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NZLR

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A 303/83

1652

BETWEEN ROGER GORDON PALMER of Amberley, Farmer

Plaintiff

A N D CLIFFORD FALCONER BELLANEY of Christchurch, Company Director

First Defendant

A N D BERNARD ALLIN HUTTON of Kumara, Butcher and JANICE HELEN HUTTON of Kumara, Married Woman

Second Defendants

A N D SPHAGNUM PRODUCTS (N.Z.) LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business there and elsewhere as excavators, processors and retailers of sphagnum moss and pulp and sphagnum moss and pulp products

Third Defendant

Hearing: 16-20 July, 26 and 27 July and 2 August 1984

Counsel: D.H. Hicks with J.R. Turner for plaintiff
R.E. Wylie with Miss C. Risk for first and third defendants
J. Cadenhead for second defendants

Judgment: 20 NOV 1984

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This action has its origin in a swamp on a farm at Springs Junction on the West Coast of the South Island. The swamp

contains sphagnum moss, a now apparently much sought after product. The owners of the Springs Junction farm, which is a renewable lease from the Crown under the Land Act 1948, are the second defendants, Mr and Mrs Hutton. They entered into a contract on 9 August 1983 ("the land contract") with the plaintiff, Mr R.G. Palmer, whereby Mr Palmer sold to Mr and Mrs Hutton his farm at Amberley in Canterbury and Mr and Mrs Hutton sold to Mr Palmer the farm at Springs Junction; in addition Mr Palmer was to pay Mr and Mrs Hutton a sum of money by way of giving equality of exchange. Later in the same month, on 30 August 1983, Mr and Mrs Hutton, without advising Mr Palmer that they were doing so, entered into an agreement ("the moss contract") with the first defendant, a Mr C.F. Bellaney, in terms of which the Huttons granted to Mr Bellaney, as agent for a company to be formed and to be known as Sphagnum Products (N.Z.) Limited, now incorporated and the third defendant, an exclusive right to extract and process material described as sphagnum pulp and sphagnum moss from a specified area on the farm. In due course the plaintiff, Mr Palmer, called upon the second defendants, Mr and Mrs Hutton, to transfer the Springs Junction farm to him but the Huttons refused unless Mr Palmer recognised the agreement with Mr Bellaney and would sign a Memorandum of Transfer creating a profit a prendre in favour of the third defendant, Sphagnum Products (N.Z.) Ltd. Mr Hutton refused and this action followed.

The plaintiff, Mr Palmer, seeks an order for specific performance by the second defendants, the Huttons, of the land

contract and he also seeks a declaration that the moss contract was void or subject to a condition precedent which has never been satisfied and that in any event is not binding upon him. In addition Mr Palmer seeks damages in the sum of $50,000. The Huttons raised a variety of defences as against the plaintiff and sought certain relief by way of a counter-claim. I do not propose to set out all the matters raised, as in the end not all were pursued. Though the Huttons had at first pleaded that Mr Palmer by his conduct had repudiated the land agreement so that they were entitled to treat it as cancelled, in the event they accepted that it was still extant and Mr Cadenhead indicated they did not resist an order for specific performance subject to two matters: first, that the land contract be rectified by making it subject to the moss contract and, second, that the judgment granting specific performance should make a factual finding that the plaintiff was aware of the existence of an agreement relating to the extraction of sphagnum moss from the land before he entered into the land agreement and in fact urged the Huttons to negotiate a more favourable moss agreement, which resulted in the moss contract. The Huttons also raised defences against the first defendant, Mr Bellaney, and the third defendant, Sphagnum Products (N.Z.) Ltd, in respect of claims for indemnity or contribution made against them by Mr Bellaney and Sphagnum Products under notices issued pursuant to Rule 99N and also sought against them relief under the Contractual Mistakes Act 1977 in respect of the moss contract. Mr Bellaney and Sphagnum

Products denied many of the allegations made by Mr Palmer and Sphagnum Products (N.Z.) Ltd counter-claimed against Mr Palmer, and claimed against the Huttons, a declaration that it had rights under the moss agreement which took priority to the rights acquired by Mr Palmer under the land agreement; or, alternatively, that the sphagnum moss or pulp was the property of Sphagnum Products; or, alternatively that the sphagnum moss or pulp were excluded from the land contract.

I have set out above, in a very abbreviated form, the nature of this action which it can thus be seen is a somewhat complex one. I have not attempted to cover all the causes of action, defence, counter-claim and claims between defendants. There were many possible alternatives open depending upon the facts found. I propose therefore to canvass now the history of the matter and the facts generally, after which I will apply the facts to some of the legal issues raised. However, before doing so, there is another matter which must be recorded.

At the beginning of the hearing I was advised by counsel for all parties that they were agreed that if an order for specific performance was made then the matter of the damages claimed by the plaintiff against all three defendants should be stood over for later determination. They were agreed that further pleadings on the matter should be permitted and that there should be a further hearing. I accepted that this trial was to proceed on that basis. I was also informed by counsel for the three defendants that when the exigency trial order was made by Ongley J. it was directed that the issues between the

plaintiff and the defendants be tried and determined but that the issues between the defendants should be stood over to a later hearing for determination, if that were necessary, save in respect of the "moss agreement". I was not clear at the time precisely what the scope of this arrangement was, as I did not, of course, appreciate all the ramifications of what was involved in what was meant by the "moss agreement", which, as will become apparent later, refers to an agreement signed on 9 September 1982 between a Mr Manifold and the second defendants as well as the moss contract signed, as already noted, between Mr Bellaney and the Huttons on 30 August 1983. I am still not quite clear just what was meant by this arrangement and I refer to it again at the end of this judgment. It was accepted by counsel, however, that if issues between the defendants had to be tried later then leave should be reserved to them to file amended or additional pleadings. Leave is reserved accordingly and I add that if this judgment does not deal with matters which the defendants intended it to deal with in terms of the arrangement referred to above then they are to be dealt with on the later hearing.

I now turn to the facts and start with a brief general narrative of events. The Huttons have owned the farm at Springs Junction for some six years or so and on it there are two swamps. One is of approximately 10 acres and the other approximately 100 acres. The 100 acre swamp contains sphagnum moss; the other does not. Stated broadly and generally, sphagnum moss is found in certain peat swamps. In those swamps

there are three layers or levels of material involved. Again stated broadly and generally, there is on the surface a growing substance, the sphagnum moss; next there is a layer of dead and decaying sphagnum moss, referred to as peat moss or moss pulp; and below that there is the third or bottom layer, which is a settled, decayed material, formed initially from the peat moss, which is peat. It may be noted in passing that under the Coal Mines Act 1979 coal is defined as including peat. For some time prior to 1982 a Mr Manifold had been taking some sphagnum moss from the swamp on the Huttons' farm and selling it to various concerns. In late 1981 Mr Manifold formed some association with Mr Bellaney in relation to dealing commercially in sphagnum moss. On 9 September 1982 a handwritten, single page document was prepared, apparently written out in a paddock according to Mr Manifold, which was in the form of an agreement between Mr Manifold as agent for a company to be formed, referred to as "the company", and Mr Hutton alone, he being described as "the farmer", whereby it was agreed in very general and broad terms that the company to be formed was given access to the farm and "full rights to the extraction and removal of all sphagnum pulp from the swamp sites on the farmer's property". The company was to pay 50 cents per full compressed woolsack and was to be responsible for royalties paid to the Lands and Survey Department. There were various other provisions and the agreement was stated to be subject to perusal by both parties' accountants and solicitors and the Commissioner of Crown Lands. It may be

noted that a Mr B.J. Scott, solicitor of Christchurch, on 20 September 1982 wrote to Messrs Guinness, Kitchingham, Solicitors, Greymouth, and stated he was acting for Mr Manifold and others. He stated his clients were forming a company but in the meantime he had been instructed to forward a copy of the agreement. Messrs Guinness & Kitchingham did not hear from Mr Scott again.

During 1982 Mr Palmer had been showing an interest in acquiring the Huttons' farm, or at least part of it. He had various discussions with Mr Hutton about it and had inspected the property. In January 1983 Mr Palmer and the Huttons signed an agreement which they prepared themselves, though on a standard form, for the sale and purchase of the Hutton farm by the Huttons to Mr Palmer. The agreement was made subject to Mr Palmer selling his own farm at Amberley and, since that condition was not satisfied, the agreement lapsed. However, later in the year, in July, they reached a verbal agreement to exchange their properties, or at least parts of them, as each proposed to sell other parts to other parties. Mr Palmer was to sell part of his Amberley farm to a Mr Hislop and the Huttons part of their Springs Junction farm to a Mr Royce. Solicitors were consulted, each party going to the same firm of Messrs Guinness & Kitchingham of Greymouth. Mr Jamieson, one partner in the firm, acted for Mr Palmer and Mr Carruthers, the other partner, acted for the Huttons. A written agreement for sale and purchase was prepared by the solicitors and was signed by the parties at separate times. Additional terms were agreed

upon and an additional memorandum was prepared and signed by the parties. The document was dated 9 August, which was the day the Huttons signed the document incorporating the additional terms. The agremeent, referred to earlier as the land contract, provided for the parties to convey or transfer and exchange to each other their respective properties as described in schedules to the agreement together with a payment of $45,000 by Mr Palmer to the Huttons to equalise the exchange. In addition there were provisions in terms of which Mr Palmer was to pay the Huttons $5,000 for a rock licence held by the Huttons and a further sum of $10,000 when the Huttons complied with a particular clause, clause 15. Clause 15 provided that the Huttons were to use their best endeavours to obtain a licence from the Mines Department for extraction of peat from approximately 100 acres of the land which is comprised in the Hutton farm and to transfer such mining rights to Mr Palmer within two years from the date of possession. The $10,000 was to be paid immediately the mining rights were transferred.

Subsequent to the execution of the land contract, but before possession date (possession date was 20 December 1983), there were some developments that occurred in relation to the sphagnum moss on the property that arose out of the agreement dated 9 September 1982 between Mr Hutton and Mr Manifold referred to earlier and hereinafter called "the Manifold agreement". On 30 August 1983, some three weeks after the Huttons had contracted to sell the property to Mr Palmer, the

Huttons entered into a written agreement with Mr Bellaney, as agent for a company to be formed and to be known as Sphagnum Products (N.Z.) Ltd, for the extraction of sphagnum pulp and sphagnum moss from a defined area referred to as the extraction area on the property, which is, in effect, the 100 acre swamp. This is the agreement referred to earlier in this judgment as the moss contract. This agreement recites that it follows upon what was referred to as the preliminary agreement dated 9 September 1982, the Manifold agreement. In September 1983, that is the month following the signing of the moss contract, Sphagnum Products (N.Z.) Ltd was formed and the moss contract was formally adopted by the company. The company then proceeded to start on the extraction of moss. Possession date under the land contract, as noted earlier, was 20 December 1983, but the Huttons refused to complete other than on the basis that Mr Palmer accepted the moss contract. They sought his execution of a Memorandum of Transfer creating a profit a prendre in favour of Sphagnum Products (N.Z.) Ltd.

This general narrative of the events must now in certain areas be developed further. The plaintiff's case depends, of course, to a considerable extent upon the evidence of the plaintiff. I record therefore my view of him as a witness; and I add I had a good deal of time in which to reach this view, for he spent a considerable period in the witness box. Mr Palmer appeared a somewhat excitable man, who was inclined to speak fast and sometimes, I think, without thinking very carefully about what he was going to say. He was, in my view,

at times somewhat illogical and some of the things he said were contradictory. He was rather dogmatic and sure he was right, though his memory was somewhat faulty; at the same time he was inclined to be suspicious of questions put to him, anticipating, I think, traps. In his dealings with the Huttons he did not show any apparent interest in the sphagnum moss. In fact he was concealing the real interest he had in it, but that is perhaps not surprising as he no doubt thought appearing to be too anxious would be likely to increase the price he would have to pay for the property. Indeed, he said just that to Mr Mustchin, a representative of the Commissioner of Crown Lands at a later meeting he had with him. He was, however, in my view, within those limitations, an honest and truthful witness and basically I accept his evidence. It follows, as will become apparent, that I have accordingly preferred his evidence to some of that given by other witnesses, more particularly that of Mr Hutton.

I go on to record my general view of the other two witnesses in respect of whom questions of credibility mainly arise. I think Mr Bellaney's evidence was markedly coloured throughout by the fact that all through his dealings with the Huttons and Mr Palmer he was very anxious about his position. He had grave doubts about the validity and effectiveness of the agreement of 9 September 1982, the Manifold agreement, and, indeed, in my view, his evidence showed he accepted it was defective and not to be relied upon. He therefore tried, when he learned that the Huttons had sold the farm to Mr Palmer, to

convince Mr Hutton that the Manifold agreement was binding on him, and probably succeeded; and he also tried at a later stage to convince Mr Palmer that that was so. He knew that the Huttons had sold the farm to Mr Palmer before the moss contract of 30 August was signed by them. Mr Bellaney's evidence was directed thus to trying to establish what was most favourable to his case, having regard to the above matters. His approach in his dealings with the other parties and in giving evidence might aptly be described as one of suppressio veri suggestio falsi. I came to the conclusion that he was quite prepared to say whatever he thought was in his best interests. I discount what he said where this is necessary in the light of what other witnesses said. So far as Mr Hutton is concerned, I reached the conclusion that he had convinced himself of some of the things he said but not all; some I think he knew were false. Put plainly I disbelieved him on some matters and I preferred Mr Palmer's evidence as I have already recorded. I do not think it credible that a farmer who had owned a property for some six years could make the mistake of thinking that a 10 acre swamp covered an area approaching 100 acres. Certainly the valuer, Mr Knight, referred to it as being about 70-80 acres, which I found somewhat surprising, but he qualified his evidence somewhat as to the area to be actually included in what was swamp. Further, he made his assessment by visually scanning the area from a distance and it is clear that he was wrong. I do not think a farmer who owned and farmed the property could make the same mistake and I do not believe

Mr Hutton thought the provision in clause 15 of the land contract related to the smaller swamp on the property rather than the larger. I add that I think Mr Hutton at first thought he was bound by the Manifold agreement and then probably did not care very much what the true position was but thought that while he retained the property, that is until 20 December, he might as well get something for himself out of the arrangement over the sphagnum moss. He spoke to Mr Palmer of the money he had spent on toll calls and of getting $3,000 back for himself. He may have thought that after 20 December the matter would be Mr Palmer's concern, not his, and therefore did not care very much. If that were so, then he would no doubt have been advised by his solicitors that if the property were transferred to Mr Palmer without the moss contract being in some way made binding and effective against it he might become liable to substantial damages and that would doubtless have affected his attitude.

I return now to some of the events that were canvassed in the evidence. Mr Palmer said that in April 1982 he had looked over the Hutton farm with Mr Hutton and they had discussed a price. They had also discussed the two swamps on the property. He said Mr Hutton had told him that the swamps were valuable because of the sphagnum moss in them and that a Mr Frank Manifold had been working there but that he, Hutton, had told Manifold to leave because they had had a "bit of a bust up" over some matter. There was some machinery there but he said it did not look as if it had been used for sme time.

Mr Hutton, he said, also told him he had applied for a mining licence. Subsequently, as already noted, the parties signed an agreement for the purchase of the Hutton property by Mr Palmer but this agreement lapsed. In July 1983 the matter moved forward. Mr Palmer said there must have been further discussions with Mr Hutton but he does not remember them, but it would appear they met on 1 July and were to drive to solicitors in Greymouth to have an agreement prepared. In the event Mr Hutton, on that day, got a small piece of metal in his eye and he went to the Greymouth Hospital to have it removed. Mr Palmer did, however, see a solicitor, the Mr Jamieson of Guinness & Kitchingham mentioned earlier. On 15 July both parties visited Messrs Guinness & Kitchingham; Mr Palmer saw Mr Jamieson and Mr Hutton saw Mr Carruthers. The evidence is not clear as to precisely how the matter arose, or, indeed, just what was raised, but Mr Palmer maintains that he raised with Mr Jamieson the question of the mining licence which he said Mr Hutton had told him he had or was getting. At all events it is clear that Mr Palmer was then taken into Mr Carruthers' room and was given Mr Carruthers' file relating to an application by Mr Hutton for a mining licence over the whole property and which according to the evidence of Mr Jamieson and Mr Carruthers was on the file. Mr Palmer at first said it was not on the file but later accepted he did not remember seeing it there. He denied discussing it with Mr Jamieson. Mr Jamieson accepted in his evidence that while he discussed the matter with Mr Palmer he did tell him that the Manifold agreement was

of no great significance because his, Palmer's, mining rights were protected under clause 15 of the agreement. Clause 15 of the agreement was the clause under which the Huttons were to use their best endeavours to obtain a licence from the Mines Department. I accept Mr Hicks' submission that in these circumstances it is not surprising that Mr Palmer had no recollection of the Manifold agreement or that at the time he had regarded it as of no importance. It is not without significance that Mr Carruthers, the Huttons' solicitor, regarded this almost year old document, in respect of which nothing had been done, as spent.

After 15 July 1983 Mr Jamieson prepared the contract document, which makes no reference to the Manifold agreement. On 28 July the Huttons signed the document and the next day, the 29th, Mr Palmer did likewise and also signed a supplementary memorandum to the document. The Huttons signed the supplementary memorandum on 9 August. I am satisfied that at the time he signed this contract Mr Palmer was not aware that it was contended that the Manifold agreement of 9 September 1982 was still considered by anyone to be effective; indeed, I think it likely that Mr Palmer had forgotten the existence of the Manifold agreement, if it had ever consciously registered upon him. He was, as he said, anxious about a mining licence which he understood the Huttons had or were getting and which, in terms of clause 15, he was to get in due course; and once he had spoken to Mr Jamieson about it and later seen Mr Carruthers' file and ascertained from that file

that the Huttons had applied for the licence but had not received one he was satisfied. Mr Palmer thought he was buying the land which was free of any licences to anyone to take sphagnum moss and that in due course he would get a mining licence by transfer to him of the one that the Huttons were seeking to get. At this stage Mr Carruthers, advising the Huttons, seems to have overlooked the Manifold agreement entirely and Mr Bellaney was unaware that the Huttons were selling the farm to Mr Palmer. I add I do not accept Mr Hutton's evidence that he discussed the Manifold agreement with Mr Palmer on the occasion that Mr Palmer returned Mr Carruthers' file to him, that is the middle of July, nor that Mr Palmer urged him to get a better deal with Mr Bellaney over royalties at a meeting later that month. I disbelieve his evidence about Mr Palmer offering him a further $10,000 to get a better deal with Mr Bellaney than the one contained in the Manifold agreement.

Mr Bellaney stated in evidence that he and Mr Manifold had carried out a series of tests and growing trials in connection with the sphagnum moss on the property. These were done with assistance and advice from various scientists. Mr Manifold and he decided there were commercial prospects in the sphagnum moss growing on the poperty and so approached Mr Hutton for an agreement to enable them to exploit it. The Manifold agreement of 9 September 1982 resulted. They then carried on with those tests and growing trials, investigated the matter of machinery that would be needed and entered into negotiations with an

export company to deal with the marketing of the product. In August 1983 Mr Bellaney said they were satisfied that development of the sphagnum moss was a viable commercial proposition and so they approached Mr Hutton again. Mr Bellaney's evidence at that point was not entirely clear as to just how the matter developed. He said that he advised Mr Hutton that they were going to write out another contract which would be a follow up to the Manifold agreement of 9 September 1982 to make their agreement neater and tidier and that it would be prepared by the solicitors to the company that was to be formed, Messrs Papprill, Hadfield and Aldous. I am satisfied that whatever he said to Mr Hutton he then learned that the farm had been sold by the Huttons, for they had signed the agreement at the end of July, and he accepted, as I have already noted, that the Manifold agreement of 9 September 1982 was not to be relied upon. Mr Bellaney then acted promptly. He had his solicitors prepare the moss contract, which was taken by Mr Manifold to the Huttons at the farm. It was signed by them on 30 August and returned to Mr Bellaney on that day by Newmans Bus. It should perhaps be noted that earlier in the year the question had arisen of whether any licence, apart from the permission of the Huttons, was required for the extraction of sphagnum moss. Mr Bellaney had in June 1983 received written advice from the Mines Division of the Ministry of Energy that a licence was not required for the removal of the living sphagnum moss and he said he understood that Mr Hutton had already obtained the consent in principle of the Lands &

Survey Department for the Crown as lessor of the land. He did, however, make an arrangement to discuss the matter with an Assistant Commissioner of Crown Lands in Nelson by telephone on 24 August and in fact discussed the position with him at Christchurch on 31 August. I think it clear that he knew that Lands & Survey Department consent was going to be needed and he obviously was going to need a proper contract betwen himself and Mr Hutton to put before the department. In fact immediately after his meeting with the Assistant Commissioner on 31 August he supplied him with a copy of the moss contract which of course was by now in his hands. On 31 August he sought permission from the Assistant Commissioner to remove sphagnum moss from the property and was given oral permission to remove one truck and trailer load as a trial shipment.

Mr Bellaney in his evidence said that Mr Hutton at some stage expressed some concern at the attitude of Mr Palmer over the moss contract. He maintained that Mr Hutton had said Mr Palmer was aware of the position in that he had seen the Manifold agreement. He acknowledged that the moss contract of 30 August 1983 should have been referred to Mr Palmer for his consent before it was executed by the parties but plainly it was not. On 9 September 1983 Mr Palmer became aware of the digging of a drain across part of the main swamp and he took the matter up with Mr Hutton. A little later he made a special visit to the farm to inspect the work being done. He was accompanied by Mr Hislop. It is quite clear that despite what the Assistant Commissioner of Crown Lands had said to

Mr Bellaney a great deal more than one truck and trailer load of material had been removed. Mr Palmer, of course, knew nothing about the approval given to Mr Bellaney by the Assistant Commissioner. Mr Palmer took the matter up with Mr Hutton, who I am satisfied did not tell him of the moss contract signed on 30 August Indeed, in my view Mr Hutton deliberately tried to mislead Mr Palmer, going as far as to say to him that he, Hutton, could do what he liked with the property until Mr Palmer took it over in December, at which point he could do what he liked.

Mr Hutton said there was another company removing the moss which was paying him, Hutton, for it and while he described in some colourful phrases what Mr Palmer could do with regard to this company's operations he suggested that it would be in Mr Palmer's best interest to let the arrangement continue after he took over. Mr Palmer immediately made it plain he was not interested in any such course as he had made his own arrangements with another concern for the extraction of the moss. Following this encounter Mr Palmer was advised by his solicitor of the moss contract and on 20 September Mr Bellaney, who up to then had not met Mr Palmer, went to his property at Amberley. I think it clear he had learned from Mr Hutton that there was going to be trouble with Mr Palmer, who would not give his consent to the moss contract between Mr Bellaney and the Huttons. Mr Bellaney talked to Mr Palmer out on the farm. He took with him a tape recorder and he recorded the conversation between them, though he did not disclose to

Mr Palmer that he was recording it. I was left with the impression that Mr Bellaney was trying to get Mr Palmer to acquiesce in the arrangement but that Mr Palmer was plainly taken aback by the course of events and was very angry with Mr Hutton, who he clearly believed had deceived him and indeed both of them. Certainly Mr Palmer said some illogical and some inconsistent things in the course of that conversation but I am satisfied that until that morning and his discussion with Mr Jamieson followed by his tape recorded discussion with Mr Bellaney he knew nothing of the moss contract of 30 August.

I summarise my findings on the facts in relation to Mr Palmer, the Huttons, the land contract, the Manifold agreement and the moss contract as follows:

(i) At the time the land contract was signed Mr Palmer had no such knowledge of the Manifold agreement as would require him in the light of the representations made to him by Mr Hutton to make any further enquiry in relation to it. To the extent that he was aware of its existence he was entitled to disregard it.

(ii) The moss contract was not signed until some three weeks after the land contract became binding and Mr Palmer had no knowledge whatever of it until 20 September, which was three weeks after it was signed. He had not known it was to be signed and he

had done nothing to encourage Mr Hutton to enter into it.

On the basis of the foregoing, and if one put to one side the questions of whether the Manifold agreement or the moss contract created an equitable interest in the land itself, or the effect of the other defences raised by Mr Wylie for Mr Bellaney and Sphagnum Products (N.Z.) Ltd, which were mentioned earlier in this judgment, the position between Mr Palmer and the Huttons would be that Mr Palmer would be entitled to an order for specific performance of the land contract, free from any rights claimed by Mr Bellaney or Sphagnum Products (N.Z.) Ltd under the Manifold agreement or the moss contract. Mr Bellaney and Sphagnum Products (N.Z.) Ltd would be left to seek whatever remedies were open to them under the Manifold agreement or the moss contract to which they were parties and those would, of course, depend upon the legal validity of the two documents. Earlier in this judgment I noted that Mr Cadenhead had indicated that the Huttons did not resist an order for specific performance subject to two matters: first, that the land contract be rectified by making it subject to the moss contract and, second, that a factual finding should be made that Mr Palmer was aware of the existence of an agreement relating to the extraction of sphagnum moss from the land before he entered into the land agreement and in fact urged the Huttons to negotiate a more favourable agreement which resulted in the moss contract. My findings above make clear that I do not make any such factual

finding and it follows from that that no question of rectification of the land contract arises. However, specific performance of the land contract so that the land once transferred was free from any obligations under the Manifold agreement or the moss contract could only be ordered against the Huttons if the defences raised by Mr Wylie in respect of the Manifold agreement or the moss contract or the other matters succeed. I turn therefore to consider these defences raised by Mr Wylie. However, before doing so I record that Mr Hicks made it clear that Mr Palmer sought specific performance of the land contract whether or not the land was subject to the Manifold agreement or the moss contract.

Mr Wylie raised seven defences or submissions:

1. The first and principal submission was that the moss contract creates an equitable interest in the land which takes priority over the equitable interest of Mr Palmer under the land contract.
2. Alternatively, that the sphagnum moss and pulp are goods within the meaning of the Sale of Goods Act 1908, the property in which passed to Sphagnum Products (N.Z.) Ltd by the moss contract.
3. Alternatively, the Manifold agreement created an equity in favour of Mr Manifold on behalf of Sphagnum Products (N.Z.) Ltd of which Mr Palmer had notice and which is not defeated by Mr Palmer's subsequent equitable inerest.

4. Alternatively, the sphagnum moss and pulp are goods within the meaning of the Sale of Goods Act 1908, the property in which passed to Sphagnum Products (N.Z.) Ltd by the Manifold agreement.

5. Alternatively, if earlier submissions fail, specific performance should not be given against the Huttons because this would result in compelling them to breach their prior agreement, the Manifold agreement, with a third party.

6. Alternatively, if earlier submissions fail, specific performance should not be given against the Huttons because this would result in unfairness or hardship to Sphagnum Products (N.Z.) Ltd.

7. Alternatively, if the plaintiff is otherwise entitled to succeed in law, he should be denied specific performance because he does not come with clean hands.

It is necessary for me to consider all these defences. I turn to the first and principal submission, namely, that the moss contract creates an equitable interest in the land which takes priority over the equitable interest of Mr Palmer acquired under the land contract.

Mr Wylie first submitted that, although the moss contract was a pre-incorporation contract in the sense that it was entered into by Mr Bellaney on 30 August 1983 on behalf of a company to be formed, but which was not in fact incorporated until 16 September 1983, Sphagnum Products (N.Z.) Ltd is entitled to the benefit of it and to enforce it by virtue of

s 4 of the Contracts (Privity) Act 1982. I think that is clearly correct. Next Mr Wylie submitted that the moss contract was an unconditional contract and therefore created an immediate equitable interest in the land of a registrable nature. The amended statement of claim had alleged that the contract was subject to consent in terms of the Land Act 1948. It was first specifically pleaded that the sphagnum moss was in the nature of soil and could not be extracted or removed without consent from the lessor, the Crown, and such consent had not been obtained. Mr Wylie submitted that there was no sufficient evidence to establish that sphagnum moss was soil and that in any event there was no specific prohibition in the Land Act 1948 against the removal of soil. Mr Hicks did not appear to pursue this specific point in his submissions and accordingly I accept, broadly, Mr Wylie's submissions. I note in passing that s 99 requires the leased land to be properly farmed and ordinarily the removal of soil would not be proper farming. The removal by harvesting a growing natural crop and then putting the land into pasture may well be proper farming in terms of the section. Mr Hicks, however, also submitted that the moss contract amounted to an agreement to dispose of an interest in the land and therefore required consent under s 89(1) of the Act. This point had not been pleaded specifically as had the reference to soil, but I think it could, broadly speaking, have come within one of the allegations in the statement of claim and certainly Mr Wylie

made extensive submissions upon it. Section 89(1) is as follows:

> "89. (1) A lessee or licensee, or the sublessee of any lease or licence, shall not transfer, sublease, or otherwise dispose of his interest, or any part thereof, in the land subject to the lease or licence without the consent of the Board. Notwithstanding the provisions of any lease or licence, the consent of the Board shall not be required to a mortgage of any interest therein."

Mr Hicks' submission was that consent was not given and that accordingly pursuant to s 82(3) the contract was void. That subsection is as follows:

> "(3) All dealings with or under any such lease or licence in contravention of the provisions of this Act shall be void, and the District Land Registrar shall not register any dealing with or under a lease or licence until he is satisfied that the said provisions have been complied with."

In my view whether such a contract as the moss contract is in the circumstances void or not does not have to be determined now. I think the issue would require further argument; it was not really argued here as Mr Wylie made no reference to s 82(3) in his submissions which, as it happened, were made several days before Mr Hicks made his. However, I think that if it is not void then, so long as the transaction is one to which s 89

applies, it requires consent. In Denning v Edwardes [1961] AC 245 Viscount Simonds, in giving the judgment of the Judicial Committee in respect of similar statutory provisions which required the consent of the Governor of Kenya to the alienation of land, expressed the view that some form of agreement was inescapably necessary before the Governor was approached for his consent but that the agreement was inchoate until that consent was obtained. It follows that if the moss contract was one to which s 89 applies then it was an inchoate agreement and no equitable interest in the land passed under it. It is clear that there must be an unconditional and enforceable agreement before an equitable interest in the land passes and here the moss contract was not in fact unconditional if s 89(1) applied to it.

Mr Hicks in his submissions had also emphasised that an equitable interest can pass only if specific performance would be granted and he submitted strongly that specific performance of the moss contract would not be granted to Sphagnum Products (N.Z.) Ltd for a number of reasons. I might add at this point that he urged it even more strongly in respect of the Manifold agreement. I do not think it necessary to canvass these submissions because I have already held that the moss contract was not in fact unconditional if it was a contract to which s 89 applied. I add, however, that in my view Mr Hicks is probably right in his submission that specific performance would not be granted.

Mr Wylie had submitted that s 89, which requires consent, was no more than a statutory contractual term between lessor and lessee and the requirement to obtain consent was in a different position from a statutory requirement such as is found in s 25 of the Land Settlement Promotion and Land Acquisition Act 1952 which prohibits transactions without consent and declares contracts entered into in contravention of that section to be unlawful and of no effect. He argued that the moss contract on its face was unconditional because it contained a recital that the Huttons had obtained the consent of the lessor to them, or their nominee, extracting the sphagnum moss and accordingly the Huttons had either to obtain the necessary consent or to put themselves in a position where consent was no longer necessary. They could, he submitted, do the latter by purchasing the freehold which they were entitled to do under the terms of their lease from the Crown. He developed an argument that this right to purchase the freehold in itself created an equitable interest through which Sphagnum Products (N.Z.) Ltd could acquire an equitable interest under the moss contract. But whatever might have been done by way of acquiring the freehold it was not in fact done and though the Huttons represented they had obtained consent in fact they had not obtained it. Mr Wylie distinguished Denning v Edwardes on the basis that the case related to a section which included a "voiding" provision but that overlooks the effect of s 82(3).

Was the moss contract one to which s 89 applied? In my view, it clearly was. Both Mr Wylie and Mr Hicks accepted that

it was. Mr Wylie had submitted that the agreement was a profit a prendre in that it fell exactly within the description of profits a prendre in para 6.055 of Hinde, McMorland & Sim's Land Law, apart from the fact that the document itself refers to the right given as a profit. Mr Hicks also submitted that it was a profit a prendre. A profit a prendre is an interest in land and accordingly in my view the moss contract was a contract to which s 89(1) applies. Consent to the Huttons disposing of part of their interest in the land had not, and has not, been given under the section and accordingly it was a conditional contract not an unconditional one. It follows that the moss contract did not create an immediate equitable interest in the land. The basis of Mr Wylie's first submission was that the moss contract did create an immediate equitable interest in the land on 30 August, which was the day it was executed, while Mr Palmer's equitable interest under the land contract did not arise until at the earliest 26 October 1983, assuming that to be the date on which the land contract became unconditional. It had been conditional until the consent of the Land Settlement Board was given under s 89(1), which was on 26 October according to the evidence of the Assistant Commissioner of Crown Lands, though it is to be noted that the letter from the Department was dated 18 November. On the ordinary principles of equity as between competing equitable interests that which arises first in time will take priority and therefore the equitable interest of Sphagnum Products (N.Z.) Ltd under the moss contract would take priority to

Mr Palmer's interest under the land contract. However, it follows that since in my view the moss contract did not create an immediate equitable interest at all Mr Wylie's first and principal submission fails.

Mr Wylie's second, and alternative, submission was that the sphagnum moss and pulp are goods within the meaning of the Sale of Goods Act 1908 and that the property in them passed to Sphagnum Products (N.Z.) Ltd by the moss contract. He submitted they come within the definition of goods in s 2 of the Sale of Goods Act and that even though they may be the subject matter of a profit a prendre, which creates an interest in land, they can still be "goods" under the Act. He relied on Howe v Waimiha Sawmilling Co. [1920] NZLR 681 at 700. In that case the parties had entered into an agreement in writing which provided for the purchase by the Waimiha Sawmilling Co. of all the millable timer on certain land. "Millable timber" was defined precisely and the company, which was given an irrevocable right to enter the land to cut and remove the timber, was bound to remove the timber within a certain time. It was held that the agreement was a sale of goods and an argument that it be construed as a lease to enable the court to grant relief against the recision of the agreement for breaches was rejected. In the course of its judgment the Court of Appeal said that a careful examination of the provisions of the document led to the conclusion that it was intended to operate primarily and substantially as a sale of growing timber. It may be noted that the actual words of the document were "that

the grantor agrees to sell and the grantee agrees to purchase all the millable timber as hereinafter defined". It went on to say that it was also a grant of a profit a prendre but its operation in that way was subsidiary to its main purpose as a sale of growing timber. In my opinion the question whether the moss contract constituted a sale of goods depends upon a consideration of the contract and I am quite satisfied that it did not constitute a sale of goods. It did not purport to sell the sphagnum moss on the specified area. It gave an exclusive right to "the grantee", which includes Sphagnum Products (N.Z.) Ltd, to extract and process, as a profit in gross, sphagnum pulp and sphagnum moss from a defined area for a period of 10 years together with rights of ingress and egress and so forth. There is no requirement that the grantee shall extract the sphagnum moss and remove it, in the way that the grantee had to fell and remove the timber in the Howe v Waimiha Sawmilling Co case. I think, too, that s 18 of the Sale of Goods Act 1908 would have application in these circumstances if this was a sale of goods and in result no property in the goods would be transferred until they were actually ascertained in the sense of being extracted. Mr Wylie had submitted that the moss contract amounted to an unconditional contract for the sale of specific goods in a deliverable state and that therefore the property in them passed when the contract was made on 30 August 1983 in terms of s 20 Rule 1 of the Sale of Goods Act 1908. I am satisfied that this was not a sale of specific goods at all. In my view it was not a sale of goods at all but a right

to extract and process sphagnum material which the grantee might exercise if he chose and, if he did so choose, he was to pay a certain commission to the grantors, the Huttons. I therefore reject this submission.

Mr Wylie's third alternative submission was that the Manifold agreement created an equity in favour of Mr Manifold on behalf of Sphagnum Products (N.Z.) Ltd of which Mr Palmer had notice and which was not defeated by Mr Palmer's subsequent equitable interest. He accepted that Sphagnum Products (N.Z.) Ltd could not rely on the Contracts (Privity) Act 1982, the agreement having been entered into before 1 April 1983, which was the date the Act took effect, and that the company could not itself enforce a pre-incorporation contract. His argument proceeded on the basis that Mr Manifold was bound by the Manifold agreement and so also were the Huttons; he accepted the agreement was not unconditional and so it could not be argued that it created an equitable interest in the land; but he submitted it did create a contingent equitable interest in the land which was at all times intended to be for the ultimate benefit of Sphagnum Products (N.Z.) Ltd. Mr Manifold was in effect a trustee for the company. There was thus, Mr Wylie contended, an interest in existence when Mr Palmer entered into the land contract of which he had either actual or constructive notice and accordingly he must take subject to the equity of that interest because ordinarily an assignor takes subject to all equities of which he has notice: 16 Halsbury's Laws of England (4th edn) page 881 para 1313. It might be a debatable

question whether the interest was a mere equity or an equity ancillary to, or dependent upon, an equitable interest and what consequences might flow from that distinction, as referred to by Mr Wylie and discussed in National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (Mr Hicks made some submissions contrary to those of Mr Wylie on the point), but in my view it is not necessary for me to explore the matter. I have already held that Mr Palmer entered into the land contract without notice of the Manifold agreement and accordingly I reject this submission.

The fourth alternative submission was the same as the second, namely, that the sphagnum moss and pulp are goods within the meaning of the Sale of Goods Act 1908, save that the submission related to the Manifold agreement and not the moss contract. I reject it for the same reason. The fifth alternative submission was that specific performance should not be given against the Huttons because this would result in compelling them to breach their prior agreement, the Manifold agreement, with a third party. The grant or refusal of an order for specific performance is a matter of discretion and, as stated in 44 Halsbury's Laws of England p 322 para 470, a species of unfairness which may stay the hand of the court is that the contract if enforced would involve a breach of a contract to a third person. In this case the parties seeking to benefit under the manifold contract are, in effect, Mr Bellaney and his company. I have already expressed an unfavourable view of Mr Bellaney's conduct and in all the circumstances this ground is not accepted. I do not think

possible unfairness to Sphagnum Products (N.Z.) Ltd would justify refusing specific performance and for that reason Mr Wylie's sixth alternative submission, which related to possible unfairness to Sphagnum Products (N.Z.) Ltd, is also rejected. I add that while it is no doubt the case that Mr Palmer may have an alternative remedy in damages against the Huttons so also may Mr Bellaney. The seventh and last alternative submission was that specific performance should be refused because Mr Palmer did not come with clean hands. In my view his hands are clean enough. There is a final matter that needs to be dealt with in relation to the position between Mr Palmer and the Huttons. It relates to a submission by Mr Cadenhead in respect of an allegation in the second amended statement of defence of the Huttons. In paragraph 14 of that statement of defence it was alleged that the land contract was, by a mistake within the meaning of the Contractual Mistakes Act 1977, not made subject to the right of the Huttons to have disposed of or to dispose of the sphagnum moss. The mistake relied on was the alleged mistake that Mr Hutton thought Mr Palmer was entering into the land contract subject to the Manifold agreement and that he knew of it and in respect of it he had encouraged Mr Hutton to try to get better terms. I have already found as a fact that Mr Palmer did not know of the Manifold agreement and did not encourage Mr Palmer to get better terms in respect of it before the land agreement was signed. I add, if it is not clear, that I do not think Mr

Hutton in fact thought that Mr Palmer was entering into the land contract knowing it was subject to the Manifold agreement.

I noted earlier in this judgment that it was accepted by counsel that issues between the defendants were to be tried later, if necessary, save in respect of the moss agreement. I noted also that I was unclear as to just what was meant by that arrangement. In the circumstances it seems to me that, the issues between Mr Palmer and the Huttons being now resolved, it is better that all the issues between Mr Bellaney and Sphagnum Products (N.Z.) Ltd on the one side and the Huttons on the other side be dealt with separately at the later hearing, at which point the issues can be clearly defined. I appreciate this may involve re-arguing some matters. The evidence in relation to the formation of the Manifold agreement and the moss contract has been given and further evidence should be limited to the question of possible damages unless, of course, fresh issues arise out of amended pleadings, leave to file which was reserved earlier.

There will be an order for specific performance by the Huttons of the land contract and a declaration that the land contract is not subject to either the Manifold agreement or the moss contract. The time within which the order is to be carried out and other matters in relation to it are reserved for later determination, if necessary. The question of the costs of this hearing is also reserved. Mr Palmer is clearly entitled to an order for costs but the matter of the amount and against whom and in what proportions needs further argument,

unless, of course, counsel can agree upon it. In addition I note that Mr Palmer's claim for damages against all three defendants has still to be determined. The question of costs between the defendants will presumably need to await the final determination of all issues between them. Leave is reserved to any party to apply for the case to be brought on for further hearing at any time.

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