[HIGH COURT OF AUSTRALIA.]

CAVALLARI . . . . . APPELLANT;
DEFENDANT,

AND

PREMIER REFRIGERATION COMPANY PROPRIETARY LIMITED . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3, 4.

MELBOURNE, *May* 29.

DIXON C.J. McTiernan, Webb, Fullagar and Kitto JJ.

Vendor and Purchaser—Contract for sale of land—Option to purchase—Offer—Certainty—Acceptance—Specific performance.

The appellant, by letter dated 18th January 1951, gave to the respondent company "an option for a period of seven days from this date within which to purchase the freehold owned by me and known as 61/63 Renwick Street, Redfern, for the sum of Thirty-two thousand pounds. I will require a period of not less than six months to enable me to make arrangements re my business plant etc. Received one shilling as consideration for above option."

The company, by letter dated 23rd January 1951, replied: "We refer to the option given to our company by you on the 18th January, instant, to purchase freehold property owned by you and known as No. 61/63 Renwick Street, Redfern, for the sum of £32,000. Vacant possession to be given after expiration of six months. We now give you formal notice of our company's exercise of such option. We shall be pleased if you will arrange with the Agent to prepare Contract of Sale."

Held that a contract enforceable by specific performance was made between the parties.

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 way of statement of claim in the equitable jurisdiction of the Supreme Court of New South Wales, and filed on 10th October 1951, the plaintiff, Premier Refrigeration Co.

Pty. Ltd., alleged, *inter alia*, that the defendant, Dante Cavallari, who carried on business under the name of Mimosa Manufacturing Co., on or about 18th January 1951, in consideration of the sum of one shilling paid by the plaintiff to the defendant executed and delivered to the plaintiff a document in the following terms :—

(i) " Mimosa Manufacturing Co.,
61-63 Renwick Street, Redfern.

Box 13 P.O. Redfern
Phone MX1531 (2 lines)
18th January 1951.

The Secretary,
Premier Refrigeration Co. Pty. Ltd.
Sydney.

Dear Sir,

As agreed with Mr. Solomons, I hereby give you an option for a period of seven days from this date within which to purchase the freehold owned by me and known as 61/63 Renwick Street, Redfern, for the sum of Thirty two thousand pounds.

I will require a period of not less than six months to enable me to make arrangements re my business plant etc.

Yours faithfully,

Received one shilling as consideration for above option.

Dante Cavallari."

(ii) that on or about 23rd January 1951 the plaintiff by its duly authorized officer executed and delivered to the defendant a document in the following terms :—

" 587 George Street,
Sydney.
23rd January 1951.

Dante Cavallari Esq.,
Dear Sir,

We refer to the option given to our company by you on the 18th January instant to purchase freehold property owned by you and known as No. 61/63 Renwick Street Redfern for the sum of £32,000. Vacant possession to be given after the expiration of six months.

We now give you formal notice of our Company's exercise of such option. We shall be pleased if you will arrange with the Agent to prepare Contract of Sale.

Yours faithfully."

(iii) that notwithstanding repeated requests made by the plaintiff since 23rd January 1951 to carry out the agreement constituted

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by the abovementioned documents the defendant had repudiated and renounced that agreement and refused and neglected to carry it out thereby causing loss and damage to the plaintiff who had been and was ready and willing to carry out the agreement on its part.

(iv) that the plaintiff feared that unless the defendant were restrained by injunction he would dispose of or deal with the subject land contrary to the terms of the agreement and in breach of it and resulting in irreparable injury and loss to the plaintiff.

The plaintiff prayed, *inter alia*, that the defendant be decreed specifically to perform and carry into execution the agreement; that in addition to or in lieu of specific performance the defendant be ordered to pay to the plaintiff damages sustained by it by reason of the defendant's repudiation and renunciation of the agreement and his refusal and neglect to carry it out, and that pending the completion of the agreement the defendant be restrained from selling, mortgaging, charging or otherwise disposing of or dealing with the land except under the direction of the plaintiff.

An *ex parte* injunction granted on 9th October 1951, restraining the defendant from alienating or attempting to alienate the subject land, was continued until a motion for an injunction brought by the plaintiff had been disposed of.

A demurrer *ore tenus* to the statement of claim, taken on behalf of the defendant upon the hearing of the motion, was overruled by *Roper* C.J. in Eq., who, having held that the plaintiff was not debarred by its laches from being entitled to the injunction, ordered that the injunction be continued until the hearing of the suit.

Upon an application on behalf of the defendant for leave to appeal to the High Court against that decision, the High Court ordered that if within seven days the defendant communicated to the District Registrar of the High Court his acceptance of a condition that he would treat the decision of the proposed appeal as final and would, if the decision were against him, submit to a decree in the suit, leave should be granted to the defendant to appeal to the High Court.

The defendant did within the time limited communicate to the District Registrar his acceptance of the condition and the appeal now came on for hearing.

C. A. Weston Q.C. (with him *A. B. Kerrigan*), for the appellant. The offer was too uncertain and could not be converted into a contract. The letter of acceptance was a variation. It was a refusal and counter-offer. The first part of the appellant's letter

contained an option only. The second part of that letter was information only. A formal contract was contemplated. The option mentioned in the respondent's letter is the first sentence. The " acceptance " by the respondent was only an alleged acceptance. Vacant possession was to be given after the expiration of six months, but there was not any reference to plant, equipment, &c. If " after " means not instanter then the matter is hopelessly at large. If the option includes the second sentence and there is a simple acceptance, it is bad for uncertainty (*Radium Hill Co. (N.L.)* v. *Moreland Metal Co.* (1)). It does not appear what arrangements the vendor intended to make. There was not any contract capable of being enforced (*Johnson* v. *Humphrey* (2)). The parties directed their minds to possession, but each dealt with it in a different manner. Essential details were not referred to: *Salmond and Williams, The Law of Contract*, 2nd ed. (1945), pp. 79, 80. Would the clause in the option or the clause in the acceptance be inserted in the formal contract ? The result would be different according to which was inserted. The differentiation was deliberate. If " after " means " at the expiration " the vendor would be restricted to the period of six months by the acceptance, not by the offer. If " after " has not that meaning then there is not any standard by which time for possession can be measured, and it is too uncertain.

G. E. Barwick Q.C. (with him *C. A. Walsh*), for the respondent. It was intended that the exercise of the option within the time specified would then result in a contract. The acceptance was an acceptance of the option whatever it was. The first paragraph of the respondent's letter was a description of the option (*Carter* v. *Hyde* (3)). There was not any qualification of the assent. The effort to paraphrase the offer negatived the idea of introducing a new term. The determination of a reasonable time is not limited to mere conveyancing matters. In effect the vendor said " When you come to the determination of a reasonable time it is to be not less than six months ". Acceptance was not to be *on* the expiration of six months (see *Johnson* v. *Humphrey* (4) ; *Hawkins* v. *Price* (5) ; and *Beckett* v. *Nurse* (6)). Laches was dealt with in *Lindsay Petroleum Co.* v. *Hurd* (7) ; *Hourigan* v. *Trustees Executors and Agency Co. Ltd.* (8) and *Prior* v. *Payne* (9). The matter of a

(1) (1916) 16 S.R. (N.S.W.) 631 ; 33 W.N. 155.
(2) (1946) 1 All E.R. 460, at p. 463.
(3) (1923) 33 C.L.R. 115, at pp. 121, 126, 133.
(4) (1946) 1 All E.R. 460.
(5) (1947) Ch. 645.
(6) (1948) 1 K.B. 535.
(7) (1874) L.R. 5 P.C. 221, at pp. 239, 240.
(8) (1934) 51 C.L.R. 619, at pp. 629, 630.
(9) (1950) A.L.R. 10 ; 23 A.L.J. 298.

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formal contract was discussed in *Niesmann* v. *Collingridge* (1); *Lennon* v. *Scarlett & Co.* (2); and *Bonnewell* v. *Jenkins* (3).

C. A. Weston Q.C., in reply.

Cur. adv. vult.

May 29.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, FULLAGAR AND KITTO JJ. The respondent company brought a suit in the Supreme Court of New South Wales against the appellant, claiming specific performance of an alleged contract for the sale of certain land by him to the company. The company obtained an interim injunction for a short period, restraining the appellant from selling or otherwise alienating the land to any person other than the company, and within that period moved for an extension of the injunction until the hearing of the suit or further order. The motion was heard by *Roper* C.J. in Eq. On the hearing the appellant demurred *ore tenus* to the statement of claim, denying that it disclosed a contract between him and the company. *Roper* C.J. in Eq. was of opinion that the statement of claim did disclose a contract between the parties. His Honour made an order overruling the demurrer, and continuing the injunction until the hearing of the suit or further order. When the appellant sought leave to appeal to this Court against that order, this Court ordered that, if within seven days he communicated to the District Registrar his acceptance of a condition that he would treat the decision of the proposed appeal as final, and would, if the decision were against him, submit to a decree in the suit, leave should be granted to appeal to this Court. The appellant did within the time limited communicate to the District Registrar his acceptance of the condition.

The sole question in the case is whether a contract was made between the parties, and that question depends on the construction and effect of two letters.

On 18th January 1951 the appellant wrote to the secretary of the company a letter in the following terms :—

" Dear Sir,

As agreed with Mr. Solomon, I hereby give you an option for a period of seven days from this date within which to purchase the freehold owned by me and known as 61/63 Renwick Street, Redfern, for the sum of Thirty two thousand pounds.

(1) (1921) 29 C.L.R. 177.
(2) (1921) 29 C.L.R. 499.
(3) (1878) 8 Ch. D. 70.

I will require a period of not less than six months to enable me to make arrangements re my business plant etc.

Received one shilling as consideration for above option.

Yours faithfully."

On 23rd January 1951 the company replied to this letter with a letter in the following terms :—

" Dear Sir,

We refer to the option given to our company by you on the 18th January instant to purchase freehold property owned by you and known as No. 61/63 Renwick Street Redfern for the sum of £32,000. Vacant possession to be given after the expiration of six months.

We now give you formal notice of our company's exercise of such option. We shall be pleased if you will arrange with the agent to prepare contract of sale.

Yours faithfully."

The argument for the appellant, which is by no means negligible, was put very clearly by Mr. *Weston*. We are of opinion, however, that the view taken by *Roper* C.J. in Eq. was correct, and that a contract was made between the parties.

In considering the effect of the two letters it is important to bear in mind two things. In the first place, the appellant's letter purports to give an " option ". In other words, it purports to be an offer capable of being accepted so as to create a contract. Moreover, the " option " is given for value, with the obvious intention that it shall not be revocable during the seven days. It follows that, if two constructions of the letter are fairly open, the one of which will make it an effective offer while the other will not, the former construction must be adopted. In the second place, while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or " open " contract, not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance. See generally *Williams, Vendor and Purchaser*, 4th ed. (1936), pp. 44 et seq. The first step, generally speaking, is for the vendor to show a good title, a comparatively simple matter when the land is under the Torrens system. He must produce his title and answer any requisitions lawfully made upon it. If and when a good title is shown, the purchaser must accept it. After acceptance of title, the purchase money must be paid in exchange for a

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conveyance, and possession must be given and taken. No time, of course, is fixed for the doing of any of these things. Each step must be taken within a reasonable time, and what is a reasonable time is a question of fact depending on the circumstances of each particular case.

There seem to be, theoretically at least, four possible views of the meaning of the words in the appellant's letter, " I will require a period of not less than six months to enable me to make arrangements re my business plant etc.". The appellant was, in fact, carrying on business in the premises at the time, and the words obviously have reference to the giving of possession in the event of the " option " being exercised. The first possible view is that what the appellant is really saying is : " We shall have to agree upon a time for giving possession, but I tell you now that I will not agree to any time less than six months ahead, because I shall require at least that period to enable me to make arrangements re my business plant etc.". On this view the appellant's letter does not contain an offer capable of acceptance giving rise to a contract. For the reason indicated above, this view is to be rejected if any other view, which will make the letter an effective offer, is fairly open. The second possible view is that the words in question do not form part of the " offer " at all, but—while leaving all the implications of an open contract to take effect in the event of acceptance of the offer which has been made—intimate that the writer expects to be allowed at least six months in which to vacate the premises. This view has little to recommend it. The use of the word " require " is strongly against it, and the time of giving possession is a matter of such importance that any such reference to it must prima facie be regarded as having the character of a stipulation.

It was the third view that was mainly pressed by Mr. *Weston*. This view emphasizes the obvious purpose of the words in question, which is to give the offeror an opportunity of removing or disposing of his business plant &c. According to this view the " enabling " of the offeror to make the " arrangements " referred to is an essential part of the offer. What the offeror is really saying is : " I am not to be called upon to give possession until I have had such time (not being less than six months) as will enable me to make arrangements re my business, stock, etc.". If this view were adopted, it could not, we think, be maintained (as Mr. *Weston* alternatively suggested) that such an " offer " was too uncertain to be capable of acceptance. But it *could* be maintained that, if that was really the offer, the offer was never accepted. What

the company did was to set out in its letter its own understanding of the offer and then to say that it accepted the offer. Its understanding of the critical sentence in the offer was expressed in the words "Vacant possession to be given after the expiration of six months". If those words do not reproduce what was really offered, the offer has not been accepted. And, if the offer be interpreted according to this third view, the company's words do not reproduce what was really offered, because they omit all reference to "enabling" the offeror to make the arrangements to which he has referred. Since the choice, in our opinion, lies between this third view and a fourth view, it will be convenient at this stage to state the fourth view.

As a matter of practical substance and ultimate effect the fourth view probably does not differ greatly from the third. It does differ, however, in that it does not regard the critical sentence in the appellant's letter as being wholly stipulatory in character, but regards it as containing a stipulation and a reason for making the stipulation. It treats the offeror as saying in effect: "I am not to be required to give possession in less than six months, because I shall require not less than that time to make arrangements re my business plant etc.". If this be the correct interpretation, the company's statement of its understanding of the offer did reproduce the offer. There is no justification for reading the word "after" in the company's letter as meaning "on" or "immediately after". Plainly the company intended to accept the appellant's offer, and it would be obvious to anybody that to require possession to be given immediately on the expiration of six months would be a departure from the terms of that offer. Both "offer" and "acceptance" must be read in the light of the implications which law and equity attach to an open contract for the sale of land. The effect of the contract, which on this view is made, is that possession is to be given within a reasonable time of the making of the contract, but in any case not until after the expiration of six months from the making of the contract. It is not a term of the contract that the vendor shall have such time as will enable him to make his "arrangements". But, in considering whether at, or at any time after, the end of the six months, a reasonable time has expired, it will be not only legitimate but necessary to have regard to the purpose for which the stipulation was introduced. What is a reasonable time must always depend on all the circumstances of the case, and in this case the circumstances within the contemplation of the parties include the facts that the vendor has been carrying on a manufacturing business on the premises

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and has to make arrangements for the transfer or disposal of his assets. It is, of course, because of this consideration that we have said that the ultimate practical difference between the third and fourth views of the offer would probably not, in the event of acceptance, be great.

There are, in our opinion, substantial reasons for preferring the latter of the two views which we consider fairly open to argument. It represents the more natural meaning of the words, the meaning, we think, that the appellant most probably intended. In any case, it would be entirely reasonable for the recipient to understand them in that sense. The company would be very concerned with the time at which it could obtain possession. It would not be directly or immediately concerned with any business problem of the appellant. Any " arrangements " which the appellant might have to make, or wish to make, would not, as such, be a matter of interest to the company. The recipient of a letter in those terms might well say to himself: " He is entitled, of course, to a reasonable time for giving possession. I see that he wants to make sure of having at least six months. He gives a good reason for wanting that. I am quite prepared to give him what he wants. Whatever may turn out to be a reasonable time, I am quite prepared to undertake not to turn him out until after the expiration of six months." Such an interpretation of the letter would be altogether natural and reasonable. It is the very interpretation which might be expected to be put upon the letter. It is the interpretation which the company did in fact put upon the letter. And not only is the sense in which the company understood the words the more natural sense of the words themselves: the proposal made by the words understood in that sense is intrinsically a much more reasonable proposal than that which would be conveyed by the other interpretation. It fits in with, and qualifies, not unreasonably, implications which are indispensable to the working out of an open contract for the sale of land. On the other view of the words, what is proposed is less definite in meaning—so indefinite indeed that Mr. *Weston* saw a foothold for an argument that the " offer " was too uncertain to be capable of " acceptance " —and much less reasonable in substance.

The view which we take of the two letters is, in effect, the view which was taken by the learned Judge from whom the appeal comes. The appeal should be dismissed, and, in accordance with the condition accepted by the appellant, there should be a decree for specific performance.

WEBB J. I would dismiss this appeal.

The reply is to be read with the offer and not *in vacuo* ; and to bring about a binding contract the offer and reply must be of and in respect of precisely the same terms : *G. Scammell and Nephew Ltd.* v. *Ouston* (1), per Viscount *Simon* L.C. Then, reading the offer and reply together, I think it is fair to conclude that the respondent in the reply meant no more than to describe in his own language the nature of the terms of the offer, one of which terms was in effect that the offeror, the appellant, should have a reasonable time, not being less than six months, to make certain arrangements. This was an offer capable of being turned into a binding contract by a simple acceptance. The respondent, however, saw fit to repeat the terms of the offer, and it was in respect of the term requiring a reasonable time, not being less than six months, that he used the expression " Vacant possession to be given after the expiration of six months ". It was submitted by counsel for the respondent that this was a correct description of the particular term of the offer, or, if not, that it was a mere misdescription, and not a counter offer, and that there was still a binding contract. He relied on *Carter* v. *Hyde* (2). I think the particular term of the offer could be paraphrased as " Vacant possession to be given after the expiration of six months ", and that such a paraphrase, and not a counter offer, was intended by the respondent, and that a binding contract resulted.

There is then no need to consider what the position would be if the respondent had misdescribed the particular term. I think however, that I should find it difficult to resist the conclusion that this misdescription revealed a misapprehension on the part of the respondent as to the terms of the offer, and that there was no *consensus ad idem.*

Appeal dismissed with costs. In pursuance of the condition imposed by the order of this Court of 8th November 1951 *declare that specific performance of the contract in the pleadings mentioned ought to be decreed with costs of suit. Remit the suit to the Supreme Court for the carrying of this order into execution.*

Solicitor for the appellant, *R. J. L. Hickson.*
Solicitors for the respondent, *Gregory S. Madden & Co.*

J. B.

(1) (1941) A.C. 251, at p. 255. (2) (1923) 33 C.L.R. 115.