15/1951

IN THE HIGH COURT OF AUSTRALIA

SIMON

V.

PAYNE

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on FRIDAY, 1ST. AUGUST, 1952.

H. E. Daw, Gov. Print., Melb
2280/45

SIMON v. PAYNE

ORDER

Order of the Full Court of the Supreme Court varied by substituting for the order as to the amount recoverable a direction that judgment should be entered for £548.11.5 together with an amount equal to the present value as on 12th December 1948 of £1416.8.7. payable in weekly amounts of £15 each and a direction that there be an inquiry by the Registrar of the Supreme Court to ascertain the amount of such present value, unless the parties agree thereon.

Otherwise appeal dismissed with costs to be taxed less the sum of £20.

SIMON v. PAYNE

JUDGMENT :

DIXON C.J.
WEBB J.
KITTO J.

SIMON v. PAYNE

JUDGMENT :

DIXON C.J.
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KITTO J.

By the order under appeal the plaintiff respondent recovered judgment against the defendant appellant for the sum of £2113.9.0 with costs in an action of contract. The order was made by the Full Court of the Supreme Court of Queensland which set aside a judgment for the plaintiff for £120 only, with costs, given at the trial by Mansfield S.P.J.

The sum to which the plaintiff has been held entitled represents the balance of moneys found to be payable by the defendant to him in respect of the goodwill and assets, including trucks and transport licences, of a carrying business which the plaintiff had carried on but had made over to the defendant.

The plaintiff had carried on for some ten years a service for the carriage of goods between Redcliffe and Brisbane and then he became bankrupt. By some arrangement, the nature of which appears only indistinctly, one Gordon Brown bought from the trustee in bankruptcy a half share of the business, and enough money was found for the creditors to obtain a discharge for the plaintiff. Thereupon Brown and the plaintiff were to dispose of the business to the defendant. Brown and the plaintiff as vendors accordingly entered into an agreement with the defendant as purchaser. The agreement which was in writing under hand was dated 1st August 1947. Thereby the vendors agreed to sell and the purchaser agreed to purchase the goodwill and effects, enumerated in a schedule, of the vendors carrying business upon terms and conditions which the document proceeded to set out. The price was fixed at £4000. Of this sum £1500 was paid as a deposit, £500 was to be paid on 5th August 1947, that is five days

later, a further sum of £1000 was to be paid when, in the words of the agreement "the license plates for all trucks belonging to the said carrying business are transferred to the purchaser", and the balance being £1000, was to be paid by equal monthly instalments of £100, "the first of such payments to be made one month after the date of the transfer of the said license plates". Possession was to be given, and was in fact given, on the day following, viz; 2nd August 1947. One of the conditions of the agreement was that the vendors should not within five years commence or be engaged concerned or interested in a carrying business within thirty miles of Redcliffe.

The schedule gave particulars of seven motor lorries one of which was described as unregistered, (Scil. under the Main Roads Acts 1920 to 1943) and it included spare tyres used in or about the business and spare parts.

What the body of the agreement called "license plates" were dealt with in the schedule by the brief item "3 Transport Licenses". These were in fact three licences to the plaintiff, which in spite of his bankruptcy he still held, issued to him under the State Transport Acts 1938 to 1943. Those Acts had in the meantime been repealed by the State Transport Facilities Act 1946 which came into force on 8th April 1947. The licences were maintained in force by the third paragraph of sec.5(3) of the latter Act which provides that such a licence then in force should, unless sooner revoked or surrendered under the repealed licensing provisions, continue in force until the currency or the extended currency of such licence under the new legislation should expire.

Under the repealed provisions a licence was issued in respect of each vehicle the licensed carrier employed. Three only therefore of the registered lorries transferred with the business were licensed, but probably there was not much difficulty in substituting one registered vehicle for another.

Under the State Transport Facilities Acts a licence is given, not in respect of the vehicles, but for the carrying service; though vehicles may not be used in the service unless

they have been approved: secs 27: 28: 37 and 38. Another difference between the old and the new legislation, one important in this case, is that in the former there was no provision enabling the transfer directly of licences from the licensee to a proposed transferee; while sec. 43 of the State Transport Facilities empowers the Commissi ner of Transport upon application by the licensee and proposed tranferee to transfer a licence under that Act, under such terms and conditions as he may determine.

Under the repealed State Transport Acts a transfer of a licence could only be effected by the licensee surrendering the licence and the Commissioner issuing a licence in lieu thereof to the proposed transferee. As Sec.43 of the State Transport Facilities Acts applies to licences under those Acts, and not to licences under the previous Acts, the purpose of transferring the three licences in the plaintiff's name to the defendant could only be accomplished by a surrender by the plaintiff of the old licences and the issue of a fresh licence to the defendant. A difficulty attending this procedure was that sec.29 requires the Commissioner before he issues a licence to invite applications for the licence by public advertisement. But subsec.(2) of the same section provides by way of qualification or exception that the Commissioner may, subject to obtaining the approval of the Governor in Council, issue a licence without such an advertisement where there are good and sufficient reasons for doing so. The exception also covers the case of the issue of a licence under the new provisions to the holder of a licence under the old legislation to enable him to continue the service. The prties were probably not aware of all these provisions, but on the same date as the agreement was executed the solicitors who drew it for the parties prepared a letter to the Commissioner from the plaintiff informing him that he desired to have the three licences transferred to the defendant or to have them cancelled and reissued in the defendant's name and requesting the Commissioner to do what ever was necessary for the purpose. The plaintiff signed the letter when he executed the agreement.

In these circumstances the references in the agreement to the transfer of the licences or "license plates" (equivalent expressions) must be taken to cover the procedure by surrender and reissue. The Commissioner's response was to inform the solicitors for the parties that there were no provisions for the transfer of licences issued under the repealed State Transport Acts and he could only act under secs. 27 and 28 of the State Transport Facilities Act 1946, that is to say the sections authorizing him to issue licences and approve vehicles. Whether there was a misunderstanding of the course the Commissioner intended to take or whether some other explanation accounts for the next step does not appear. But the next step was the preparation and execution of an agreement varying the first agreement. The second agreement is dated 20th August 1952. It consists only of three clauses. The first provided that the purchase price of the goodwill and effects of the carrying business should be £1500 instead £4000 and acknowledged that the sum of £1500 had been paid. The second clause provided that the purchaser should pay the vendors "for the use of the plates granted to him by the Commissioner of Transport the sum of £15 per week for a period of three years from the date hereof when the vendors should undertake to have signed (sic) to the purchaser the rights of (sic) such plates"; The third clause confirmed the principal agreement "subject only to the variations herein contained and such alterations if any as may be necessary to make the principal agreement consistent with this agreement".

It is hardly necessary to say that the attempt made by the second of these clauses to transfer or impart to the purchaser the benefit of the licences of which the plates are the outward symbol or manifestation is quite contrary to the policy, and indeed the provisions, of the legislation. Sec.23 prohibits persons from using or permitting or allowing to be used on any road a vehicle for the carriage of goods unless under and in accordance with a provision of Part III of the State Transport Facilities Acts. Nothing in Part III would warrant such a thing and no warrant can be found in any extension of the

privileges given by licences under the repealed State Transport Acts which sec. 5(3) of the State Transport Facilities Acts may accomplish nor in the continuance of secs. 6,7,8,15,16,and 17 of the repealed Acts effected by sec.5(3)(i) of the latter Act.

Indeed it was not denied by Counsel that clause 2 of the agreement of variation contemplated an illegality and was unlawful.

It is quite clear that clause 2 is a basal part of the agreement of variation and that the whole agreement must stand or fall with it. This agreement must therefore be considered as illegal and void. However the parties proceeded for a time on the basis of its provisions. Gordon Brown it is true soon dropped out. He received the full sum of £1500 which had been paid by the purchaser and he thereupon resigned his interest to the plaintiff. Hence it comes that the plaintiff, without objection from the defendant, sues alone in this action and does not join Gordon Brown as a co-plaintiff. But as from 2nd August 1947 the defendant carried on the business. The three licences in the plaintiff's name did not expire all at the same time but the earliest expired on 30th September 1947. The Commissioner on that date extended all three to a uniform date viz: 30th April 1948. On 16th December 1947 the Commissioner informed the parties that the approval of the Governor in Council had been obtained to the issue of a licence to the defendant under the State Transport Facilities Act and that he would issue the licence to the defendant subject to the proper observance of the requirements of that Act. The Commissioner said that it would be necessary for the defendant to make a formal application for a licence to obtain the surrender by the plaintiff of his three licences, to submit the vehicles for inspection and to forward certificates of registration, of insurance and of inspection. When this was done a licence would issue in the defendant's name with a currency to 30th April 1948. The defendant sent forms of surrender to the plaintiff and requested him to sign them. By this time the parties were no longer advised by the same solicitors. The

plaintiff's solicitors took the view that now that the Commissioner was about to accept a surrender of the plaintiff's licences and issue a licence to the plaintiff, the agreement of variation providing for a payment of £15 a week for three years was in-appropriate and they required that the parties replace it with another agreement, in the meantime holding the surrenders which the plaintiff had signed. The Commissioner had made a circular demand upon all licensees under the repealed Acts to renew their licences under the existing Statute before the 31st January 1948 and to comply with this demand they proposed, unless the matter was settled before then to apply for a renewal in the plaintiff's name. Such a licence would be transferable to the defendant under sec. 43 of the State Transport Facilities Acts, so to take the course indicated would not be inconsistent with the agreement. But however reasonable the view may be thought to be that the agreement of variation had become inappropriate to the situation, the plaintiff was not entitled to make it a condition of his taking further steps towards the fulfilment of the transaction that the defendant should agree upon new terms. The defendant however did not elect to disaffirm the transaction, either then or afterwards while the plaintiff persisted in seeking a new agreement. On the contrary he retained the trucks and continued to exploit the goodwill of the business. He complained to the Commissioner and asked for advice. The Commissioner naturally was more concerned with the carrying on of the service. He sought payment of the fees due monthly under the licences and as the end of January drew near he wrote to the defendant's solicitors asking that before 31st of the month the application of the defendant, the surrender of the plaintiff's licence and the other documents he had before required should be forwarded to him together with a letter from both parties stating that it was desired that the licence should issue in the defendant's name. Otherwise he said the licences would go on till 30th April 1948 when they would expire and then they would be subject to his power to invite applications for a licence to conduct the service: sec.29(1). As between the

parties the plaintiff maintained his contention that the variation of 20th August 1947 was not applicable to an immediate grant to the defendant of a licence and that a new arrangement should therefore be made. But to the Commissioner on 30th January 1948 the plaintiff sent in his surrenders together with an application for a reissue to himself. There is a reference in the application to two letters to the Commissioner which probably explained the purpose, which, as stated in a letter to the defendant's solicitors, was to satisfy the requirements of the Commissioner, to prevent a lapse of the licences on 31st January 1948 (scil. as a result of non compliance with the Commissioner's circular) and to protect the plaintiff's rights pending further negotiations.

The defendant also executed on 30th January 1948 applications for the issue of licences in his name but he did not lodge these applications until 19th April 1948.

In the meantime on 17th February 1948 the plaintiff and defendant met at the latter's dwelling place. The plaintiff asked him for some money. The material part of the conversation is not in dispute. The plaintiff said that according to the last agreement drawn up the defendant was supposed to pay him £15 a week for three years. The defendant replied that that was only while the licences were in the plaintiff's name. The plaintiff said that that was the clause in the agreement which he wanted altered. The defendant then said "you transfer the licences (or plates) to me and I will continue to pay you the £15 a week." The defendant said that he would go to his solicitors and have the agreement altered. The plaintiff assented and said that he would go to his solicitors. On the same day the plaintiff's solicitors wrote to the defendant's solicitors confirming the conversation. They put it, however, not as a concluded agreement but as an expression of willingness to agree upon a variation of the agreement. For after stating the effect of the arrangement they added the words "provided that your client varies the agreement dated the 20th August 1947 to incorporate such arrange-

ment", and in a later part of the letter they used the expression "if this arrangement is come to". To this the defendant's solicitors replied that it was true that the defendant was prepared to pay the plaintiff the sum of £15 per week for the balance of the terms of three years providing that the plaintiff transferred to the defendant the plates of the carrying business. The letter proceeded "you might therefore ask your client to request the Commissioner for Transport to have the plates transferred to our client and we would suggest that a short amended form of agreement be completed by our respective client thus putting the matter in order". Upon receipt of this letter the plaintiff's solicitors at once informed the Commissioner that both parties had come to an agreement in regard to the carrying on of the service and the payment of the balance of purchase money, and sent him copies of the letters. They requested the Commissioner to advise them whether he was prepared to proceed with the issue of the licences as previously arranged. But in stating that the plaintiff proposed to comply with the requirements which the Commissioner had laid down as early as 16th December 1947, the letter introduces the statement with the expression "subject to the preparation approval and execution of a suitable agreement between the parties."

It is convenient to pause at this point for the purpose of considering whether in spite of the expressions contained in the plaintiff's solicitors letters the parties had reached a concluded agreement by which the defendant agreed to pay the plaintiff for the residue of the three years the weekly sum of £15 if the plaintiff would cause a licence forth with to be issued in the defendant's name".

Mansfield S.P.J. found that such an agreement was made. His Honour said "On the 17th February 1948 it was verbally agreed between the plaintiff and the defendant that the defendant would pay to the plaintiff the sum of £15 per week for the balance of the period of three years, that is from 20th August 1947, if the plaintiff would transfer the licences to the defendant". This finding was upheld in substance by the Full

Court, although the formation of the contract was placed rather on the offer of a promise by the defendant for an act. The question however necessarily presents itself whether the parties did not intend that the making of a written contract should be a condition or term of the arrangement so that, unless and until such a document was agreed upon and executed, the arrangement would have no binding operation. No doubt there is much in the correspondence which may be used with more or less plausibility in support of the view that when on 17th February 1948 the plaintiff and the defendant ended the conversation, in which they had reached accord, by agreeing to go to their respective solicitors they meant to treat the preparation of a formal document as more than an expression or record of an agreement they had already concluded and looked upon it rather as the process which would produce a contract between them from what they had only tentatively arranged. It is seldom easy when such a question arises to say whether the given case falls within such authorities as Barrier Wharfs Ltd. v. Scott Fell 1908 5 C.L.R. 647: Farmer v. Honan 1919 26 C.L.R. 183 and Sinclair Scott & Co. v. Naughton 1929 43 C.L.R. 310 and Summergreene v. Parker 1950 80 C.L.R. 304 on the one hand or on the other hand within such as Niessman v. Collingridge 1921 29 C.L.R. 177 and Lennon v. Scarlett 1921 29 C.L.R. 499, to mention only cases decided in this Court. Here however we are dealing with an oral agreement and the meaning of such an agreement is always to be decided as a matter of fact. There are concurrent findings that what was said amounted to a definitive promise. While it is true that the letters of the plaintiff's solicitors represent the arrangement as subject to the preparation approval and execution of a formal document, that may be accounted for less by the writer's conception of what was intended by the two parties to the conversation of 17th February than by a desire on his part to hold the matter open, fearing that his client had gone too far and had committed himself to his possible disadvantage. Further it must be remembered that the matter agreed was extremely simple. The variation of 20th August 1947 contemplat-

ed a weekly payment for three years and then a making over of the licences to the defendant. If there was an immediate issue of the licence to the defendant there was, as the defendant appeared to be saying, nothing to compel him to continue the payments. All they were deciding on 17th February 1948 was that if a present transfer or issue of the licence to the defendant was obtained, he should nevertheless continue to be liable to pay the £15 a week until the end of the period of three years from 20th August 1947. To agree upon this simple proposition finally would involve no difficulty about consequential or subsidiary terms.

In all the circumstances it seems right on this appeal to accept the conclusion that the parties made a definitive agreement on 17th February 1948. It is not necessary to consider whether the Statute of Frauds could have been pleaded on the ground that the oral agreement varied the agreement of 1st August 1947 and that the latter was an agreement not to be performed within the space of one year from the making thereof. For in fact the statute was not pleaded or relied upon in the argument of this appeal. The plaintiff's solicitors having informed the Commissioner at once of the position reached the latter answered on 17th March 1948 that he would issue a licence to the defendant as from 1st. April 1948 if the latter complied with the requirements that he had already stated that is on 16th December 1947. This answer was sent to the defendant's solicitors. But it contained the information that the licence fee would be 15 per cent of the gross revenue derived from the service. This would greatly exceed the total amount of the fees payable under the old licences. The defendant however did not then raise any objection on this score and it can hardly have surprised him, in view of the changes made by and under the State Transport Facilities Acts. Of course the purpose of doing so was to put himself in a position to issue a new licence to the defendant. It is important to notice that the Commissioner's notification meant that he would accept the surrender as from 31st March 1948 and this he

apparently did. The plaintiff's solicitors prepared a draft agreement embodying what the parties had agreed upon on 17th February 1948. The defendant did not visit the office of the Commissioner as he had been requested to do and he did not execute or accept the agreement. On 21st April 1948 his solicitors informed the plaintiff's solicitors that he would not sign it and intended to rely upon the agreements already executed between himself and the plaintiff. In the meantime several things had happened. In the first place the Commissioner had given the defendant a permit or permits to carry on the service and had called in or confiscated the plaintiff's. The permits had a months duration but they were renewed month by month. The the defendant had sent in his application for a licence. On the same day the plaintiff's solicitors had informed the Commissioner that the defendant had not signed the agreement and had asked the Commissioner to hold his hand and this the Commissioner communicated to the defendant. The plaintiff's solicitors informed the solicitors for the defendant that they could not allow the licence to issue to the defendant unless he would carry out the new arrangement. They replied that he would not sign the agreement prepared but would rely on the agreement already executed.

However on 12th May 1948 the defendant again applied to the Commissioner for the issue to him of the plates previously in the plaintiff's name, and on 18th May 1948 the plaintiff's solicitors wrote requesting the Commissioner to issue to the defendant licences in respect of the carrying service previously carried on by the plaintiff between Redcliffe and Brisbane. They informed the defendants solicitors that they had done so and that they relied on the agreement of 17th February 1948. The defendant's solicitors took up the position that as from 1st April 1948 the plaintiff's licences had ceased and the defendant was under no further liability to pay instalments to the plaintiff, a view which both as to the fact and the consequence the plaintiff's solicitors contested. From this time forward it remained only for the defendant to comply

with the/Commissioner's requirements already stated in order to obtain a licence. He however continued the service under the monthly permits. Communications from the Commissioner made it clear to him that a licence would issue to him and indeed pressed him to take the necessary steps. He attended the Commissioner's office and supplied some of the necessary information and documents, and nominated vehicles but he did not complete the formal requirements. At length on 3rd November 1948 he informed the Commissioner that he in turn had sold the carrying business and asked him to issue the licence in the name of the purchaser from him. The State Transport Facilities Acts contain a provision forbidding the sale of a licensed service unless twenty-one days notice to the Commissioner is first given: sec.42. Apparently the defendant failed to comply with this provision. He was called upon on this ground and on the ground of his failure to comply with the requirements of the Commissioner to show cause why a licence should issue to him. After various communications between him and the Commissioner the latter informed him on 4th March 1949 that it had been decided to issue a licence to him for the carriage of goods between Brisbane and Redcliffe from 1st. March 1949 to 31st January 1951 at a fee of ten per cent of the gross revenue. On 25th March 1949 a licence was in fact issued to him. This is clearly the fact though in his evidence he did not admit it. A month later he sought to transfer the licence to the purchaser but again he disregarded sec.42. It does not appear what the fate of the licence has been nor is its further history material to the case.

What is material is that before this time, namely on 13th December 1948, the plaintiff had issued the writ in this action without waiting for the effluxion of the three years from 20th August 1947. The instalments of £15 paid by the defendant amounted to £375 making, with the £1500 paid as a deposit, £1875. Further moneys he refused to pay. He maintained the stand he had taken that at the end of March 1948 he ceased to be liable to pay to the plaintiff any further

weekly sums of £15 because he was thenceforward operating under the permits to him and not under the plaintiff's licences, which, having been surrendered, were cancelled.

Mansfield S.P.J. treated the defendants liability as governed by the oral agreement of 17th February 1948. But His Honour said "The defendant had the use of the plates and licences which remained in the name of the plaintiff until the 30th March 1948 on which date they were cancelled. In my opinion the licences contemplated by the agreement have not been transferred to the defendant and the plaintiff has therefore failed to prove a condition precedent to his recovery of the sum of £15 for the balance of the three years' period." His Honour found that besides the sum of £1500 the defendant had paid only £375 on account of the weekly payments and that £120 remained due that is on the footing that after the end of March 1948 no further liability to make them accrued.

In the Full Court the view that the defendant ceased to be liable to further payments at the end of March 1948 was not accepted. Townley J. who delivered the judgment of the Court expressed the view that although it was a condition that the defendant should obtain the licences he too was under an implied obligation to do within a reasonable time all that was necessary for him to do to obtain them and that obligation he had broken. Further he had repudiated his obligation to make the weekly payments and this was before writ issued. He was liable, so it was held, for the arrears of weekly payments up to the date of the issue of the writ, a sum fixed at £548.11.5, and thereafter in damages representing the present value as at that date of the then future weekly payments to 20th August 1950. These then future payments were calculated (erroneously as it now appears) as amounting to £1666.8.7 the present value of which as at 13th December 1948 was fixed by the Registrar at £1564.8.7. This sum and that of £548.11.5 amount to £2113.9.0.

The first step taken by the defendant appellant in attacking the conclusions of the Full Court was to dispute

the view that a contract resulted from the accord reached by the plaintiff and the defendant on 17th February 1948. For reasons to be given later, it does not seem to aid the defendant even if he succeeded in this contention. But the ground upon which he supported the contention was that it amounted on the defendants part to an offer of a promise for an act namely the procuring the Commissioner to issue a licence to the defendant and that before the act was done he (the defendant) had retracted the offer.

It is sufficient to say that this contention gives the arrangement on 17th February an erroneous complexion. It was not an offer of a promise for an act but an immediate agreement to vary the terms of a prior contract still executory so that the consideration should be payable in the specified instalments in a different event. It is true that the parties regarded the prior contract as composed of the original agreement and of a variation and that the variation was in fact illegal and void, although they did not or probably did not so regard it. But the new variation would replace the illegal variation and operate on the original contract which was not illegal.

Adopting the view that there was an immediate oral variation and that it resulted in the consideration becoming £1500 (already paid) and a weekly sum of £15 payable until 20th August 1950, the plaintiff procuring a licence for the defendant, that meant that the plaintiff must do on his part what was necessary and sufficient to secure the issue to the defendant of a licence, the defendant doing all that he reasonably could be expected to do to fulfil the conditions on his part to be observed and performed by him as the person to whom the licence was to issue.

For the defendant appellant it was then contended that the plaintiff had failed in the performance of essential conditions without the fulfilment of which he was not entitled to the weekly payments forming part of the consideration. First it was said that the plaintiff had not caused the licence

to be issued to the defendant but on the contrary the defendant had obtained the permits under which he carried on the business, and alternatively the licence, independently and, so to speak, not derivatively from the plaintiff but by an original title. The answer to this lies in the facts. Whatever mistakes the plaintiff may have made in attempting to restrain the issue by the Commissioner of a licence until the defendant resumed the performance of his liabilities, the contract remained open and before it was too late the plaintiff made an unconditional request to the Commissioner to issue the licence to the defendant. Backed as this was by the surrender he had long since lodged, by the approval of the Governor in Council and by the willingness of the Commissioner to license the defendant on his complying with the necessary conditions, no more remained for the plaintiff to do. The defendant being in possession of the permits delayed the performance of his obligations without which a licence could not issue. The permits were however the consequence of the plaintiffs having sought to effect a transfer of the licence by its surrender and reissue, and they represented an ad interim method of carrying forward the completion of the contract. The defendant had denied his obligations under the agreement as varied on 17th February 1948 and the default which delayed complete fulfilment was his. Secondly it was said for the defendant that the licence issued subject to a fee of ten percent of the revenue was a different thing from the licence contracted for. The aggregate fees for the three licences under the repealed legislation amounted only to £4.8.8. a month. But the agreement was made in a condition of the law which gave the Commissioner authority to fix the fee and in all other material respects the licence was that contemplated. The alteration of the fee was a risk which fell upon the purchaser. The fact is that the defendant obtained and enjoyed the assets and goodwill of the plaintiff's business including the privilege of carrying on the trade and that substantially is what he bargained to get. He cannot

while retaining and enjoying these tangible and intangible assets resist payment of the consideration moneys.

The delay that was experienced was in part due to the parties making and acting upon the agreement of variation bad for illegality but it was due in greater part, and later on altogether, to the defendants' own refusal or failure to perform the duties of co-operation in obtaining the licence which such an agreement always implies. To place upon him such an obligation is no more than an application of the general rule stated by Lord Blackburn in Mackay v. Dick 1881 L.R. 6 A.C. 251 at p.263 that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect.

If the view were taken that the conversation of 17th February 1948 between the plaintiff and defendant did not amount to a concluded agreement varying the former contract or contracts the defendant would hardly be better off. Then the situation would be that the parties would be thrown back on the original contract of 1st August 1947. They would have proceeded, on the mistaken supposition that they were bound by the variation of 20th August 1947, to carry it out by a substituted method of performance. Then at the defendants instance the plaintiff surrendered his licence to enable the defendant to obtain a licence. Long as the process was and much as it deviated in detail from the performance contemplated by the original agreement, the result was that which the defendant had bargained for and the delay in obtaining the result was due, as to the earlier part, to what he concurred in and, as to the later part, to his own default. Having obtained in substance what he bargained for and having obtained it in consequence of the contract he could not be allowed to escape payment of the consideration moneys.

There is no counterclaim by the defendant for damages for any breach by the plaintiff of any obligation express or implied on his part to be performed. On this footing the plaintiff would be entitled to the unpaid balance of the full consideration of £4000. But accepting the view that an oral agreement of variation was concluded on 17th February the consideration money to which the plaintiff became entitled was £3840 consisting of £1500 deposit and £2340 being £15 a week for three years.

The view of the Full Court that the defendant's refusal further to pay the weekly sums enabled the plaintiff to sue for the present value of future payments as damages has not been contested.

A mistake however was made in the Full Court in stating that £1666.8.7 was the balance left after deducting from £1965 the amount of instalments which fell due up to and before the issue of the writ, that is £548.11.5. The balance is £1416.8.7. The sum of £1965 is the excess of the total amount of the weekly payment for three years,£2340, after deducting the amount of the weekly payments actually made viz: £375.

The order of the Full Court should therefore be varied by directing that judgment should be entered for £548.11.5 together with the present value as on 12th December 1948 of £1416.8.7 payable in weekly amounts of £15 each and by directing an inquiry by the Registrar of the Supreme Court to ascertain the amount of such present value, unless the parties agree upon it.

The mistake if discovered in time might have been corrected without an appeal and indeed it was not expressly mentioned in the notice of appeal to this Court. But the correction of the mistake might have involved some costs. A deduction of £20 from the costs of the appeal will be sufficient.

Subject to the above variation the appeal should be dismissed with costs to be taxed less £20.
