

The policy upon which s. 122 and s. 122A proceed supplies no sufficient reason for giving any wider meaning to the words " mining operations " and " mining property ". No doubt the policy is in part founded in the propriety of allowing a deduction for a proportioned part of expenditure upon a wasting asset. And it may be conceded that much of the plant in a quarry is of this kind. But, as the *Assessment Act* shows at a number of points, the policy of the legislature has always been to make special concessions to mining as a means of winning precious metals and valuable minerals from the soil : see ss. 23 (*m*), 23A, 44 (2) (*c*) and (*d*), (3) and (4), and 78 (1) (*b*). One may be sure that it is this policy which led to the making of a special provision to deal in the case of mining with what after all is a problem in functional obsolescence or depreciation of general occurrence in terminating undertakings and wasting assets.

In *Deputy Federal Commissioner of Taxation (Q.) v. Stronach* (1), the Court applied, in effect, the foregoing interpretation to the words " operations carried on in Australia in mining " which occurred in the *Sales Tax Assessment Act*. In that case reasons were given for distinguishing the decision in *Australian Slate Quarries Ltd. v. Federal Commissioner of Taxation* (2). The same distinction applies to the present case, but we feel bound to say that we find ourselves unable to concur in much that is contained in the judgment of *Isaacs* and *Rich JJ.* in the case of the *Australian Slate Quarries* (3).

In our opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Parish, Patience & McIntyre*.

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.

H. C. OF A.
1955-1956.

N.S.W.
ASSOCIATED
BLUE-METAL
QUARRIES
LTD.

v.
FEDERAL
COMMISSIONER OF
TAXATION.

—
Dixon C.J.
Williams J.
Taylor J.

(1) (1936) 55 C.L.R. 305.
(2) (1923) 33 C.L.R. 416.

(3) (1923) 33 C.L.R., at pp. 419-421.

[HIGH COURT OF AUSTRALIA.]

BESIER APPELLANT ;
 DEFENDANT,
 AND
 FOSTER RESPONDENT.
 PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
 TASMANIA.

H. C. OF A. *Contract—Specific performance—Sale of land for fixed sum or such other sum as might be approved by Commonwealth authority under Commonwealth regulations—Application to Commonwealth authority—Cessation of regulations before decision—Provision by State Act for dealing with applications pending before Commonwealth authority—Whether decision by State authority a fulfillment of contractual term.*
 1952.
 MELBOURNE,
 Mar. 14, 17.
 Dixon,
 McTiernan,
 Williams,
 Webb and
 Fullagar JJ.

An agreement dated 9th August 1948, for the sale of land in Tasmania provided that the purchase money should be as follows : for the purchase of the land the sum of £26,500 or such sum as may be approved by the delegate of the Treasurer under the *National Security (Economic Organization) Regulations* whichever is the lesser. On 20th September 1948, land sales in Tasmania ceased to be controlled by the Commonwealth regulations. On the same day the *Land Sales Control Act 1948* (Tas.) came into operation. By s. 5 (5) it provided that, where before the date of commencement of the Act an application for consent to a transaction affecting land was made under the Commonwealth regulations but no decision on the application was given before that date, the Minister might deal with the application as if the Act had been in force when it was made and the application had been made under the Act. The Act conferred power on the Minister to delegate certain of his functions and in fact the application which had been made to the federal authority for consent was dealt with by a delegate of the Minister who consented to a sale of the real estate at a price of £15,548. In an action by the purchaser for specific performance of the contract,

Held, that the action failed, upon the ground that no consent was given to the contract for the higher sum of £26,500 and the condition on which sale at the lower sum depended was never fulfilled in that the clause specified consent by the Federal authority and not by the State authority.

Decision of the Supreme Court of Tasmania (Full Court), reversed.

APPEAL from the Supreme Court of Tasmania.

On 30th August 1949 Francis Oliver Foster commenced an action in the Supreme Court of Tasmania against Emma Phillipina Besier claiming specific performance of an agreement dated 9th August 1948, wherein the defendant was vendor and the plaintiff was purchaser.

The action was heard before *Gibson* A.J., who, on 22nd May 1950, ordered that judgment be entered for the defendant. From this decision the plaintiff appealed to the Full Court of the Supreme Court of Tasmania constituted by *Morris* C.J. and *Green* J. which, on 8th June 1951, allowed the appeal and ordered that the agreement be specifically performed.

From this decision the defendant appealed to the High Court.

The facts and arguments appear sufficiently in the judgment hereunder.

H. S. Baker and *R. C. Wright*, for the appellant.

S. C. Burbury Q.C. and *O. F. Dixon*, for the respondent.

THE COURT delivered the following oral judgment :—

The plaintiff succeeded in the Supreme Court of Tasmania in an action for specific performance of an agreement dated 9th August 1948 for the sale of what may, we think, shortly be called a residential business together with the land which formed it. The business which was called “Ingomar” was carried on in Hobart and was well-known. The action for specific performance was resisted upon a number of grounds. We find it necessary to deal with only one of them, a ground upon which we think that the action should fail. The agreement was made on 9th August 1948 at the time when the *National Security (Economic Organization) Regulations* (Cth.) were still in force and applicable to Tasmania. It is true that it was not very long before they went out of force, at all events in relation to future transactions. They went out of force on 20th September 1948. Whether on 9th August 1948 the parties contemplated them going out of force or not is perhaps a matter into which it is not material to inquire. They may have done so or they may have not. But they had to take account of the regulations as they existed and they did so by making a provision in the contract which provided that the purchase money should be as follows: for the purchase of the land the sum of £26,500 or such sum as may be approved by the delegate of the Treasurer under the *National Security (Economic Organization) Regulations* whichever is the lesser; for the goodwill of the business so carried on the sum of £2,500;

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and for the plant the sum of £1,000. The regulations continued in force until 20th September 1948. By S.R. 1948 No. 121 notified on 16th September 1948 a new regulation numbered 25 was inserted in the *National Security (Economic Organization) Regulations*. Regulation 25 (1) enabled the Treasurer by declaration published in the *Gazette* to declare that, from and including a date specified in the declaration, sales of land should, in the State or Territory of the Commonwealth specified in the declaration, cease to be controlled under the regulations. Sub-regulation (2), however, said that where such a declaration was made in relation to a State or Territory of the Commonwealth, Pts. III and IIIA of these regulations and Pt. VI of these regulations, in so far as that Part applies in relation to Pt. III or IIIA, should not have effect in respect of transactions entered into in that State or Territory on or after the date specified in the declaration. The point has been raised whether sub-reg. (2) does not mean that although a declaration was made the regulations were to continue in force in relation to transactions such as this. But we shall not deal with that question. The Act of the State of Tasmania for the control of land sales, called the *Land Sales Control Act* 1948, was assented to on 17th September 1948 and came into force in pursuance of sub-s. (2) of s. 1 on 20th September 1948. On that date a declaration published in the Commonwealth *Gazette* pursuant to reg. 25 (1) prescribed and declared that land sales in Tasmania should cease to be controlled by the regulations as from 20th September 1948. The *Land Sales Control Act* 1948 in the State of Tasmania then took up the business of land sales control. Section 5 sub-s. (5) provides that where before the date of the commencement of this Act an application for consent to a transaction affecting land was made under the Commonwealth regulations, but no decision on the application was given before that date, the Minister may deal with the application as if this Act had been in force when it was made and the application had been made under this Act. Section 13 provides that the Minister may, by writing under his hand, delegate all or any of his powers and functions under the Act (except the power of delegation), in relation to any matter or class of matters, so that the delegated powers and functions may be exercised by the delegate with respect to the matter or class of matters specified in the instrument of delegation. Had it been necessary to consider the operation of sub-s. (2) of the new reg. 25, difficulties might have arisen as to the operation of sub-s. (5) of the State Act. We pass over that matter. In fact a delegate of the Minister constituted under s. 13 of the *Land Sales Control Act*

went on to deal with the application that had been made to the federal authority for consent. It is said that the result of his consideration of that application was to lead him to give his consent to a price for the real estate of £15,548. The steps by which that is supported are in dispute but in the end an unqualified consent was endorsed on the contract to the transaction at that sum.

We shall not enter upon the questions which were discussed as to the sufficiency of that or the sufficiency of the consents which were given. What we shall place our decision upon is the plain meaning of the provision which we have read from the contract, the provision which states that the price may be a lower sum approved by the delegate of the Treasurer under the *National Security (Economic Organization) Regulations*. No consent was given to the contract for the higher sum of £26,500 and any approval or consent which was obtained capable of satisfying the terms of the provision was given only by the State authority. It is clear that the clause specifies the federal authority, the delegate of the Treasurer under the *National Security (Economic Organization) Regulations*, and we think that the plaintiff cannot escape the consequences of the fact that the condition which those words prescribe was never fulfilled, with the result that the condition on which the obligation of the contract as a sale at a lower price depends was never fulfilled. To escape from that it has been argued that the words "the delegate of the Treasurer" in the *National Security (Economic Organization) Regulations*, whilst literally referring to the federal authority, are really directed at specifying what may be called the legal authority for the time being who may exercise land sales control on the same principles as appear from the Economic Organization Regulations. The argument is that there is nothing except the legal position of the delegate of the Treasurer under the *National Security (Economic Organization) Regulations* to lead to the selection of him as the person to fix the lower price and that in reality and in substance those words are merely directed to prescribe the legal authority as he may be from time to time constituted provided that the principles upon which the authority proceeds are the same or substantially the same as those which the *National Security (Economic Organization) Regulations* contemplated. Accordingly, they should, as it is submitted for the plaintiff, be construed as in substance providing for the possibility of the transfer of authority from Commonwealth to State.

We think that there cannot be found in the words any such wide intention. They speak for themselves. They are definite and they satisfy the authority which is erected by the Commonwealth. The

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