would not defeat the purchaser's claim for specific performance, without a special warning notice, a fortiori delay when no date is fixed, mere delay, without such a notice would not, in my opinion, defeat the claim.

But this suit was instituted on 19th May, before the transfers to Angel were registered, and it is urged that at the institution of the suit, 19th May 1924, Goode was not "ready" as well as "willing" to transfer to Angel. It appears that the block to be transferred to Angel was in the name of Goode and his two sons; that one of the sons did not attain twenty-one till May; that on 23rd May, after attaining twenty-one, that son re-executed the transfers to Angel; that the transfer of the land under the *Real Property Act* was not registered till 18th June and the transfer of the land under the *Crown Lands Consolidation Act* was not registered till 22nd July. Strictly speaking, therefore, Goode was not able to transfer to Angel till after the suit was instituted, and, so far as appears, he was not in a position to compel the sons to transfer. But it is sufficient for the purpose of this action to say (omitting other considerations) that the rule as to alleging and proving readiness of the plaintiff to carry out his contract applies, so far as it is applicable, to the contract Crosby to Goode, not to the contract Goode to Angel. Goode, as plaintiff, has to show, in his suit against Crosby, that he was ready and willing to carry out the contract with Crosby *according to the terms of that contract*; and his only obligation under that contract was to procure the result, by some means, by any means, that the transfer of the block to Angel "goes through"—is completed—in reasonable time. And the transfer has been completed in reasonable time, as I have stated.

No objection has been taken by the appellant to that part of the decree which, in addition to the declaration and order for specific

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Higgins J.

H. C. OF A. performance, orders an inquiry as to the damages sustained by the
1925-1926. refusal of Crosby to perform his agreement.

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v.

GOODE.

—
Higgins J.

The decree as drawn up directs, substantially, the defendants to do all in their power to enable the land of Crosby to be transferred to the plaintiff if the Minister of Lands approve of the plaintiff as transferee; but, under this direction, this obligation imposed on the defendants is to arise only *upon payment* by the plaintiff to Crosby of the whole of the purchase-money (after certain deductions). Probably Mr. *Maughan* is right in saying that the minutes drawn up by the learned Judge do not warrant the insertion of such a condition; but we have to deal with the formal decree as it stands. Why should the plaintiff pay to the vendor the purchase-money before it is known that the Minister will approve of the plaintiff as transferee? Personally, I see no substantial objection to the course proposed by the Chief Justice—that the decree be varied by ordering the money to be paid into Court in the meantime. As to the injunction against proceeding with the transfer to Maynard, it is to last only “until further order”; and if the Minister should refuse the transfer to Goode the injunction can be dissolved.

Maynard joined with Crosby in the defence; and under all the circumstances he should be made liable to the same costs as Crosby.

RICH J. The first question raised by Mr. *Loxton* relates to the construction of the agreement. In my opinion, the completion of the transfer of the respondent's land to Angel is not a condition precedent to the operation of the agreement the subject to this appeal. I agree with the construction adopted by the learned primary Judge. Furthermore, I am unable to accede to the suggestion that the nature of the property dealt with makes time of the essence of the contract. And I consider that, having regard to all the circumstances, the completion of the transfer was effected in reasonable time. I agree that the appeal should be dismissed and the decree varied as suggested by the Chief Justice.

*Decree of Supreme Court varied by substituting
for the words “upon the plaintiff paying to
the defendant Crosby” the words “upon*

payment into Court to the credit of this cause.” H. C. OF A.
Save as aforesaid decree affirmed and appeal 1925-1926.
dismissed with costs.

MAYNARD
v.
GOODE.
—

Solicitors for the appellant, *Throsby, Young & Stellway*, Wagga Wagga, by *Dowling, Tayler & Macdonald*.

Solicitors for the respondent *Goode, Walsh & Blair*, Wagga Wagga, by *McDonell & Moffitt*.

B. L.

[PRIVY COUNCIL.]

PALMER APPELLANT ;

AND

CAREY RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

Contract—Construction—Agreement to lend money to trader—Repayment out of proceeds of goods—Security, lien or charge of lender over goods—Equitable assignment.

PRIVY
COUNCIL.*
1926.
April 19.

By an agreement in writing made in New South Wales between the respondent and a person carrying on business as an indentor, which recited that the latter required additional capital to enable him to extend his business and that the respondent had agreed to advance various sums of money, it was agreed that the borrower should from time to time purchase goods for the purpose of the business and the respondent should advance the purchase-money therefor, which would be applied exclusively to such purchase. In consideration therefor the borrower agreed (*inter alia*) to sell the goods as soon as possible after the purchase thereof and to pay the proceeds of sale forthwith into the credit of the respondent at a certain bank ; to attend diligently to the business and to the sale of the goods ; and to keep proper books of account

* Present—Viscount Cave L.C., Lord Parmoor, Lord Wrenbury, Lord Blanesburgh and Lord Darling.