[HIGH COURT OF AUSTRALIA.]

O'BRIEN . . . . . APPELLANT;
PLAINTIFF,

AND

DAWSON AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 23, 24; *May* 7.

Rich, Starke, McTiernan and Williams JJ.

Conspiracy—Company—Directors—Procuring breach of contract.

The plaintiff sued a company and two of its directors for conspiracy to injure the plaintiff, alleging that in pursuance of the conspiracy the defendants took possession of certain theatres and ejected the plaintiff therefrom The evidence was to the effect that the plaintiff was in occupation of the theatres under an agreement with the defendant company and that the defendant company acting by the defendant directors terminated the agreement and ejected the plaintiff from the theatres. The jury returned a verdict for the plaintiff. This verdict was set aside by the Full Court of the Supreme Court of New South Wales and judgment ordered to be entered for the defendants, principally upon the ground that breach of contract by a company acting through the medium of its board of directors does not amount to a tortious procurement of a breach of contract or to a conspiracy (*O'Brien* v. *Dawson*, (1941) 41 S.R. (N.S.W.) 295; 58 W.N. 106). On appeal to the High Court,

Held that the appeal should be dismissed, but (*per Starke* and *Williams* JJ., *McTiernan* J. *contra*) expressly without prejudice to such other appropriate proceedings as the plaintiff might be advised to bring.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Thomas Alexander O'Brien against Theodore Wesley Garland Dawson, Stuart Frank Doyle and Bligh Street Holdings Pty. Ltd. in which he claimed damages in the sum of £10,000.

By his declaration, dated 16th October 1940, the plaintiff alleged that he was entitled to a lease of two picture theatres, the Savoy Theatre, Sydney, and the Savoy Theatre, Melbourne, up to 1st May 1951 and 28th May 1951, respectively, and was entitled to the possession and sole control and management of those picture theatres and to all profits derived therefrom and that he was in possession thereof and was carrying on business therein whereupon the defendants unlawfully and maliciously combined and conspired together to injure him personally and in his business with regard to carrying on the said picture theatres, and in pursuance of such conspiracy wrongfully and unlawfully and in breach of the plaintiff's right to possession, control and management of the said picture theatres and to his rights to the profits therefrom entered into possession of the said picture theatres and of the plaintiff's goods therein, ejected the plaintiff therefrom, dismissed his employees thereat, prevented them from continuing in his employment and prevented him from continuing in possession, control and management of the said picture theatres, and that the defendant Dawson wrongfully terminated his contract of employment with the plaintiff, by reason whereof the plaintiff had suffered and would suffer loss of profits, injury to his credit and reputation, and other damage.

On 23rd October 1940, the defendants asked for certain particulars including particulars of: (3) the date of the alleged conspiracy, and (4) "what person or persons on behalf of the defendants is or are alleged to have been party to such combination and conspiracy?" The particulars which were given included the following: (3) "it is alleged that the defendants combined and conspired to injure the plaintiff between the months of April and the end of September 1940," and (4) "the persons alleged to have been parties to such combination and conspiracy are the defendants herein, Mr. Lynton Williams, Mr. John Edgely and Mrs. Jean Bader."

The defendants denied the allegations in the declaration (1) that the plaintiff was entitled to (*a*) the lease therein mentioned, (*b*) the possession and sole control and management of the picture theatres, and (*c*) all the profits derived therefrom; (2) that the picture theatres were in the possession and sole control and management of the plaintiff; and (3) that he was carrying on the business of the picture theatres. For a second plea the defendants pleaded that they were not nor was any of them guilty.

A few days before the trial of the action the plaintiff's solicitor by letter informed the defendants' solicitors that at the trial the plaintiff would apply for leave to amend the declaration by inserting, immediately before the allegation that Dawson had wrongfully

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terminated his contract of employment with the plaintiff, the words "and repudiated the plaintiff's right to a lease of the said picture theatres." No such amendment appears to have been made but, apparently, the trial was conducted on the footing that it had been made.

The defendants did not go into evidence.

The evidence by or on behalf of the plaintiff was to the following effect :—

At all material times the directors of the defendant company were the defendants Doyle and Dawson and one Lipman, except that Doyle ceased to be a member of the board for a period commencing 1st November 1939 and ending 22nd April 1940.

The defendant company had two leases, one of the Savoy Theatre, Sydney, and the other of the Savoy Theatre, Melbourne. The first was a lease dated 27th January 1939, by a building company to the plaintiff, which the defendant company had acquired by assignment from the plaintiff on 28th March 1939 for a sum of £1,950. It was for a term of five years from 1st May 1937 at a rental increasing to £42 per week, with a right of renewal for a further period of five years at a rental of not less than £42 per week, to be fixed by arbitration, conditionally upon the lessee having performed and observed his covenants; and it provided that the lessee should not assign, sublet or otherwise dispose of the demised premises without the consent of the lessor, such consent not to be unreasonably withheld in the case of a responsible and respectable tenant. The other—the lease of the Melbourne theatre—was to the defendant company. It was dated 30th May 1939 and was for a term of six years from 29th May 1939 at a weekly rental of £26, with the option of a further lease upon the same terms and conditions (except the option) at a similar rent. It provided that the lessee should not assign sublet or part with possession without the consent of the lessor, consent to an assignment or sublease not to be arbitrarily or unreasonably withheld.

On 21st July 1939 the plaintiff by letter made an offer to the defendant company to take a sublease of the Sydney theatre from date of possession to 1st May 1951 and of the Melbourne theatre from date of possession to 28th May 1951 at a total rent of £110 per week, payable fortnightly in advance, £100 deposit on account of advance rent to be paid on acceptance of offer. In addition to this rent, the plaintiff was to pay the defendant company twenty per cent of the profits, if any, of the two theatres, with adjustments half-yearly (the plaintiff's salary to be limited to a charge of £20 per week). The defendant Dawson's three-year

contract with the defendant company was to be taken over or compromised by the plaintiff from the date the lease commenced. An agreement was to be drawn by their joint solicitors embodying the offer, and possession to be given on a date to be mutually agreed. The defendant company replied on 26th July accepting, and suggesting that if the head lessors' consents could be obtained in time, possession should be given on 31st July, and if not the theatres could be carried on under the plaintiff's direction as from that date. It was asked that a contract be prepared and signed embodying the terms that had been offered and accepted. On 28th July 1939 the plaintiff replied confirming the contract with the substitution of 5th August for 31st July as the date of possession, as agreed by an oral conversation. £100 rent payable in advance was enclosed, and it was confirmed that the letter constituted a binding contract, although it was stated to be understood that as a matter of convenience the terms of the contract constituted by the correspondence would be embodied in an agreement.

On 5th August 1939 the plaintiff's solicitor wrote to the defendant company's solicitors a letter confirming an agreement between the plaintiff and the defendant company that the plaintiff should enter into possession of the theatres as agent for the defendant company on the terms, *inter alia*, that the plaintiff should have the sole control, and be entitled to all the profits and liable for all the losses, that the defendant company would endeavour to obtain as soon as possible the consents of the head lessors to the subleases, that completion would take place as soon as possible, that the entry should not be considered an entry under the agreement, or an assignment of the leases, until settlement should take place. It was under this second subsidiary agreement that the plaintiff in August entered into possession. Whilst in possession, he made payments to the defendant company at the rate of £110 per week by fortnightly payments in advance. He also arranged with the defendant Dawson to pay him the salary which the defendant company had been paying him, together with certain additional payments. Under this arrangement, Dawson managed the two theatres for the plaintiff whilst he was in possession as the defendant company's agent under the subsidiary agreement.

In the meantime, on 1st August, the defendant company wrote to the defendant Dawson, who was one of its directors and also had a contract from it to manage the two theatres, suggesting that he should release the company from its contract in consideration of the plaintiff taking over. In his reply dated 15th August the defendant Dawson declined to release the defendant company from the

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contract, but said that he would accept payments of salary from the plaintiff and regard them as made by the company.

Between 15th August and 13th October the defendant company, to the knowledge of the plaintiff's solicitor, was in communication with the head lessor for the purpose of obtaining consents to the subleases. On 13th October 1939 the plaintiff's solicitor asked the defendant company that the consents of the head lessees be obtained and draft leases submitted to him, so that the agreement of July could be completed ; and on 23rd October draft leases were forwarded to him by the defendant company's solicitors.

On 1st November 1939 the defendant Doyle resigned from the board of the defendant company.

In January 1940 the plaintiff's solicitor had an interview with the solicitors for the defendant company at which the plaintiff was present, the drafts were discussed, and certain objections made on the plaintiff's behalf. It was suggested, however, by the plaintiff that he would be prepared to forego some of the objections if the defendant company was prepared to forego the twenty per cent of the profits of the theatres provided for by the July agreement. After this interview the plaintiff's solicitor took the drafts with him. He said that he took them accidentally and without realizing that he had done so.

On 22nd January 1940 the plaintiff wrote to the defendant Doyle (who was apparently still interesting himself in the matter although he was no longer a director of the defendant company) stating that he had lost over £700 on the theatres up to date, and asking that the stipulation for twenty per cent of the profits be abandoned. He pointed out that it was doubtful whether it was of any value, and was embarrassing to him in his financial arrangements. The defendant Doyle in reply on 23rd January said that the proposal would be considered, but that it was essential that subleases as executed should contain provision for payment of twenty per cent of profits.

On 22nd April 1940 the defendant Doyle again became a director of the defendant company.

The next communication between the parties appears to have been a letter written on 6th May by the defendant company's solicitors to the plaintiff's solicitor. This pointed out that the draft leases had not been returned approved. It stated that unless the plaintiff completed the contract on or before 15th May "we will have no alternative but to place the matter before our client for its instructions." The plaintiff's solicitor sent a formal acknowledgment on 7th May.

Early in June—before 5th June—the plaintiff had a conversation with the defendant Doyle at the latter's office. Doyle told him that he would have to sign the subleases as they were, or get out. The plaintiff expostulated, and told him that he had made an arrangement with one Kapferer for showing pictures in both theatres for a year. He added that he took it that so long as he paid the rent he would get the subleases as promised.

On 5th June the defendant company's solicitors sent a letter to the plaintiff's solicitor calling upon the plaintiff to complete, and appointing 10th June at noon for the purpose of completion. They added: "We make time the essence of the contract herein."

On 10th June the plaintiff entered into an agreement with Kapferer by which, in effect, for a period of twelve months, with an option of renewal for a further twelve months, Kapferer took over the conduct of the theatres, but under the general management of the defendant Dawson as the plaintiff's representative, on the terms of Kapferer making certain payments to the plaintiff. The plaintiff admitted in cross-examination that from the time he made this agreement with Kapferer he would not have been prepared to bind himself to pay the defendant company twenty per cent of the excess takings of the two theatres over the total of their outgoings.

On 11th June the plaintiff's solicitor wrote to the defendant company's solicitors stating that when the defendant company submitted a lease in accordance with the agreement he would sign the same and complete immediately.

In July—before 12th July—a Mrs. Bader, claiming that the films which were being shown in the theatres by Kapferer belonged to her, obtained an injunction restraining their exhibition.

By 24th July Kapferer owed the plaintiff £900 under the agreement of 10th June, and told him that he could not pay.

Early in August the defendant Dawson told the plaintiff that if he got into difficulties over Kapferer's contract the defendant Doyle might force him (Dawson) to take the theatres over.

On 7th August the plaintiff commenced an action against Mrs. Bader claiming £10,000 damages for the breach by Kapferer of his agreement of 10th June, the plaintiff apparently contending that Mrs. Bader was Kapferer's undisclosed principal.

On 12th August, the defendant company accepted from the plaintiff a payment of £110, and gave him a receipt for "A/c rent to 23/8/40." This was in respect of his occupancy of the theatres under the subsidiary agency agreement.

On some occasion about this time, the defendant Dawson told the plaintiff that he was quite certain that the defendant Doyle did not want the theatres.

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At a board meeting of the defendant company held on 14th August 1940 at which Doyle and Dawson were the directors present it was resolved that an agreement be entered into between the company and the defendant Dawson. The defendant Dawson, presumably to comply with the articles of association, formally disclosed his interest in the agreement. The document embodying this agreement recited the main and subsidiary agreements with the plaintiff, that the company was endeavouring to terminate the main agreement and also the appointment of the plaintiff as its agent, and recited also that it had been agreed between the defendant company and Dawson that if the agreements with the plaintiff were terminated and he was legally ejected from the premises, the defendant company would grant sub-leases to the defendant Dawson. It was then agreed accordingly. It was further agreed that if the plaintiff should sue for and obtain specific performance of his agreement, the agreement with Dawson should be at an end.

A day or two after this, the defendant Dawson went to Melbourne, but did not disclose to the plaintiff the real purpose of his visit. On 17th August he took possession of the Melbourne theatre on behalf of the defendant company, and on 19th August the Sydney theatre. Both theatres were closed; and the plaintiff was forcibly prevented from getting access to the Sydney theatre. On 19th August, the defendant Dawson told an employee of the Sydney theatre that he had a dirty thing to do but had to do it.

On 19th August the defendant company sent the plaintiff a notice that, he having repudiated and failed to carry out his agreement of 21st July 1939, the defendant company treated it as discharged and terminated it at this date, and sent to him also another notice terminating his appointment as its agent in respect of the two theatres and stating that it had re-entered into possession and control. On the same day it returned to him a cheque for £110 which the plaintiff had posted to it on 17th August.

On 19th August also, Kapferer's solicitor by letter informed the plaintiff's solicitor that the defendant company having taken possession, the plaintiff could not carry out his contract of 10th June, and Kapferer treated himself as no longer bound by it.

On 20th August, the plaintiff's solicitor sent a letter to the defendant Dawson stating that the plaintiff dismissed him for misconduct, and a letter to the defendant company denying its right to terminate the agency agreement or the agreement for the sub-leases. Recriminatory correspondence then ensued.

At the trial, no attempt was made to establish any such general conspiracy as was alleged in the declaration. The charge of conspiracy was sought to be based on the facts that the defendant

company had cancelled its contract with the plaintiff and that the individual defendants were directors who had been instrumental or interested in its so doing.

In the result, the jury were directed that the matters for their determination were: (*a*) Was there in existence on 19th August an agreement between the plaintiff and the defendant company that was enforceable by the plaintiff? (*b*) If there was, did the three defendants agree or conspire together wilfully and knowingly to procure a breach of it? (*c*) If they did so agree, did they, or one or more of them, carry such agreement into effect and wrongfully dispossess the plaintiff from the theatres? and, (*d*) In so doing, did the defendants act under a *bona-fide* belief that they were doing what was lawful?

The jury returned a verdict in favour of the plaintiff in the sum of £7,000.

Upon an appeal the Full Court of the Supreme Court ordered that the verdict be set aside and that a verdict and judgment be entered for the defendants: *O'Brien* v. *Dawson* (1).

From that decision the plaintiff appealed to the High Court.

Donohoe (solicitor), for the appellant. The judgment appealed from shows a complete misconception of the appellant's cause of action and of the facts of the conspiracy he endeavoured to set up. The respondents conspired to secure a breach of contract and thus to infringe legal rights in the appellant under the contract by putting him out of possession and to substitute another person in his place. The subject matter of their agreement was merely the end, the dispossession; alternatively, it may not have been merely the end, but the end and the means. *Sorrell* v. *Smith* (2) and similar cases are not applicable to this case. If the object of a conspiracy is to commit *damnum* only the state of mind of the parties thereto is important, but if the object is to commit *injuria* plus *damnum* it is sufficient to show that the parties to the conspiracy knew that what they were doing was *injuria* and *damnum*; their state of mind is relevant only as to their knowledge of the *injuria*. The conspiracy agreement is sufficiently proved if it can be inferred from the acts of the parties (*The King and the Attorney-General of the Commonwealth* v. *Associated Northern Collieries* (*The Vend Case*) (3)). The undoubted intention of the parties to the conspiracy was to cause damage to the appellant, and the agreement was to cause that damage. It was malicious damage caused under colour of a claim

(1) (1941) 41 S.R. (N.S.W.) 295; 58 W.N. 206.
(2) (1925) A.C. 700.
(3) (1911) 14 C.L.R. 387, at pp. 399-402.

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of right which to the respondents' knowledge was false. A conspiracy to injure the appellant can be inferred from the evidence. It shows that each of the respondents was a party to an agreement to injure the appellant. An agreement to do an act which is wrongful is actionable as a conspiracy to injure. The intention to injure and the agreement to injure are inferred from the agreement to do the wrongful act which is accompanied by damage (*Quinn* v. *Leathem* (1)).

Weston K.C. (with him *Asprey*), for the respondents Stuart Frank Doyle and Bligh Street Holdings Pty. Ltd. The Court below did not have a wrong conception of the appellant's cause of action. As put in that Court, the appellant's sole case was conspiracy to procure a breach of an agreement for lease in point of time made prior to and different from the agreement to which the appellant has invited the attention of the Court. *Qua* these respondents the appellant was an agent, and *qua* these respondents and the land the appellant was a licensee. *Sorrell* v. *Smith* (2) is a case of conspiracy *simpliciter*. Although this case was commenced by the appellant on the basis of conspiracy *simpliciter* it was not thereafter conducted on that basis: See *O'Brien* v. *Dawson* (3). The attempt to prove the conspiracy alleged was abandoned. The appellant should be bound by the way his case was conducted. A company can act only by its officers. When a company by its directors commits a breach of contract it is preposterous to suggest that it is conspiring with the directors and the directors are conspiring with each other *inter se*. There is not any evidence (*a*) that the respondent Doyle, as a director, had knowledge of the arrangement between the appellant and the respondent Dawson, (*b*) fit to be submitted to the jury on the issues the parties fought on specifically, and (*c*) that the three respondents conspired together knowingly to procure a breach of the contract. The appellant did not have an enforceable contract.

Webb, for the respondent Theodore Wesley Garland Dawson.

Donohoe (solicitor), in reply.

Cur. adv. vult.

May 7.

The following written judgments were delivered :—

RICH J. I have had the advantage of reading the judgment of my brother *Williams* and agree with it.

(1) (1901) A.C. 495.
(2) (1925) A.C. 700
(3) (1941) 41 S.R. (N.S.W.), at p. 297

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales in Full Court which set aside a verdict in favour of the plaintiff for £7,000 and entered a verdict and judgment for the defendants. The plaintiff declared upon a count for conspiracy. As an inducement he alleged that he was entitled to a lease of two picture theatres, namely, Savoy Theatre, Sydney, and Savoy Theatre, Melbourne, up to 1st May 1951 and 28th May 1951 respectively and to possession and sole control and management of the picture theatres and all profits derived therefrom and that the said theatres were in his possession and sole control and management and that he was carrying on the business of the said picture theatres and declared that the defendants unlawfully and maliciously combined and conspired together to injure the plaintiff personally and in his business with regard to carrying on the said picture theatres and in pursuance of such conspiracy wrongfully and unlawfully and in breach of the plaintiff's right to possession control and management of the said picture theatres and to the rights to the profits therefrom entered into possession of the said picture theatres and of the plaintiff's goods therein and ejected the plaintiff therefrom and prevented him from continuing in his possession and control and management of the said picture theatres and repudiated his right to a lease of the said picture theatres and the defendant Dawson wrongfully terminated his contract of employment with the plaintiff whereby he suffered damage.

The overt acts set forth in the declaration may thus be classified: —(i) Trespass to land and to goods. (ii) Breach of contract on the part of Bligh Street Holdings Pty. Ltd. and Dawson. (iii) Knowingly procuring the repudiation and breach of an agreement between the plaintiff and Bligh Street Holdings Pty. Ltd. whereby the plaintiff was entitled to a lease and also knowingly procuring Dawson wrongfully to terminate his contract of employment with the plaintiff.

All these acts are actionable torts, or else a breach of contract which also gives rise to an action for damages.

In "the case of concerted action," said Lord *Dunedin* in *Sorrell* v. *Smith* (1), "the first and obvious observation is that if a combination of persons do what if done by one would be a tort, an averment of conspiracy, so far as founding a civil action, is mere surplusage." It does not seem important, except perhaps in New South Wales where the joinder of parties in an action is somewhat restricted (*Common Law Procedure Act* 1899 (N.S.W.), sec. 49; *Smurthwaite* v. *Hannay* (2)), whether persons are engaged in common wrongful acts in concert or not, for in either case they would appear to be

(1) (1925) A.C., at p. 716. (2) (1894) A.C. 494.

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joint tortfeasors who might be sued jointly or severally for the same conduct. Again, motive or intention, save in exceptional cases, is quite irrelevant in cases of breach of contract or the commission of torts. "Motives are immaterial. It is the act, not the motive for the act, that must be regarded" (*Bradford Corporation* v. *Pickles* (1); *Allen* v. *Flood* (2)). The question is what have the defendants done, not why they did it, the motive or intention with which they did it. An exceptional case, however, arises in connection with the civil action for conspiracy when there is nothing done which *per se* would be a tort. A combination or conspiracy to injure is, I gather from the authorities, actionable when the acts done in pursuance of the combination or conspiracy are not in themselves illegal but are done with intent to injure without just cause or excuse, and are followed by actual injury (*Sorrell* v. *Smith* (3); *Ware and De Freville Ltd.* v. *Motor Trade Association* (4), per *Atkin* L.J.; *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (5)). But the present case is not a case of this character. The acts done in pursuance of the conspiracy in the present case are either unlawful acts: trespass, breach of contract; or the means are unlawful: knowingly procuring a breach of contract (*Lumley* v. *Gye* (6); *Ware and De Freville Ltd.* v. *Motor Trade Association* (7); *Jasperson* v. *Dominion Tobacco Co.* (8)).

The trial of the action lasted many days and the charge of the trial judge to the jury was lengthy, but its purport can be gathered from the following observations which he made to the jury: "To sum up the position gentlemen the matters for your determination seem to me to be as follows:—(1) Was there in existence on the 19th August an agreement between the plaintiff O'Brien and Bligh Street Holdings Ltd., that was enforceable by the plaintiff? (2) If there was did the three defendants agree or conspire together wilfully and knowingly to procure a breach of it? (3) If they did so agree did they or one or more of them carry such an agreement into effect and wrongfully dispossess the plaintiff from the theatres? and (4) In so doing did the defendants act under a *bona-fide* belief that they were doing what was lawful? Gentlemen, if you answer those questions in favour of the plaintiff then you come to the question of damages."

The jury apparently answered these questions in favour of the plaintiff, for they found a verdict in his favour for £7,000 damages.

(1) (1895) A.C. 587, at p. 601.
(2) (1898) A.C. 1.
(3) (1925) A.C. 700.
(4) (1921) 3 K.B. 40, at pp 76 *et seq.*
(5) (1892) A.C. 25.
(6) (1853) 2 E. & B. 216 [118 E.R. 749].
(7) (1921) 3 K.B., at pp. 72, 88, 89.
(8) (1923) A.C. 709, at pp. 712, 713.

The direction was not unfavourable, in some respects, to the defendants, though it cannot be supported as a proper direction in law. The first question involved in the main the construction of several letters which was for the judge himself, and should not have been left to the jury in the form adopted, though the repudiation or rescission of the suggested agreement may have involved some matters of fact. Again, question 2 assumes the possibility of a party to a contract conspiring with others to procure its breach, which is a little whimsical. A party who breaks a contract commits an unlawful act, and those who knowingly procure its breach also commit an unlawful act whether they act in concert or not. The fourth question was, in the circumstances of this case, for reasons already stated, wholly irrelevant.

But it is essential to the plaintiff's case that he had some right to, or was in possession of, the theatres on 19th August 1940 when it was alleged the defendants entered into possession thereof and ejected the plaintiff. In a letter of 21st July 1939 from the plaintiff to the respondent company, the plaintiff confirmed his offer to lease the Savoy Theatres in Sydney and Melbourne upon various terms and conditions set out in the letter. The arrangement was subject to the formal approval of the head lessors and " upon final settlement of the terms herein " the plaintiff stated that he was " agreeable to waive the balance owing under the terms of an agreement " between him and the company. And the letter concluded : " An agreement is to be drawn up by our joint Solicitors embodying the above and possession is to be given to me on a date to be mutually agreed."

The company replied on 26th July 1939 that it accepted the terms contained in the offer, and suggested, subject to consent of the head lessors, that Monday the 31st inst. be fixed as the date upon which possession should be given. And it further stated that its solicitors had been instructed to prepare " the necessary contract embodying the terms offered by you and accepted by it," and further that it would appreciate the name of the plaintiff's solicitor so that the contract could be finally drawn up and signed. On 28th July the plaintiff in a letter to the company confirmed an alteration in the date of possession from 31st July to 5th August 1939, and he added that " it is understood that the terms of our correspondence will be embodied into an agreement for the purpose of convenience, but this is not to affect the validity of the contract now evidenced by our correspondence," and by the payment of £100 rent in advance.

The company does not appear to have replied to this letter, but appears to have treated the contract as concluded in a letter of

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Starke J.

1st August 1939 to the respondent Dawson. But when the documents necessary to effect the arrangement between the plaintiff and the respondent company came to be prepared and settled by the solicitors for the parties, several difficulties arose, as was perhaps inevitable. The result was a letter of 5th August 1939 from the solicitor for the plaintiff to the solicitors for the company:—"I confirm my telephone conversation . . . when it was agreed for and on behalf of our respective clients as follows:—

1. My client should enter into possession of the premises known as 'Savoy Theatre, Sydney' and the 'Savoy Theatre, Melbourne,' as agent for Bligh Street Holdings Pty. Limited upon the following terms:—(*a*) That my client shall have the sole and only control, conduct and management of the Theatres and the business thereof, and all matters in relation thereto. (*b*) That my client shall be entitled to retain all profit earned as from the date hereof, and shall be liable to bear all losses in respect of the said businesses. 2. That my client does not by entering into possession thereby forfeit waive or abandon any right which he now has. 3. That you will endeavour to obtain as soon as possible the consents of the head lessors to the sub-leases to my client that completion will take place as soon as possible. 4. The entry of my client shall not be considered an entry under the said agreements or an assignment by you of the said Leases until settlement in pursuance of the agreements already entered into."

The plaintiff entered into the theatres under this arrangement and carried them on and made payments of £110 per week; the last receipt being "A/c rent to 23/8/40." On 19th August 1940 he was ejected. On 5th June 1940 the defendant company called upon the plaintiff to complete the agreement existing between the company and him and appointed Monday 10th June at noon for the purpose of such completion and made time the essence of the contract. On 11th June the plaintiff replied that he would complete immediately upon the company submitting a lease in accordance with the agreement arrived at between the plaintiff and the company. On 19th August 1940 the company notified the plaintiff that he "having repudiated and failed to carry out the agreement of 21st July 1940" the company "now treats the said agreement as discharged and at an end and hereby terminates the same at this date." On the same day, as already stated, the plaintiff was ejected from the theatres.

The occupation of the theatres by the plaintiff was clearly pursuant to the subsidiary agreement, as it has been called, of 5th August 1940, which no doubt was so expressed in order to avoid covenants in the

head leases against assigning, subletting, disposing or parting with the possession of the theatres without the consent of the head lessors. The subsidiary agreement excluded the plaintiff from possession of the theatres but allows him to occupy them as agent of the company and to carry on the business there, retaining profit and bearing losses. But this arrangement does not give to the plaintiff the present possession of the premises, or of the goods on the premises or the legal right to the possession such as is necessary to support an action for trespass: See *Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 414. In short, no possessory right of the plaintiff was infringed. Still I cannot think that no agreement had been concluded between the plaintiff and the company. Any business man, I should think, would regard the letters of 26th July and 28th July as concluding an agreement and be strongly confirmed in that view by the letter to Dawson of 1st August 1939 and the letters purporting to repudiate the agreement. The letters of 28th July stipulate that the terms of the agreement should be embodied in a formal contract for convenience and not as a condition of agreement. In that there is nothing contrary to law (*Sinclair, Scott & Co. Ltd.* v. *Naughton* (1)).

The date of possession was agreed upon, and although the arrangement of 21st July 1939 is expressed to be subject to the formal approval of the head lessors, still that is a term of the agreement and not a condition of agreement (*Niesmann* v. *Collingridge* (2)). The agreement of 5th August 1939 did not cancel the agreement of July 1939 but in effect provided a working arrangement or subsidiary agreement, as it has been called, until the parties were in a position to complete in formal manner that arrangement and the conveyancing documents necessary to give it effect. The defendants, however, insisted that both the agreement of July 1939 and the subsidiary agreement of August 1939 were terminated. This contention involves some questions of fact which were for the jury. And on this aspect of the case I agree with the opinion of the learned Chief Justice of the Supreme Court and with his reasons for that opinion. "There was nothing," he said, "which made it necessary for the jury to find a repudiation on the plaintiff's part" and as regards the notice of 5th June 1940, non-compliance with which was relied upon, "not only were the jury entitled to treat it as insufficient but . . . in law it was manifestly bad." It was therefore open to the jury to find a breach on the part of the company of the agreement of July 1939. And further, though this does not appear to have been relied upon at the trial, there was evidence of

(1) (1929) 43 C.L.R. 310. (2) (1921) 29 C.L.R. 177.

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a breach on the part of the company of the subsidiary agreement of 5th August 1940. The company was not entitled to eject the plaintiff from the premises and prevent him carrying on business there without giving him a reasonable time to quit, arrange his business and remove any of his belongings (*Kerrison* v. *Smith* (1); *Cornish* v. *Stubbs* (2); *Mellor* v. *Watkins* (3); *Canadian Pacific Railway Co.* v. *The King* (4)).

Again, it appears from the evidence that the respondent Dawson entered into an agreement with the plaintiff to manage the theatres for him at a salary with certain additional payments. The respondent Dawson had also a contract with the company, but he declined to release the company from its contract and said he would accept payments of salary from the plaintiff and regard them as made by the company. Dawson entered into an agreement with the company whereby in certain events he was to obtain leases of the theatres from the company and he also took possession of the theatres on behalf of the company. So there was evidence that the company was guilty of an unlawful act in breaking its contracts of July and August 1939 and that Dawson also broke his agreement of service with the plaintiff. But was there any evidence that the defendants were all engaged in common wrongful acts in concert or as joint tortfeasors? A company "cannot act in its own person for it has no person" (*Ferguson* v. *Wilson* (5)). So it must of necessity act by directors, managers, or other agents. The company, if it were guilty of a breach of its contracts in this case, acted through its director the respondent Doyle, but it is neither "law nor sense" (*Lagunas Nitrate Co.* v. *Lagunas Syndicate* (6)) to say that Doyle in the exercise of his functions as a director of the company combined with it to do any unlawful act or become a joint tortfeasor. Again, it is equally fallacious to assert that Doyle knowingly procured the company to break its contract. The acts of Doyle were the acts of the company and not his personal acts which involved him in any liability to the plaintiff. But I would add that it does not follow that a director of a company would escape personal liability under cover of the company's responsibility if he himself became an actor and invaded the plaintiff's rights, as by trespassing on his land, or seizing his goods and so forth. And for similar reasons the contention is equally untenable that Doyle and the respondent Dawson combined together or engaged in common in knowingly procuring a breach by

(1) (1897) 2 Q.B. 445.
(2) (1870) L.R. 5 C.P. 334.
(3) (1874) L.R. 9 Q.B. 400.
(4) (1931) A.C. 414.
(5) (1866) 2 Ch. App. 77, at p. 89.
(6) (1899) 2 Ch. 392, at p. 431.

the company of its contracts. Dawson if he is guilty of a breach of his contract with the plaintiff is of course liable in damages. And here, I think, there is some evidence that the company knowingly, through its director Doyle, procured the breach of Dawson's contract with the plaintiff. Doyle was I think, acting within the scope of his functions as a director of the company in procuring Dawson to terminate his employment with the plaintiff and to enter into an agreement with the company. It was an unlawful act of the company done through its director Doyle. But Doyle is not involved in the act otherwise than as a director. It was again the company's act.

The contention, however, that the company and Dawson conspired together to procure the breach by Dawson of this agreement with the plaintiff appears to me also untenable. Dawson broke his contract and the company knowingly procured him to do so. Both committed an unlawful act, but they were acts of a different nature and not a combination to do the same act.

The result, I think, is though the plaintiff seems entitled to some relief, that the present action was misconceived and conducted on a wholly mistaken basis at the trial and ought therefore to be dismissed. But I think that it should be without prejudice to the plaintiff bringing any other action (other than one based upon combination or conspiracy of the defendants to injure the plaintiff in his business) as he may be advised.

McTiernan J. In my opinion the appeal should be dismissed and the order of the Supreme Court (Full Court) affirmed.

The case which the plaintiff made at the trial and on which the jury were directed was that all the defendants had agreed or conspired together wilfully and knowingly to procure a breach of the contract under which the plaintiff was in possession of the theatres between him and the defendant company and that they all or one or more of them carried such agreement into effect and wrongfully dispossessed the plaintiff from the theatres. It was necessary to the success of such a case that the contract existed and was enforceable by the plaintiff when the defendants procured it to be broken. The jury were directed to find on that issue. Conspiracy being regarded as the gist of the case, the jury were also directed to find whether or not the defendants acted under a bona-fide belief that what they were doing was lawful, when they terminated the plaintiff's agreement. The jury found a verdict for the plaintiff and awarded £7,000 damages. It seems a correct assumption that they found in the plaintiff's favour on all these issues on which they were directed to find. The substantial question for the Full Court was whether

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the jury's verdict for the plaintiff on that case should stand, or whether it should be set aside and judgment be entered for the defendants. The Full Court set aside the verdict and entered judgment for the defendants. We have the advantage of a full statement of the evidence which appears in the judgment of *Jordan* C.J. His Honour's judgment, in which the other members of the Court agreed, is based on two grounds. First, that there was no evidence that the defendants knew that the termination of the agreement was not legally justified, and that the onus was on the plaintiff to prove that the defendants had that knowledge. Secondly, that the position of each of the individual defendants who was a director of the defendant company deprived the allegation of conspiracy between the company and them of any substance, and although the individual defendants could conspire otherwise than in their character as directors to break its contract with the plaintiff, the fact of the agreement at the meeting of the directors on 14th August 1940 affords no evidence that either of them knew or believed that the termination of the contract was not justifiable on lawful grounds, and there was no evidence that these defendants conspired as alleged. These conclusions are clearly right. Indeed, Mr. *Donohoe* limited his forceful argument only to the denial of the proposition that the allegation of a conspiracy between the company and its directors is not one that is capable of being sustained.

A commits an actionable wrong against B if he procures C to break his contract with B (*Lumley* v. *Gye* (1); *Quinn* v. *Leathem* (2); *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ltd.* (3)). Hence *McCardie* J. said in *Pratt* v. *British Medical Association* (4) that it is necessary in dealing with actionable conspiracy to distinguish at once the line of decisions which establish this proposition. He added: "An individual can commit the tort as effectively as an aggregate of persons. The effect of a conspiracy to commit a wrong within *Lumley* v. *Gye* (1) is of importance only in considering the weight of the acts alleged and the extent of the resultant damage"—See also *Larkin* v. *Long* (5); *Clark* v. *Urquhart*; *Stracey* v. *Urquhart* (6). But an action by the plaintiff would not lie against the company for procuring a breach of its own contract with him nor against the individual defendants on that cause of action if in terminating the agreement they were acting in pursuance of their authority as directors (*Said* v. *Butt* (7)). There is no evidence that they were not acting in pursuance of that authority.

(1) (1853) 2 E. & B. 216 [118 E.R. 749].
(2) (1901) A.C., at p. 510.
(3) (1905) A.C. 239.
(4) (1919) 1 K.B. 244, at p. 254.
(5) (1915) A.C. 814, at p. 826.
(6) (1930) A.C. 28, at p. 50.
(7) (1920) 3 K.B. 497, at p. 506.

When the application for a nonsuit was made at the close of the plaintiff's case, he elected not to argue the matter and went to the jury on the evidence as it stood. Now that the proceedings have ended in a judgment for the defendants I see no reason why a condition be added to the order dismissing the appeal which might interfere with their right to make any defence of *res judicata* or plea in estoppel on which they might be advised to rely in the event of new proceedings being brought by the plaintiff.

The order of the Full Court should be affirmed and the appeal should be dismissed. I do not agree to the addition of any qualification to the order.

WILLIAMS J. This appeal relates to certain happenings which occurred between the plaintiff and the defendants in relation to the Savoy Theatre, Sydney, and the Savoy Theatre, Melbourne.

In July 1939 the defendant company was the lessee of both these theatres; in the case of the Sydney theatre for a term ending 1st May 1942 with two options each to renew for five years; and in that of the Melbourne theatre for a term ending 29th May 1945 with an option to renew for six years. Both leases contained provisions that the lessee should not assign sublet or otherwise dispose of the demised premises without the consent of the lessor, consent to such assignment or sublease not to be arbitrarily or unreasonably withheld. The defendant Dawson was employed by the company as general manager for Melbourne under a written contract for a term of three years at a salary of £13 10s. a week, a share of certain profits and certain allowances.

Negotiations took place between the plaintiff and the company, of which the defendant Doyle was chairman of directors, for a sub-lease of the Sydney theatre from the date of possession to 1st May 1951 and of the Melbourne theatre from the date of possession until 28th May 1951; and for the plaintiff to take Dawson into his employment on the terms that the latter's contract with the company should be taken over or compromised from the date the leases commenced.

On 21st July the plaintiff wrote to the company confirming an offer to this effect. The letter, after stating that the inclusive rent of both theatres was to be £110 per week and the leases were to incorporate the whole of the conditions except rent contained in the head leases and agreements which the company had entered into, and after referring to the taking over by the plaintiff of a large number of contracts affecting the theatres, provided, *inter alia*, that the arrangement was subject to the formal approval of the head lessors; *that upon final settlement of the terms* the plaintiff was agreeable to

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waive the balance owing under the terms of a certain agreement between him and the company for the payment of £225, *that an agreement was to be drawn up by the joint solicitors embodying the contents of the letter*, and *possession was to be given to him on a date to be mutually agreed.* The company replied on 26th July accepting the terms contained in the offer, suggesting that subject to the consent of the head lessors 31st July should be fixed as the date upon which possession should be given, that should such consent not be obtained by that date the respective theatres could be carried on by the company under the plaintiff's direction and for his benefit from that date, that the company had instructed its solicitors to prepare the necessary contracts embodying the terms offered by the plaintiff and accepted by the company and requested the plaintiff to let it have the name of his solicitor so that the contract could be finally drawn and signed. The letter added: "Re the Savoy Theatre Sydney :—You are to take over the existing lease of approximately five years of the Kiosk and sweet rights to Marie Tait, the provisions of which are known to you." On 28th July 1939 the plaintiff wrote to the company stating that, following his conversation with Mr. Doyle and Mr. Lipman, he confirmed the contract between the parties, the date mentioned for possession in the company's letter of 26th July to be 5th August instead of 31st July. He also stated he was agreeable to take over the lease to Marie Tait referred to in the letter and concluded :—" I confirm that it is agreed between us that upon me handing this letter to you there is a binding contract between your company and myself, and I enclose herewith my cheque for the sum of £100 rent payable in advance in order to bind this contract. It is understood that the correspondence will be embodied into an agreement for the purpose of convenience, but this is not to affect the validity of the contract now evidenced by our correspondence and this payment."

Notwithstanding the concluding remarks in the plaintiff's letter of 28th July, I cannot hold as a matter of construction that there ever was a finally concluded agreement between the parties arising out of the July correspondence, so that the reference in the letters to the agreement which was to be drawn up by the solicitors for the parties and signed could be regarded as an expression of the mere desire of the parties as to the manner in which a transaction already agreed to should go through. Many of the matters referred to in the letters, including the settlement of the provision relating to the company's right to twenty per cent of the profits, were far from complete and required further negotiations between the parties. The dates for taking possession referred to were tentative, and no

final date could be agreed upon until the head lessors had given their consents. As there is no evidence such consents were ever given, no final agreement was ever made as to the date on which possession should be taken and the parties therefore never agreed upon the date of the commencement of the leases. This was a matter of considerable practical importance, seeing that the company's right to share in the profits only accrued from that date, while, from a legal point of view, it is one of the essential points on which the parties must agree (*Halsbury's Laws of England*, 2nd ed., vol. 20, p. 40). In *May and Butcher Ltd.* v. *The King* (1) Lord *Dunedin* said :—" To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties." As Lord *Russell of Killowen* said in *Scammell (G.) and Nephew Ltd.* v. *Ouston (H. C. and J. G.)* (2) : " For myself I feel no doubt that no contract between the parties existed at all ; notwithstanding that they may have thought otherwise." In my opinion, therefore, these letters did not constitute a binding agreement. They only amounted to an agreement to enter into an agreement as explained in *Chillingworth* v. *Esche* (3) ; *Coope* v. *Ridout* (4)—see also *Bannister* v. *Heyman* (5) ; and such an agreement does not create any legal rights (*Raingold* v. *Bromley* (6) ; *H. C. Berry Ltd.* v. *Brighton and Sussex Building Society* (7) ; *Scammell (G.) and Nephew Ltd.* v. *Ouston (H. C. and J. G.)* (8) ; *Sinclair, Scott & Co. Ltd.* v. *Naughton* (9)).

Delays in the completion of the arrangements contemplated by these documents having occurred, the plaintiff entered into possession of the businesses of the theatres on 5th August under a temporary arrangement embodied in a letter which his solicitor wrote to the company's solicitor on that date, which provided that : " 1. My client should enter into possession of the premises known as ' Savoy Theatre, Sydney ' and the ' Savoy Theatre, Melbourne ' as agent for Bligh Street Holdings Pty. Ltd. upon the following terms :— (*a*) That my client shall have the sole and only control, conduct and management of the Theatres and the business thereof, and all matters in relation thereto. (*b*) That my client shall be entitled to retain

(1) (1934) 2 K.B. 17, at p. 21.
(2) (1941) A.C. 251, at p. 260.
(3) (1924) 1 Ch. 97, at p. 114.
(4) (1921) 1 Ch. 291, at p. 297.
(5) (1924) 34 C.L.R. 243, at p. 265.
(6) (1931) 2 Ch. 307.
(7) (1939) 3 All E.R. 217.
(8) (1941) A.C. 251.
(9) (1929) 43 C.L.R. 310.

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all profit earned as from the date hereof, and shall be liable to bear all losses in respect of the said businesses. 2. That my client does not by entering into possession thereby forfeit waive or abandon any right which he now has. 3. That you will endeavour to obtain as soon as possible the consents of the head lessors to the sub-leases to my client so that completion will take place as soon as possible. 4. *The entry of my client shall not be considered as entry under the said agreements* or an assignment by you of the said leases until settlement in pursuance of the agreements already entered into."

After taking over the businesses of the two theatres on 5th August, the plaintiff continued to run them for his own benefit until he was dispossessed as hereinafter mentioned. Dawson acted as the general manager of the plaintiff in both theatres, but would not agree to cancel his contract with the company. But the plaintiff paid him remuneration equivalent to the amount he had been receiving from the company, and the general effect of the agreement he made with Dawson was that the latter, while retaining any reversionary rights he might have under his agreement with the company in respect to any term outstanding after the completion of his service with the plaintiff, became, with the consent of the company, the employee of the plaintiff, upon terms and conditions which relieved the company from any responsibility to remunerate Dawson while so employed by the plaintiff.

The plaintiff paid the company £110 per week in advance but no share of the profits whilst he was running the business, and these payments came to be referred to between the parties as rent. Draft leases were submitted by the company's solicitor to the plaintiff's solicitor on 23rd October, the commencing dates being left blank; but nothing was done to settle their form until 3rd January 1940, when a conference took place at the latter's office at which the plaintiff was present. The plaintiff's solicitor had struck out of the drafts the provision relating to twenty per cent of the profits, and the plaintiff intimated a desire that he should be released from this provision. On 22nd January, he wrote a letter to the company to this effect, but the company, while stating his proposals would be considered, said it was essential that the sub-leases as executed should contain provision for payment of twenty per cent of the profits. Matters then drifted on for some time without any real steps being taken to complete the arrangement of 12th July. On 5th June the company's solicitor wrote to the plaintiff's solicitor calling upon the plaintiff to complete his agreement with the company, fixing 10th June as the date for completion and making time of the essence. The plaintiff's solicitor ignored this letter, although on 10th June, the

day fixed for completion, the plaintiff made an agreement with Kapferer by which (to quote from the judgment of the Chief Justice) "in effect, for a period of twelve months, with an option of renewal for a further twelve months, Kapferer took over the conduct of the theatres, but under the general management of the defendant Dawson as the plaintiff's representative, on the terms of Kapferer making certain payments to the plaintiff. The plaintiff admitted in cross-examination that from the time he made this agreement with Kapferer he would not have been prepared to bind himself to pay the defendant company twenty per cent of the excess takings of the two theatres over the total of their outgoings." On 11th June the plaintiff's solicitor wrote to the company's solicitor stating that when the company submitted a lease in accordance with the agreement the plaintiff would sign the same.

The plaintiff continued to pay the rent in advance which was still accepted by the company and in this way the company accepted rent up to 23rd August. At a board meeting of the company held on 14th August, at which Doyle and Dawson were the directors present, a resolution was passed that an agreement be entered into between the company and Dawson by which Dawson was to become the lessee of the theatres. To quote again from the judgment of the Chief Justice:—"The document embodying this agreement recited the main and subsidiary agreements with the plaintiff that the company was endeavouring to terminate the main agreement and also the appointment of the plaintiff as its agent, and recited also that it had been agreed between the defendant company and Dawson that if the agreements with the plaintiff were terminated and he was legally ejected from the premises, the defendant company would grant subleases to the defendant Dawson. It was agreed accordingly. It was further agreed that if the plaintiff should sue for and obtain specific performance of his agreement the agreement with Dawson should be at an end."

On 17th August the company, without any warning to the plaintiff, took possession simultaneously of both theatres; and the plaintiff has ever since been deprived of any right he had to continue in possession and carry on the business. Dawson had proceeded to Melbourne shortly before this date, ostensibly on the business of the plaintiff; but, on arrival, he proceeded to take possession of the Melbourne theatre on behalf of the company and to dismiss the plaintiff's Melbourne staff. One Hall had in the meantime taken possession of the Sydney theatre on behalf of the company on the same day. Dawson arrived from Melbourne on the 19th and also dismissed the Sydney staff.

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On 10th September the plaintiff commenced an action against the defendants alleging in his declaration that the plaintiff was entitled to a lease of two picture theatres, and to the possession and control thereof, and to the profits derived therefrom, and that he was in possession thereof and carried on business therein, whereupon the defendants unlawfully and maliciously combined and conspired together to injure the plaintiff personally and in his business with regard to carrying on the said picture theatres, and in pursuance of such conspiracy wrongfully and unlawfully entered into possession of the theatres and of the plaintiff's goods therein and ejected the plaintiff therefrom, and dismissed his employees thereat and prevented him from continuing in possession and control, and Dawson, one of the defendants, wrongfully terminated his contract of employment with the plaintiff, by reason whereof the plaintiff had suffered loss of profits, injury to his credit and reputation, and other damages.

The action was tried in June 1941, the jury returning a verdict for the plaintiff for £7,000. The defendants appealed to the Full Court of New South Wales, which set aside the verdict and ordered a verdict and judgment to be entered for them. The plaintiff has now appealed to this Court and has asked that the verdict be restored or alternatively that a new trial be granted.

It is clear that the trial and the appeal to the Full Court proceeded on the basis that the defendants had committed the tort of wrongfully and maliciously conspiring to put an end to the plaintiff's contract with the company of 12th July and that this contract gave him a right to leases of the theatres until 1951. I agree with the learned Chief Justice, for the reasons he has given, that the notice of 5th June was ineffective to put an end to the agreement (if any) of 12th July, but that there is no evidence that any of the defendants knew this; so that, as it is of the essence of the tort that the defendants should have known they were not entitled to treat the contract as discharged, there is no evidence to support the verdict of the jury. But, as it appears to me for the reasons already given that the agreement of 12th July was not an enforceable contract, there was, in my opinion, nothing to put an end to and no notice was necessary.

The plaintiff's rights at the date of his dispossession depended therefore upon the relationship created by the letter of 5th August, his entry into possession of the businesses, and the payment of the weekly sums of £110. The letter specifically refers to his carrying on the businesses as agent of the company. It is clear that the parties intended to guard against the risk of forfeiture of the leases through breaches of the covenants against the company parting with possession of the theatres without consent. The legal result of the plaintiff entering into possession of the businesses on the above conditions

was, in my opinion, that he did not acquire any legal possession of the premises, but became entitled as a licensee to their use for carrying on the theatre businesses, he to receive the whole of the profits in consideration of paying the company £110 a week and indemnifying it against the debts (*Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (1); *Edwardes* v. *Barrington* (2); *Jackson* v. *Simons* (3); *Clore* v. *Theatrical Properties Ltd. and Westby & Co. Ltd.* (4); *Pincott* v. *Moorstons Ltd.* (5); *Cowell* v. *Rosehill Racecourse Co. Ltd.* (6)). Such a licence would only be revocable on reasonable notice (*Canadian Pacific Railway Co.* v. *The King* (7)). If the company employed Dawson and Hall to enter into possession without giving such a notice it would be guilty not of a tort but of a breach of contract (*Kerrison* v. *Smith* (8)).

Seeing that the issue before the jury was whether the defendants conspired to deprive the plaintiff of his rights under an enforceable contract for the grant of leases for twelve years when no such contract existed, and the damages were assessed on this basis, it follows that on this ground, in addition to the considerations which weighed with the Supreme Court, the verdict cannot stand.

There were, however, on 17th August two contracts in existence. The one already mentioned by which the plaintiff was entitled to use the premises to carry on the businesses (and it is immaterial whether he was entitled to do so on his own behalf or as agent of the company) until his right to do so was determined by reasonable notice; and the other by which Dawson was acting as the plaintiff's general manager. Lord *Dunedin* in *Sorrell* v. *Smith* (9) pointed out "that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and the motive or intent is immaterial; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy": See also *Thorne* v. *Motor Trade Association* (10). Since it is unlawful for an individual wilfully and knowingly to induce and procure a breach of contract, the allegation that more than one person acted in combination to do so is mere surplusage except to make them liable as joint tortfeasors. But, since in August 1940 Dawson was in the employment of the plaintiff, there is evidence

(1) (1921) 2 A.C. 465.
(2) (1901) 85 L.T. 650.
(3) (1923) 1 Ch. 373, at p. 380.
(4) (1936) 3 All E.R. 483.
(5) (1937) 156 L.T. 139.
(6) (1937) 56 C.L.R. 605.
(7) (1931) A.C. 414.
(8) (1897) 2 Q.B. 445.
(9) (1925) A.C., at p. 724.
(10) (1937) A.C. 797, at pp. 815, 816.

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that Doyle, and the company by them as its agents did combine to induce and procure Dawson, in breach of his obligations to the plaintiff, under the subterfuge of acting as the plaintiff's general manager, secretly and surreptitiously to enter into occupation of the theatres on behalf of the company, dismiss the plaintiff's employees, and ruin the plaintiff's business (*Jasperson* v. *Dominion Tobacco Co.* (1); *British Industrial Plastics Ltd.* v. *Ferguson* (2)). It was no part of the business of the company to procure such a breach of this contract. It is difficult to see how Doyle and Dawson could be heard to say that in doing so they were acting as agents of the company, and the belief that the company had the right to determine the agreement of 12th July could not provide any justification for such actions. As it appears therefore that, on the issue on which the case was fought, the Supreme Court came to the proper conclusion, but that the plaintiff may have rights of action against the defendants as joint tortfeasors for this tort, against the company for breach of an agreement not to determine the licences already mentioned without reasonable notice, against Dawson for breach of faith in the execution of his contract to act as the plaintiff's general manager and possibly as against some of the defendants for trespass to or detinue and conversion of his goods, the dismissal of the appeal should be without prejudice to the plaintiff's rights to sue in respect of all or any of these causes of action.

The appeal should be dismissed.

Appeal dismissed with costs. But dismissal of action to be without prejudice to any other proceedings the plaintiff may be advised to bring against the defendants or any of them in respect of the transactions between them relating to the Savoy Theatre, Sydney and the Savoy Theatre, Melbourne, other than for conspiracy to injure the plaintiff in his business or wilfully and knowingly to procure a breach of the contract (if any) made between the plaintiff and the defendant company in July 1939.

Solicitor for the appellant, *F. P. Donohoe.*

Solicitor for the respondent T. W. G. Dawson, *Alan V. Ritchie* (on military service), by *J. Stuart Thom & Co.*

Solicitors for the respondents S. F. Doyle and Bligh Street Holdings Pty. Ltd., *D. Lynton Williams, Ellis & Co.*

J. B.

(1) (1923) A.C., at p. 712.
(2) (1940) 1 All E.R. 479; 56 R.P.C. 271; 58 R.P.C. 1.