

In the Privy Council

ON APPEAL from the Full Court of the Supreme Court of New South Wales

BETWEEN

J. JAMIESON AND SONS PTY. LIMITED - - - - - Plaintiff

AND

THE COMMISSIONER FOR RAILWAYS - - - - - Defendant

AND BY AMENDMENT made the Fourth day of December, 1959
pursuant to leave granted the Twenty-sixth day of November, 1959

BETWEEN

10 AUSTRALIAN HARDWOODS PTY. LIMITED - - - - - Plaintiff (*Appellant*)

AND

THE COMMISSIONER FOR RAILWAYS - - - - - Defendant (*Respondent*)

CASE FOR THE RESPONDENT

RECORD.

1. This is an appeal pursuant to leave granted by the Supreme Court of New South Wales from the decision of the Full Court of the said Supreme Court (Evatt, C.J., Herron and Sugerman, JJ.) delivered on the 1st June, 1960. The decision of the Full Court was given upon two appeals (brought respectively by the Plaintiff and Defendant) from a decree of Myers, J., sitting in Equity which dismissed the Plaintiff's suit for specific performance and the Defendant's counterclaim for a declaration and injunction. The Court dismissed the Plaintiff's appeal and upheld the Defendant's appeal granting to the Defendant a declaration and injunction in accordance with the relief sought in the counterclaim.

2. The Respondent is a body corporate charged with the duty of administering and maintaining the Railway system of the State of New South Wales.

3. The Appeal concerns a sawmill in the Bril Bril State Forest situated on the North Coast of New South Wales.

4. The Respondent being concerned to obtain a regular supply of sleepers and timber for use in the working of the railways had procured the issue to it on the 7th November, 1951, of a sawmill licence (Exhibit 4) by the Forestry Commission of New South Wales under the terms of the Forestry Act, 1916-1935, such licence expiring on 31st December of each year but being subject to annual renewal. It has been renewed annually and is still in force.

- RECORD.
5. Clause 1 of the sawmill licence states:—
 “This licence is granted for the sole purpose of sawing sleepers and off-cuts from such Crown logs as may be made available at the discretion of the Commission under special licence from Bril Bril State Forest.”
6. The Respondent also procured the issue to it by the said Commission under the said Act of an occupation permit (Exhibit 3) on 15th April, 1952, such occupation permit to operate from 1st November, 1951. Such permit entitled the Respondent to occupy in the Bril Bril State Forest three acres of land, identified in a plan attached to the permit, for the purpose of a site for the said sawmill and for a camp.
7. Prior to 1956 one Jamieson had operated the sawmill for the Respondent. By agreement dated 3rd May, 1956 (set forth in paragraph 2A of the Amended Statement of Claim), between the said Jamieson of the first part the Appellant (in the Agreement referred to as J. Jamieson & Sons Pty. Limited—which name has now been changed to Australian Hardwoods Pty. Limited) of the second part and the Respondent of the third part it was agreed that the Appellant was to be deemed to have operated the Respondent’s sawmill as from 13th July, 1952, upon the terms and conditions and subject to the covenants and obligations set forth in the said Agreement.
8. Before the end of 1957 the Appellant committed breaches of the Agreement which were admitted by the Appellant on the pleadings and during the hearing before Myers, J. Many of the breaches were of a serious character, involving inter alia the sale of large quantities of timber to purchasers other than the Respondent and the failure of the Appellant to cut from the available timber the maximum number of sleepers for use by the Respondent.
9. The principal questions involved in this Appeal are whether the Appellant exercised an option to purchase the sawmill equipment set out in the Schedule to the Agreement; whether the Respondent is bound to request the Forestry Commission to transfer to the Appellant the occupation permit and licence; the effect upon the rights of the parties of the admitted termination of the said Agreement by virtue of the Appellant’s breaches thereof, and whether the Respondent is as against the Appellant entitled to possession of the subject lands and sawmill. The determination of these questions depends largely upon the proper interpretation of the aforesaid agreement referred to in paragraph 7 hereof.
10. The facts in relation to such questions are:—
 (a) On the 11th June, 1957, the Appellant gave the Respondent a notice in writing (Exhibit A) purporting to

be an exercise of the option contained in Clause 9 (a) of the Agreement. The Appellant failed to pay any purchase moneys either on the 11th June, 1957, or at any time thereafter. p. 12, l. 38.

- (b) On 11th September, 1957, the Appellant gave a further notice (Exhibit F) purporting to confirm the notice of 11th June, 1957. p. 168.
- (c) On 16th September, 1957, the Appellant gave the Respondent a further notice in writing (Exhibit J) also purporting to be an exercise of the said option but did not pay any purchase moneys on 16th September, 1957, or at any time thereafter except in pursuance of an agreement between Counsel of 12th December, 1957 (Exhibit M) referred to under (f) of this paragraph. pp. 178, 179.
- (d) On 25th November, 1957, the Respondent gave the Appellant, pursuant to Clause 6 of the Agreement, three months' notice of termination of the Agreement by reason of the breaches thereof by the Appellant. p. 12, ll. 1-10. p. 97, l. 2.
- (e) At all relevant times the Respondent contended that the Appellant had not validly exercised the said options and questions having arisen in this regard an arbitration was proposed between the parties.
- (f) On 12th December, 1957, Counsel for the parties agreed to certain terms for adjournment of the arbitration (Exhibit M) which involved payment of moneys by the Appellant to the Respondent to be treated by the Respondent as purchase moneys in the event of it being determined that the Appellant had exercised the option or might exercise it at the expiration of three months from the giving of the notice of 16th September, 1957. pp. 178, 179.
- (g) The agreement between Counsel of 12th December, 1957, provided inter alia as follows:—
- “Nothing herein contained or done pursuant to anything herein contained shall prejudice the contention of the Commissioner that no dispute now exists which is arbitrable under the contract or his contention that the said option of purchase has not been and cannot now be exercised.” p. 197, ll. 6-10.
- (h) On 23rd December, 1957, the Appellant required the Respondent by letter (Exhibit N) to request the Forestry Commission to transfer to the Appellant the said licence and permit. p. 180.

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p. 97, l. 28.
- (i) On 25th February, 1958, the notice of termination of the Agreement given by the Respondent to the Appellant on 25th November, 1957, expired and the Appellant admits that the Agreement then came to an end.
11. In the suit the main relief eventually contended for by the Appellant was—
- p. 22, l. 36.
- (a) a declaration that the option to purchase had been validly exercised and that the agreement arising therefrom should be specifically performed;
- p. 23, l. 1.
- (b) specific performance of the provisions of Clause 9 of the 10 Agreement that the Respondent request the Forestry Commission to transfer the said licence and permit to the Appellant;
- p. 23, l. 20.
- (c) an injunction restraining the Respondent from entering upon the lands the subject of the said licence and permit.
- p. 23, l. 33.
12. The Appellant in its suit contended before Myers, *J.*, that:—
- (a) A contract for the sale of chattels being the buildings and plant itemised in the Schedule to the said Agreement arose upon the mere giving by the Appellant to the Respondent of one or more of the notices of intention to 20 exercise the option.
- (b) Alternatively to (a) above, that if payment of purchase money was a condition of the exercise of an option the payment had been made by reason of the agreement of 12th December, 1957, between Counsel (Exhibit M).
- p. 178.
- (c) In the circumstances of this case such a contract was of a nature susceptible of specific performance.
- (d) If there was a contract for the sale of chattels it was an executed contract which incorporated in its terms Clause 9 (a), (b) and (c) of the said Agreement and was com- 30 pletely independent of the said Agreement and therefore should be specifically performed notwithstanding breaches of the Agreement by the Appellant and/or termination thereof by the Respondent.
- p. 12, l. 38—
p. 13, l. 22.
- (e) The provisions of Clause 9 (c) of the Agreement placing an obligation upon the Respondent to request the Forestry Commission to transfer the licence and permit to the Appellant ought to be specifically performed once the option had been exercised notwithstanding breaches of the Agreement by the Appellant and/or termination thereof 40 by the Respondent.
- p. 13, ll. 9-22.

- (f) An injunction should be granted restraining the Respondent from entering upon the lands the subject of the said licence and permit because the Appellant should be considered to be entitled to possession of such lands as against the Respondent from 23rd December, 1957, when the Respondent was required by the Appellant to request the Forestry Commission to transfer the said licence and permit to the Appellant.

13. The Respondent in respect of the Appellant's suit contended
10 before Myers, J., that:—

- (a) There could not be a contract for the sale of the chattels because:—

(i) no purchase moneys had been paid upon the purported exercise of option, the payment of the purchase money being a condition of the exercise of such option.

(ii) the payment of moneys under the Agreement between Counsel of 12th December, 1957 (Exhibit p. 178. M), could not discharge the Appellant's obligations under Clause 9 of the Agreement as such moneys p. 12, l. 38. were paid after three months' notice of termination of the Agreement had been given on 25th November, 1957, and Clause 6 of the Agreement provided, inter p. 12, ll. 1-16. alia, as follows:—

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“Provided however that upon notice of termination being given to the Contractor by the Owner the Contractor shall not during the period of three (3) months hereinbefore referred to have the right of exercising the option in pursuance of Clause 9 hereof to purchase all or any of the items set out in or subsequently added to the Schedule to this Agreement.”

(iii) the payment of moneys under the said Agreement between Counsel was without prejudice to the Respondent's contention that the said option of purchase had not been and could not then be exercised.

- (b) If a contract for the sale of the chattels had resulted from
40 a valid exercise of the option it should not be specifically enforced because—

(i) the subject of any such contract was chattels;

(ii) damages would be an adequate remedy for any breach thereof;

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p. 12, l. 38.

- (iii) the chattels were in the possession of the Appellant;
 - (iv) the Agreement had been lawfully terminated by the Respondent because of the Appellant's breaches thereof and this termination put an end to any rights of the Appellant under Clause 9 of the Agreement;
 - (v) the Agreement was in essence a managerial Agreement and it was not the purport or intent thereof that the Appellant could exercise the option and 10 simultaneously refuse to carry out its managerial obligations;
 - (vi) the remedy of specific performance would not be mutual because of the nature of the Agreement and because of the termination thereof;
 - (vii) any contract arising from the exercise of the option was not independent of the main Agreement and the enforcement of the exercise of the option in the circumstances would give to the Agreement a construction which would destroy its full operation and 20 put an end to its main purpose namely the securing of a supply of sleepers and timber by the Respondent;
 - (viii) the Court would exercise its discretion against the Appellant because it had breached its main obligations under the Agreement;
 - (ix) the Court would exercise its discretion against the Appellant because the Appellant by its breaches had brought about the termination of the Agreement; 30
 - (x) there was no evidence that at relevant times the Appellant was ready and willing to perform the Agreement.
- (c) There should be no order requiring the Respondent specifically to perform the obligation to request the Forestry Commission to transfer the licence and permit to the Appellant because—
- (i) no option had been exercised;
 - (ii) the Agreement had terminated;
 - (iii) the Appellant having caused the termination of the 40 Agreement because of its breaches should not be permitted to obtain the licence and permit to use

for its own benefit thereby depriving the Respondent of any opportunity of itself using the said licence and permit to obtain a supply of sleepers and timber to which it was entitled before the Appellant caused the termination of the said Agreement;

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- (iv) of reasons analogous to those set forth in 14 (b) (ii) (iv) (v) (vi) (vii) (viii) (ix) and (x) hereof.

10 (d) No injunction should be granted against the Respondent because—

- (i) the Agreement had terminated;
- (ii) the option had not been exercised;
- (iii) the Appellant was not entitled as against the Respondent to remain in possession of the subject lands;
- (iv) the Respondent was entitled to enter into possession of the subject lands for the reasons put forward in support of the Respondent's counter-claim.

20 14. Myers, *J.*, dismissed the Appellant's suit for the reasons that:—

- (i) there was nothing to show that the contract flowing from the exercise of option (if it existed) was of a nature susceptible of specific performance because it was a mere contract for the sale of goods; p. 97, l. 39-
p. 98, l. 4.
- (ii) there was no evidence that damages would not be a sufficient remedy for breach of such a contract; p. 98, l. 1.
- (iii) the goods were in the possession of the Appellant and there was no act left to be performed by the Respondent; p. 98, l. 2.
- 30 (iv) because of the nature of the Agreement the remedy of specific performance would not be mutual and the Appellant therefore could not have specific performance on its part; p. 98, ll. 11-15.
- (v) there was no evidence that the Appellant was always ready and willing to perform its obligations under paragraphs (d) and (e) of Clause 9 of the Agreement; p. 98, l. 17.
p. 13, ll. 23-29.
- (vi) there was no independent contract consisting of paragraphs (a) (b) and (c) of Clause 9 of the Agreement and the breaches by the Appellant of the Agreement afforded p. 98, l. 43.
p. 12, l. 38-
p. 13, l. 22. a defence to the claim for specific performance. p. 99, l. 10.

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- RECORD. 15. In its counterclaim the Respondent sought the following relief—
- p. 37, l. 23. (i) a declaration that the Appellant was not entitled to remain in possession of the subject lands and sawmill;
- p. 37, l. 25. (ii) an injunction restraining the Appellant from preventing or hindering the Respondent from entering upon the subject lands and sawmill;
- p. 37, l. 29. (iii) such further or other relief as the nature of the case might require.
16. The Respondent contended in support of its counterclaim 10 before Myers, J. that—
- (i) the occupation permit gave the Respondent a right to occupy the said lands;
- (ii) the Appellant had been placed in possession of the said lands for the managerial purposes of the Agreement and the Agreement having terminated the Respondent was entitled as against the Appellant to resume possession of the said lands;
- (iii) the mere assertion by the Appellant of the right to remain in possession of the said lands as against the Respondent 20 was sufficient to support the granting of the injunction sought by the Respondent;
- (iv) by virtue of the provisions of Section 39 of the Equity Act, 1901-1957, the Respondent was entitled to the relief sought in the counterclaim as being the substance of the relief it would obtain in an ejectment action against the Appellant. The said Section 39 is as follows:—
- “39. (1) A defendant may in his statement of defence, set-off or set up by way of counterclaim against the claim of the plaintiff any equitable or legal right or 30 claim, whether or not connected with the claim of the plaintiff, and such set-off or counterclaim shall have the same effect as a statement of claim in a cross suit so as to enable the Court to pronounce a final judgment in the same suit both on the original and on the cross claim.
- (2) The Court may on the application of the plaintiff before the hearing, refuse permission to the defendant to avail himself of such set-off or counterclaim if, in the opinion of the Judge, such set-off or 40 counterclaim cannot be conveniently disposed of in the pending suit, or ought not in the circumstances of the case to be allowed”.

- RECORD.
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- (v) it was irrelevant to the relief sought against the Appellant that the Respondent might not have the right to exclusive possession of the subject lands as against the Forestry Commission;
 - (vi) the Respondent was entitled to exclusive possession of the said lands as against the Appellant;
 - (vii) the Respondent had a statutory right to occupy the said lands by virtue of the grant of the permit and licence to it under the Forestry Act and the Appellant should be restrained from interfering with such right;
 - (viii) the Respondent had an interest in land entitling it to the relief sought;
 - (ix) the Appellant, on the evidence, would not leave the subject lands unless ordered to do so by the Court;
 - (x) the terms of settlement of motions for interim injunctions dated 3rd December, 1958 (Exhibit O) could have no bearing on the right to the relief sought in the counterclaim. p. 182.

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20 Myers, *J.*, that—

- (i) for the reasons submitted by the Appellant in support of its suit the Appellant was entitled to exclusive possession of the sawmill and subject lands as against the Respondent;
- (ii) by virtue of the said terms of settlement of motions for interim injunctions the Appellant was rightfully in possession of the sawmill and subject lands;
- (iii) if the Appellant lost its suit it did not intend to remain in possession of the sawmill and subject lands;
- (iv) the Respondent had no interest in land sufficient to support its counterclaim;
- (v) the Respondent did not have an exclusive right to occupy the land;
- (vi) the termination of the Agreement by the Respondent did not deprive the Appellant of a right to be upon the land the Respondent having a non-exclusive licence.

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40 18. Myers, *J.*, dismissed the Respondent's counterclaim for the following reasons:—

- (a) The Appellant did not intend or never had intended to remain on the land unless it succeeded in the suit; p. 100, l. 21.
- (b) The Respondent had no interest in the subject land which would make the mere presence of a stranger on it wrongful as against him and hence the presence of the Appellant was not wrongful; p. 101, l. 36.

RECORD.

- p. 182.
p. 102, l. 13. (c) By virtue of the Agreement of 3rd December, 1958, in settlement of motions for injunctions the Appellant was on the land with the consent of the Respondent;
- p. 103, l. 24. (d) Even although the Agreement had been terminated it did not follow that the Appellant had no right to be on the land at all.
- p. 109. 19. The Appellant and the Respondent in the Appeal to the Full Court of the Supreme Court of New South Wales again made the respective submissions put to Myers, J., and the Respondent placed further evidence on affidavit to which the Respondent craves leave to 10 refer (particularly the affidavit of Alan Grant Crawford sworn the seventh day of April, 1960, and filed in the proceedings before the Full Court) which was not disputed to the effect that the Appellant intended to remain on the subject lands and to conduct the sawmill for its own business and purposes and that it had sought since the decision of Myers, J., to procure a transfer to it of the Respondent's sawmill and occupation permit.
- p. 111, l. 8.
p. 113, l. 35;
p. 114, l. 43. 20. The Full Court accepted the affidavit evidence referred to in the preceding paragraph.
- p. 130, l. 25. 21. The Full Court dismissed the Appellant's Appeal against 20 dismissal of its suit and upheld the Respondent's appeal against dismissal of its counterclaim and gave the following reasons for such decision:—

AS TO THE APPEAL AGAINST DISMISSAL OF THE SUIT:

- p. 123, ll. 10-16. (a) The intention of the parties in making the Agreement of 3rd May, 1956, was to constitute the Appellant a manager of the Respondent's sawmill so that with the use of the Commissioner's forestry permit and licence for an initial period of ten years the Respondent would be guaranteed 30 a constant supply of sleepers and timber for railway purposes;
- p. 125, ll. 3-12. (b) The main purpose of the Agreement was not to come to an end if the Appellant bought the plant and equipment—the paramount consideration and purpose of the Agreement until its determination in 1972 being to secure a supply of sleepers and timber to the Respondent.
- p. 126, ll. 5-12. (c) The option could only have been validly exercised by the Appellant if it had given three months' written notice of the chattels it proposed to purchase and if at the 40 expiration of that period it had tendered to the Respondent the purchase price in cash according to the price stated in the Schedule and providing it did this

before notice of determination was given on 25th November, 1957. The Appellant failed to pay the purchase money. RECORD.
p. 126,
ll. 13-16.

- (d) The language of Clause 9 of the Agreement would not support the Appellant's contentions that a contract of sale came into existence on notice and that the Appellant took title to the goods at the end of three months subject to payment of the price within a reasonable time. p. 126, l. 12.
- 10 (e) The Agreement of 12th December, 1957, for adjournment of arbitration had no effect on the rights of the parties in the suit. p. 127, l. 16.
- (f) The option contained in Clause 9 (a) could not be construed so as to destroy in other respects the full operation of the Agreement and the main purpose of the Agreement, namely to supply sleepers and timber to the Commissioner, continued despite the exercise of the option. p. 127,
ll. 31-38.
- (g) The Respondent's obligations under Clause 9 (c) (i) and (ii) were in aid of the continued supply of timber until 1972. p. 127,
ll. 38-40.
- 20 (h) The intention of the parties was that if the Agreement was lawfully determined at any time during the currency all the rights of the parties should thereupon cease. p. 128,
ll. 2-5.
- (i) As the contract came to an end on the 25th February, 1958, this fact was fatal to the Appellant's claim to specific performance. p. 128,
ll. 7-10.
- (j) Clause 9 of the Agreement could not be said to stand alone to create a wholly independent contract. It merely provided an alternative method of a change of ownership of the plant and equipment by which the end purpose of the Agreement, namely the management of the mill with a view to supplying the requirements of the Respondent, was to be achieved. p. 128, l. 12.
p. 128,
ll. 13-17.
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AS TO THE APPEAL AGAINST DISMISSAL OF COUNTERCLAIM:

- (a) The Agreement of 3rd December, 1958, in settlement of the motions for interlocutory injunctions was merely a substitute for interlocutory injunction and intended to provide a modus vivendi until the hearing but not beyond it. p. 129,
ll. 18-23.
- 40 (b) On the evidence in the suit and the affidavit evidence in the Appeal, the Appellant intended to remain on the subject lands or to conduct the sawmill for its own business and purposes and since the decision of Myers, J., had

- RECORD.
- sought to procure a transfer to it of the Commissioner's sawmill licence and occupation permit.
- p. 130,
ll. 30-35. (c) The Appellant had no right at law or in equity to remain upon the land the subject of the permit once the Agreement of the 3rd May, 1956, terminated, and thereupon the Respondent became entitled to resume possession of the subject lands.
- p. 130,
ll. 35-39. (d) The Appellant holding as licensee under the Respondent could not be heard to dispute the Commissioner's right to possession; *Johnson v. Baytup* (1835) 3 A & E 188; *Doe* 10 d. *Willis v. Birchmore* (1839) 9 A & E 662; *Dudley v. Brown* (1888) 14 V.L.R. 655.
- p. 130,
ll. 39-44. (e) The Respondent was entitled to have its right declared and enforced under his Counterclaim notwithstanding that the right in question was a legal and not an equitable right; Equity Act, 1901, Section 39 (1) as amended by Supreme Court Procedure Act, 1957, Section 5 (2) (d) (1); *Burnham v. Carroll Musgrove Theatres Ltd.* 26 S.R. 372.
- p. 130, l. 44-
p. 131, l. 3. (f) The Respondent was entitled to have his right declared 20 and enforced because as at the time when the Counterclaim was instituted the Appellant was in possession and claiming to be entitled to remain in possession as against the Respondent.
- p. 131,
ll. 4-7. (g) It was no answer to the Respondent's right to have a curial declaration and enforcement of his rights in the Counterclaim, that the Appellant did not intend to remain on the land unless it succeeded in the suit.
- p. 131, l. 22. 22. The Full Court accordingly dismissed the Appellant's appeal and having set aside so much of the decree of *Myers, J.*, as dismissed 30 the counterclaim, the Court declared that the Appellant was not entitled to remain in possession as against the Defendant of the subject lands and ordered the Appellant to deliver up possession of the said lands to the Respondent on or before 1st August, 1960. Upon motions for conditional leave to appeal to Her Majesty in Council and for a stay of proceedings pending such appeal
- p. 131,
l. 26-38. the Full Court ordered—
- “(a) That save as provided in and subject to (b) and (c) below the Judgment of this Court be carried into execution; 40
- (b) That the Appellant may however allow to remain on the subject land and shall not be obliged to remove therefrom within the time for giving up possession provided for by the said Judgment any property of the Appellant which is now upon the subject land;

- (c) That the Appellant shall be at liberty to enter upon the subject land and remove therefrom any property of the Appellant thereon within such time as may hereafter be fixed for that purpose on the application of either party by a Judge of this Court sitting in its equitable jurisdiction."

Thereupon by motion dated 28th July, 1960, the Appellant sought from the High Court of Australia leave or alternatively special leave to appeal from such order of the Full Court as to a stay of proceedings and 10 the motion coming on for hearing before the said High Court on the 8th August, 1960, was dismissed.

The Respondent entered into possession of the said lands in pursuance of the said order and has been and is operating the said sawmill.

23. The Respondent relies upon the decision of the Full Court and the reasons given by their Honours.

SUBMISSION

24. The Respondent respectfully submits that the appeal should be dismissed with costs for the following amongst other

REASONS

- 20 (1) Because the decision appealed from is right.
- (2) Because on the proper construction of the Agreement of 3rd May, 1956, and on the facts the Appellant is not entitled to the relief sought.
- (3) Because the option under Clause 9 of the said Agreement was not exercised and Clause 9 was not brought into operation.
- (4) Because the Appellant had no rights under the said Agreement once it had been validly terminated.
- 30 (5) Because no contract independent of the said Agreement arose out of Clause 9 thereof.
- (6) Because the specific performance sought by the Appellant is not appropriate either because the subject matter is chattels, or damages are adequate.
- (7) Because the said Agreement is not susceptible of specific performance owing to the nature thereof and the remedy is not mutual.
- (8) Because of the admitted breaches by the Appellant of the said Agreement and discretion to refuse relief.
- 40 (9) Because the Appellant was not ready and willing to perform the Agreement on its part.

- (10) Because the granting of specific performance to the Appellant would in the circumstances destroy in other respects the full operation and main purpose of the said Agreement.
- (11) Because the Appellant had no rights at law or in equity as against the Respondent to remain upon the subject lands once the Agreement terminated upon the happening of which event the Respondent became entitled as against the Appellant to resume possession of the subject lands.
- (12) Because the Appellant holding as licensee under the Respondent could not be heard to dispute the Respondent's right to possession.
- (13) Because the Respondent was entitled to have its right declared and enforced under its Counterclaim notwithstanding that the right in question was a legal and not an equitable right.
- (14) Because the Appellant was asserting in the suit and otherwise that it was entitled to remain in possession as against the Respondent.
- (15) Because it was no answer to the Respondent's claim for relief that the Appellant did not intend to remain on the subject lands unless it succeeded in the suit.
- (16) Because the Appellant intended at all relevant times to remain on the subject lands unless ordered by the Court to surrender possession thereof to the Respondent.

N. A. JENKYN.

HERMANN JENKINS.

Counsel for Respondent.

In the Privy Council

On Appeal from the Full Court of
the Supreme Court of New South Wales

BETWEEN

J. JAMIESON AND SONS PTY. LIMITED
Plaintiff

AND

THE COMMISSIONER FOR RAILWAYS
Defendant

AND BY AMENDMENT made the Fourth day of
December, 1959 pursuant to leave granted the
Twenty-sixth day of November, 1959

BETWEEN

AUSTRALIAN HARDWOODS PTY. LIMITED
Plaintiff (Appellant)

AND

THE COMMISSIONER FOR RAILWAYS
Defendant (Respondent)

Case for the Respondent
The Commissioner for Railways

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