[HIGH COURT OF AUSTRALIA.]

MILNE AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA AND OTHERS . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *June* 5, 6, 7, 8;

SYDNEY, *Aug.* 22.

Dixon C.J., McTiernan, Williams, Fullagar and Taylor JJ.

Contract—Settlement of discharged members of Forces on land—Administration of scheme by Closer Settlement Board (Tas.)—Dealings between settler and Board—Whether giving rise to contractual rights in settler—Interpretation—"Capital cost to the Board of the holding at the time of allotment"—Meaning—Costs in Supreme Court—Successful defendant raised technical defences on which he did not subsequently rely or need to rely—Appeal to High Court by unsuccessful plaintiff—Whether respondent precluded from challenging order below as to costs—Commonwealth and State War Service Land Settlement Agreement Act 1945 (*No.* 36 *of* 1945) (*Tas.*)—*War Service Land Settlement Act* 1950 (*No.* 82 *of* 1950) (*Tas.*), *s.* 37.

The *War Service Land Settlement Act* 1950 (Tas.) enacts a new and exhaustive set of provisions dealing with war service land settlement in Tasmania and covers the whole field on the subject.

Section 37 of the *War Service Land Settlement Act* 1950 (Tas.) provides that "the purchase price of a holding . . . shall be a sum determined by the board with consent but not more than the capital cost to the board of the holding at the time of allotment, excluding the amount payable for improvements under s. 26 and including any amount fixed under s. 19 in respect of the holding, or the unimproved value of the holding obtained for the purpose under s. 41 of the *Land Valuation Act* 1950 whichever is the greater, together with the amount (if any) remaining unpaid under s. 26".

Held, that the words "capital cost to the board of the holding at the time of allotment" refer to the total cost of the holding including all improvements effected by the board.

The plaintiff, an eligible person for settlement under the *Commonwealth and State War Service Land Settlement Agreement Act* 1945 (Tas.) was informed on 8th February 1946 by the Closer Settlement Board administering such Act, that he had been classified as "suitable 'A' for land settlement". The plaintiff in July 1947 in response to an inquiry from the board informed it that he was willing to accept employment on the L. estate provided he was granted an allotment of leasehold in that area. Later in the same month the board informed him in writing that he had been selected for employment on the L. estate and that he would "definitely be allotted a leasehold". By a circular dated 22nd December 1948 the board after stating that many of the conditions of settlement had so far been left "rather vague" said: "Negotiations have now been completed and a definite policy can be stated on the general terms on which you will occupy your leasehold". Referring to structural improvements which had been or were to be erected on the land by the board it said "The price to be charged for these structural improvements will be the estimated cost as at 1st July 1946 . . . For all these improvements the figure to be adopted will be the lowest estimated cost as at 1st July 1946". By a further circular dated 14th April 1949 the board after stating that the circular was "issued in an endeavour to clarify and explain certain phases of the Land Settlement Scheme which have given rise to doubts in the minds of intending settlers and others" set out a number of provisions in the agreement between the Commonwealth and the State and stated, *inter alia*, that the tenure of the allotment was to be perpetual leasehold and that the rent thereof was to be determined in the manner therein set out and that the cost of structural improvements calculated as at 1946, was to be repaid over thirty years. In February 1949 the plaintiff went into possession of a holding on the L. estate and thereafter carried on farming operations there. Among other things he effected improvements to the house and land, erected fencing and put in a water supply. On 29th November 1950 the board forwarded to the plaintiff for his signature a document described as a licence. It was accompanied by a letter, which commenced: "To enable you to commence farming under the normal conditions of settlement as provided between the State and the Commonwealth, it is proposed to offer you a short term licence for a period of twelve months from 1st December 1950," during which period no rent or interest or repayment of advances was to be required. It was said to be anticipated that the valuation of the holding would be completed by the end of the period, when the settler would be offered a permanent lease in which the rent and the value of structural improvements effected by the board would be stated. The letter said:— "The board reserves all rights to fix a rental as determined after the valuation has been completed." The licence, dated 15th December 1950 was duly executed and recited that the land, being lot 22 on the L. estate was allotted to the plaintiff on 1st December 1950, but that the terms and conditions on which the same should be held by him have not yet been determined. It granted to the plaintiff a licence under s. 101 of the *Crown Lands Act* 1935 (Tas.) to take possession of the land for pastoral and agricultural purposes for twelve months from 1st December 1950. It contained a number of

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covenants, and cl. 3 was in the following terms: "The licensee hereby agrees with the Minister and the Board that the date hereinbefore mentioned as the date of allotment" (*scil.* 1st December 1950) "shall be the commencing date of any lease or grant of the said land which may hereafter be granted or made to the licensee pursuant to any Statute of Parliament passed in that behalf, and that the rental payable under such lease shall be not less than the sum of £170 in respect of the land and £60 in respect of improvements thereon." The board, after the passing of the *War Service Land Settlement Act* 1950 (Tas.), determined to calculate rents of allotments on a new basis from that set out in the earlier circulars. The plaintiff contended that he had a contractual right to have the rent of lot 22 determined in accordance with the terms announced in the circulars.

Held, that no contract had been established because, *inter alia*, the circulars were not contractual documents and, in any event, the terms on which the parties had not agreed were not such as might be implied by law.

Defendants in an action in the Supreme Court of Tasmania, although successful, were ordered to bear their own costs because they had raised by their defence the *Statute of Frauds* and another technical defence, on neither of which they subsequently relied or needed to rely. The unsuccessful plaintiffs having unsuccessfully appealed to the High Court,

Held, that the defendants were entitled to their costs in the Supreme Court.

Decision of the Supreme Court of Tasmania (*Morris* C.J.), varied.

APPEAL from the Supreme Court of Tasmania.

Edward Nicholson Milne, Neil Peter Mulcahy, William Edward Maxwell, Lionel Percy Milne, Alan Richard Butters, Alexander Lexicon Graeme-Evans, Frank Burgess Powell, George William Brasher, Devlin James Nickolls, Edward Louis Archer, Paul Philip Nichols, Philip Hilyer Mason, Vincent George Manning, Ross Allen Johnston, Roy Alexander Gourlay, Edgar William Bannister, Frank Maxwell Downham, Dermot Glynn Rice and Randolph Wybert Bannister on 2nd December 1952 commenced an action in the Supreme Court of Tasmania against the Attorney-General for the State of Tasmania, the Closer Settlement Board, the Honourable John James Dwyer who was sued as Minister for Agriculture of the State of Tasmania and Raymond James Veale who was sued as the Director of Land Settlement for the State of Tasmania.

The action was heard before *Morris* C.J. The case of Edward Nicholson Milne being typical it was agreed that it should be the only case heard. On 12th November 1954 *Morris* C.J., in a written judgment, held that judgment should be entered for the defendants.

From this decision the plaintiffs appealed to the High Court.

The facts and arguments sufficiently appear in the judgment hereunder.

E. R. Reynolds Q.C. and *S. H. Collie*, for the appellants.

S. C. Burbury Q.C., Solicitor-General for the State of Tasmania, and Miss *N. W. Levis*, for the respondents.

Cur. adv. vult.

Aug. 22.

THE COURT delivered the following written judgment :—

This is an appeal from a judgment of the Supreme Court of Tasmania (*Morris* C.J.) in an action in which nineteen plaintiffs sued the Attorney-General for Tasmania, the Closer Settlement Board of Tasmania and two other defendants, claiming certain declarations of right and other relief. Each of the plaintiffs sued severally, but the claims of all arose out of the same set of circumstances and stood on the same footing. After the issue of the writ it was agreed that pleadings should be delivered, and the action should proceed, as if one of the plaintiffs, Edward Nicholson Milne, were the sole plaintiff. The defendants delivered a counterclaim with their defence. The learned Chief Justice gave judgment for the defendants on both claim and counterclaim. Formal judgment was entered against all the nineteen plaintiffs, and all appeal, but it will be convenient to refer, for the purposes of this judgment, to Milne as if he had been a sole plaintiff and a sole appellant.

The basis of the plaintiff's claim is contractual, but it arises by reason of certain legislation enacted in and after 1945, which had for its object the settlement on the land in Tasmania of discharged members of the forces who had served in the war of 1939-1945.

By the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945), which came into force on 11th October 1945, the Commonwealth Parliament authorised the execution on behalf of the Commonwealth of agreements with the States providing for the co-operation of the Commonwealth and the States in the matter of war service land settlement. Two forms of agreement were scheduled to the Act, the first being applicable to the States of New South Wales, Victoria and Queensland and the second to the States of South Australia, Western Australia and Tasmania. There are certain differences between the two agreements, but the only point which need be noted is that the former did, whereas the latter did not, provide for the acquisition of land by the State at a value not exceeding that ruling on 10th February 1942. The agreement

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between the Commonwealth and Tasmania was executed by the Prime Minister and the Premier of the State on 9th November 1945, and it received legislative sanction from the Parliament of Tasmania by the *Commonwealth and State War Service Land Settlement Agreement Act* 1945, which came into force on 20th December 1945. Section 4 of this Act provided that the Closer Settlement Board (a body constituted, but not then incorporated, under the *Closer Settlement Act* 1929) should, subject to any direction given by the Minister, have power to do and should do all such acts and things as might be required or necessary for carrying out and giving effect to the agreement on the part of the State.

The agreement, of course, was purely a matter between the Commonwealth and the State. On the one hand, it conferred no rights upon anybody. On the other hand, it did not limit in any way the constitutional powers of the State. In order, however, to understand what followed, it is necessary to refer briefly to certain of its terms.

By cl. 2 the agreement defined "eligible person" as meaning "a discharged member of the Forces who complied with certain specified conditions". It defined "holding" as meaning "the land allotted to a settler under the scheme". It defined "settler" as meaning "a person who has been allotted a holding under the scheme". By cl. 5 the Commonwealth was to provide the capital moneys necessary for the carrying out of the scheme. For the purposes of the scheme it was necessary that valuations of holdings should be made, and cl. 6 (6) provided that the valuations should be made by officers appointed by the Commonwealth and the State in consultation. By cl. 6 (7) it was provided that in making the valuations the officers should "have regard to the need for the proceeds of the holding (based on conservative estimates over a long-term period of prices and yields for products) being sufficient to provide a reasonable living for the settler after meeting such financial commitments as would be incurred by a settler possessing no capital." Clause 16 provided that holdings were to be allotted by the State on perpetual leasehold tenure, and that the general terms and conditions of the lease were to be approved by the Commonwealth.

The plaintiff was an eligible person within the meaning of the agreement, and on 14th January 1946 he signed a form of application to the Closer Settlement Board for assistance under the scheme. On 8th February 1946 he was informed by the Board that he had been classified as "suitable 'A' for land settlement". The land on which he desired to be settled was in a large estate known as the Lawrenny Estate near Hamilton in Southern Tasmania.

In July 1947 certain correspondence took place on which the plaintiff has relied as establishing a contract, though he finds the actual terms of his alleged contract in certain later documents.

On 7th July 1947 the board wrote to the plaintiff a letter inquiring whether, in the event of his being selected for allotment to a holding on the Lawrenny Estate, he was prepared to accept employment on farm work there. On 10th July 1947 the plaintiff replied saying that he was willing to accept employment at Lawrenny as from a date not later than 15th August 1947, provided he was granted an allotment of leasehold in that area. On 25th July 1947 the board wrote informing the plaintiff that he had been selected for employment on the Lawrenny Estate. The latter added :— " I also wish to advise that you will definitely be allotted a leasehold ". A good deal of correspondence followed over a considerable period. Throughout this correspondence language is used which shows clearly that the plaintiff was regarded as having been " allotted " a " holding ", which consisted of lot 22 in the Lawrenny Estate.

It is now necessary to refer to the two documents on which the plaintiff relies as containing the terms of the contract which he alleges. The first is a circular dated 22nd December 1948. This circular, after mentioning that many of the conditions of settlement have so far been left " rather vague ", says : " Negotiations have now been completed, and a definite policy can be stated on the general terms on which you will occupy your leasehold." Referring to structural improvements which had been, or were to be, erected on the land by the board, it said : " The price to be charged for these structural improvements will be the estimated cost as at the 1st July 1946 . . . For all these improvements the figure to be adopted will be the lowest estimated cost as at 1st July 1946." The second document is another circular from the board which was sent out on 14th April 1949. This circular purports to be " issued in an endeavour to clarify and explain certain phases of the Land Settlement Scheme which have given rise to doubts in the minds of intending settlers and others." A number of provisions contained in the agreement between the Commonwealth and the State of Tasmania are set out. With regard to " tenure and rent " there is a passage which should, we think, be set out in full. " The tenure which the settler is required to accept on going into effective occupation of his farm is that of perpetual leasehold or, as may be better expressed—a grant of land to the tenant, his heirs and assigns for ever, subject to the payment of a rental on the land. This type of tenure is common in some of the mainland States of Australia,

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although it is new as far as Tasmania is concerned. At the time the settler goes into occupation of his holding there is an obligation on the Commonwealth and State Government to make a valuation of the actual holding, and in making this valuation the officers concerned are required to take into account the same factors as have been outlined above in the trial budget which was constructed originally for the purpose of determining farm size. Naturally, in making the valuation the officers valuing will construct an actual budget including probable returns from the stock carried, at average prices based on long term prognostications, while the operating costs will be estimated on a liberal scale similar to those existing at the time the valuation is made. In this connection it is also necessary for the valuers to take into account isolation or proximity to existing markets, the stage of development of the farm and such other similar factors as are applicable to the particular farm being valued. Having constructed this final budget, the surplus remaining, as indicated above, is the basis on which rent is determined and is actually the maximum amount which may be charged. However, if the costs incurred in acquiring, subdividing and developing the land are less than the capitalised value of the surplus at two and one half per cent, then the rent is reduced to the cost basis rather than the valuation basis." There is also another reference to structural improvements. It is explained that the settler is required to repay the cost of these over a period of thirty years, and that they are to be charged not on the basis of actual cost but on what they would have cost if they had been constructed in 1946.

It should be mentioned at this stage that the complaint of the plaintiff is, in substance, that there was at a later date a departure, on the part of the board or the Crown, from the terms announced in the above-mentioned circulars, and in particular that there has not been a strict adherence to those terms in relation to the valuation of the holding and the ascertainment of the rent.

By December 1948 the board had erected a house on lot 22 and in that month the plaintiff and his wife moved in to live, and they have lived there ever since. On 28th February 1949 the plaintiff took possession of certain sheep and cattle which he had received from the board, and from that time onwards he has run stock and carried on farm operations on lot 22, and has received the proceeds of the wool and other produce grown on that block. He effected a number of improvements to the land and to the house. Among other things he erected certain fencing and put in a water supply. In the words of the Chief Justice, " no one questioned that the situation was otherwise than as set out in the circulars above

referred to, and that in due course the land would be assessed in the manner described and a lease issued."

The year 1949 ended without any valuation of the holdings on the Lawrenny Estate having been made, and without any rent having been fixed. On 21st December 1949 the decision of this Court in *P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (1) was given, in which it was held by a majority that Act No. 52 of 1945 of the Commonwealth, so far as it authorised the execution on behalf of the Commonwealth of the war service land settlement agreement with the State of New South Wales was invalid, with the consequence that New South Wales legislation, which had been passed to implement that agreement, was inoperative and without effect. The decision was based on the view that cl. 11 of the agreement, which provided for the acquisition of land by the State at prices ruling in February 1942, did not provide " just terms " within the meaning of s. 51 (xxxi.) of the Constitution. The decision seems to have occasioned some doubt in the minds of the board and the Government in Tasmania as to the validity or effectiveness of the Tasmanian Act of 1945, which authorised the execution on behalf of Tasmania of the corresponding agreement between the Commonwealth and Tasmania. It is difficult to see why any such doubt should have been felt, because, as has been pointed out, the offending provision in the agreement with New South Wales does not occur in the agreement with Tasmania. There were, however, other reasons why it should be thought necessary to enact new legislation defining the position of settlers under the war service land settlement scheme. In the first place, the agreement provided that holdings should be allotted by the State on " perpetual leasehold tenure ", and that the general terms of the lease should be approved by the Commonwealth. " Perpetual leasehold ", as the board had pointed out in one of its circulars, is a form of tenure of Crown land which is known in some of the mainland States, where its nature and incidents are defined by statute, but it is unknown to the law of Tasmania. There were other matters which obviously needed definition. It had not been possible to obtain agreement with the Commonwealth on valuations, and it would appear that quite early in 1950 new legislation was contemplated. Its introduction, however, was delayed, and no intimation was given to settlers generally or to the plaintiff that the Government intended to introduce a bill in Parliament.

On 29th November 1950 the board forwarded to the plaintiff for his signature a document described as a licence. It was accompanied

(1) (1949) 80 C.L.R. 382.

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by a letter, which commenced: "To enable you to commence farming under the normal conditions of settlement as provided between the State and the Commonwealth, it is proposed to offer you a short term licence for a period of twelve months from 1st December 1950." This period was to be recognised as the "assistance period" (provided for in cl. 13 of the agreement with the Commonwealth), and during that period no rent or interest or repayment of advances was to be required. It was said to be anticipated that the valuation of the holding would be completed by the end of the period, when the settler would be offered a permanent lease in which the rent and the value of structural improvements effected by the board would be stated. The letter said:—"The board reserves all rights to fix a rental as determined after the valuation has been completed."

The licence, which is dated 15th December 1950, was executed by the plaintiff and by the Commissioner of Crown Lands, the Minister of Agriculture and the board. It recites that the land, being lot 22 on the Lawrenny Estate, was allotted to the plaintiff on 1st December 1950, but that the terms and conditions on which the same should be held by him have not yet been determined. It grants to the plaintiff a licence under s. 101 of the *Crown Lands Act* 1935 to take possession of the land for pastoral and agricultural purposes for twelve months from 1st December 1950. It contains a number of covenants, and cl. 3 is in the following terms: "The licensee hereby agrees with the Minister and the board that the date hereinbefore mentioned as the date of allotment" (*scil.* 1st December 1950) "shall be the commencing date of any lease or grant of the said land which may hereafter be granted or made to the licensee pursuant to any Statute of Parliament passed in that behalf, and that the rental payable under such lease shall be not less than the sum of £170 in respect of the land and £60 in respect of improvements thereon."

Although it may not have been realised by the settlers who executed it, it is obvious that this licence was designed to lead up to a final definition of rights, and that in some respects it represented a "new start". For one thing, although the board had purported long since to have allotted holdings, it is provided that the date of allotment is to be treated as being 1st December 1950. Again, it is recited that the terms and conditions of allotment have not yet been determined, and the board reserves its "right" to "fix a rental as determined". Apart from any other consideration, it could not be easy for a settler, who accepted and signed the licence, to maintain that he had, and continued to have, any pre-existing legal rights.

On 21st December 1950 the *War Service Land Settlement Act* 1950 (Tas.) came into force. It repealed the Act of 1945. It provided that the board, heretofore an unincorporated body, should be a body corporate. Section 9 vested in the board a number of areas of what had been Crown land, including the Lawrenny Estate, and provided that the board should hold those lands "in fee for the purposes of the Act". Section 14 provided :—"(1) As holdings become available for occupation by tenants the board shall offer each one to some eligible person considered by the board to be suitable for settlement immediately. (2) In each such offer the board shall specify—(*a*) the holding ; (*b*) the rent ; (*c*) the amount a tenant will have to pay under s. 26 ; (*d*) the special conditions, if any, the board intends to impose ; (*e*) whether or not the board reserves the right to obtain an increase of rent under s. 19, and, if so, the improvements for which the increase will be payable ; (*f*) the capital cost to the board of the holding at the time of allotment, excluding the amount payable for improvements under s. 26 ; and (*g*) the time for which the offer is open." Section 15 provided :—"(1) Upon acceptance of such an offer the board shall, by notice under its common seal, allot the holding to the acceptor, and shall specify in the notice the holding allotted, the rent, and any special conditions imposed, and state whether or not the board reserves the right to obtain an increase of rent in accordance with the provisions of s. 19, as the acceptor has accepted them. (2) Upon such allotment the acceptor may enter as tenant at will upon the terms and conditions to be included in the grant of the holding under s.17, and shall be left in quiet possession so long as he observes those terms and conditions." Section 16 provided :—"(1) Where an eligible person considered by the board to be suitable for settlement immediately has entered upon a holding in pursuance or purported pursuance of a temporary licence under s. 101 of the *Crown Lands Act* 1935, he shall be deemed to have been offered and to have accepted the holding in accordance with s. 14, and shall be entitled to a notice of allotment under s. 15 accordingly. (2) Where at the time when any such person so entered, the board had not specified to him all the matters mentioned in pars. (*b*), (*c*), (*d*), (*e*) and (*f*) of sub-s. (2) of s. 14, it may, not later than one month before the expiry of his temporary licence, make him a supplementary offer in respect of the matters not specified, and if he does not within one month after the supplementary offer is made give possession of the holding to the board, he shall be deemed to have accepted the offer constituted by the terms on which he entered and the supplementary offer and be entitled to a notice of allotment under s. 15 accordingly."

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Section 17 provided that, as soon as practicable after allotment under s. 15, the board should grant the holding to the tenant his heirs and assigns for ever to hold of the board for ever at the rent specified in the notice of allotment and on the conditions set out in ss. 22 and 23. (An amending Act of 1952 provides for the issue to the grantee of a certificate of title expressed to give him an estate in " fee farm ".) Section 18 provided :—" The rent to be specified in the board's offer under s. 14 shall be such that allowing for all payments to be made by the tenant under this Act and in the normal course of working the holding he will be assured of a reasonable standard of living even though he begins with no capital." Sections 37 and 38 provide for the acquisition by a settler, after a certain time and on certain conditions, of an " absolute freehold " in his holding.

In April 1952 the board held a meeting at which it had before it a refusal by the Commonwealth to accept the " budgetary " method of valuation which had been adopted, and which had probably proved unsatisfactory and indeed more or less impracticable. The meeting was informed that Cabinet had approved a new method of valuation, and it was decided to adopt a valuation which had been made on this basis of the Lawrenny Estate. The new method of fixing rents adopted in relation to Lawrenny is thus explained by the learned Chief Justice. It was, says his Honour, " to ascertain the total cost to the board of acquisition, which included certain interest and cost of development, embracing draining, cultivation, fencing, water supply, buildings, a certain cost of rabbit control, costs of survey, cost of supervision and some other costs, to distribute it according to estimated productivity at full development, and to take two and one-half per cent of these distributed amounts as the rental of the holdings. Since the settlers were required to purchase structural improvements and were enabled to purchase them at 1946 sale value, the amount payable by them for structural improvements was not included for the purpose of arriving at total cost. But the difference between the amounts payable by the settlers and the amount actually expended by the board on structural improvements was so included. As one witness put it, the excess of the actual cost over the 1946 value of structures, instead of being written off as promised, was being written into the ground, and the settlers obliged to pay two and one-half per cent on it in perpetuity. An estimate was made of the cost of such further structural improvements as were considered necessary to bring the holding to full development. If the settler effected these at his own expense, his rent remained unaltered, but if he required

the board to effect them or to advance the money for them, the rent would increase by two and one-half per cent upon the amount so expended or advanced."

On 22nd June 1952 the board forwarded to the plaintiff, with a covering letter, what it described as an " offer to you in regard to the tenancy of lot 22 in the subdivision of the Lawrenny estate." The " offer " was to be taken as having been made on 1st December 1950. It is unnecessary to set out this " offer ", but two things are to be noted with respect to it. Firstly, it purports to be an " offer " under s. 14 of the Act of 1950, and not a " supplementary offer " under s. 16. Secondly, it specifies the matters required to be specified by pars. (*a*) to (*e*) inclusive and (*g*) of s. 14 (2). As to par. (*f*), however, it says :—" The board is not in a position to determine the capital cost of the holding, which will be provided at a further date." The time for which the offer was open was stated to be twenty-one days from its date. The offer has not been expressly either accepted or refused by the plaintiff.

The learned Chief Justice based his decision against the plaintiff on the ground that the purpose and effect of the Act of 1950 was to institute a new and exhaustive set of provisions dealing with war service land settlement and covering the whole field of that subject. To use his Honour's phrase, it was to " wipe the slate clean ", so that from its commencement the rights and obligations of all concerned should depend upon the provisions contained in it and depend upon nothing else. Where the board was given a discretion, as in " specifying " the matters mentioned in s. 14 (2), the discretion was to be subject to no limitation or condition except such as were to be found expressed in the Act, as, for example in ss. 18, 20 and 26 (2).

The view expressed by his Honour is, in our opinion, clearly correct. It is supported by a number of considerations. It is clear from Pt. V of the Act, which is headed " Validation of Transactions ", that one of the reasons which led to the passing of the Act was a grave doubt as to the validity of the Act of 1945 and of what has been done under it. That doubt may, as has been pointed out, have been groundless, but as to its existence there can be no question, and it could not be set at rest except by an exhaustive enactment which covered the whole ground. Moreover, in other respects the whole position had become confused and unsatisfactory. The Act creates serious difficulties of its own, but it cannot be doubted (to use his Honour's language again) that its object was to infuse some order and certainty into a confused and doubtful situation. With this end in view, and in anticipation of the passing of the Act,

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the " temporary licences " were issued, which had the effect of crystallising the position of " settlers " pending the enactment of the new " code ". The fact that the intention of the Government to bring new legislation before Parliament was not disclosed to the settlers may be matter for adverse comment, but it is irrelevant to any question of the effect of the Act. Apart from these extrinsic considerations, the whole framework and content of the Act support the view taken by his Honour. The Act of 1945 is repealed. The board is, for the first time, incorporated. The Crown lands formerly held for purposes of war service settlement are vested in it in fee simple. It is to hold those lands " for the purposes of this Act "—not for the purposes of the repealed Act or of any agreement with the Commonwealth. Again, the very general words with which s. 14 begins—" As holdings become available for occupation by tenants " —strongly suggest that the whole situation is being dealt with anew. It was never, of course, intended to disappoint or defeat the general expectations of settlers to whom holdings had in fact been allotted, but the words show, and the whole tenor of s. 14 shows, that a new charter of rights is coming into existence.

It was argued by counsel for the appellant that his Honour's view of the effect of the Act of 1950 did not dispose of the case. The appellant, he said, had pre-existing contractual rights, and it was not inconsistent with the Act that those rights should continue. The board under s. 14 could determine, and was bound to determine, the rent in accordance with the alleged contract. We are disposed to think that his Honour's view of the general effect of the Act was rightly regarded by him as fatal to the appellant, even if he had any pre-existing contractual right. But, whether this be so or not, it seems clear to us that there never was any relevant contract. We can see no real foundation for any argument that any relevant contract was ever made.

The fundamental reason why the plaintiff fails to establish a contract is that the documents on which he relies, and in particular the two circulars of 22nd December 1948 and 14th April 1949, cannot be construed as contractual documents. On their face, they are not offers capable, if accepted, of giving rise to a contract. They are not put forward as offers at all, and they do not invite acceptance or rejection. They are no more, and purport to be no more, than statements of present Government intention and present Government policy. The earlier circular says that " a definite policy can now be stated on the general terms on which you will occupy your leasehold". It is intended " to keep you acquainted with developments in the sphere of war service land settlement "—" to deal

with a few major points in detail." The later circular is "an endeavour to clarify and explain certain phases of the land settlement scheme "—" to explain the nature of settlers' financial obligations."

Furthermore, apart from the fact that the general purport of the communications in question evinces anything but an intention to affect legal relations, those documents deal with some only of the terms which must of necessity be settled before a binding contract can exist. This is not really a case at all where parties are negotiating with a view to contract, but, even if it be treated as such a case, no contract is concluded until the parties negotiating are agreed upon *all* the terms of their bargain—unless indeed the terms left outstanding are "such as the law will supply": cf. *Stimson* v. *Gray* (1) (per *Maugham* J.). Here the transaction ultimately contemplated was of a very complex character, and it is clear that the law cannot supply its terms. The conditions on which the settler originally entered were never precisely defined, and it is obvious that much was necessarily left, and understood as being left, to the discretion of the board and of the Crown. The very fact that what is ultimately contemplated is a "perpetual lease" seems to us to be enough to dispose of the argument that a contract came into being. That term has in some of the States a statutory meaning, but it has no meaning at common law, and it does not describe a form of tenure provided for by the statute law of Tasmania.

There are still other difficulties in the appellant's way. With whom is his alleged contract made? His statement of claim says that it was made with "the Board and/or the Minister". The board at that stage was unincorporated, and the land in question was Crown land. In the end some form of grant from the Crown would be necessary, and presumably it is intended to allege a contract with the Crown. But the minister would have no power to bind the Crown to make any grant of land, and it does not appear to us that either s. 4 of the *Commonwealth and State War Service Land Settlement Agreement Act* 1945 or s. 50A of the *Closer Settlement Act*, which was introduced into that Act by an amending Act of 1945, empowers the board to bind the Crown to make a grant of land on any terms. Again, even if some sort of contractual obligation were found to exist, it would be necessary to consider the effect of the acceptance by the appellant of the temporary licence in December 1949. But it is unnecessary to pursue the matter further. It seems plainly impossible to maintain that any contractual obligation was in existence at the date when the Act of 1950 was passed.

(1) (1929) 1 Ch. 629, at p. 644.

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It follows from what has been said that the plaintiff's claim in the action was rightly dismissed. It remains, however, to consider that part of the judgment under appeal which deals with the defendant's counterclaim.

The object of the counterclaim was to obtain a pronouncement as to the position subsisting as between the board and the settlers under an Act which presents difficulties of construction in several respects. His Honour made seven declarations or orders. As to six of these, we did not understand them to be challenged by counsel for the appellant. Assuming his main argument to have failed, they are not unfavourable to the appellant, and it is to his advantage, as well as to the advantage of the board, that the position should be cleared up as far as possible. There remains, however, the declaration contained in par. (*d*) of the judgment of the court. This was strongly challenged.

By par. (*d*) it is declared :—" that in specifying the capital cost to the defendant board of each holding for the purposes of s. 37 of the said Act the defendant board upon the true construction of s. 37 is entitled to include therein the cost to the defendant board of all improvements to the said holding (including structural improvements) subject to a deduction from the total capital cost so calculated of the amount payable by the tenant for structural improvements pursuant to s. 26 of the *War Service Land Settlement Act* 1950."

This declaration expresses the view of the learned Chief Justice as to the effect of s. 37 of the Act of 1950, which provides for the price at which the settler may acquire an " absolute freehold " in his holding under s. 38. Section 37 provides : " The purchase price of a holding for the purpose of this division shall be a sum determined by the board with consent but not more than the capital cost to the board of the holding at the time of allotment, excluding the amount payable for improvements under s. 26 and including any amount fixed under s. 19 in respect of the holding, or the unimproved value of the holding obtained for the purpose under s. 41 of the *Land Valuation Act* 1950 whichever is the greater, together with the amount (if any) remaining unpaid under s. 26 ". The question of its construction might be thought not to arise at present, because the plaintiff cannot in any case acquire the " absolute freehold " until six years have elapsed after the grant of his holding to him under s. 17. He may indeed never desire to acquire an absolute freehold. It would seem, however, that the question ought to be answered now, because one of the matters which the board is required to " specify " to the settler either under s. 14 or under s. 16 is the " capital cost to the board of the

holding at the time of allotment ". It seems clear that the capital cost referred to in these sections is the capital cost which is referred to in s. 37.

The question turns on the meaning to be assigned to the words " capital cost to the board of the holding at the time of allotment ". The view put for the defendants, and accepted by his Honour, is that the words refer to the total cost of the holding including all improvements effected by the board. The section then, according to this view, goes on to provide that the cost is not to include the amount payable by the settler for structural improvements under s. 26, but is to include amounts expended by the board and payable by the settler for non-structural improvements under s. 19. There is then to be added any amount payable under s. 26 but not yet paid. The total amount payable by the settler in respect of structural improvements under s. 26 is limited to their " capital value determined as on 1st July 1946 ", a value which would be considerably lower than the value as at the date of allotment (1st December 1950). If the view put for the defendants is correct, it is seen that the settler who wishes to acquire an " absolute freehold " will have to pay the difference between the actual cost to the board of structural improvements on his holding and the amount which he has to pay under s. 26. That actual cost is first added in to the total " capital cost ", and the amount payable under s. 26 is then deducted. The difference is the difference between actual cost of structural improvements and their value as at 1st July 1946.

We are of opinion that the learned Chief Justice's construction of s. 37 is the correct construction. We do not think that any other construction is really possible. The argument for the appellant was that " capital cost to the board of the holding " meant a capital cost of the land alone, and reference was made to s. 3 of the Act, which defines the word ' holding ' as meaning the land allotted to an eligible person for the purposes of the Act." But the word " land " is in its turn defined by s. 46 of the *Acts Interpretation Act* 1931 as including messuages, tenements and hereditaments, houses and buildings of any tenure. In any case, if " capital cost " meant only the cost of the land, there would be no sense in expressly excluding the amount payable for improvements under s. 26. Counsel for the appellant sought support for his argument in the alternative method of arriving at purchase price, which is provided for by s. 37. This alternative method is by reference to the unimproved value of the holding obtained from the Chief Valuer under s. 41 of the *Land Valuation Act* 1950. But no support for the argument can be found here. Indeed, when we find that the purchase price is

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to be " capital cost or unimproved value, whichever is the greater " the natural meaning of " capital cost " seems to be rather emphasised than modified.

There was some discussion during the argument of the Solicitor-General with regard to par. (*c*) of the judgment of the Supreme Court, which orders the board " forthwith to make a supplementary offer to each of the plaintiffs specifying the matters mentioned in pars. (*b*), (*c*), (*d*), (*e*) and (*f*) of s. 14 (2) of the *War Service Land Settlement Act* 1950." The document of 2nd June 1952 purports to be an " offer " under s. 14 and not a " supplementary offer " under s. 16 (2), and it is incomplete, because it does not specify the matter mentioned in par. (*f*) of s. 14 (2). The difficulty about making a " supplementary offer " arises from the language of s. 16 (2). What it says is that the board " may, not later than one month before the expiry of his " (i.e. the settler's) " temporary licence make him a supplementary offer." Milne's temporary licence expired on 30th November 1950. The order made by his Honour must have been based on the view that, although the language of s. 16 (2) is in terms merely enabling, it should be construed as imposing a duty on the Board. It is inaccurate to speak of such a construction as reading the word " may " as " shall ". It is more correct to say that a power is given, and from the context a duty to exercise the power is implied. If a duty is imposed on the board by s. 16 (2), the difficulty arising from the existence of a time limit disappears. For, while a power may be lost through failure to exercise it within a prescribed time, a duty does not necessarily cease to exist on the expiration of a time prescribed for its performance. There are difficulties in the way of his Honour's view, because of the negative form of expression used—" not later than one month before ". The order made by par. (*c*), however, was not specifically challenged by the appellant, and it is indeed favourable to him. There is, therefore, we think, no reason why this Court should interfere with it.

There is still one matter remaining for consideration. Although the respondents were completely successful in the action, *Morris* C.J. (apart from two matters of small importance) refused to make an order in their favour for costs. There was no cross-appeal as to this refusal, but, on the hearing of the appeal, the Solicitor-General applied for an order extending the time for appealing. The appellant's notice of appeal was given early in December 1954. It would appear that for a very considerable time reasonable doubts were entertained as to whether it was intended to proceed with the appeal, and it was in these circumstances that the necessity of giving a notice under O. 70, r. 13, was overlooked. It is impossible,

in our opinion, to justify the refusal of costs to the successful defendants. The defendants were not merely entitled, but bound, to rely on the statute of 1950, and the fact that they raised by their defence the *Statute of Frauds* and another "technical" defence, on which they did not rely, or need to rely, is quite insufficient to disentitle them to costs. It was not established that the class to which the plaintiff belonged were very substantially worse off under the Act of 1950 than they would have been if their contentions had succeeded. In some respects they were better off. We should have thought that, if there ever was a case in which plaintiffs should be held to litigate at their own risk as to costs, this is that case. And, in all the circumstances, we do not think that the respondents should be precluded from challenging the order made as to costs. The ground of attack is not merely that a discretion has been wrongly exercised. It is a general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary, and no reason to the contrary was shown in this case. The failure to give notice under O. 70, r. 13, is not wholly unexplained. Again, the case is not like *Jenkins* v. *Lanfranchi* (1), where an application for special leave to appeal as to costs was refused. Here the plaintiff has himself brought the whole case before this Court, and it has not been suggested that he has been in any way prejudiced by the failure to give a notice under O. 70, r. 13. We think that a proper course, and the simplest course, is to make an order under O. 64, r. 2, and then to vary the judgment of the Supreme Court by ordering that the plaintiffs pay the defendants' costs of the action. Whether any attempt should be made to enforce the order is a matter which does not concern us. Subject to that variation the appeal should be dismissed with costs.

Order that respondents be relieved from the requirement of filing and serving a notice of cross-appeal under O. 70, r. 13, of the Rules of this Court. Vary Order of Supreme Court of Tasmania by adding thereto an order that the plaintiffs pay the defendants' taxed costs of the action. Subject to such variation, appeal dismissed with costs.

Solicitors for the appellants, *Simmons, Wolfhagen, Simmons & Walch*, Hobart.

Solicitor for the respondents, *D. M. Chambers*, Crown Solicitor for the State of Tasmania.

R. D. B.

(1) (1910) 10 C.L.R. 595.