Privy Council Appeal No. 68 of 1960

Australian Hardwoods Pty. Limited - - - - - - *Appellant*

v.

The Commissioner for Railways - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH FEBRUARY, 1961

Present at the Hearing:

VISCOUNT SIMONDS
LORD REID
LORD RADCLIFFE
LORD TUCKER
LORD GUEST

[*Delivered by* LORD RADCLIFFE]

This appeal arises out of an action instituted by the appellant Australian Hardwoods Pty. Ltd. in the Supreme Court of New South Wales in its Equitable Jurisdiction claiming various reliefs by way of specific performance, declarations, mandatory orders and injunctions. The rights in aid of which these reliefs were sought were all claimed as arising out of a written Agreement made on the 3rd May 1956 between the appellant and the respondent; and it is solely upon the legal effect of certain provisions of that Agreement, in particular the ninth clause, that the issues argued before their Lordships will be found to depend.

Hitherto the appellant has been unsuccessful in obtaining any of the reliefs which it claims. Its suit was dismissed by the trial Judge (Myers, J.) who also dismissed a counter claim put in by the respondent. When appeal was taken to the Full Court (Evatt C.J., Herron and Sugerman JJ.) the appellant failed again, but the respondent succeeded in obtaining an order on his counter claim, which in effect gave to him the right to possession of certain land about three acres in extent, the site of a sawmill which is the subject of the whole dispute. The appellant now seeks the reversal of the Full Court's Order and some part of the relief which it sought from the trial judge.

The argument before their Lordships was confined essentially to two questions:—(1) whether the appellant had ever purchased the buildings, machinery and plant comprising the sawmill under an option granted to it by the Agreement of 3rd May 1956, and (2) if it had purchased this property, whether it was entitled to claim from the Court an order directing the respondent to send forward to the Forestry Commission certain requests in favour of the appellant which were specified in the text of the Agreement. Before dealing with these questions it is necessary to make some more detailed reference to the contents and circumstances of the Agreement which gives rise to them.

The appellant is a company engaged in the timber business: the respondent's name indicates his status and activities. At the date of the Agreement the respondent held an occupation permit and a sawmill

licence, both issued by the Forestry Commission under the powers of the Forestry Act, and by virtue of them he was entitled to occupy land and operate a sawmill in Bril Bril State Forest in the State of New South Wales. The general tenor of the Agreement, which contained numerous stipulations and provisions, was to arrange for the appellant (styled " the Contractor ") (1) to take over the operation of the sawmill as from the 13th July 1952 ; (2) to hold the buildings and plant comprising the mill on lease or hire at a rent ; (3) to receive a supply of millable timber from the Forestry Commission through the intermediation of the respondent ; and (4) to mill the logs so supplied and sell the resulting sleepers and sawn timber to the respondent, who was to buy them at a price and on terms fixed under the Agreement. It was a specific condition of the Agreement that, subject to certain exceptions, the appellant was not to sell any sleepers or sawn timber produced in the mill to any one except the respondent. In general then the appellant secured a customer and the respondent secured a supply.

The Agreement was to run for a period of ten years from the 13th July 1952. There was however a clause (clause 6) which provided for determination on three months notice given by either side at any time if there had been a breach on the other side of " any clause or provision of this Agreement ". The full text of clause 6 was as follows:—

> 6. IF the owner or the Contractor shall commit a breach of any clause or provision of this agreement the Owner or the Contractor as the case may be shall be entitled (without prejudice to any other right to which such breach may give rise) to terminate the contract by giving three (3) months notice in writing posted to the Contractor or the owner at its or his address as hereinbefore set out AND in the event of the Owner exercising his right to terminate the contract under this clause the Contractor shall be precluded from referring to arbitration in pursuance of clause 10 hereof the question of the entitlement or otherwise of the Owner to exercise such right of termination 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.

The crux of the dispute between the parties is clause 9, which contained both the option of purchase and an undertaking by the respondent, contingent on the purchase, to ask the Forestry Commission to transfer to the appellant the occupation permit and sawmill licence and to continue to it the supply of milling timber which it had hitherto been the respondent's responsibility to obtain for the mill. The rest of clause 9 contained provisions which made it plain that neither the exercise of the purchase option nor the transfer of the permit and licence, if that followed, was to interfere with the supply of sleepers and sawn timber from the mill for the needs of the respondent. Indeed, if the transfer did come about, the supply ararngements were to be extended for another ten years, ending on 13th July 1972. The full text of the clause was as follows:—

> 9. (a) The Contractor shall have a separate and distinct option to purchase each and every item set out in or subsequently added to the Schedule to this Agreement and any such option may be exercised upon the Contractor giving three (3) months notice in writing by prepaid registered post to the owner at 19 York Street Sydney each such notice to specify the item or items which the Contractor proposes to purchase. The purchase price in each and every case shall be the residual value at the time of such purchase calculated in accordance with the figures set out in or subsequently added to the Schedule to this Agreement in accordance with subclause (b) of clause 1 hereof.
>
> (b) The purchase money shall be paid to the Owner in cash upon the exercise of such option.

(c) When the Contractor in pursuance of subclause (a) and (b) of this clause has purchased all the buildings and plant (with the exception of road motor vehicles and tractors) specified in or subsequently added to the Schedule to this agreement the Owner shall if required in writing by the Contractor during the currency of this agreement

(i) request the Forestry Commission to transfer to the Contractor the said Permit and the said Licence and

(ii) request the Forestry Commission to maintain to the Contractor during the currency of this agreement a supply of timber to the extent previously provided for in sub-clause (d) of clause 1 hereof.

(d) The exercise from time to time of any option by the Contractor prior to the determination of the Agreement shall not affect the contractual rights of the parties hereto during the said period of ten years insofar as relates to the sale and purchase of sleepers and sawn timber.

(e) In the event of the said Permit and the said Licence being transferred to the Contractor in pursuance of sub-clause (c) of this clause the Contractor shall for a period of ten (10) years after the thirteenth day of July One thousand nine hundred and sixty two continue to sell and the Owner shall continue to purchase the whole of the sleepers and sawn timber referred to in sub-clause (c) of clause 2 hereof in accordance with the terms and conditions of this agreement insofar as they are applicable.

One or two preliminary observations will serve to show the course which their Lordships have thought it right to take in dealing with this appeal. First, sub-clauses 9 (a) and (b) are so worded that it is a matter of considerable difficulty to determine what is to constitute the "exercise" of the option in the sense of some act or event which is to fix the right of the appellant to take over the purchase items and the right of the respondent to have cash in exchange for them. It might be the giving of the option notice, or, possibly, the expiration of the time limited by the notice: on the other hand, it might be that, though a notice of the required length has to be given, no rights are created unless and until the purchase price is tendered at the date when the prescribed time has run out. The latter is the view that commended itself to the Full Court, and basing themselves upon it, they concluded that the appellant had never succeeded in exercising his option at all, because notice to terminate the Agreement had been given before any payment was made.

Both views were fully argued on the appeal: but it was conceded by the appellant's counsel that, while it was important to his case to establish that there had taken place a purchase of all the buildings and plant within the meaning of clause 9 (*c*), he could not claim any relief from the Equitable Jurisdiction which related merely to asserting the validity of the appellant's exercise of the option. Since the appellant had been in possession of all the buildings and plant of the saw mill at all relevant dates, there was nothing that the respondent could be called upon to do, even if there had been a valid exercise. It would have involved merely a transfer from lease and possession into ownership and possession. Nor would a bare declaration of right be an appropriate form of relief when the transaction, the validity of which was in issue, would amount if valid to no more than a sale of goods.

Having regard to these considerations and to the fact that other proceedings are, it seems, on foot or pending in other branches of the Supreme Court's jurisdiction, which proceedings relate to this same matter, their Lordships think that it would be preferable not to come to any conclusion upon the point whether or when the option of purchase was exercised. Instead they will address themselves to the question which is more directly appropriate to the Equitable Jurisdiction, whether, assuming that the appellant did purchase the buildings and plant under the option,

it can claim to be entitled to any equitable relief such as would compel the respondent to comply with clause 9 (*c*) and forward his requests to the Forestry Commission. It was this aspect of the matter to which the trial Judge directed his attention in dismissing the appellant's suit, and their Lordships are bound to say that on the facts that appeared at the trial it is difficult to see what other course he could have taken.

Assuming that the appellant did effect a purchase it is necessary to ascertain what is the earliest date at which that could have taken place. It first gave notice with regard to the purchase option by a letter dated 11th June, 1957. The notice was described in the letter as "three months' notice of . . . intention to exercise the option to purchase each and every item . . . ". By letter dated 11th September, 1957, it referred to the previous letter and stated "we hereby confirm the exercise of the option accordingly". On the 16th September another letter was sent which contained the words "without prejudice to our claim that we have validly exercised this option . . . we now give you a further three months' notice pursuant to clause 9 . . . of our intention to exercise the option to purchase . . ." Whatever the legal effect of these letters there is no doubt that up to that date the appellant had neither paid nor tendered any money in cash in respect of the items to be purchased. It had not therefore complied with the conditions of clause 9 (*b*).

The earliest date at which any payment can be said to have been made was the 16th December, 1957, the monies being provided under the terms of an agreement made by the parties' respective counsel on the 12th December in the course of arbitration proceedings. The terms of that agreement are not otherwise material. Before the 16th December however events had occurred which brought about a fundamental alteration in the position of the parties and of their respective rights and liabilities under the Agreement of 1956: for on the 25th November, 1957, the respondent had served on the appellant a written notice determining that Agreement at the conclusion of three months from the date of notice. The notice of determination was given under the power provided by clause 6 of the Agreement on the ground of breaches committed by the appellant, and when the suit came to trial it was conceded by the appellant's counsel that the Agreement had been effectively determined by this notice so as to expire on the 25th February, 1958, and that the appellant had committed a number of breaches of obligations under the Agreement which were listed in the respondent's defence and counter-claim.

The position in which the appellant stood at the trial with regard to the claim to have clause 9 (*c*) enforced in its favour can thus be stated as follows. It had on two occasions called on the respondent in writing to make the desired request to the Forestry Commission, on the 11th October, 1957, and on the 23rd December, 1957. By the first occasion no money had been paid, even if there had been in some sense an exercise of the option, so the respondent's obligation to implement clause 9 (*c*) could not have fallen due; on the second occasion, though money had been paid, an effective notice to determine the whole Agreement had been served by the respondent and the appellant was admittedly in breach of several of its obligations thereunder. Long before the trial took place the Agreement was at an end and no one could recall it into existence. In those circumstances could the appellant have any right to call on the Court to compel the respondent to perform clause 9 (*c*) in its favour?

In their Lordships' opinion it does not make any difference to the result whether the question is approached by enquiring if the contractual obligation imposed by clause 9 (*c*) subsisted at all in the light of what had happened by the 23rd December, 1957, or by enquiring if, assuming some obligation still subsisting, its nature and the circumstances were such as to justify a claim for specific performance. In either case the appellant's claim is unmaintainable. To take the contractual point first, it is impossible to regard clause 9 (*c*) as a mere consequential

appendage of the exercise of the option under sub-clauses (*a*) and (*b*) and therefore as something to be performed irrespective of the observance and enforcement of the rest of the obligations under the Agreement. This point is insisted upon in the judgment of the Full Court and their Lordships agree with it. "The Commissioner's obligations under clause 9 (*c*) (i) and (ii)", they say, "were in aid of the continued supply of sleepers and timbers until 1972 . . . It appears to us to be evident that the intentions of the parties was that if the Agreement was lawfully determined at any time during its currency all the rights of the parties should thereupon cease. Once the Company's obligation to supply and sell sleepers and timber to the Commissioner ceased any right that it otherwise had to the executory aspects of clause 9 ceased." It follows therefore that if the appellant had fallen into default through breaches of the Agreement and by so doing had brought down upon itself the notice of termination the respondent was by that fact discharged from compliance with a clause such as clause 9 (*c*) which was essentially part of a working scheme that had by then become abortive.

The appellant's position is, to say the least, none the stronger if it is judged as an applicant for specific performance and its claim for this special relief is tested by the equitable principles that apply to such a claim. It might be a difficult task to enumerate all the separate aspects in which the claim is liable to be defeated on grounds of equity. It is sufficient for the decision of this case to identify two of them. A plaintiff who asks the Court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of inter-dependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations. The case of *Measures Bros.* v. *Measures* [1910] 1 Ch. 336, [1910] 2 Ch. 248 is a familiar instance of this principle. The appellant in this case has not been able to deny or at any rate has not denied that it was in default in several respects at the time when the respondent served upon it the notice of termination. Secondly, where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are in fact part of the consideration for the undertaking of the defendant that the plaintiff seeks to have enforced. Here the appellant could never show that it was ready and willing to perform its share of the Agreement of 1956: for its breaches had brought upon it the notice of determination which precluded it for good from doing anything more in furtherance of that Agreement.

It was sought in argument to withdraw the appellant's case from what was said to be the full vigour of these equitable considerations by saying that the specific relief asked for in respect of clause 9 (*c*), was not specific performance "proper", on the ground that that phrase ought to be confined to the specific performance of agreements which were not intended in their nature to be the final instrument regulating the mutual relations of the parties. Now it is true that on one occasion Lord Selborne, L.C., did advert to such a distinction, stating that "the common expression 'specific performance' as applied to suits by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed" (see *Wolverhampton and Walsall Railway Co.* v. *London & North Western Railway Co.*, L.R. 16 Eq. 433 at p. 439). The same distinction has been adverted to in a case in the High Court of Australia—*Williamson* v. *Lukey*, 45 C.L.R. 282.

Their Lordships are of opinion however that this distinction between executory and executed agreements (to adopt Lord Selborne's nomenclature for this occasion) in connection with the jurisdiction to grant specific performance does not suggest any line of argument that can be of assistance to this appellant. The distinction certainly cannot

be taken as warrant for the idea that the jurisdiction to give specific relief by ordering the performance of particular acts is confined to the enforcement of agreements that are executory in this sense: nor can it mean that when a Court is invited to order specific performance of an agreement which is not executory or some part of that agreement it should not pay attention to considerations as to the conduct and position of the plaintiff which are similar to those it attends to in the "proper" cases. Lord Selborne in the passage referred to made only the broad distinction between the class of executory agreements, such as agreements for the sale of land and marriage articles, and the principles applicable to specific performance of them on the one hand and on the other a very different class of agreement, which he described as "ordinary agreements for work and labour . . . hiring and service and things of that sort". Such a division leaves uncategorised a great many agreements of various kinds which are not inherently unsuitable for specific performance in the sense that contracts for work and labour, hiring and service are normally regarded as being by their very nature so unsuitable. As to this intermediate class it does not appear to their Lordships that there is any obvious reason why, even if their terms do not call for the execution of a further instrument regulating the rights of the parties, the equitable right to specific relief in respect of them should be tried by principles which are in any way different from those applicable to executory agreements "proper".

The most that the appellant's argument could amount to was that since it was not asking for specific performance "proper" in seeking the enforcement of clause 9 (*c*) the defaults attributable to it need not necessarily be fatal to its right to relief. The only answer that that can receive is that, unless the Court is to ignore equitable principles altogether in considering the right to specific relief in the present case, the relief sought cannot be granted.

It follows that the appeal against the dismissal of the appellant's suit cannot succeed.

At the trial of the suit the respondent obtained no relief on its counter-claim. The learned Judge did not consider that there was a case made out for any intervention by a Court of Equity. On appeal however the Full Court reversed the decree dismissing the counter-claim and made an order against the appellant to deliver up possession of the land described in the respondent's occupation permit. In their view the facts did show a case for aiding the respondent by specific order and injunction. The surrender of such possession is the inevitable consequence of the termination of the Agreement and the failure of the appellant to obtain a transfer of the permit to itself. If the appellant cannot succeed on its appeal the order made on the counter-claim must stand. There seems to be no dispute about this and no argument to the contrary was submitted to their Lordships.

For the reasons set out their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

(39436) Wt. 8109—53 100 3/61 D.L.

In the Privy Council

AUSTRALIAN HARDWOODS PTY. LIMITED

v.

THE COMMISSIONER FOR RAILWAYS

DELIVERED BY LORD RADCLIFFE

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