[HIGH COURT OF AUSTRALIA.]

AXELSEN AND OTHERS . . . . . APPELLANTS ;
PLAINTIFFS,

AND

O'BRIEN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 21, 22.

Latham C.J., Rich and Dixon JJ.

Specific Performance—Sale of land—Agreement—Balance of purchase moneys to be secured by mortgage—Terms to be settled by solicitors—Trustees to be nominated by purchasers—Survey—Refusal of vendor to carry out agreement—Readiness and willingness of purchasers—Remedy—Certainty of contract—Want of mutuality.

By an agreement for the sale of land for £900, part of a larger block of land held under one certificate of title, it was provided that, upon the consent of the Treasurer being given, the vendor should execute a nomination of trustees over the land to trustees appointed by the purchasers upon their paying £500 and upon the trustees executing a mortgage securing the balance of the purchase moneys and containing such other terms and conditions as required by the solicitors for the purchasers. The agreement also made provision for delivery of possession and the vendor paying survey fees to enable the land to be transferred. No survey was ever made and although trustees were appointed their names were never notified to the vendor. Possession was not given on the due date and the vendor repudiated on the ground that the purchase moneys were not paid. The purchasers then advised the vendor of their willingness to proceed with the sale and sent £500 which was refused. In a suit for specific performance by the purchasers,

Held that there was a concluded contract as the settlement of the terms of the mortgage and the nomination of trustees did not depend upon further agreement between the parties.

Held, further, that a decree should be made for specific performance of the contract as the conditions not performed by the purchasers were merely the subsidiary means of carrying out the contract.

Williams v. *Brisco*, (1882) 22 Ch. D. 441 ; *Milnes* v. *Gery* (1807) 14 Ves. 400 [33 E.R. 574], distinguished.

Decision of the Supreme Court of Queensland (*Philp* J.) reversed.

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APPEAL from the Supreme Court of Queensland.

Twelve members of a firm known as Maryborough Bread Distributors sued Michael O'Brien in the Supreme Court of Queensland for specific performance of an agreement in writing for the sale to them by the defendant of certain land upon which were erected a bakehouse and shop. The relevant portions of the agreement and the facts are set out in the judgment of *Latham* C.J.

By his defence the defendant contended that if there were a valid agreement the plaintiffs had failed to perform their part of the said agreement in that they refused to pay the purchase moneys, failed to tender for execution any nomination of trustees, failed to appoint trustees and failed to have prepared or signed or delivered any bill of mortgage.

Philp J. held that as there was no evidence that any persons were prepared to act as trustees, the contract could not be enforced against the plaintiffs. Accordingly, as there was no mutuality, he refused a decree of specific performance and dismissed the suit.

From this decision the plaintiffs appealed to the High Court.

Bennett K.C. (with him *O'Hagan*) for the appellants. There was a concluded contract, certain in its terms, which could be carried into effect without any further agreement between the parties.

[DIXON J. referred to *Ellis* v. *Rogers* (1) and to *Williams* v. *Brisco* (2).]

Counsel referred to *Dougan* v. *Ley* (3); *Hart* v. *Hart* (4).

[He was stopped by the Court.]

Fahey for the respondent. The purchasers have not covenanted to pay any amount under the mortgage. It will be necessary that the parties make a further agreement on the terms of the mortgage. The contract is therefore uncertain and cannot be specifically enforced (*Bowes* v. *Chaleyer* (5); *Peto* v. *Brighton Uckfield and Tunbridge Wells Railway Co.* (6); *Pickering* v. *The Bishop of Ely* (7); *Smith* v. *Wirth* (8)). As far as the material part of the contract is concerned it is merely an agreement to make an agreement (*Hart* v. *Hart* (9); *Tillett* v. *Charing Cross Bridge Co.* (10)). Furthermore the purchasers never appointed trustees. The conditions precedent were never carried out. No tender was made of the

(1) (1885) 53 L.T. 377.
(2) (1882) 22 Ch. D. 441.
(3) (1946) 71 C.L.R. 142, at p. 154.
(4) (1881) 18 Ch. D. 670, at p. 684.
(5) (1923) 32 C.L.R. 159, at p. 169.
(6) (1863) 1 H. & M. 468 [71 E.R. 205].
(7) (1843) 2 Y. & C.C.C. 249 [63 E.R. 102].
(8) (1945) Q.S.R. 59.
(9) (1881) 18 Ch. D. 670, at p. 688.
(10) (1859) 26 Beav. 419 [53 E.R. 959].

purchase moneys. Specific performance will not be ordered in a case like this where the contract is unfair as far as the vendor is concerned and lacks mutuality. There was no concluded contract as further terms had to be agreed upon (*G. Scammell and Nephew Ltd.* v. *Ouston* (1)).

Bennett K.C. was not called upon to reply.

Cur. adv. vult.

June 22.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from the judgment of the Supreme Court of Queensland pronounced by *Philp* J. in an action in which the plaintiffs, twelve members of a firm known as Maryborough Bread Distributors, sued for specific performance of an agreement of sale made in writing on 19th June 1945 for the sale to the firm by the defendant Michael O'Brien of land upon which a bakehouse and shop were erected. The land was part of a larger block of land for which there was one certificate of title. The agreement of 19th June 1945 had been preceded by an agreement also in writing which set out the general arrangement between the parties. The transaction involved O'Brien's going out of business and transferring his plant to the plaintiffs. The earlier agreement of 15th June 1945 expresses acceptance of the offer for sale of the land at £900. The preliminary agreement also provides for the sale of the bakery plant and an Overland motor truck at £580 payable on delivery and possession to be given on 1st July 1945. That £850 was paid on 5th July 1945. The agreement of 19th June 1945 provides by clause 2 that the vendor agrees to sell and the purchaser to purchase the unencumbered fee simple in possession of the land described for £900 payable as follows:—(*a*) Upon the consent of the Treasurer being given to the sale the vendor shall execute the nomination of trustees over the land to trustees appointed by the purchaser and shall hand such nomination of trustees and all other documents to enable same to be registered to the solicitors for the purchaser upon the purchaser paying to the vendor the sum of £500 and upon such trustees executing a bill of mortgage in favour of the vendor securing payment of the balance of the purchase price, namely £400, which bill of mortgage shall contain the following terms and conditions:—(i) The purchaser shall pay to the vendor the sum of £400 by equal quarterly payments of £50 each the first to be paid within three months after the date of the consent of the

(1) (1941) A.C. 251, at p. 269.

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Treasurer. (ii) The purchaser shall also agree to pay to the vendor interest at four and three-quarters per cent on so much of the £400 as remains unpaid. (iii) The bill of mortgage shall contain such other terms and conditions as shall be required by Corser Sheldon & Gordon of Maryborough, solicitors, not inconsistent with the above terms. The agreement also provides by clause 3 that all rates, taxes and other outgoings shall be paid and discharged by the vendor up to 30th June 1945 and after that date by the purchaser. By clause 6 the vendor was to pay all necessary survey fees to enable the land to be transferred to the purchaser and pay the costs of registration on such plan of survey. By clause 8 it was provided that if the consent of the Treasurer was not given to the sale the agreement should be null and void and all moneys paid refunded by the vendor to the purchaser. By clause 9 the vendor agreed to transfer the land to such nominee as might be appointed by the purchaser and to execute the transfer in such form as the purchaser required.

The provisions of clause 2 (*a*) are that upon the consent of the Treasurer the vendor is to execute the nomination of trustees over the land to certain trustees and hand over the documents. These trustees are to be appointed by the purchaser, so that the vendor cannot complete until the trustees are appointed by the plaintiffs. The next provision is that the purchaser pay £500 and the trustees execute a bill of mortgage to secure the balance of the purchase price. Accordingly the consent of the Treasurer is a condition precedent to the fulfilment of the obligations set out in clause 2 (*a*), namely, the execution of the nomination of trustees, the handing over of the documents, the payment of £500 by the purchaser and the execution of the bill of mortgage. The transaction could not be completed until a survey was made. The only authority a surveyor would have to enter on the land and make a survey would be that given by the vendor. It is a fair conclusion that the obligation of having a survey made was on the vendor. There was provision that the bill of mortgage was to contain such other terms and conditions as were required by Corser Sheldon & Gordon, solicitors. The evidence showed that that firm of solicitors consisted of one member only, Mr. Sheldon. Under clause 4 the vendor was entitled to the rents and profits and possession up to 30th June 1945 and after that date the purchaser was entitled to the same. Accordingly, the purchaser was entitled to possession from 1st July 1945 and was so entitled independently of the performance of any other terms and conditions by any other party. No survey was ever made. Three persons were appointed as trustees but their names were never notified. On 1st July the purchaser asked

for possession, but the vendor refused unless the sum of £500 was was paid to him. This was not then due, becoming due only on the consent of the Treasurer being given to the sale. This consent was not given until 26th July following and the other terms of the contract as to the survey had not been carried out. On 10th August the vendor's solicitor wrote a letter purporting to repudiate the contract, stating that as the purchasers had not yet paid any of the moneys agreed to be paid, his client had decided in view of the purchasers' failure to pay the money, to cancel the agreement. Those moneys had not become due and there was no breach of the agreement by the purchasers. Their solicitors replied to the letter stating that the purchasers had not failed to carry out any condition of the agreement and sent a cheque for £500, which was returned.

On these facts *Philp* J. dismissed a suit for specific performance, pointing out that no tender of the quarterly payments of £50 each had been made by the purchasers. The trial judge next pointed out that there was no form of bill of mortgage settled or tendered to the vendor, and that, even if trustees were appointed, there had been no communication of their names to the vendor and there was no evidence that the persons so appointed were willing to act as such. Finally he referred to the payment of £900 into court as a belated offer which would not influence him. In fact he regarded the £900 as due, and held that the offer to perform the contract was made only after the matter had reached the court. The trial judge referred to *Williams* v. *Brisco* (1) in which *Cotton* L.J. said: "Where there is a contract to grant a lease to a nominee of the plaintiff, the plaintiff must aver in his claim that he has appointed a nominee, and that the nominee is ready and willing to accept the lease." Then *Cotton* L.J. continues: "But that is not enough to dispose of this action, for if the defendant had distinctly refused to perform the contract, that would have dispensed with the necessity for the plaintiff to perform the conditions, and would have entitled the plaintiff to claim damages." Here the Lord Justice refers to the principle that if one party repudiates an essential term going to the root of a contract the other party is entitled to say that he will not perform the conditions of the contract. The application of this principle to specific performance is not clearly defined. In this case no question of a repudiation on the part of the purchasers which would dispense with the necessity of the vendor's performance of conditions arises. Therefore the passage from *Williams* v. *Brisco* (2) relied on by the trial judge does not apply. There is

(1) (1882) 22 Ch. D. 441, at p. 449. (2) (1882) 22 Ch. D. 441.

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no provision in the agreement that time was to be the essence of the contract. In the case of sale of land time may be made the essence by one party giving notice to the other that he requires the performance of some act within a certain time. The vendor committed a breach in failing to surrender possession of the land, but as time was not of the essence the purchasers could not repudiate. The position then was that the purchasers were not in breach at any time and the breach of the vendor did not entitle the vendor to be discharged from the contract. Accordingly the principle of *Williams* v. *Brisco* (1) has no application to this case.

It is also objected that there is no mutuality between the parties and therefore equity will not order specific performance. This means that a decree will not be given to the plaintiffs unless specific performance could also be decreed at the suit of the defendant. It is said that a decree could not be made against the plaintiffs, as there was no complete and concluded contract. The terms of the proposed bill of mortgage have not been determined by the solicitor, Mr. Sheldon, and therefore it is contended that the contract is uncertain and falls within the rule that there is no real agreement because further terms still have to be arranged. If the matter is to be determined by a further agreement it is argued that there is no contract. For this argument reliance was placed on *Milnes* v. *Gery* (2) and on *Hart* v. *Hart* (3). In *Milnes* v. *Gery* (2) dealt with in *Hart* v. *Hart* (3), the agreement was for a sale according to the valuation of two persons, one to be appointed by each party. These persons differed in their estimate and it was decided that the contract could not be specifically performed. In giving his judgment Sir *William Grant* said: "The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specific mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract which the court is called upon to execute? . . . The contract which the court is called upon to execute is not a complete contract, but it is an agreement that a contract should be made. The court cannot enforce an agreement that a contract should be made; the contract must be complete." Reliance was also placed on *G. Scammell and Nephew Ltd.* v. *Ouston* (4) where Lord *Wright* quotes the following statement of Lord *Dunedin* in *May & Butcher* v. *The King* (5): "To be a good contract there must be a concluded bargain and a con-

(1) (1882) 22 Ch. D. 441.
(2) (1807) 14 Ves. 400 [33 E.R. 574].
(3) (1881) 18 Ch. D. 670, at p. 688.
(4) (1941) A.C. 251, at p. 269.
(5) (1934) 2 K.B. 17, 21 (n).

cluded 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 has still to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties." But in the case before us the terms of the bill of mortgage do not depend upon the agreement between the parties. It is for the solicitor Mr. Sheldon to settle those terms. Therefore this case differs from that of *Milnes* v. *Gery* (1) where the agreement on the face of it is incomplete until something is done by further agreement between the parties. Should the position arise that the terms of the mortgage cannot be settled by Mr. Sheldon, then the remedy is in the hands of the court and the court would settle the terms. Therefore the argument that the agreement is uncertain fails and the argument that specific performance cannot be decreed also fails.

I am of opinion that the appeal should be allowed, the order of the Supreme Court discharged, and that it should be ordered that the parties should specifically perform and carry into execution the contract dated 19th June 1945. The plaintiffs should be ordered to pay into the Supreme Court to abide the order of the Court the sum of £900 with interest at four and three-quarters per cent. The action should be remitted to the Supreme Court to give consequential directions to carry the contract into execution, both parties to have liberty to apply.

RICH J. I agree. There was a concluded contract between the parties for the sale of certain land at a fixed price. This involves no uncertainty. There was a subsidiary agreement that a bill of mortgage would be executed to secure the balance of purchase moneys and the terms of the mortgage were to be settled by solicitors. This does not qualify the prior agreement in any way, which provides for the sale of certain land at a fixed price and is one which can be specifically performed within the meaning of *Jackson* v. *Jackson* (2).

DIXON J. I agree that the appeal should be allowed. The objections suggested that a decree of specific performance of an agreement made on 19th June 1945 between the plaintiffs and the defendant should be refused may be reduced to five heads.

(1) (1807) 14 Ves. 400 [33 E.R. 574].

(2) (1853) 1 Sm. & Giff. 184 [65 E.R. 80].

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The first objection is that the contract was not complete founded upon the fact that a bill of mortgage was to be given for the balance of the purchase moneys, the terms of which were left to solicitors and on the further fact that a nomination of trustees was to be signed, but the trustees were not nominated. The answer is simply that these matters are left for the decision of solicitors in the preparation of the documents and do not form an essential part of the contract but are the means to carry the sale into effect. The bill of mortgage is an ordinary conveyancing document and forms part of the agreement. It is competent for the parties to agree as to how the mortgage is to be settled. The court may settle the terms if it grants specific performance. As to nomination of trustees, the trustees are to be the persons appointed by the purchasers. That is a matter for them and it was open to the vendor to protect himself. The trusts may be in a schedule to the nomination of trustees and not go upon the register, yet although they are part of the transaction they are not part of the contract to be specifically performed.

The second objection is related to the first and is that until these conditions are fulfilled and made certain the remedy of specific performance cannot be maintained. That contention means that until it is known who the trustees are and until it is known what are the terms of the bill of mortgage a court of equity will not carry the contract into execution. The cases cited in support of this argument show that courts of equity will not order conditional contracts to be carried out. But there are cases which show that that view is not applicable to conditions which are the subsidiary means of carrying out the contract made and it is not correct to say that equity will not maintain the remedy of specific performance where those conditions are not fulfilled or until they have been completed.

The third objection is that the contract is unfair. It is said that the unfairness lay in the unusual provisions in the agreement that the vendor should give possession to the purchasers before the consent of the Treasurer to the sale was obtained and before any conveyancing document was prepared or purchase money handed over. Those were the terms of the contract as agreed to by the vendor. He may not have been wise in agreeing to those terms. They may have been unbusinesslike or risky. But where parties have agreed on the terms the court will not refuse a decree of specific performance on the ground of unfairness. Here the consent of the Treasurer was given and the vendor had refused to give possession on the date agreed upon.

The fourth objection is that the conditions precedent set out in the agreement were not performed. In order to deal with this combination it is necessary to set out the dates. The agreement was made on 19th June. The consent of the Treasurer to the sale was given on 26th July and the contract was then in full operation. The vendor consulted his solicitor on 8th August and on 19th August repudiated the contract by letter. His repudiation was based on the failure of the purchasers to pay the purchase money. The purchasers then sent a cheque for £500 with a view to the contract proceeding but the cheque was returned. The situation then was this. The contract was for the sale of part of a block of land which required a subdivision. This in turn required a survey and there was a clause in the agreement providing for a survey at the expense of the vendor. It was the duty of the vendor to undertake the survey and pay the cost of same. It was part of the vendor's duty of making title to the land. There were difficulties in obtaining a survey and until it was made it was not possible for the purchaser to prepare his nomination of trustees and it was not possible to prepare the bill of mortgage. Steps were taken to appoint trustees, but their names were never communicated to the vendor. The payment of the purchase price and the execution of the conveyance were concurrent conditions. At the same time the purchasers were to secure by the mortgage quarterly payments of £50 each, and interest. The situation that arose was that there was no duty on the purchasers to take any further step, and the time had not arrived for preparation of the conveyance. The repudiation of the vendor makes it clear that he did not rely on the absence of the Treasurer's consent provided for by clause 8. He had taken no step to give notice and create a default going to the root of the contract by making time the essence of the contract. Having taken no such step it was impossible for him to rely on non-performance of a condition which did not go to the root of the contract. Once the matter came before the court it was a judicial question to be decided between the parties. What happened after the issue of the writ was of no importance, not affecting the real question to be determined.

The fifth objection is that the contract lacked mutuality. It was argued that if the boot were on the other foot the vendor could resist a claim for specific performance on the ground that he could not be compelled to nominate trustees, that perhaps he could not find them, that perhaps, if he did nominate them, they would not be prepared to act or enter into the bill of mortgage. This view is incorrect. If the purchasers were sued for specific performance

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the contract would not be impossible to carry out as the purchasers could be required to nominate themselves as trustees and perform the contract as to entering into the bill of mortgage. The contract makes it clear that the purchasers are obliged to enter into the mortgage and if they were in default the contract could be enforceable against them. I agree with the order proposed. In the circumstances of the case it is right that the purchasers pay the moneys and time be allowed to work out the decree. The Supreme Court is to see that the purchasers get possession, that interest be paid and rents and profits adjusted.

Appeal allowed. Order of the Supreme Court discharged; in lieu thereof declare that the agreement dated 19*th June* 1945 *ought to be specifically performed and carried into execution and order and adjudge the same accordingly. Direct that plaintiffs pay into the Supreme Court within one month* £900 *and interest at four and three-quarters per cent per annum from* 19*th June* 1945, *to date of payment in. Remit action to Supreme Court to give such further or consequential directions as may be necessary for the purpose of carrying this order into execution. Liberty to apply to Supreme Court. Defendant to pay costs of proceedings in the Supreme Court and this Court.*

Solicitors for the appellants: *Corser, Sheldon & Gordon*, Maryborough, by *Chambers McNab & Co.*

Solicitor for the respondent: *R. L. Weir*, Maryborough, by *Henderson & Lahey.*

B. J. J.