HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

LINDSAY GORDON PARK & ANOR APPELLANTS

AND

CLIVE ROY BROTHERS RESPONDENT

Park v Brothers [2005] HCA 73
6 December 2005
S226/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales dated 23 July 2004 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

I M Barker QC with D H Murr SC for the appellants (instructed by Holman Webb)

T E F Hughes QC with T D F Hughes for the respondent (instructed by Lumleys Solicitors)

CATCHWORDS

Park v Brothers

Vendor and purchaser – Sale of land – Purchasers entitled to possession prior to completion on conditions including requirement of vendor's approval – Vendor wrongly purported to rescind contract – Vendor denied purchasers access to land – Purchasers sued for damages for breach of access provision – Whether necessary for purchasers to seek vendor's approval notwithstanding purported rescission – Whether vendor's conduct waived condition of approval.

Contract – Construction of contract – Purchasers to have access to land prior to completion to farm in areas approved by vendor – Whether vendor required to act reasonably in granting or withholding approval.

Contract – Construction of contract – Implied duty to co-operate – Limits of operation of implication.

Practice and procedure – Appeal – Whether it is open to an appellate court to allow an appeal on a new ground that was not raised at trial and that, if raised, could have been the subject of evidence.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. On 25 September 2000, the respondent agreed to sell, and the appellants agreed to buy, a rural property of a little less than 25,000 acres, located about 40 km west of Hay. The purchase price was $3,350,000. Although the contract provided for completion on 7 December 2000, disputes and litigation intervened. In the event, completion took place on 24 March 2001. The pre-settlement litigation involved proceedings brought by the appellants in the Equity Division of the Supreme Court of New South Wales, seeking a declaration that a purported rescission of the contract by the respondent was ineffective and, if necessary, an order for specific performance. On 27 February 2001, Young J held in favour of the appellants, but it was unnecessary to make a formal decree for specific performance[1]. Following completion of the contract, the proceedings remained on foot, to enable the appellants to pursue claims for damages.

2 The proceedings next came before Campbell J, who dealt with various claims by the appellants for damages arising out of certain pre-contractual representations said to have been made in contravention of the *Fair Trading Act* 1987 (NSW) ("the Fair Trading Act"), and for damages for breach of contract. On 7 October 2003, Campbell J gave judgment in favour of the appellants, upholding most of their claims, and awarding damages in the total amount of $1,512,052 plus interest[2].

3 The respondent appealed to the New South Wales Court of Appeal (Giles JA, Ipp JA, Wood CJ at CL). The Court of Appeal upheld the appeal on one ground relating to part of the claim for damages for breach of contract, and reduced the amount of the judgment to $464,641 plus interest[3]. The present appeal is concerned only with the issue that gave rise to that reduction in damages. We are not concerned with the damages awarded for breaches of the Fair Trading Act, and we are concerned with part only (albeit the larger part) of the damages originally awarded for breach of contract. In order to explain that issue, it is necessary to say something more about the contract, and the litigious history.

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1 *Park v Brothers* (2001) 10 BPR 18,649.

2 *Park v Brothers* [2003] NSWSC 865.

3 *Brothers v Park* (2004) 12 BPR 22,501.

The contract

4 The property, known as "Jellalabad", was a mixed farming property, fronting the Murrumbidgee River. It was originally put on the market for sale by auction in August 2000. The advertising material made reference to extensive areas available for irrigation and for rice production. The first appellant is a farmer experienced in growing both rice and wheat. In pre-contract conversations with the respondent and the respondent's agent, particular reference was made to the availability of water, and the potential for rice production. Developing land for rice production requires substantial expenditure on infrastructure. Part of the land had already been developed for that purpose. On one inspection of the property the first appellant told the respondent that he wanted to increase the area available for rice production. The respondent said: "There is plenty of land to do that – but there is no infrastructure – that is your job."

5 The rice growing season is such that a crop must be planted by the end of October, or early November, and its growing cycle should be completed by late summer. The first appellant gave evidence that, at a pre-contract inspection, the agent explained that the contract would provide for the purchasers "to immediately take possession of the farm and look after it", because the respondent had been ill and was unable properly to farm the land himself. Rural properties in the area are sometimes sold in the spring, just before the time when rice crops are planted, and it is not uncommon for purchasers to be allowed immediate possession of the property to grow crops. The agent told the first appellant that there would be 1000 acres ploughed ready for a crop. The evidence showed that the parties to the contract contemplated that, after contract, and before completion, the purchasers would plant a rice crop in land that had already been developed for that purpose, for the 2000-2001 growing season.

6 The contract was signed by the appellants on 12 September 2000, although formal exchange of contracts did not take place until 25 September 2000. The appellants went into possession on 12 September 2000 and immediately set about planting a rice crop for the 2000-2001 season. They spent about $225,000 on the necessary work. The contract provided for completion on 7 December 2000, and the terms of payment of the purchase price were $250,000 deposit, $250,000 on completion, and the balance of $2,850,000 secured by mortgage back to the vendor, payable as to $500,000 on 7 July 2001, as to $350,000 on 7 September 2002, and as to $2,000,000 on 7 September 2005.

7 Special condition 22.4 of the contract is not directly relevant to the present appeal, but it was relevant to a dispute that arose between the parties. It required

the purchasers, on or before 7 October 2000, to reimburse the vendor in respect of a sum of $150,000 which the vendor was to pay to a certain authority in connection with water supply. This was a topic that was important in the litigation before Young J. For present purposes, it suffices to say that there was conflicting evidence about whether the respondent agreed to postpone that payment until completion; a conflict which Young J found it unnecessary to resolve.

8 Special condition 24 of the contract, which is central to this appeal, provided:

> "**Early occupation by purchaser to do farming work – no reimbursement to purchaser.**
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> The purchaser may enter the property and occupy the Manager's Cottage as licensee only at any time after the date of this Contract and payment of the deposit without payment of any occupation fee to work up ground for crops such work to be at his expense and risk and in locations first approved by the vendor. The purchaser agrees in doing such work to adopt the highest farming standards used in the local district and the purchaser's entry shall also be governed by the provisions of special condition 25 hereof. The purchaser acknowledges that 14 days notice given to the vendor will be required prior to occupancy of the cottage, which is presently occupied."

9 Special condition 25 is presently immaterial.

10 The first appellant gave evidence that he attended the property every day between 12 and 21 September 2000. He engaged a contractor to fertilise the area which had been ploughed for rice growing. After that, the fields were progressively flooded, and banks were built up to retain water. In October, a rice crop was sown by contractors. No approval was either sought or obtained under special condition 24, but there was no objection by the respondent. What was done was within the joint contemplation of the parties. The question of prior approval of location was never raised, either at the time or later.

11 Disputes arose between the parties about a number of matters, the most important of which was the payment of the amount of $150,000. Young J held that time for that payment was not of the essence and, further, that in any event, if a right of rescission had arisen, it had been waived by the respondent. However, on 12 December 2000 the respondent purported to rescind the contract, and ordered the appellants to leave the property, as they did. The appellants

commenced the present proceedings, which were determined first by Young J on 27 February 2001. The contract was completed on 24 March 2001. The first appellant's evidence was that, in early March 2001, he inspected the rice crop he had previously sown, and engaged someone to look after it. He visited the property twice a week until he had full access from 24 March 2001.

The proceedings before Campbell J

12 The claims for damages for breaches of the Fair Trading Act based on alleged pre-contractual misrepresentations are not relevant to this appeal.

13 Of indirect relevance is a claim for damages relating to the 2000-2001 rice crop. The claim that is presently in issue relates to losses in respect of the 2001-2002 rice crop, but in considering that claim it is relevant to note the claim in respect of the earlier crop.

14 There were no formal pleadings in the proceedings. They were commenced by Summons. Evidence was by way of affidavit, supplemented by some oral evidence. However, Points of Claim were filed, presumably pursuant to a direction, in July 2003, and Points of Defence (which amounted to nothing more than a general denial of each and every allegation including, for example, the allegation that a contract of sale had been entered into) were filed in August 2003. The Points of Claim, relevantly for present purposes, recited special condition 24 and then, under the heading "Repudiation of Contract by Defendant and Exclusion of Plaintiffs From 'Jellalabad'", asserted that, in December 2000, in breach of special condition 24, "the [respondent] wrongfully excluded the [appellants] from 'Jellalabad', so that they were unable to go onto the property to care for the rice crop." This was a reference to the 2000-2001 rice crop. Campbell J upheld this claim. He accepted evidence, including expert evidence, to the effect that the inability of the first appellant to care for the crop, because he had been wrongfully deprived of access to the land from December 2000 until March 2001, resulted in a substantially lower crop yield. He quantified damages at $104,641. That item is not the subject of this appeal.

15 The next heading in the Points of Claim was: "Plaintiffs' Access Restored, Complete Contract But Suffer Damage". Under that heading, the following paragraphs appeared:

> "22. The [appellants] were allowed access to the rice crop [ie the 2000-2001 crop] on or shortly after 27 February 2001, following publication of the reasons for judgment of Justice Young on 27 February 2001.

23. The contract for sale was settled on 24 March 2001.

24. As a result of their exclusion from 'Jellalabad' from 19 December 2000 to 27 February 2001, the [appellants] have suffered loss [or] damage.

Particulars

1. Loss of profit from reduced yield to the 2000-01 rice crop that they planted; and

2. Loss of profit from further disruption of cropping programme in 2001-02.

Further particulars are contained in the affidavits of the first [appellant] and in the experts' reports served by the [appellants]."

16 It is the claim referred to in particular 2 that is directly in issue in this appeal.

17 The affidavit evidence referred to in the particulars was to the following effect. The first appellant said that it was his intention to plant a further 860 ha of rice in the growing season 2001-2002. Of this, some 600 ha was to be planted in an area known as the South Coonoon Paddock and some 246 ha was to be planted in an area known as the Dam Paddock. (The figures of 846 ha and 860 ha appear to have been used interchangeably. The difference is presently immaterial.) The first appellant said: "Had the contract settled in December 2000, I would have had possession of Jellalabad from settlement and would have been able to carry out the necessary steps to landform that area and plant rice in September/October 2001." He then set out the steps in detail. They included providing necessary infrastructure to the area mentioned. He said: "Because the contract was not settled until 24 March 2001, it was not possible to carry out these works so as to have the area available to plant a rice crop in September/October 2001." He went on to give reasons for that, which amounted, in effect, to the proposition that, in order to have a realistic prospect of preparing the South Coonoon Paddock and the Dam Paddock for the 2001-2002 crop, he needed access before March 2001; access which had been denied to him.

18 The evidence of the first appellant was supported by a report of an expert, Mr Sharman, who said that "problems that arose with the purchase agreement resulted in the [appellants] being denied access to [Jellalabad]". He said that the "severe interruption to development, management and cropping plans resulted in substantial financial loss". That loss included losses resulting from the inability

to develop the 860 ha in time to sow the proposed 2001-2002 crop. His report explained in detail why that loss was caused by inability to gain access to the property over the period of exclusion between December 2000 and March 2001, and estimated the amount of the loss.

19 It may be observed, both in connection with the main issue argued in this Court, and with a Notice of Contention which the respondent seeks leave to file, that the claim for damages in respect of the 2001-2002 rice crop, as elaborated in the evidence incorporated by reference in the particulars, was put on the basis (accepted by Campbell J) that access to the property between December 2000 and March 2001 was critical to the first appellant's plans (known to the respondent at the time of contract) to increase the acreage that was available for cultivation. The first appellant had assumed he would have such access because he expected the contract to be completed on or about 7 December 2000. Nobody raised, either in the course of evidence, or in argument, any question about whether, if for some reason other than the purported rescission, the contract had remained on foot but uncompleted between December 2000 and March 2001, there would have been any difficulty about gaining approval for access to the 860 ha, and whether, in such a situation, the appellants would have wanted to develop the 860 ha in exercise of their rights under special condition 24. The topic of the need for prior approval under special condition 24 was never mentioned at the trial before Campbell J, just as it had never been the subject of any express communication between the parties before the 2000-2001 crop was sown. A possible explanation for this might be that (apart from his contention that the contract had been rescinded) there was no reason why the respondent would have declined approval for the development of the 860 ha, if the contract had remained on foot but uncompleted. There may have been nothing about the proposed development work, or the proposed locations, to which the respondent could have taken, or would have wanted to take, exception.

20 Campbell J assessed damages under this head at $963,852. The details of that assessment are not presently material. His reasons for finding for the appellants reflect the way in which the case was conducted. He said:

> "2001/2002 Rice Crop
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> At the time of entering the contract [the first appellant] had formed plans for what would be done with the property, so far as cropping was concerned, after the 2000/2001 rice growing season. He intended to plant 860 hectares of rice in the 2001/2002 rice growing season. Of this, he planned that about 600 hectares was to be in the South Coonoon Paddock, and the remainder in the Dam paddock. The whole of the rice crop to be

planted in 2001/2002 was to be planted on newly developed irrigation land. To be able to plant rice on that newly developed land, he would have needed first to obtain Departmental approval to plant the rice to the area in question. He would then have needed to engage a surveyor to survey the area, and mark out blocks and bays, and then to landform the area. It would also be necessary to install two river pumps to pump water from the Murrumbidgee River to the area in the South Coonoon paddock. There was already a water channel available to the area in the Dam Paddock. It would also be necessary to install irrigation stops, and various pipes, in both areas. Only after this preparatory work was done could he commence preparation of the seedbed. To fit in with the growing season for rice, the preparatory work would have to have been finished by, at the latest, September 2001. While the [respondent] was not aware of all the details concerning [the first appellant's] plans for cropping on the property, he was aware before the contract was entered, that [the first appellant] intended to make a significant increase in the area of irrigated land under cultivation, and that effecting that increase in area of irrigated land under cultivation would require the provision of significant infrastructure.

[The appellants], as well as carrying on farming activities, also have a landforming business, which owns sufficient machinery and employs sufficient staff and was available, around the time the [appellants] were excluded from the property, to have landformed the area intended to have been planted to rice. The landforming of that area would have taken approximately four or five months.

Landforming is a process which is weather dependent. [The first appellant] gives evidence, which I accept, that it is not possible to reliably plan to carry out landforming in the Hay area after about June, because winter rains usually arrive in that month, and landforming is not possible when the earth reaches a certain stage of dampness. When the earth is too wet, it is impossible to work because it sticks to the laser operated machine buckets. In winter, an inch of rain can make ground unsuitable for landforming for some weeks. As it happened, the rain which Jellalabad received in June and July 2001, would have prevented landforming in those months.

This is confirmed by Mr Sharman, who gives evidence that:

> 'Land development operation is best conducted in the summer and early autumn, when soil conditions are generally dry and free flowing. To have attempted to perform this operation during late

> autumn or winter would have been a high-risk operation because of the incidence of winter rainfall in the [Hay district].'
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> Thus, the exclusion of the [appellants] from the property had the effect that they lost the window of opportunity to enable landforming to be carried out, to enable 860 hectares of rice to be planted in the 2001/2002 season. *No other obstacle to the planting of the 860 hectares has been shown to exist*." (emphasis added)

The Court of Appeal

21 The respondent appealed against various aspects of the decision of Campbell J, on a number of grounds that were ultimately withdrawn, or that failed.

22 When the matter came on for hearing in the Court of Appeal the respondent sought leave to amend his Notice of Appeal by adding the following ground:

> "8. If the [first appellant] was excluded from the property on 19 December 2000:
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> (i) The right of the [appellants] to enter upon the property was limited to a right of entry to work up ground for crops in locations first approved by the [respondent].
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> ...
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> (iii) … [T]here was no evidence that the [respondent] had approved the locations which the [appellants] claimed they had intended to work up and in relation to which [they] claimed to have suffered loss."

23 The application to amend was opposed on the basis that the new ground sought to raise a point that had not been argued at trial and that, if raised, could have been the subject of evidence. The amendment was allowed, and subsequently became the basis of the decision of the Court of Appeal on the issue with which we are presently concerned.

24 Giles JA, with whom Ipp JA and Wood CJ at CL agreed, noted that Campbell J's implicit finding that, if the contract had proceeded to completion in the ordinary course, development of the 860 ha would have commenced prior to 24 March 2001 was not challenged in the appeal. Giles JA said:

> "His Honour's reasoning was that inability to commence landforming prior to 24 March 2001 meant that the [appellants] reasonably decided not to commence that work, because they could not be sure of completing it by the end of June 2001; but that if they had been allowed access to the property from 19 December 2000 they would have commenced the work and, together with the prior step of survey and the other steps of obtaining Departmental approval, installing pumps and providing irrigation works, would have planted a 2001/2002 rice crop on the newly developed irrigation land ...
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> The [respondent] did not challenge this reasoning, or any other factual findings underpinning it."

25 Giles JA then turned to the new point, which was that it had not been established that the 2001-2002 crop losses were caused by breach of special condition 24, because in the absence of prior approval there was no entitlement to access to the 860 ha prior to 24 March 2001. Without expressing a preference for one view or the other, he said there were two possible views of the vendor's position under special condition 24: either the vendor's capacity to grant or refuse approval to development at a particular location was unfettered or, alternatively, by implication approval could not be withheld unreasonably. Either way, he said, the appellants failed:

> "The [appellants] could have proposed the locations of the 860 hectares for approval, but that did not mean that the locations would have been approved. Let it be assumed that, but for the [respondent's] purported rescission and denial of entitlement to enter upon the property, they would have proposed the locations, but did not do so because of the [respondent's] stance – [the first appellant] gave no such evidence, but it is a readily available inference ... But the [respondent] may or may not have given approval ...
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> If the [respondent] had an unfettered ability to approve or disapprove, on the facts he would have declined approval, as the [appellants] accepted, and the [appellants] would not have an action for breach of contract. If there was an implication that the [respondent] could not unreasonably withhold approval, the [appellants'] cause of action would be for unreasonably withholding approval, not for simple exclusion: the [appellants] did not present such a case, and it is not self-evident. On the case they presented, it remains that they did not establish an entitlement to access permitting them to do the work for the 2001/2002 rice crop."

26 What is difficult to discern from the reasoning of Giles JA is the hypothesis upon which he was considering the question of the respondent's attitude to a request for approval to develop the 860 ha. In the events that occurred, no question of approval arose. From mid-December 2000, the appellants were excluded from the property altogether by reason of the respondent's purported rescission of the contract and his related refusal to permit them to continue to remain on the land. The appellants were not permitted to care for the 2000-2001 crop, which had been planted with the knowledge and at least tacit approval of the respondent. The respondent had excluded the appellants altogether, and was refusing to complete the contract. Both the exclusion and the refusal to complete were on the basis that the contract had been rescinded.

27 If the hypothesis was no exclusion, but some delay in completion resulting from circumstances not involving breach by either party, then it may have been necessary to call evidence bearing on the question of the likelihood of approval. It could well have been possible to demonstrate that there was no reason why the respondent should not give the necessary approval, and every reason why he should.

28 Giles JA dealt separately with the question whether the present respondent should be permitted to rely on this new point, having regard to the conduct of the trial. He said:

> "The [appellants] had framed their case as one of breach of the contractual entitlement conferred by special condition 24. Faced with the broad denial in the points of defence, they had full opportunity to put all necessary evidence before the Court. It is clear enough that they could not provide evidence of approval of the locations. I do not think the point is correctly described as a new ground not taken at the trial, or that it is correct to say that the [respondent] is departing from the course that he adopted at the trial. On the ultimate question of whether it is 'expedient and in the interests of justice to entertain the point' ... in my opinion the balance of expediency and justice favours doing so."

29 Giles JA said the circumstances of the case were essentially the same as those in *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd*[4]. In that case the defendant bank pleaded that the proceedings were statute-barred. The

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4 (1990) 169 CLR 279.

defendant bank did not appear at the hearing. Judgment was given for the defendants at trial, and the plaintiff successfully appealed to the Court of Appeal. The defendant bank then appealed to this Court. On appeal, it was allowed to rely on its plea of the statute of limitations. It was pointed out in this Court that the case was not one that turned on the way a trial was conducted and arguments were presented[5]. The issues for determination were clearly defined in the pleadings, and they included the limitation point. Here, however, the Points of Defence did not define any issues, and one of the complaints about the new argument was that, if it had been raised at trial, it could have been the subject of further evidence. The reasoning of Giles JA implies, without expressly stating, that, even if an issue about approval had been distinctly raised at trial, it could not have been the subject of any relevant additional evidence. That is disputed.

The Notice of Contention

30 In this Court, the respondent seeks further to expand the issues by raising, by way of Notice of Contention, an argument that was not taken either at trial or in the Court of Appeal. The argument is "that on the evidence, the intention of the [a]ppellants to work up [860] hectares for, and to plant, a 2001-2002 rice crop thereon, was conditional upon the completion of the contract of sale dated 25 September 2000 and not upon any application for approval under special condition 24 of the contract."

31 Campbell J found that the appellants would have developed the 860 ha for a 2001-2002 rice crop, and Giles JA recorded that there was no challenge in the Court of Appeal to that finding. Yet, as counsel for the respondent pointed out in this Court, the only direct evidence as to the intention of the appellants reflected their assumption that the contract would have been completed some time in December 2000, and that, in January and February 2001, they would have had access to the land, not in the exercise of their limited rights under special condition 24, but in the exercise of their absolute rights as owners.

32 It is not self-evident that if, for some reason other than the respondent's purported rescission and the consequent litigation, the contract had remained uncompleted in January and February 2001, the appellants would have sought access to the 860 ha under special condition 24, and spent money on infrastructure and other development pursuant to their rights as purchasers, in the expectation that ultimately they would obtain the benefit in the form of the 2001-

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5 (1990) 169 CLR 279 at 304 per Toohey J.

2002 rice crop. The argument before Campbell J proceeded upon the assumption, reflected in his reasons, and in the reasons of Giles JA in the Court of Appeal, that if the appellants had the necessary rights of access to the 860 ha, either as owners or at least as purchasers pursuant to special condition 24, they would have exercised those rights for the purpose of preparing for the 2001-2002 rice crop. Giles JA, in a passage quoted above, said that it was a readily available inference that the appellants would have proposed the locations. That may be correct but, because the assumption was not challenged, no evidence was directed to the question.

33 This is a matter that could have been addressed by evidence, had it been raised. Indeed, the respondent's proposed Notice of Contention, in expressing the argument, begins with a reference to such evidence as there was at the trial. The argument is that a certain inference of fact as to the intentions of the appellants (contrary to what Giles JA said) should be drawn. If the argument had been raised at trial, there may well have been relevant evidence that could have been given, either directly as to the intentions of the first appellant, or as to the commercial circumstances surrounding the transaction, that may have answered the inference for which the respondent, now, for the first time, wishes to contend.

34 This was not a case in which there were formal pleadings. Nevertheless, the issues at trial were formulated by Points of Claim and particulars, understood in the light of affidavit evidence to which they referred, and by the conduct of the proceedings on behalf of the parties by their legal representatives. As was pointed out in *Whisprun Pty Ltd v Dixon*[6], even when there are pleadings, to determine whether a party is raising a new point on appeal the actual conduct of the proceedings must be considered. In adversarial litigation, as a general rule, a party is bound by the conduct of his case. There are circumstances in which the interests of justice may lead an appellate court to permit a party to raise a point that was not taken at trial, but where the point is one that could have been met by calling evidence below then it cannot be raised for the first time on appeal[7].

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6 (2003) 77 ALJR 1598 at 1608 [52]; 200 ALR 447 at 461.

7 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51]-[52]; 200 ALR 447 at 461.

35 Leave to file the Notice of Contention should be refused. The issue it seeks to raise is purely an issue of fact, and if it had been raised at the trial it could have been dealt with by evidence.

Special condition 24

36 The decision of Young J, on 27 February 2001, that the contract remained on foot at that date was not challenged in any later part of the proceedings. It is now common ground. As has been noted, the contract was completed on 24 March 2001. It follows that, over the critical period of January and February 2001, the rights of the parties concerning access to the subject land, and the opportunity to develop, or to begin to develop, the 860 ha necessary for the proposed 2001-2002 rice crop, were governed by special condition 24. Over that period, the respondent denied the appellants access to any part of Jellalabad, asserting that the contract had been rescinded and was of no continuing force and effect. That assertion was wrong. The appellants pursued, and Campbell J upheld, their claim for damages on the basis that they were wrongfully denied access to the land. The Court of Appeal rejected the relevant part of that claim on the ground that the appellants never sought, or obtained, the respondent's approval of the particular sites which they proposed to develop for the 2001-2002 rice crop.

37 Giles JA found it unnecessary to decide whether, under special condition 24, the respondent had an unfettered right to refuse to approve a particular location, or whether such right was qualified by a requirement that it must not be withheld unreasonably. Apart from that question of law, there is also a question of fact, which is part of the appellants' complaint about the decision to permit the point to be taken in the Court of Appeal. But for the dispute between the parties about whether the contract had been rescinded, what interest would the respondent have had in refusing approval to development of the 860 ha? So far as appears from the evidence, such development would have improved the value of the subject land, and caused no harm or inconvenience to the respondent. That may also help to explain why the question was never raised at trial. If, for some reason other than the legal dispute about purported rescission, the contract had remained uncompleted in January and February 2001, and (as Giles JA said was a readily available inference) the appellants had sought approval of the 860 ha as locations for development, what interest of the respondent would have been served by refusing approval? None is suggested by the evidence; but if the question had been raised at trial the evidence may well have thrown more light on the matter. The Court of Appeal evidently regarded this question as irrelevant. The fact that no approval was sought, or obtained, was treated as a conclusive answer to the appellants' claim.

38 The nature of the respondent's capacity to withhold approval of particular locations as sites for "work[ing] up ground for crops" pending completion depends upon the true construction of special condition 24. In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[8], after referring to the general principle of construction according to which parties are taken to agree to do all that is reasonably necessary to secure performance of their contract[9], Mason J said:

> "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

39 Special condition 24 must be construed in the light of the circumstances surrounding the contract, and the purpose the condition was intended to serve. The background to special condition 24 was that, the respondent being ill and unable to work the property himself, it was in the mutual contemplation of the parties that whoever bought the property would enter into possession immediately, and farm the land. The time of year at which the sale took place reinforced the importance of that aspect of the bargain. No doubt the appellants' right of access to the land to grow crops was a factor in the agreed price. At the same time, there could be a number of reasons why the contract might not proceed to completion, and it was reasonable to protect the interests of the respondent by reserving to him the power to approve, or withhold approval of, the locations at which such activity was to occur. Infrastructure, especially

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8 (1979) 144 CLR 596 at 607-608.

9 *Mackay v Dick* (1881) 6 App Cas 251 at 263; *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71.

uncompleted infrastructure, would not necessarily increase the value of the land. It was foreseeable that the respondent could suffer adverse consequences from development activity undertaken prior to completion by the appellants. At the same time, the respondent had told the appellants that there was "plenty of land" available for development for rice growing and, provided the respondent's interests were adequately protected, it is unlikely to have been the intention of the parties that he could obstruct development unreasonably. The respondent was to approve the locations of any development, having regard to what the proposed development involved. The provision should be understood as meaning that the respondent, in granting or withholding approval, was required to act reasonably, having regard to the legitimate interests of the respondent which the requirement of approval was there to protect. If the question of approval had been raised as an issue at the trial, it would have been possible to explore those interests, and to investigate whether there was any possibility that they could have been affected adversely by development of the 860 ha.

40 The appellants' response to the respondent's purported rescission of the contract, and their exclusion from the land, was to affirm the contract by instituting proceedings for specific performance. In those proceedings for specific performance, the appellants, in their evidence, complained about their exclusion from the land. Indeed, the damaging effect on the 2000-2001 rice crop was put forward, and accepted, as a reason why the litigation should be heard and determined urgently. In an affidavit, the first appellant said that it was imperative for him to be restored to immediate possession of the property. Young J decided to deal urgently with the question whether the purported rescission was effective. When that question was decided in favour of the appellants, they were allowed back into possession, and the contract was completed, all within the space of two or three weeks. Involved in the appellants' claim for specific performance was a claim for access to the land under special condition 24. During January and February 2001, the respondent was denying that the contract remained on foot, and excluding the appellants from access to any part of the land.

41 So long as the contract remained on foot and uncompleted, the right of the appellants to "work up ground for crops" was conditional upon the respondent first having approved the locations in which the appellants intended to do that. For present purposes, those are the locations of the 860 ha. In the Court of Appeal, when the respondent, over the objection of the appellants, was permitted to raise for the first time the argument that the condition had not been fulfilled, one response of the appellants was to invoke a principle considered by this Court

in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd*[10] and *Foran v Wight*[11]. In the latter case, the principle was stated by Mason CJ in the following terms[12]:

> "A failure by the innocent party to treat an anticipatory breach of an essential term as a repudiation and to terminate the contract has the effect of leaving the contract on foot, in which event it remains in force for the benefit of both parties, just as it would if the anticipatory breach had never occurred, subject to a qualification to which I shall refer in a moment. The parties then remain bound by the contract and the repudiating party may rely on any supervening circumstance which justifies his non-performance of the contract when the time for performance arrives ... The qualification is that, if the repudiating party by his refusal to perform or other conduct intimates to the innocent party that he need not perform an obligation which is a condition precedent to the performance by the repudiating party of his obligation, and does not retract that intimation in time to give the innocent party an opportunity to perform his obligation, that party may be excused from actual performance of the condition precedent. The repudiating party then waives complete performance of the condition precedent and his conditional promise becomes unconditional."

42 In the earlier case, Dixon CJ referred to repudiatory conduct which expressly or implicitly intimates to the innocent party that it is useless to perform a condition, in consequence of which that party is dispensed from performing the condition. This, he said, was "just as effectual as actual prevention."[13] Kitto J said[14]:

> "The principle, which applies whenever the promise of one party, A, is subject to a condition to be fulfilled by the other party, B, may, I think, be stated as follows. If, although B is ready and willing to perform the

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10 (1954) 90 CLR 235.

11 (1989) 168 CLR 385.

12 (1989) 168 CLR 385 at 395-396.

13 (1954) 90 CLR 235 at 246-247.

14 (1954) 90 CLR 235 at 250.

> contract in all respects on his part, A absolutely refuses to carry out the contract, and persists in the refusal until a time arrives at which performance of his promise would have been due if the condition had been fulfilled by B, A is liable to B in damages for breach of his promise although the condition remains unfulfilled."

43 The application of that principle to a given case may be affected by the nature of the promise, and the nature of the condition. If the conduct of the party in breach of contract prevents the performance by the other party of the condition, then it has been said to be "evident from common sense" that it is "equal to performance" of the condition[15]. The result has been explained sometimes in terms of waiver[16], and sometimes in terms of estoppel[17]. Lord Mansfield said that "reason" dictated that if one party stops the other offering performance by showing an intention not to perform "it is not necessary for the first to go farther, and do a nugatory act."[18] In the circumstances of the present case, however, the position is more complex. The principle justifies a conclusion that the failure of the appellants to seek approval of the locations of the 860 ha did not itself deprive them of their rights under special condition 24. In the light of the respondent's stance that the contract had been rescinded, to seek approval would have been futile. That, however, deals with only one aspect of the condition to which the right of the appellants was subject.

44 The right of the appellants to have access to the 860 ha was conditional, not upon the performance by the appellants of a unilateral act, but upon an act of the respondent (approval of location) in response to an act of the appellants (application for approval). The condition to which the right of access was subject was not simply the making of a request by the appellants; it was the approval of that request by the respondent. It is true that the conduct of the respondent in excluding the appellants altogether from the subject land made it plain that it would be useless for the appellants to seek approval of access to the 860 ha. It does not follow, however, that the respondent, by his conduct, was intimating to the appellants that he was abandoning such control over the

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15 *Hotham v The East India Co* (1787) 1 TR 638 at 645 [99 ER 1295 at 1299].

16 *Foran v Wight* (1989) 168 CLR 385 at 396 per Mason CJ.

17 *Foran v Wight* (1989) 168 CLR 385 at 422 per Brennan J, 434 per Deane J.

18 *Jones v Barkley* (1781) 2 Dougl 684 at 694 [99 ER 434 at 440], cited by Mason CJ in *Foran v Wight* (1989) 168 CLR 385 at 397.

locations on which further development occurred on his property as was given to him by special condition 24. Neither reason, nor common sense, nor equity, dictates that he, by his conduct, was abandoning his capacity to grant or withhold approval of the locations on which development work was proposed, if that were a matter about which there was, or could have been, a serious question.

45 That consideration underlines the forensic significance of the fact that no question of approval or want of approval of location was raised at the trial. So far as appeared from the evidence before Campbell J, there was nothing about the locations in question that could have given the respondent any reason to withhold, or to want to withhold, approval of them as sites for development of the kind contemplated by the appellants. In the proceedings before Campbell J, the respondent did not seek to raise for consideration the possibility that, acting reasonably, he may have refused such approval.

46 No doubt, as the Court of Appeal said, if, in January or February 2001, the appellants had sought approval in respect of the 860 ha, such approval would have been declined. That, however, would have been because the respondent had purported to rescind the contract. There is nothing to suggest that it would have been for any reason related to the locations of the proposed development, or the nature of the proposed development, or any legitimate interest of the respondent contemplated by special condition 24.

47 The respondent, wrongfully, denied the appellants access to any part of the land, including the land on which the 2000-2001 rice crop was growing. The appellants' right to take advantage of access to the land to develop the 860 ha was conditional upon the respondent's approval of the contemplated locations, but such approval could not be withheld unreasonably. In the events that happened, the respondent's total denial of access to the land meant that no question of approving the particular locations could arise. In considering the amount of the damages that flowed from the wrongful total exclusion, it is relevant to note that the appellants' right to "work up" the 860 ha was not unqualified, but was qualified by the respondent's capacity to withhold approval. The appropriate claim was not, as Giles JA suggested, a claim for damages for wrongful refusal to grant approval. It was a claim for damages for the breach of special condition 24 involved in the total refusal of access. The question was one of quantifying the damages. That could have involved assessing the possibility, if any, that approval of the locations in question could properly have been withheld. If any argument about want of approval had been raised before Campbell J, then it would have been necessary to explore, in evidence, the question whether there was any ground upon which the respondent would, or might reasonably, have withheld approval. Instead the case proceeded as though approval, or absence of

approval, of the locations in question was not an issue. The new point should not have been permitted to be raised as an issue in the Court of Appeal because it was, by then, too late to deal with it fairly.

48 Finally, it may be noted that the conclusions reached at trial, and in the appeal to this Court, about the operation of special condition 24 are consistent with a much simpler analysis of the appellants' rights, in the events that happened, that they appear not to have advanced in their Points of Claim, or in argument at trial. That was that the respondent's breach of contract, in failing to complete on the agreed date[19], closed the window of opportunity the appellants had to develop the 860 ha, and plant the 2001-2002 rice crop. The failure to complete on time thus caused the appellants the damage which the Court of Appeal held should not be allowed. It is, however, not necessary to consider further this way of analysing the matter.

Conclusion

49 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and, in their place, it should be ordered that the appeal to that Court be dismissed with costs.

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19 *Louinder v Leis* (1982) 149 CLR 509 at 525-526 per Mason J.