[HIGH COURT OF AUSTRALIA.]

PATTI AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

BELFIORE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1958.

SYDNEY, *Apr.* 18, 21, 22; *June* 26.

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

Vendor and purchaser—Sale of land subject to consent of statutory board—Board not to refuse consent unless satisfied price "unfair and unreasonable"—Contractual term providing for events of board refusing approval, withholding approval beyond three months of date of application and refusing consent on grounds that price high or appears to be high—Transaction "not approved price appears high"—Renewal of application for consent—Approval subsequently given—Claim by vendor that contract no longer binding—Meaning of "refuse" as used in contract—Final and definite refusal contemplated—Prior intimation of board's attitude not such a refusal—Specific performance at suit of purchasers.

On 22nd December 1955 P. entered into a contract for the purchase from B. of the latter's sugar cane farming property at Home Hill, Queensland, for the sum of £12,500. Clause 3 of the contract of sale provided: "The transaction hereby evidenced is subject to the consent of the Central Sugar Cane Prices Board and in the event of such approval being refused or if the same shall be withheld for a period exceeding three months from the date on which application shall have been made therefor then and in any such case the transaction hereby evidenced shall be abandoned and the said deposit refunded to the purchasers." Clause 9 provided: "Notwithstanding anything herein contained if the Central Board shall refuse its consent as aforesaid on the ground that the purchase price is high or appears to be high then and in any such case the vendor shall offer to sell the property hereby agreed to be sold to the purchasers at such price as the Central Board will approve and if the purchasers shall accept such offer then the vendors shall execute all such further documents as shall be necessary to fully effectuate the sale consequent upon such acceptance provided always that the vendor will not under any circumstances sell the said property to any other person or persons within a period of one year from the date hereof unless he shall have first offered the same to the purchasers at the same price and on the same conditions as he would sell to such other person or persons and the purchasers shall have

refused such offer but in the event of the purchasers accepting such offer the vendor shall sell to them accordingly." Application having been made for consent the board on 27th January 1956 informed the parties by telegram that the agreement was " not approved price appears high ". The board's minute in relation to the matter was in like terms. At the time of considering the matter the board had before it a letter written by B. expressing the hope that as the price payable to him under the contract was exceptionally high the board might regard it as too high to approve of the sale. P., on receipt of the board's communication, took the view that cl. 9 of the contract had become operative and that B. was obliged to sell the property for £10,000, this being the figure at which it was supposed that the board would consent to the sale. B. declined to sell at any figure less than the contract price. After some discussion a further application for consent to the original contract was made by P. to the board on 21st February 1956 and on 24th February 1956 the board gave its approval to the agreement in its original form. Upon being informed that the board had consented, B. immediately adopted the attitude that the agreement was no longer in existence. P. then sought specific performance of the original agreement or alternatively of an oral agreement on substantially the same terms alleged to have been made after the receipt of the board's telegram on 27th January 1956.

Held, (1) that in both cll. 3 and 9 the word " refuse " means a final and definite refusal to approve of the agreement at all and the board's telegram dated 27th January 1956 was not to be construed as expressing such a refusal; (2) that the original agreement accordingly remained on foot and it was competent for P. to make the further representations in February to secure approval for the transaction; (3) that P. was entitled to the relief sought.

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

APPEAL from the Supreme Court of Queensland.

On 4th April 1956 Guiseppe Patti, Alfio Bonanno, Guiseppe Bonnano and Sebastiano Bonanno commenced proceedings in the Supreme Court of Queensland against one Carmelo Belfiore seeking specific performance of an agreement in writing dated 22nd December 1955 made between the plaintiffs as purchasers and the defendant as vendor of the defendant's sugar cane farming property near Home Hill, Queensland, which the defendant had declined to complete.

The action came on for hearing before *Jeffriess* J. at Townsville, Queensland, and on 8th June 1957 his Honour granted the relief sought.

From this decision the defendant appealed to the Full Court of the Supreme Court of Queensland (*Stanley*, *Mack* and *Hanger* JJ.) which by a majority (*Mack* J. dissenting) allowed the appeal, set aside the judgment appealed from and in lieu thereof entered judgment for the defendant with costs.

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From this decision the plaintiffs appealed to the High Court. Further relevant facts appear in the judgments hereunder.

A. L. Bennett Q.C. and *G. A. G. Lucas*, for the appellants.

T. J. Lehane and *L. L. Byth*, for the respondent.

Cur. adv. vult.

June 26.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN AND TAYLOR JJ. This is an appeal from an order of the Full Court of the Supreme Court of Queensland which set aside a decree for specific performance of an agreement for the sale by the respondent to the appellants of the former's sugar cane farming property near Home Hill in Queensland. The circumstances of the case are unusual and in their statement of claim the agreement between the parties was alleged in different and alternative forms. The reason for this will become apparent as the facts of the case are appreciated.

The first dealing between the parties was embodied in a written agreement dated 22nd December 1955. By this agreement the respondent agreed to sell his property for the sum of £12,500 of which sum a deposit of £1,000 had already been paid. By cl. 3 the sale was expressed to be subject to the consent of the Central Sugar Cane Prices Board, a body constituted under *The Regulation of Sugar Cane Prices Act* 1915 *to* 1954, and the balance of the purchase money was expressed to be payable " immediately after receipt of the consent of the Central Sugar Cane Prices Board as hereinafter provided or so soon thereafter as is practicable ". A sale of the land without the consent of the board would have resulted, as explained in *Goodwin* v. *Temple* (1), in a forfeiture of the " mill assignment " of the land but it is necessary for the purposes of this case to recapitulate the relevant statutory provision. It is contained in s. 5 (2A) of the Act referred to and, so far as is material, it is in the following terms :—" . . . in all cases where the owner of the assigned land is also the cane grower the assignment in question shall remain until such time as the owner sells or leases his assigned land, whereupon such assignment shall lapse or be rescinded unless the Central Board has approved in writing of the terms of such sale or lease, as the case may be. Any such approval of the Central Board shall not be refused by it unless the Central Board is satisfied that the price and/or terms and/or conditions of sale or lease are unfair and

(1) (1957) Q.S.R. 376.

unreasonable, and/or that the person to whom the sale or lease is desired is not a fit and proper person to hold an assignment."

Shortly after its execution the agreement was submitted to the board for its approval. But, on or about the 27th January 1956, the solicitor acting for all parties in the transaction received from the board a telegram which read as follows :

" Beames
Solicitor
Home Hill
Belfiore to Patti and Bonanno not approved price appears high.

Caneprices "

This was followed by a letter dated 31st January 1956 from the secretary of the board in the following terms :

" Dear Sir,

Re : *C. Belfiore to G. Patti,*
& A. G. & S. Bonanno.

In confirmation of my wire of the 27th instant I have to advise that my Board has refused approval of the above sale, being of the opinion that the price appears high.

Yours faithfully,

I. Ferguson,
Secretary, per A."

It will be seen that the letter, in terms, goes somewhat further than the telegram ; the former intimated that the board had not approved and may have been thought to indicate that the matter was still open whilst the letter intimated that, in the exercise of its functions under the Act, the board had decided that it should refuse its approval. The minute of the board's formal decision upon the matter is, however, in evidence and it states, in bare terms, " Not approved—Price appears high ".

The true significance of the board's action is of some importance in view of cll. 3 and 9 of the agreement. Each of those clauses contemplated the possibility that the board might refuse its consent and purported to make some provision for that contingency. Needless to say, the somewhat curious provisions of these clauses have provoked considerable discussion during the litigation and it is as well to set them out in full. " 3. The transaction hereby evidenced is subject to the consent of the Central Sugar Cane Prices Board and in the event of such approval being refused or if the same shall be withheld for a period exceeding three months from the date

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on which application shall have been made therefor THEN AND IN ANY SUCH CASE the transaction hereby evidenced shall be abandoned and the said deposit refunded to the Purchasers. 9. Notwithstanding anything herein contained if the Central Board shall refuse its consent as aforesaid on the ground that the Purchase Price is high or appears to be high THEN AND IN ANY SUCH CASE the Vendor shall offer to sell the property hereby agreed to be sold to the Purchasers at such price as the Central Board will approve and if the Purchasers shall accept such offer then the Vendor shall execute all such further documents as shall be necessary to fully effectuate the sale consequent upon such acceptance PROVIDED ALWAYS that the Vendor will not under any circumstances sell the said property to any other person or persons within a period of ONE YEAR from the date hereof unless and until he shall have first offered the same to the Purchasers at the same price and on the same conditions as he would sell to such other person or persons and the Purchasers shall have refused such offer but in the event of the Purchasers accepting such offer the Vendor shall sell to them accordingly."

After the receipt of the above-mentioned telegram and letter from the board there were further discussions between the parties. Some of these took place in the presence of the solicitor for the parties and others took place between the parties themselves. There was considerable dispute concerning what then occurred but one or two, at least, of the material facts appear to be beyond dispute. The first is that the appellants maintained that cl. 9 of the agreement had come into operation and that the respondent had, thereby, become bound to sell the property to them for the sum of £10,000, that being said to be the price at which the board would be prepared to approve of a sale. Indeed, immediately before the discussions commenced the solicitor for the parties had prepared for their signature an agreement which purported to vary the original agreement by the substitution of £10,000 as the agreed price. This further agreement it may be noticed, recited that the board had refused its consent to the original agreement on the ground that the price appeared high and, further, that it had been ascertained that the board was "likely to approve the said transaction at the price of £10,000". The next thing that may be asserted with some confidence is that the respondent would have none of this further agreement. He had, he said, sold the property for £12,500 and he would not take less; unless he received this sum there would be no sale. There seems little doubt that feeling ran high but in the end the application for the board's approval to the original agreement was renewed. The

renewed application was supported by a statement prepared by the parties' solicitor and signed by the appellants and this was forwarded to the board under cover of a letter dated 21st February 1956. Whether the respondent assented to this course may be open to doubt; indeed, it may be thought that the statement, itself, contains some evidence that he did not. Yet the learned trial judge found upon the evidence " that the agreement had been kept alive by all parties after the first notice came from the board and that it was then agreed that the matter be resubmitted ". A majority of the Full Court, however, concluded upon the facts that the respondent did not so agree but upon the view which we take of the case it is unnecessary that this conflict should be resolved. It remains to be said that on 24th February 1956 the renewed application came before the board and it then gave its approval to the agreement in its original form. The respondent was informed of this by the solicitor's letter of 27th February 1956 and his reaction was immediate. He consulted another solicitor and immediately took up the attitude that the agreement was no longer in existence.

There may be much to be said for the view that the respondent repented of his bargain at a very early stage and that when he saw an opportunity to escape he was, thereafter, quite unwilling to, and did not, co-operate with the appellants in any way. At the best, the evidence that further representations were made to the board with his concurrence is somewhat shadowy and appears to be inconsistent not only with certain of the representations made in the statement submitted to the board by the appellants but also with his immediate response after he had been informed of the board's approval. As we have already said, it is not necessary for us to resolve this conflict and we have again referred to it only for the purpose of introducing another document which may be thought to have some relevance not only to this issue but also to another aspect of the case. The document was a letter written by the respondent to the board on 26th December 1955, that is to say, a mere four days after the date of the agreement. It is in the following terms:

" The Secretary,
Central Cane Prices Board,
BRISBANE.

Dear Sir,

Last Wednesday I signed an agreement to sell my sugar cane farm, situated off the Groper Creek Road, Home Hill, to Messrs. Bonanno and Patti for the sum of £12,500.

For some time I have been ill and worried. At my own expense I brought my son from Sicily to Home Hill, thinking that I would

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have the pleasure of his company and the benefit of his help. However, after being here only a short time, he went to Sydney, promising before he did so, that he would return to Home Hill, but he has not done so. I decided that I would sell my farm and go to Sydney to live, but now I realise, perhaps too late, that, having been so long in Home Hill, a small country town, I would never be able to content myself in a large city like Sydney. I know that, as the agreement has been signed I can do nothing to cancel the sale, and this thought has given me considerable worry. However, as the price agreed upon, viz. £12,500, is exceptionally high, I am hopeful that the Central Cane Prices Board may regard it as being too high to approve of the sale.

Trusting that, after consideration of all factors by the Central Cane Prices Board, the price will be considered to be too high for the sale to be approved.

I am,

Yours faithfully,

(Signed) C. BELFIORE"

As appears from the agreement the respondent was bound to use his utmost endeavours to obtain the consent of the board to the agreement and his letter is not without materiality in considering the significance of the board's action when, on the 27th January 1956, it did not approve of the agreement. The minute of the decision of the board—a body consisting of five members and meeting formally—was, it will be remembered, "Not approved—Price appears high".

Upon the facts alleged in the statement of claim the appellants sought, primarily, specific performance of the original agreement. Alternatively, they claimed specific performance of an oral agreement for sale upon the same, or substantially the same terms, made between the parties after the receipt of the board's telegram and letter. A further claim to specific performance of an agreement for the sale of the property for the sum of £10,000 was deleted from the statement of claim by amendment during the course of the hearing though there still remains what is, in effect, a claim for specific performance of an agreement to sell the property "at such price as the Board will approve". It is unnecessary to refer to other subsidiary issues which the pleadings, inartistic as they are in form, may be thought to raise.

The first question for our consideration is whether the board's failure to approve of the agreement on 27th January 1956 constituted a refusal within the meaning of the agreement. This is,

of course, partly a question of law and partly a question of fact and we have used the expression " failure " merely as a neutral term to describe what happened on that day and because it is necessary, first of all, to comprehend what is meant by the expressions " refuse " and " refusal " as used in the agreement. This question must be considered in the light of the fact that the parties had bound themselves to sell and to purchase conditionally upon the consent of the board being given. This was their bargain and all parties were bound to use their utmost endeavours to obtain the board's consent. But the certainty of consent being given could not be assumed so that it was necessary to contemplate the possibility that it would not be forthcoming. For this contingency cl. 3, and in some measure, and " notwithstanding anything " contained in the agreement, cl. 9 made provision. The precise operation of these clauses may be open to argument but whatever difficulties are involved in their construction two things are clear. The first is that cl. 3 makes a clear distinction between a " refusal " and a " withholding of consent " and, the second, that the parties intended that the contracts should be at an end not only if consent should be refused but also if it could not be obtained within three months from the date of application. But the contract was not to be " abandoned " merely if, on some occasion or occasions within that period, the board should withhold its consent. In one sense, however, to withhold consent is to refuse it and the board, by withholding its consent at one formal meeting, might be said to have refused to give its consent at that meeting. Nevertheless, it is clear that the word " refuse " in cl. 9 was not used to cover every possibility of this character; on the contrary, there can be no doubt that it was used to describe a final and definite refusal to consent to the transaction at all. So much is clear not only from the language of the clause but also from the general framework of the agreement in which it is found. It is also in this sense that the word " refusal " is used in cl. 7 and there is no reason for supposing that " refuse " in cl. 9 should receive any different interpretation.

The question then is whether the manner in which the board treated the application for approval at its meeting on 27th January 1956 constituted a refusal of this character. For the respondent it was contended that it did and in this submission he was supported by the reasons of a majority of the Full Court. *Mack* J., who constituted the minority, thought the facts showed that " the board was not making a final decision " and he was of the opinion that this view was supported by consideration of the language of s. 5 (2A), under which the board was bound to approve unless it was satisfied,

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so far as the agreed price was concerned, that it was unfair and unreasonable. *Hanger* J., however, in the course of his leading judgment took the contrary view. He examined the provisions of the agreement at considerable length and, although satisfied that the decision of the board was " clearly not a refusal to approve within the meaning of s. 5 (2A) ", formed the opinion that there had been a refusal to consent within the meaning of both cll. 3 and 9. His view on the latter point depends on the notion that cl. 9 contemplates something more than a refusal upon the appropriate ground specified in s. 5 (2A) and includes a so-called, though unwarranted, refusal on the ground that " the price is high or appears to be high ". The steps involved in his Honour's view appear to be as follow:— (1) Under s. 5 (2A) the board may refuse to approve of an agreement on the score of price only if it is satisfied that the price is unfair and unreasonable ; (2) Nevertheless, with knowledge that the authority of the board was so limited, they introduced into cl. 9, as one of the conditions of its operation, a " refusal " by the board to consent " on the ground that the price is high or appears to be high "; (3) Since the board could not legitimately refuse its approval on such a ground the parties must have been taken, by the use of these words, to have referred to something less than a final and definitive refusal of consent or approval ; and (4) Accordingly, the condition was satisfied by proof that the board had considered the application on 27th January 1956 and had, that day, withheld its consent on this ground.

The weakness in this approach is that it attributes too little force to the word " refuse " and too much prescience to the parties. As already appears that expression, as used in cl. 3, clearly means a definite and final refusal. It does not connote a withholding of consent on some particular occasion although, in one sense, that might be characterised as a refusal ; it connotes a refusal, final and definite, to approve of the agreement at all and, as we have already indicated, the word means precisely the same in its context in cl. 9.

Upon this view of the meaning of cl. 9 the board did not refuse to approve or consent to the agreement. It is true that at its meeting on 27th January 1956 the agreed price " appeared " to it to be high and that it resolved not to approve of the agreement that day. But is it possible to say that the minute " Not approved— Price appears high " means more ? To our minds it is not. The words " price appears to be high " are at the most tentative ; they do not express a concluded opinion that the price is high, or too high or unfair or unreasonable. Indeed, the telegram, which correctly

transcribed the minute of the board's decision may well be understood to have conveyed a distinct intimation that the matter was still open and that the board was prepared to consider any further representations which the parties might care to make. This view is, moreover, fortified by a consideration of the circumstances in which the board was called upon to consider the application. It had before it an application for approval to the agreement between the parties. That was an application which all parties had undertaken to support to their utmost. Yet, behind the back of the appellants the respondent had invited the board to refuse its consent and had asserted that the price was " exceptionally high ". In these circumstances it is not surprising that the board was not prepared to deal finally with the matter that day. No doubt it felt that it should have further information on the matter before finally approving or refusing to approve of the agreement. In this state of affairs it is impossible to treat the decision of the board not to approve of the agreement that day as a final and definitive refusal to approve of the agreement. It may be that the appellants were, for a time, induced by the letter of 31st January 1956 to think otherwise but we are satisfied that what the board did that day amounted to no more than a withholding of its approval. Accordingly, we are of the opinion that the agreement remained on foot and that it was competent for the appellants to make further representations, as they did, for the purpose of obtaining approval.

During argument counsel for the respondent strongly pressed upon us the decisions of this Court in *Walker* v. *Oldham* (1) and *Milburn* v. *Blomley* (2), but the facts of these cases are clearly distinguishable from those of the present case; in each of those cases there was ample room for the view that there had been a final refusal to consent to the contract sought to be enforced.

In the circumstances it becomes unnecessary to consider the other matters which were argued in this appeal and for the reasons given the order of the Full Court should be set aside and the decree of the trial judge restored.

FULLAGAR J. In this case I agree with the joint judgment which I have had the advantage of reading. I wish to add only one or two observations. It is unnecessary to set out again the provisions of s. 5 (2A) of *The Regulation of Sugar Cane Prices Acts* 1915 *to* 1948 (Q.) or the two immediately relevant clauses of the contract of sale.

(1) (1948) 23 A.L.J. 382. (2) (1951) 83 C.L.R. 453.

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If cl. 9 had not been in the contract, I do not think that the case would have presented any real difficulty. Clause 3 no doubt contemplates a communicated approval or refusal of approval, and s. 5 (2A) requires the board's approval to be in writing. The relevant document in relation to what happened on 27th January 1956 is, I think, the secretary's telegram of that date. This accords with the record of the board's proceedings, and the secretary's later letter does not, I think, affect the position. What the board did is expressed in the words: "Not approved—Price appears high." I am unable to regard those words as conveying a "refusal" of "consent" or "approval" within the meaning of cl. 3. In the first place, the board could not lawfully under s. 5 (2A) *refuse* approval on the ground that the price appeared to it to be high: it could only refuse on the score of price if satisfied that the price was "unfair and unreasonable". In the second place, the words themselves are negative and tentative, and I would think it clear that the refusal contemplated by cl. 3 was a positive and definitive refusal. Clause 3 seems to use the words "consent" and "approval" interchangeably, but it distinguishes clearly between a refusal and a mere withholding. As *Mack* J. has said, it really "contemplates three things—approval, refusal of approval, and also an intermediate state—a withholding of approval for a period not exceeding three months." The provision that the transaction shall be "abandoned" can only mean, in my opinion, that the contract shall become void, and it seems extremely unlikely that the parties should have intended that the whole obligation of the contract should be automatically destroyed by any provisional or qualified decision or expression of opinion by the board.

If the above view be correct, no change took place on 27th January 1956 in the legal relations of the parties. The contract was still binding, the whole matter of the board's approval remained open, either party was at liberty to make representations to the board, and it is of no consequence whether Belfiore agreed or did not agree that the matter should be "re-submitted" to the board. Nor is it of any consequence that Mr. Beames took a mistaken view of the situation, and advised his clients accordingly. It is clear that Belfiore refused to enter into any new contract, and the position was simply that he remained bound by the old.

So far, however, I have left out of account cl. 9 of the contract, and it is this ill-conceived clause that has created the whole difficulty of the case. It is open to many comments. For one thing, one would have expected it to give the option to the vendor, and not to the purchasers, who might be expected to be only too glad to buy

at a lower price. But this is by the way. The difficulty arises from the fact that it speaks of a " refusal " of approval by the board " on the ground that the purchase price is high or appears to be high." On the one hand, the board cannot lawfully, under s. 5 (2A) refuse approval on the mere ground that the price " is high " or " appears to be high ". On the other hand, when the board first considers the matter on 27th January 1956, the reason why it is not prepared to approve the sale is expressed almost in the very words of cl. 9— " Price appears high." From these two facts, coupled with the fact that cl. 9 is clearly intended as a qualification of cl. 3, the respondent would deduce that the word " refuse " is not used in cl. 3 in the sense of an unqualified and final refusal to approve, but in a sense which would cover what the board actually said on 27th January 1956.

One may guess, as *Hanger* J. did, that the board was in the habit of expressing the reason for some of its decisions in the words " Price is high " or " Price appears high ". But there is no evidence of this, and evidence to that effect would, in my opinion, be inadmissible. In any case, it would be quite wrong, in my opinion, to interpret the word " refuse " in cl. 3 by means of a dubious deduction based on cl. 9. The reasons for saying that the word " refuse " in cl. 3 refers to a final and unqualified refusal seem to me to be very strong, and the natural and proper course is to interpret the word in cl. 9 by reference to its meaning in cl. 3. This is after all its natural meaning, and cl. 9 is no more likely than cl. 3 to have been intended to make a definite result follow from an indefinite event. Clause 9 does no doubt contemplate that there may be a definitive refusal on the ground that the board is of opinion that the price is too high, but the words " Not approved—Price appears high " do not convey such a definitive refusal.

Even if we were to read cll. 3 and 9 as the respondent would have us read them, it does not appear to me that the respondent would be any better off. On the view which I have expressed neither cl. 3 nor cl. 9 operates to affect the legal relation of the parties. On the view which I have rejected cl. 3 would operate if it were not for cl. 9. But, on that view, the very event for which cl. 9 provides occurred, and the vendor became bound to offer to sell the property to the purchasers at such price as the board would approve. He never in fact made such an offer, but in equity the offer must be treated as having been made. The board ultimately approved, within the three months allowed by cl. 3, of the price of £12,500. And, when the purchasers called on the vendor to convey at this price, they must be taken to have accepted the offer. No new memorandum is required to satisfy the *Statute of Frauds*. The original contract

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provides all that is needed. It is signed by the vendor, it contains all the terms except the price, which is ascertainable and is later ascertained, and the vendor is bound to convey in pursuance of the offer, which he must be treated as having made, and which has been accepted.

This view was put as an alternative argument in the Full Court. *Hanger* J. observed that no authority had been cited to support it. But it merely applies the well-known maxim that equity regards that as done which ought to be done. The famous case of *Walsh* v. *Lonsdale* (1) was no more and no less than an application of that maxim: see *Hanbury* on *Modern Equity*, 6th ed. (1952), p. 71. And what may be regarded as direct authority for the present case is to be found in *Woodroffe* v. *Box* (2). If cl. 9 is assumed to apply, the argument seems to me to be entirely sound, but I think that, on the correct analysis of the case, neither cl. 3 nor cl. 9 ever comes into play.

The appeal should, in my opinion, be allowed and the judgment of *Jeffriess* J. restored.

Appeal allowed. Order of the Full Court set aside and in lieu thereof order of the trial judge restored.

Solicitors for the appellants, *Morris, Fletcher & Cross*, Brisbane, by *Sly & Russell*.

Solicitors for the respondent, *J. W. Biggs & Biggs*, Brisbane, by *J. Stuart Thom & Co.*

R. A. H.

(1) (1882) 21 Ch.D. 9.

(2) (1954) 92 C.L.R. 245, at p. 261.