[HIGH COURT OF AUSTRALIA.]

SUTTOR . . . . . APPELLANT;
DEFENDANT,

AND

GUNDOWDA PROPRIETARY LIMITED . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 25-28, 31.

ADELAIDE, *Sept.* 26.

Latham C.J., Williams and Fullagar JJ.

Specific Performance—Station property—Purchase—Option—Extension—Alleged failure to exercise—Contract—Provisions—Conduct of parties—Alleged misrepresentation by purchaser's agent—Finding of trial judge—Belated defence—Practice of appellate court—Time, essence of contract—Treasurer's consent to sale—Failure to obtain within period expressly provided—Effect—"Deemed to be cancelled"—Contract void, or voidable by one or both parties—Contractual requirement—Continuation in employment on specified terms and conditions—Deed between purchaser and employees of vendor—National Security (Economic Organization) Regulations, regs. 6 (1), (10), 10 (1).

Upon the hearing of an appeal the defendant raised for the first time the defence that the plaintiff's agent had been guilty of sharp practice and that in all the circumstances it would be inequitable and oppressive specifically to enforce the contract and that the plaintiff should be left to its remedy, if any, at law. This defence did not form one of the grounds of appeal.

Held, that if the defence had been raised in the court below relevant evidence might have been tendered with respect to the questions of fact which must necessarily be decided, therefore it was now too late to raise that defence.

A contract, dated 20th October 1947, for the sale of a pastoral property provided, by cl. 12, that in the event of the consent of the Treasurer not being obtained within two months of that date, or within such further period as might be mutually agreed upon by the parties, the contract should be deemed to be cancelled and upon the vendor returning to the purchaser any deposit neither party should be under any further liability to the other for any sum for damages, costs or otherwise. The purchaser's agent resided on the property with the defendant, and had frequent relevant conversations

with him, from 29th November to 8th December 1947 and from 27th December to 30th December 1947. The Treasurer's consent in writing was obtained on 5th January 1948. On 15th January 1948, the vendor's solicitor, by letter, informed the purchaser's solicitor that the Treasurer's consent not having been obtained within the said period of two months the contract was no longer effective after 20th December 1947.

Held, that the non-receipt of the Treasurer's consent by 20th December 1947, did not effect an automatic cancellation of the contract because: (1) cl. 12 of the contract should be construed as making the contract not void but voidable, the question of who might avoid it depending on the event; and (2) the evidence proved, the Statute of Frauds not having been pleaded, an oral agreement between the parties prior to 20th December 1947 that the time for the Treasurer's consent should be extended for a reasonable period after that date.

New Zealand Shipping Co. Ltd. v. *Société des Ateliers et Chantiers de France* (1919) A.C. 1, discussed and applied.

Held, that cl. 12 of the contract was a condition subsequent and was not affected by reg. 6 (10) of the *National Security* (*Economic Organization*) *Regulations*.

Clause 8 of the contract provided that the purchaser would continue to employ on the property three named persons at a salary of not less than the amount they were then receiving from the vendor together with an annual bonus to each and, further, that the purchaser should enter into a deed between it and the three named persons more effectually to carry out the provisions.

Held, that the intention was that the clause would be completely performed by the purchaser entering into a deed with the three named persons containing the benefits stipulated for.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.), affirmed.

APPEAL from the Supreme Court of New South Wales.

In a suit brought by it in the equitable jurisdiction of the Supreme Court of New South Wales the plaintiff, Gundowda Pty. Ltd., sought specific performance of an agreement in writing for the sale of certain land entered into between it and the defendant, Charles Ernest Suttor, on 20th October 1947, and, alternatively, specific performance of an oral agreement alleged to have been entered into on or about 8th December 1947, which it was alleged was partly performed. The defences were, as to the written agreement: (1) that the defendant was induced to enter into it by the fraudulent misrepresentation of the agent of the plaintiff; (2) that the agreement came to an end under its own terms; (3) that the agreement was not in its nature one as to which the remedy

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of specific performance was available because it involved the rendering of personal services; and (4) that specific performance should not be decreed against the defendant because of the hardship which the agreement inflicted upon him. As to the alleged oral agreement in addition to reliance upon those defences the making of the agreement and the performance of acts of part performance were denied.

The agreement entered into between the parties on 20th October 1947 was in writing, and it provided for the purchase by the plaintiff from the defendant of a pastoral property known as Gundowda on a walk-in walk-out basis, that was including stock, plant and furniture as set out in a schedule to the agreement, for the sum of £85,000 and for certain further benefits to the vendor. The agreement provided that the consideration was to be paid by a deposit of £2,000 and by payment of the balance on completion. For the purpose of stamp duty the purchase price was apportioned as to the sum of £80,000 for the land, as to the sum of £3,550 for the stock, as to the sum of £450 for the plant, and as to the sum of £100 for the furniture. In addition the purchaser agreed to pay to the vendor for the remainder of his natural life the sum of £600 a year and to enter into a deed to secure that payment, the security to be by way of charge over the land comprised in Gundowda. The agreement further provided that the vendor should have the right to occupy the main homestead on Gundowda and to use and enjoy the fixtures, fittings and furniture in the homestead and to use milking cows for milk, and horses for riding, and sheep for meat, during his occupancy of the homestead. It also provided that the purchaser would continue to employ on the station three named persons, who at the time of the agreement were employed thereon by the vendor, at a salary of not less than the amount that they were then in receipt of, and would further pay in cash as a bonus each year to each of those employees not less than £150 so long as they remained in the employ of the purchaser, and further that the purchaser should enter into a deed between it and the three employees more effectually to carry out the provisions, such deed to be drawn by the vendor's solicitors and approved by the purchaser's solicitors at the expense of the purchaser. It further provided that the vendor should be entitled to all rents and profits up to but not including 1st July 1947, and that from that date the purchaser should bear and pay all outgoings and any necessary apportionment should be made and adjusted on completion. The income from the property arising after 1st July was to belong to the purchaser. By cl. 11 of the agreement it was provided that

the contract was entered into subject to the *National Security Act* and all regulations and proclamations made thereunder, and subject to the consent of the Treasurer thereto being obtained, and by cl. 12 that " in the event of the consent of the Treasurer not being obtained within two months from the date hereof or within such further period as may be mutually agreed upon by the parties hereto, this contract shall be deemed to be cancelled, and upon the vendor returning to the purchaser any deposit paid herein neither party shall be under any further liability to the other for any sum for damages, cost or otherwise." Clause 13 conferred certain rights of pre-emption upon the three employees referred to in the agreement.

The agreement was made as a result of lengthy negotiations between the defendant and one McManamey who, after its incorporation, acted as an agent for the plaintiff. The plaintiff company was formed for the purpose of acquiring the property Gundowda from the defendant, and was incorporated on 15th October 1947. McManamey had previously been negotiating for some time with the defendant in connection with the property ; he had obtained an option of purchase in favour of another company in May 1947, and a further option of purchase in his own favour on 29th June 1947. Under the option last mentioned, the purchaser, if the option had been exercised, was to pay an amount of £83,000 for the property, and to pay the vendor an annuity of £480 free of income tax and to permit him the right of residence substantially as it was contained in the contract of 20th October 1947, and was to take over the responsibility for the property in the sense of being liable to pay all outgoings and entitled to receive all incomings as from 1st July. That option was to hold good until 21st July 1947, and there was endorsed upon it a term which the defendant said was written on 29th June 1947, but which McManamey said was written later, that in the event of the option being the basis of completion of the sale, the purchaser agreed to pay all income taxation that might be assessed against the vendor in regard to any stock changing hands. That option was not exercised, but on 30th September 1947 a written agreement was made between McManamey and the defendant. McManamey in that agreement was described as the agent for a company to be formed and to be known as Gundowda Pty. Ltd. The terms of that agreement were substantially the same as those of the agreement of 20th October, although there were some differences of importance. The agreement was subject to be approved by the solicitors for the purchaser, such approval or non-approval to be given in writing by the purchaser's

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solicitors to the vendor's solicitors within fourteen days from the date thereof. The provision as to the purchaser employing the three employees was in some respects different from that contained in the agreement of 20th October, but the provisions as to obtaining the consent of the Treasurer and as to the position in the event of the consent not being obtained within two months were the same as were contained in the agreement of 20th October. In discussions leading to the signing of the agreement of 30th September 1947, the question of the liability of the vendor for income tax was a matter of importance. Under the terms of the option of 29th June, if it included the last clause the purchaser was to assume liability for any income tax arising out of the sale of the stock, and the vendor's annuity was to be free of tax. There was not any provision in the agreement of 30th September dealing with income taxation at all, but the amount of the annuity was increased as compared with the option from £480 to £600 a year, and the lump sum purchase price was increased from £83,000 to £85,000. The defendant and McManamey considered that these increases were to replace any liability of the purchaser in respect of the vendor's income tax.

The defence of fraudulent misrepresentation was inserted by amendment made with the leave of the court on the seventh day of the hearing of the suit. The alleged fraudulent misrepresentation was said to have been made on 30th September shortly before the signing of the contract on that date. On that day McManamey and the defendant had gone to the office of the defendant's solicitors in Mudgee, and after spending some little time there had visited the defendant's bank, and had gone then to the office of the defendant's accountants where McManamey had two interviews with a Mr. Walter, a partner in the firm of Langdon & Walter, accountants. Although the defendant was not present at those interviews he did authorize Mr. Walter to give McManamey such information as he might desire as to the defendant's financial affairs. There was a conflict of evidence as between McManamey and Walter as to some of the things which occurred at those interviews. McManamey said that he was interested only to obtain particulars of the defendant's income as returned for income tax purposes, and of amounts at which the stock and plant were valued for income tax purposes, and that that information substantially was given to him by Mr. Walter. Mr. Walter said that there was also a discussion about the liability which the defendant might incur in respect of income tax if the sale of Gundowda were carried through. Mr. Walter said that he pointed out that the stock stood at a very low figure, for the purpose of taxation, in the defendant's books,

and that the difference between that figure and the market value of the stock would, or might, be considered as assessable income of the defendant, and further that the structural improvements on the property had been written down by depreciation claimed for income tax purposes, and that on the sale the commissioner for taxation might claim that some part of their value should be brought in for income tax purposes, and Mr. Walter said that he told McManamey that the defendant's liability to income tax would be considerable.

Walter's evidence was confirmed to some extent as to those matters by the evidence of his partner, Langdon, who was not present at the interview, but to whom Walter spoke on the telephone for the purpose of getting information and an opinion in the course of the interview. The misrepresentation relied upon occurred after McManamey's interview with Walter; the defendant said that McManamey having left Walter came to him and told him that he the defendant had scored in the matter of income tax by the additional £2,000 being provided for the purchase price of the property, and that Walter had told him that the defendant would not be liable to pay any tax. The defendant further said that upon the faith of that representation he then signed the contract of 30th September without worrying on the matter of income tax. He also said that when the contract of 20th October 1947 was signed the same inducement arising from the same misrepresentation was present to his mind.

With respect to the defence that the contract came to an end under its own terms, it appeared that the consent of the Delegate of the Treasurer to the contract of 20th October was obtained on 5th January 1948. The two-month period referred to in cl. 12 of that contract expired on 20th December 1947. The defendant therefore submitted that the contract was to be deemed to be cancelled upon the expiry of that period, and in effect then came to an end.

There were three answers put forward on behalf of the plaintiff to that submission. It was said that the time fixed in cl. 12 was not of the essence of the contract, and that although the consent was not obtained within two months that did not bring the clause into operation at once, but still allowed a reasonable time to obtain the consent; further that there was an agreement between the parties within the terms of cl. 12 itself to extend the time for a reasonable time beyond 20th December; and further that after 20th December the defendant by a clear recognition of the continued existence of the contract forbore to assert the provision of cl. 12

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against the plaintiff and waived the cancellation which that clause might have brought about.

There was a considerable conflict of testimony on a number of important features of the case. It appeared that on 29th November 1947, McManamey, acting for the plaintiff, took up residence at Gundowda. He was given an office by the defendant, and lived in the homestead until 8th December, spending his time in getting acquainted with the property and the activities conducted thereon, and preparing for the time when he would take over the management of the property on behalf of the plaintiff. McManamey said that on 29th November he told the defendant what had been done in regard to getting the Treasurer's consent, and that he said that the actual granting of the consent might be delayed a little, and the defendant said that that would not matter, that as it had all been lodged and completed they were in the Government people's hands, and would have to wait and see what happened and that he would not mind if there was a delay, and was quite happy to let the matter take its course. The substance of that was denied by the defendant. McManamey said that again on 8th December he, having found it necessary to leave Gundowda and go to Sydney on personal business, told the defendant that he would push the matter along when he got down to Sydney, and the defendant said again that he was happy to let the matter take its course, and if there was any delay he realized the circumstances. That again was denied by the defendant. During that period, that is 29th November to 8th December, there was a discussion between McManamey and the defendant as to the provisions of the contract with regard to the three employees. The defendant wished to have some alteration and clarification of the position which the employees would have under the contract, and in particular he wished them to have some share in the profits arising from the grazing business. He also thought that some express provision should be made with regard to payment of interest upon the balance of purchase money in view of the fact that the plaintiff would be taking over the property as from 1st July 1947. McManamey agreed to discuss those matters with the directors of the plaintiff with a view to obtaining some amicable arrangements along the lines which the defendant had indicated.

After McManamey arrived at Sydney on 9th December he endeavoured to obtain the Treasurer's consent before 20th December. It was made clear to him, however, that the Delegate of the Treasurer would not consent to the transaction on the basis on which it had been submitted to him. The Delegate's objection

was to the manner in which the plaintiff proposed to finance payment of the purchase money, and eventually it appeared that he indicated that he would only consent to the transaction on the basis that the whole of the purchase money be paid without any borrowing on the part of the purchaser. The plaintiff was in a position to and decided to provide the money in that way, but that involved a new application which was not made until 22nd December 1947, and, on or about that date, it was indicated by the Delegate that he would consent to the transaction, but the actual formal consent would not be available until after the holiday period which was then approaching.

On 27th December 1947, McManamey with a Mr. Allworth went to Gundowda at the defendant's invitation. Allworth was interested in the plaintiff company and its finances. He was an accountant with some knowledge of pastoral accounts and was, apparently, the accountant to the company or person who was providing the finance for the transaction. His evidence was taken before the suit commenced, as he then had but a short time to live, and he died some little time after the evidence was taken. He and McManamey stayed at Gundowda until 31st December 1947, and there were a number of conflicts between them and the defendant as to what occurred during their stay. Their evidence showed that they and the defendant all treated the contract as still being on foot, and that the defendant had been informed that the consent would be obtainable within a very short time, and that he led them to believe that the contract would be completed by him. The matters dealt with the retention of an employee whom the defendant had given notice to terminate the employment; holiday leave being granted to another employee with some additional remuneration; the question of insurance of the livestock against loss from bush fires; the question of the provision of rams for the conduct of the business; and of the sale of a bale of skins. One matter which was relied upon by the defendant as of importance during that period was that on 30th December there was a discussion between him and McManamey, a note of which was available in McManamey's handwriting as to the arrangements with the three employees, as to the plaintiff company continuing a lease of another property which the defendant had, and as to liability for income taxation on the proceeds of the 1947/1948 wool clip which had been sold in November and had realized a very high figure.

The defence that the contract was not one as to which the remedy of specific performance applied was based upon the provision

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contained in it with regard to the employment of the three employees.

The consideration expressed in the contract was less than the true value of the property sold.

With respect to the defence of hardship it was said by the defendant that if the contract was enforced the defendant would become liable for a payment of income tax to the extent of some £18,000; that he would be left in the position of having an annuity and a residence, but of having no money to pay a substantial balance of that tax, and that in the circumstances that did constitute hardship in the relevant sense.

Roper, C.J. in Eq., was satisfied that there was a discussion on 30th September 1947 as to the defendant's liability for income tax in Walter's office substantially as related by him, but was not satisfied that McManamey made the statement to the defendant which was alleged to have been made, and his Honour thought rather that he did not. It was clear that he, the defendant, regarded the substitution of £600 a year in place of £480 a year free from income tax as satisfactory to him, and that if the stock were brought into the sale at the values at which they stood in his books for income tax purposes he would not be liable to pay any income tax arising out of the sale of those stock, and they were brought into the contract at that value. Earlier correspondence showed, said his Honour, that the defendant attached importance to, *inter alia*, the view that no tax would be payable in respect of the sale of stock if they were brought into the purchaser's opening books at the value at which they stood in the vendor's books at the time of the sale. That view was not an unreasonable one to entertain in the light of the history of s. 36 of the *Income Tax Assessment Act* 1936, and his Honour thought that the defendant entertained it. The defendant's own belief, not founded on any representation by McManamey induced him to sign the contract without worrying further about his liability for income tax. His Honour held that the defence based upon fraud or on misrepresentation, whether innocent or fraudulent, was not established, and, further, that the defendant did indicate during the period 29th November to 8th December that he would not object to some delay in obtaining the Treasurer's consent. His Honour accepted the evidence of McManamey and Allworth on the matters relating to the delay in obtaining the consent of the Delegate of the Treasurer, the extension of time therefor, the retention of an employee, holiday leave and additional remuneration, insurance of livestock, provision

of rams and the sale of a bale of wool, and held that throughout the said period the defendant treated the contract as being on foot, and continued working for its completion, and, further, that the evidence established that after 20th December 1947, the defendant did proceed upon the basis that the contract was still in existence, and went on negotiating for its completion. If time were of the essence in cl. 12 of the contract it appeared to his Honour that it was no longer of the essence in the light of that conduct by the parties, and that any cancellation under cl. 12 was in fact waived by the defendant. His Honour held that the provision relating to the employment of the three employees did not render the remedy of specific performance inapplicable. It had to be borne in mind that the employees were not parties to the contract, nor was the defendant a trustee of the provisions for them. The performance which was really aimed at in the contract on the purchaser's part was the entering into a deed between it and the employees. Mere inadequacy of consideration was not hardship in the relevant sense so as to cause the court to exercise a discretion against the remedy of specific performance. As at present advised his Honour did not think that a liability on the part of the defendant to pay taxation to the extent of £18,000 would be established, and in particular he did not think that the defendant would properly be liable in respect of the income arising from the property since 1st July 1947 because, although he was carrying it on, he was not carrying it on on his own behalf, if the contract was carried out. His Honour was not satisfied that an oral contract was made on 8th December 1947, and, even if it were, he was not satisfied that any of the acts relied upon as being acts of part performance were sufficient to constitute part performance of such a contract. His Honour held that that branch of the plaintiff's claim failed, but that it was entitled to succeed upon its claim for specific performance of the contract of 20th October 1947.

From that decision the defendant appealed to the High Court.

The relevant provisions of the *National Security* (*Economic Organization*) *Regulations* are sufficiently set forth in the judgment hereunder.

J. W. Shand K.C. (with him *C. M. Collins* and *C. McLelland*), for the appellant. The trial judge found that the agent of the respondent had wrongly denied that he had had a certain conversation with the accountant of the appellant. That evidence was false. The trial judge having so found it is competent for this Court

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to decide for itself the true facts (*Watt or Thomas* v. *Thomas* (1); *Yuill* v. *Yuill* (2)). The trial judge should have found that the agent did tell the appellant that he had "scored" over the tax. The evidence was clear that the appellant was most concerned as to the income tax he would have to pay if he disposed of his property, including stock. In any event the withholding from the appellant of what the accountant did tell the agent amounted to fraud on the principle of *suppressio veri*. If there was not any fraud then the court should, in the circumstances, have refused to grant specific performance on the principle of *Webster* v. *Cecil* (3); *Halsbury's Laws of England*, 2nd ed., vol. 31, par. 416; *Kerr* on *Fraud and Mistake* 6th ed. (1929), p. 519. The suppression by the agent of what he was told by the accountant was a fraud vitiating the transaction (*Bruce* v. *Ruler* (4)) referred to by *Phillimore* J. in *Gray* v. *Owen* (5). *Walters* v. *Morgan* (6) is to the same effect.

[WILLIAMS J. referred to *Brooke* v. *Fairbairn* (7).]

Even if there were not sufficient evidence of fraud, the conduct of that agent coupled with the facts as to the large amount of income tax likely to be payable by the appellant as the result of a sale was a hardship and the trial judge should have so found.

[WILLIAMS J. referred to *Gall* v. *Mitchell* (8).]

Time was of the essence of the contract, the clause as to time having been inserted by the respondent's agent or solicitors.

[WILLIAMS J. referred to *Hudson* v. *Temple* (9).]

There was not any waiver before 20th December 1947. All the conversations and actions were consistent with the fact that the contract was then on foot. After 20th December there was not any waiver. There cannot be a waiver of a condition in a contract which has legally come to an end. There was not any finding of estoppel. Everything was consistent with negotiations for a new contract or a variation of the old one which would in fact be the making of a new contract. The onus is upon the respondent to prove that there was an extension of the old contract. The clause as to time was drafted with reg. 6 (10) of the *National Security (Economic Organization) Regulations* in view, and the consent of the Federal Treasurer was not given within the time agreed upon. That sub-regulation required any extension to be in writing and there was not any such writing. As to the interpretation of that

(1) (1947) A.C. 484, at pp. 488, 489.
(2) (1945) P. 15.
(3) (1861) 30 Beav. 62 [54 E.R. 812].
(4) (1828) 2 Man. & Ry. 3; 6 L.J. (O.S.) K.B. 228.
(5) (1910) 1 K.B. 622, at p. 624.
(6) (1861) 3 De G.F. & J. 718, at pp. 723, 724 [45 E.R. 1056, at p. 1059].
(7) Noted (1935) 9 A.L.J. 113.
(8) (1924) 35 C.L.R. 222.
(9) (1860) 29 Beav. 536 [54 E.R. 735].

regulation: see *Walter* v. *Oldham* (1); *O'Neill* v. *O'Connell* (2). The court will not grant specific performance of a contract which involves constant supervision, such as a contract for personal services (*Granville* v. *Betts* (3)).

[LATHAM C.J. referred to *Fry* on *Specific Performance*, 6th ed. (1921), p. 389, par. 836.]

G. Wallace K.C. (with him *I. C. Roberts* and *J. D. Evans*), for the respondent. The trial judge found that the appellant was not induced to enter into the contract by any misrepresentation on the part of the respondent; that the appellant had not discharged the onus of showing that the alleged misrepresentation, if made, was false; and that such misrepresentation was not in fact made. The appellant's amendments relating to fraud were belated and should not have been allowed, particularly having regard to the fact that an essential witness had died. The trial judge was justified in accepting the evidence of the respondent's agent relating to the alleged misrepresentation and rejecting that of the appellant. The appellant's recollection, especially as to sequence, was faulty and his answers to questions were evasive and inconsistent. This is not a special case where the Court can interfere with the decision of the court below. In *Furs Ltd.* v. *Tomkies* (4) the Court was able to do so because of written testimony which is not present in this case. Demeanour is a very important matter. All these matters were considered by the court below. Only in an exceptional case would an appellate court reverse the findings of the trial judge on questions of fact. This was not an exceptional case. The respondent relied upon his own counsel and not upon his accountant or the agent. The "scoring off" had reference to income tax other than s. 36 of the *Income Tax Assessment Act*. His mind was directed to the income tax position and not the stock position. The allegations of oppressiveness, unfair dealing and unreasonableness on the part of the respondent to the appellant has been raised by the appellant for the first time in this Court. It was not pleaded nor was it referred to in the court below. Hardship as pleaded in the statement of defence covers inadequacy of consideration only and is different from oppressiveness, unfair dealing and unreasonableness which should be specially pleaded. There are not any special circumstances to enable the matter to be taken out of the general rule. The evidence does not show the agent's conduct

(1) (1948) 1 A.L.R. 129; noted 23 A.L.J. 382.
(2) (1946) 72 C.L.R. 101.
(3) (1848) 18 L.J. (Eq.) 32.
(4) (1936) 54 C.L.R. 583.

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to be oppressive, unfair or unreasonable, particularly relating to the matter of the quantum of income tax payable. The agent was not under any duty to the appellant to disclose information given to him by, or the opinion of, the appellant's accountant. The trial judge found that the appellant relied on his own belief. He was not misled by the respondent (*Tamplin* v. *James* (1); *Webster* v. *Cecil* (2); *Goldsbrough, Mort & Co. Ltd.* v. *Quinn* (3)). Unreasonableness in relation to specific performance was considered in *Watson* v. *Marston* (4); *Wedgwood* v. *Adams* (5); and *Fry* on *Specific Performance*, 6th ed. (1921), par. 432. The appellant must be bound by the way he pleaded and conducted his case in the court below. There are not any exceptional circumstances to warrant the raising of the matter for the first time in this Court. Clause 12 of the contract was a condition subsequent. The clause was not one which operated automatically nor one of which time was of the essence. The appellant cannot take advantage of his own wrong. He failed to furnish for a very long time the vendor's statement required by the Delegate of the Treasurer and delayed the giving by the Delegate of his consent. The expression " deemed to be cancelled " in cl. 12 should be construed as meaning voidable at the option of either party (*Newbon* v. *City Mutual Life Assurance Society Ltd.* (6); *New Zealand Shipping Co. Ltd.* v. *Société des Ateliers et Chantiers de France* (7); *Kilmer* v. *British Columbia Orchard Land Ltd.* (8); *Steedman* v. *Drinkle* (9); *Brickles* v. *Snell* (10); *McFarlane* v. *Wilkinson* (11)). Time can be made of the essence, yet waiver can take place by conduct (*Hudson* v. *Bartram* (12)). The respondent does not have to rely on waiver but there is an agreement there, the consideration being mutual promises. Had the normal procedure been carried out and the appellant, as vendor, had given his statement within a reasonable time, the Delegate's consent would have been obtained before the stipulated date; therefore it was due to the appellant's own default that the consent was not obtained until after that date. The defence now raised under the *National Security* (*Economic Organization*) *Regulations* was not raised on the pleadings nor argued before the judge of first instance, nor was that ground taken in the notice of appeal to this Court. The respondent's case is bound up by reg. 6 (10) of

(1) (1880) 15 Ch. D. 215, at pp. 219, 221.
(2) (1861) 30 Beav. 62 [54 E.R. 812].
(3) (1910) 10 C.L.R. 674.
(4) (1853) 4 De G.M. & G. 230 [43 E.R. 495].
(5) (1843) 6 Beav. 600 [49 E.R. 958].
(6) (1935) 52 C.L.R. 723, at pp. 732, 733.
(7) (1919) A.C. 1, at pp. 14, 15.
(8) (1913) A.C. 319, at p. 321.
(9) (1916) 1 A.C. 275, at p. 280.
(10) (1916) 2 A.C. 599, at p. 604.
(11) (1927) V.L.R. 359.
(12) (1818) 3 Madd. 440, at p. 441 [56 E.R. 566, at p. 567].

those regulations. The views expressed in *O'Neill* v. *O'Connell* (1) should be followed. The parties must be deemed to have contracted on the basis of the law as then existing. On the true construction of reg. 6 (10), as amended by Statutory Rule 1945 No. 189, the two periods were alternatives. The respondent complied with one of the alternatives open to it, therefore the provision in reg. 6 (10) that the contract would not have any effect was inapplicable (*Walker* v. *Oldham* (2)). Words should be given their normal meaning. The *National Security* (*Economic Organization*) *Regulations* were in force in May 1947 (*Hume* v. *Higgins* (3)) but see *R.* v. *Foster* (4). The intention of the parties as revealed in cl. 8 of the contract was that a deed relating to the three employees should be the objective. A mere agreement between the vendor and the purchaser would not benefit those employees (*In re Schebsman, deceased* (5)). It is clear that the parties wanted a deed so as to accomplish more effectively what they had in mind concerning those employees. An approving solicitor must act reasonably (*Radium Hill Co.* v. *Moreland Metal Co.* (6)). The terms must be incorporated in the contract (*Australian Can Co. Pty. Ltd.* v. *Levin* (7) ; *Chipperfield* v. *Carter* (8) ; *Caney* v. *Leith* (9)). The fact that the deed was to be drawn by the appellant's solicitors could not operate against the respondent (*Fry* on *Specific Performance*, 6th ed. (1921), p. 389, par. 836 ; and see *Granville* v. *Betts* (10) and *Stocker* v. *Wedderburn* (11)). The first part of cl. 8 does not require personal supervision. The court would not have to supervise the employment of the three employees. " Personal service " cases are different from this case : see generally *Halsbury's Laws of England*, 2nd ed., vol. 31, pp. 333-335, and *Fortescue* v. *Lostwithiel and Fowey Railway Co.* (12). A purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the sale of the subject to be sold. Simple reticence does not amount to legal fraud (*Walters* v. *Morgan* (13) ; *Fry* on *Specific Performance*, 6th ed. (1921), pp. 331, 332).

J. W. Shand K.C., in reply. The respondent's argument relating to reg. 6 (10), as amended, of the *Economic Organization Regulations* involves the substitution of the word " further " for the

(1) (1946) 72 C.L.R., at pp. 119-133.
(2) (1948) 1 A.L.R., at p. 131 ; noted 23 A.L.J. 382.
(3) (1949) 78 C.L.R. 116.
(4) (1949) 79 C.L.R. 43.
(5) (1944) Ch. 83.
(6) (1916) 16 S.R. (N.S.W.) 631 ; 33 W.N. 155.
(7) (1947) V.L.R. 332.
(8) (1895) 72 L.T. 487.
(9) (1937) 2 All E.R. 532, at pp. 534, 535.
(10) (1848) 18 L.J. Ch. 32.
(11) (1857) 3 K. & J. 393 [69 E.R. 1162].
(12) (1894) 3 Ch. 621.
(13) (1792) 3 De G.F. & J. 718 [45 E.R. 1056].

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word "other." There should not be any such substitution. If "condition" governs reg. 10 as suggested then the amendment to reg. 6 (10) was useless.

[WILLIAMS J. referred to *O'Neill* v. *O'Connell* (1).]

Regulation 6 (10) was a specific provision that provided for a particular situation and as such was not governed by reg. 10. Upon that view there was less difficulty in reconciling those provisions. Waiver must be in writing. The meaning of the word "void" and the circumstances under which it may be construed as "voidable" were discussed in *Roach* v. *Bickle* (2). An extension of a period of time which was the essence of the contract was dealt with in *Steedman* v. *Drinkle* (3). In *Kilmer* v. *British Columbia Orchard Land Ltd.* (4) there was a release before the date for performance arrived. The facts show that the appellant was not responsible for, and did not cause, any delay. It was established that the appellant would be liable to pay a large amount as tax (*Phillips* v. *Homfray* (5)). The court requires the utmost good faith between vendor and purchaser. Clause 8 of the contract does not effect a merger. Rights are alive under the first part. The court cannot enforce a contract strictly personal or special (*Rigby* v. *Connol* (6) ; *Bainbridge* v. *Smith* (7) ; *De Francesco* v. *Barnum* (8)).

G. Wallace K.C., by leave. In *Kilmer* v. *British Columbia Orchard Land Ltd.* (4) the waiver was before as well as after. As to oppressiveness : see *Phillips* v. *Homfray* (9) and *Helling* v. *Lumley* (10). The position was not sufficient to stop a suit for specific performance (*Cargill* v. *Bower* (11)). The appellant would not be liable for tax on the proceeds of wool sold in November 1947, the contract having effect as from 1st July of that year. Until the wool was clipped and sold there would not be any income.

Cur. adv. vult.

Sept. 26. THE COURT delivered the following written judgment :—This is an appeal by the defendant from a decree made by *Roper* C.J. in Eq., sitting as the Supreme Court of New South Wales in its equitable jurisdiction, ordering the specific performance of a contract

(1) (1946) 72 C.L.R. 101.
(2) (1915) 20 C.L.R. 663, at p. 670.
(3) (1916) 1 A.C., at p. 280.
(4) (1913) 82 L.J. (P.C.) 77.
(5) (1871) L.R. 6 Ch. App. 770, at p. 778.
(6) (1880) 14 Ch. D. 482, at p. 487.
(7) (1889) 41 Ch. D. 462, at p. 474.
(8) (1890) 45 Ch. D. 430, at p. 438.
(9) (1871) L.R. 6 Ch. App. 770.
(10) (1858) 3 De G. & J. 493 [44 E.R. 1358].
(11) (1878) 10 Ch. D. 502, at p. 516.

made on 20th October 1947 between the plaintiff as purchaser and the defendant as vendor for the sale to the plaintiff on a walk-in walk-out basis of the defendant's station property Gundowda of 45,000 acres or thereabouts situated near Mudgee in the State of New South Wales. The purchaser agreed to pay £85,000 in cash, that the vendor should be allowed to reside in the homestead for his life and be supplied with milk, meat and riding horses, to pay the vendor an annuity of £600, and to retain the services of three relatives of the vendor, W. B. Suttor, A. C. McGrath and C. W. Howard, who worked on the station. The purchase price for the stock was £3,550, this being the value at which they stood in the defendant's books. The sale was the culmination of negotiations between one McManamey and the defendant extending over several months. In the first instance these negotiations resulted in an option to purchase dated 29th June 1947 expiring on 21st July 1947 by which McManamey agreed, if the option was exercised, to pay £12,000 cash free of commission, to take over the existing mortgage to the Bank of New South Wales at £66,000 and the existing wool lien to the N.Z.L. & M.A. Pty. Ltd. at £5,000, to allow the defendant to reside in the homestead for his life and to pay the defendant an annuity of £480 free of income tax. McManamey also agreed that in the event of the option being the basis of completion of the sale of Gundowda the purchaser would pay and be liable for all or any income taxation that might be assessed against the vendor in regard to any stock changing hands on the sale.

This option was not exercised but on 30th September 1947 the defendant entered into a contract with McManamey as agent for a company to be formed and known as Gundowda Pty. Ltd. for the sale of the station to the company. On the same day, after the contract had been signed, the defendant signed another document dated 24th September 1947 renewing the terms of the option for a period of fourteen days from the date thereof. The contract of 30th September differed from the options in that, *inter alia*, it provided for a cash price of £85,000 instead of the purchaser paying £12,000 cash and taking over the mortgage and lien already mentioned, so that the total sum payable in money or money's worth was increased by £2,000. It also provided that the purchaser should pay the vendor an annuity of £600 subject to tax instead of £480 free of income tax. It is common ground that the increase of £2,000 was intended to cover any liability of the vendor for income tax in respect of the sale of the stock in lieu of the indemnity contained in the option to purchase and that the annuity was increased

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by £120 to cover the vendor in respect of any income tax payable upon the annuity.

On the morning of 30th September 1947, prior to the signing of this contract, McManamey and the defendant went to Mudgee and the defendant introduced McManamey to Walter, a partner in the firm of Langdon & Walter, chartered accountants (Aust.), who looked after the defendant's income tax affairs. Langdon usually did the defendant's work but he was away so that the interview was with Walter. The defendant introduced McManamey to Walter so that the latter, at the request of another chartered accountant (Aust.), Allworth, now dead, who was to be one of the directors of the new company, might check the figures on a statement which the defendant had given McManamey of his taxable income for some years past including particulars of the live stock over the past five years.

McManamey had two interviews with Walter at neither of which the defendant was present. In his judgment his Honour said: "Although the defendant was not present at these interviews he did authorize Mr. Walter to give Mr. McManamey such information as he might desire as to the defendant's financial affairs. There is a conflict of evidence as between McManamey and Walter as to some of the things which occurred in these interviews. McManamey says that he was interested only to obtain particulars of the defendant's income as returned for taxation purposes, and of amounts at which the stock and plant were valued for income tax purposes, and that this information substantially was given to him by Mr. Walter. Mr. Walter says that there was also a discussion about the liability which the defendant might incur in respect of income tax if the sale to Gundowda were carried through. Mr Walter says that he pointed out that the stock stood at a very low figure, for the purpose of taxation, in the defendant's books, and that the difference between that figure and the market value of the stock would, or might be considered, as assessable income of the defendant, and further that the structural improvements on the property had been written down by depreciation claimed for income tax purposes, and that on the sale the Commissioner for Taxation might claim that some part of their value should be brought in for income tax purposes, and Mr. Walter says that he told McManamey that the defendant's liability to income tax would be considerable. Mr. Walter's evidence is confirmed to some extent as to these matters by the evidence of his partner, Mr. Langdon, who was not present at the interview,

but to whom Mr. Walter spoke on the telephone for the purpose of getting information and an opinion in the course of the interview."

Later in his judgment his Honour said that he was satisfied that there was a discussion on the liability of income tax in Walter's office, substantially as related by him. In his evidence Walter said that McManamey told him that the defendant was rather worried about his tax and they were going to indemnify him against all tax commitments and had provisionally allocated £2,000 to cover the liability and he would like to know whether that would be adequate. Walter told McManamey that the £2,000 would be adequate to cover taxation commitments up to 30th June 1947, but that the sale of stock would be taxed at their market value whereas in previous returns they were brought into account on the principle of the average cost, that the difference between the average cost and the market price in the case of the sheep could not be less than £1 a head, that there were approximately 12,000 sheep and that the £2,000 would be wholly inadequate to cover the tax arising out of the sale. Walter said that he referred McManamey to s. 36 of the *Income Tax Assessment Act* 1936 as amended and to certain pages in Mr. Gunn's book on the subject.

Immediately after the second interview McManamey met the defendant in the street and they went to the office of the defendant's solicitor and signed the contract of 30th September. The hearing before *Roper* C.J. in Eq. occupied twelve days, but it was not until the seventh day that an amendment was made to the statement of defence alleging that the defendant was induced to enter into the contract of 20th October by the fraudulent misrepresentation of McManamey that Walter had informed him during their interviews that no income tax would be payable on the sale of the sheep. The onus was on the defendant to prove this representation which it was alleged was made to the defendant after McManamey's second interview with Walter and before the contract of 30th September was signed. As his Honour said, if the representation was made and induced the defendant to enter into the contract of 30th September and the defendant was not disillusioned in the meantime, it would be reasonable to infer that it also induced him to enter into the contract sued on. But his Honour was not satisfied that the representation was made. As his Honour accepted Walter's evidence, it would seem that his Honour must have thought that McManamey decided to keep Walter's opinion that £2,000 would be wholly inadequate to cover the defendant against income tax on the sale of the stock to himself and not to reveal it to the defendant. It was contended for the plaintiff that Suttor

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could not have been exercised about the matter because, if he had been, it would have been easy for him to have sought Langdon and Walter's advice before entering into the contract of 30th September and a further three weeks elapsed before the making of the contract sued on. On the other hand it was contended for the defendant that he did not do so because he had confidence in McManamey and relied upon his statement that Walter had said that no such income tax would be payable. McManamey's conduct in not passing on the information to the defendant does not indicate that he is a man of the highest morality, but he was not under any legal obligation to do so and there does not appear to be any sufficient material on which it would be safe for us to disagree with his Honour's finding that he was not satisfied that McManamey made the alleged representation and affirmatively to find that he made it.

Mr. *Shand's* sheet anchor was an admission by McManamey that he had told the defendant that he had scored on the £2,000 meaning that the income tax in question would not be £2,000, so that the defendant was better off with £2,000 added to the purchase price than he would have been with an indemnity against any income tax as originally agreed. McManamey admitted at first that he had said this on 30th September 1947 and this admission would tend strongly to prove that he had made the representation. But later he altered his evidence and said that he had not made the statement until 5th and 9th February 1948. It was contended that this change of date could not be correct because by that time McManamey had been advised that the tax would be in excess of £2,000 and had offered to increase this sum to £4,000 or to £5,000. A good deal of evidence was tendered on behalf of the defendant to prove that McManamey was offering this increase in January and February 1948 and this evidence, if accepted, would be quite inconsistent with McManamey saying at that time that Suttor had scored on the £2,000. But McManamey denied that he had ever offered to increase the £2,000 and his Honour was at liberty to accept this evidence and evidently did so. If no such offer was ever made by McManamey, his amended evidence that he made the statement in February 1948 and not in the previous September could be true. McManamey was not bound to accept Walter's opinion that income tax would be payable on the sale of the stock. According to Walter, McManamey said that he would refer this matter to Allworth, and McManamey said that he did so and that Allworth advised him to the contrary. In February McManamey was upbraiding the defendant for refusing

to complete the contract and it would have been natural for him to have made the statement in question in this connection. Apart from this incident it is clear that there is a considerable conflict in the evidence in support of and against the probability of the representation having been made, and the case is not one in which an appellate court would be justified in overruling his Honour's finding.

But the appellant also contends that on his Honour's findings the plaintiff was at least guilty of sharp practice by its agent McManamey when he failed to reveal Walter's opinion to the defendant, that specific performance is a discretionary remedy, that in all the circumstances it would be inequitable and oppressive specifically to enforce the contract against the defendant and that the plaintiff should be left to its remedy if any at law. It was contended that McManamey knew perfectly well all along that the defendant was not willing to sell Gundowda unless he was fully protected against liability for income tax on the sale of the sheep, and that it would be oppressive to enforce the contract when it is clear that the defendant will have to pay income tax under s. 36 of the *Income Tax Assessment Act* far in excess of the £2,000 included in the purchase price to cover this liability. Evidence was led that at least £11,000 of income tax would be payable under this section. This amount is obviously excessive for it was arrived at after crediting the defendant with the whole of the proceeds of the sale of wool at Gundowda sold after the date of the contract, the profit from which under the contract belonged to the plaintiff and not the defendant. But it may well be that the defendant will have to pay income tax under this section considerably in excess of £2,000. Lack of candour and suppression of the truth on the part of the plaintiff, where this results in hardship to the defendant, has been held to be a sufficient ground for refusing specific performance (*Summers* v. *Cocks* (1); *Sydney Consumers' Milk and Ice Co. Ltd.* v. *Hawkesbury Dairy and Ice Society Ltd.* (2)).

The difficulty is that this defence is now raised for the first time on the hearing of this appeal. It does not even form one of the grounds of appeal. It is true that it would not naturally occur to the defendant to raise the defence before his Honour delivered judgment, because it is grounded on his Honour's findings that Walter told McManamey that £2,000 would be quite inadequate to indemnify the defendant against income tax on the sale of the sheep and that McManamey suppressed this from the defendant.

(1) (1927) 40 C.L.R. 321.

(2) (1931) 31 S.R. (N.S.W.) 458, at p. 468; 48 W.N. 127, at p. 130.

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But it was open to the defendant to ask his Honour to restore the suit to the list and hear argument upon the effect of these findings and if necessary to re-open the case and hear further evidence. The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. In *Connecticut Fire Insurance Co.* v. *Kavanagh* (1), Lord *Watson*, delivering the judgment of the Privy Council, said, "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below." (2). The present is not a case in which we are able to say that we have before us all the facts bearing on this belated defence as completely as would have been the case had it been raised in the court below. The decision whether or not to refuse specific performance in the exercise of the discretion is one peculiarly for the trial judge and his Honour should have been given an opportunity of exercising his discretion before being told that the appeal had been allowed upon a point he had no opportunity of considering (*Sutherland* v. *Thomson* (3)). In *Grey* v. *Manitoba and North Western Railway Co. of Canada* (4), Lord *Hobhouse*, delivering the judgment of the Privy Council, made the following appropriate remarks: "The questions now raised ought to have been raised on the pleadings and evidence so that they might be properly thrashed out in the courts below. As the matter stands they have not been touched by the courts below . . . they (their Lordships) confine themselves to deciding the issues which the court below were invited by the plaintiffs to decide." (5).

Specific performance is not a remedy which should lightly be refused when the plaintiff has established the existence of a contract capable of specific performance which the defendant has refused to complete. "It is well established that the court cannot judicially exercise its discretion by refusing the remedy in a case of the appropriate class, unless some sound and recognized reason is shown"

(1) (1892) A.C. 473.
(2) (1892) A.C., at p. 480.
(3) (1906) A.C. 51, at p. 55.
(4) (1897) A.C. 254.
(5) (1897) A.C., at p. 267.

(*Fullers Theatres Ltd.* v. *Musgrove* (1)). It would be necessary for the defendant to prove that a hardship amounting to an injustice would be inflicted on him by holding him to his bargain and that it would not be reasonable to do so. The fact that McManamey suppressed Walter's opinion is an important circumstance but it is not the only circumstance which would have to be taken into account. There is his Honour's finding, amply supported by the evidence, that the defendant thought that the terms of the contract of 30th September gave him sufficient protection in the matter of income tax. His Honour said: "It is clear that he regarded the substitution of £600 a year in place of £480 per year free from income tax as satisfactory to him, and I think that he thought that if the stock were brought into the sale at the values at which they stood in his books for income tax purposes, he would not be liable to pay any income tax arising out of the sale of those stock, and they were brought into the contract at that value. It is clear from earlier correspondence that he attached importance to the values at which the stock were to be brought in upon a walk-in walk-out sale, and the view that no tax would be payable in respect of the sale of stock if they were brought into the purchaser's opening books at the value at which they stood in the vendor's books at the time of the sale, was not an unreasonable one to entertain in the light of the history of s. 36 of the *Income Tax Assessment Act* 1936, and I think that the defendant entertained it." There is also the fact that, although income tax on the sale of the sheep would have been assessable, if at all, in respect of the year ended 30th June 1948, there is no evidence that the defendant has ever been assessed. Neither party called the Commissioner of Taxation. The evidence is confined to speculations by experts expressing inconsistent views as to the likelihood or not of s. 36 being invoked against the defendant and the extent of his liability under it. The defendant may never be assessed under the section, in which event he will, as McManamey said, score on the £2,000. It is obvious that effect could not be given to the defence without deciding nice questions of fact, and it is by no means clear that, if the defence had been raised in the court below, further relevant evidence might not have been tendered. In these circumstances we are of opinion that it is now too late to raise the defence.

It is therefore necessary to consider the other contentions raised on the appeal. These were shortly (1) that cl. 12 of the contract of 20th October 1947 provided that in the event of the consent of the Treasurer not being obtained within two months from its date

(1) (1923) 31 C.L.R. 524, at p. 549.

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(that is 20th December 1947) or within such further period as might be mutually agreed upon by the parties the contract should be deemed to be cancelled and upon the vendor returning to the purchaser any deposit neither party should be under any further liability to the other for any sum for damages, costs or otherwise, and that the consent of the Treasurer was not obtained within two months so that the contract was automatically cancelled on that date; (2) that cl. 8 of the contract provided that the purchaser would continue to employ W. B. Suttor, A. C. McGrath and C. W. Howard each at a certain salary and bonus up to a period of eight years on the terms and conditions therein mentioned, that this was a contract for personal services, and that a Court of Equity will not specifically enforce such a contract.

So far as cl. 12 is concerned, there are, in our opinion, two answers to the contention of the appellant.

In the first place McManamey was at Gundowda from 29th November to 8th December 1947 and he gave evidence of conversations between himself and the defendant which his Honour accepted and which are quite sufficient to prove an oral agreement prior to 20th December that the time for the Treasurer's consent should be extended for a reasonable period after that date. This agreement would vary cl. 12 whether that clause originally provided for an automatic cancellation or not. This variation of cl. 12 was expressly alleged in the statement of claim. It was a variation of a contract for the sale of land and therefore a contract which could not have been proved if the Statute of Frauds (now s. 54A of the *Conveyancing Act* 1919 (N.S.W.) as amended) had been pleaded. But the statute was not pleaded and it was therefore open to the plaintiff to prove the variation.

In the second place, although cl. 12 in terms provides for an automatic avoidance of the contract on the occurrence of a specified event, that is (even if no agreement for an extension of time were made) by no means the end of the matter. The effect of contractual provisions of this character was discussed and explained in *New Zealand Shipping Co. Ltd.* v. *Société des Ateliers et Chantiers de France* (1). Lord *Atkinson* said:—"It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the

(1) (1919) A.C. 1.

contract would be put to an end by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract." (1).

Where the event in question is one which cannot occur without default on the part of one party to the contract, the position is clear. The provision is then construed as making the contract not void but voidable: only the party who is not in default can avoid it, and he may please himself whether he does so or not. In the present case the happening of the event (not obtaining the Treasurer's consent) may be brought about by failure on the part of either party to take certain necessary steps (provision of particulars by the vendor or making of application by the purchaser) to obtain the Treasurer's consent, or it may be brought about without any default on the part of either party. In fact, although there was some argument to the contrary, it was, we think, brought about without any default on the part of either party. Such a case is perhaps not quite so clear as the simpler case where the event cannot occur without default on one side or the other. But we are of opinion that the *New Zealand Shipping Case* (2) requires the same construction to be given to the contract in both classes of case. The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends on what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on either side, then either party may avoid the contract. But neither need do so, and, if one party having a right to avoid it does not clearly exercise that right the other party may enforce the contract against him. This is, we think, the view of Lord *Shaw* and Lord *Wrenbury* in the *New Zealand Shipping Case* (2), and it is consistent with what was said by Lord *Finlay*

(1) (1919) A.C., at p. 9.

(2) (1919) A.C. 1.

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L.C. The language of Lord *Atkinson* (1) may perhaps be regarded as expressing a different view, but we doubt whether his Lordship had in mind the precise point which arises here and which did not arise in the *New Zealand Shipping Case* (2). Although the effect of a provision in a contract may differ according to the events which happen, its construction cannot differ according to the events which happen. If " void " means " voidable," it means " voidable " whatever happens. It cannot very well mean " voidable " if an event happens through the default of one party, and " void " if the event happens without default by either party.

McManamey and Allworth were at Gundowda from 27th to 31st December 1947. The construction of cl. 12 which we have adopted is that the clause did not automatically cancel the contract of 20th October 1947 but only brought it to an end if after that date one of the parties exercised its option to cancel it. On 6th January 1948 the defendant's solicitor wrote to the plaintiff's solicitors that cl. 12 of the contract spoke for itself and this may have been intended to be a notice that the defendant considered the contract to be cancelled. But there was no clear statement that the contract was considered by the defendant as cancelled until 15th January 1948 when the defendant's solicitor wrote to the plaintiff's solicitor that " the consent of the Treasurer was not obtained within the period of two months of the date of the contract and therefore the contract is no longer effective after 20th December 1947." But this letter was obviously written on the view, with which we do not agree, that cl. 12 effected an automatic cancellation of the contract when the Treasurer had not consented by 20th December 1947. His Honour accepted the evidence of McManamey and Allworth of the events that occurred at Gundowda between 27th and 31st December, 1947, and it is clear from this evidence that the defendant was treating the contract as still on foot although he was asking for certain variations to which McManamey agreed provided the directors of the plaintiff approved. Before the defendant's solicitor purported to cancel the contract the consent in writing of the Treasurer to the transfer had been obtained on 5th January, 1948, and the cancellation was therefore too late.

Clause 11 of the contract provides that it is entered into subject to the *National Security Act* and all regulations and proclamations thereunder and subject to the consent of the Treasurer being obtained. There was no *National Security Act* in force at the time the contract was made. The Act in force was the *Defence (Transitional Provisions) Act* 1946 which continued in force, until 31st

(1) (1919) A.C., at pp. 10, 11. (2) (1919) A.C. 1.

December 1947, many sets of regulations made under the *National Security Act* including the *National Security (Economic Organization) Regulations*. We are of opinion that the reference to the *National Security Act* in the contract is a mistake, that it was intended to refer to the *Defence (Transitional Provisions) Act*, and this is simply an example of *falsa demonstratio non nocet*. The contract was therefore entered into subject to the *Economic Organization Regulations* which made the purchase of land unlawful without the Treasurer's consent.

Regulation 6 (1) of these regulations makes it an offence to purchase any land without the consent in writing of the Treasurer. Regulation 6 (10) provides that a transaction shall not be deemed to be entered into in contravention of this regulation if an application for the consent of the Treasurer is made within three months after the date of the transaction, but the transaction shall not have any effect unless the Treasurer gives his consent thereto within a period of six months after the date of the transaction, or within such other period as is agreed on in writing, at the time the transaction is entered into or at any time thereafter, by all the parties to the transaction. Regulation 10 (1) provides that where any transaction is entered into in contravention of this part . . . or where any condition to which the transaction is subject is not complied with, the transaction shall not thereby be invalidated, and the rights, powers and remedies of any person thereunder shall be the same as if these regulations had not been made. It was contended that in the contract of 20th October 1947 the parties had provided in writing for a period other than the period of six months provided for in reg. 6 (10), that this period was substituted by the sub-regulation for the period of six months, and that the contract had no effect because the Treasurer did not give his consent in writing within two months.

We are of opinion that on its true construction cl. 12 of the contract is not a condition precedent but a condition subsequent, and that this construction is not affected by reg. 6 (10). In a case raising the construction of this regulation, before the words commencing " within a period of six months &c." were added, this Court in *O'Neill* v. *O'Connell* (1) sought to reconcile the contents of reg. 6 (10) with those of reg. 10 (1), and the opinion was then expressed, to which we adhere, that the rights and remedies of the parties under the contract were not affected by the regulations and the contract could be enforced as though they did not exist. Accordingly a contravention of the regulations did not affect the

(1) (1946) 72 C.L.R. 101.

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operation of the contract but merely exposed the contravenor to penalties. We do not think that the additional words have altered the meaning of reg. 6 (10) and that for the purposes of specific performance the contract of 20th October 1947 should be construed as though the sub-regulation did not exist. Clause 12 of the contract therefore remains a condition subsequent having the incidents already mentioned and did not operate to cancel the contract because either it was varied before 20th December 1947 so as to give the plaintiff a further reasonable time after that date to obtain the Treasurer's consent, or the defendant was too late in availing himself of any option he had to cancel the contract.

The final question is whether cl. 8 of the contract is an impediment to its specific performance. This clause concludes by providing that the purchaser shall enter into a deed between it and W. B. Suttor, A. C. McGrath and C. W. Howard more effectually to carry out its provisions, such deed to be drawn by the vendor's solicitors and approved by the purchaser's solicitors at the expense of the purchaser. His Honour held, and we agree, that on its true construction cl. 8 only requires for its completion that the purchaser shall enter into the deed therein provided for, and that the parties intended that thenceforth the rights of the employees should be rights under the deed which they could themselves enforce and not rights under the contract which, if enforceable at all, could only be enforced on their behalf by the defendant. The purpose of the deed is stated to be more effectually to carry out the clause instead of stating that it is effectually to carry it out but we are of opinion that this is its true meaning. In *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.* (1), Lord *Selborne* L.C. said: "There is a class of suits in this court, known as suits for specific performance of executory agreements, which agreements are not intended between the parties to be the final instruments regulating their mutual relations under their contracts . . . The common expression, 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed." (2). Clause 8 deals with a topic altogether separate and apart from the other clauses of the contract. It is a clause intended to confer benefits on the employees in question and not on the vendor, and the employees would have a vital interest in the exact

(1) (1873) L.R. 16 Eq. 433.

(2) (1873) L.R. 16 Eq., at p. 439.

terms and conditions of employment embodied in the deed. The defendant could not object to variations of the clause agreed upon between them and the purchaser. The general frame of the clause points unmistakably to an intention that it would be completely performed by the purchaser entering into a deed with the employees containing the benefits stipulated for. The deed is to be approved by the purchaser's solicitors but the parties have already agreed upon its essential provisions, and this stipulation only means that the solicitors may insist upon any provisions being inserted in the deed properly required to carry the concluded agreement of the parties into effect: *Chipperfield* v. *Carter* (1); *Caney* v. *Leith* (2).

For these reasons we are of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Rawlinson, Hamilton & Francis.*
Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.

(1) (1895) 72 L.T. 487.

(2) (1937) 2 All E.R., at pp. 534, 535.