Sir Owen Dixon: a Strict and Complete Legalist?

His Contract Decisions Examined

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Chapter Seven — Shorter Case Studies

Cohen v Cohen\(^1\)

The first contracts case decided by Dixon J in the High Court was *Cohen v Cohen.*\(^2\) There a separated but not divorced couple was in dispute over various amounts of money claimed by Mrs Cohen. The item in dispute which raised contractual issues concerned an arrangement whereby before marriage the husband promised to pay the wife £100 per year paid quarterly as a dress allowance. Although the husband initially paid this allowance, by the time of the action he was in arrears to the tune of £275 and this was the amount claimed by the wife.

Justice Dixon noted that the statement of claim alleged no consideration for this promise and that, since a contract to marry ‘probably’ had been made before this promise to pay a dress allowance had been made, the intended marriage could not be consideration for that promise. If he was wrong on this point, Dixon J suggested that the defence could be amended to plead the Statute of Frauds. But, to Dixon J both these points only arose if and only if the arrangement was intended to create legal relations. ‘I think it was not so intended. The parties did no more, in my view, than discuss and concur in a proposal for the regular allowance to the wife of a sum which they considered appropriate to their circumstances at the time of marriage.’\(^3\)

The authorities relied upon by Dixon J were *Balfour v Balfour*\(^4\) and *Rose & Frank Co v Crompton & Bros Ltd.*\(^5\) In *Balfour*\(^6\) a couple married in 1900 and lived in Ceylon. In 1915 they returned for a visit but the husband returned home alone because Mrs Balfour had some medical problems. She intended to return to Ceylon but in the meantime the parties made an arrangement that he would pay her £30 a month until she returned. However she failed to return, the parties separated and Mrs Balfour claimed the money owing under the agreement. At trial consideration was found for the agreement. On appeal to the Court of Appeal all the judges found that there was

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\(^1\) (1929) 42 CLR 91 (‘Cohen’).
\(^2\) (1929) 42 CLR 91.
\(^3\) Ibid 96 (Dixon J).
\(^4\) [1918–19] All ER 860 (‘Balfour’).
\(^5\) [1924] All ER 245 (‘Rose & Frank’).
\(^6\) [1918–19] All ER 860.
no intention to create a binding contract. Lord Justice Warrington analysed the situation as one where the couple agreed to what would be necessary for her to maintain herself while she remained in England but that there was no evidence that either wanted to be bound by an agreement that did not take into account possible changes in the circumstances of both parties — namely, that there was no intention to create a contract. Lord Justice Duke accepted that the parties could have made a binding agreement but that in a marriage relationship the courts would be unlikely to find an intention to create a contract. Lord Justice Atkin did not think it prudent or wise for courts too readily to find arrangements between married couples to be binding contracts and that in most of these agreements there was no intention to be legally bound. While Dixon J did not comment on the wider issue of whether or not agreements between married couples would, normally, be seen as creating contracts, his decision fits squarely within the facts of Balfour and the stated requirement for an intention to create legal relations which he did not find on the facts.

In Rose & Frank two companies with a long and profitable business relationship drew up a document to put their relationship on a clearer footing. After spelling out what would normally have been seen as the rights and obligations of the respective parties the document concluded as follows:

This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the ... parties concerned, to which they honourably pledge themselves with the fullest confidence — based on past business with each other — that it will be carried through by each of the ... parties with mutual loyalty and friendly co-operation.

Subsequent to this document being drawn up the defendant became unhappy with the efforts of the plaintiffs and terminated the arrangement. The plaintiffs sought damages for breach of contract. The trial judge found for the plaintiffs and held the document to be legally binding. In the Court of Appeal Bankes LJ made it clear that an intention to create legal relations was necessary for the formation of a valid contract. He went on to add that, in

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7 Ibid 862 (Warrington LJ).
10 Ibid.
11 [1924] All ER 245.
12 Reproduced in [1924] All ER 245, 247.
the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow. In the case of agreements regulating social engagements it equally follows almost as a matter of course that the parties do not intend legal consequences to follow.\textsuperscript{13}

While this is a wider formulation than that applied by Dixon J in \textit{Cohen}\textsuperscript{14} in that it postulates almost a default rule about intention and social agreements, it certainly would include fact situations similar to those in \textit{Cohen}\textsuperscript{15} and \textit{Balfour}.\textsuperscript{16} Lord Justice Bankes went on to add that while it might seem improbable that commercial actors should not want a document setting out their considerable business relationship in some detail to have legal effect, it was certainly open to the parties to do exactly this.

Lord Justice Scrutton agreed that an intention to create legal relations was necessary for the formation of a valid contract and that this would normally be implied in a business agreement and not implied in family and social ones. But he, too, agreed that if business parties wanted to frame documents in terms that expressly disavow any intention to create legally binding relations they could do so.\textsuperscript{17} Similar sentiments were expressed by Atkin LJ\textsuperscript{18} and were endorsed, on appeal, by the House of Lords.\textsuperscript{19}

In \textit{Cohen}\textsuperscript{20} Dixon J applied in a non-controversial way the requirement for an intention to create legal relations for the formation of a legally binding contract. On the facts it is difficult to dispute his finding that there was no such intention in this case and, in any event, the facts were sufficiently similar to those in \textit{Balfour}\textsuperscript{21} to have applied that case directly. The requirement for such an intention had been made clear by successive Court of Appeal decisions and confirmed by the House of Lords. Justice Dixon applied this test and, in line with the general caution that was embodied in his judicial method, avoided a general discussion about whether or not social agreements and those made by married couples (or those contemplating marriage)

\textsuperscript{13} [1924] All ER 245, 248 (Bankes LJ).
\textsuperscript{14} (1929) 42 CLR 91.
\textsuperscript{15} Ibid.
\textsuperscript{16} [1918–19] All ER 860.
\textsuperscript{17} [1924] All ER 245, 249–50 (Scrutton LJ).
\textsuperscript{18} Ibid 252 (Atkin LJ).
\textsuperscript{19} Ibid 257 (Lord Phillimore).
\textsuperscript{20} (1929) 42 CLR 91.
\textsuperscript{21} [1918–19] All ER 860.
would embody such an intention. It is difficult to describe Dixon J’s judgment in *Cohen*\textsuperscript{22} as anything other than being legalistic.

**Land Development Company Ltd v Provan**\textsuperscript{23}

In *Provan*\textsuperscript{24} the defendant Provan in defending a claim for instalment money owing on a contract for the sale of land raised the defence of illegality because the negotiations for the sale and the signing of the contract all took place on a Sunday, which meant that the contract was voidable because it was an illegal contract according to the provisions of the *Sunday Observance Act 1677*.

Section 1 of the act provided that ‘noe tradesman, artificer workeman labourer or other person whatsoever shall doe or exercise any worldly labour, business or worke of their ordinary callings upon the Lords day or any part thereof (works of necessity and charity onely excepted).’\textsuperscript{25}

The Full Court of the Supreme Court of New South Wales held that the contract came within the Act and found for Provan. The company appealed to the High Court. The Court (Gavan Duffy, Rich, Starke and Dixon JJ) reversed the decision of the Supreme Court, holding that the company did not come within the terms of the Act.

The words ‘tradesman, artificer workeman labourer or other person whatsoever’ have received a construction which is settled by authority. We are not at liberty to give to the expression ‘other person whatsoever’ the wide meaning which it might receive in a statute of to-day. It must be taken to refer only to persons who are *ejusdem generis* with tradesmen, with artificers, with workmen or with labourers.\textsuperscript{26}

The judges referred to a number of authorities in support of these contentions — *Sandiman v Breach*,\textsuperscript{27} *Peate v Dicken*,\textsuperscript{28} *R v Cleworth*,\textsuperscript{29} *Palmer v Snow*,\textsuperscript{30} *Smith v Sparrow*\textsuperscript{31} and *Hawkey v Stirling*.\textsuperscript{32} The first four cases illustrated a propensity in the courts to treat this legislation restrictively by limiting the range of persons who came within it. The latter two cases involved an agent selling nutmeg as part of his normal

\textsuperscript{22} (1929) 42 CLR 91.
\textsuperscript{23} (1930) 43 CLR 583 (‘Provan’).
\textsuperscript{24} Ibid.
\textsuperscript{25} Reproduced in (1930) 43 CLR 583, 586.
\textsuperscript{26} (1930) 43 CLR 583, 587 (Gavan Duffy, Rich, Starke and Dixon JJ).
\textsuperscript{27} (1827) 7 B & C 96; 108 ER 661.
\textsuperscript{28} (1834) 1 CB & R 422; 149 ER 1145.
\textsuperscript{29} (1864) 4 B & S 927; 122 ER 707.
\textsuperscript{30} (1890) 1 QB 725.
\textsuperscript{31} (1827) 4 Bing 84; 130 ER 700.
\textsuperscript{32} [1918] 1 KB 63.
trading activity and an amusement parlour owner running games with prizes as part of his normal trading activity, respectively. Both were found to come within the Act.

The High Court held that the land agent was not dealing in the equivalent of sale of goods which meant that he did not come within the Act. The High Court’s decision that land sales did not come within the Act was consistent both with the restricted interpretation of the Act given by a line of authorities and the spirit of those decisions which was to limit the application of the Act quite strictly.

*Wendt v Bruce*\(^\text{33}\)

The plaintiff vendor, Bruce, entered into a series of agreements with the defendant purchaser, Wendt, to sell 1,747 acres of farming land to Wendt and to enter into a share-farming arrangement over the land. The sale was to be completed on 1 March 1928. Wendt went into possession and planted a crop. Bruce failed to produce a clear title on the nominated date and on 15 October 1928 Wendt gave notice to Bruce that he required completion by 5 November 1928 and made time of the essence. The defendant Wendt continued in possession after 5 November to harvest the crop that had been planted, a job that took till March of 1929 to complete. Bruce was ready to complete on 12 December 1928 but on 20 December 1928 Wendt wrote to Bruce that he declined to complete the purchase given Bruce’s failure to complete by 5 November 1928.

The trial judge, Richards J., held that Wendt had, in effect elected not to rescind within a reasonable time of the fixed date and on appeal to the Full Court of the Supreme Court of South Australia this decision was affirmed. The High Court (Gavan Duffy CJ, Starke, Dixon and McTiernan JJ, Evatt J dissenting because of a different interpretation of the facts) found that the defendant by continuing his possession of the land and harvesting the crop had elected to affirm and had not put an end to the contract.

Justice Dixon noted that Wendt had a choice of either affirming the contract or bringing it to an end when Bruce did not meet the deadline of 5 November to complete the contract after notice had been given that time was of the essence.

\(^{33}\) (1931) 45 CLR 245 (‘*Wendt*’).
But after failure to comply with a notice, the party not in default cannot himself exercise rights which he possesses only if the contract continues on foot and, after he has done so, treat the contract as nevertheless discharged by default. The law enables him to choose between rights; and that choice is exercised, whatever he may desire, when he proceeds to do what he could only lawfully do in virtue of one of the two sets of rights between which he may elect.\textsuperscript{34}

He cited Lord Blackburn in \textit{Scarff v Jardine}\textsuperscript{35} in support of this reasoning:

\begin{quote}
whether he has intended it or not, if he has done an unequivocal act — I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way — the fact of his having done that unequivocal act to the knowledge of the person concerned is an election.\textsuperscript{36}
\end{quote}

For Dixon J the purchaser Wendt could not at the same time harvest the crop, thus indicating that he was affirming the contract, and at the same time claim that he was electing to rescind the contract. The very act of harvesting the crop indicated that he had affirmed the contract and once this choice was made he no longer had the option of rescinding the contract.\textsuperscript{37}

\textit{Wendt}\textsuperscript{38} provides a clear illustration of Dixon J applying uncontroversial doctrines of law attested to by the House of Lords in a straightforward manner.

\textbf{Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd}\textsuperscript{39}

The Australian Provincial Assurance Association Ltd (‘Australian Provincial’) issued a policy of life assurance to one Evans to the value of £2,000. Australian Provincial then entered into a policy of reassurance with the Southern Cross Assurance Co Ltd (‘Southern Cross’) with Southern Cross agreeing to pay Australian Provincial £2,000 on the death of Evans. Australian Provincial sought payment from Southern Cross on the death of Evans. Southern Cross disputed the claim and by the time matter came to the High Court the major dispute between the parties revolved around the question of whether the reinsurance upon life was only a contract to indemnify the reinsured against liability under the primary policy and no more, or whether, instead, the

\begin{thebibliography}{99}
\bibitem{34} Ibid 257 (Dixon J).
\bibitem{35} \[1881–85]\ All ER 651. Lord Selbourne expressed similar sentiments to those of Lord Blackburn quoted by Dixon J at 655–6 and Lords Watson and Bramwell at 659 concurred with Lords Selbourne and Blackburn.
\bibitem{36} \[1881–85]\ All ER 651, 658 (Lord Blackburn).
\bibitem{37} (1931) 45 CLR 245, 257 (Dixon J).
\bibitem{38} Ibid.
\bibitem{39} (1935) 53 CLR 618 (‘Southern Cross’).
\end{thebibliography}
contract in this case imposed an obligation upon Southern Cross to pay Australian Provincial the money on the death of Evans.

The High Court found for Australian Provincial. Justice Dixon commenced his analysis by examining the legal history of life assurance. He noted that the Court of Chancery by the eighteenth century appeared to regard all insurance as necessarily being limited to indemnification of a loss actually suffered. By the nineteenth century this clearly applied to, for example, contracts for fire insurance which could be only contracts of indemnity. Life assurance contracts were affected by the passage of legislation \((\text{Life Assurance Act 1774 14 Geo. 111. c 48})\) which required an interest for an assurance contract to be valid. However the courts interpreted this as only imposing limits on otherwise valid contracts. The effects of this statute were well described by Bradley J, delivering the judgment of the United States Supreme Court in \textit{Connecticut Mutual Life Insurance Co v Schaefer}\(^{41}\) which was referred to by Dixon J.

It is generally agreed that mere wager policies — that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction — are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance ... with respect to lives, by the statute of 14 Geo. III c 48. ... But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion ... But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.\(^{42}\)

Both Dixon J\(^{43}\) and Bradley J\(^{44}\) recognised that the decision in \textit{Dalby v Life Insurance Co},\(^{45}\) and particularly the judgment of Parke B,\(^{46}\) made it clear that, in general, life insurance policies were not contracts of indemnity and that the \textit{Life Assurance Act 1774} required only an interest at the time the insurance was entered into but did not need to continue until death.

\(^{40}\) Ibid 623–37 (Rich, Dixon, Evatt and McTiernan JJ) and at 637–42 (Starke J). For reasons of brevity I will refer to Dixon J when discussing the joint judgment.

\(^{41}\) (1876) 94 US 457 (‘Schaefer’).

\(^{42}\) (1876) 94 US 457, 460 (Bradley J). The first three sentences in this quotation were quoted by Dixon J in \textit{Southern Cross} at 633–4.

\(^{43}\) (1935) 53 CLR 618, 635 (Dixon J).

\(^{44}\) (1876) 94 US 457, 462–3 (Bradley J).

\(^{45}\) [1843–60] All ER 1040; (1854) 15 CB 365; 139 ER 465.

\(^{46}\) [1843–60] All ER 1040, 1042–5 (Baron Parke).
Justice Dixon found that the interest in the life of Evans required by the law was satisfied by ‘existence at the time when reinsurance is effected of a primary insurance under which the reinsurer is liable as insurer’.\textsuperscript{47} He also acknowledged that while a contract of reinsurance could be a promise merely of indemnity, that this was not the case in the contract before the court.\textsuperscript{48}

In \textit{Southern Cross}\textsuperscript{49} Dixon J clearly identified and applied the authorities dealing with reinsurance contracts for life assurance in a non-controversial way. In addition, the case also highlights another aspect of his legalism — resisting answers to questions not directly before the court. In concluding his judgment Dixon J said the following:

Neither the pleadings nor the facts raise the question already referred to, whether, if the policy of primary insurance is at the time of the reinsurance voidable at the option of the insurer, he possesses an insurable interest sufficient to support the contract of reinsurance, and nothing that has been said in this judgment is intended to affect it.\textsuperscript{50}

\textbf{Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd}\textsuperscript{51}

Tramways Advertising Pty Ltd and Luna Park Ltd entered into a contract for advertising of the latter’s amusement park through the use of roof boards on trams run by Tramways Advertising. The contract was for three years with 53 roof boards to be displayed over 52 weeks over three summer seasons commencing in December 1935 and ending in the early part of 1938. The contract consisted of a contract note and a letter. On the letter a Tramways Advertising representative had written that ‘we guarantee that those boards will be on the tracks at least eight hours per day throughout your season’ and all the judges in the High Court accepted that this was a condition of the contract.

A dispute arose over the performance of the contract and it appeared that over the first two summer seasons the average period of display exceeded eight hours per roof board per day. However, it was conceded by Tramways Advertising that each and every board had \textit{not} been displayed for eight hours each and every day during those two summer seasons. The trial judge held that the contract imposed on Tramways

\textsuperscript{47} (1935) 53 CLR 618, 633–4 (Dixon J).
\textsuperscript{48} Ibid 634–6 (Dixon J).
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid 637 (Dixon J).
\textsuperscript{51} (1938) 61 CLR 286 (‘Tramways Advertising’).
Advertising the obligation of ensuring that each of the 53 boards was to be displayed for a minimum of 8 hours per day during the summer season and that this had not been done. On appeal the Full Court of the Supreme Court of New South Wales (Jordan CJ and Davidson J, Nicholas J dissenting) allowed the appeal. Chief Justice Jordan, with whom Davidson J concurred interpreted the contract, which had included statements to the effect that the average running time of the tram cars was eight hours, to mean that the average of each tram car bearing a roof board was to be taken separately over the season but should average a running time of at least eight hours to satisfy the clause as to running time contained in the contract. As Dixon J noted, Tramways Advertising had argued a third interpretation, that the clause meant that ‘if an average is taken over each season of the running time of all cars bearing the roof boards, it should be found to work out at not less than eight hours per car’. Indeed, Dixon J identified two further possible interpretations of the clause.

In the High Court Latham CJ, Rich J and McTiernan J in separate judgments agreed with the interpretation adopted by the trial judge — that is, that the running time clause imposed on obligation on Tramways Advertising to ensure that each of the 53 roof boards would be displayed for at least eight hours on each and every day of the summer season. In dissent, Dixon J adopted the interpretation favoured by the majority in the Supreme Court of New South Wales — that is, that it imposed an obligation on Tramways Advertising to ensure that the average of each car bearing a roof board must be taken separately over the season and that that average must be at least eight hours a day.

How did Dixon J come to his meaning of the clause and how does this fit into his conception of legalism?

In choosing among the various meanings proposed, it is impossible to do more than attach that interpretation to the contract which to the individual mind appears most favoured by the evidential considerations comprised under the three heads of grammatical construction, context and subject matter, when brought into combination. My own choice may be the result of giving greater weight to context and subject matter than to the exact grammatical construction which the language of the clause, isolated from other considerations, might seem presumptively to bear. But we are not dealing with phrases or expressions of a fixed prima-facie import. The clause is inartificial, an unstudied production in ordinary works. ‘A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary

52 Ibid 308 (Dixon J) (emphasis added).
53 Ibid 309 (Dixon J).
greatly in colour and content according to the circumstances and the time in which it is used’ (*Towne v Eisner* (1918) 245 US 418 at 425 per Holmes J). It may be suspected that in the case now in hand the living thought was itself incomplete and ill-considered. But the actual intention of the parties and the implications which are involved must be discovered from the entirety of the writings. The verbal skin in which the particular meaning has been encased does not appear to me incapable of containing either of the two rival intentions which respectively commended themselves to Jordan CJ and Davidson J, on the one hand, and to Nicholas J on the other. \(^5^4\)

It is no secret that the meaning of words is one of the most intractable problems facing anyone who deals with language. In the above extract Dixon J makes clear that ultimately a decision as to meaning will be subjective. At the same time, however, he also makes it clear that this subjective choice will take place within a framework of grammar, context and subject matter so that meaning is not going to be totally subjective. In other words, while meaning might be theoretically intractable it still has to be dealt with and Dixon J has provided a sophisticated response, acknowledging the essential subjectivity of finding meaning but placing this task into as objective and legalistic framework as possible. The mere fact that other judges, applying the same standards, came to another interpretation does not and cannot raise any doubts about the objective and legalistic approach adopted by Dixon J.

**McDermott v Black** \(^5^5\)

Black, the purchaser/plaintiff in this litigation, was induced by the fraudulent misrepresentations of McDermott, the vendor/defendant, to enter into a contract to buy shares in shares in a company that ran a dance hall. Before the completion date Black wrote to McDermott complaining of misrepresentations about the business. However, after some negotiations Black agreed to withdraw his allegations in return for McDermott giving him an extension of time to complete the purchase. Black was not able to complete and McDermott rescinded the contract. Black then commenced an action in the Supreme Court of Victoria in deceit. At stake was £2,000 worth of bonds that Black had paid to McDermott as part of the purchase price (while McDermott counterclaimed for damages to the value of £8,400). McDermott denied the allegations and relied on the agreement that in consideration for giving Black additional time to complete the purchase Black had agreed to withdraw all the allegations.

\(^{54}\) (1938) 61 CLR 286 at 309–10 (Dixon J).

\(^{55}\) (1938) 63 CLR 161 ("McDermott").
At trial Martin J found that the correspondence which it was claimed constituted the contract to withdraw the allegations was too vague and uncertain to enforce. On appeal the High Court disagreed and found that a contract had been made. However, the High Court divided on the effect of the contract with Latham CJ, in dissent, finding that the contract was merely one to withdraw allegations and not one that could amount to a defence against the allegations made by Black. The remaining judges held that the contract amounted to a promise not to sue in respect of the misrepresentations or to be a release of any cause of action in respect of them.  

For Dixon J the applicable law was to be understood in the following way.

The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one. ... The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the performance, then there is no discharge unless and until the promise is performed.  

For Dixon J this proposition of law was established by Flockton v Hall in 1849. This case involved a dispute over a patent and revolved around issues of pleading. In deciding this point Coleridge J said the following: ‘Now there may be two kinds of accord: the making of the agreement itself may be what is stipulated for, or the doing the things mentioned in the agreement.’  

Clearly, this is the proposition advanced by Dixon J who then added that the ‘decision of the Court of Appeal in British Russian Gazette &c Ltd and Talbot v

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56 Ibid 175–6 (Starke J), 183–9 (Dixon J). Rich and McTiernan JJ concurred with Dixon J.
57 Ibid 183–5 (Dixon J).
58 (1849) 14 QB 380; 117 ER 150 (‘Flockton’).
59 Ibid 386 (Coleridge J). Erle J gave a short judgment to the same effect: at 387.
Associated Newspapers Ltd⁶⁰ ... does not appear to me to be inconsistent with the received doctrine that no new cause of action is given by an accord executory."⁶¹ In British Russian Gazette⁶² the plaintiff company and a director brought actions for slander and libel respectively against the defendant newspaper. Talbot, who had set up the British Russian Gazette, purported to settle his claim and that of the company for the sum of 1,000 guineas, but did so without the authority of the other director who repudiated the settlement. On a counterclaim by the newspaper for damages for breach of warranty against Talbot his defence was that the settlement was an accord without satisfaction, that this created no legal obligation and, thus, no enforceable implied warranty existed.

Lord Justice Scrutton, with whom Slessor LJ agreed,⁶³ interpreted the case as one where the executory promise was made but that it was to have immediate effect. In other words, the agreement made by the parties that Talbot (and the company, ignoring for the moment the issue of authority) would settle for the payment of money was intended to have immediate effect and thus amounted to accord and satisfaction.⁶⁴ Lord Justice Scrutton agreed that an accord executory was of no effect.⁶⁵ Similar sentiments were expressed by Greer LJ, the third member of the bench.⁶⁶ The topic of accord and satisfaction has its complications but in this case Dixon J clearly followed earlier decisions of the English courts.

Fink v Fink⁶⁷

Here an estranged couple entered into an agreement which, among other things, provided that the husband would allow the wife to continue living in the matrimonial home, on certain conditions, for twelve months and that, if she fulfilled these conditions he would not bring divorce proceedings in that period. Unfortunately, the couple did not seem able to live together with the wife leaving the home and the husband instituting divorce proceedings within six months. As part of her action she

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⁶⁰ [1933] All ER 320 (‘British Russian Gazette’).
⁶¹ (1938) 63 CLR 161 184 (Dixon J).
⁶² [1933] All ER 320.
⁶⁴ Ibid 327–8 (Scrutton LJ).
⁶⁵ Ibid.
⁶⁶ Ibid 330–2 (Greer LJ).
⁶⁷ (1946) 74 CLR 127 (‘Fink’).
claimed damages for her husband’s alleged breach of contract for, amongst other things, the loss of the chance or opportunity of a reconciliation with her husband during the twelve months. This was the major contractual dispute between the parties.

The High Court (Starke, Dixon and McTiernan JJ, Latham CJ and Williams J dissenting) decided that her claim for damages failed. Justice Starke found that the contract did not contain a promise to give her the chance of a reconciliation68 while Dixon and McTiernan JJ (in a joint judgment) held that only nominal damages could be given for breach of the promise alleged as the loss alleged was not one for which pecuniary compensation could be assessed. Chief Justice Latham and Williams J found that the breach, if proved, would have entitled her to real and not just nominal damages.69

Justice Dixon commenced his analysis70 by referring to Pollock CB in *Hamlin v Great Northern Railway Co*71 where the Chief Baron said that damages for ‘the disappointment of mind’ were not available in breach of contract cases.72 He then went on to say:

The chance of a reconciliation if ... the agreement had been punctually performed is one depending on all the fortuitous elements upon which the healing or the exacerbation of domestic differences depends. They are not like contingencies or conditions which are recognised for some commercial purpose, such as the chances which are made the subject of insurance; they are not aleatory, such as are habitually made the subject of the calculation of odds, or, at all events, of the giving and taking of odds; they bear no resemblance to the claim of one of a very limited number of competitors to receive the consideration to which he is contractually entitled in the distributive award of definite and material benefits. ... There is no actual relation in human affairs between the tolerance or intolerance of one spouse for another and the material considerations which we are accustomed to estimate in money, and there is no common understanding or convention under which any such relation is presumed to exist.73

Justice Dixon saw this case as fitting into Vaughan Williams LJ’s admonition in *Chaplin v Hicks*74 that there ‘are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any

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68 Ibid 138 (Starke J).
70 For brevity’s sake reference will be made to Dixon J only when referring to the joint judgment of Dixon and McTiernan JJ.
71 (1856) 1 H & N 408; 156 DR 1261.
72 (1856) 1 H & N 408, 411 (Pollock CB); 156 DR 1261 1262 (Pollock CB).
73 (1946) 74 CLR 127 143 (Dixon and McTiernan JJ).
74 [1911–13] All ER 224 (‘Hicks’).
assessable loss resulting from the breach’. However, in coming to their conclusion that damages could be assessed in this case for loss of the chance of a reconciliation between husband and wife Latham CJ and Williams J had the following to say.

Since the case of Chaplin v Hicks it cannot be said that the fact that a benefit under a contract depends upon a contingency, and the fact that an element in the contingency is the exercise of the will of a particular person or persons, are sufficient to make the damages for the deprivation of such a benefit irrecoverable because too remote …

Has Dixon J applied Chaplin v Hicks correctly? In Hicks the plaintiff Chaplin was one of 50 women chosen by popular vote to participate in a competition in which 12 would be chosen and given theatrical engagements for three years. By an admitted breach the defendant Hicks denied Chaplin the chance to participate in the competition. At trial the judge held that Chaplin was entitled to damages which were assessed by a jury at £100. Hicks appealed and the matter came before the Court of Appeal.

As noted above Vaughan Williams LJ had said that where loss was dependent on the ‘mere unrestricted volition of another’ it might be impossible to assess and award damages. But he was quick to add that in the case before him he was satisfied that a jury might reasonably value the loss of the chance suffered by Chaplin. Chaplin was one of 50 chosen women and Vaughan Williams LJ must have decided that the choice to be made by Hicks of choosing 12 out of these 50 women was not one that rested on the mere unrestricted volition of Hicks. In addition, Vaughan Williams LJ found that the chance of being one of the 12 chosen was a thing that could be valued by anyone. If we compare this with the situation in Fink the similarities and differences become apparent. First, Mrs Fink was the only person with whom her husband could reconcile. So, she was in a better situation than the plaintiff in Hicks. But secondly, it is unlikely that anyone would feel comfortable in assessing the value of Mrs Fink’s chance of reconciliation.

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75 Ibid 227 (Vaughan Williams LJ), quoted in Fink (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ).
76 (1946) 74 CLR 127, 135 (Latham CJ and Williams J) (footnote omitted).
78 Ibid.
79 Ibid 227 (Vaughan Williams LJ).
81 (1946) 74 CLR 127.
In response to an argument by counsel Fletcher Moulton LJ in Hicks\textsuperscript{83} rejected the suggestion that if the result of a contract depended on the volition of an independent person no damages would flow from breach but then added the following.

I have come to the conclusion that where a man has a right to belong to a limited class of competitors for something of value, and that right is taken away from him, it is always open to the jury, and in fact their duty, to assess the damage he has sustained.\textsuperscript{84}

Now while Fletcher Moulton LJ’s reference to individual volition might be seen as qualifying Vaughan Williams LJ’s reference to individual volition, when it is put into the context of his conclusion about a person’s contractual right as a member of a limited class of competitors it becomes clear that this does not challenge Dixon J’s understanding of Hicks.\textsuperscript{85} Lord Justice Fletcher Moulton was merely indicating that individual volition will not necessarily mean that damages cannot be assessed and that in the limited example that was before him the fact that the defendant had to exercise individual choice by itself did not render the assessment of damages too remote or inappropriate. As was suggested by Dixon J there is a vast gulf between a competition such as occurred in Hicks,\textsuperscript{86} where it is in the self-interest of the person doing the choosing to pick the best person, and the completely different situation of the possibility of a husband rekindling his affections for his wife.

The third judge, Farwell LJ, agreed that the ‘mere existence of a contingency depending upon the volition of a third person is not enough to make the damages impossible of assessment’.\textsuperscript{87} But he, too, found for the plaintiff Hicks because of the nature of the agreement as a competition where the Hicks had a real chance of being selected. He cited in support Richardson v Mellish\textsuperscript{88} where the plaintiff was assured that if the master of a trading vessel hired for four voyages to India died during the contract he, the plaintiff, would be made master. The original master died with two voyages remaining but the plaintiff was not awarded master. The court found for the plaintiff. Such an example suggests that for Farwell LJ there had to be a real chance of success and one that any reasonable person would be happy to calculate. Could the

\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid 229 (Fletcher Moulton LJ).
\textsuperscript{85} Ibid.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid 231 (Farwell LJ).
\textsuperscript{88} (1824) 2 Bing 229.
same be said of the chance that a husband would be reconciled to his wife if she lived with him for six months?

Once the facts in *Hicks*\(^\text{89}\) and the reasoning of the judges there are examined it becomes clear that, at the very least, Dixon J’s application of that decision and the reasoning of the judges is a plausible reading of that case. As he makes clear, the cases preceding and succeeding *Hicks*\(^\text{90}\) all involved business or relatively hard-headed decisions. *Fink*\(^\text{91}\) by comparison involved such idiosyncratic and utterly unpredictable decision-making by the husband that it seems reasonable and defensible to decide, as did Dixon J, that it did not fit within the rule established by *Hicks*.\(^\text{92}\)

**Carr v J A Berriman Pty Ltd\(^\text{93}\)**

On 3 May 1950 Berriman Pty Ltd contracted to build a large building for Carr on the latter's land. It was a term of the contract that Carr was to level the site so that it would be ready for building. Another term provided that the steel for the building was to be supplied by Carr to Berriman Pty Ltd to be fabricated to satisfy the building specifications. The site was to be excavated and prepared by 29 May 1950 with a completion date of 1 March 1951.

However, the property had not been prepared by 29 May and was not so prepared by the time (31 July 1950) Berriman Pty Ltd purported to rescind the contract. The weather up to 29 May had been fine but June and July of 1950 were exceptionally wet and made excavation work difficult. On 7 June 1950, pursuant to the contract, Berriman Pty Ltd had entered into an agreement with a third party for the fabrication of the steelwork in connection with the building and this was communicated to Carr. Both parties commenced actions claiming damages for breach of contract and at trial before Owen J of the Supreme Court of New South Wales Berriman Pty Ltd succeeded on both actions with damages of £2,992 awarded. An appeal to the Full Court of the Supreme Court by Carr was dismissed (Street CJ and Herron J, Sugerman J dissenting). Carr then appealed to the High Court.


\(^{89}\) [1911–13] All ER 224.  
\(^{90}\) Ibid.  
\(^{91}\) (1946) 74 CLR 127.  
\(^{92}\) [1911–13] All ER 224.  
\(^{93}\) (1953) 89 CLR 327 ('*Berriman*').
The High Court (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ) affirmed the
decision of the Full Court and dismissed the appeal. The main judgment was handed
down by Fullagar J, with all the other judges (including Dixon CJ) agreeing with his
judgment.\footnote{Ibid 340 (Williams J), 340 (Webb J), 352 (Kitto J). In his judgment Fullagar J stated that the ‘Chief
Justice has authorized me to say that he agrees with this judgment’: at 352.} Justice Fullagar’s judgment will be treated as a proxy for Dixon CJ in this
case.

After examining the facts Fullagar J held that Carr’s failure to excavate the site and
the repudiation of Carr’s obligation to deliver the structural steel for fabrication
amounted to breaches of the contract that had been committed by 31 July 1950 when
Carr purported to rescind the contract. Justice Fullagar noted that the courts below had
approached the matter as if the failure to prepare the site were the only breach
committed by Carr before 31 July. As Fullagar J was to make clear the law on this
was clear even if its application to the facts in this case was controversial.

Where a contract contains a promise to do a particular thing on or before a specified
day, time may or may not be of the essence of the promise. If time is of the essence,
and the promise is not performed on the day, the promisee is entitled to rescind the
contract, but he may elect not to exercise this right, and an election will be inferred
from any conduct which is consistent only with the continued existence of the
contract. If time is not of the essence of the promise, the promisee is not entitled to
rescind for non-performance on the day. If either (a) time is not originally of the
essence, or (b) time being originally of the essence, the right to rescind for non-
performance on the day is lost by election, the promisee can, generally speaking, only
rescind after he has given a notice requiring performance within a specified
reasonable time and after non-compliance with that notice.\footnote{Ibid 348–9 per Fullagar J (emphasis in original).}

In support of this statement of the law Fullagar J cited three cases. In the first,
\textit{Taylor v Brown},\footnote{(1839) 2 Beav 180, 183; 48 ER 1149, 1150 (Lord Langdale MR).} which involved a sale of land, Lord Langdale MR said the
following.

\begin{quote}
[W]here the contract and the circumstances are such that time is not … of the essence
of the contract — in such a case, if any unnecessary delay is created by one party the
other has a right to limit a reasonable time within which the contract shall be
perfected by the other … and where the time has been thus fairly limited, by a notice
stating that within such a period that which is required must be done or otherwise the
contract will be treated as at an end.\footnote{(1839) 2 Beav 180, 183; 48 ER 1149, 1150 (Lord Langdale MR).}
\end{quote}
The second case, the House of Lords decision in *Stickney v Keeble*,\(^98\) also involved a sale of land. In this case the vendor, Keeble, was guilty of delay and after some correspondence the purchaser, Stickney, for whom the delay was of some inconvenience (a fact known to Keeble), gave a final notice to Keeble that if the sale were not completed within 14 days he would treat the contract as at an end and demand the return of his deposit. The Law Lords (Earl Loreburn, Lord Atkinson, Lord Mersey, Lord Parker and Lord Parmoor), found for Stickney. Lord Parmoor’s discussion of the law dealing with notices was consistent with the exposition of the law by the other judges.

Where time is not made of the essence of a contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay a distinct written notice by the other that he shall consider the contract at an end if it be not completed within a reasonable time to be named would be treated in equity as binding on the party to whom it is given; but a reasonable time must be allowed.\(^99\)

The third case, the Court of Appeal decision in *Panoutsos v Raymond Hadley Corporation of New York*,\(^100\) involved a sale of flour where a term of the contract required the buyer, Panoutsos, to provide confirmed credit. The buyer did not provide this form of credit but the sellers, Raymond Hadley, waived this condition and made one delivery. The sellers then purported to cancel the remainder of the contract for breach without giving any notice. At trial before Bailhache J it was held that the waiver bound the sellers for the period covered by the waiver and that the sellers could not cancel the remainder of the contract without giving reasonable notice of their intention to cancel. On appeal to the Court of Appeal, Viscount Reading, with whom Cozens-Hardy MR and Scrutton LJ agreed, described the legal situation facing the sellers in this way.

> It is open to a party to a contract to waive a condition in the contract which is inserted for his benefit. If the sellers chose to ship without the protection of a confirmed bankers' credit, they were entitled to do so, and the buyer performed his part of the contract by paying for the goods shipped, though there was no confirmed bankers' credit, inasmuch as that condition had been waived. If at a later stage the sellers wished to avail themselves of the condition precedent, in my opinion there was nothing in the facts to prevent them from demanding the performance of the condition, provided they gave reasonable notice to the buyer that they would not make a further shipment unless there was a confirmed bankers' credit. If they had done that and the buyer had then failed to comply with the condition, he would have

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\(^{98}\) [1914–15] All ER 73.

\(^{99}\) Ibid 83 (Lord Parmoor) (quoting from Sugden on Vendors and Purchasers (14th ed): at 268).

\(^{100}\) [1916–17] All ER 448.

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been in default, and the sellers would have been entitled to cancel the contract without being liable to any claim by the buyer for damages.\textsuperscript{101}

These cases clearly support the formulation of law enunciated by Fullagar J.

But, for Fullagar J, this understanding of the law did not resolve the legal issue before him because the acts of the builder after 29 May, the date on which a prepared building site was to be ready, could only be interpreted as confirming the contract.\textsuperscript{102} And, given that rain had then interrupted any possible excavation work, it was not possible to argue, as had been argued successfully in \textit{Associated Newspapers Ltd v Bancks},\textsuperscript{103} that the failure to carry out the excavation work amounted to continuing conduct that indicated a refusal to be bound by the contract.\textsuperscript{104} But when the other breach of the owner was taken into account the situation took on another complexion. By reneging on his agreement to allow the builder to fabricate the steel for the building, the owner had denied the builder approximately £450 profit (one quarter of the estimated profit on the entire transaction) as well as rendering the builder liable to damages of the same amount for breach of its own contract with its sub-contractor. While Fullagar J thought that this breach alone might have amounted to such repudiation as justified rescission, the combination of the two breaches meant that any doubt about rescission was removed.\textsuperscript{105}

An election not to rescind for failure to deliver the excavated site on the due date could not deprive that failure of all significance. When a second breach occurs, the two combined may have a significance which it might not be legitimate to attach to the first alone. The position when Mr Oser’s letter [of 19 July informing the builder that the owner had, in breach of the contract, contracted with a third party to fabricate the steel for the building] was received was this. The site had not been delivered on the due day. It was covered with heavy material. Nothing had been done towards putting it into the state required for delivery, further material had been placed on adjoining land on which it had been proposed to place the material then on the site itself, and repeated requests to the building owner had failed to produce any assurance that anything would be done within a reasonable time. Possession of the site was, of course a vitally important matter. It is in this state of affairs that the building owner announces that he has engaged another contractor to carry out a large part of the work comprised in the contract. A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract

\textsuperscript{101} Ibid 450 (Viscount Reading).
\textsuperscript{102} (1953) 89 CLR 327, 349 (Fullagar J).
\textsuperscript{103} (1951) 83 CLR 322 ("Bancks").
\textsuperscript{104} (1953) 89 CLR 327, 349–50 (Fullagar J).
\textsuperscript{105} Ibid 351 (Fullagar J).
seriously, that he is prepared to carry out his part of the contract only if and when it suits him.\footnote{106}

This is a neat application of the principle enunciated in Bancks.\footnote{107} In that case Bancks had agreed to provide a full-page comic drawing for insertion in a Sunday newspaper put out by Associated Newspapers. As part of the agreement the Associated Newspapers undertook to display the drawing on the front page of the comic section of that paper. All went well with the transaction for two and a half years but then for three consecutive Sundays Bancks’ comic drawings were placed on the third page of the comic section. In response to this Bancks gave notice that he was no longer bound by the contract. The High Court in a unanimous judgment (Dixon, Williams, Webb, Fullagar and Kitto JJ) found that the requirement to place the comic drawings on the first page of the comic section of the Sunday paper was a condition of the contract and that the three successive failures to do so entitled Bancks to treat the contract as discharged.\footnote{108}

In Berriman\footnote{109} there was a similar breach of a condition (to place the fabrication of the steel for the building with the builder) as well as a continuing breach of another condition. Justice Fullagar’s judgment applies the decision in Bancks\footnote{110} and develops it by indicating that breaches of two separate conditions only strengthened the conclusion that the defaulting party no longer intended to be bound by the contract. This is an illustration of the bounded creativity that was part of Sir Owen Dixon’s legalism.

\textit{Maybury v Atlantic Union Oil Company Ltd}\footnote{111}

In this case Maybury, the appellant/respondent, was a radio producer who entered into a number of agreements to make a series of 52 radio shows for the plaintiff/respondent Atlantic Union. As part of the arrangement Maybury was to be paid £200 for each show of which not less than £100 (or £5,200 over the life of the arrangement between the parties) was to be used as prize money for contestants on the radio shows. It was a term of one of the agreements that if Maybury paid out less than

\footnote{106} Ibid 351 (Fullagar J).
\footnote{107} (1951) 83 CLR 322.
\footnote{109} (1953) 89 CLR 327.
\footnote{110} (1951) 83 CLR 322.
\footnote{111} (1953) 89 CLR 507 (‘Maybury’).
£5,200 over the series of productions that underpayment became a debt owing to Atlantic Union.

In the event Maybury paid out only £3,908\(^{112}\) and Atlantic Union brought an action seeking £1,492, which was the total of the underpayment of prize money. Maybury counter claimed alleging an oral collateral agreement that in consideration of Maybury entering into the main agreements Atlantic Union warranted that the radio programs produced by Maybury would not be broadcast so as to compete with radio programs presented by Bob Dyer (a famous radio figure who had previously produced radio programs for Atlantic Union). Maybury claimed that Atlantic Union breached this agreement by broadcasting his programs in direct competition with Bob Dyer and claimed £10,000 damages. At trial before Kinsella J of the Supreme Court of New South Wales Maybury’s claim for damages for breach of a collateral contract were rejected because the alleged warranty was inconsistent with the main contract. Judgment was handed down for £1,492 for Atlantic Union. Maybury appealed to the High Court.

In the judgment of the Court delivered by Dixon CJ\(^{113}\) Maybury’s argument was rejected because the oral agreement alleged was seen to conflict with the main agreement and could not, therefore, stand with it.

A collateral agreement made in consideration of a main agreement cannot effectively subsist unless it is consistent with the main agreement. Once an agreement is made in writing it is treated, unless the parties are shown otherwise to intend, as the full expression of their obligations. If it is established that the writing was intended to contain only part of a fuller agreement it may be otherwise. That, however, is not the present case. But it may be established that an entirely separate agreement was made by the parties. One of them may give a collateral promise in consideration of the other entering into the principal agreement. But if such a collateral agreement is to have effect as a contract it must be consistent with the provisions of the main agreement, the making of which by the other party provides the consideration. If the promise sought to modify, control or restrict the principal agreement it would detract from the very consideration which is alleged to support the promise.\(^{114}\)

In support of this analysis of the relationship between main and collateral contract Dixon CJ referred to the well-known case of Hoyts Pty Ltd v Spencer\(^{115}\) and quoted

\(^{112}\) All the figures have been rounded out to the closest pound.

\(^{113}\) The other judges sitting were Fullagar and Taylor JJ.

\(^{114}\) (1953) 89 CLR 507, 517 (Dixon CJ).

\(^{115}\) (1919) 27 CLR 133 (‘Hoyts’), quoted.
from the judgment of Isaacs J in support of his position.\textsuperscript{116} That case, which involved a dispute between a landlord (Spencer) and the tenant (Hoyts) over whether a provision in a collateral contract that the landlord would not exercise rights to terminate the lease, clearly supports the position adopted by Dixon CJ. In \textit{Hoyts}\textsuperscript{117} Chief Justice Knox expressed similar sentiments to those of Dixon CJ reproduced above, as well as citing several authorities in support.\textsuperscript{118} Justice Isaacs after a lengthy examination of the issue came to the same conclusion as Dixon CJ\textsuperscript{119} while Rich J, the other sitting judge, agreed with both Knox CJ and Isaacs J.\textsuperscript{120}

\textit{Maybury}\textsuperscript{121} provides a clear example of Dixon CJ applying the applicable authority in a non-controversial way.

\textbf{\textit{Milne v Attorney-General for Tasmania}}\textsuperscript{122}

Milne was one of 19 persons who had settled land under the \textit{Commonwealth and State War Service Land Settlement Agreement Act 1945} (Tas) and had then brought an action against the Attorney-General for Tasmania and other persons and government boards for breach of a claimed contract. The Tasmanian government had under the terms of the Act put around a series of circulars from 1946 to 1949 indicating to approved persons (normally discharged members of the armed forces) some of the conditions that would govern settlement of land provided to these persons in the form of leaseholds. In particular, one circular suggested that the value of improvements such as houses, water supply, etc, would be calculated at 1946 prices in the calculation of the rent to be paid for particular properties. However, partly in response to perceived legal problems and partly as a result of a change in government policy, by the time formal leases were offered to Milne\textsuperscript{123} (and the other affected persons) in June 1952 the actual cost of improvements made by the state of Tasmania were in excess of the prices that would have held in 1946. This meant that the rent payable by

\begin{footnotesize}
\begin{enumerate}
\item[(116)] (1953) 89 CLR 507, 517–18 (Dixon CJ).
\item[(117)] (1919) 27 CLR 133.
\item[(118)] Ibid 138–9 (Knox CJ).
\item[(119)] Ibid 144–8.
\item[(120)] Ibid 148 (Rich J).
\item[(121)] (1953) 89 CLR 507.
\item[(122)] (1956) 95 CLR 460 (\textit{\textquoteleft Milne\textprime}).
\item[(123)] Milne had gone into occupation in December 1948 pending the State government’s completion of the legal framework surrounding the settlement of his and similar landholdings.
\end{enumerate}
\end{footnotesize}
Milne was substantially higher than would have been the case had 1946 prices applied.

Milne claimed that a contract had been created and that the terms relating to the calculation of the rent and, in particular, how improvements were to be calculated, were those outlined in the various circulars issued between 1946 and 1949.

At trial before Morris CJ of the Supreme Court of Tasmania it was held by the Chief Justice that the passage of the War Service Land Settlement Act 1950 (Tas), which was passed to clarify the legal position of the government and of the scheme of settlement and under which the formal lease was offered to Milne in 1952, had the effect of wiping ‘the slate clean, so that from its commencement the rights and obligations of all concerned should depend upon the provisions contained in it and depend on nothing else’.\textsuperscript{124} However, Milne contended before the High Court that its claimed contractual rights had not been effected by the legislation. This was rejected by the High Court.\textsuperscript{125}

The fundamental reason why the plaintiff fails to establish a contract is that the documents on which he relies, and in particular the two circulars of 22\textsuperscript{nd} December 1948 and 14\textsuperscript{th} April 1949, cannot be construed as contractual documents. On their face, they are not offers capable, if accepted, of giving rise to a contract. They are not put forward as offers at all, and they do not invite acceptance or rejection. They are no more, and purport to be no more, than statements of present Government intention and present Government policy.\textsuperscript{126}

In addition, the High Court held that the documents, apart from not evincing an intention to create legal relations, could not have formed a contract because the documents dealt ‘with some only of the terms which must of necessity be settled before a binding contract can exist’.\textsuperscript{127} Neither could the court supply terms to fill the gap.

Here the transaction ultimately contemplated was of a very complex character, and it is clear that the law cannot supply its terms. The conditions on which the settler originally entered were never precisely defined, and it is obvious that much was necessarily left, and understood as being left, to the discretion of the board and of the Crown. The very fact that what is ultimately contemplated is a ‘perpetual lease’ seems to us to be enough to dispose of the argument that a contract came into being. That term has in some of the States a statutory meaning, but it has no meaning at

\textsuperscript{124}(1956) 95 CLR 460, 471 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ), (summarising the essence of Morris CJ’s judgment at trial).

\textsuperscript{125} The High Court, Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ, handed down a single judgment.

\textsuperscript{126}(1956) 95 CLR 460, 472 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).

\textsuperscript{127}Ibid 473 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).
common law, and it does not describe a form of tenure provided for by the statute law of Tasmania. 128

In support of this contention the judgment referred to Stimson v Gray, 129 where an agreement between the parties that included reference to ‘reservations, exceptions, restrictions, stipulations, and conditions’ which were not defined was held not to be a contract because the missing terms were material and could not be supplied by a court. 130 These missing terms were similar in nature to the rights and obligations that were missing in the agreement alleged by Milne.

In Milne 131 Dixon CJ applied the non-controversial legal principle that statements of government policy clearly evincing no intention to create legal relations could not amount to an offer which could be accepted to form a legally binding contract. In a similar vein Dixon CJ applied the non-controversial legal principle that courts cannot and will not supply essential terms to a contract.

**Ballas v Theophilos** 132

In *Ballas* 133 the surviving partner of a partnership which ran a milk bar in Collins Street, Melbourne, appealed against the decision of Smith J of the Supreme Court of Victoria. The survivor, Ballas, claimed that he had validly exercised an option contained in the partnership agreement to acquire the share of the deceased partner, the husband of the defendant executrix, Theophilos. The partnership deed did not provide any specific time during which the option was to be exercised and Ballas purported to exercise the option 16 months after the death of the deceased partner. The trial judge held that considering the circumstances 16 months did not satisfy the common law implication of a term of a reasonable period, dismissed the action and declared that the partnership between Ballas and the deceased was dissolved upon the death of the deceased. The High Court (Dixon CJ, McTiernan and Williams JJ) affirmed the trial judge’s decision on appeal.

For Dixon CJ the appeal was confined to narrow limits despite the breadth of the trial judge’s decisions and the arguments of counsel. ‘This appeal appears to me to
turn upon a very limited question. It is an appeal from a judgment given by Smith J in
an action the hearing of which occupied many days and the decision in which covered
a number of matters. 134

For Dixon CJ the limited question was ‘whether the option was duly exercised by
the plaintiff as the surviving partner’. 135 According to Dixon CJ the plaintiff Ballas
through a voluminous correspondence made it clear from his partner’s death that he
wished to purchase his partner’s share but only on terms which did not, on their face,
meet the detailed requirements set out in the partnership deed for the exercise of the
option. 136 It was only after 16 months that the plaintiff purported to make a formal
exercise of the option in the terms set out in the partnership deed. This delay,
according to Dixon CJ, took the purported acceptance outside what could be
considered a reasonable time.

For that reason there was no exercise within due time of the option conferred by the
clause in the partnership deed. Beyond that it seems unnecessary to go. Without going
into any further question I think that the foregoing requires the dismissal of this
appeal. 137

When compared to the lengthier and more elaborate judgment of Williams J the
emphasis placed by Dixon CJ on only deciding what was necessary to decide the case
is starkly highlighted. 138 For example, Williams J dealt at length with the issue of
various aspects surrounding the nature of options despite twice acknowledging that
the discussion was not needed to decide the matter before him. 139

_Ballas_ 140 is a fine illustration of Dixon CJ giving effect to an important aspect of
legalism, the avoidance of unnecessary legal discussion of points not central to the
resolution of the case before the court.

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134 Ibid 194 (Dixon CJ).
135 Ibid 195 (Dixon CJ).
136 Ibid.
137 Ibid 197 (Dixon CJ).
138 Williams J came to the same conclusion as Dixon CJ, and McTiernan J, the third member of the
bench, gave a short judgment to the same effect: ibid 198–211 (Williams J), 198 (McTiernan J).
139 (1957) 98 CLR 193, 207 and 209 (Williams J).
140 Ibid.
Cooper v Ungar

Here Ungar, the plaintiff vendor, brought an action against the defendant purchaser Cooper, for £6,125 after Cooper had failed to complete the purchase of Ungar’s property. The contract price of the land was £18,750 with a 10% deposit and the balance to be paid on completion. Cooper paid the deposit but failed to complete the purchase. Notwithstanding repeated requests by Ungar’s solicitors Cooper persisted in his default. Clause 14 of the contract provided, inter alia, that if the purchaser failed to complete the purchase the deposit would be forfeited and the vendor would be entitled to sell the property in any way possible and claim any shortfall between that sale price and the original contract price as liquidated damages.

It took Ungar almost 18 months and several abortive attempts at sale before the property was sold. The shortfall (taking into account the forfeited deposit) between the original contract price of £18,750 and the forced sale price was £6,125 and this was the amount claimed by Ungar from Cooper as liquidated damages pursuant to clause 14.

At trial before Richardson J and a jury Ungar was successful in her claim and this was affirmed on appeal to the Full Court of the Supreme Court of New South Wales. Cooper then appealed to the High Court. In a joint judgment the High Court (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ) affirmed the decision of the lower courts and dismissed the appeal.

Much discussion at trial and in the appeals was given over to the meaning of clause 14 and, in particular, whether that clause embodied a requirement that a sale take place within a reasonable time and two competing forms or implications that could give effect to this requirement. Chief Justice Dixon, however, refused to be sidetracked from the issue before him.

We can, I think, pass by the controversy which I have briefly described, for the reason that in our view on the facts there was no breach of such a condition, if it ever existed in either sense. ...

It is hardly necessary to say that we do not suggest that either of the implications should be made in cl. 14. It is a matter which on the facts does not arise for our

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141 (1958) 100 CLR 510 (‘Cooper’).
142 Ibid 514–16 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).
decision and it is better in such a matter to confine ourselves to the questions which the facts raise.\textsuperscript{143}

Cooper\textsuperscript{144} provides a wonderful illustration of the legalist desire to be cautious in judging by deciding only what is necessary to resolve the particular issue before the court and to avoid speculation on points of law that are not central to the legal dispute facing the judges.

\textit{International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company}\textsuperscript{145}

At the centre of this case was a badly performing hay baler. Members of the Carrigan firm had seen the machine during a visit to the Easter Show in Sydney in 1952 and had been advised by an International Harvester representative to see a company called Hassan & Kensell Pty Ltd in Gunnedah which sold International Harvester machines (and which later went into liquidation). Carrigan Hazeldene purchased the hay baler from Hassan & Kensell but the machine did not perform to according to expectations. Carrigan Hazeldene sued International Harvester for breach of warranty contained or implied in the contract of sale. International Harvester defended the action by denying that it had entered into a contract with Carrigan Hazeldene or that Hassan & Kensell had entered into the contract with Carrigan Hazeldene as the agent for International Harvester. Carrigan Hazeldene was successful at trial and was awarded damages but this was overturned on appeal to the Full Court of the Supreme Court of New South Wales, which ordered a new trial. Both sides appealed and the High Court in a joint judgment (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ) dismissed the appeal of Carrigan Hazeldene and allowed that of International Harvester with the result that verdict was given for International Harvester.

Central to the dispute before the High Court was the claim that Hassan & Kensell had contracted as agents for International Harvester. After examining the facts Dixon CJ held that there was no evidence that Hassan & Kensell had acted as agents for International Harvester or that there was 'holding out' from the latter company that Hassan & Kensell had authority to act as an agent.\textsuperscript{146}

\textsuperscript{143} Ibid 516 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).
\textsuperscript{144} Ibid.
\textsuperscript{145} (1958) 100 CLR 644 ("International Harvester").
\textsuperscript{146} Ibid 649–52 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).
No one supposes that the ‘distributing agent’ or ‘exclusive agent’ in a particular ‘territory’ for a proprietary commodity or specific kind of article or machine is there to put a ‘consumer’ into contractual relations with the manufacturer. In the case of any wide geographical distribution there is a general understanding of the practices of allotting territories, of zoning, of providing some regional superintendence of dealers or distributing ‘agents’ as well as the maintenance, and sometimes of the proper use, of the machine or article. None of this implies that the manufacturer or the head supplier contracts with the ultimate buyer or ‘consumer’ as vendor. In the present case it appears clear enough that the transaction was carried through on the basis that Hassan & Kensell Pty Ltd sold the baler to the plaintiff company and that the defendant company was not the contracting party. There is nothing in the letters which in face of the facts could possibly authorise the contrary conclusion.\(^{147}\)

Now while such sentiments might seem less convincing in a legal environment such as today’s, with a far greater emphasis on consumer protection, these views follow logically from the facts presented in the case and accord with the authorities, *Wheeler and Wilson v Shakespear*,\(^{148}\) *WT Lamb and Sons v Goring Brick Co Ltd*\(^{149}\) and *Kennedy v De Trafford*.\(^{150}\) The plaintiffs did try to make an argument about the terms of the contract but Dixon CJ said that given the finding about the absence of agency it would be ‘superfluous to discuss the terms of the contract’ and that this was a ‘matter that does not arise on the view we take of the case and need not be pursued’.\(^ {151}\)

In a fashion similar to the judgments in *Ballas*\(^ {152}\) and *Cooper*,\(^ {153}\) *International Harvester*\(^ {154}\) is another illustration of the legalist desire to be cautious in judging by deciding only what is necessary to resolve the particular issue before the court and to avoid speculation on points of law that are not central to the legal dispute facing the judges.

*Pirie v Saunders*\(^ {155}\)

Here the plaintiff/respondent Saunders brought an action against Pirie and his co-defendant/appellant Cripps for breach of an alleged agreement to grant a lease of a shop. Discussions had taken place between Saunders and the appellants about the

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147 Ibid 653 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).
148 (1869) 39 LJ Ch 36.
149 [1932] 1 KB 710.
150 [1897] AC 180.
151 (1958) 100 CLR 644, 653 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ).
152 (1957) 98 CLR 193.
153 (1958) 100 CLR 510.
154 (1958) 100 CLR 644.
155 (1960–61) 104 CLR 149 (‘Pirie’).
proposed lease but a formal lease was not created. By the time the matter had come before the High Court the central legal issue was whether notes about the proposed lease prepared by the appellants’ solicitor could amount to a note or memorandum to satisfy s 54A of the *Conveyancing Act, 1919* (NSW) through the operation of the ‘authenticated signature fiction’.

At trial Richardson J directed the jury that there was no concluded agreement between the parties capable of being enforced and a verdict was returned for Pirie and Cripps. On appeal to the Full Court of the Supreme Court of New South Wales this verdict was set aside with the majority (Owen and Collins JJ, Brereton J dissenting) deciding that the solicitor’s notes were capable of being regarded as a sufficient note or memorandum for the purposes of the Act. The High Court in a joint judgment (Dixon CJ, Fullagar, Kitto, Taylor and Menzies JJ) disagreed and reversed the decision of the Full Court.

Chief Justice Dixon described the authenticated signature fiction in the terms used by the Full Court as meaning that,

> if the name of the party to be charged (not being a signature in the ordinary sense of the word) is placed on the document said to constitute the written memorandum of the contract, it is to be treated as a signature for the purposes of the statute if such party expressly or impliedly indicates that he recognizes the writing as being an authenticated expression of the contract.\(^{156}\)

However, according to Dixon CJ, the Full Court had misapplied this doctrine.

With respect to those members of the Full Court who thought otherwise we are of opinion that their Honours’ decision pushes too far the principle applied in *Leeman v Stocks*\(^{157}\) and ... *Neil v Hewens*.\(^{158}\) ... Here there is an allegation of a prior concluded contract and the solicitor’s notes are said to constitute a note or memorandum of this contract. But they purport to be and are nothing more or less than a brief notation of his instructions for the preparation of a draft lease for submission to the respondent’s solicitor. Neither the existence of the document nor its contents are indicative of the existence of any binding contract.\(^{159}\)

In *Leeman*\(^{160}\) the vendor Stocks had put up for sale at auction a dwelling house. The vendor’s solicitor was unavailable and the auctioneer, acting as the agent of the vendor, had a draft contract drawn up and printed the vendor’s name on it. Leeman

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\(^{156}\) (1960–61) 104 CLR 149, 154 (Dixon CJ, Fullagar, Kitto, Taylor and Menzies JJ).

\(^{157}\) [1951] 1 All ER 1043 (‘*Leeman*’).

\(^{158}\) (1953) 89 CLR 1 (‘*Hewens*’).

\(^{159}\) (1960–61) 104 CLR 149, 155 (Dixon CJ, Fullagar, Kitto, Taylor and Menzies JJ).

\(^{160}\) [1951] 1 All ER 1043.
was the successful bidder and at the end of bidding he signed his name on the
document. Neither the auctioneer nor the vendor signed the document. Leeman
brought an action for specific performance and the vendor claimed that the document
was not a sufficient memorandum to satisfy the Law of Property Act 1925. Specific
performance was awarded by Roxburgh J.

In coming to this conclusion Roxburgh J referred to Lord Ellenborough's judgment
in Schneider v Harris161 where he had explained that a printed name on a document
could, in appropriate circumstances, be treated as a signature. He then referred to
Evans v Hoare162 and in particular the judgment of Cave J where that judge had
insisted that there needed to be a ‘memorandum of a contract, not merely the
memorandum of a proposal … ’ when using the authenticated signature fiction.163 He,
Roxburgh J, found that a ‘perfect agreement’ had been made in this case and that the
vendor was, thus, bound by the document prepared by the auctioneer with the
vendor’s name printed on it and then signed by the purchaser.164 This supports exactly
the proposition relied upon by Dixon CJ.

In Neill v Hewens165 the purchaser Neill sought specific performance of an
‘agreement’ between the purchaser and Hewens and Bradford, who were executors of
an estate which contained the property of the claimed sale. The plaintiffs were able to
obtain the signature of Bradford to the agreement for sale of the land but Hewens did
not sign it although it contained his printed name. At trial Roper CJ in Eq held that
Bradford acting alone could not bind the estate to sell the land and that the contract
was not enforceable against Hewens. The High Court, in a joint judgment (Dixon CJ,
Williams, Webb, Fullagar and Taylor JJ), affirmed Roper CJ’s decision. In particular,
they quoted with approval Roper CJ’s analysis of Evans166 and Leeman167 and the
requirement that the document which purportedly contains the authenticated signature

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161 (1814) 2 M & S 286; 105 ER 388 ("Schneider").
162 [1892] 1 QB 593 ("Evans").
163 [1951] 1 All ER 1043, 1046 (quoting Cave J in Evans).
164 Ibid 1049 (Roxburgh J).
165 (1953) 89 CLR 1 ("Hewens").
166 [1892] 1 QB 593.
167 [1951] 1 All ER 1043.
must be a complete contract.\textsuperscript{168} This decision is also in accordance with the principle enunciated in \textit{Pirie}.\textsuperscript{169}

\textit{Pirie}\textsuperscript{170} shows the careful examination of authorities and the detailed analysis of the principles contained in them that is central to the legalist endeavour.

\textbf{Ballantyne v Phillott}\textsuperscript{171}

Roberta Ballantyne had been in a relationship with Frank Phillott during which he transferred large sums of money to her. At the heart of the case was a dispute whether this money had been lent to Ballantyne or whether it had been a gift. At the break-up of the relationship Phillott commenced an action claiming over £31,000 but before it could be heard that action had been discontinued. Ballantyne and Phillott then both signed a document in the form of a statutory declaration that Phillott promised not to commence again such an action as the one that he had just discontinued, as well as waiving any rights or claims he had against Ballantyne. Subsequently Phillott commenced an action claiming the identical sum of over £31,000 and Ballantyne relied on a defence of accord and satisfaction as well as a claim that the money owing had been a gift.

Chief Justice Mansfield of the Supreme Court of Queensland found that £17,867 had been lent with the rest being a gift. He found no consideration for the alleged contract of accord and satisfaction. On appeal the High Court (Menzies and Windeyer JJ, Dixon CJ dissenting) affirmed the decision of Mansfield CJ.

Chief Justice Dixon commenced his judgment as follows:

This appeal has caused me great difficulty. The point in the case is, I suppose, whether the respondent plaintiff's cause or causes of action should be held extinguished by accord and satisfaction. A question of accord and satisfaction is seldom easy but the difficulty which I have felt is not traceable to the unsatisfactory nature of the criteria the law provides. It arises rather from an inability clearly to perceive what was happening at the critical time between the parties themselves and between them and the auxiliaries upon whose counsel and assistance they seem to have depended.\textsuperscript{172}

\textsuperscript{168} (1953) 89 CLR 1, 12 (Dixon CJ, Williams, Webb, Fullagar and Taylor JJ).
\textsuperscript{169} Ibid.
\textsuperscript{170} Ibid.
\textsuperscript{171} (1960–61) 105 CLR 379 (‘Ballantyne’).
\textsuperscript{172} Ibid 384-5 per Dixon CJ.
Indeed the difference of opinion between Dixon CJ on the one hand and Menzies and Windeyer JJ on the other turned on their interpretation of the relationship and dealings between the plaintiff and defendant respectively with one McDonough, who seems to have had the unusual role of confidant and counsellor to both parties. As can be seen in the judgments of Menzies and Windeyer JJ both judges had similar difficulties to those experienced by Dixon CJ in making sense of the facts in light of the confusing and self-serving evidence of all the parties in the dispute.\textsuperscript{173} \textit{Ballantyne}\textsuperscript{174} might tell us something of the foibles of humans but it does nothing to challenge the view that Dixon CJ's judgment was rendered as anything other than a strict and complete legalist.

\textit{Colyton Investments Pty Ltd v McSorley}\textsuperscript{175}

Colyton commenced a suit seeking specific performance of an agreement for the sale of a hotel against two executors of an estate in whom the property was invested. One of the respondent/defendants, J G McSorley had signed a printed form of contract but the other, his brother D R McSorley, had not done so. J G McSorley did not purport to sign on behalf of his brother but expected, or perhaps more accurately, hoped, that his brother would sign the printed form of contract.

At trial before Jacobs J of the Supreme Court of New South Wales the suit was dismissed and Colyton appealed to the High Court. In a joint judgment (Dixon CJ, Kitto and Windeyer JJ) the High Court dismissed the appeal and affirmed the judgment of Jacobs J.

Chief Justice Dixon agreed with Jacobs J that s 153(4) of the \textit{Conveyancing Act 1919} had the effect of denying one of several executors acting alone the power to sell the testator's land with the leave of the Supreme Court in its probate jurisdiction and that, since this leave had not been sought or given, a contract made with the signature of J G McSorley alone could not be made the subject of a decree for specific performance.\textsuperscript{176} But he added that, in the absence of such a provision, Colyton's claim for specific performance must have failed.

\textsuperscript{173} Ibid 393–8 (Menzies J), 399–400 (Windeyer J).
\textsuperscript{174} Ibid.
\textsuperscript{175} (1962) 107 CLR 177 (\textit{McSorley}).
\textsuperscript{176} Ibid 182 (Dixon CJ, Kitto and Windeyer JJ).
The case of *Lepard v Vernon* shows that, where one only of several executors has dealt with property of the estate, even though by an actual assignment, a court of equity will not as of course lend its aid for the effectuation of the transaction; it will insist upon being satisfied as to the propriety of the terms, and especially the price, before granting relief as against the estate and thus depriving the beneficiaries of the property.

In *Lepard* Grant MR said of a claim based on the assignment of property of an estate by one of several executors:

[T]his is a mere assignment of a chose in action by one of several executors, of which no use can be made, unless this court shall act upon it, and interfere to give the particular creditor an advantage against the other executors and the general creditors. That the court will not do.

Chief Justice Dixon then referred to *Sneesby v Thorne* as providing an ‘apposite illustration’ of this principle. In *Sneesby* one of two executors had entered into a contract of sale of a leasehold belonging to the estate in the expectation that the other one sanctioned the agreement and would sign it. The plaintiff Sneesby sought specific performance of the agreement but this was rejected by Wood V-C, whose judgment was affirmed on appeal. Wood V-C based his judgment on the fact that the price might not have been sufficient and on appeal Turner LJ agreed. In addition both Turner and Knight Bruce LLJ agreed that the court would not enforce such an agreement when it was clear that the executor who had signed the document had not intended to act alone and expected that the other executor, the defendant Thorne, would ratify the agreement.

In *Sneesby* executor A thought that he had executor B’s concurrence and would not have signed otherwise. In *McSorley* executor A thought that executor B would concur and would not have signed otherwise. The cases are similar because in both cases executor A wanted the concurrence of executor B — in the first he thought that

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177 (1813) 2 V & B 51; 35 ER 237 ("Lepard").
178 (1962) 107 CLR 177, 185 (Dixon CJ, Kitto and Windeyer JJ).
179 (1813) 2 V & B 51; 35 ER 237.
180 (1813) 2 V & B 51, 53; 35 ER 237, 238 (Grant MR).
181 (1855) 7 De GM & G 399; 44 ER 156 ("Sneesby").
182 (1962) 107 CLR 177, 185 (Dixon CJ, Kitto and Windeyer JJ).
183 (1855) 7 De GM & G 399; 44 ER 156.
184 (1855) 7 De GM & G 399, 401 (Wood V-C), 403 (Turner LJ); 44 ER 156, 157 (Wood V-C), 157 (Turner LJ).
185 (1855) 7 De GM & G 399, 402 (Knight-Bruce LJ), 403 (Turner LJ); 44 ER 156, 157 (Knight-Bruce LJ), 157 (Turner LJ).
186 (1855) 7 De GM & G 399; 44 ER 156.
187 (1962) 107 CLR 177.
he already had it and in the second he expected to get it. Here we have an example of minor creativity within the confines established by the case law.

Chief Justice Dixon also found that D R McSorley’s objection to the price might have been valid and that this would have allowed a court to exercise its discretion not to award a decree of specific performance and in doing so agreed with the judgments of Wood V-C and Turner LJ in *Sneeshy.* Again, this shows Dixon CJ applying the law in a manner consistent with the authorities.

**Conclusion**

The fifteen cases examined in this chapter deal with a variety of contractual issues and cover almost the entire period of Sir Owen Dixon’s tenure on the High Court. All display the careful reasoning, based on the authorities and a clear command of the principles to be found in them, which lies at the heart of Sir Owen’s strict and complete legalism. In several of the cases examined the caution which was a strong characteristic of Sir Owen’s judging is also exemplified. Sir Owen would only decide the legal point before him and was wary of speculative reasoning not necessary for the resolution of the legal dispute between the parties before the court.

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188 (1855) 7 De GM & G 399, 401 (Wood V-C), 403 (Turner LJ); 44 ER 156, 157 (Wood V-C), 157 (Turner LJ).
Chapter Eight — Doubtful Decisions

This chapter will examine those decisions which on their face raise doubts about Sir Owen Dixon’s fidelity to his self-proclaimed adherence to strict and complete legalism.

*Cameron v Hogan*¹

The plaintiff Hogan had been the Premier of Victoria leading a Labor Party government. Because of strong differences of opinion over measures to deal with the Depression Hogan was expelled from the Labor Party and disendorsed as a candidate for that party. Nevertheless, at the next election Hogan was returned to parliament but could not be elected as leader of the state parliamentary Labor Party nor, thus, as premier. Hogan sought a declaration that he was still a member of the Labor Party, that his exclusion was wrongful and that his disendorsement was unlawful. He asked for damages and an injunction to restrain his exclusion from the party.

In the Supreme Court of Victoria Gavan Duffy J found for the plaintiff by holding that the defendants, who were central executive officers of the Labor Party, had not followed their own procedures in expelling him from the party and that this amounted to an actionable breach of contract. However, Gavan Duffy J also found that Hogan had no substantial or proprietary interest in the property of the association and refused to grant an injunction or issue a declaration. He awarded nominal damages to Hogan. The defendants appealed and Hogan cross-appealed to the High Court.

The High Court (Rich, Dixon, Evatt and McTiernan JJ, and Starke J in a separate judgment) reversed the decision of the trial judge by holding that the rules of the Labor Party did not create contractual rights between members or between members and the executive and upheld the original decision that Hogan did not have the proprietary rights necessary to support a claim for an injunction or declaration.

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¹ (1934) 51 CLR 358 ("Hogan").
After considering various procedural issues arising from the dispute Dixon J considered the substantive legal questions before him. He noted that judicial statements of authority are to be found to the effect that, except to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of rules has been committed, cannot maintain any action directly founded upon that complaint.\(^2\)

In applying those authorities to the rules and organisational structure of the Labor Party the resolution of the legal question before Dixon J was clear. Hogan did not and could not have any proprietary interest in the property of the Labor Party. This meant that his action could not succeed. But, in the main, these authorities had dealt with sporting and other associations, not bodies as potentially significant as a political party. Did it make a difference that the dispute involved a political party, indeed one that had been in government at the time of the dispute?

Hitherto rules made by a political or like organization for the regulation of its affairs and the conduct of its activities have never been understood as imposing contractual duties upon its officers or its members. Such matters are naturally regarded as of domestic concern. The rules are intended to be enforced by the authorities appointed under them. In adopting them, the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction. The matter has not been the subject of much, if any, discussion in English cases.\(^3\)

In other words, while Dixon J asserts that the rights of members of political parties will be essentially the same as those of members of other voluntary associations, he did note that the English courts have not dealt with this matter. He also referred to an American authority, McKane v Adams,\(^4\) and it is informative to contrast the approach of an American court with that adopted by Dixon J.

In McKane\(^5\) a similar fact situation arose to that in Hogan.\(^6\) In giving the judgment of the Court of Appeals of New York, Gray J adverted to the political aspects of the matter before him. In particular he noted that political action commonly occurred through the action of political parties with voluntary membership. He then said:

\(^2\) (1934) 51 CLR 358, 370 (Rich, Dixon, Evatt and McTiernan JJ).
\(^3\) Ibid 376 (Rich, Dixon, Evatt and McTiernan JJ).
\(^4\) (1890) 123 NY 609 ("McKane").
\(^5\) Ibid.
\(^6\) (1934) 51 CLR 358.
How can it be said that in such work anything like a contract relation subsists, or that there can be any obligation confining the free exercise of the personal rights of citizens? Shall they not be free to reject as an associate, or as an officer of their association, one whose character, aims, or record may, in their judgment, fall below the standard of loyalty, or of integrity, demanded by the work in which they are engaged; or who, for any cause satisfactory to their minds, is unfit for the position of leadership he demands to occupy? Surely such propositions would seem to contain their own refutation. The existence of constitutions and by-laws does not alter the question. Obedience to their requirements may well be demanded as a condition of association; but it would be in conflict with the principles of our government and with the spirit and intent of our laws, if by any contractual obligation, express or implied, the individual action of the citizen could be fettered in his choice of political associates or leaders, or in the freest exercise of the political rights conferred upon him by the fundamental law.\(^7\)

The contrast with the reasoning of Dixon J is clear. The New York court’s emphasis is on the political, indeed, constitutional implications of the case. That the case involved a political party and not a social or sporting club was of central importance to the court. Dixon J, on the other hand, reasoned by analogy, accepting that the English courts had not considered this matter in detail and used the cases dealing, in the main, with social and other like clubs to find against Hogan. In arriving at his decision Dixon J clearly applied the law relating to voluntary associations that had been developed by the English courts. But, given his explicit recognition that issues involving political parties had not been the subject of significant judicial discussion, it is appropriate to ask whether the approach adopted by the New York court in \textit{McKane},\(^8\) with its open and explicit recognition of the political and constitutional aspects surrounding political parties when compared to other voluntary organisations, might not have provided a richer and perhaps even more convincing answer to the legal question before him.

\textit{New South Wales v Bardolph}\(^9\)

Bardolph was the owner of a newspaper, the \textit{Labor Weekly}, which circulated in New South Wales. Through the agency of an officer of the Premier’s Department in New South Wales a contract was made with Bardolph for the insertion of advertisements relating to the Tourist Bureau of New South Wales. The Tourist Bureau was a government department under the control of the Chief Secretary. The contract was entered into by the officer of the Premier’s Department on instructions from the

\(^7\) (1890) 123 NY 609, 613 (Gray J).

\(^8\) Ibid.

\(^9\) (1933–34) 52 CLR 455 (‘Bardolph’).
Premier that it was a ‘matter of government policy’. Soon after the contract commenced there was a change of government (following the sacking of the Lang government) and Bardolph was informed that it was the new government’s policy to discontinue the advertisements and not to pay for advertising space in the Labor Weekly. Bardolph continued to place the advertisements and at the end of the period named in the contract brought an action in the High Court for the unpaid money owing under the contract. The defendant pleaded that since the contract had not been authorised or ratified by the Parliament of New South Wales it was made without authority in law and was not binding on the state.

At trial before Evatt J the plaintiff Bardolph was successful and the defendant appealed to Full Court of the High Court (Gavan Duffy CJ, Rich, Starke, Dixon and McTiernan JJ), which affirmed Evatt J’s decision.

Much of the reasoning in this case involved questions of constitutional law but there was one aspect of the case which raised an issue of contract law and which was addressed by Dixon J. After rehearsing the facts in the case Dixon J said the following.

No statutory power to make a contract in the ordinary course of administering a recognised part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown.10

In support of this proposition Dixon J cited the judgments of Rowlatt J in Rederiaktiebolaget Amphitrite v The King11 and Blackburn J in Thomas v The Queen.12 In Rederiaktiebolaget13 Rowlatt J had to decide on a claim by a Swedish company that an English government undertaking not to detain their vessel during war conditions amounted to a contract. In finding against the company Rowlatt J said the following: ‘No doubt, the government can bind itself, through its officers, by a commercial contract, and, if it does so, it must perform it like anybody else or pay damages for the breach. But there was no commercial contract in this case.’14

10 Ibid 508 (Dixon J).
11 [1921] All ER 542 (‘Rederiaktiebolaget’).
12 [1874–75] LR 10 QB 31 (‘Thomas’).
13 [1921] All ER 542.
14 Ibid 544 (Rowlatt J).
Though expressed in very general terms this clearly supports Dixon J’s contention. But it is the reference to Blackburn J in *Thomas*\(^{15}\) that raises some questions. That case involved a contract made between Thomas and the British government over intellectual property in artillery pieces. The court ultimately found for the plaintiff Thomas on a petition of right but in coming to that conclusion Blackburn J (for the court) expressed the following.

We leave it for future discussion to determine who have authority to make contracts on behalf of Her Majesty, and whether the contracts on which the supplicant proceeds were in fact made by any one on behalf of Her Majesty, and if so made, whether they were made within the scope of that person’s authority. On these points we express no opinion.\(^{16}\)

It is difficult to see how this statement supports Dixon J’s contention in any way given that Blackburn J expressly disclaims any intention to decide on the very question for which Dixon J cites him in support. At the very least this is sloppy research by Dixon J. Is it more than this? Probably not, as the other judges who handed down substantive judgments, Rich, Starke and McTiernan JJ, provide ample authority and reasoning to support similar sentiments to those of Dixon J reproduced above.\(^{17}\)

The slip in the standard of Dixon J’s research and reasoning in *Bardolph*\(^{18}\) is real but obviously minor. It does not show, for example, that Dixon J deliberately distorted the authority to achieve a predetermined goal because the other judges provided the necessary authority to support his position. Rather it is an example of Dixon J misreading an authority.

**Neal v Ayers**\(^{19}\)

The plaintiff Neal brought an action against Ayers who had sold her a hotel with licence, goodwill and furniture. Neal alleged that she was induced to buy the property upon Ayers’s fraudulent misrepresentation that the hotel takings were about £100 of which 15 to 20 per cent was derived from after-hours (illegal) trading. Neal discovered that her weekly takings were not less than £100 a week but that at least 40 per cent of that came from trading during illegal hours. Neal did not want an after

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\(^{15}\) [1874–75] LR 10 QB 31.

\(^{16}\) Ibid 33 (Blackburn J).

\(^{17}\) (1933–34) 52 CLR 455, 494–6 (Rich J), 501-3 (Starke J), 517–21 (McTiernan J).

\(^{18}\) Ibid.

\(^{19}\) (1940) 63 CLR 524 (‘Neal’).
hours hotel but carried out the purchase knowing that a significant proportion of the takings were due to illegal trading. She also acknowledged that she would continue to trade illegally after purchase but that it was her intention to reduce and ultimately terminate such trading. Expert evidence tendered at the trial suggested that a hotel which traded 80 per cent legally and 20 per cent illegally, as represented by Ayers, was at least 25 per cent more valuable than one which traded 60 per cent legally and 40 per cent illegally.

The trial judge found that the contract was based on illegality to which both parties were in pari delicto and directed a nonsuit even though illegality had not been pleaded. This was affirmed by a majority on appeal to the Full Court of the Supreme Court of New South Wales. The High Court (Starke J, Dixon and Evatt JJ in a joint judgment) allowed the appeal and ordered a new trial.

Justice Dixon described the issue before the court was whether the element of illegality entering into the value of the hotel and the plaintiff’s willingness to continue the illegal trading prevented her from pursuing her claim of the fraudulent misrepresentation. He noted that the illegality in the transaction could potentially affect a claim in deceit in three ways.

First,

if the representation could be material as an inducement only to a representee who contemplated some unlawful course of conduct, it would seem that the law would not countenance a complaint by him that it had operated as a fraudulent inducement. If, for instance, the misrepresentation had consisted not in understating but in overstating the profits from unlawful trading, it might be said that the overstatement would be material only to the mind of a purchaser intent on conducting an unlawful business. But in the present case the misrepresentation has the opposite tendency. It would operate as an inducement to a person who wanted a hotel rather for its lawful business.

While one can see the point being made by Dixon J nevertheless it was quite clear that the plaintiff was not only buying a business which conducted illegal trading (and therefore illegality furnished part of the value of the business), she had also admitted that she would continue the illegal trade.

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20 Ibid 530 (Dixon and Evatt JJ).
21 Ibid 530–31 (Dixon and Evatt JJ).
The second possible way in which illegality could affect a claim in deceit would arise in a case where the subject matter of the contract was itself unlawful which would then prevent any of the money expended for the purchase being recovered, even against a fraudulent wrongdoer. However, Dixon J characterised the contract of sale as not being unlawful or as relating to an unlawful subject matter. It was a sale of a hotel, licence, goodwill and furniture and this was not intrinsically unlawful.\(^22\) It was the third possibility which raises some doubts about Dixon J’s reasoning in this case.

In the third place, if the common purpose of the parties in entering into a contract is that the subject matter should be used for an unlawful purpose, the transaction may be unlawful and it may follow that an action of deceit may not be maintained to recover any part of the consideration paid, in the guise of damages.\(^23\)

Justice Dixon referred to five authorities in support of this proposition. The first was *Gas Light and Coke Co v Turner*.\(^24\) There the parties had entered into a lease of premises to enable the defendant tenants to distil oil from tar purchased from the plaintiff landlords. The defendant refused to purchase the tar and claimed in defence that the contract to lease the property breached a statute which prohibited the distilling of oil from tar in industrial quantities in any place nearer than 75 feet from the nearest other building. Abinger CJ stated the following.

> All the decisions show, that, at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced. ... According to the cases ... where a party has granted a lease providing for the execution of an unlawful thing, it makes no difference as to the illegality of the contract that the unlawful act has not been carried into effect.\(^25\)

In *Neal*\(^26\) the unlawful act of after hours trading was carried out by Neal, who knew that that would continue when she purchased the property. However, in *Neal*\(^27\) the proportion of illegal as compared to legal activities was less than half of the total activity envisaged in the contract. In *Gas Light*,\(^28\) by comparison, all the activity envisaged under the contract would have been illegal. On the other hand, as the quote immediately above makes clear, the judges in *Gas Light*\(^29\) would have been happy to

\(^{22}\) Ibid 531 (Dixon and Evatt JJ).

\(^{23}\) Ibid 531 (Dixon and Evatt JJ).

\(^{24}\) (1840) 6 Bing NC 324; 133 ER 127 ("Gas Light").

\(^{25}\) (1840) 6 Bing NC 324 at 327-8; 133 ER 127 at 129 (Abinger CJ). Littledale, Patteson, Coleridge JJ and Parke and Gurney BB agreed with these sentiments.

\(^{26}\) (1940) 63 CLR 524.

\(^{27}\) Ibid.

\(^{28}\) (1840) 6 Bing NC 324; 133 ER 127.

\(^{29}\) Ibid.
treat the contract as unlawful even if the illegal activity had not been carried into
effect. In *Neal*\(^3\) the unlawful activity had been carried out. The facts in *Neal*\(^1\) seem
to fit comfortably into the principle enunciated in *Gas Light*.\(^2\)

The second authority relied upon was *Pearce v Brooks*.\(^3\) Brooks, a prostitute, had
bought a carriage on hire from the plaintiff to use as part of her activities. She
returned the carriage in a damaged state before she had paid her first instalment and
failed to pay a forfeiture as spelt out in the agreement. Pearce brought an action
claiming the forfeiture and damages but the trial judge found for the defendant on the
ground that the carriage had been purchased to carry out an unlawful and immoral
act. Pearce appealed to the Court of Exchequer but the judges upheld the trial
verdict.\(^4\) The principle articulated by Pollock CB was supported by the other judges
(Martin, Pigott and Bramwell BB).

I take the rule to be that any person who contributes to the performance of an illegal
act, knowing that the subject-matter is to be so applied, cannot recover the price of
such subject-matter ... The rule now is, ex turpi causa non oritur actio, and whether
such turpitude be an immorality or an illegality, the effect is the same; no cause of
action can arise out of one or the other.\(^5\)

Baron Martin expressed doubts that this principle would apply when it was not
certain that the money or goods the object of the contract would be used for an illegal
purpose\(^6\) but, of course, this disclaimer would not apply to *Neal*\(^7\) where both parties
knew that illegal trading would continue. In other words, Neal contributed to the
performance of an illegal act.

In *Upfill v Wright*\(^8\) similar sentiments were expressed about a claim for rent from
the defendant Wright, who had taken a flat as the mistress to the knowledge of the
plaintiff landlord. *Alexander v Rayson*\(^9\) involved a dodgy landlord, Alexander, who
manipulated the lease documents in order to reduce his exposure to tax. Rayson, the

\(^{30}\) (1940) 63 CLR 524.
\(^{31}\) Ibid 524.
\(^{32}\) (1840) 6 Bing NC 324; 133 ER 127.
\(^{33}\) [1861–73] All ER 102 (decided 1866) ("Pearce").
\(^{34}\) Reference is made to an appeal although, of course, the nature of litigation in nineteenth century
England makes the use of this term anachronistic. But for the purposes of this chapter the use of
the term ‘appeal’ is not substantively inaccurate.
\(^{35}\) [1861–73] All ER 102, 103 (decided 1866) (Pollock CB).
\(^{36}\) Ibid 104 (Martin B).
\(^{37}\) (1940) 63 CLR 524.
\(^{38}\) [1911] 1 KB 506 ("Upfill").
\(^{39}\) [1936] 1 KB 169 ("Rayson").
tenant, refused to pay elements of the rent because of the failure of the landlord to comply with his obligations and in defence to a claim for the money owing relied on the unlawfulness of the contract. The tenant was not aware of the landlord’s illegality at the time of the making of the contract and this continued until after the action commenced. At trial the defence of illegality failed and Rayson appealed to the Court of Appeal (Greer, Romer and Scott LJJ) which upheld her appeal. After considering a number of authorities, including those relied upon by Dixon J in Neal, the Court pronounced the following.

It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it is often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose … The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose, in such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff.

The agreement to buy a hotel is unobjectionable on its face but in Neal both parties knew that it was intended that new owner would carry on with the illegal trading. In Rayson the judges also rejected a plea that the law would allow the landlord a locus poenitentiae: ‘Where the illegal purpose has been wholly or partially effected the law allows no locus poenitentiae.’

In Neal the purchaser carried on with the illegal trading before seeking damages for deceit and this would seem to deny the possibility of being able to have claimed a locus poenitentiae.

The last case referred to by Dixon J is Harry Parker Ltd v Mason. This case involved a purported betting scam. Mason was a racehorse owner who agreed with Harry Parker, a bookmaker, that illegal bets would be placed by the latter on one of

40 (1940) 63 CLR 524.
41 [1936] 1 KB 169, 182 (Greer, Romer and Scott LJJ).
42 (1940) 63 CLR 524.
43 [1936] 1 KB 169.
44 Ibid 190 (Greer, Romer and Scott LJJ).
45 (1940) 63 CLR 524.
46 [1940] 2 KB 590 (‘Harry Parker’). In his judgment Dixon J refers to the decision of the trial judge, Stable J. The case went to the Court of Appeal but in the war conditions of 1940 the judgment of that court (handed down on 1 August 1940) was apparently not available to the High Court when it handed down its decision on 2 September 1940.
Mason’s racehorses. The illegal betting was designed to allow large bets to take place without affecting the odds of the horse winning the race. Harry Parker took the money, but being confident that the horse would not win, failed to place the bets and simply pocketed the money. The horse failed to win but Morris discovered that Harry Parker had kept the money and brought an action to recover the money. The trial judge, Stable J, found that the contract between the parties was illegal and that neither side could recover on the contract.

The Court of Appeal affirmed Stable J’s decision and agreed with his reasoning. MacKinnon LJ was at pains to illuminate the underlying principle in such cases.

The rule *ex turpi causa non oritur actio* is, of course, not a matter by way of defence. One of the earliest and clearest enunciations of it is that of Lord Mansfield, in *Holman v Johnson*.47 ‘The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendants*. The Court drives both parties from its presence: *Procul este profani*.48

Now, of course, in both *Neat*49 and *Harry Parker*50 it could be said that both parties were equally at fault because in both cases all the parties were happy to break the law. It could also be said that one party in each case was more crooked than the other (the vendor publican by understating admitted illegal trading and the bookmaker by double-crossing his partner in crime). In *Harry Parker*51 both Stable J and the Court of Appeal understood the legal principle as giving effect to the first interpretation, namely that both parties were equally at fault because both were happy to enter into a contract which would involve illegal activity. What of the

47 (1775) 1 Cowp 343; 98 ER 1120 (‘Holman’).
48 [1940] 2 KB 590, 601–2 (MacKinnon LJ). Luxmoore and Du Parcq LJJ expressed similar sentiments at 608–9 and 611–12 respectively.
49 (1940) 63 CLR 524.
50 [1940] 2 KB 590.
51 Ibid.
consideration that in *Neal*\(^{52}\) only part of the price for the hotel given reflected the illegal purpose of after hours trading while the majority of the value associated with the contract dealt with legal trading? Does this amount to a legally significant difference? In *Harry Parker*\(^{53}\) Lord Justice Du Parcq considered such a claim and suggested that if part of the contract dealt with legal bookmaking and part with illegal bookmaking the offending part might have been severed. But, since the whole contract before him was tainted with illegality severance was not an option.\(^{54}\) It is difficult to see how the contract in *Neal*\(^{55}\) could have been severed as the transaction was not split into different sections but was a unity.

So how did Dixon J apply the principles to be derived from these cases to the facts in *Neal*\(^ {56}\)?

But in our opinion the present case cannot be brought within such a doctrine. The substantial purpose of the contract was to transfer the property on which a business was carried on and was to be continued. The fact that on and from the property the purchaser intended for a time to exceed the limits within which she could lawfully trade, could not invalidate the whole transaction, notwithstanding the vendor’s knowledge of her intention. Her intention to continue for a time the practice of unlawful trading does not go to the substance of the transaction. It is an incident which provided none of the inducement for her to enter into it, if her evidence is to be believed. It appears to us to be extrinsic to the dealing which forms the foundation of the contract and of the inducing causes and therefore not to corrupt the contract.\(^ {57}\)

This reasoning is not persuasive and, in any event, does not give effect to the authorities that Dixon J relied on. The purpose of the contract was to transfer a trading concern whose trading was partly legal and partly illegal. The intrinsic value of the concern, accepted and acknowledged by the purchaser, was inextricably linked to its legal and illegal trading. The illegal trading was not an incident, easily desisted from, to the contract. It was part and parcel of the going concern and Neal was aware of this from the beginning. Nor was the illegal trading a neatly packaged part of a greater transaction and severable if necessary. Neal herself admitted that the illegal trading would need to be continued after the purchase. To sever in such circumstances would be to create a radically different contract from the one entered into by the parties and this the courts will not do.

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\(^{52}\) (1940) 63 CLR 524.

\(^{53}\) [1940] 2 KB 590.

\(^{54}\) Ibid 612 (Du Parcq LJ).

\(^{55}\) (1940) 63 CLR 524.

\(^{56}\) Ibid.

\(^{57}\) Ibid 531–2 (Dixon and Evatt JJ).
Neither does this reasoning show fidelity to the authorities discussed by Dixon J. All of the cases referred by Dixon J emphasise that the courts will not aid parties in their actions if these actions are brought on a contract whose subject matter is for an unlawful purpose. Neal and Ayers were both aware that illegal trading was an essential attribute of the hotel which was the object of the transaction between them, and Neal openly admitted that she had intended to carry on illegal trading when she entered into the contract. As the cases show, in such circumstances the courts will not aid persons who bring actions that rely on such illegal purposes. Indeed, as suggested above, it is difficult to distinguish *Neal*\(^{58}\) from *Harry Parker*.\(^{59}\) In both cases both parties knew that the contract would involve an illegal purpose and in both cases one party tried to take advantage of the other in illegitimate fashion. In both cases the respective transactions were inextricably linked to an unlawful purpose and in both cases there was no act of repentance by either party before the contract was given effect to. The only difference between the two cases is that in *Harry Parker*\(^{60}\) the whole transaction was tainted by illegality whereas in *Neal*\(^{61}\) the major part of an inseverable transaction was legitimate.

It is difficult to avoid the conclusion that Dixon J was determined to allow Neal to bring an action of deceit against a clearly untruthful vendor. But just as clearly Dixon J has not explained how, on the facts, *Neal*\(^{62}\) could be distinguished from the authorities which, if relied upon, would not have allowed Neal to bring the action that she did. In other words, Dixon J has *not* explained how the fact that illegal trading made up less than half of the value of the transaction meant that the principles enunciated in the authorities did not apply. To be blunt, Dixon J has not acted as a strict legalist in this case because he has not followed the authorities, which were quite clear, and his attempted ground of distinction, whilst possibly potentially fruitful, is pure assertion without any real attempt at legal analysis. It is not as if, for example, Neal had entered into the contract with an express aim of *not* continuing the illegal trading,\(^{63}\) or it was only a possibility that Neal would continue

\(^{58}\) Ibid.
\(^{59}\) [1940] 2 KB 590.
\(^{60}\) Ibid.
\(^{61}\) (1940) 63 CLR 524.
\(^{62}\) Ibid.
the illegal trading,\textsuperscript{64} or that the contract was not complete before Neal commenced her action.

\textit{Slee v Warke}\textsuperscript{65}

The defendant/appellant Slee was the owner of a hotel who entered into negotiations with Warke for the lease of the hotel to the latter. Negotiations took place with lawyers. Slee was interested in selling the hotel but problems in financing meant that the parties settled for a lease initially but with the intention of giving Warke the option to purchase the property within the first year of the three-year lease. Slee desired to ensure that the lease ran for at least one year even if Warke exercised the option within that time. However, Slee's solicitor misinterpreted his instructions and formulated a lease/option agreement which gave Warke the option to purchase after the passage of one year for the remainder of the three years term of the lease. Slee did not examine the lease and signed it even though it did not embody his wishes.

Warke brought an action in the Supreme Court of Victoria seeking a declaration that she was entitled to require Slee to sell the property to her or pay damages in lieu. Slee had refused to sell, arguing that the lease and option had not given effect to the intention of the parties as originally conveyed during negotiations. Justice Martin made the declaration sought and Slee appealed to the High Court. In a joint judgment (Rich, Dixon and Williams JJ) the High Court affirmed the trial judge's decision.

Justice Dixon commenced his analysis by noting that Slee's counsel rested his defence

on the sole ground that the evidence established that the only option which the appellants were ever prepared to grant was an option the exercise of which was limited to the first year of the lease, and that they executed the contract and indenture in the mistaken belief that these documents contained this option and that they would not have executed either of these documents but for this mistake. He relied on the statement of Sir W Page Wood VC. ... in \textit{Wood v Scarth} 'that a person shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his agreement, is well established.'\textsuperscript{66}

\textsuperscript{64} This is the interpretation, again contrary to the facts, given in D Greig and J Davis, \textit{The Law of Contract} (Law Book, 1987) 1131.

\textsuperscript{65} (1949) 86 CLR 271 ("Slee").

\textsuperscript{66} (1855) 2 K & J 33, 42; 69 ER 682, 686 (Page Wood VC), quoted in (1949) 86 CLR 271, 274 (Rich, Dixon and Williams JJ).
Justice Dixon’s response to this is a non-controversial piece of legal analysis which shows that Wood v Scarth\(^67\) had been misinterpreted and that in any event subsequent decisions in both the Court of Appeal and the High Court established that the hardship necessary to enliven the jurisdiction of the court could not be satisfied by the circumstances established by Slee, whose own carelessness was responsible for mistake that had occurred.\(^68\) In these circumstances Dixon J held that Warke was entitled to have the contract containing the option specifically enforced as that remedy, and not a declaration, had been, in substance, the remedy at the centre of the dispute. There is no suggestion that Dixon J’s analysis of the facts and the law was anything other than orthodox and in line with strict legalist methods.

However, Dixon J did not stop there. Despite having come to a decision which resolved the dispute Dixon J went on to discuss the defence of mutual mistake even though this had been dropped by counsel for the appellants during the hearing of the appeal. As seen in the analysis of other cases Dixon J was usually careful to avoid answering unnecessary legal issues, preferring to answer those that were necessary to the resolution of the legal dispute before the court and leaving what would be obiter for another day. It appears, however, that Slee\(^69\) presented Dixon J with an opportunity to tidy up an area of law that that he now believed himself to have been mistaken about despite the fact that in doing so he acted contrary to what he believed to be good judicial method.

He expressed the legal issue he was determined to clarify in the following terms. ‘It has sometimes been said that the power of the Court to rectify a contract on the ground of mutual mistake is confined to cases where there was an actual concluded contract antecedent to the instrument which is sought to be rectified.’ \(^70\)

In support of this proposition was the seminal judgment of James VC in MacKenzie v Coulson\(^71\) and the High Court decision (with Dixon J as part of the bench) in Australian Gypsum Ltd v Hume Steel Ltd.\(^72\) Both of these cases clearly embody the proposition enunciated in the quote above but in a subsequent case,

\(^{67}\) (1855) 2 K & J 33; 69 ER 682.
\(^{68}\) (1949) 86 CLR 271, 274–80 (Rich, Dixon and Williams JJ).
\(^{69}\) Ibid.
\(^{70}\) Ibid 280 (Rich, Dixon and Williams JJ).
\(^{71}\) (1869) LR 8 Eq 368 (‘Coulson’).
\(^{72}\) (1930) 45 CLR 54 (‘Australian Gypsum’).
Shipley Urban District Council v Bradford Corporation,\textsuperscript{73} Clauson J provided a detailed examination of the authorities to show that Coulson,\textsuperscript{74} and by implication Australian Gypsum,\textsuperscript{75} should be read as applying only to cases where the mutual mistake is sought to be established by reference to the terms of a previous contract.\textsuperscript{76} Justice Dixon noted that on appeal the Court of Appeal, although deciding the appeal on another point, endorsed Clauson J's judgment,\textsuperscript{77} and he was happy to do the same.\textsuperscript{78} In the context of the facts in Slee\textsuperscript{79} Dixon J accepted that there was no concurrent intention of the parties that any option would be exercisable only in the first year with the proviso that the lease itself would need to run for at least one year. This was a belief only of the appellant Slee. This meant that even on the revised understanding of a court's power to rectify an instrument there was no mutual mistake upon which to ground such a jurisdiction. Or, in other words, there had been no need to discuss the legal issues surrounding mutual mistake.

Viewed from the perspective of a strict and complete legalist this part of Dixon J's judgment in Slee\textsuperscript{80} is extraordinary. Here we have an example of Dixon J discussing in great detail a legal argument that had been abandoned by counsel and which, had it been a live argument, would not have applied as the facts did not support its operation. It is quite clear that Dixon J did not need to examine and then pronounce on this legal issue to decide the matter before the court. This is not an example of strict legalism in action.

Indeed, it seems appropriate to understand Dixon J's discussion of the law in this part of his judgment in Slee\textsuperscript{81} as an example of agenda judging. By this I mean it appears that Dixon J approached his reasoning in this case with preconceived ideas about what the law should say. It seems that he accepted that the formulation in

\textsuperscript{73} [1936] Ch 375 ('Shipley').
\textsuperscript{74} (1869) L.R. 8 Eq 368.
\textsuperscript{75} (1930) 45 CLR 54. This case was not discussed by Clauson J in Shipley.
\textsuperscript{76} [1936] Ch 375, 394–8 per Clauson J. In other words, Clauson J argued that even if there was no antecedent contract an instrument which would otherwise record a contract but which did not give effect to the concurrent intention of the parties at the time of its execution could be rectified by a court — in appropriate circumstances.
\textsuperscript{77} (1949) 86 CLR 271, 281 (Rich, Dixon and Williams JJ).
\textsuperscript{78} Ibid 280–1 (Rich, Dixon and Williams JJ).
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.

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Australian Gypsum,\textsuperscript{82} which he had had a hand in putting together, was not as convincing as it might have been and that the subsequent treatment of this topic by Clauson J in Shipley,\textsuperscript{83} provided a superior understanding of the authorities and formulation of the rule. While it is, of course, impossible to read the mind of a long-dead judge, it seems likely that Dixon J used the ‘opportunity’ provided by Slee,\textsuperscript{84} an illegitimate opportunity by the standards of a strict and complete legalist, to correct what he would have been perceived as a long-standing error in the law; indeed, a long-standing error which he had helped to perpetuate some 19 years earlier.

\textit{Duncombe v Porter}\textsuperscript{85}

Duncombe was a grazier who sought to recover the price for hay delivered and claimed damages for the non-acceptance of the balance of hay sold pursuant to a contract entered into with Porter, a produce merchant.

The parties had entered into a contract for the sale of hay. The hay was in stacks and was estimated to amount to 500 tons. After inspecting the hay the purchaser agreed to buy it with the contract containing two terms which would lie at the heart of the dispute between the parties. Clause 1 provided that ‘Quality to be as inspected and all rain-damaged hay to be discarded and the purchaser shall only be responsible to accept all sound dry hay in good merchantable condition’. Clause 2 stated that ‘The purchaser’s agent shall have the right to accept or reject at the stacks but in the event of the buyer’s representative not being present when any hay is loaded at the stacks no objection shall be taken by the purchaser to the quality of the hay delivered at rail’. The hay was to be trucked from its place of origin to a railhead and then to the buyer’s storage area. The reference to the buyer’s agent in clause 2 was to the option of the agent being there when the initial loading on the truck took place.

A dispute arose over the quality of the hay delivered and the legal issue before the parties was described by Dixon CJ as ‘whether on the terms of the contract the buyer is entitled to recover damages in respect of hay delivered on the ground that it was not of the quality as inspected or that all rain-damaged hay was not discarded or that it was not sound dry hay in good merchantable condition but was mouldy and unfit

\textsuperscript{82} (1930) 45 CLR 54.
\textsuperscript{83} [1936] Ch 375.
\textsuperscript{84} (1949) 86 CLR 271.
\textsuperscript{85} (1953) 90 CLR 295 (‘Duncombe’).
for use.\footnote{Ibid 303 (Dixon CJ).} Duncombe brought an action before the Full Court of the Supreme Court of New South Wales which gave judgment for the defendant. He appealed to the High Court (Dixon CJ, Webb and Fullagar JJ, Kitto and Taylor JJ dissenting) which affirmed this decision.

Chief Justice Dixon interpreted clause 1 and, in particular, the words ‘quality to be as inspected and all rain-damaged hay to be discarded’ as importing a warranty that the hay be of the quality as inspected. He found that clause 2, which contained the words ‘no objection’ did not exclude the buyer’s right to claim damages for hay delivered on ground of condition or quality. He reasoned as follows.

First, he noted the general rule expressed by all the judges in \textit{Szymonowski \& Co v Beck \& Co}\footnote{(1923) 1 KB 457 (‘Szymonowski’).} which, in Dixon CJ’s words, was ‘that if a party wished to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms’.\footnote{(1953) 90 CLR 295, 306 (Dixon CJ).} Here he found that clause 2 did not clearly exclude the ordinary rights of the buyer of the hay.

Secondly, Dixon CJ did not find the words of clause 2 to be as expansive as the plaintiff argued.

\begin{quote}
[T]here is no express provision that the failure of the buyer’s representative, when attending, to reject at the stacks shall have any particular consequence and it could only be by implication that the words ‘no objection shall be taken’ could be considered to exclude the right to claim damages in the case of the buyer’s representative, though attending at the stacks, failing to reject bales of hay which when opened up showed that all damaged hay had not been discarded \ldots
\end{quote}

Finally, Dixon CJ understood the words ‘no objection’ as being particularly appropriate for decisions made at the time of loading and not having any ramifications for the legal position of the parties if the hay was in poor condition on delivery. These conclusions were supported by Webb and Fullagar JJ.\footnote{Ibid 306–7 (Dixon CJ).}

Justices Kitto and Taylor dissented. Justice Kitto understood the operation and relationship of clauses 1 and 2 in the following way.

\begin{quote}
[T]he first of the three provisions of cl 1 appears simply as an explanatory introduction to a clause the function of which is to exclude from the sale so much of
\end{quote}

\footnote{Ibid 307 (Webb J), 309–13 (Fullagar JJ).}
the hay in the stacks as may be found, when the time for delivery arrives, to be no longer of the quality which alone the purchaser is content to accept, because it is rain-damaged or for some other reason not sound, dry and in good merchantable condition. Clause 1 thus protects the purchaser in regard to quality, and cl 2 modifies the extent of that protection in order to save the vendor the expense and trouble of loading hay and carting it to the rail, only to have it then rejected for defects of quality. Clause 2 shows that the only defects of quality which are to exclude hay from the sale are such as exist at the time of loading for cartage to the rail.\textsuperscript{91}

On Kitto J’s understanding, such an interpretation acknowledged the opportunity of the buyer’s agent to attend, or not attend, the loading of the hay in order to examine the hay as it was being loaded.\textsuperscript{92} Justice Taylor agreed with this interpretation of the agreement.\textsuperscript{93}

\textit{Duncombe}\textsuperscript{94} gives a good opportunity to examine differing interpretations of a commercial agreement and how differences in interpretation can occur within a broad framework of legalist judging. The competing interpretations offered by Dixon CJ and Kitto J are plausible readings of the agreement and both can be supported by the general background to the transaction. Both interpretations give effect to the commonly accepted rules applying to the interpretation of contracts as illustrated by \textit{Szymonowski}\textsuperscript{95} and neither gives the slightest indication of either judge deciding on other than legalist grounds. Because the case was dealt with by demurrer detail about the particular circumstances surrounding the transaction were not presented to the court and this meant that the judges had only the general background of the negotiations to aid their interpretation.

\textit{Fitzgerald v Masters}\textsuperscript{96}

This case involved an appeal from a decision of McLelland J in the Supreme Court of New South Wales granting a decree of specific performance of a contract of sale between Fitzgerald as vendor and Masters as purchaser of a half interest in a farm of 1,773 acres. The contract had been entered into on 5 March 1927 and Masters commenced his action in 1953, meaning that more than 26 years had elapsed between the making of the contract and the suit for specific performance. Masters went on to the property for a number of years and worked it with Fitzgerald in a

\textsuperscript{91} ibid 315–16 (Kitto J).
\textsuperscript{92} ibid 316 (Kitto J).
\textsuperscript{93} ibid 316–19 (Taylor J).
\textsuperscript{94} ibid.
\textsuperscript{95} [1923] 1 KB 457.
\textsuperscript{96} (1956) 95 CLR 420 (\textit{Fitzgerald}).

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partnership but left the property when it became evident that it would not support two families. Masters attempted to pay instalments but these were refused by Fitzgerald who was worried about the tax implications of receiving this money. Masters had paid over half the value of the land to Fitzgerald by the time that the suit commenced. Masters had tried on several occasions to get the sale moving but between 1937 and 1948, when he consulted a solicitor who then wrote to Fitzgerald, the matter was left to lie fallow. By the time that the dispute came before the High Court Fitzgerald had died and the action was defended by the executors of his estate.

The appellant/defendants made several arguments in response to Masters’ claim. One dealt with a curiously drafted clause, clause 8, which stated that the ‘usual conditions of sale in use or approved of by the Real Estate Institute of New South Wales relating to sales by private contract of lands held under the Crown Lands Act shall so far as they are inconsistent herewith be deemed to be embodied herein’.

The High Court (Dixon CJ and Fullagar J, McTiernan, Webb and Taylor JJ) rejected claims that the clause was uncertain because of the obvious error — ‘inconsistent’ instead of ‘consistent’. All the judges also agreed that despite the fact that there was not a set of usual terms and conditions endorsed by the Real Estate Institute for sales of Crown Land the contract was not uncertain as the parties had agreed to all the essential terms necessary for a valid sale of land.97

However, the judges differed on the issue of whether the delay of 26 years between the making of the contract and the commencement of an action for specific performance indicated that the parties had either abandoned the contract or that this was good ground for a court to reject a claim for specific performance. Chief Justice Dixon did not find that the parties had abandoned the contract and he also held that the delay which had occurred was not a ground for refusing to grant specific performance. Justices McTiernan, Webb and Taylor disagreed but ultimately found for Masters because the various Moratorium Acts passed by the New South Wales Parliament had postponed the obligation of a buyer in Masters’s position until 1952, thereby removing any suggestion of unreasonable delay on the part of Masters.

It was accepted by Dixon CJ that an inordinate amount of time had been allowed to pass since the contract was made and he referred to three authorities as embodying the relevant legal principles and providing examples of them in operation. The cases cited were *Pearl Mill Co Ltd v Ivy Tannery Co Ltd*,\(^98\) *Matthews v Matthews*\(^99\) and *G W Fisher Ltd v Eastwoods Ltd*.\(^100\) Nevertheless Dixon CJ did not find that the contract had been abandoned.

It is impossible … to infer a discharge of the contract in the present case. In each of the cases cited above the contract was an executory contract, under which neither party had acquired any proprietary right or interest. The position was simply that each party had promised to do something, and for a long period no act was done in performance of the contract, and no step was taken to require any act to be done in performance of the contract. Here the contract had been partly performed by the respondent. Before he left the property, he had paid more than half of the purchase price, and he had an equitable interest in the land. He had registered his contract. It is impossible to suppose, nor can the deceased have supposed, that he ever intended simply to allow the deceased to keep both the money and the land, and no suggestion that the money should be repaid to him was ever made.\(^101\)

Do the authorities relied upon by Dixon CJ support this analysis? In *Pearl Mill*\(^102\) Pearl Mill Ltd had entered into a contract in September 1913 for 50 dozen skins, ‘delivery as required’. Twenty dozen were supplied on request by early 1914 but then for over a year nothing was done on the contract. In November 1915 the defendant, Ivy Tannery Co, offered 30 dozen skins at the contract price but was told that Pearl Mill had purchased skins elsewhere. In July 1917 Pearl Mill requested the delivery of the remaining 30 dozen skins under the contract but Ivy Tannery refused, claiming that the contract was no longer in existence. Pearl Mill brought an action for damages for breach of contract in refusing to supply the skins but the trial judge held that the plaintiffs had either abandoned the contract or had induced the defendant to believe that the contract had been abandoned. On appeal both Rowlatt and McCardie JJ felt that such a long\(^103\) or inordinate\(^104\) amount of time had passed that both parties were entitled to think that the contract had been abandoned.

\(^98\) [1919] 1 KB 78 (*Pearl Mill*).
\(^99\) [1941] SASR 250 (*Matthews*).
\(^100\) [1936] 1 All ER 421 (*Fisher*).
\(^101\) (1956) 95 CLR 420, 432 (Dixon CJ and Fullagar J).
\(^102\) [1919] 1 KB 78.
\(^103\) Ibid 82 (Rowlatt J).
\(^104\) Ibid 83 (McCardie J).
In *Matthews*\(^{105}\) a husband and wife entered into an agreement in June 1932 that they would ‘pool’ their respective properties (mainly land) and other assets and liabilities for the purpose of sale with a view to split all gains equally. Apart from some tentative attempts to sell two properties, one belonging to each, nothing was done in pursuance of the agreement although both parties dealt with their respective properties in other transactions. A dispute arose between the couple in 1941 and an action was brought by the husband plaintiff claiming an interest in half the home owned by his wife, the defendant. He based his claim on the 1932 contract.

Both at trial and on appeal to the Full Court of the Supreme Court of South Australia the husband’s claim was rejected. The Full Court (Murray CJ, Angas Parsons and Napier JJ) emphasised that the ‘length of delay and the nature of the acts done during the interval’\(^{106}\) were significant in deciding whether or not specific performance would be granted in such a situation. The judges concluded as follows.

> In this case the liabilities that he parties agreed to ‘pool’ have been largely, if not entirely, discharged, and new liabilities have been incurred. Both of the parties have disposed of some of their properties, and others have been acquired. It seems to us that specific performance, at this stage, would be more than inequitable. It has, in fact, become impossible.\(^{107}\)

In *Fisher*\(^{108}\) the plaintiff had entered into a contract with Eastwoods Ltd to supply 25,000 tons of cement at 28 shillings per ton as and when required. Fisher had expected to win a contract to supply cement but did not do so and only 40 tons was supplied under that contract. Fisher made numerous requests for quotes but he appears to have been singularly unsuccessful in winning orders. However, in November 1931 the two parties negotiated a variation to the 1929 contract for supply of cement and just over 1,000 tons were supplied at 28 shillings. For four years there was some communication between the parties and some 3000 tons of cement were delivered at a lower price but from May 1934 till February 1935 the parties did not deal with each other. In February 1935 Fisher sought to rekindle the relationship but the defendants asserted that the contract between them had expired. On an action for a declaration that the defendants were under a contractual obligation to supply the remainder of the originally stipulated amount of 25,000 tons at 28 shillings per ton,

\(^{105}\) [1941] SASR 250.
\(^{106}\) Ibid 255 (Murray CJ, Angas Parsons and Napier JJ).
\(^{107}\) Ibid.
\(^{108}\) [1936] 1 All ER 421.
the trial judge, Branson J, found that the contract had been abandoned. He saw the question before him as being whether or not on the facts there was still a binding contract and in answering it took into account the following considerations.

That is a question which depends not only upon the time during which a contract is allowed to lie unused and unreferred to, but also upon such other acts of the parties, done while that time was elapsing, which may bear upon the question whether they in their own minds did not come to the conclusion that this contract was to be treated as no longer operative between them. All kinds of considerations of fact may arise in the decision of a question of that sort, the relationship between the parties, their conduct in respect of other contracts which have been entered into between them and the whole history of their mutual dealings ... 109

After examining the history of the parties’ relationship Branson J held that the contract had been abandoned long before the February 1935 request and found for the defendants.

After examining these authorities Dixon CJ then considered the argument that Masters’ delay in seeking specific performance was so great that the court should exercise its discretion and refuse to grant the decree. Counsel for Masters cited several cases where even a delay of several months was considered enough to justify a refusal of specific performance. Chief Justice Dixon responded by arguing that these cases involved special circumstances.

The typical case is the case where the vendor has purported to rescind for breach of contract or under a special condition as to title. In such cases the purchaser who wished to attack the validity of the rescission must always come very promptly to a court of equity. It is natural and reasonable that this should be required of him, for the vendor is not to be placed indefinitely in the position of not knowing whether he can safely deal with the property in question on the footing that the contract has ceased to exist. In the present case the vendor could, if he had wished to bring matters to a head, have taken steps to rescind at any time. 110

How do Dixon CJ’s findings — that the contract was not abandoned and that the delay, a matter of 26 years or so, did not provide cause for a court of equity to refuse specific performance — stand up when compared to the judgment of the majority judges in the case or to the authorities that he examined? On the face of it 26 years seems an extraordinarily long time not to assert one’s legal rights and all the cases referred to by Dixon CJ involve substantially shorter periods to time. But when the circumstances are considered in more detail the decision not to treat the delay as

109 Ibid 426 (Branson J).
effecting an abandonment becomes more persuasive. In *Fitzgerald* the contract was partly executed and involved a substantial sum whereas in the cases referred to by Dixon CJ the contracts were essentially executory. Secondly, the parties had not changed their circumstances in ways that would have had bearing on the contract in question. Third, much of the delay was caused by the defendant asking Masters not to pay further money on account and to refrain from registering the contract. At the end of the day even after the passage of 26 years neither party would be disadvantaged if the contract was given effect to, unlike the contracts considered in *Pearl Mill*, *Matthews* and *Fisher*.

**South Australia v The Commonwealth**

The dispute in this case revolved around an agreement, the Railways Standardization Agreement of 1949, between the Commonwealth and South Australia. This agreement was ratified in legislation by both parties. In it the Commonwealth promised to reimburse South Australia for the costs of converting several rail lines to standard gauge — as well as promising to build a standard gauge rail line from Alice Springs to the outskirts of Darwin, a project that was to take somewhat longer than expected. Questions about the order of conversion works and possible commencement dates were, according to clause 9 of the agreement, to be ‘determined by agreement between the parties’ and if agreement was not reached these matters were to be ‘decided by the Minister of Transport [Cth] in agreement with the Minister of Railways of the State’. The Commonwealth had funded the conversion of several of the rail lines but no agreement was forthcoming on funding and commencement of work on the remaining rail lines. South Australia commenced an action in the High Court seeking declarations that the Commonwealth was in breach of the Agreement in refusing to fund the conversion and construction of the remaining lines. The Commonwealth demurred.

The High Court (Dixon CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ) allowed the demurrer and rejected the claim of South Australia. Judgment was given on a variety of grounds. Chief Justice Dixon and Justices Kitto, Menzies

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111 Ibid.
112 [1919] 1 KB 78.
113 [1941] SASR 250.
114 [1936] 1 All ER 421.
and Windeyer held that no breach of the Agreement had been shown as the Agreement contemplated the Commonwealth’s refusal at any particular time to supply funds or agree to the commencement of works. Justices Taylor and Owen analysed the Agreement as amounting, in legal terms, to an agreement to agree, while McTiernan, Taylor and Windeyer JJ also held that the Agreement gave rise to political obligations only and did not create legally enforceable obligations.

After describing the Agreement and the background to the dispute in some detail Dixon CJ summed up his views as follows.

A close consideration of the whole agreement ... leads one to the view that there is no foundation in its nature or its terms for the conclusion that the refusal of the Commonwealth ... to agree to the commencement of the work involves a breach of any implied term of the agreement, still less of any express term.116

He was happy to endorse the argument of the Solicitor-General for the Commonwealth when the latter argued that since any undertaking of the Commonwealth had not been agreed to by the Commonwealth there was no time for performance and any obligation was inchoate.117

The text of the agreement supports the contention of the Commonwealth thus briefly stated. To answer that the Commonwealth is bound to attempt to agree with the State on a time of commencement of any given work is to endeavour to import into the provision concerning agreement an implication which is not justified. The question of time in particular thus remitted to agreement in the case of two governments must essentially depend upon matters of principle or policy into which obviously financial and economic considerations must enter.118

Can this judgment be considered in conformity with Dixon CJ’s strict and complete legalism? Chief Justice Dixon refers to no authorities (except in discussing the High Court’s original jurisdiction to hear the matter) in his judgment. But his analysis proceeds from the nature and terms of the Agreement made between the Commonwealth and South Australia and gives effect to it on its own terms. If the parties had agreed that they would negotiate about the timing of any conversion or construction work, negotiations which would have to take into account financial and economic considerations affecting both parties, it is difficult to disagree with Dixon CJ that no breach of the Agreement had been committed by the Commonwealth. When compared to the judgment of McTiernan J, for example, the careful and legalistic nature of Dixon CJ’s judgment becomes clear. Justice

116 Ibid 146–7 (Dixon CJ).
117 Ibid 147 (Dixon CJ).
118 Ibid 147 (Dixon CJ).
McTiernan characterised the promises made by the parties as political and not intended to have legal effect.¹¹⁹ This may very well have been true and it is conceivable that Dixon CJ would have agreed with this characterisation if this were the direct legal issue before the court. But, as Dixon CJ makes clear, given the nature of the declarations sought by South Australia and the demurrer made by the Commonwealth, the precise legal issue before the court was whether or not the facts alleged by South Australia were legally sufficient to support the claim. By showing that on any conceivable understanding of the Agreement — that is, whether it was an enforceable contract or not — there had not been action which could amount to a breach, Dixon CJ was answering the legal question before him in the most direct way possible. In other words, it was not necessary for the decision in the case, according to Dixon CJ, to determine whether or not the Agreement was an enforceable contract. All that was needed was an analysis of the facts to see if they supported the declaration sought and Dixon CJ did not think that they did. A discussion about the validity or otherwise of the Agreement as a contract was unnecessary and in line with his normal practice Dixon CJ avoided answering legal questions that were not directly relevant to the precise legal dispute before the court.

**Conclusion**

Do Sir Owen Dixon’s judgments in these cases accord with his self-proclaimed strict and complete legalism?

*Hogan*¹²⁰ certainly shows no departure from his careful reliance on authority and the principles contained and exemplified in them. Nevertheless, it could be argued that Dixon J could have openly acknowledged the major difference between voluntary organisations such as sporting clubs on the one hand, and political parties on the other hand, with their political and constitutional significance on the other. It was not as if there was not authority — be it United States authority — which could have been used to do this.

*Bardolph*¹²¹ again raises no issues about fidelity to authority and principle. But it does raise, in a minor way, the standard of Sir Owen’s judicial work with his

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¹¹⁹ Ibid 148–9 (McTiernan J).
¹²⁰ (1934) 51 CLR 358.
¹²¹ (1933–34) 52 CLR 455.

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puzzling (and unnecessary) reference to Blackburn J’s judgment in *Thomas*. Here we have an example, a rare example, of Sir Owen misreading an authority.

*Neal* is a different matter entirely. It seems that Sir Owen was determined to allow Neal to bring an action of deceit against a clearly untruthful vendor. But, just as clearly, he has not explained how, on the facts, *Neal* could be distinguished from the authorities which, if relied upon, would not have allowed Neal to bring the action that she did. This is a case where Sir Owen has not followed the authorities which were quite clear and where his attempted ground of distinction, whilst possibly potentially fruitful, is pure assertion without any real attempt at legal analysis. This judgment is not in accord with his self-proclaimed strict legalism.

*Slee* is another case where Sir Owen’s fidelity to strict legalism can be questioned. The decision in the case and the reasoning given are uncontroversial but it is his totally unnecessary digression to deal with an issue that had been dropped by counsel arguing the case and which, in any event, would not have been applicable on the facts of the case, which shows a departure from his normal standards. Sir Owen clearly wanted to clear up an area of law that he himself had muddled some years before and this overcame his otherwise steadfast adherence to only answering legal issues that were before the court and necessary for the resolution of the legal problem facing the parties.

*Duncombe*, by way of contrast, shows how even diametrically opposed interpretations of contractual provisions can each be based on legalist method. Dixonian strict legalism does not and cannot demand identical responses by judges to questions of law or interpretation and *Duncombe* provides a clear illustration of this.

A superficial reading of *Fitzgerald* might suggest that it is an example of Sir Owen playing fast and loose with the authorities. After all, the delay in that case was over 26 years and all the authorities relied upon by Sir Owen had seen abandonment

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123 (1940) 63 CLR 524.
124 Ibid.
125 (1949) 86 CLR 271.
126 (1953) 90 CLR 295.
127 Ibid.
128 (1956) 95 CLR 420.
recognised by the courts when the period of delay in question had been far shorter. But once his analysis of these authorities is considered and the clear difference in situations between them and the facts in *Fitzgerald*\(^{129}\) are recognised it becomes manifest that, far from being a retreat from strict legalism, it is, instead, an illustration of strict legalism in action.

Finally, in *South Australia v The Commonwealth*\(^{130}\) Sir Owen illustrates how deciding the legal issue before the court and only the legal issue before the court might appear, on a superficial reading of his judgment, as unimaginative or even incomplete judging. But when the spotlight is focused where it should be, on the legal issue before the court, Sir Owen’s judgment is plainly seen to wear the cloak of strict legalism.

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\(^{129}\) Ibid.

\(^{130}\) (1961–62) 108 CLR 130.
Conclusion

It was the purpose of this thesis to see whether Sir Owen Dixon’s judgments in contract cases handed down during his tenure on the High Court conform to his self-proclaimed judicial approach of strict and complete legalism.

As has been shown Dixon did not understand the judicial role as a form of divination with judges merely declaring an already existing law. Neither did he believe it to take the form of mechanical jurisprudence with a judge’s role being equivalent to that of an umpire who merely applies rules and does not create them. Instead he understood judging as a practice which gave effect to the authorities, principles and traditional modes of reasoning associated with the common law. While Dixon accepted that there was a creative aspect to strict legalism, it is quite clear that for him it was a bounded creativity far removed from political activity. In Dixon’s hands strict and complete legalism was a sophisticated form of practice which bears no relationship to simplistic notions of mechanical jurisprudence or to ideas that judges simply declare an already existing law.

As a legalist judge Dixon had to deal with the jumble that is the common law, a jumble caused by the immense scope and volume of the legal materials and the varying capacities of the judges that have developed it over many centuries. As understood by Dixon, common law reasoning is messy — by the standards of academic theorising at least, if not necessarily by those of the practising lawyer. However, it is still possible to determine whether a judge’s legal reasoning displays a genuine attempt to apply the authorities and, where necessary, develops existing authority within a greater framework provided by the common law’s architecture; or whether, on the other hand, what has been done is merely a transparent attempt by the judge to cloak policy preferences behind a veneer of unconvincing and unpersuasive legal reasoning. The examples provided by Scrutton LJ and Denning LJ in their attempts to craft an exception to privity in the cases subsequent to Elder Dempster\(^1\) and, indeed, the judgments of Sir Owen Dixon himself in Neal\(^2\) and Slee\(^3\).

\(^1\) [1924] AC 522.
\(^2\) (1940) 63 CLR 524.
show that such decisions can be clearly identified and contrasted with judgments where judges have made genuine, even if controversial, attempts to derive from the authorities an answer to the legal problem before them. In other words, this thesis has shown that Dixon’s self-proclaimed strict and complete legalism presents a testable hypothesis.

Practical concerns have meant that although every one of Sir Owen Dixon’s contract decisions has been analysed, not every one of these decisions could be presented in this thesis. What has been shown is that in a series of significant contract decisions and a larger group of more minor cases Sir Owen Dixon and a number of other judges on the High Court did indeed judge as strict legalists. It has also been shown that in at least two decisions, Neal and Slee, Dixon failed to follow his own strictures and appears to have decided with predetermined results in mind.

The limitations of this thesis need to be noted. First, even if Dixon did decide the overwhelming majority of his contract cases in conformity with his strict legalist beliefs this does not show that his decision-making was the same in other areas of law. It might be that contract law is especially appropriate to Dixonian judging and that other areas of law are not. Tort law, for example, might be more susceptible to instrumental, policy-based reasoning. And, given the fact that Australia’s constitution only came into effect some 28 or so years before Dixon was appointed to the High Court it would be interesting to undertake a study of his constitutional decisions to see what strict legalism would mean in such a context and whether those judgments did give effect to this judicial method in what were often highly charged and politically sensitive cases. Dixon’s fidelity to strict legalism in other areas of law can only be determined if and when studies comparable to the one carried out for this thesis are made in these other areas of law.

Secondly, showing that Dixon and other judges did decide a number of contract cases as strict legalists does not, of course, necessarily show that all or most judges at other times and in other jurisdictions have judged as strict legalists. There is no
necessary correlation between what one influential Australian judge did in the middle decades of the twentieth century and what other judges in this and other countries have done at that and other times.

Thirdly, the thesis does not make any general claim about the appropriateness of Dixonian strict legalism. One can accept that judges can or could judge in this manner and still argue that for Australia in 2010 there are better, more appropriate judicial styles.

Fourthly, to show that Dixon decided as a strict legalist in the overwhelming majority of his contract cases is not to suggest that in doing so Dixon was, somehow, totally immune from the biases and prejudices that affect everyone. A strict legalist judge is not someone who is without human instincts and flaws. Rather, strict legalism as understood and practiced by Dixon is the adoption of a method to \textit{minimise} the effects of ordinary human limitations when acting as a judge.

Finally, this thesis does not respond to what appear to be justified criticisms of Dixon. Revelations made in Philip Ayres’ recent biography of Dixon show that Dixon had written ‘substantial’ parts of a judgment that came out under Rich J’s name (with Dixon J then sitting on an appeal from that judgment).\textsuperscript{7} Leeser’s characterisation of this as hypocrisy on Dixon’s part is valid.\textsuperscript{8} Nor does this thesis respond to justifiable questions about the close relationship between Dixon and Sir Robert Menzies, questions that raise real concerns about Dixon’s having crossed the invisible but very real line that separates judging from politics, at least in the eyes of a strict legalist.\textsuperscript{9} These are serious criticisms and are worthy of examination and analysis, but the focus of this thesis has been on Dixon’s judging in contract cases.

Nevertheless, even with such limitations this thesis has established something significant. It is the conclusion of this thesis that Sir Owen Dixon (and several other High Court judges) did judge as strict legalists in over 100 contract cases spanning the period from 1929 to 1964. Any debate about judging should now treat Dixonian strict legalism as a real and practicable judicial method that has been used in the very

\textsuperscript{7} Philip Ayres, \textit{Owen Dixon} (Miegunyah Press, 2003) 93.
recent past. Discussion on judging today should not revolve around unexamined suggestions that Dixonian strict legalism was an unsophisticated myth believed in by self-delusional judges or, indeed, that it was an outright lie. Rather, Dixonian strict legalism deserves recognition of its merits, and should be judged on those merits to see whether it is an appropriate form of judging for the needs of today.