

Standard Portland Cement Company Pty. Limited and Another *Appellants*

v.

Colin Elliott Good -- -- -- -- -- *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER 1982

Present at the Hearing:

LORD KEITH OF KINKEL
LORD EDMUND-DAVIES
LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD TEMPLEMAN

[*Delivered by* LORD TEMPLEMAN]

This appeal involves three associated problems of construction, rectification and estoppel.

On 2nd November 1979 Mr. Howes, an executive general manager of the second appellants, Blue Circle Southern Cement Limited, reached agreement in principle for the sale to the respondent, Mr. Good, of various items of equipment and parcels of land at the price of \$350,000. The vendors were the first appellants, Standard Portland Cement Company Pty. Limited, a wholly-owned subsidiary of the second appellants. The equipment sold to Mr. Good included chattels and fixtures situate on land belonging to and retained by the vendors at the site of the Maldon Cement Works, Brogan's Creek Quarry, Portland Cement Works and other locations. The land sold to Mr. Good was the site of the vendor's Charbon Cement Works. There was situate at the Charbon Cement Works a building known as the 'O' Mill which housed a substantial cement mill which weighed 100 tons when empty. In the course of the present litigation Waddell J. sitting in the Supreme Court of New South Wales (Equity Division) considered all the relevant authorities and came to the conclusion, which is not now challenged, that the building and the mill housed in the building and its ancillary equipment, all of which were known as the 'O' Mill, were fixtures which pass with the land unless they are expressly excluded.

It was the intention of the appellants and Mr. Good that the 'O' Mill should be excluded from the sale by the appellants of the Charbon land to Mr. Good. In a letter dated 5th November 1979 Mr. Howes set out in detail the agreement in principle which had been reached with

Mr. Good. Among certain items excluded from the sale Mr. Howes specified: "2(a) 'O' Mill, spares and building and other equipment indicated on Schedule given to you on Friday (2.11.79)". It was the intention that the appellants who thus reserved to themselves the 'O' Mill should remove the 'O' Mill from the Charbon land. This was an undertaking of some magnitude which the learned judge on the evidence considered would take about seven weeks. It was agreed as Mr. Howes set forth in his letter dated 5th November 1979 that "5(b) Mr. C. Good and Associates be given the opportunity to quote for removal of the 'O' Mill at Charbon" as contractors on behalf of the appellants. By telex dated 8th November 1979 Mr. Good agreed to the terms set forth in the letter from Mr. Howes dated 5th November 1979. In an internal memorandum dated 12th November 1979 Mr. Howes wrote to another employee of the appellants giving instructions for the necessary contracts and other documents to be prepared to carry into effect the agreement which had been negotiated in principle between Mr. Howes and Mr. Good. The memorandum suggested: "(3) Right of access—this must work both ways as BCSC has to remove the 'O' Mill from the land being purchased by Mr. Good and likewise Mr. Good has to remove the equipment from Brogan's Creek, the ropeway and from other buildings on the western side of the railway lines. It is suggested that the contract should contain a clause giving access for a reasonable period, but stipulating that plant, etc. to be removed must be completed within 12 months from exchange of contracts". By a letter dated 13th November 1979 Mr. Good proposed that his total purchase price of \$350,000 should be apportioned between the various items which he was purchasing in the manner indicated in that letter. The sum of \$85,000 was apportioned to the Charbon land. The agreement which provided for the purchase by Mr. Good from the appellants of chattels and equipment is dated 23rd November 1979. By clause 3 Mr. Good covenanted "to remove all the goods hereby sold within twelve months from the date hereof except such goods as may be situated on land being sold to the buyer by the seller and property in the goods shall be deemed to have passed upon removal".

The agreement for the purchase by Mr. Good from the appellants of the Charbon land was dated 3rd December 1979. There was no express exclusion of the 'O' Mill but clause 9 of the special conditions provided: "Should completion be effected before the expiration of twelve months from the date hereof the Purchaser will grant the Vendor licence to enter upon the property for the purpose of removing the 'O' Mill situated thereon such removal to be effected in any event within 12 months from the date hereof".

In a letter dated 4th December 1979 Mr. Howes reminded Mr. Good: "You were going to let me have your estimate for the cost of removing the 'O' Mill together with an indication of time and receipt of this information would be appreciated in due course".

There was a discussion between Mr. Good and Mr. Howes on 29th August 1980 and by a letter dated 3rd September 1980 Mr. Howes referred to those discussions and confirmed to Mr. Good as follows:—

"(a) You are requested to take immediate action to arrange for the removal of the plant and equipment being purchased by you at our Maldon Cement Works.

"(b) Provided BCSC is satisfied with your performance in removing the equipment purchased by you at our Maldon Cement Works, we will be prepared to enter into a contract with you for the removal of the 'O' Mill from Charbon Cement Works.

"(c) You were to forward me a letter confirming that there would be no change in your quotation for the cost of removing the 'O' Mill regardless of whether the point of delivery is Berrima or Maldon.

(d) Your alternate proposal for financial contras for the cost of removing the 'O' Mill against the balance of payments owing under the contract for the Charbon plant, etc. is not acceptable."

Mr. Good did not object to that letter or deny that it summarised the effect of the conversation which had taken place on 29th August. In the result the responsibility for further delay in removing the 'O' Mill was assumed by Mr. Good. As soon as he removed the equipment from the Maldon Works to the satisfaction of the appellants, he would obtain acceptance of his quotation for the removal of the 'O' Mill from the Charbon land. The appellants could not begin to remove the 'O' Mill in the meantime without being in breach of the undertaking to accept Mr. Good's quotation provided that he satisfactorily performed his obligation of removing equipment from the Maldon Works. By 5th November 1980 Mr. Good had done nothing and Mr. Howes in a letter of that date reminded Mr. Good of his covenant to remove the equipment which he had purchased and continued: "On that basis your contract expires on the 23rd November 1980, and it would appear to us that you would have very little hope of completing your obligations by this date. Accordingly we would appreciate advice as to your intentions in this regard to this matter". Mr. Good replied on 26th November 1980 saying that certain equipment would be removed by mid-January. He continued: "Re the further extension of time for the removal of the goods purchased in the overall package, we beg your indulgence of a further period of twelve months. This, I am sure, will benefit both parties to future prosperity If you recall my comments twelve months ago, that with a situation that we were undertaking at the time, there would need to be some give and take on both sides and I feel that this should be fair to both parties". By that date Mr. Good was in breach of his contractual obligation to remove all his equipment by 23rd November 1980. It was impossible for the appellants to remove the 'O' Mill by their contractual date of 3rd December 1980. Both parties were content that the contractual dates should not be adhered to. Thus on 4th December 1980 Mr. Howes asked that the entire Maldon site be cleared by mid-January and for a time-table for removal of plant and equipment at other locations and said: "Upon receipt of the information requested a firm decision will then be given regarding the extension of time as outlined in your letter of the 26th in the meantime would you please proceed with work at Maldon".

On 27th January 1981 and again on 13th February 1981 Mr. Howes complained that Mr. Good was not proceeding with the work of removing equipment from the Maldon land. On 18th February 1981 Mr. Good wrote a letter in which after referring to his contractual obligation to remove equipment from the Maldon land by November 1980 he undertook to begin work at Maldon by 18th March and to man the site with sufficient equipment and manpower to complete the removal of all equipment by 18th June. If Mr. Good had fulfilled these undertakings satisfactorily then the appellants would have been under an obligation to accept his quotation for the removal of the 'O' Mill in accordance with the terms of the letter dated 3rd September 1980. By July 1981 however Mr. Good had still not removed all the equipment from the Maldon site. On 16th July 1981 the appellants, losing patience, informed Mr. Good ". . . the existing situation cannot be allowed to continue any longer and it appears you now leave us no alternative but to engage other contractors to remove your equipment from site at your cost". Mr. Good having failed to complete the removal of the equipment from the Maldon land satisfactorily, there was no longer any obligation on the appellants to consider accepting his quotation for the removal of the 'O' Mill. The appellants accordingly opened negotiations with the Broken Hill Proprietary Company Limited ("B.H.P.") for the sale of the

'O' Mill to B.H.P. and the assignment to B.H.P. of the right to remove the 'O' Mill from the Charbon land. There were three visits to the site of the 'O' Mill by B.H.P. representatives in July and August 1981 and, as the learned judge found, by the end of August Mr. Good was well aware that there was a proposal for the 'O' Mill to be removed for some purpose in which B.H.P. was engaged. On 7th September 1981 Mr. Good orally offered to purchase the 'O' Mill from the appellants for \$50,000 in cash. On 11th September 1981 B.H.P. offered \$180,000 for the 'O' Mill and on 15th September 1981 Mr. Good was informed by the appellants that they had contracted to sell the 'O' Mill to B.H.P. There were some further negotiations between the appellants and B.H.P. and finally on 9th October 1981 B.H.P. placed a firm order for the 'O' Mill and a binding contract was entered into.

Also on 9th October 1981 Mr. Good apparently consulted his solicitors and was unfortunately advised that the 'O' Mill which was never intended to be his property, which was worth \$180,000 and for which he himself had offered \$50,000, had fallen into his lap by reason of the appellants' failure to remove the 'O' Mill by 3rd December 1980, a failure for which Mr. Good was responsible and of which he had made no prior complaint.

On 13th October 1981 Mr. Good issued a summons claiming an injunction restraining the appellants from entering on the Charbon land and removing the 'O' Mill. By an amended cross-claim dated 28th October 1981 the appellants sought rectification of the contract for the sale of the Charbon land dated 3rd December 1979 by inserting at the end of the description of the property sold the words "excluding thereout the 'O' Mill, its building and associated equipment". The appellants also sought an order restraining Mr. Good from interfering with their right of access to the Charbon land for the purpose of removing the 'O' Mill. On 12th November 1981 Waddell J. gave judgment in favour of Mr. Good. The appellants appeal with leave of the judge to Her Majesty in Council.

The appellants submit that upon the true construction of the contract dated 3rd December 1979, and in particular special condition 9, ownership of the 'O' Mill was retained by the appellants out of the Charbon lands agreed to be sold to Mr. Good. As a necessary incident of the retained ownership of the 'O' Mill, the appellants reserved the right to enter on the Charbon land and remove the mill. Condition 9 imposed on the appellants a contractual obligation to remove the 'O' Mill by 3rd December 1980, but a breach of that contractual obligation could only sound in damages (if any) or expose the appellants to proceedings seeking an injunction ordering them to remove the 'O' Mill.

In his judgment Waddell J. rightly came to the conclusion: "It is perfectly clear . . . that the 'O' Mill . . . was to be excluded from the sale". Nevertheless he also concluded that after 3rd December 1980: "If (Mr. Good) is able to dispose of the mill profitably (he) is entitled to do so as the owner". Their Lordships are unable to agree with this view. If the 'O' Mill was excluded from the sale, Mr. Good never became the owner. Special condition 9 is only consistent with the exclusion of the 'O' Mill from the land sold to Mr. Good and *ex abundanti cautela* the appellants are entitled to the rectification which they seek and which makes clear that which is expressed in the correspondence and implicit in the contract. If the 'O' Mill is excluded from the sale, the appellants have at all times been and still are the owners of the 'O' Mill. That ownership could not and did not pass to Mr. Good on 4th December 1980 merely because the 'O' Mill had not been removed by that date. If ownership of the 'O' Mill remains with the appellants, they are entitled as incident of that ownership to enter

and remove the 'O' Mill. Mr. Good is protected because he can require the appellants to remove the 'O' Mill; he has never sought to do this or objected to the continued presence of the appellants' 'O' Mill on his land.

Their Lordships also consider that Mr. Good is estopped from preventing the removal of the 'O' Mill. Condition 9 required the 'O' Mill to be removed by 3rd December 1980. But in the negotiations and correspondence in August 1980 Mr. Good made it clear that the appellants need not remove the 'O' Mill by 3rd December 1980 and need take no steps to remove the 'O' Mill until Mr. Good had exercised an opportunity to prove that he could satisfactorily remove his equipment from the Maldon land. By November 1980 when Mr. Good sought and obtained an extension of the time limited for fulfilment of his obligations it was impossible for him to remove his equipment by his contractual date of 23rd November 1980 and it was equally impossible for the appellants to remove the 'O' Mill by 4th December. Both sides waived the contractual dates. Thereafter Mr. Good was entitled to require the appellants to remove the 'O' Mill but only on reasonable notice to do so. Mr. Good gave no such notice. On the contrary in August and September 1980 by offering to purchase the 'O' Mill for \$50,000 and by allowing the appellants to negotiate with B.H.P. he led the appellants to believe that they were still entitled to remove the 'O' Mill. In reliance on that belief the appellants contracted to sell the 'O' Mill to B.H.P. and to assign their right to remove the 'O' Mill to B.H.P. Waddell J. said: "The conduct of the plaintiff was an acquiescence in the assertion by the first defendant of its claimed right to remove the mill rather than any representation that the right existed". In their Lordships' view the conduct of the plaintiff was a classic example of estoppel by acquiescence.

In the result their Lordships will humbly advise Her Majesty that the appeal be allowed, the order of Waddell J. discharged and that judgment be entered for the appellants on their cross-claim. Mr. Good must pay the costs to be taxed of the appellants in the proceedings before Waddell J. and in the proceedings before the Board.

In the Privy Council

**STANDARD PORTLAND CEMENT
COMPANY PTY. LIMITED
AND ANOTHER**

v.

COLIN ELLIOTT GOOD

**DELIVERED BY
LORD TEMPLEMAN**