REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;
DEFENDANT,

AND

MORELAND TIMBER COMPANY PROPRIETARY LIMITED AND OTHERS . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1946.

MELBOURNE, *Oct.* 3.

SYDNEY, *Dec.* 10.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Real Property—Profit à prendre—Licence coupled with interest—Agreement for sale of sawmilling business and of right to cut and remove timber on and from vendor's land—Right of purchaser, whether exclusive.

An agreement between R. and G. was expressed as an agreement that R. would sell to G. (*a*) the goodwill of R.'s sawmilling business, (*b*) R.'s interest in the lease of the premises on which the business was conducted, (*c*) the licence held by R. under the *Forests Act* 1928 (Vic.) to cut timber on certain Crown land (it being a condition of the agreement that the consent of the Forests Commission to the transfer of the licence be obtained), (*d*) the plant of the business, and "(*e*) the right to cut timber and remove same on and from the vendor's private area of 201 acres or thereabouts adjoining" the Crown land mentioned in clause (*c*). The agreement provided that the consideration for the sale should be £800. In addition, G. undertook "to pay monthly the sum of 1s. 4d. per 100 super feet over the saw for all timber cut on the said private area," and it was provided that "possession of the said business plant and areas shall be given and taken on payment of the . . . purchase money."

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD.

Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Williams* J. dissenting), that the agreement, by clause (*e*), conferred on G. in respect of the "private area" the exclusive right to cut and remove timber.

Decision of the Supreme Court of Victoria (Full Court): *Moreland Timber Co. Pty. Ltd.* v. *Reid*, (1946) V.L.R. 237, affirmed.

APPEAL from the Supreme Court of Victoria.

Edward D. Reid carried on the business of a sawmiller at a mill situated on the leasehold premises referred to in clause 1 (*b*) of the agreement hereunder mentioned; he had a licence (referred to in clause 1 (*c*) of the agreement) under the *Forests Act* 1928 (Vic.) to cut timber on certain Crown land, and he was the owner in fee simple of adjoining land which is referred to in clause 1 (*e*) of the agreement. By an agreement in writing made between Reid as vendor and Herbert Grumach as purchaser it was agreed, in clause 1, that Reid sold and Grumach purchased—"(*a*) The goodwill of the . . . business. . . . (*b*) all the right title and interest of the vendor in the leasehold premises and buildings whereon and wherein such business is conducted. (*c*) The licence held by the vendor under the *Forests Act* to cut timber on the land known as the Blackwood Gully Area (which area is as inspected by the purchaser on the 12th September 1939). (*d*) The whole of the plant" of the business. "(*e*) The right to cut timber and remove same on and from the vendor's private area of 201 acres or thereabouts adjoining the Blackwood Gully Area (which private area is as inspected by the purchaser on the 16th September 1939)." The agreement also provided:—"2. The consideration money for such sale is £800 payable as follows:—The purchaser shall on the signing hereof pay a deposit of £100 . . . and the balance of £700 shall be paid immediately on the issue by the Forests Commission of its consent to the transfer of the . . . licence" referred to in clause 1 (*c*). "3. In the event of the consent to transfer being refused the deposit of £100 shall be repayable to the purchaser and this agreement shall be cancelled. . . . 5. The vendor will . . . obtain the consent of . . . such . . . person as may be necessary for the transfer of the lease" of the site of the mill. "6. The purchaser hereby undertakes to pay monthly the sum of 1s. 4d. per 100 super feet over the saw for all timber cut on the said private area of 201 acres and to pay the royalty to the Forests Commission as charged by it from time to time. 7. Possession of the said business plant and areas shall be given and taken on payment of the balance of purchase money."

On 29th April 1941 Grumach assigned his interest under the agreement to William Vosper Sealey, who assigned his interest, on 8th July 1942, to Moreland Timber Co. Pty. Ltd.

All three joined as plaintiffs in an action in the Supreme Court of Victoria against Reid, claiming damages as for a breach of the agreement in that Reid had in December 1942 agreed with one Lord to allow Lord to cut timber on the land referred to in clause 1 (*e*) of the agreement and Lord had taken timber from the land.

Gavan Duffy J., being of opinion that clause 1 (*e*) did not confer an exclusive right, gave judgment for the defendant, but on appeal this decision was reversed by the Full Court of the Supreme Court: *Moreland Timber Co. Pty. Ltd.* v. *Reid* (1).

From the decision of the Full Court of the Supreme Court, Reid appealed to the High Court.

Voumard, for the appellant. An agreement conferring a licence should not be read as conferring an exclusive licence unless it appears clearly from the terms of the agreement that it was intended to be exclusive (*Carr* v. *Benson* (2); *Duke of Sutherland* v. *Heathcote* (3)). There is nothing in the present agreement or the circumstances of the case which is not consistent with the view that it was intended to confer merely a non-exclusive licence. Clause 6 of the agreement, in particular, supports this view; in fact, it is inconsistent with the idea of an exclusive licence. Under it Grumach was only bound to pay for timber which he actually cut. There is no provision binding him to cut any of it, and he is not in any way limited as to time. It is unlikely that the agreement would have been so expressed if the intention was that Grumach's licence was to be exclusive. The result would be that Grumach could, for a period to which no limit is set, deprive the appellant of the opportunity of disposing of any of the timber. It does not seem probable that this was intended. The reference in clause 7 to "possession" does not tell against this view. It is obvious that Grumach was not to be given possession of the vendor's land; all he had, in any view, was the right to enter on the land to cut timber and to carry it away. The clause cannot mean any more than that Grumach was to be put in a position to exercise his right.

Coppel K.C. (with him *H. Minogue*), for the respondents. It is plain that the timber on the private area was intended in the first instance for milling at the vendor's mill, and the sale of the business

(1) (1946) V.L.R. 237.
(2) (1868) 3 Ch. App. 524, at p. 532.
(3) (1892) 1 Ch. 475, at pp. 485, 486.

H. C. OF A. 1946.

REID v. MORELAND TIMBER CO. PTY. LTD.

and plant &c. was in substance a sale of the sawmilling business as a going concern with all that was necessary for carrying it on. It would have been impracticable, therefore, to leave the vendor free to grant licences which might have had the effect of denuding the land of timber before the purchaser could avail himself of it. The word "possession" in clause 7 is apt, in the fullest sense, with respect to the business and plant, and, when, in that context, it is applied to the private area, it must mean that he is to be given such possession as is necessary to enable him to cut the timber; this strongly suggests that the parties did not contemplate others coming in and cutting the timber. Clause 6 would be subject to the usual implied qualification that the purchaser must exercise his right within a reasonable time. So regarded, it is not inconsistent with the licence being exclusive.

Cur. adv. vult.

Dec. 10.

The following written judgments were delivered :—

LATHAM C.J. The appellant Edward Reid owned in freehold a block of 201 acres of land which was situated at Powelltown, Victoria. He carried on a sawmiller's business at a sawmill which was upon land leased by him, and he also had a licence under the *Forests Act* 1928 (Vic.) to cut timber upon certain Crown land. On 18th September 1939 he made an agreement with Herbert Grumach under which he sold the goodwill and the plant of the business to Grumach, undertaking to transfer to him the licence to cut timber upon the Crown lands, and agreed that he should have the right to cut timber on the freehold area of 201 acres. Grumach assigned his rights under the agreement to W. V. Sealey, and Sealey in turn assigned his rights to the Moreland Timber Co. Pty. Ltd. In December 1942 Reid agreed to allow one Lord to cut timber on the freehold block. The company Grumach and Sealey sued Reid for breach of contract in permitting Lord to cut timber on the block. They also sued Lord for alleged trespass in cutting the timber, but it has been held in the Full Court of the Supreme Court that a licensee (or the assignee of a licensee) under the agreement of 18th September 1939 had no right of action as against Lord. There is no appeal against this decision. The plaintiffs' claim against Reid depends upon whether or not the licence granted to Grumach was an exclusive licence. If it was, then it was a breach of agreement for Reid to grant a licence to Lord and allow him to cut timber. If, on the other hand, it was not an exclusive licence, the plaintiffs have no cause of action.

Gavan Duffy J., who tried the action, was of opinion that the licence was not an exclusive licence. He pointed out that it was not expressed to be exclusive; that Grumach was to pay at a fixed rate for only such timber as he cut; and that there was no obligation resting upon him to cut any timber. He also adverted to the fact that the freehold block was not the only place whence timber might come to the mill which the plaintiff sold to Grumach.

In the Full Court it was held that the licence was exclusive. The ground of the decision was that the transfer of the licence was incidental to the sale of the goodwill of the sawmill business and of the plant, and that an essential adjunct to a sawmill is timber. Hence, it was concluded, the object of the agreement was to enable the purchaser of the timber business to have all the timber on the freehold block.

Whether a licence is exclusive or not depends upon the terms of the licence as applied to the subject matter. Prima facie a licence is a mere permission to a person to do something which would otherwise be wrongful, and is therefore not exclusive in character. If it is expressed to be exclusive, then, of course, it is exclusive. If it is not so expressed, it should not be held to be exclusive unless the subject matter is such as to show that it was the intention of the parties that it should be exclusive. A licence to a person to walk across a paddock is obviously consistent with the existence of licences to many other persons to do the same thing. It could not in such a case be suggested that the owner had, by giving such a licence to one person, excluded himself from walking across his own paddock, or prevented himself from giving similar leave to other people. On the other hand, a licence to sell refreshments at a particular booth at an agricultural show where only one person could carry on business at a time should be held to be exclusive. There is, however, nothing in the nature of the subject matter of the licence now under consideration which makes it exclusive. A licence to pick flowers and a licence to cut timber in an area may be exercised by several persons simultaneously.

The law is stated in *Newby* v. *Harrison* (1), where Vice-Chancellor *Page Wood* said: "The distinction is well known between a mere ordinary licence and an exclusive licence, and in the latter you expect to find something of that nature expressed." Similarly, in *Duke of Sutherland* v. *Heathcote* (2), referring to *profits à prendre*, *Lindley* L.J. said: "An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such a right cannot be

(1) (1861) 1 John. & H. 393, at p. 396 [70 E.R. 799, at p. 801].

(2) (1892) 1 Ch. 475, at p. 485.

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD. Latham C.J.

inferred from language which is not clear and explicit." In *Carr* v. *Benson* (1) it is again emphasized that a licence (in the case in question to remove coal) is prima facie not exclusive and it was said: "it has been held from the earliest period that a man taking a license where he is under no obligation to work cannot exclude his licensor from granting as many more of those licenses as he thinks fit, provided always that they are not so granted as to defeat the known objects of the first licensee in applying for his license" (2).

The agreement of 18th September 1939 included the following provisions:—

"The vendor sells and the purchaser purchases:—

(*a*) The goodwill of the vendor's business at Powelltown.

(*b*) All the right title and interest of the vendor in the leasehold premises and buildings whereon and wherein such business is conducted.

(*c*) The licence held by the vendor under the *Forests Act* to cut timber on the land known as the Blackwood Gully Area (which area is as inspected by the purchaser on the 12th September 1939).

(*d*) The whole of the plant as set out in the Schedule hereunder written.

(*e*) The right to cut timber and remove same on and from the vendor's private area of 201 acres or thereabouts adjoining the Blackwood Gully Area (which private area is as inspected by the purchaser on the 16th September 1939)."

Clause 2 provided that the consideration of money for the sale was £800. Clause 3 provided that if the consent to transfer (presumably the licence held under the *Forests Act*) was refused, a deposit of £100 should be repayable and the agreement should be cancelled. Under clause 5 the vendor undertook to obtain the consent of the lessor to the transfer of the lease or licence to occupy the mill and tramway site. Under clause 6 the purchaser Grumach undertook to pay monthly a sum of 1s. 4d. per 100 super feet over the saw for all timber cut on the private area of 201 acres, and also to pay royalty to the Forests Commission. Clause 7 provided that: "Possession of the said business plant and areas shall be given and taken on payment of the balance of the purchase money."

In the first place, it should be observed that the agreement purports only to grant to Reid the right to cut timber, and does not purport to grant to him the sole right to cut timber. Thus the licence is not exclusive in its terms. In the next place, it should be noted that Grumach did not buy the standing timber; neither did

(1) (1868) 3 Ch. App. 524. (2) (1868) 3 Ch. App., at p. 532.

he buy the freehold land. The transaction was not a "walk-in-walk-out" sale. He only bought (so far as that land was concerned) a right to cut timber on it. Such a right with respect to some land was doubtless necessary to the continued operation of the sawmill—but it cannot be said that the mill could not be used unless the timber rights were such as to prevent other persons from getting timber from particular areas. Further, Grumach was not under an obligation to cut any timber, and the agreement contained no time limit. Accordingly, if the licence to Grumach were held to be exclusive, the position would be that he need not cut any timber and therefore need not pay any royalties to Reid under clause 6, and that Reid could neither cut timber himself nor allow anybody else to cut timber on the block. It was argued that clause 7, providing for the delivery of possession, meant that exclusive possession of the freehold block should be given to Grumach and that such possession necessarily involved the consequence that the right to cut timber on the block was exclusive. But the word "possession" in clause 7 is used in relation to the business, the plant and the areas of land mentioned. Possession of the business and plant would be given by procuring the transfer of the lease or licence of the mill and tramway site to Grumach, and by Reid withdrawing from occupation thereof. In the case of the licence under the *Forests Act*, it is obvious that Reid could not give possession in a legal sense of the Crown lands. In the case of Reid's freehold land, a licence to cut timber does not confer upon the licensee a right to exclude the owner from the land as if the licensee had acquired the freehold of the land. The possession of the freehold land which was to be given under clause 7 was only that degree of possession which was necessary in order to exercise the right to cut the timber—as in the case of the Crown lands.

Accordingly, in my opinion, it should be held that the licence was not exclusive, and that therefore the grant of a licence to Lord was not a breach of the contract of Reid with Grumach, that the removal of timber from the freehold block by Lord was not damage arising from a breach of contract, and that therefore the plaintiffs should fail in their action, not only as against Lord, but also as against Reid. The judgment of the Full Court should be set aside and the judgment of *Gavan Duffy* J. restored.

STARKE J. By an agreement in writing, which was not under seal, the appellant Reid sold to the respondent Grumach :—

(*a*) The goodwill of the appellant's business of a sawmiller at Powelltown.

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD. Starke J.

(*b*) All the right, title and interest of the appellant in the leasehold premises and buildings whereon and wherein such business is conducted.

(*c*) The licence held by the appellant under the *Forests Act* 1928 (Vic.) to cut timber on the land known as Blackwood Gully area which had been inspected by the respondent Grumach.

(*d*) The whole of the sawmilling plant set out in the Schedule.

(*e*) The right to cut timber and remove same on and from the appellant's private area of 201 acres or thereabouts adjoining the Blackwood Gully area inspected by the respondent Grumach.

The consideration for the sale was £800 payable as stipulated in the agreement. Possession of the business plant and area was to be given on payment of the purchase money. But in the event of the authority under the *Forests Act* refusing consent to a transfer of the licence to cut timber on the land known as Blackwood Gully the agreement was to be cancelled and any payments made repaid.

The respondent Grumach conveyed and assigned to the respondent Sealey the property mentioned in, and the benefits of, this contract and Sealey conveyed and assigned it to the respondent the Moreland Timber Co. Pty. Ltd.

The only question arising on this appeal is whether the right to cut and remove timber from the appellant's private area is or is not exclusive.

The agreement does not operate as a demise or as an agreement for a demise, for the agreement does not entitle the purchaser to exclusive possession of the area for any definite period.

A mere licence to cut timber would not be exclusive ; it would pass no interest and transfer no property but only make an act lawful which otherwise would have been unlawful. But the licence in this case does not stand alone. It is a licence coupled with an agreement to make a grant. Had it been by deed the licence would have been coupled with a grant. The right to cut down and remove trees would be a licence as to the acts of cutting down timber but as to removing them it would be a grant (*Thomas* v. *Sorrell* (1) ; *Muskett* v. *Hill* (2)). A licence coupled with a grant is irrevocable if the grant is valid and so, I apprehend, a licence would be irrevocable if coupled with an agreement to make a grant : Cf. *Cowell* v. *Rosehill Racecourse Co. Ltd.* (3). But it does not follow that a licence to cut timber coupled

(1) (1673) Vaughan 330, at p. 351 [124 E.R. 1098, at p. 1109].

(2) (1839) 5 Bing. N.C. 694, at p. 707 [132 E.R. 1267, at p. 1272].

(3) (1937) 56 C.L.R. 605.

with a grant or with an agreement for a grant of the timber cut is an exclusive licence. That depends upon the construction of the agreement between the parties. In the present case the licence coupled with the agreement for a grant of timber forms part of an agreement for the purchase of a sawmilling business and its object is to provide timber, though not all the timber, required for the purposes of the business, from the vendor's small private area of 201 acres or thereabouts of which possession was to be given on payment of the balance of purchase money. In transactions such as this business efficacy must have been intended by the parties and that end would not be achieved if the vendor could cut and remove the timber himself or license other persons to do so. Indeed, the physical difficulties of several persons cutting and removing timber at the same time on this small block would almost require the licence to be exclusive. And it is to be observed that the appellant himself made it clear, as *Macfarlan* J. said in the Supreme Court, that his agreement gave an exclusive right to cut and remove the timber on the block and that it would be dishonest to grant anyone else a right so long as the agreement was in operation. Business men would, I should think, have little doubt, having regard to the nature of the agreement, the area and the working of such a block, that the licence was exclusive. But the Court was referred to the agreement requiring the respondent to pay royalty on the timber cut on the 201-acre block, which is a stipulation to be considered but is certainly not decisive, and to a number of cases which, it was said, precluded it from deciding that the licence was exclusive (*Newby* v. *Harrison* (1) ; *Duke of Sutherland* v. *Heathcote* (2)). The cases however establish no rule of law and the question whether the right to cut timber was or was not exclusive depends upon the proper construction of the particular agreement. It cannot be construed effectively without reference to its context and the surrounding circumstances.

In my opinion, the decision under appeal was right and this appeal should be dismissed.

DIXON J. The question submitted for our decision in this appeal is one of interpretation ; but it depends upon more than the mere construction of language. The considerations which must be taken into account include the character of the transaction, the nature of the subject-matter and the purpose of the particular provision to be interpreted. The transaction was the sale of a saw-milling business. Besides the goodwill, the lease of the site of the mill and

(1) (1861) 1 John. & H. 393 [70 E.R. 799].

(2) (1892) 1 Ch. 475, at p. 483.

H. C. OF A. 1946.

REID v. MORELAND TIMBER CO. PTY. LTD.

Dixon J.

the machinery and plant, the agreement of sale included certain rights under which timber might be obtained for milling. The place where the timber stood is called Blackwood Gully, and in respect of a large part of this area the appellant, who was the vendor, held a licence from the Forests Commission to cut timber. The licence was governed by the *Forests Act* 1928 (Vic.) and I take it to be a licence of a special area for the exclusive cutting of timber. The area, of course, in respect of which the licence was issued consisted of unalienated Crown land. Another part of the area, however, contiguous with the Crown land in question, consisted of land alienated from the Crown in which the appellant held an estate in fee simple. It was a small area of 201 acres only and, like the adjacent area, was the site of standing timber suitable for milling. They were mountain ash trees. The two areas together formed part of the business, so to speak, of the appellant, the vendor. They formed the source of expected supply for his mill. How it came about that he himself had acquired an estate in fee simple in the 201 acres does not appear, but clearly enough the sole immediate purpose for which the land was fit was the cutting of timber for milling. The period during which the land held under licence from the Forests Commission would, if continually worked, supply a sufficient quantity of timber to keep the mill going was not very long, perhaps a year, perhaps more. The adjacent 201 acres was obviously intended to supplement the source of supply and so to lengthen the period. It appears from the agreement itself that, during the week of negotiation preceding the making of the contract, the respondent Grumach, who was the purchaser, inspected the area held under licence on one day and, on a subsequent day, the 201 acres, which the vendor called his private area.

The agreement, although drawn by a solicitor, is not expressed in terms of art. It is in fact a short form of contract of sale. The subject of the sale is described in five items. The third is expressed as follows: "The licence held by the vendor under the *Forests Act* to cut timber on the land known as the Blackwood Gully area (which area is as inspected by the purchaser on the 12th September 1939)."

The fifth is in the following terms: "The right to cut timber and remove same on and from the vendor's private area of 201 acres or thereabouts adjoining the Blackwood Gully area (which private area is as inspected by the purchaser on the 16th September 1939)."

The question for our consideration is whether under this fifth item it is intended to confer on the respondent Grumach as purchaser the sole right so to cut and remove timber, or a right which was to be

concurrent with a similar right in the vendor and any other person or persons whom he might authorize or license to cut and remove timber from his private area. The question arises because the appellant, the vendor, proceeded after some time to grant a licence to a stranger to obtain timber from his private area. This he could only do if the purpose of the clause giving a right to cut and remove timber was to give a right concurrent with a like right in himself and those claiming under him. Otherwise he would be derogating from what he had agreed to grant.

A vendor of any form of property incurs an implied obligation not to destroy, defeat or impede the enjoyment by the purchaser of the subject of the sale. He may not derogate from that which he has disposed of. No doubt it is necessary that it should affirmatively appear that the intention was to give the sole right. But the intention to do so may be collected from the nature of the agreement, its business purpose, the subject with which it deals and the circumstances surrounding its making.

The nature of the agreement appears from what has already been said, but it is necessary to take into consideration the remaining provisions of the agreement, which give some assistance in the solution of the problem. The consideration for the sale was a lump sum of £800. A deposit of £100 was payable immediately and the balance of £700 upon the Forests Commission's issuing its consent to the transfer of the licence. If that consent were refused, the sale was to be cancelled and the deposit repaid. An express provision required that " possession " of the business plant and areas should be given and taken on payment of the balance of the purchase money. For the timber obtained from the private area a royalty was to be paid. This was dealt with by a clause which said that the purchaser undertook to pay monthly the sum of 1s. 4d. per hundred super feet over the saw for all timber cut on the private area of 201 acres and to pay the royalty to the Forests Commission as charged by it from time to time, that is, pursuant to the licence under the *Forests Act*.

If the draftsman of the agreement had been minded to express it according to the technical conceptions of the law of real property and of the use and enjoyment of land, he might have considered whether he would grant a lease or licence of the 201 acres giving exclusive occupation but subject to restrictive covenants confining the use of the land to the cutting and removal of timber, whether he would grant a *profit à prendre*, whether he would grant a licence under seal or a bare licence, and whether, in the case of the *profit à prendre* or the licence, he would make them exclusive or non-exclusive. He preferred to express himself in more direct language which the parties would probably better understand.

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD. Dixon J.

The right to cut timber and remove it from land is a not unnatural way of describing one of the rights of enjoyment which springs from ownership, and one can scarcely doubt that it was that particular right of ownership which attracted the vendor when he himself acquired his so-called private area of 201 acres. When the dispute arose between them, correspondence on the part of the respondent Grumach with the appellant made it clear that he unquestionably assumed that the right he had obtained to cut timber was exclusive, and the reply of the appellant, who justified his action on the mistaken ground that the agreement had been discharged by a failure on the part of the purchaser to perform, implied plainly enough that he accepted the assumption. These are considerations which may be taken into account in elucidating the intention of the parties in employing such an equivocal expression as "the right to cut timber and remove same on and from the vendor's private area." In one of the letters it is treated as conferring "the cutting rights" belonging to the area, a not inappropriate description.

The subject-matter of the provision may also be taken into consideration. It consisted of a relatively small area of land, which could hardly carry many months' supply of timber suitable for milling. From a working point of view it might be regarded as physically forming part of the whole area of Blackwood Gully but, as part of that area was held under licence from the Forests Commission, it might be found necessary to cut the licensed area first. That would mean a delay in cutting timber on the private area of sufficient length to enable the vendor, or any one whom he might license, to take the whole of the timber, if the agreement allowed such a course. Although not completely impossible, it would from a business point of view be quite unpractical for more than one miller to cut in the 201 acres at the same time. When the provision in the agreement relating to completion speaks of "possession," probably it means exactly what it says. It is true that the word "possession" may be used merely in the sense of enjoyment, but it is more probable that from everybody's point of view it was considered that the vendor would place the purchaser in actual control or occupation of the timber areas as well as of the premises upon which the plant stood. In my opinion, it does sufficiently appear from the circumstances to which I have referred that the purpose was to give the respondent Grumach, the purchaser, the sole right to cut and remove timber. It was an out-and-out sale of the business of the vendor as a going concern; the sources of supply made over included the 201 acres; the source of supply of a timber mill, as is common knowledge, determines the life of the business at

that site ; the 201 acres might be the last to be worked and, therefore, stood in reserve ; concurrent working, from a practical point of view, would never be entertained ; indications exist in the agreement that it was considered that possession (that is, full enjoyment of the right) would be assumed ; and, by their conduct, or correspondence, the parties showed that they so understood the agreement.

I, therefore, think that the conclusion of the Full Court of the Supreme Court ought not to be disturbed.

I should, perhaps, add that it was suggested, in effect, that to give an interminable exclusive right to cut timber might mean that the land must be sterile in the hands of the owner of the fee simple awaiting the pleasure of the purchaser, for the vendor could not cut the timber and the purchaser was not bound to do so. But I do not regard the right as interminable. I think that the common implication would be made restricting the exercise of the right to a reasonable time. In other words, it should be understood as a right within a reasonable time to cut and remove the timber on the land. An implication of a reasonable time when none is expressly limited is, in general, to be made unless there are indications to the contrary : See *Ellis* v. *Thompson* (1) ; *Picturesque Atlas Co. Ltd.* v. *Bradbury* (2) ; *Picturesque Atlas Co. Ltd.* v. *Searle* (3) ; *Lynn* v. *Creati* (4). It cannot be treated as a contract for the benefit only of the party doing the acts it authorizes : See *Burton* v. *Griffiths* (5).

For the foregoing reasons, I think the appeal should be dismissed.

McTiernan J. In my opinion the appeal should be dismissed.

The question which it is necessary to decide is whether the right which Reid sold to Grumach in respect of timber on the area which is described in the agreement of 18th September 1939 as " the vendor's private area of 201 acres or thereabouts " was an exclusive right or not. The right which is expressed to be sold is the " right to cut timber and remove same on and from " the above-mentioned area. The agreement states that such area " is as inspected by the purchaser on the 16th September 1939." According to authority, " a licence to cut down a tree on a man's ground and to carry it away the next day after to his own use " is a licence as to the act of cutting down the tree ; but as to the carrying away of the tree cut down, is a grant (*Thomas* v. *Sorrell* (6) ; *Muskett* v. *Hill* (7)). Licences

(1) (1838) 3 M. & W. 445 [150 E.R. 1219].
(2) (1893) 19 V.L.R. 439.
(3) (1892) 18 V.L.R. 633.
(4) (1892) 18 V.L.R. 629.
(5) (1843) 11 M. & W. 817 [152 E.R. 1035].
(6) (1673) Vaughan 330, at p. 351 [124 E.R. 1098, at p. 1109].
(7) (1839) 5 Bing. N.C. 694 [132 E.R. 1267].

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD. McTiernan J.

are of two kinds, "a mere ordinary licence" and "an exclusive licence" (*Newby* v. *Harrison* (1)). In the case of *Heap* v. *Hartley* (2) *Fry* L.J. said "an exclusive licence is only a licence in one sense; that is to say, the true nature of an exclusive licence is this. It is a licence to do a thing, and a contract not to give leave to anybody else to do the same thing." *Fry* L.J. went on to say that an exclusive licence, like any other licence, confers no interest or property in the thing unless it is coupled with a grant. In *Newby* v. *Harrison* (3) the question arose whether a licence granted in a lease, which was by deed, was an exclusive licence. Lord *Hatherley*, then Vice-Chancellor, said:—"It appears to me that I cannot hold it to be an exclusive licence, because, if it were intended so to be, it would be framed with words of an exclusive character. That may, I think, be assumed, unless I find something in the deed which compels me to come to a different conclusion. The distinction is well known between a mere ordinary licence and an exclusive licence, and in the latter you expect to find something of that nature expressed." Lord *Hatherley* added: "Though I cannot come to the conclusion that it was intended there should be an exclusive right, on the other hand, it appears to me that any Court would feel itself bound to put such a construction upon this grant as should not enable the grantor to defeat his own grant."

The case of *Duke of Sutherland* v. *Heathcote* (4) involved the construction of a reservation of liberty to dig and carry away coal made in a conveyance of land. The question was whether the plaintiff who claimed under the reservation had the exclusive right to dig and carry away coal from the land. *Lindley* L.J., who gave the judgment of the Court, said:—"The plaintiff, however, says that, whether he wants to work the mines or not, the defendants have no right to work them, and that by working them the defendants have infringed the plaintiff's rights. Now, putting all legal subtleties and technicalities aside, this is in substance a claim by the plaintiff to the mines in question, and if his right to the mines as his property is negatived, it is not easy to see how he can establish a right, not only to work the mines, but to prevent the owners of them from doing so, when the plaintiff is not himself working them. A *profit à prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit, but does not exclude, the second. An exclusive right to all the profit of a particular kind can,

(1) (1861) 1 John. & H., at p. 396 [70 E.R., at p. 801].
(2) (1889) 42 Ch. D. 461, at p. 470.
(3) (1861) 1 John. & H., at p. 369 [70 E.R., at p. 801].
(4) (1892) 1 Ch. 475.

no doubt, be granted; but such a right cannot be inferred from language which is not clear and explicit" (1). Referring to the way in which the reservation of liberty to dig and take coal from the land was framed, *Lindley* L.J. said: "The words used in this reservation are certainly not such as any conveyancer in 1783 would have used in order to reserve an exclusive right to work the mines; there is not enough, in our opinion, to show that anything more was reserved than a right to work the mines when desired; such a right does not exclude the right of the owner to work them, provided he does not disturb the grantee in his working operations when and where he is carrying them on" (2). It appears from these decisions, that even if Grumach's right was not exclusive, it would have restricted Reid or any person to whom he granted a licence to cut timber on the area in question to the extent at least that neither Reid nor any such licensee was at liberty to disturb Grumach's operations of cutting and taking away timber.

Applying the criterion of *Fry* L.J. of what is an exclusive licence, I should hold that here there is necessarily implied in the agreement a promise on Reid's part that he would not grant a licence to anybody else to do the same sort of thing which he gave Grumach leave to do on the private area. Applying Lord *Hatherley's* rule of construction, I think that the agreement and its subject-matter compel the conclusion that the right to cut and remove timber sold to Grumach is an exclusive right. Applying the rule of construction stated by *Lindley* L.J., I think that in the context of this agreement the words "the right to cut timber and remove the same from the vendor's area" are clear and explicit. I think that in this context these words are not capable of meaning "a mere ordinary licence" of the kind which Grumach and a number of persons could hold concurrently. The words apply to a right sold with the goodwill of the vendor's sawmilling business, his interest in the premises where it was carried on, a licence held under the *Forests Act* (Vic.) by the vendor to cut timber on a different area from that now in question, and certain plant. It seems to me that Reid sold the right which he had to cut timber on his private area, with all the business advantages that it had to Reid himself. The right was held exclusively by Reid. So far as this right was concerned, he sold to Grumach what he had. It was not open to Reid afterwards for the period of the right to cut timber and take it away from the private area; and it was not open to him to give leave to anybody else to do so.

(1) (1892) 1 Ch., at p. 484. (2) (1892) 1 Ch., at p. 486.

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD.

WILLIAMS J. The facts have already been stated in previous judgments and I shall not repeat them. Of the various issues of fact and questions of law that arose in the action, one question of law survives for determination on this appeal. It is whether the true meaning and effect of the agreement of 18th September 1939 is to confer upon the purchaser an exclusive or non-exclusive licence and grant to cut and remove timber from the vendor's private area of 201 acres.

The right to cut and remove timber from the area of 201 acres is a licence to enter and cut the trees and a grant of a right to remove the timber when cut. If the grant had been by deed it would have been a grant at law of an incorporeal hereditament, namely, a *profit à prendre* (*In re Refund of Dues under Timber Regulations* (1)). The agreement is not, however, under seal, so that it does not confer a legal right, but it was entered into for valuable consideration and so confers a good interest in equity, and the licence to enter and cut the trees being coupled with an interest is irrevocable (*James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (2); *Cowell* v. *Rosehill Racecourse Co. Ltd.* (3)).

The agreement does not oblige the purchaser to cut any trees on the 201 acres, so that if it is an exclusive licence no timber could ever be cut on the area unless the purchaser chose to exercise his right. The effect of a mere licence is to make an act lawful which without it would be unlawful, so that to confer a licence to do a thing does not in itself import an intention to confer a right to do that thing to the exclusion of any other person. A *profit à prendre* is a right in land which is not accompanied by exclusive possession (*Halsbury's Laws of England*, 2nd ed., vol. 27, p. 607). Licences and *profits à prendre* are not therefore construed as giving an exclusive right to the benefit conferred unless the instrument expressly so provides or an intention to that effect can be gathered from its language as a whole. The present agreement does not expressly provide that the right should be exclusive and its language as a whole does not appear to me to raise an implication to that effect. It is true that it is an agreement for the sale of *the* right to cut and remove the timber, but the word "the" is not of itself sufficient to imply that the right is exclusive. In *Duke of Sutherland* v. *Heathcote* (4) the words "full and free liberty" were held insufficient to confer an exclusive right. *Lindley* L.J., delivering the judgment of the Court of Appeal, said: "A *profit à prendre* is a right to take something off another

(1) (1935) A.C. 184, at p. 193.
(2) (1909) 2 Ch. 440, at p. 443.
(3) (1937) 56 C.L.R. 605, at pp. 618, 626, 628, 630.
(4) (1892) 1 Ch. 475.

person's land ; such a right does not prevent the owner from taking the same sort of thing from off his own land ; the first right may limit, but does not exclude, the second. An exclusive right to all the profit of a particular kind can, no doubt, be granted ; but such a right cannot be inferred from language which is not clear and explicit. This is plain from the many cases referred to in the argument, viz. : *Lord Mountjoy's Case* (1) ; *Chetham* v. *Williamson* (2) ; *Doe* v. *Wood* (3) and *Carr* v. *Benson* (4) " (5).

If the agreement had been intended to be a complete walk-in-walk-out sale, as Dr. *Coppel* contended, it would have provided for the purchaser buying the fee simple of the 201 acres, or at least buying the standing timber. But the purchaser did not do either. He merely bought the right to enter and cut the trees, and only agreed to pay for such timber as he cut from time to time.

Both sides relied upon some of the remarks of Lord *Hatherley* (then Sir *W. Page Wood*) in *Newby* v. *Harrison* (6) on the nature of licences. I am of opinion that these remarks, so far as they are of general application, assist the appellant. His Lordship stated the general principle as follows :—" I cannot hold it to be an exclusive licence, because, if it were intended so to be, it would be framed with words of an exclusive character. That may, I think, be assumed unless I find something in the deed which compels me to come to a different conclusion. The distinction is well known between a mere ordinary licence and an exclusive licence, and in the latter you expect to find something of that nature expressed " (7). The respondents relied on the statement (8) that " there is a clear, definite grant of so much (ice) as may be wanted for the purpose of filling these ice houses." They contended that by parity of reasoning there was a grant of so many of the trees as the purchaser would want for the business and that this meant all the timber. But in *Newby's Case* (6) the payment for the ice was included in the rent of the land on which the ice houses stood, whereas in the present case payment for the timber on the 201 acres is conditional upon the purchaser exercising his right to fell the trees.

The respondents also relied upon the words in clause 7 of the agreement " possession of the business plant and areas shall be given and taken on payment of the balance of purchase money." I agree that the " areas " referred to include the forest area and the 201

(1) (1594) 1 And. 307 [123 E.R. 488].
(2) (1804) East. 469 [102 E.R. 910].
(3) (1819) 2 B. & Ald. 724 [106 E.R. 529].
(4) (1868) 3 Ch. App. 524.
(5) (1892) 1 Ch., at pp. 484, 485.
(6) (1861) 1 John. & H. 393 [70 E.R. 799].
(7) (1861) 1 John. & H. 393, at p. 396 [70 E.R. 799].
(8) (1861) 1 John. & H. 393, at the bottom of p. 398 [70 E.R. 799].

H. C. OF A. 1946. REID v. MORELAND TIMBER CO. PTY. LTD. Williams J.

acres. The purpose of this clause is to fix the time for completion of the agreement. But the purchaser could not enter into legal possession of the forest area. He had only a licence to enter this area to cut the timber. The word " possession " is not used strictly but somewhat loosely and compendiously to describe the property and rights of which the purchaser was to enter into possession in the sense of entering into enjoyment of the various items upon completion. And in *Fitzgerald* v. *Firbank* (1) *Lindley* L.J. (in a passage cited in *Nicholls* v. *Ely Beet Sugar Factory Ltd.* (2)) said that a person who enjoys a *profit à prendre* has possessory rights, and that if he is not " a grantee by deed but only claiming under an agreement, he can be said to have the use and occupation of the right."

Clause 7 of the agreement throws no light on the question under discussion.

For these reasons I agree with the learned trial judge that the right to cut the timber on the 201 acres was a non-exclusive licence and I would allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Michael Niall & Co.*
Solicitors for the respondents, *A. L. C. Flint and Marrie.*

E. F. H.

(1) (1897) 2 Ch. 96, at p. 101.

(2) (1931) 2 Ch. 84, at p. 88, and (1936) Ch. 343, at p. 348.